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TESTIMONY

House Judiciary Committee

**Public Hearing
Justice Reinvestment Initiative (JRI-II)
SB 500 (PN 850)
SB 501 (PN 692)
SB 502 (PN 693)**

**Majority Caucus Room
140 Main Capitol Building
Harrisburg, PA**

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Good morning Chairman Kauffman, Chairman Briggs, and members of the House Judiciary Committee. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for providing this opportunity to testify about JRI-II (SB500, SB501, SB502; and HB1573, HB1574, HB1575). I will focus my brief comments this morning on the role of sentencing structures, data, and guidelines in advancing the objectives of the Justice Reinvestment Working Group, and how the proposed legislation can serve as a vehicle to strengthen public safety through redirecting critical correctional resources. I have attached to my testimony a copy of a 2016 paper I wrote with Dr. Bret Bucklen (PDOC) regarding Justice Reinvestment.

Streamlining Sentencing Structures

A key finding of the Justice Reinvestment Working Group is that the structure of sentencing in Pennsylvania is unnecessarily complicated, and the delivery of correctional services is uneven due to the heavy reliance on counties and the minimal state investment. To address the structural problems, JRI-II proposes combining and streamlining several sentencing alternatives and correctional programs. To address the funding needs, JRI-II proposes reinvesting the savings realized from reforms at the state level in county adult probation and parole, with funding linked to documented needs, best practices and proven success.

The first of the structural changes is at the county level: incorporating county intermediate punishment into an Order of Probation as restrictive conditions. When initially enacted, county intermediate punishment was designated as a separate sentencing alternative in order to avoid net-widening (assigning more restrictive conditions than required on non-confinement sentences) and with funding linked to program compliance. Advances in assessments and community supervision strategies during the past 25 years, and the provisions in JRI-II that define the use of restrictive conditions in terms of intensity and duration and that monitor compliance address these earlier concerns.

The other structural changes occur at the state level and involve: redefining state intermediate punishment as state drug treatment program within in the Department of Corrections; and streamlining the consideration of parole for those state sentences with relatively short minimum terms. These



actions provide for a more efficient, less burdensome process of getting the right individuals into the right programs in a timely manner, aligning the offender's risk and needs with the programming required, and providing for expedited processing of parole for the most appropriate cases. Not only are these approaches supported by research and practice, but they generate the costs savings needed for investment in county probation and parole services.

Leveraging Sentencing Data

A mission-critical function of the Sentencing Commission is the collection, analysis and dissemination of sentencing data. The Commission has prepared detailed sentencing data sets since 1985, and launched a JNET-based SGS Web application in 2002 which is used by all Courts of Common Pleas to prepare sentencing guidelines and to report sentences (and re-sentences) to the Commission. The data reported through SGS Web are used: to provide the General Assembly and the Administration with information for impact analyses of legislation and for state criminal justice population projections; to inform the Commission's adoption of guidelines and to evaluate programs and practices; and to make available to agencies, counties, courts and the public information on sentences imposed in Pennsylvania.

The Commission is utilizing this platform (and hopefully a next-generation platform) to make available when implemented the sentence risk assessment instrument, resentencing guidelines, and state parole guidelines and recommitment ranges. JRI-II proposes two additional uses of these data and this platform: to provide courts with interactive information on risk, recidivism and costs for consideration along with sentencing guidelines prior to sentencing; and to provide to the Pennsylvania Commission on Crime and Delinquency (PCCD) sentencing data to be used by the County Adult Probation and Parole Advisory Committee for developing a funding plan and formula. As part of the JRI-II responsibilities, the Sentencing Commission is required to certify each county's compliance with the guidelines and with the county's intermediate punishment plan for imposing restrictive conditions.

Aligning Sentencing Guidelines with Best Practices

The sentencing guidelines are advisory benchmarks which serve as a common starting point for sentencing in Pennsylvania. Sometimes described as providing "the typical sentence for the typical



offender,” the guidelines promote uniformity and proportionality in sentencing across the commonwealth. Originally built in the 1980s and revised 16 times, the guidelines provide recommendations based on the current conviction offense and the offender’s criminal history. Similar to guidelines adopted in other jurisdictions, Pennsylvania’s sentencing guidelines are retributive, but consider other more utilitarian purposes, such as rehabilitation through clinically prescribed treatment for drug dependent offenders, or incapacitation of repeat violent offenders through substantial periods of total confinement.

Current convictions are ranked by seriousness and seek to hold the offender accountable through recommendations that address the disposition and duration of the sentence. The criminal history, called a prior record score, considers the number and seriousness of prior convictions, and serves dual roles as a sentencing enhancement: to reflect the blameworthiness of the offender (“the offender should have known”) and as a measure of risk of future offending (“past is prologue”). As part of the Commission’s ongoing review and revisions of the sentencing guidelines, JRI-II proposes that the prior record score focus more on risk and less on blameworthiness, more on recent offending and less on past offending. This is consistent with research and findings by the Robina Institute at the University of Minnesota Law School related to criminal history and public safety. The Commission has been analyzing the impact of the prior record score on sentences imposed; the authorization proposed in JRI-II would permit the Commission to reduce the valuation of less serious offenses and to modify the criminal history to reflect risk to reoffend.

The JRI-II legislation also includes a proposal that the Commission address the intensity of intervention, the use of restrictive conditions and the duration of terms of probation as part of the sentencing guidelines. This is an important linkage between the work of county adult probation and parole in assessing the risk, needs and responsivity (RNR) of offenders and the use of this information by the courts to determine the appropriate intensity and duration of probation supervision and/or the consideration of other sentencing alternatives. There are times when the use of probation and community supervision is viewed from a retributive perspective: a trade-off between a short period of confinement and a longer period of probation. But if JRI-II is redirecting the focus from retribution to



public safety, then risk and needs should drive decisions regarding the intensity and duration of supervision, and long probation terms should be the exception rather than the rule. An analysis of 2015 sentencing data found that over 70% of non-DUI sentences imposed during judicial proceedings included probation, with average terms of probation equal to or less than five years, typically viewed as the outer limits of community supervision. However, approximately 20% of the probation sentences were 'split sentences' (probation was consecutive to confinement or IP), and numerous outlier cases were present (e.g., probation duration of 20 years, 25 years, 59 years).

Closing Thoughts

JRI-II is not the first criminal justice reform being considered by this committee, and it will not be the last. I know there have been concerns that JRI-I over-promised and under-delivered, but real changes did occur because of JRI-I and sustained reductions in the DOC population were the result. The bills you are considering now as part of JRI-II are a good start on front-end reforms. They are different than the bills considered during the last Session, and are different than the initial proposals adopted by the Justice Reinvestment Working Group. The restrictions are greater, the streamlining is more modest, the savings are reduced, the funding is lower. But these bills, if enacted, will make important changes to sentencing structures, data and guidelines, will improve the use of community and institutional correctional resources, and will provide much needed funding to county adult probation and parole where most of community supervision occurs.

Thank you again for providing this opportunity to testify. As an agency of the General Assembly, the Commission on Sentencing is happy to provide any additional data and information requested by the Committee.

Justice Reinvestment in Pennsylvania: Another Opportunity for Bold Action

I. A Principled Beginning

Since Pennsylvania's founding in 1681 as a proprietary colony, sentencing and punishment have been prominent and persistent concerns. William Penn's *First Frame of Government* and its charter of liberties included many provisions regarding the operation of courts, the use of bail, limits on the imposition of fines, and standards for the administration of prisons.¹ The values contained in this Constitution were born of his experiences with persecution and imprisonment for his religious beliefs. These ideals were also present in this "Holy Experiment" through the restricted use of the death penalty, which applied only to convictions for murder and treason at a time when the English penal code permitted it for some 200 offenses.²

These Quaker principles served as the foundation for progressive thought over the next century and a half, and led during this period to the convening of The Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787. The Society advocated for more humane correctional practices, including the replacement of harsh corporal punishment with hard labor, and the move from crowded communal imprisonment to solitary confinement with a focus on repentance and training in useful trades.³ These concepts found both architectural and practical expression in Philadelphia with the construction of the Walnut Street Jail in 1790 and the Eastern State Penitentiary in 1829. Although initially touted by luminaries such as Alexis de Tocqueville as a powerful approach to reformation of prisoners, others, including Charles Dickens, came to view the isolation at the heart of the "Pennsylvania System" as torture.⁴ Although this approach of using regret and penitence to shape attitudes was eventually abandoned, many of the values of the penitentiary movement—such as humane and individualized treatment and a focus on changing criminal behavior—survive.

Much changed in sentencing and penology over the next 150 years, and in Pennsylvania this was witnessed through the continued reworking of confinement, the introduction of various forms of community supervision (e.g., pretrial release, probation, discretionary parole), the adoption of the Model Penal Code, the enactment of mandatory minimum sentencing provisions, and the establishment of a sentencing commission. The structure of sentencing in Pennsylvania had evolved by the late twentieth century into what has been described as an "indeterminate, advisory and

guided" system⁵: *indeterminate* in that the court imposes a minimum and maximum term of confinement (although there is no right to parole, discretionary parole is available upon completion of the minimum term); *advisory* in that the court is required to consider sentencing guidelines, but has broad discretion to depart from the guidelines subject to relatively weak appellate review; and *guided* in that the sentencing guidelines recommend the disposition and minimum term of confinement for all convictions, while mandatory sentencing provisions restrict discretion and require minimum terms of confinement for certain selected convictions.

In Pennsylvania, institutional and community corrections responsibilities are shared by the Commonwealth and its sixty-seven counties. Although there are exceptions, a sentence with a maximum term of two years or greater is served in a state facility (Pennsylvania Department of Corrections, PDOC); and the decision whether or when to grant parole, and the supervision of parole for the unserved balance of the maximum term, is the responsibility of an independent state agency (Pennsylvania Board of Probation and Parole, PBPP). A sentence with a maximum term of less than two years is served in a county facility, with the sentencing judge having parole authority. Offenders on county parole (for the unserved balance of the maximum term), as well as the majority of those on probation, are supervised by county probation/parole officers employed by the local court. County jails and county probation/parole operations are funded primarily by the county.

Perhaps the current wave of reforms in Pennsylvania can be traced to a riot in 1989 at the State Correctional Institution at Camp Hill. Over the course of three days, 123 individuals were injured and fourteen buildings were destroyed, with damage estimated at \$15 million.⁶ Subsequent investigations blamed severe overcrowding and poor administration as causes,⁷ and led to the enactment of legislation to expand state and county correctional capacity⁸ and to create new sentencing alternatives⁹ and correctional programs.¹⁰ This marked the start of a new era in the leadership and operations of the PDOC, with the appointment of innovative and forward-thinking Secretaries, beginning with Joseph Lehman and succeeded by Martin Horn, Jeffrey Beard, and John Wetzel.

This also ushered in new duties for the Pennsylvania Commission on Sentencing, requiring for the first time the



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formal consideration of diversion of offenders from traditional confinement in jails and prisons. Later reforms would further expand the Commission's original sentencing mandate to include responsibility for developing guidelines for re-sentencing, parole, and recommitment,¹¹ with the goals of increasing accountability, enhancing transparency, and providing greater coordination between sentencing and parole. More recently, the Commission was directed to develop a risk assessment instrument for use at sentencing.¹² The assignment of these numerous duties to a single agency evokes the indeterminate structured sentencing (ISS) model in which a commission "promulgates two sets of coordinated guidelines that constrain both sentencing and release powers . . . a distinctive hybrid approach . . . [to] channel a judge's decisional authority . . . [and] encourage[] the predictable exercise of discretionary . . . parole release authority."¹³

Despite these advances, Pennsylvania's incarceration rate remains high compared to other states in the Northeast,¹⁴ and the number of offenders under parole supervision leads the nation.¹⁵ The cause of the high confinement levels in Pennsylvania was identified nearly two decades ago in the aftermath of the disturbance at SCI-Camp Hill¹⁶:

[T]he real problem is that the state policies in Pennsylvania which were intended to "get tough" on criminals have resulted in the increased sentencing of offenders to prison or jail with little regard to either the cost or the effectiveness of incarceration. Since a dramatic increase in criminal activity is not the reason for the Commonwealth's corrections overcrowding problem, we have concluded that Pennsylvania has reached this overcrowding crisis through a series of policy decisions that received broad-based support since the late 1970s. While recently enacted boot camp and intermediate punishment legislation have signaled a modest "mid-course correction," the basic policy response to crime is still imprisonment.¹⁷

And the solution remains the same as then, a "course of action" described then as an alternative to the "imprisonment policies of the 1980s":

While this public investment is justified to keep a dangerous, violent person off the streets, there are many other situations where alternative punishments are sufficient and certainly more cost effective. . . . We believe, as does the public, that doing time in prison is not the only way or the most cost effective means by which to punish an offender.¹⁸

So, although numerous efforts during the past two decades have been directed toward reducing the number of offenders confined and supervised, as well as the associated costs, the outcomes have been modest. A comprehensive review of Pennsylvania's criminal justice system was central to the initial Justice Reinvestment Initiative (JRI-I) in 2012, which addressed back-end reforms, with deliverables including better coordination between the PDOC and the

PBPP, elimination of certain pre-release programs, and the reworking of consequences for technical violations of parole. The Commonwealth's commitment to a second phase of the Justice Reinvestment Initiative (JRI-II), which began in March 2016, recognizes unmet front-end challenges in three key areas: county impacts and outcomes, sentencing complexity and variation, and prison and parole volumes. A discussion of these two efforts follows.

II. JRI-I (2012)

In the five years immediately prior to Pennsylvania's first JRI (2007 to 2011), Pennsylvania was facing a state prison population that was increasing by an average of nearly 1,500 inmates per year, requiring adding the bed space equivalent of a new prison roughly every other year to maintain adequate capacity. Staff from the Council of State Governments (CSG) worked with Pennsylvania lawmakers and policy-makers during 2007 to explore potential corrections and sentencing reform options, which resulted in a package of bills enacted in late 2008.¹⁹ Although this 2008 legislative package was intended in large part to relieve state prison population growth, gains were quickly undermined by a three-month parole moratorium during the end of 2008, as a result of a high-profile incident where a police officer was shot and killed by a recently released state parolee.

After 2008, policy attention began to focus on two groups of offenders contributing to the state prison population: technical parole violators (TPVs) and short minimum sentenced ("short min") offenders.²⁰ Another legislative effort was undertaken in 2010, with a focus in part on alleviating the contribution of TPVs to the state prison population by creating Parole Violator Centers (PVCs) as a sanctioning option for TPVs. Several factors again offset the ability of these new efforts to generate the full potential impact of reducing the state prison population.

First, an "earned time" provision in the 2008 legislation provided for an earlier minimum sentence date for eligible inmates who completed treatment and behaved in prison, which had the impact of increasing the number of "short min" inmates in state prison. These "short min" inmates are especially difficult for a state prison system to manage, since state prison operations are generally geared toward longer-term offenders.²¹ The practical consequence is that "short min" inmates serve a higher percentage above their minimum sentence than do longer-term inmates, which then obviously has an impact on the prison population.

Second, a provision originally considered for inclusion in the 2010 legislation would have allowed "short min" offenders to be diverted to halfway houses on a pre-release status shortly after their arrival to state prison, but this provision ultimately failed, leaving the "short min" population unaddressed.

Third, a provision of the earlier 2008 legislative reform package that changed the presumptive place of confinement for short-term offenders became effective in 2011. This provision required that offenders given a maximum sentence length of at least two years but less than five years

were to be presumptively sentenced to state prison, whereas prior to this change, it was completely up to the discretion of the sentencing judge whether these offenders would be sentenced to a county jail or a state prison. Although this provision did not take effect until 2011, many counties started moving toward sentencing this population of offenders to state prison a few years before 2011 in anticipation of the effective date for this change.

Pennsylvania first officially engaged in JRI during 2011. A Pennsylvania JRI work group was formed, and convened for the first time in early 2012. The Pennsylvania JRI work group included representatives from a broad cross-section of state and local criminal justice stakeholders, as well state legislators and policymakers. Through funding from the U.S. Department of Justice's Bureau of Justice Assistance and the Pew Charitable Trusts, the CSG was recruited to facilitate this JRI effort in Pennsylvania.

The general stated goal of JRI is to cut corrections spending by reducing the prison population, and reinvest savings in strategies to reduce recidivism and improve public safety. The emphasis of Pennsylvania's first JRI effort focused primarily (although not exclusively) on back-end solutions for addressing the state prison population. Particular focus was on parole and community corrections policies: (1) reducing the contribution of parole violators to the prison population, (2) improving efficiency in processing inmates for parole interview and parole release, and (3) improving outcomes in the CCC (halfway house) system.

Leading up to the first JRI effort, increasing attention was paid to the contribution of parole violators (especially TVPs) to the state prison population. As referenced previously, legislation passed back in 2010 created secure CCCs, referred to as PVCs, as an option for sanctioning TVPs. This legislation had modest but limited impact on reducing the number of TVPs in prison. TVPs recommended for diversion to a PVC were still required to first go to prison for a violation hearing before being moved out to a PVC. Time spent in prison before being moved to a PVC was typically between one and three months. Further, only about 15 percent of TVPs were being recommended for diversion to a PVC. The average time spent in prison for a technical violation did decrease as a result of the use of PVCs, from an historical average of between twelve and fourteen months down to approximately nine months, but this average still remained quite high in comparison to other states that had undertaken reforms in the use of prison for sanctioning TVPs. With approximately 3,900 TVPs being sent to state prison (more than 20 percent of total state prison admissions) in the year immediately prior to undertaking the first JRI reforms, the JRI work group clearly recognized the need for further reforms in this area.

At the same time, the JRI work group focused on the disappointing results of Pennsylvania's Community Corrections Center system. Pennsylvania had historically been a high investor in the use of CCCs (i.e., halfway houses) compared to other states, spending approximately \$100 million per year for the operation of fourteen state-run

CCCs and contracts with forty privately operated Community Contract Facilities (CCFs) across the state. An evaluation of recidivism rates for Pennsylvania's CCCs and CCFs conducted by the University of Cincinnati in 2009 found that the majority of these centers were producing poor results. Recidivism rates for offenders going to CCCs and CCFs after prison were higher than recidivism rates for offenders going straight home after prison. At the time, Pennsylvania used its CCCs and CCFs for four different types of offenders: (1) for parolees as a transition home after being released from prison; (2) for misbehaving parolees as a "halfway back" diversionary option instead of being returned to prison as a technical violator; (3) for pre-release inmates who met certain eligibility criteria for spending the rest of their minimum sentence in a CCC or CCF rather than in prison; and (4) for substance-abusing offenders participating in an alternative sentence called the State Intermediate Punishment (SIP) program. One theory for why recidivism results were so disappointing for CCCs and CCFs was that no attention was being paid to separating offenders by risk level within centers. The same CCC/CCF could house both TVPs and low-risk inmates on pre-release status.

The JRI work group was further concerned about pre-release inmates being housed in CCCs. Fully one-third of all CCC and CCF residents were on pre-release in 2011. Prosecutors and victim advocates were never supportive of the pre-release program because it allowed inmates to reside within the community in a non-secure halfway house before they reached their minimum sentence date (i.e., their minimum eligibility for parole release). Out of the dual concerns of TVPs in prison and pre-release inmates in CCCs and CCFs emerged an option that the JRI work group came to a consensus around and ultimately adopted, which was to redesign the CCC system by eliminating the pre-release program and presumptively sending TVPs directly to CCCs. This was the core reform of Pennsylvania's first JRI.

In June 2012, the Pennsylvania legislature unanimously passed Act 122 of 2012, which became the first piece of the JRI legislative package. Act 122 was the legislative vehicle for the redesign of the CCC system. The pre-release program was statutorily repealed. In turn, Act 122 required most TVPs to be presumptively sanctioned directly to a CCC (now a PVC), with a capped length of stay of no longer than six months. The only technical violators statutorily permitted to be returned to state prison were those who met one or more of five specific criteria: (1) the violation was sexual in nature, (2) the violation involved assaultive behavior, (3) the violation involved a weapon, (4) the violator had absconded supervision and could not be safely housed in community corrections, or (5) the violator posed an identifiable risk to public safety.²² Even for those technical violators meeting one or more of these five criteria who were allowed to be returned to prison, caps were set on their maximum length of stay in prison: six months for a first recommitment, nine months for a second recommitment, and one year for a third or subsequent recommitment.²³

Although the CCC redesign was the most significant provision under Act 122 in terms of projected prison population impact, the act also included several other provisions targeted at prison population reduction and related to discussions and recommendations coming out of the JRI work group. One target in Act 122 was intended to expand the use of the SIP program, which is an alternative sentence for state-sentenced, substance-abusing offenders. SIP offenders spend a shorter period of time in state prison, with the balance of their sentence served in community treatment. Previous evaluations of the SIP program showed that it was successful both in reducing recidivism and in saving costly prison beds. Act 122 expanded SIP eligibility by removing the defendant's ability to refuse SIP participation if found eligible and otherwise recommended for participation. It also allowed offenders facing certain mandatory minimum sentences to be considered for SIP, and permitted prosecutors to waive SIP eligibility requirements contingent upon victim notification and input.

Another provision in Act 122 prohibited courts from sentencing offenders to state prison when the aggregate sentence consisted of a conviction for an offense graded less than a second degree misdemeanor.²⁴ During the course of the JRI work group meetings, staff from CSG presented findings to the work group showing that Pennsylvania was one of only seven states where an offender with only a misdemeanor could be sentenced to state prison. This provision was intended as a first step toward reducing the number of misdemeanors sent to state prison, although the impact turned out to be almost negligible since very few offenders with a maximum sentence for an offense lower than a second degree misdemeanor were in fact being sent to state prison prior to JRI.

Act 122 also expanded the age eligibility for the Boot Camp program from 35 or younger to 40 or younger. Previous evaluations of Pennsylvania's Boot Camp program showed success in terms of lower recidivism rates and reduced prison population. Another provision in Act 122 encouraged county probation departments to implement a "swift and certain" sanctioning approach modeled after the successful Hawaii HOPE probation program. Act 122 also provided increased powers to the Parole Board, including the ability to parole nonviolent illegal immigrant inmates to deportation before reaching their minimum sentence date, and the ability to award credit for the time spent at liberty on parole for nonviolent Convicted Parole Violators (CPVs) recommitted to state prison. Finally, Act 122 also directed the PDOC and PBPP to jointly establish a "safe community reentry" program to further provide community services to returning offenders that enhance their successful reintegration and reduce recidivism.

In addition to Act 122, the JRI work group made specific recommendations around improving efficiencies in the parole process. These recommendations did not require statutory enactment, but were recognized by the JRI work group as important targets. Two inefficiencies were specifically targeted: (1) inefficiencies in processing inmates for

a timely parole hearing after reaching their minimum sentence date, and (2) inefficiencies in actually releasing inmates from prison to parole after receiving a positive parole decision. The JRI work group set as a goal increasing the number of parole cases interviewed per month by 20 percent by 2015. Before JRI, approximately 2,300 inmates at any given time had been approved for parole yet remained in prison, costing approximately \$77 million per year. The JRI work group also made recommendations around aligning specific resources to ensure an inmate's timely release from prison after receiving a positive parole decision.

The companion piece of legislation to Act 122 in the legislative package for Pennsylvania's first JRI effort was Act 196 of 2012, which was enacted in October 2012. Act 196 was the crucial "reinvestment" piece of the JRI package. Per the JRI model, savings generated from quick wins in reducing the prison population are to be reinvested into longer-term options for reducing crime and sustaining prison population reductions. Act 196 very explicitly outlined how savings were to be reinvested over a fixed five-year period (FY2013-14 to FY2017-18). One controversial discussion in the drafting process of Act 196 was whether credit would be given for savings from the total prison population reduction or only for savings that could be directly tied to JRI initiatives. In the end, Act 196 gave credit only to savings directly tied to JRI initiatives in Act 122.

Act 196 directed that the amount of funds to be reinvested each fiscal year was to be based on the total amount of savings attributable to Act 122-related JRI initiatives in the immediately preceding fiscal year. Only 75 percent of previous year savings were to be reinvested during Year 1, 100 percent of previous year savings were to be reinvested during Year 2, and 25 percent of previous year savings were to be reinvested during Years 3 through 5. Each year, the first \$1.4 million available to be reinvested was earmarked by Act 196 to go to funding victim services and to the Pennsylvania Commission on Sentencing to develop a sentencing risk assessment tool (\$1 million to victim services, and \$400,000 to the Commission on Sentencing). After the first \$1.4 million, the remaining amount available to be reinvested each year was directed by Act 196 to be distributed as follows: 43 percent to fund grants for innovative policing practices, 26 percent to fund evidence-based county probation supervision practices, 21 percent to pay counties for the diversion of "short min" inmates from state prison, 6 percent to help streamline the state parole process, and 4 percent to fund coordinated community reentry efforts.

In total, as a result of Act 122, Pennsylvania's first JRI was initially projected to reduce the state prison population by 1,260 inmates over the full five-year period, saving \$138.7 million. Nearly 75 percent of this total projected 1,260 inmate reduction was expected to come solely from the redesign of CCCs, that is, the elimination of pre-release and presumptive placement of most TVPs in PVCs, as well as the caps on the length of stay for technical violators.

Through the end of the first three years of Pennsylvania's first JRI effort (FY2012-13 to FY2014-15), the story has been one of mixed success. Start-up was slow on the major components of JRI during the first two years of implementation, especially on the redesign of sanctioning TVPs. The original projected impact from diverting TPVs to community corrections and capping their length of stay was initially expected to reduce the prison population by 750 inmates during the first two years (375 inmates per year). In fact, the inmate population was not reduced by any inmates during the first year, and only by 338 during the second year as a result of implementing this policy. There were a few reasons for this. First, Year 1 produced no impact largely because of an overlooked time discrepancy between when Act 122 was enacted and when the community corrections redesign policy actually became effective. Second, evidence suggested that net-widening occurred during the first two years, with the total volume of parole violators increasing compared to historical averages just prior to JRI enactment. In the first two years of JRI, the monthly rate of parole violators admitted to PDOC custody per state supervised parole population was 2.5 percent, compared to 2.3 percent during the two years immediately prior to JRI enactment. Although this does not look like a large difference on the surface, with a state-supervised parole population averaging just over 29,000 parolees, this two-tenths of a percentage point increase in the violation rate translates into an increase of about 700 more parole violators coming into PDOC custody per year. This increase offset gains that were made during the first two JRI years as a result of the reduced length of stay for technical violators due to the new statutory caps. One contributor to this net-widening was an unexpected overuse of the five exception reasons for allowing a TPV to be recommitted to state prison, especially for the last two exception categories (i.e., "absconder not amenable to community supervision" and "identifiable threat").

The third year of JRI implementation (which is the most recent full year, FY2014-15) has represented a significant improvement in the success of the initiative. The prison population was originally expected to be reduced by only an additional 43 inmates during Year 3 as a result of the TPV and community corrections redesign policy, but in fact was reduced by approximately 632 inmates as a result. Although good news from a prison population reduction standpoint, this late start diminished the cost savings and reinvestment part of the JRI package. From a cost savings standpoint, the first two years were mostly a loss due to the implementation obstacles noted above. Losing two years out of the fixed five-year savings time frame means that the total five-year savings is now projected to be \$88.3 million rather than the originally projected \$138.7 million (about one-third of the original projected cost savings). Second, from a reinvestment standpoint, only 25 percent of savings are allowed to be reinvested during Years 3 through 5 per Act 196, whereas 75 percent would have been available for reinvestment in Year 1 and 100 percent in Year 2. This means that the Commonwealth mostly lost out on the two high

reinvestment years as a result of the slow start-up during these first two years.

Despite being able to reinvest only 25 percent of savings, the current fiscal year (FY2015-16) is the first year that the Commonwealth has been able to make substantial reinvestments as a result of JRI savings during Year 3 implementation (FY2014-15). In addition to the fixed \$1.4 million reinvested to support victim services and the development of the sentencing risk assessment tool, \$668,000 is actually being reinvested to innovative policing grants, \$404,000 to evidence-based county probation practices, \$326,000 to pay counties for the diversion of "short min" offenders, \$93,000 to streamline the state parole process, and \$62,000 for coordinated community reentry efforts.

From a population reduction standpoint, Pennsylvania's first JRI effort has been a success. There are currently 998 fewer parole violators in a Pennsylvania state prison than there were just prior to JRI enactment. The total state prison population is down 1,074 inmates since JRI enactment. In the last two calendar years alone the total state prison population has declined by nearly 1,600 inmates. And though other factors such as the invalidation of drug mandatories may have had some effect, this shows a fast recovery from the slow start-up that produced an actual prison population increase during the first year of JRI implementation. Pennsylvania is well on target to meet the originally projected five-year prison population reduction of 1,260 inmates. This is a substantial gain and cost avoidance to Pennsylvania, given that prison population projections prior to initiating this first JRI effort anticipated a state prison population of approximately 54,705 inmates by this point in time, whereas the actual prison population was only 49,914 inmates as of December 31, 2015.

III. JRI-II (2016)

Prison populations are driven by two factors: admissions and length of stay. Decisions to incarcerate at sentencing or to recommit following a parole violation affect admissions; decisions regarding the minimum sentence, parole release, and back-time for revocations affect length of stay. However, the volume of cases for which sentencing and parole decisions are being made may also affect prison populations. Increased crime and/or enhanced law enforcement and prosecution efforts may drive up prison admissions at sentencing, even if the sentencing practices remain unchanged; and a growing parole population may drive up re-commitments, even if the revocation policies are the same. As noted previously, JRI-I addressed back-end issues that affect recommitments and length of stay; the efforts of JRI-II are directed toward court admissions and other front-end concerns.

A more specific description of this next phase is provided in the following Justice Center *Overview*:

Whereas the previous justice reinvestment effort focused on corrections and parole systems, this justice reinvestment project includes an explicit focus

on crime, arrest, pretrial, sentencing, county probation and parole supervision, jails, substance abuse and mental disorders, and community-based treatment and programs to reduce recidivism.²⁵

During the first meeting of Pennsylvania's Justice Reinvestment Working Group, three key challenges were identified: county impacts and outcomes, sentencing complexity and variation, and prison and parole volumes.²⁶ The Justice Center found that "over 80% of sentences are served at the county level, whether on probation, in jail, or county intermediate punishment. Almost a quarter million people are supervised by 65 county adult probation departments on any given day."²⁷ Counties are primarily responsible for the cost of local supervision, and the level of support received from the Commonwealth through grant-in-aid funding has declined. As a result, criminal justice resources vary substantially by county, and the outcomes of many programs and practices are unknown. Reforms over the years intended to address overcrowding have complicated sentencing procedures, the sentencing volume has increased by 10 percent during the past decade, and "despite the structure provided through the guidelines, variation in sentencing outcomes can exist across similar cases."²⁸ The result has been a state incarceration rate that exceeds other states in the region, the fourth highest increase in incarceration rate in the nation during the 2004–2014 period, and the highest parole supervision rate in the country.

The Justice Center noted that "efforts to curb prison population growth have contributed to recent reductions, but state corrections spending has continued to climb, reaching \$2.3 billion."²⁹ In recent years, the percentage of cases sentenced to the PDOC has remained relatively stable: approximately 14 percent of all criminal incidents reported to the Commission and approximately 12 percent of the individuals sentenced, although over time a greater portion of these cases are drug-related offenses.³⁰ And, although the average (mean) minimum and maximum sentences have fluctuated, they remain at or below earlier levels,³¹ due in part to the shorter sentences for drug-related offenses offsetting the increased sentences for violent and repeat offenders. A substantial number of offenders confined in state facilities, especially those with short minimum sentences, could be diverted safely to other programs or institutions.

Although the factors contributing to Pennsylvania's corrections challenges are many, and any solutions will require bold and coordinated action across agencies and units of government, a common thread is the potential of the Commission's various guidelines and risk assessments to promote data-driven, evidence-based decisions and recommend more efficient use of correctional and treatment resources. An important related need is a comprehensive review of the contents and prescribed use of pre-sentence investigation reports in Pennsylvania, to promote standardization, appropriate targeting, and the incorporation of

Risk-Needs-Responsibility () information. JRI-II provides a structure for the vetting of proposals and the building of support for streamlining sentencing statutes and simplifying requirements for correctional programs, as well as other changes to improve the efficacy of the system.

When established in 1978, an important goal of Pennsylvania's sentencing guidelines was to reduce unwarranted disparity in sentences. However, other goals included providing an alternative to mandatory minimum sentencing provisions, and preserving judicial discretion while providing a mechanism for review of sentences viewed as excessively lenient or harsh. The initial guidelines, adopted by the Commission³² but rejected by the General Assembly, relied heavily on recommendations to non-confinement and/or county jail. There were numerous constraints within the guidelines, including an exclusive list of aggravating³³ and mitigating³⁴ circumstances, lapsing of prior record for most F3s and all misdemeanors following a six-year crime-free period, limits on application of the offender's criminal history score at sentencing, and standards regarding the imposition of concurrent and consecutive sentences. Many of these factors, which would have constrained the variation in sentencing, were criticized by the General Assembly when rejecting these initial guidelines, and this has shaped all future guidelines.

In 2014, the Commission established a Strategic Planning Work Group (SPWG) to conduct an external review of the current guidelines, to consider other changes in the criminal justice system, and to discuss concepts that could guide a re-visioning of the guidelines. The SPWG provided the first opportunity for a comprehensive review of the guidelines since the 1990s. A number of changes during the preceding two decades were important considerations in this review: a number of landmark decisions by the United States Supreme Court,³⁵ the clarification by the Pennsylvania Supreme Court of the advisory nature of the sentencing guidelines, the role of the sentencing guidelines as a predicate to resentencing and parole guidelines, and the role of various sentencing programs and problem-solving courts developed during the last twenty years.

Many of the issues raised by the SPWG are similar to the challenges identified for JRI-II. The SPWG identified the following needs: (1) to improve certainty in sentencing through streamlined and simplified guidelines, narrower ranges of recommendations, clearer targeting of alternatives, and guidance regarding the use of concurrent/consecutive sentences; (2) to provide clinically appropriate treatment throughout the criminal justice system, providing treatment at the earliest contact with the system and facilitating continuation of treatment across decision points, facilities, and between institutional and community corrections; (3) to promote evidence-based practices by linking recommendations to recidivism research in supervision periods, using RNR to inform the appropriateness of sentencing alternatives and problem-solving courts; and (4) to improve resource utilization to better address the

appropriate use of state prisons and county jails, and well as the duration and structure of sentences. In addition to addressing these needs, the Commission continues work on its other mandates, nearing completion of the development of a risk assessment instrument for use at sentencing, and collaborating with the PBPP on parole guidelines and recommitment ranges. JRI-II provides a forum for complementary efforts by the Justice Reinvestment Working Group and the Commission to make progress in these areas of mutual concern.

IV. Future Potential

Pennsylvania has an opportunity to dramatically change its approach to sentencing and corrections. It has been here before. Its founder espoused principles of justice that served as the bedrock for his "Holy Experiment," and at times since Pennsylvania's leaders have adopted bold reforms that have substantially altered and improved the criminal justice system. But just as often, the reaction to mounting problems in sentencing and corrections has been inaction or half-measures. Incremental change may be adequate to keep correctional populations in check, but bold action is required to fundamentally change the direction. Perhaps consistent with its history, or at least in line with the notion of half-measures, Pennsylvania is engaged in the second act of the Justice Reinvestment Initiative. This second chance is an opportunity to get it right, and to be bold. Pennsylvania should follow the example of its founder, and enact lasting reforms.

Notes

- ¹ William Penn, *Frame of Government of Pennsylvania* (1682), available at http://avalon.law.yale.edu/17th_century/pa04.asp.
- ² Jim Powell, *William Penn, America's First Great Champion for Liberty and Peace*, <http://www.quaker.org/wmpenn.html>.
- ³ Chai Woodham, *Eastern State Penitentiary: A Prison With a Past*, Smithsonian.Com, Sept. 30, 2008, <http://www.smithsonianmag.com/history/eastern-state-penitentiary-a-prison-with-a-past-14274660/?no-ist>.
- ⁴ *Id.*
- ⁵ *Commonwealth v. Yuhasz*, 923 A.2d 1111 (Pa. 2007).
- ⁶ Deb Kiner, *Riots at Camp Hill prison were 26 years ago*, Oct. 25–27, 1989, PennLive, Oct. 22, 2015, http://www.pennlive.com/midstate/index.ssf/2015/10/riots_at_camp_hill_prison_were.html.
- ⁷ *Id.*
- ⁸ 1990 Act 71 (Prison Facilities Improvement Act).
- ⁹ 1990 Act 193 (County Intermediate Punishment Act); 1990 Act 201.
- ¹⁰ 1990 Act 2015 (Motivational Boot Camp Act).
- ¹¹ 2008 Acts 81, 83.
- ¹² 2010 Act 95.
- ¹³ Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L. Rev. 380 (2005).
- ¹⁴ Justice Center, Council of State Governments, *Justice Reinvestment in Pennsylvania: Overview* (2016).
- ¹⁵ Robina Institute of Justice, *American Exceptionalism in Parole Supervision* (2016).
- ¹⁶ See, e.g., Final Report of the Governor's Commission to Investigate Disturbances at Camp Hill Correctional Institution (1989); Pennsylvania Commission on Corrections Planning,

- Final Report (2003); Senate Judiciary Committee, Chairman's Report, *Prison Overcrowding and Alternative Sentencing* (1996).
- ¹⁷ Pennsylvania Commission On Corrections Planning, Final Report 13 (2003) (citing Pennsylvania Economy League, Inc., *Costs of Corrections in Pennsylvania* (1993); *Reconsidering Prisons: The Case for New Corrections Policy in Pennsylvania*, 36 Capital Perspective, no. 2 (1993)).
 - ¹⁸ Pennsylvania Commission 2003 Report, *supra* note 17.
 - ¹⁹ Some consider this to have been actually the first JRI effort in Pennsylvania, but more accurately, it should be considered a JRI precursor.
 - ²⁰ "Short min" offenders are defined as offenders who have twelve months or less to serve to their minimum sentence date at the time of reception to the Pennsylvania Department of Corrections (PDOC). "Short min" offenders represent more than one-third of all PDOC admissions.
 - ²¹ Pennsylvania's "earned time" program is referred to as the Recidivism Risk Reduction Incentive (RRRI) program.
 - ²² Technical violators meeting one or more of these five criteria have come to be referred to by Pennsylvania insiders as "Fab 5" parole violators.
 - ²³ The only statutory exceptions to these caps for TPVs sent to prison are if the TPV committed a disciplinary infraction involving assaultive behavior, sexual assault, a weapon, or a controlled substance; if the TPV spent more than 90 days in a segregated housing unit; or if the TPV refused participation in treatment programming or work assignment.
 - ²⁴ The only exception to this exclusion from commitment to state prison is if the Secretary of Corrections or designee consents to the commitment.
 - ²⁵ Justice Center, *supra* note 14.
 - ²⁶ Council of State Governments Justice Center, *Justice Reinvestment in Pennsylvania: First Presentation to the Pennsylvania Justice Reinvestment Working Group* (2016), <https://csgjusticecenter.org/jr/pennsylvania/publications/first-presentation-to-the-pennsylvania-justice-reinvestment-working-group/>.
 - ²⁷ *Id.*
 - ²⁸ *Id.*
 - ²⁹ Council of State Governments Justice Center, *Justice Reinvestment in Pennsylvania: Presentation to Pennsylvania Commission on Sentencing—Quarterly Meeting* (2016).
 - ³⁰ See Pennsylvania Commission on Sentencing Annual Report 2014, tbl. 6, Summary of Sentences Imposed by County, <http://pcs.la.psu.edu/publications-and-research/annual-reports>.
 - ³¹ See *id.*, figures H, I.
 - ³² 10 Pa. B. 43 (1980).
 - ³³ *Id.* *Aggravating circumstances* included: history of violent conduct; defendant inflicted severe and determined cruelty on the victim; victim was particularly vulnerable; offender was leader in the crime in which there were multiple participants; and offense included more than one victim.
 - ³⁴ *Id.* *Mitigating circumstances* included: victim induced, provoked, or facilitated the crime; conduct of defendant neither caused nor threatened serious personal injury or serious property loss; defendant lacked substantial capacity for judgment at time of offense; there were substantial grounds tending to excuse or mitigate the defendant's conduct or culpability; defendant compensated or made arrangements to compensate victim; defendant played a minor or passive role; and defendant cooperated in the apprehension or prosecution of the offender.
 - ³⁵ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Miller v. Alabama*, 567 U.S. ___ (2012).