ACLU-PA Analysis of SB 501 / Act 115

Act 115 of 2019

Reinstates mandatory minimum sentences

- Reinstates mandatory minimums for certain offenses where the victims are less than 16 years old, including for aggravated assault and sexual offenses. This means if an 18-year-old gets into a fight at school with a 15-year-old and is convicted of aggravated assault, they would be facing a mandatory minimum of 2 to 4 years incarceration even if they had no prior record. 42 Pa.C.S. § 9718. Likewise, a 17-year-old, charged as a direct file juvenile for involuntary deviate sexual intercourse against a fifteen-year-old, would be facing a mandatory 10 years of incarceration if convicted.
- A person convicted of these mandatories will not be eligible for parole until they have served the mandatory minimum.
- Grants the Commonwealth the right to appeal any sentence below the mandatory minimum.

Creates a new mandatory period of "reentry supervision" for anyone sentenced to 4 to 8 years or greater, for whom the parole board denies parole

- **§ 6137.2 Reentry Supervision** - Anyone sentenced to 4 to 8 years of state incarceration (or longer) may have to serve an additional year of parole consecutive to incarceration if that person is *not* granted parole during their incarceration. In other words, for any sentence of 4 to 8 years or longer, if the person maxes out (i.e., serves their entire sentence in prison), they must ***still*** serve one additional year of parole following the completion of their state sentence.

The Act creates an unconstitutional revocation procedure that allows courts to revoke probation and incarcerate someone without the requisite due process protections

With the inclusion of § 9771.1 (the swift and certain sanctions section) into the revocation section, 9771, this Act eliminates constitutionally required due process protections. Federal and state due process, as well as our current law, mandate a substantive amount of due process before probation may be revoked and a person deprived of their liberty. *See e.g. Morrissey v. Brewer,* 408 U.S. 471 (1972); *Com. ex rel. Rambeau v. Rundle*, 314 A.2d 842, 844 (Pa. 1973); *Commonwealth v. Ferguson 761 A.2d 613 (Pa. Super. 2000)*.

- Constitutional due process requires two hearings before revocation. At these violation hearings, the following rights are guaranteed:
    1. Written notice of the claimed violations of parole;
    2. Disclosure to the parolee of evidence against him;
    3. The opportunity to be heard in person and to present witnesses and documentary evidence;
    4. The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
    5. A 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
    6. A written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey v. Brewer*, 408 at 488-89.
- Prior to this Act, 9771.1 was a special program that allowed swift and certain sanctions for certain eligible probationers. To enter this program, the court had to find a person eligible and hold a warning hearing advising the person of the requirements of the program and encouraging compliance. Once admitted into the program, a court would *then* have the authority to automatically sentence probationers

to a graduated incarceration scheme following allegations of probation violations. It is an open question whether 9771.1 was constitutional, however, one could argue that the statute's prior eligibility requirements and mandatory warning hearing in 9771.1 constituted a voluntary waiver of one's due process rights.

- JRI II eliminated all of the eligibility and warning requirements under 9771.1, and inserted 9771.1 into 9771, the section on revocation. This act **now permits a court to revoke probation and incarcerate someone for a violation of probation without any of the constitutionally mandated due process requirements.**
- Under 9771.1 a court may impose "brief sanctions" after a hearing held two days after the arrest. Previously, under 9771 a court could only revoke probation **upon proof of the violation of specific conditions** of probation. *See also Commonwealth v. Foster,* 214 A.3d 1240. JRI II inserted the power to "impose a brief sanction under section 9771.1" into the revocation section. This gives courts the power to impose "brief sanctions" without due process, essentially allowing probation judges to bypass the requisite two hearings and accompany rights articulated in *Morrissey and Gagnon*.
- **Incarceration for technical probation violations could get worse.** The act transforms the current swift and certain sanctions program into universally applied sentences for probation violations. The bill removes the eligibility requirements that currently exist in 9771.1 and applies this section to everyone on probation. This means that if anyone on probation "commits a probation violation, the participant shall be promptly arrested, and a hearing held no later than two business days after the arrest date."

Creates "swift, predictable, brief sanctions" for technical parole violations

- § 6138 (C)(1.1) Inserts provision that allows for those on parole "may be arrested and detained without revocation of parole under a program to impose swift, predictable, and brief sanctions. The program shall provide for immediate detention….for a period not to exceed seven days." This runs into similar constitutional issues as the "brief sanctions" for probation violations above.

Excessively garnishes wages and commissary accounts

- Requires that county jails deduct fines, costs, and restitution from inmate accounts, in the same way that DOC already does. In theory, this is not too troubling, but it requires that **AT LEAST 25%** is deducted from the inmate account - **with no limit**. Some counties may just take it all.
- Gives courts the discretion to garnish up to **25% of GROSS salary** at the time of sentencing for fines, costs, and restitution. Garnishment is already authorized by law for fines, costs, and restitution and frankly, there are no guidelines.

Makes it harder to get into the State Intermediate Punishment (SIP) program

- The bill revamps SIP and renames it State Drug Treatment. It's important to note that SIP is currently wildly underutilized, despite the benefits it provides - only a fraction of eligible people are actually evaluated or sentenced to the program. According to the PA Sentencing Commission's 2018 Annual Report, of all the SIP eligible people, only 23% were actually evaluated for the SIP and only 5% of eligible people were actually sentenced to SIP despite the fact that people on SIP are far less likely to recidivate and save the state lots of money. The bill states "the judge shall exclude the person from eligibility if the prosecuting attorney opposes eligibility." This is essentially taking sentencing power away from the trial judge and handing it directly to prosecutors - any prosecutor who opposes SIP can prevent a person from being receiving state drug treatment. One of the ***only benefits*** SB 501 included was to get more people in SIP - and this amendment makes imposes yet another hurdle to this program.

Eliminates County Intermediate Punishment (CIP) and transforms it into restrictive conditions of probation

- The Act eliminates county intermediate punishment, changing it to restrictive conditions of probation. The restrictive conditions of probation appear to serve the same function as CIP.

Includes problematic risk assessment provisions

- Although the Sentencing Commission has already passed a risk assessment instrument, the bill would give the Commission the authority to embed a new risk assessment tool into the guidelines. The bill calls for modifications to the sentencing guidelines to "reflect risk to reoffend and substantial risk to public safety" and declares "the guidelines shall include interactive information to support decisions with risk..." This would have a particularly damaging impact on young people, as age is one of the factors most directly correlated to "risk." Moreover, again we would see the double-counting problem as criminal history typically defines risk and is also defines one's prior record score.
- Requires that a sentencing court take the "risk assessment instrument" into consideration when sentencing.

Changes to Short Sentence Parole § 6137.1

- Applies only to a very narrow list of eligible offenders serving 2 to 4 or less
- The following will NOT be eligible:
    - Anyone serving a sentence for a personal injury crime (i.e. assault)
    - Anyone serving time for a crime of violence
    - Anyone serving time for a firearms offense
    - Anyone serving time for an offense committed with a deadly weapon
    - Anyone serving time for a sexual offense
    - Anyone serving time for drug trafficking
    - Anyone denied parole on a sentence they are currently serving
    - Anyone convicted of any offense while incarcerated
    - Anyone the board would like to exclude
    - Anyone with a disciplinary infraction
- For those three people eligible under this statute, the parole board shall parole them at their minimum date without requiring an interview.

Broad definition of “victims” permitted to testify at parole hearings

- **§ 6140** The term “victim or family member” shall be interpreted to include all victims and family members and shall not be interpreted to exclude any victim, victim’s representative or family member who wishes to submit a statement, testify or otherwise participate.