Testimony on Behalf of the Risk Assessment Task Force by Marni Jo Snyder
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** Legal citations available upon request**

Good morning everyone. I am Marni Snyder. I am a criminal defense attorney in Philadelphia. In the summer of last year, State Representative Brian Sims and I formed the Risk Assessment Task Force because of our concern that the proposed risk assessment instrument would have disparate impact on the people of Philadelphia and especially people of color.

The task force includes Temple Law Professor Sara Jacobson, Assistant District Attorney Mike Barry, Philadelphia Defender Association Policy Director Mark Houldin, William Cobb, the deputy director of organizing and partnerships at the ACLU's Campaign for Smart Justice, Retired Judge Carolyn Engel Temin (elected 1983- retired December 31, 2012). The intention was to draw from diverse backgrounds in the criminal justice system- practitioners, scholars, jurists, and advocates.

After examining the proposed tool, seminal case law regarding sentencing purposes and procedure, and other on topic literature, we rested our attention on a number of issues. We are continually exploring the racial and disparate impact, and we implore the Sentencing Commission to conduct a study on the same. We are considering the impact in the courtroom, judges, and on the courts, specifically the First Judicial District. Finally, we are looking at the tool itself-- the "New Jim Crow" era data used within the algorithm, the lack of dynamic factors that would be required to evaluate change in a defendant's risk level, the likely and strong constitutional challenges to the use of the proposed tool, and the Sentencing Commission's plan to experiment with the tool on Philadelphia's accused population before conducting a comparison assessment to uncover whether judicial determinations of risk have even been deficient and at what rate.

Today, we challenge the Sentencing Commission to provide us with studies in racial and a disparate impact and the comparison assessment I just mentioned. Today we share with you a glimpse into our discussion regarding implementation, constitutionality, and impact on judges and the courts. You will hear more from us in the near future.

Due process guarantees individualized sentencing and that the judge finds the facts to be used at sentencing by a preponderance of the evidence. Pennsylvania's proposed sentencing risk assessment instrument is flawed and violates the state and federal constitutions because it recommends an enhanced sentence based upon the mere fact of prior arrests. "The mere fact of an arrest, by itself, is not reliable evidence of guilt." Due process requires that sentencing facts be established by a preponderance of the evidence and that although a court can learn of a prior arrest, it must recognize that the alleged conduct did not result in a conviction and cannot enhance a sentence based upon the mere fact of the arrest alone. The federal courts uniformly prohibit this conduct because "a mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct. This is because arrest 'happens to the

innocent as well as the guilty.'"

The current tool does not meet this threshold. The use of arrests alone is a material factor necessary to the current tool. It uses the mere fact of arrest supported by probable cause to determine a higher risk of recidivism. What a court cannot consider directly cannot be accomplished by filtering unreliable and unconstitutional factors through the filter of a "high" or "low" result. The tool does not satisfy constitutional muster.

Additionally, due process guarantees the right to be free from arbitrary or discriminatory sentencing. The tool's current determination of a "high" versus "low" recidivism label violates this tenet. Without basis or reasonable support, the Commission made "[a] policy decision [. . .] that it would be better to err on the side of overpredicting recidivism [which results in more offenders incorrectly predicted to recidivate] than to err on the side of underpredicting recidivism [which results in more offenders incorrectly predicted to not recidivate]." In doing so, it decided, arbitrarily, that wrongly labeling 14 people high risk was better than to incorrectly label an actual recidivist as low risk, meaning that tool over penalizes at a ratio of 14 to 1. There is no support for this harsh result. As such, it violates the law.

Here, we have another Legislative mandate to further the culture of sentencing by the numbers. The Commentary to the current tool states that the risk assessment "does not make any recommendation regarding the sentence to be imposed," and also states that, "the risk assessment score or category is not intended to be used by the court as an aggravating or mitigating factor." Judge Temin is at a conference today, but she has sent me some remarks. Based on her 30 years on the bench, Judge Temin predicts differently, "I predict that although these precepts will be followed as to form, as a practical matter and substantively they will definitely have an effect on the length and type of sentence imposed…" She goes on to state that, "[i]n more serious cases, any data generated by these reports and any conclusory recommendations will be used by Prosecutors and Judges as a basis for increasing a sentence. Particularly, in cases where the RNA or RNR suggests that the offender will reoffend unless he or she receives certain kinds of services and those services are not available, the assumption might be that reoffending is a certainty."

Another important consideration is that the risk assessment tool uses data already in the CPCMS system and there is always a possibility that the data is either incorrect or subject to attack on a number of bases including racial and gender bias. This means that, either the use of the assessment report become in and of itself a civil rights violation (which may or may not be discovered by the defense lawyer) or, that sentencing hearings… will involve very lengthy and complicated hearings on the accuracy of the data.

Which brings me to our next point, implementation of this new risk assessment tool will create delay and make sentencing more costly. In 2015 – the most recent year for which statistics are readily available- Philadelphia processed over 9200 cases as guilty pleas and another 1500 cases in jury and nonjury trials. The specific statistics for the number of open guilty pleas

versus the number of negotiated pleas is not available, but anecdotal evidence demonstrates that a significant number of cases are resolved with open guilty pleas, particularly in municipal court. For each of these cases, § 305.4 creates a delay.

Because § 305.4 mandates process beyond what is readily determinable in a courtroom under the current sentencing guidelines, sentencing hearings will be delayed. One can calculate an Offense Gravity Score and Prior Record Score quickly. Because § 305.4 requires an additional layer of calculation and, in some cases mandates a presentence investigation, it will take more time for court officials before a defendant may be sentenced at all. In many cases, this will mean that the defendant can not be sentenced the same day of a guilty plea or trial when otherwise this would not have been the case. For defendants who are incarcerated, that means more time in jail with all of the collateral personal losses attendant to incarceration. For victims and police, delay means additional court dates to attend and delay in any sense of finality or resolution.

For the courts,the consequences of delay are equally significant. Delay in processing cases means that overall cases will move through the system more slowly. It means additional time spent by every member of existing court personnel- public defenders, district attorneys, court staff, judges, and sheriffs, as individual cases now take more dates to resolve. This is equally true in every county in the Commonwealth. § 305.4 will also necessitate hiring additional probation personnel in each county, both to calculate the § 305.4 "risks" and to process additional presentence investigation reports.

This cost and delay are created by the addition of an instrument that adds nothing to the information already available to courts at sentencing, other than a mandate that sentencing be impacted by unproven allegations in prior arrests.

Judge Temin offers this viewpoint from her vast experience on the bench; she says:
"In the interest of transparency, I must tell you that I am NOT a fan of sentencing by the numbers. Sentencing guidelines were originally thought to be something that would help to ensure that sentences for similar offenses would be more or less within the same ballpark all over the State. They are helpful when training new judges and in giving all judges a sense of the average range of sentences for a particular crime (when updated regularly). But in my view, they often act to discourage judges from listening carefully to witnesses and arguments at a sentencing hearing and to make them more concerned with following guidelines than doing justice."

Thank you for listening.

If you would like to post any questions to the Risk Assessment Task Force, please email me at marni@snyderlawyer.com.