



## The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

223 Fourth Avenue, Suite 500  
Pittsburgh, PA 15222  
412.391.5301  
pa-interbranchcommission.com

### **Testimony Before the Pennsylvania Commission on Sentencing on its Proposed Sentence Risk Assessment Instrument**

**Submitted by  
Lisette McCormick, Executive Director  
and Margaret Ogden, Staff Attorney  
The Pennsylvania Interbranch Commission  
for Gender, Racial and Ethnic Fairness**

Good morning. My name is Margaret Ogden, and I am the Staff Attorney for the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Interbranch Commission").<sup>1</sup> Our Interbranch Commission wishes to thank the Commission on Sentencing ("PCS") for the opportunity to comment on its proposed sentencing risk assessment instrument.

By way of background, the Interbranch Commission was established in 2005 as a means of implementing the recommendations from the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System ("Committee"). After three years of study, the Committee produced the Racial and Gender Bias Report in 2003.<sup>2</sup> The report consists of 550 pages, covering fourteen individual topics, and concludes with 173 recommendations for addressing the deficiencies discovered in the system.

A significant portion of the Supreme Court Committee's report was devoted to examining racial and ethnic disparities within Pennsylvania's criminal justice system. In

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<sup>1</sup> Members of the Interbranch Commission include Nora Winkelman, Esq.; Rhonda Hill-Wilson, Esq.; Andrew Barnes; Helen Casale, Esq.; Hon. Kim Berkeley Clark; Jesse M. Cohen, Esq.; Hon. Deborah E. Curcillo; John Dawe, CNP, CFRE; Khadija Diggs, Esq.; Homer C. Floyd; Katherine Gomez, Esq.; Will Gonzalez, Esq.; Jeanette Ho, Esq.; Hon. Timothy Lewis; Lynn Marks, Esq.; Lucille Marsh, Esq.; Leonard Rivera, Esq.; Senator Judith Schwank; Bernadette Eyler Smith, CFP; Hon. John Wetzel; Sam Yun, Esq.; and Executive Director Lisette McCormick, Esq. Secretary Wetzel, Mr. Barnes, and Judge Curcillo declined to join this testimony due to potential conflicts with their professional responsibilities.

<sup>2</sup> A copy of the report is available online at [http://www.pa-interbranchcommission.com/\\_pdfs/FinalReport.pdf](http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf)

particular, Chapter 4 of the report, entitled *Sentencing Disparities in the Criminal Justice System*, contains the findings of a sweeping statistical analysis, conducted for the Committee by Pennsylvania State University, of the effect of race, ethnicity, gender, and age on criminal sentences in Pennsylvania. The study concluded that “[a]fter controlling for legally prescribed factors and mode of conviction...the defendant status characteristics of race, ethnicity, gender and age definitely affect sentencing outcomes of all kinds.”<sup>3</sup> Moreover, when the researchers studied “the interactive effects of race, ethnicity, gender, and age”, they found that “the effects on sentencing differed ‘dramatically’ by gender and age.” Specifically, “young African American males, ages 18-29, had a 4.8 percent greater probability of incarceration and received sentences that were, on average, 4.3 months longer than whites.”<sup>4</sup>

Since the publication of the Supreme Court Committee’s report in 2003, general incarceration rates in Pennsylvania have continued to trend upward.<sup>5</sup> In fact, between 2005 and 2014, they rose by 16%.<sup>6</sup> This is particularly concerning, as our neighboring states have seen their incarcerated populations decline over the same time frame. For instance, New Jersey saw an 18% drop in its incarceration rate, and New York, 24% during that period.<sup>7</sup> Moreover, the disproportionate rate at which Pennsylvania incarcerates Black defendants is much higher than the national average, with 8.9 Black individuals incarcerated for every White person in 2014 (nationally, that rate is five to one).<sup>8</sup> Thus, the evidence is clear that a defendant’s race or ethnicity continues to influence the criminal sentencing, and the resulting over-incarceration of Pennsylvanians of color. Based upon this data, as well as the findings of the original Supreme Court study and a more recent examination by our Commission of legal financial obligations and the use of risk assessment tools,<sup>9</sup> the Interbranch Commission has concluded that the risk assessment instrument proposed by the PCS will likely exacerbate this problem, due to

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<sup>3</sup> *Id.* at 129.

<sup>4</sup> *Id.* at 130.

<sup>5</sup> However, over the past three years, Pennsylvania Department of Corrections has reported a slight decline in state prison population. Yearly population reports are available online at <http://www.cor.pa.gov/About%20Us/Statistics/Pages/Reports.aspx>

<sup>6</sup> Council of State Governments Justice Center. *Justice Reinvestment in Pennsylvania: Policy Framework*. New York, NY (2017). Available online at [www.csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17\\_JR-in-Pennsylvania.pdf](http://www.csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17_JR-in-Pennsylvania.pdf)

<sup>7</sup> *Id.*

<sup>8</sup> The Sentencing Project. *The Color of Justice: Racial and Ethnic Disparities in State Prisons*. Washington, D.C. (2016). Available online at <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>

<sup>9</sup> *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*. See, [http://www.pa-interbranchcommission.com/\\_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf](http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf)

its failure to distinguish between different types of recidivism and the ongoing lack of racial impact analysis in the development of its proposed instrument.

### Defining “Recidivism”

In the legislation that mandated the creation of the risk assessment instrument, the General Assembly instructed that the final tool “may be used as an aide in evaluating the relative risk that an offender will reoffend *and* be a threat to public safety.”<sup>10</sup>

The question then becomes, what type of behavior constitutes a re-offense that, at the same time, poses a threat to public safety? The proposed risk assessment instrument answers this question with an overly broad definition of “recidivism” as a “re-offense, defined as a re-arrest for a felony or misdemeanor in Pennsylvania within three years...or a recommitment to the PA Department of Corrections for a technical violation within three years of release from confinement.”<sup>11</sup> The problem is that this definition fails to distinguish between new crimes and technical violations, lumping both into the unduly large basket of “recidivism.” Moreover, the definition improperly relies on re-arrest, rather than a new conviction, in defining what constitutes a re-offense.

As referenced earlier, the Interbranch Commission reviewed a wide range of risk assessment tools used to aid in making bail determinations in the pre-trial setting in its 2016 report, *Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*.<sup>12</sup> We cautioned against relying on risk assessments that fail to distinguish between new criminal activity and technical violations of pretrial release conditions. The same is true in the context of sentencing: a technical violation of probation or parole is not the same as a new criminal conviction, and should not be treated as such because it does not pose a “threat to public safety”. This is particularly problematic due to Pennsylvania’s unusually high rate of probation and parole supervision, which is 36% higher than the national average and the highest of the states in the Northeast.<sup>13</sup> In fact, recent findings by Pennsylvania’s Justice Reinvestment Initiative indicated that “[s]upervision violations in Pennsylvania are a key driver of incarceration. People who have violated the terms of their probation or parole occupy

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<sup>10</sup> 42 Pa.C.S. §2154.7 (emphasis added).

<sup>11</sup> PA Commission on Sentencing, *Proposed Sentence Risk Assessment Instrument*, (March 2018). Available online at [http://www.hominid.psu.edu/specialty\\_programs/pacs/guidelines/sentence-risk-assessment-instrument-approved-for-purpose-of-public-comment](http://www.hominid.psu.edu/specialty_programs/pacs/guidelines/sentence-risk-assessment-instrument-approved-for-purpose-of-public-comment)

<sup>12</sup> *Supra*, note 8.

<sup>13</sup> Schirladi, Vincent. *The Pennsylvania Community Corrections Story*, Columbia University Justice Lab (April 25, 2018). Available online at <http://justicelab.iserp.columbia.edu/img/PACommunityCorrections4.19.18finalv3.pdf>

nearly one-third of prison beds.”<sup>14</sup> The data from the PCS itself shows that 42% of offenders will “recidivate” within three years, but fails to account for the very real difference between the high rate of probation violations versus new criminal activity.

Due to the ballooning imposition of fines, restitution, and other court costs (collectively, legal financial obligations or “LFOs”), probation and parole violations are often directly tied to an offender’s financial situation. These LFOs often total in the thousands of dollars for a single case, and can include mandatory fines, imposed without consideration of an offender’s indigency.

When the Interbranch Commission examined the impact of these LFOs, we found that, “in some counties, offenders cannot be discharged from probation until all LFOs are paid in full, which often results in probation being extended indefinitely for low-income Pennsylvanians, increasing their risk of incarceration for probation violations.”<sup>15</sup>

Additionally, the Interbranch Commission found that judges throughout Pennsylvania were routinely incarcerating offenders for failure to pay their LFOs without conducting constitutionally required ability-to-pay hearings: “a transcript from a February 2016 fines and costs proceeding in Cambria County [Court of Common Pleas] indicated that the presiding judge there summarily jailed 54 defendants for contempt without holding a hearing to determine whether they were able to afford to pay the LFOs on which they had defaulted.”<sup>16</sup> Including these technical violations of probation or parole in the overall definition of recidivism unfairly equates offenders who cannot pay their LFOs with those who commit new crimes. Indigency alone is not and should not be considered a “threat to public safety.”<sup>17</sup>

Finally, the proposed risk assessment instrument includes re-arrests, not new convictions, in its definition of recidivism. In its guide, the Interbranch Commission cautioned against relying on this metric, noting that “current risk assessment tools predict rearrest - a different category that is not necessarily representative of future violence or threat to public safety, and is demonstrably a more likely outcome for an individual of color or an otherwise marginalized person.”<sup>18</sup> Indeed, the PCS considered using prior arrest data as an input measure, but declined to do so after its own study found that

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<sup>14</sup> The Council of State Governments Justice Center, *Justice Reinvestment in Pennsylvania: Policy Framework* (June 2017) at 5. Available online at [https://csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17\\_JR-in-Pennsylvania.pdf](https://csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17_JR-in-Pennsylvania.pdf)

<sup>15</sup> *Supra*, note 8 at 15.

<sup>16</sup> *Id.* at 25.

<sup>17</sup> 42 Pa.C.S. §2154.7.

<sup>18</sup> *Supra*, note 8 at 8.

"current arrest scales fail to pass the standard measure of racial bias."<sup>19</sup> According to the PCS data, Black offenders are 33-37% more likely to be re-arrested, and Hispanic offenders are 18-20% more likely to be re-arrested, than their White counterparts. Even with this indication that re-arrest data includes constitutionally impermissible racial taint, the risk assessment instrument proposed by PCS continues to include re-arrest as a proxy for measuring new criminal behavior.

### Lack of Racial Impact Analysis

While risk assessment tools may appear to reduce bias against people of color in sentencing decisions by relying on objective measures rather than the potential implicit bias of judges or juries, in its guide the Interbranch Commission warns against adopting these tools without a careful analysis of their actual impact on defendants of different races. We noted that, "while risk assessment tools may help a jurisdiction reduce its incarcerated population, they do not necessarily address underlying racial disparities... In fact, no rigorous studies have shown risk assessment tools to accomplish both goals."<sup>20</sup> The U.S. Department of Justice highlighted similar concerns in a 2014 letter to the U.S. Sentencing Commission, warning that "utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills," a population that, in Pennsylvania, is disproportionately comprised of people of color.<sup>21</sup>

We understand that the PCS conducted some limited racial impact analysis on an earlier proposed version of its risk assessment instrument. As discussed above, a prior iteration of the tool included prior arrests as a factor in assessing risk. When the PCS examined prior arrests as a factor, they concluded that its inclusion unfairly biased the instrument against Black offenders, and consequently, removed that factor from consideration. However, no broader study has been conducted on the racial impact of the entire tool. The above discussion of the continued inclusion of re-arrest in the definition of recidivism indicates that further study in this area is warranted. This lack of more detailed analysis is particularly problematic considering that other, similar tools have

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<sup>19</sup> Pennsylvania Commission on Sentencing, "Risk Assessment Update: ARREST SCALES," February 28, 2018. Available online at [http://www.hominid.psu.edu/specialty\\_programs/pacs/publications-and-research/research-and-evaluation-reports/risk-assessment/risk-assessment-update-february-2018-arrest-as-predictive-factor](http://www.hominid.psu.edu/specialty_programs/pacs/publications-and-research/research-and-evaluation-reports/risk-assessment/risk-assessment-update-february-2018-arrest-as-predictive-factor)

<sup>20</sup> *Supra*, note 8 at 10.

<sup>21</sup> United States Department of Justice Letter to United States Sentencing Commission, July 29, 2014, at 5. Available online at <https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>

been found to institutionalize the racial bias that pervades the criminal justice system, especially in the sentencing context.<sup>22</sup>

In conclusion, the Interbranch Commission respectfully recommends that the PCS take the following actions to ensure that the risk assessment tool protects the constitutional rights of all defendants, particularly the indigent or racial minority defendant:

- recalibrate its risk assessment instrument to distinguish between new criminal convictions and technical probation or parole violations;
- further distinguish between technical probation or parole violations that are tied solely to a defendant's indigency and other, more serious technical violations;
- remove all use of arrest data, including re-arrest, which has been shown to contain racial bias; and
- conduct further analysis of the instrument's potential disparate racial impact.

Without these changes, the current risk assessment instrument runs the risk of being built upon the very same racial bias that it was intended to eradicate.

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<sup>22</sup> Julia Angwin, Jeff Larson, Surya Mattu, and Laruen Kirchner, *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks*, ProPublica (May 23, 2016). Available online at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>