

## *Post-Conviction and Sentencing*

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### 8.1 CHAPTER OVERVIEW

This chapter explores issues that a trial court must consider after a sex offender has been convicted, by either a jury or bench trial, or by way of a guilty/nolo contendere plea. Many of these post-conviction matters, as discussed in section 8.2, must be addressed prior to sentencing, including:

- Review of bail following conviction.
- The preparation and use of a Pre-sentence Investigation Report.
- DNA and venereal disease testing.

Next, in section 8.3 the chapter includes a discussion, for sentencing purposes, of *Megan's Law III*, including information about the sexually violent predator assessment and the pre-sentence hearing.

Detailed information is then provided regarding penalties for crimes of sexual violence. Section 8.4 begins with a general discussion of sentencing standards and the use of the sentencing guidelines. The maximum allowable penalty for each crime of sexual violence is provided, beginning with section 8.4(B)(1), Rape. In section 8.4(D), the mandatory penalties for crimes involving sexual violence are listed, along with the criteria and notice provisions.

Section 8.4, **Sentencing Options**, includes detailed information regarding applicable sentencing options, including maximum and mandatory penalties, as well as the sentencing guidelines. The chapter concludes with section 8.5 which contains requirements and suggestions to assist at the time of the sentencing hearing.

### 8.2 POST-CONVICTION MATTERS

#### A. Bail (After Finding of Guilt) – Pa.R.Crim.P. 521

##### 1. Before Sentencing: Pa.R.Crim.P. 521(A)

**There is no right to bail in death penalty and life imprisonment sentences.**

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. Pa.R.Crim.P., Rule 521(A)(1), 42 PA. CONS. STAT. ANN.

If the aggregate of sentences does not exceed 3 years, the same right to bail exists as before the verdict.

In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years.

If the possible sentences do not exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. Pa.R.Crim.P., Rule 521(A)(2)(a), 42 PA. CONS. STAT. ANN.

If the aggregate of sentences exceeds 3 years, the same right to bail exists unless the sentencing judge uses the following criterion to revoke or refuse to set bail:

- That no one or more conditions of bail will reasonably ensure that the defendant will appear and comply with the conditions of the bail bond; or
- That the defendant poses a danger to any other person or to the community or to himself or herself.

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds that: (i) that no condition of bail will reasonably ensure compliance with the bail bond; or (ii) that the defendant poses a threat to the community or himself. Pa.R.Crim.P., Rule 521(A)(2)(b), 42 PA. CONS. STAT. ANN.

### **2. After Sentencing: Pa.R.Crim.P. 521(B)**

If sentence is less than 2 years, the same right to bail exists.

After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as he did prior to the conviction, unless the Judge modifies the bail order pursuant to Pa.R.Crim.P., Rule 521(D), 42 PA. CONS. STAT. ANN. Pa.R.Crim.P., Rule 521(B)(1), 42 PA. CONS. STAT. ANN.

If sentence is more than 2 years, the right to bail is within the judge's discretion.

Excluding capital and life imprisonment cases, if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the trial judge. Pa.R.Crim.P., Rule 521(B)(2), 42 PA. CONS. STAT. ANN.

If set after sentencing, bail must be conditional upon filing of appeal or post-sentence motion.

After the defendant is sentenced and released on bail, the trial judge must impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. Pa.R.Crim.P., Rule 521(B)(3), 42 PA. CONS. STAT. ANN.

In ***Commonwealth v. McMaster***, 730 A.2d 524 (Pa. Super. 1999), ***appeal denied***, 563 Pa. 613, 757 A.2d 930 (2000), the Defendant was convicted of involuntary deviate sexual intercourse and incest. Following a remand for resentencing, the trial court sentenced him to concurrent terms of imprisonment of five to ten years for the IDSI conviction and one to five years for the incest conviction. At the resentencing, the trial court granted him immediate bail pending parole. The Superior Court reversed on two separate grounds: (1) after noting that a trial court may allow bail pending appeal after a finding of guilt, so long as an avenue of direct appeal is open, the Superior Court found that the defendant was no longer eligible for release on bail because the time period for appealing from the reimposition and affirmance of judgment of sentence had expired<sup>1</sup> and (2) the trial court was without authority to parole an individual sentence to a period of incarceration longer than 2 years.<sup>2</sup>

No protected liberty interest in post-sentence bail if sentence is for more than two years.

There is no protected liberty interest which requires bail or specific criteria for the denial of bail in Pennsylvania for defendants who are sentenced to a term of two years or more. *See Owens v. Beard*, 829 F.Supp. 736 (M.D. Pa. 1993). In a decision which refers to former rule 4010, which was substantially similar to current Rule 521(B), the District Court stated that the rules give trial judges discretion in determining whether to grant or continue bail pending appeal. *Id.* at 739-740.

### **3. Reasons for Refusing or Revoking Bail Must be Stated on the Record.**

In accordance with Pa.R.Crim.P. 521(C), whenever bail is refused or revoked under Rule 521, the trial judge must state on the record the reasons for the refusal or revocation.

### **4. Conditions of Bail After Verdict or After Sentencing.**

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge's own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. Pa.R.Crim.P., Rule 521(D)(1), 42 PA. CONS. STAT. ANN. The decision to modify the bail order should be based on the same considerations

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<sup>1</sup> The Superior Court utilized former Rule 4014.

<sup>2</sup> This authority lies in the Pennsylvania Parole Board pursuant to 61 PA. STAT. § 331.21.

relevant when first deciding to grant bail.<sup>3</sup> Pa.R.Crim.P., Rule 521(D)(2), 42 PA. CONS. STAT. ANN. Whenever bail is refused or revoked after conviction, the Judge must state on the record reasons in support of the decision. Pa.R.Crim.P., Rule 521(C), 42 PA. CONS. STAT. ANN.

### B. Pre-Sentence Investigation Report

#### 1. Purpose

Upon conviction of any crime, but typically only in felony cases, the trial court may order a pre-sentence investigation report<sup>4</sup> to be completed by a probation officer.<sup>5</sup> The purpose of a pre-sentence investigation report is to provide the trial judge with additional information about the defendant, the offenses and to discuss sentencing options so that the trial judge is more informed at sentencing.<sup>6</sup>

As stated by the United States Supreme Court in *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959):

once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics.

The pre-sentence report tells about the defendant's earlier criminal history, education, jobs, drug and alcohol use, and mental health. It also recites the facts of the case, and how the crime affected the victim(s). The victim is usually contacted and given an opportunity to have a statement included in or added to the report. The defendant is typically also given an opportunity to speak to the probation officer and provide a statement for the report; the defendant's cooperation during this process is typically reflected in the pre-sentence report.

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<sup>3</sup> The considerations include the likelihood of the defendant fleeing the jurisdiction or whether the defendant is a danger to any other person in the community, or himself or herself. Pa.R.Crim.P., Rule 521, 42 PA. CONS. STAT. ANN.

<sup>4</sup> See Pa.R.Crim.P. 702.

<sup>5</sup> "While the extent of the pre-sentence inquiry may vary depending on the circumstances of the case, '[a] more extensive and careful investigation is clearly called for in felony convictions, particularly where long terms of confinement are contemplated.'" *Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), appeal denied, 563 Pa. 672, 759 A.2d 920 (2000), citing *Commonwealth v. Martin*, 466 Pa. 118, 134 n.26, 351 A.2d 650, 658 n.26 (1976). In such situations, the trial court should either order a pre-sentence report or conduct a full pre-sentence inquiry taking into consideration the essential and adequate elements of a pre-sentence report. *Commonwealth v. Hill*, 761 A.2d 1188 (Pa. Super. 2000).

<sup>6</sup> In accordance with Pa.R.Crim.P. 700, the judge who presided at the trial or who received the plea of guilty or *nolo contendere* must typically impose sentence. There is an exception for situations where extraordinary circumstances preclude the trial judge's participation.

The pre-sentence investigation report is, of course, made available for the use of the sentencing judge, but also must be made available to the prosecutor and defense counsel. Pa.R.Crim.P. 703(A)(2). The sentencing court and the criminal clerk's office must maintain the confidentiality of the pre-sentence report and related mental health reports, which must not appear in the public report.

### 2. Requirement to Place on the Record Reasons for Failure to Order Pre-sentence Report in Certain Cases

In accordance with Pa.R.Crim.P. 702(A)(2), the sentencing judge shall place on the record the reasons for dispensing with the pre-sentence investigation report if the judge fails to order a pre-sentence report in any of the following instances:

1. when incarceration for one year or more is a possible disposition under the applicable sentencing statutes;
2. when the defendant is less than 21 years old at the time of conviction or entry of a guilty plea;
3. when a defendant is a first offender in that he or she has not heretofore been sentenced as an adult.

A trial court's failure to provide a statement of reasons for dispensing with a PSI report, as required by Rule 702(A)(2), mandates re-sentencing, regardless of the putative soundness of its rationale. *See Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000); *Commonwealth v. Warren*, 393 A.2d 821, 822 (Pa. Super. 1978).

### 3. Contents of Pre-Sentence Report

The pre-sentence investigation report must include information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence.<sup>7</sup> Pa.R.Crim.P. 702(A)(3). The Pennsylvania Supreme Court has specified the minimum content of a PSI report. *See Commonwealth v. Martin*, 466 Pa. 118, 351 A.2d 650 (1976). The "essential and adequate elements" of a PSI report include all of the following:

- i. a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
- ii. a full description of any prior criminal record of the offender;
- iii. a description of the educational background of the offender;

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<sup>7</sup> "The information used by a judge in imposing sentence need not necessarily meet the standards of admissible evidence at trial; however, the due process clause does apply to the sentencing procedure." *Commonwealth v. Shoemaker*, 313 A.2d 342 (Pa. Super. 1973), *affirmed*, 462 Pa. 342, 341 A.2d 111 (1975).

- iv. a description of the employment background of the offender, including any military record and his present employment status and capabilities;
- v. the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;
- vi. the offender's medical history and, if desirable, a psychological or psychiatric report;
- vii. information about environments to which the offender might return or to which he could be sent should probation be granted;
- viii. supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;
- ix. information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;
- x. a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.<sup>8</sup>

**Martin**, 466 Pa. at 134, 351 A.2d at 658. In a recent decision of the Superior Court of Pennsylvania, **Commonwealth v. Monahan**, 860 A.2d 180 (Pa. Super. 2004), *appeal denied*, 583 Pa. 688, 878 A.2d 863 (2005), additional guidance was provided to ascertain the basic information that is required under Rule 702:

- i. the highest grade of education completed by defendant;
- ii. the defendant's occupation and employment history;
- iii. the defendant's marital status;
- iv. listing of the defendant's children, if any;
- v. the official version of the offense;
- vi. the defendant's version of the offense;
- vii. a social hereditary history of the defendant, including family background, living situation, etc.
- viii. the defendant's physical and mental health;
- ix. the defendant's drug or alcohol use;
- x. the defendant's military history;

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<sup>8</sup> Conceding that there is no requirement for the probation office to make a sentencing recommendation, the Superior Court in **Commonwealth v. Bastone**, 467 A.2d 1339 (Pa. Super. 1983), stated, however, that if a recommendation is made, it must be disclosed to defendant's counsel.

- xi. the defendant's financial status;
- xii. the role of religion in the defendant's life, if any;
- xiii. the defendant's hobbies and leisure activities;
- xiv. the sources of the above information; and
- xv. an evaluation by the pre-sentence investigator.

*Monahan*, 860 A.2d at 185.

#### 4. Victim Impact Statement

When preparing a pre-sentence report, the probation officer will contact the victim(s) of the crime and ask if the victim would like to give a victim impact statement. This statement goes to the probation officer, the prosecutor, the defense attorney and the judge. The statement lets the victim tell the judge about the different kinds of injuries caused by the crime.

Pa.R.Crim.P. 702(A)(4) provides that the pre-sentence investigation report "shall also include a victim impact statement as provided by law." Under the Pennsylvania Crime Victim's Act, 18 PA.STAT. §§ 11.101 et seq., a victim of a crime is entitled:

To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

18 PA.STAT. § 11.201(5). The victim can ask for restitution for actual expenditures made necessary because of the defendant's criminal conduct, such as counseling costs, and for conditions of supervision that will help to protect the victim and any others affected by the crime.

Besides writing a statement and being interviewed by the probation office, as noted above, the victim has a right to speak at the sentencing hearing. If the crime is a misdemeanor, typically no pre-sentence report will be prepared. However, a victim of a misdemeanor may speak at the sentencing hearing, and may also give a victim impact statement.

#### 5. Psychiatric or Psychological Examination

In addition to or in lieu of a pre-sentence investigation report, the trial court may order mental health evaluations of the defendant to assist in the sentencing process. Pa.R.Crim.P. 702(b) provides:

### **Psychiatric or Psychological Examination**

After a finding of guilt and before the imposition of sentence, after notice to counsel for both parties, the sentencing judge may, as provided by law, order the defendant to undergo a psychiatric or psychological examination. For this purpose the defendant may be remanded to any available clinic, hospital, institution, or state correctional diagnostic and classification center for a period not exceeding 60 days.

Although the mental health reports are confidential and must be sealed and not included in the public record maintained by the Criminal Clerk's office, the psychiatric or psychological evaluation ordered under this rule, for sentencing purposes, may be made available to other professionals or agencies "having a legitimate professional interest in the disposition of the case" by order of the sentencing judge. Pa.R.Crim.P. 703(A) & (D). Additionally, under Rule 703(C), unless otherwise ordered by the sentencing judge, the mental health reports must be made available to:

1. correctional institutions housing the defendant;
2. departments of probation or parole supervising the defendant; and
3. departments of probation or parole preparing a pre-sentence investigation report regarding the defendant.

This includes out-of-state correctional facilities and parole boards.

### **6. Disclosure of Pre-Sentence Report**

Although the Pennsylvania Supreme Court has acknowledged the privilege of confidentiality accorded pre-sentence reports, this privilege is not absolute. In accordance with Pa.R.Crim.P. 703, in order for the report and related mental health evaluations to assist in the sentencing mechanism, prosecutors, defense attorneys, the sentencing judge, and appropriate correctional, probation and parole agencies all have access to a pre-sentence report.

If the defendant wishes to contest matters contained in the pre-sentence report, at least two methods of rebuttal are readily available. First, under Rule 703(B), both the Commonwealth and the defendant have the right to correct any inaccuracy in the report.

(B) If the defendant or the Commonwealth alleges any factual inaccuracy in a report under this rule, the sentencing judge shall, as to each inaccuracy found, order that the report be corrected accordingly.

Second, Pennsylvania grants all defendants the right of allocution - the traditional inquiry by the trial judge as to whether defendant has anything to say before sentence is pronounced.

In *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), the Supreme Court adopted the American Bar Association's Standards for Criminal Justice Sentencing regarding disclosure. The current standard is as follows:

### **Standard 18-5.7 Disclosure of report to parties**

- (a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.
- (b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.
- (c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

## **C. DNA Data and Testing**

### **1. The DNA Act**

The DNA Act, 44 PA.CON.S.TAT.ANN. §§ 2301–2336, mandates that persons convicted of certain classes of sexual offenses must submit a sample of their DNA for inclusion in the DNA database. *See Singleton v. Lavan*, 834 A.2d 672 (Pa. Cmwlth. 2003) (discussing the prior act, 42 PA.CON.S.TAT.ANN. §§ 4701–4741, which was repealed and substantially reenacted as the current DNA Act). Every state has enacted a statute creating a DNA (deoxyribonucleic acid) database as a tool in criminal investigations. *See generally*, Annotation, *VALIDITY, CONSTRUCTION, AND OPERATION OF STATE DNA DATABASE STATUTES*, 76 A.L.R.5th 239 (2000). Although these statutes have frequently been challenged, the challenges usually have been unsuccessful.

The DNA Act applies to a person who is convicted or adjudicated delinquent for a felony sex offense or other specified offense. It states:

1. The DNA sample drawn upon intake to a prison, jail, or juvenile detention facility.
  - a. If already incarcerated, the DNA sample is drawn immediately after sentencing or adjudication, or at any time thereafter.
2. The DNA sample drawn prior to release from any prison, jail, detention facility or institution.
  - a. This chapter applies to incarcerated persons convicted or adjudicated delinquent for a felony sex offense prior to the effective date of this chapter.

- b. Release means release, parole, furlough, work release, prerelease or release to any other manner
  - 3. The DNA sample is drawn as a condition of acceptance into ARD as a result of a criminal charge for a felony sex offense or other specified offense filed on or after the effective date of this section.
- 44 PA.CONS.STAT.ANN. § 2316. A “felony sex offense” includes the following:
- i. **Any sexual offense** listed in Chapter 31 of the Crimes Code, 18 PA.CONS.STAT.ANN. §§ 3101-3129;
  - ii. **Incest**, 18 PA.CONS.STAT.ANN. § 4302;
  - iii. **Prostitution and related offenses**, 18 PA.CONS.STAT.ANN. § 5902(c)(1)(iii)&(iv);
  - iv. **Obscene and other sexual materials and performances** – where a felony, 18 PA.CONS.STAT.ANN. § 5903(a);
  - v. **Sexual Abuse of Children**, 18 PA.CONS.STAT.ANN. § 6312;
  - vi. **Unlawful Contact with Minor** – underlying offense is a felony, 18 PA.CONS.STAT.ANN. § 6318; and
  - vii. **Sexual Exploitation of Children**, 18 PA.CONS.STAT.ANN. § 6320.

## **2. Motion for DNA Testing by Defendant**

In *Commonwealth v. Williams*, 909 A.2d 383 (Pa.Super. 2006), the defendant filed for post conviction DNA testing. The Superior Court, citing *Commonwealth v. Brooks*, 875 A.2d 1141, 1148 (Pa. Super. 2005) and *Commonwealth v. Young*, 873 A.2d 720, 724 (Pa. Super. 2005), *appeal denied*, 586 Pa. 739, 891 A.2d 733 (2005), stated that a motion for DNA testing, while clearly separate and distinct from claims pursuant to other sections of the PCRA, nonetheless constitutes a postconviction petition under the PCRA.<sup>9</sup> The Superior Court further held that because the defendant had presented a defense of consent at the time of his trial on the charge of Rape, he failed to set forth *prima facie* requirements for postconviction DNA testing. Because the identity of perpetrator was not at issue, he failed to satisfy his burden under 42 PA.CONS.STAT.ANN. § 9543.1.

With respect to the *prima facie* requirement for DNA testing, the Superior Court, in *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. 2005), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005), explained that on its face, the *prima facie* requirement set forth in § 9543.1(c)(3) and reinforced in § 9543.1(d)(2) requires an appellant to demonstrate that favorable results of the requested DNA testing “*would establish*” the appellant’s actual innocence of the crime of conviction. Because the petitioner in *Heilman* failed to make such a demonstration, his petition was properly denied. *Heilman*, 867 A.2d at 546-547.

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<sup>9</sup> The Post Conviction Relief Act is codified at 42 PA.CONS.STAT.ANN. §§ 9541-9546.

### D. Venereal Disease Testing

Among the purposes of the Disease Prevention and Control Law, 35 PA.STAT. § 521.8, is to assign primary responsibility for the prevention and control of diseases to local health departments, and to institute a system of mandatory reporting, examination, diagnosis, and treatment of communicable diseases. **Commonwealth v. Moore**, 526 Pa. 152, 159, 584 A.2d 936, 940 (1991). The Law provides:

- (i) Any person taken into custody and charged with any crime involving lewd conduct or a sex offense, or any person to whom the jurisdiction of a juvenile court attaches, may be examined for a venereal disease by a qualified physician appointed by the department or by the local board or department of health or appointed by the court having jurisdiction over the person so charged.
- (ii) Any person convicted of a crime or pending trial, who is confined in or committed to any State or local penal institution, reformatory or any other house of correction or detention, may be examined for venereal disease by a qualified physician appointed by the department or by the local board or department of health or by the attending physician of the institution, if any.
- (iii) Any such person noted in paragraph (1) or (2) of this section found, upon examination, to be infected with any venereal disease shall be given appropriate treatment by duly constituted health authorities or their deputies or by the attending physician of the institution, if any.

### E. Human Immunodeficiency Virus (HIV) Testing

35 PA.STAT. § 521.11a provides for HIV testing of convicted sex assailants:

**Test:** Following a conviction or an adjudication of delinquency of any of the offences listed below, at the request of a victim, the defendant must be tested for Human Immunodeficiency Virus (HIV).

**Deemed Consent:** The individual who has been convicted or adjudicated delinquent shall be deemed to have consented to the performance of the HIV-related test and to the release of the results of the test to the victim.

#### Offenses:

- Rape: 18 PA.CON.S.TAT.ANN. § 3121
- Statutory Sexual Assault: 18 PA.CON.S.TAT.ANN. § 3122.1
- Involuntary Deviate Sexual Intercourse: 18 PA.CON.S.TAT.ANN. § 3123
- Incest, 18 PA.CON.S.TAT.ANN. § 4302
- Corruption of Minors, 18 PA.CON.S.TAT.ANN. § 6301, if there has been sexual intercourse as defined in 18 PA.CON.S.TAT.ANN. § 3101 between the individual who has been convicted or adjudicated delinquent and the victim.

## F. Scheduling of Sentencing

### 1. Time for Sentencing

As a general rule, the date for sentencing, which should ordinarily be within 90 days, should be scheduled at the time of conviction or the entry of a plea of guilty or *nolo contendere*. Therefore, the sentencing hearing should be held within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*. A limited exception is when the trial court orders a psychiatric or psychological examination pursuant to Pa.R.Crim.P. 702(B), but in no event should the time for sentencing be extended for longer than 30 days beyond the original 90 day limit. Pa.R.Crim.P. 704, Comment.

Pursuant to Rule 704(A)(2), the trial judge may also grant an extension beyond the 90 day limit for extraordinary circumstances:

When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension.

As stated, the extension may only be for a specific time period, and the record must reflect the exact time period for the extension. The comment following Rule 704 lists a Megan's Law Assessment, 42 PA.CON.S.TAT.ANN. § 9795.4, as a legitimate reason for an extension.

### 2. Remedy for Late Sentencing

A defendant who is sentenced in violation of Pa.R.Crim.P. 704's requirement that sentencing ordinarily take place within 90 days of conviction or entry of plea is entitled to discharge *only* where defendant can demonstrate that delay in sentencing prejudiced him or her.

***Commonwealth v. Anders***, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999).<sup>10</sup>

A number of factors must be analyzed before the trial court should consider discharge. To determine whether discharge is appropriate, a trial court should inquire into the following factors:

- (1) the length of the delay falling outside of the 90 day provision;
- (2) the reason for the improper delay;
- (3) the defendant's timely or untimely assertion of his rights; and
- (4) any resulting prejudice to the interests protected by the defendant's speedy trial and due process rights.

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<sup>10</sup> The Supreme Court in ***Commonwealth v. Anders***, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999) utilized Pa.R.Crim.P. 1405, the predecessor to Rule 704. With the exception of the fact that former Rule 1405 provided that a defendant was to be sentenced within 60 days of conviction or entry of a guilty or *nolo contendere* plea, rather than within 90 days as provided in the current rule, Rule 704 and its predecessor are substantially similar.

Prejudice should not be presumed by the mere fact of an untimely sentence. The approach of the court should be to determine whether there has in fact been prejudice, rather than to presume that prejudice exists. “The court should examine the totality of the circumstances, as no one factor is necessary, dispositive, or of sufficient importance to prove a violation.”

**Commonwealth v. Anders**, 555 Pa. 467, 473, 725 A.2d 170, 173 (1999). *See also, Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001); **Commonwealth v. Still**, 783 A.2d 829 (Pa. Super. 2001).

**G. Suggested Colloquy Following Guilty Plea or Guilty Verdict**

Mr./Ms. \_\_\_\_\_, you have been found guilty/  
pled guilty to the following crime(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The maximum penalty for each of the offenses is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

In accordance with Pennsylvania Rule of Criminal Procedure 704, sentencing is scheduled for

\_\_\_\_\_.

In preparation for sentencing, I am ordering the adult probation department to conduct a pre-sentence investigation and prepare a pre-sentence investigation report which will be available for you and your attorney, as well as the Commonwealth’s attorney, to review prior to sentencing.

I am also ordering:

- A psychological examination and report;
- A psychiatric examination and report;
- A drug and alcohol assessment;
- An assessment under § 9795.4 of Megan’s Law in l i g h t of your conviction of the crime of \_\_\_\_\_.

Other evaluations or assessments:\_\_\_\_\_.

If you have any extraordinary circumstances, I will hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial prior to your sentencing. The motion, and my decision, must be made before you are sentenced.

Do you have any questions?

- Trial Judge must continue, modify or revoke bail.

### 8.3 SEXUALLY VIOLENT PREDATOR ASSESSMENT

#### A. History and Constitutionality of *Megan's Law II*

Pennsylvania's *Megan's Law II*, 42 PA.CONS.STAT.ANN. §§ 9791 – 9799.7, like the generally similar *Megan's Laws* enacted in all other states, requires defendants convicted of enumerated sex offences to register with state and local police, and subjects certain sex offenders to community notification whereby police alert the communities in which the offenders reside or work to their presence. *Megan's Law II* imposes registration, notification, and counseling requirements on convicted sex offenders found to be sexually violent predators.

Unlike the prior law, *Megan's Law I*, which was declared unconstitutional, *Megan's Law II* places the burden on the Commonwealth of proving by clear and convincing evidence that the defendant is a sexually violent predator.<sup>11</sup> The general validity of Pennsylvania's *Megan's Law II* has been sustained over various constitutional challenges. In *Commonwealth v. Williams (Williams II)*, 574 Pa. 487, 832 A.2d 962 (2003), the Pennsylvania Supreme Court held that *Megan's Law II* was, in most respects, constitutional.<sup>12</sup> *See also:*

- *Commonwealth v. Howe*, 842 A.2d 436 (Pa. Super. 2004): *Megan's Law II* did not violate constitutional prohibition against enacting a bill containing more than one subject.
- *Commonwealth v. Howe*, 842 A.2d 436 (Pa. Super. 2004): *Megan's Law II* does not subject an individual to a harsher sentence because of his mental condition and thus did not, on that basis, violate substantive due process or constitutional prohibition against cruel and unusual punishment.
- *Commonwealth v. Rhoads*, 836 A.2d 159, 163 (Pa. Super. 2003): *Megan's Law II* does not violate separation of powers doctrine by allegedly usurping Supreme Court's power to prescribe rules governing practice, procedure, and conduct by implementing separate criminal proceeding; *Megan's Law II* is a substantive law, not criminal proceeding, and did not promulgate rules of court practice or procedure.
- *Commonwealth v. Rhoads*, 836 A.2d 159, 162 (Pa. Super. 2003): *Megan's Law II* does not violate due process considerations regarding additional punishments for the same crime. The Superior Court relied on *Commonwealth v. Williams (Williams II)*, 574 Pa. 487, 832 A.2d 962 (2003), and held that "all of appellant's constitutional challenges, which hinge on the underlying assumption that the registration, notification and

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<sup>11</sup> In *Commonwealth v. Williams (Williams I)*, 557 Pa. 285, 733 A.2d 593 (1999), the Pennsylvania Supreme Court ruled that *Megan's Law I*, which provided that a person convicted of a sexual assault had to rebut a presumption of "SVP" classification by clear and convincing evidence, was unconstitutional.

<sup>12</sup> In *Williams II*, the Supreme Court also held that the registration requirements that were unconstitutionally punitive were severable.

counseling provisions of the Act constitute criminal punishment and therefore, individually or collectively, violate one's constitutional rights by imposing an additional punishment without providing due constitutional safeguards, to be without merit." The Superior Court held the aforesaid requirements were not punitive in nature.

- ***Commonwealth v. Kopicz***, 840 A.2d 342 (Pa. Super. 2003): Megan's Law II does not violate due process considerations because definition of "sexually violent predator" and "mental abnormality" in ***Megan's Law II*** are not unconstitutionally vague.
- ***Commonwealth v. Wilson***, 589 Pa. 559, 910 A.2d 10 (2006): Finding that "the Act's provisions imposing criminal liability for non-compliance [with the Act's registration and reporting requirements] are constitutional."

Effective January 24, 2005, Megan's Law II was amended and updated. See 2004, Nov. 24, P.L. 1243, No. 152.

- ***Commonwealth v. Hitner***, 910 A.2d 721 (Pa. Super. 2006): Finding that the registration requirements under ***Megan's Law III*** were not unconstitutionally punitive absent a showing that there was a cure for petitioner's particular mental disorder.

### B. Purpose of ***Megan's Law II***

The primary objective of ***Megan's Law II*** is to provide the public with adequate notice and information regarding sexually violent predators and certain other offenders in the community, and to therefore enable those communities to prepare for an offender's release.<sup>13</sup> The purpose of the assessment, then, is to identify *sexually violent predators*.

#### 1. The designation of Sexually Violent Predator

The sexually violent predator ("SVP") designation is reserved for those who have been:

- a) convicted of a sexually violent offense as set forth in 42 PA.CONS.STAT.ANN. § 9795.1 and,
- b) determined to be a sexually violent predator under 42 PA.CONS.STAT.ANN. §9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses even after release.

The SVP designation applies to offenders determined to be sexual violent predators in another state, territory, Federal Court, the District of Columbia, or by court martial.

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<sup>13</sup> ***Commonwealth v. Baird***, 856 A.2d 114, 116 (Pa. Super. 2004): *Megan's Law II* "serves to protect the public by providing them with adequate notice and information about a sexual offender planning to live, work or reside in any given community, thereby providing the community with an opportunity to develop a constructive plan to prepare themselves and their children for the offender's release."

- As stated by the Superior Court in *Commonwealth v. Plucinski*, 868 A.2d 20 (Pa. Super. 2005):

Under Megan’s Law II, a SVP is defined as “a person who has been convicted of a sexually violent offense...and who is determined to be a sexually violent predator under section 9795.4 ... due to a *mental abnormality* or *personality disorder* that makes the person likely to engage in *predatory sexually violent offenses*.” 42 Pa.C.S.A. § 9792. “Mental abnormality” is defined as “[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” *Id.* “Predatory” is defined as “[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.”

*Id.* at 25 – 26 (emphasis added).

“Mental abnormality” is “[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” 42 PA.CON.S.STAT.ANN. § 9792.

“Predatory” is defined as “[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.” 42 PA.CON.S.STAT.ANN. § 9792.

## **C. The Sexually Violent Predator Assessment**

### **1. Order for Assessment**

In accordance with 42 PA.CON.S.STAT.ANN. § 9795.4, within ten days of the date of conviction, but before sentencing, the trial judge must order a defendant convicted of an offense, or attempt thereof, specified under 42 PA.CON.S.STAT.ANN. §9795.1, to be assessed by The State Sexual Offenders Assessment Board (“Board”).<sup>14</sup> The assessment is mandatory for any defendant convicted of a predicate offense.<sup>15</sup> The Board members are appointed by the Governor and are to be comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of treatment of sexual offenders. The offenses specified under §9795.1 include:

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<sup>14</sup> The order for assessment must be sent to the administrative officer of the board within ten days of the date of conviction. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 n.2 (Pa. 2003); 42 PA.CON.S.STAT.ANN. §9795.4(a).

<sup>15</sup> *Commonwealth v. Baird*, 856 A.2d 114, 118 (Pa. Super. 2004).

- i. Rape;<sup>16</sup>
- ii. Involuntary deviate sexual intercourse;<sup>17</sup>
- iii. Sexual assault;<sup>18</sup>
- iv. Aggravated indecent assault;<sup>19</sup>
- v. Kidnapping, where the victim is a minor;<sup>20</sup>
- vi. Luring a child into a motor vehicle;<sup>21</sup>
- vii. Institutional sexual assault;<sup>22</sup>
- viii. Indecent assault;<sup>23</sup>
- ix. Incest;<sup>24</sup>
- x. Prostitution;<sup>25</sup>
- xi. Child pornography;<sup>26</sup>
- xii. Sexual abuse of children;<sup>27</sup>
- xiii. Unlawful contact with a minor;<sup>28</sup>
- xiv. Sexual exploitation of children;<sup>29</sup>

## 2. The SVP Assessment

The salient inquiry in determining SVP status is identification of the impetus behind the commission of the offense; that is, whether it proceeds from a mental defect or personality disorder, or another motivating factor. The answer to that question determines, at least theoretically, the extent to which the offender is likely to reoffend. *Megan's Law II* provides the criteria by which such likelihood may be gauged. ***Commonwealth v. Price***, 876 A.2d 988, 995 (Pa. Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 224, 166 L.Ed.2d 179 (2006).

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<sup>16</sup> 18 PA.CON.S.TAT.ANN. § 3121.

<sup>17</sup> 18 PA.CON.S.TAT.ANN. § 3123.

<sup>18</sup> 18 PA.CON.S.TAT.ANN. § 3124.1.

<sup>19</sup> 18 PA.CON.S.TAT.ANN. § 3125.

<sup>20</sup> 18 PA.CON.S.TAT.ANN. § 2901.

<sup>21</sup> 18 PA.CON.S.TAT.ANN. § 2910.

<sup>22</sup> 18 PA.CON.S.TAT.ANN. § 3124.2.

<sup>23</sup> 18 PA.CON.S.TAT.ANN. § 3126, where the offense is a misdemeanor of the first degree.

<sup>24</sup> 18 PA.CON.S.TAT.ANN. § 4302, where the victim is 12 years of age or older but under 18 years of age, or when the victim is under 12 years of age.

<sup>25</sup> 18 PA.CON.S.TAT.ANN. § 5902(b), where the actor promotes the prostitution of a minor.

<sup>26</sup> 18 PA.CON.S.TAT.ANN. § 5903(a)(3),(4),(5) or (6), relating to obscene and other sexual materials and performances, where the victim is a minor.

<sup>27</sup> 18 PA.CON.S.TAT.ANN. § 6312.

<sup>28</sup> 18 PA.CON.S.TAT.ANN. § 6318.

<sup>29</sup> 18 PA.CON.S.TAT.ANN. § 6320.

A member of the Board, as designated by its administrative officer, conducts the assessment of the defendant to determine if the individual should be classified as a sexually violent predator. The evaluator must ascertain the following factors<sup>30</sup> regarding the current offense:

- i. whether the offense involved multiple victims;
- ii. whether the defendant exceeded the means necessary to achieve the offense;
- iii. the nature of the sexual contact with the victim;
- iv. the relationship of the defendant to the victim;
- v. the age of the victim;
- vi. whether the offense included a display of unusual cruelty by the defendant during the commission of the crime; and,
- vii. the mental capacity of the victim.

The evaluator shall also examine the prior offense history to determine the defendant's prior criminal record, and whether the defendant completed any prior sentences, or whether the defendant participated in available programs for sexual offenders.<sup>31</sup> With regards to the defendant's characteristics, the evaluator should determine the individual's age, any use of illegal drugs, and any mental illness, mental disability, or mental abnormality.<sup>32</sup> The evaluator shall also examine any other factors reasonably related to the risk of re-offense. *Commonwealth v. Plucinski*, 868 A.2d 20, 25-26 (Pa. Super. 2005).

Copies of records or information requested by the Board in connection with the court-ordered assessment shall be provided by any state, county, and local agency, office, or entity in this Commonwealth.

The Board must submit a written report containing its assessment to the district attorney no later than 90 days from the date of the defendant's conviction.

### 3. The SVP Assessment Hearing

After the Board issues its assessment and recommendation, the district attorney may request a hearing before the trial court to determine whether the individual should be adjudicated as a sexually violent predator. In order to schedule the hearing, the district attorney must file a praecipe.<sup>33</sup> On occasion, in situations when the assessment is attached to a pre-sentence

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<sup>30</sup> 42 PA. CONS. STAT. ANN. § 9795.4(b).

<sup>31</sup> 42 PA. CONS. STAT. ANN. § 9795.4(b)(2).

<sup>32</sup> 42 PA. CONS. STAT. ANN. § 9795.4(b)(3).

<sup>33</sup> 42 PA. CONS. STAT. ANN. § 9795.4(e). The district attorney must send the defendant's counsel a copy of the assessment along with the praecipe.

investigation report, the trial court will schedule the hearing after reviewing the assessment.<sup>34</sup>

In any event, the defendant and district attorney must be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses.

In addition, the defendant has the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. If the defendant makes arrangements for another expert assessment, the defendant must provide a copy of the expert assessment to the district attorney prior to the hearing. 42 PA.CON.S.TAT.ANN. § 9795.4(e)(2).

The Commonwealth bears the burden of proving through clear and convincing evidence that the defendant meets the statutory definition of SVP. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003). The clear and convincing standard requires evidence that is “so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.” *Id.*, 838 A.2d at 715 (citation omitted).

#### D. Reporting Requirements

If the trial court concludes that the defendant should be classified as a sexually violent predator, the defendant is subject to lifetime registration, notification, and approved monthly counseling.<sup>35</sup> If there is no finding of SVP, the defendant is deemed an “offender” and is subject to registration only, for a period of either ten years or the remainder of his life, depending upon the predicate offense and/or the number of convictions. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 (2003); 42 PA.CON.S.TAT.ANN. § 9795.1(a) & (b).

Any offender convicted of a predicate offense under § 9795.1(a) & (b), whether or not he is deemed a sexually violent predator, must:

- (i) register his current residence or intended residence with the state police upon release from incarceration, parole from a correctional institution, or commencement of an intermediate punishment or probation;
- (ii) inform the state police within ten days of a change of residence;
- (iii) inform the state police within ten days of change in employment or employment location;
- (iv) inform the state police within ten days of change in status or location of enrollment as a student; and

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<sup>34</sup> 42 PA.CON.S.TAT.ANN. § 9795.4(f): “**Presentence investigation.**—In all cases where the board has performed an assessment pursuant to this section, copies of the report shall be provided to the agency preparing the presentence investigation.”

<sup>35</sup> 42 PA.CON.S.TAT.ANN. §§ 9795.1(b), 9796(a), & 9799.4. As stated, Megan’s Law II mandates that a sexually violent predator attend counseling sessions at least monthly, and that he pay the fees assessed from such sessions if he is able to do so. 42 PA.CON.S.TAT.ANN. § 9799.4.

- (v) register within ten days with a new law enforcement agency after establishing residence in another state.

42 PA.CON.S.TAT.ANN. § 9795.2(a). State police officials then forward this data, together with fingerprint and photographic information obtained from the sentencing court,<sup>36</sup> to the chief of police of the locality where the offender will reside following his change of address or release from prison.<sup>37</sup>

In the case of a sexually violent predator, local law enforcement is also charged with: “notif[ying] the individual’s neighbors, as well as day care operators and school officials within the municipality. . . . The data sent to these recipients includes the offender’s name, address, offense, and photograph (if available), as well as the fact that he has been determined . . . to be a sexually violent predator . . . . The sexually violent predator’s name and address, including any subsequent change of address, is also sent to the victim of the offense . . . .” ***Commonwealth v. Williams (Williams II)***, 574 Pa. 487, 496-497, 832 A.2d 962, 967 (2003).

### E. Requirements at Time of Sentencing

In accordance with 42 PA.CON.S.TAT.ANN. § 9795.3, the sentencing court must inform offenders and sexually violent predators at the time of sentencing of the provisions of *Megan’s Law II* that apply to them. The court must inform the offender or sexually violent predator of:

- (i) their duty to register and provide the information required for each registration, including verification;
- (ii) their duty to inform the Pennsylvania State Police of changes in residence, employment, employment location or school enrollment;
- (iii) their duty to inform the Pennsylvania State Police within ten days of becoming employed or enrolled as a student if the person has not previously provided that information to the Pennsylvania State Police;
- (iv) their duty to register with a new law enforcement agency if the offender or sexually violent predator moves to another state no later than ten days after establishing residence in another state;
- (v) their duty to register with the appropriate authorities in any state in which the offender or sexually violent predator is employed, carries on a vocation or is a student if the state requires such registration.

The sentencing judge must also order the fingerprints and photograph of the offender or sexually violent predator to be provided to the Pennsylvania State Police.

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<sup>36</sup> 42 PA.CON.S.TAT.ANN. § 9795.3(4).

<sup>37</sup> 42 PA.CON.S.TAT.ANN. § 9795.2(c).

Lastly, the sentencing judge must require the offender or sexually violent predator to read and sign a form which verifies that the duty to register under *Megan's Law II* was explained. If the offender or sexually violent predator is incapable of reading, the court must certify that the duty to register was explained and the offender or sexually violent predator indicated an understanding of the duty.

### E. Appellate Review of SVP Status

**Plenary Review:** The Pennsylvania Supreme Court noted that “[q]uestions of evidentiary sufficiency present questions of law; thus, “[the] standard of review is de novo and [the] scope of review is plenary.” *Commonwealth v. Meals*, 590 Pa. 110, \_\_\_, 912 A.2d 213, 218 (2006) (citations omitted).

**Clear and Convincing Standard:** “[I]n reviewing the sufficiency of the evidence regarding the determination of SVP status, [the appellate court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied.” *Commonwealth v. Moody*, 843 A.2d 402, 408 (Pa. Super. 2004) (quoting *Commonwealth v. Krouse*, 799 A.2d 835, 837 (Pa. Super. 2002) (en banc), *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003); *Commonwealth v. Haughwout*, 837 A.2d 480, 484 (Pa. Super. 2003).<sup>38</sup> “The clear and convincing standard requires evidence that is ‘so clear, direct, weighty and convincing as to enable [the trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.’” *Commonwealth v. Maldonado*, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (quoting *Rohm and Haas Co. v. Continental Gas Co.*, 566 Pa. 464, 476, 781 A.2d 1172, 1179 (2001).

The evidence must be viewed in the light most favorable to the Commonwealth. *Commonwealth v. Plucinski*, 868 A.2d 20, 25 (Pa. Super. 2005). The reviewing court may not weigh the evidence or substitute its judgment for that of the trial court. *Id.* See also *Commonwealth v. Meals*, 590 Pa. 110, \_\_\_, 912 A.2d 213, 223 (2006).

## 8.4 SENTENCING OPTIONS

### A. General Standards

Under Pennsylvania’s Sentencing Code, 42 PA.CON.S.TAT.ANN. § 9701 et seq., as a general rule, in determining the sentence to be imposed upon the defendant, the sentencing court must consider and employ one or more of the following alternatives, and may impose them consecutively or concurrently:

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<sup>38</sup> 42 PA.CON.S.TAT.ANN. § 9795.4(e) mandates that the Commonwealth prove, by clear and convincing evidence, that the defendant is a sexually violent predator at the hearing held prior to sentencing.

- 1) An order of probation;
- 2) A determination of guilt without further penalty;
- 3) Partial confinement;
- 4) Total confinement;
- 5) A fine;
- 6) Intermediate punishment.

42 PA.CONS.STAT.ANN. §9721(a). The sentencing court's standards for selecting from the above alternatives should conform to the general principle that the sentence imposed calls for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitation of the defendant. ***Commonwealth v. Robertson***, 874 A.2d 1200, 1212 (Pa. Super. 2005); 42 PA.CONS.STAT.ANN. §9721(b).

The sentencing court must also consider the guidelines adopted by the Pennsylvania Commission on Sentencing, contained in Chapter 303 of the Pennsylvania Code:

The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. Where crimes merge for sentencing purposes, the court shall consider the sentencing guidelines only on the higher graded offense.

204 Pa.Code § 303.1(a). *See also*, 42 PA.CONS.STAT.ANN. §§ 2151 - 2155 (governing creation and adoption of the Sentencing Guidelines); 204 Pa.Code §§ 303.1 – 303.18 (Pennsylvania Sentencing Guidelines).

The Sentencing Guidelines enumerate aggravating and mitigating circumstances; assign scores based on (1) a defendant's criminal record and (2) on the seriousness of the crime; and then specify a range of punishments for each crime.<sup>39</sup> "In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 PA.CONS.STAT.ANN. §9721(b); 204 Pa.Code § 303.1(d).

Trial courts retain broad discretion in sentencing matters.<sup>40</sup> The Sentencing Guidelines are not mandatory, and therefore the trial court may sentence

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<sup>39</sup> "Essentially, the Guidelines set forth a recommended standard range ('standard range') in which any given defendant's sentence should fall, based on the gravity of the defendant's offense and the defendant's prior record. For each standard range that corresponds to a particular offense committed by a particular defendant, the Guidelines also sets forth an 'aggravated range' and a 'mitigated range' to guide the court should it believe that a sentence in the standard range would be inappropriate under the circumstances. See 204 Pa.Code § 303.13." ***Commonwealth v. Mouzon***, 571 Pa. 419, 425 n. 3, 812 A.2d 617, 621 n.3 (2002) (plurality).

<sup>40</sup> "Within the constraints of the Sentencing Code, the trial court has broad discretion to fashion a sentence consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." ***Commonwealth v. Thomas***, 879 A.2d 246, 262 (Pa.Super. 2005).

defendants outside the Guidelines. In cases where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing, the court shall provide a contemporaneous written statement of the reasons for deviating from the guidelines. 42 PA.CON.S.TAT.ANN. § 9721(b); 204 Pa.Code § 303.1(d).

When the sentencing court imposes a sentence that deviates significantly from guideline recommendations, it must demonstrate that the case under consideration is compellingly different from the “typical” case of the same offense or point to other sentencing factors that are germane to the case before the court. *Commonwealth v. Robertson*, 874 A.2d 1200, 1213 (Pa. Super. 2005).

Failure to comply with these general standards is grounds for vacating the sentence and resentencing the defendant.

### **B. Statutory Penalties for Crimes of Sexual Violence**

Pennsylvania’s statutory scheme specifies the grade and degree of each particular crime. Moreover, the General Assembly has provided the statutory maximum legal sentences for each grade and degree of crime:

#### **18 PA.CON.S.TAT.ANN. § 1103.**

##### **Sentence of Imprisonment for Felony**

Except as provided in 42 Pa.C.S. § 9714 (relating to sentences for second and subsequent offenses), a person who has been convicted of a felony may be sentenced to imprisonment as follows:

- (1) In the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years.
- (2) In the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years.
- (3) In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.

#### **18 PA.CON.S.TAT.ANN. § 1104.**

##### **Sentence of Imprisonment for Misdemeanors**

A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:

- (1) Five years in the case of a misdemeanor of the first degree.
- (2) Two years in the case of a misdemeanor of the second degree.
- (3) One year in the case of a misdemeanor of the third degree.

If the trial court imposes a sentence of total confinement, the sentence must set a maximum period of incarceration and a minimum period which must not “exceed one-half of the maximum sentence imposed.” 42 PA.CONS.STAT.ANN. § 9756(b). The following is a list of the statutory maximum penalties permitted for crimes of sexual violence. For ease of use, an abbreviated definition is also included for each crime.

### 1. RAPE: 18 PA.CONS.STAT.ANN. § 3121

#### a) § 3121(a): Rape

- **Grading:** a felony of the first degree.
- **Definition:** includes sexual intercourse with a victim:
  - 1) by forcible compulsion;
  - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
  - 3) who was unconscious or where the defendant knew that the victim was unaware that the sexual intercourse was occurring;
  - 4) where the defendant had substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
  - 5) who suffers from a mental disability which rendered the victim incapable of consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

#### b) § 3121 (b): Rape by substantial impairment of victim

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with the victim and had substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance, is a felony of the first degree.
- **Penalty:** Maximum incarceration sentence and maximum fine: in addition to the penalty provided for by § 3121 (a), an additional period of incarceration which *shall not exceed an additional 10 years confinement and an additional fine which shall not exceed \$100,000.* The aggregate sentence for the offense shall therefore be not more than 30 years and the fine shall not exceed \$125,000.

#### c) §3121 (c): Rape of a child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with a victim who was less than 13 years old.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years* [see 18 PA.CON.S.TAT.ANN. § 3121(e)(1)] *and \$25,000.*

d) **§3121 (d): Rape of a child with serious bodily injury**

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated this section and the victim is under 13 years of age and suffered serious bodily injury in the course of the offense.
- **Penalty:** Maximum incarceration sentence and the maximum fine: up to life imprisonment [see 18 PA.CON.S.TAT.ANN. § 3121(e)(2)] *and not to exceed \$25,000.*

2. **STATUTORY SEXUAL ASSAULT: 18 PA.CON.S.TAT.ANN. § 3122.1**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse with a victim under the age of 16 years and the defendant is four or more years older than the victim, and they were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

3. **INVOLUNTARY DEVIATE SEXUAL INTERCOURSE:  
18 PA.CON.S.TAT.ANN. § 3123**

a) **§ 3123(a): Involuntary Deviate Sexual Intercourse**

- **Grading:** a felony of the first degree.
- **Definition:** includes deviate sexual intercourse with a victim:
  - 1) by forcible compulsion;
  - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
  - 3) who was unconscious or where the person knew that the victim was unaware that the sexual intercourse was occurring;
  - 4) where the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants or other means for the purpose of preventing resistance;
  - 5) who suffers from a mental disability which rendered him or her incapable of consent; or
  - 6) who was less than 16 years of age and the defendant is four or more years older than the victim and the victim and defendant were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

- b) **§ 3123(b): Involuntary Deviate Sexual Intercourse with a Child**
  - **Grading:** a felony of the first degree.
  - **Definition:** where the defendant engaged in deviate sexual intercourse with a victim who was less than 13 years of age.
  - **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years* [see 18 PA.CONS.STAT.ANN. § 3123(d)(1)] *and \$25,000.*
- c) **§ 3123(c): Involuntary Deviate Sexual Intercourse with a Child with Serious Bodily Injury**
  - **Grading:** a felony of the first degree.
  - **Definition:** where the defendant violated this section, the victim was less than 13 years of age, and the victim suffered serious bodily injury in the course of the offense.
  - **Penalty:** Maximum incarceration sentence and the maximum fine: up to life imprisonment [see 18 PA.CONS.STAT.ANN. § 3123(d)(2)] *and not to exceed \$25,000.*

**4. SEXUAL ASSAULT: 18 PA.CONS.STAT.ANN. § 3124.1**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse or deviate sexual intercourse with a victim without the victim's consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

**5. INSTITUTIONAL SEXUAL ASSAULT: 18 PA.CONS.STAT.ANN. § 3124.2**

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant was an employee or agent of the Department of Corrections or a county correctional authority, youth development center, youth forestry camp, State or county juvenile detention facility, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution, and engaged in sexual intercourse, deviate sexual intercourse or indecent contact with a victim who was an inmate, detainee, patient or resident.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

**6. AGGRAVATED INDECENT ASSAULT: 18 PA.CONS.STAT.ANN. § 3125**

- a) **§ 3125(a) Aggravated Indecent Assault**
  - **Grading:** a felony of the second degree.
  - **Definition:** where the defendant engaged in penetration, however slight, of the genitals or anus of a victim with a part of the defendant's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and if the defendant does so:
    - 1) without the victim's consent;

- 2) by forcible compulsion;
- 3) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution
- 4) when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;
- 5) when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
- 6) the victim suffers from a mental disability which rendered him or her incapable of consent;
- 7) the victim was less than 13 years of age; or
- 8) the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

**b) § 3125(b) Aggravated Indecent Assault of a Child**

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated § 3125 (a)(1), (2), (3), (4), (5), or (6) and the victim was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

**7. INDECENT ASSAULT: 18 PA.CON.S.TAT.ANN. §3126**

**a) § 3126 (a)(1)-(6), (8) Indecent Assault**

- **Grading:** A misdemeanor of the second degree.
- **Definition:** where the defendant had indecent contact with a victim or caused the victim to have indecent contact with the defendant, if the offense occurred:
  - i. without the victim's consent;
  - ii. by forcible compulsion;
  - iii. by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
  - iv. when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;
  - v. when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
  - vi. the victim suffers from a mental disability which rendered him or her incapable of consent;

- vii. the victim was less than 13 years of age; or
- viii. the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

b) § 3125 (a)(7) **Indecent Assault of a Child**

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant committed indecent assault and the victim was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

8. **INDECENT EXPOSURE: 18 PA.CONS.STAT.ANN. § 3127**

a) § 3127 **Indecent Exposure**

- **Grading:** a misdemeanor of the second degree.
- **Definition:** where the defendant exposed his or her genitals in any public place or in any place where there were present other persons under circumstances in which he or she knew or should have known that his conduct was likely to offend, affront, or alarm.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

b) § 3127 (b): **Indecent Exposure in the presence of persons less than 16 years of age**

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant knew or should have known that any of the persons present were less than 16 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

9. **SEXUAL INTERCOURSE WITH ANIMAL:**

18 PA.CONS.STAT.ANN. §3129

- **Grading:** a misdemeanor of the second degree.
- **Definition:** where the defendant engaged in any form of sexual intercourse with an animal.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$5,000.*

10. **INCEST: 18 PA.CONS.STAT.ANN. §4302**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant knowingly married, cohabited, or had sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and

relationship of parent and child by adoption.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

**11. CORRUPTION OF MINORS – SEXUAL NATURE:**

**18 PA.CONS.STAT.ANN. §6301(a)(1)**

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant, being of the age of 18 and upwards, by any act corrupted or tended to corrupt the morals of any minor less than 18 years, or who aided, abetted, enticed or encouraged any such minor in the commission of any crime, or who knowingly assisted or encouraged such minor in violating his or her parole or any order of court.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

**12. SEXUAL ABUSE OF CHILDREN: 18 PA.CONS.STAT.ANN. § 6312**

**a) § 6312 (b): Sexual abuse of children (photographing, videotaping, depicting on computer or filming sexual acts)**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant caused or knowingly permitted a child under the age of 18 years to engage in a prohibited sexual act, or in the simulation of such act, if the defendant knew, had reason to know, or intended that such act may be photographed, videotaped, depicted on computer or filmed.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

**b) § 6312 (c)(1): Sexual abuse of children (dissemination of photographs, videotapes, computer depictions and films)**

- **Grading:** a first offense is a felony of the third degree; a second or subsequent offense is a felony of the second degree.
- **Definition:** includes any knowing sale, distribution, delivery, dissemination, transfer, display, or exhibition to others, or possession for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicted a child under the age of 18 years engaging in prohibited sexual act or in the simulation of such act.
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.

- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

**13. SEXUAL EXPLOITATION OF CHILDREN:**

**18 PA.CON.S.TAT.ANN. § 6320**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant procured for another person a child under 18 years of age for the purpose of sexual exploitation.
- **Penalty:** Maximum incarceration sentence and the maximum fine: ***shall not exceed 10 years and \$25,000.***

**C. Inchoate Crimes**

**18 PA.CON.S.TAT.ANN. §905(a) Grading of Criminal Attempt, Solicitation and Conspiracy**

Inchoate crimes of sexual violence, unless otherwise provided, shall be crimes of the *same grade and degree* as the most serious offense which is attempted or solicited or is an object of the conspiracy.

**D. Mandatory Sentences for Crimes of Sexual Violence**

**1. 42 PA.CON.S.TAT.ANN. § 9712**

**Crime of Violence with a Firearm**

**Criteria:**

The person visibly possessed a firearm or a replica of firearm, whether or not the firearm or replica was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of a crime of violence including those specified below.

**Offenses included:**

- 18 PA.CON.S.TAT.ANN. § 3121 (Rape)
- 18 PA.CON.S.TAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.S.TAT.ANN. § 4302 (Incest)

**Mandatory Sentence:**

Minimum sentence of *at least five years total confinement.*

**Notice and Hearing Requirements:**

- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

**2. 42 PA.CON.S.TAT.ANN. § 9713**

**Crime of Violence In/Near Public Transportation**

**Criteria:**

The person commits a crime of sexual violence specified below if the crime occurs in or near public transportation.

**Offenses Included:**

- 18 PA.CON.S.TAT.ANN. § 3121 (Rape)
- 18 PA.CON.S.TAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.S.TAT.ANN. § 4302 (Incest)
- 18 PA.CON.S.TAT.ANN. § 3124.1 (Sexual Assault)

**Mandatory Sentence:**

Minimum sentence of *at least five years total confinement*.

**Notice and Hearing Requirements:**

- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

**3. 42 Pa.Cons.Stat.Ann. § 9714**

**Crime of Violence – Second or Subsequent Conviction**

**Criteria:**

Conviction for a second or subsequent crime of violence, including as specified below, if at the time of the commission of the current offense the person had previously been convicted of a crime of sexual violence as specified below.

**Offenses included:**

- 18 PA.CON.STAT.ANN. § 3121 (Rape)
- 18 PA.CON.STAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.STAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.STAT.ANN. § 4302 (Incest)
- 18 PA.CON.STAT.ANN. § 3124.1 (Sexual Assault)

**Mandatory Minimum Sentence:**

- (i) “Second Strike Provision” - for a single prior conviction, a minimum sentence of *at least ten years total confinement*;
- (ii) “Three Strikes Law” - for multiple prior convictions, a minimum sentence of *at least 25 years total confinement*. However, the sentencing court may, if it determines that 25 years of total confinement is insufficient to protect the public safety, sentence the offender to *life imprisonment* without parole.

**Mandatory Maximum Sentence:**

a defendant sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.Cons.Stat.Ann. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

**Notice and Hearing Requirements:**

- Upon a second conviction for a crime of violence, the court shall give the defendant oral and written notice of the penalties under this section for a third conviction for a crime of violence;
- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must have a complete record of the previous convictions of the defendant, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court must schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section.

- Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the defendant has the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

**4. 42 PA.CON.S.TAT.ANN. § 9717**

**Victim Over 60 Years Old**

**Criteria:**

Conviction for Rape (18 Pa.Cons.Stat.Ann. § 3121) or Involuntary Deviate Sexual Intercourse (18 Pa.Cons.Stat.Ann. § 3123) where the defendant is under 60 years of age, and the victim is over the age of 60 and not a police officer.

**Mandatory Sentence:**

Mandatory term of imprisonment of *at least five years*.

**5. 42 PA.CON.S.TAT.ANN. § 9718 (a)(1)**

**Victim Under 16 Years Old**

**Criteria:**

Conviction for the following offenses when the victim is under 16 years of age:

- Rape (18 PA.CON.S.TAT.ANN. § 3121(a) (1),(2),(3),(4)&(5));  
or
- Involuntary Deviate Sexual Intercourse (18 PA.CON.S.TAT.ANN. § 3123) when the victim is under 16 years of age.

**Mandatory Sentence:**

Mandatory term of imprisonment of *at least five years*.

**6. 42 PA.CON.S.TAT.ANN § 9718 (a)(2)**

**Victim Under 13 Years Old**

**Criteria:**

Conviction for Aggravated Indecent Assault (18 PA.CON.S.TAT.ANN. § 3125(a)(1) through (6)) when the victim is under 13 years of age.

**Mandatory Sentence:**

Mandatory term of imprisonment of *at least 2 ½ years*.

**7. 42 PA.CON.S.TAT.ANN § 9719**

**Crime of Violence Committed While Impersonating a Police Officer**

**Criteria:**

Conviction for the following offenses, or an attempt thereof, and the defendant impersonated a police officer while committing the offense:

- Rape (18 PA.CON.S.TAT.ANN. § 3121); or
- Involuntary Deviate Sexual Intercourse (18 Pa.Cons.Stat.Ann. § 3123).

**Mandatory Sentence:**

Mandatory term of imprisonment of *at least 2 ½ years*.

**Notice and Hearing Requirements:**

- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

**E. Sentencing Guidelines**

**1. Analysis of the Guidelines**

The sentencing guidelines are written with the typical case in mind, so that a sentence suggested within the standard range will generally serve as an appropriate penalty for the offense. The guidelines were promulgated primarily to provide standardization in sentencing throughout the state. The discretion the sentencing court once enjoyed was changed dramatically by implementation of the guidelines in the late 1970’s. As the Pennsylvania Supreme Court summarized in *Commonwealth v. Mouzon*, 571 Pa. 419, 424 n.2, 812 A.2d 617, 620 n.2 (2002) (plurality):

In 1978, the General Assembly empowered the Pennsylvania Commission on Sentencing to formulate Sentencing Guidelines, which the General Assembly subsequently adopted. This Court has recognized that the Sentencing Guidelines were promulgated in order to structure the trial court’s exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the Guidelines were enacted “to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict the unfettered discretion we give to sentencing judges.”

The sentencing court must consider the guidelines in determining the appropriate sentence for a defendant convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. 204 PA. CODE § 303.1. The procedure for determining the guideline sentence from the matrix requires the determination of the Offense Gravity Score and the defendant’s Prior Record Score. In every case in which a sentence is imposed for a felony or misdemeanor, the sentencing court must state on the record, and disclose in

open court at the time of sentencing and on the Guideline Sentence Form, the reason(s) for the sentence imposed.

If the sentencing judge determines that the standard range sentence will not provide a just result due to the existence of certain aggravating or mitigating circumstances, the sentencing court may impose, within the guidelines, an aggravated range or mitigated range sentence that either increases or decreases the standard range penalty by a specified number of months, which varies based on the Offense Gravity Score. Pursuant to 204 PA. CODE § 303.13(c), when the sentencing court imposes an aggravated or mitigated sentence, the reasons for departing from the standard range sentence shall be stated both on the record and on the Guideline Sentence Form.

When sentencing outside of the guideline ranges, the sentencing court must ensure that the record reflects “with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them.” *Commonwealth v. Rodda*, 723 A.2d 212, 216 (Pa. Super. 1999).

Although the Sentencing Commission, rather than the General Assembly itself, directly adopts the Sentencing Guidelines and therefore the Guidelines are not statutes *per se*, the Guidelines nevertheless retain a legislative character, as the General Assembly may reject them in their entirety prior to their taking effect, subject, of course, to gubernatorial review.<sup>41</sup> Moreover, the General Assembly itself has designated the Commission as a legislative agency. 42 PA.CON.S.TAT.ANN. § 2151.2 (“The commission shall be established as an agency of the General Assembly ....”). Therefore, the appellate courts apply the standard rules of statutory construction to the guidelines. *See Commonwealth v. Hackenberger*, 575 Pa. 197, 201 n.9, 836 A.2d 2, 4 n.9 (2003).

### E. Sentencing Alternatives to Traditional Incarceration

#### 1. Intermediate Punishment

Pennsylvania first enacted provisions establishing intermediate punishment as a sentencing alternative in 1990. The current act, the Pennsylvania County Intermediate Punishment Act, 42 PA.CON.S.TAT.ANN. §§ 9801-9812, provides that County intermediate punishment program options include the following:

- (1) Restrictive intermediate punishments providing for the strict supervision of the offender including programs that:
  - (i) House the offender full or part time;

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<sup>41</sup> “Subject to gubernatorial review pursuant to section 9 of Article III of the Constitution of Pennsylvania, the General Assembly may by concurrent resolution reject in their entirety any guidelines adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin ....” 42 PA.CON.S.TAT.ANN. § 2155(b).

- (ii) Significantly restrict the offender’s movement and monitor the offender’s compliance with the program; or
  - (iii) Involve a combination of programs that meet the standards set forth under subparagraphs (i) and (
- (2) When utilized in combination with restrictive intermediate punishments, restorative sanctions providing for nonconfinement sentencing options that:
- (i) Are the least restrictive in terms of the constraint of the offender’s liberties.
  - (ii) Do not involve the housing of the offender, either full or part time.
  - (iii) Focus on restoring the victim to pre-offense status.

42 PA.CON.S.TAT.ANN. § 9804. The Legislature’s intent was: “to give judges another sentencing option which would lie between probation and incarceration with respect to sentencing severity; to provide a more appropriate form of punishment/treatment for certain types of non-violent offenders; to make the offender more accountable to the community; and to help reduce the county jail overcrowding problem while maintaining public safety.” *Commonwealth v. Phillipp*, 709 A.2d 920, 921 (Pa. Super. 1998) (quoting Sentencing in Pennsylvania 1990: 1990–1991 Annual Report of The Pennsylvania Commission on Sentencing 8). *See also*, *Commonwealth v. Williams*, 868 A.2d 529 (Pa. Super. 2005), *appeal denied*, 586 Pa. 726, 890 A.2d 1059 (2005).

The CIPA specifically excludes individuals who are charged or have prior records of certain crimes of sexual violence. The current law for determining an offender’s eligibility for an intermediate punishment sentence is set forth in 42 PA.CON.S.TAT.ANN. § 9802; an “eligible offender” is defined as follows:

Subject to section 9721(a.1) (relating to sentencing generally) [concerning sentences with a mandatory minimum], a person convicted of an offense who would otherwise be sentenced to a county correctional facility, **who does not demonstrate a present or past pattern of violent behavior** and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). **The term does not include an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses:**

...

18 PA.CON.S.TAT.ANN. § 3121 (relating to rape).

18 PA.CON.S.TAT.ANN. § 3122.1 (relating to statutory sexual assault).

18 PA.CON.S.TAT.ANN. § 3123 (relating to involuntary deviate sexual intercourse).

18 PA.CON.S.TAT.ANN. § 3124.1 (relating to sexual assault).

18 PA.CON.S.TAT.ANN. § 3125 (relating to aggravated indecent assault).

18 PA.CON.S.TAT.ANN. § 3126 (relating to indecent assault).

...

18 PA.CON.S.TAT.ANN. § 4302 (relating to incest).

### 2. Order of Probation

Probation may be an appropriate sentence based upon the grounds specified in **42 PA.CON.S.TAT.ANN. § 9722**:

The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of an order of probation:

- (1) The criminal conduct of the defendant neither caused nor threatened serious harm.
- (2) The defendant did not contemplate that his conduct would cause or threaten serious harm.
- (3) The defendant acted under a strong provocation.
- (4) There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.
- (5) The victim of the criminal conduct of the defendant induced or facilitated its commission.
- (6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.
- (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
- (8) The criminal conduct of the defendant was the result of circumstances unlikely to recur.
- (9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
- (10) The defendant is particularly likely to respond affirmatively to probationary treatment.
- (11) The confinement of the defendant would entail excessive hardship to him or his dependents.
- (12) Such other grounds as indicate the desirability of probation.

When necessary, the terms of a probationary sentence can be tailored to address issues in a cases involving sexual abuse. A probationer may be required to:

remain at home during the hours designated by the court; remain within the court's jurisdiction or in a psychiatric institution indefinitely; undergo medical treatment; perform community service; make restitution or reparations; refrain from frequenting certain locations and/or associating with particular individuals; permit the probation officer to visit his home frequently; devote himself to a specific occupation; and/or satisfy a variety of other conditions that the court deems necessary.

***Commonwealth v. Williams***, 574 Pa. 487, 509 n. 15, 832 A.2d 962, 975 n. 15 (2003). The conditions of probations listed in the statute, **42 PA.CON.S.TAT.ANN. § 9754** include:

**(c) Specific Conditions.**—The court may as a condition of its order require the defendant:

- (1) To meet his family responsibilities.
- (2) To devote himself to a specific occupation or employment.
  - (2.1) To participate in a public or nonprofit community service program unless the defendant was convicted of murder, rape, aggravated assault, arson, theft by extortion, terroristic threats, robbery or kidnapping.
- (3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose.
- (4) To pursue a prescribed secular course of study or vocational training.
- (5) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation.
- (6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.
- (7) To have in his possession no firearm or other dangerous weapon unless granted written permission.
- (8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.
- (9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment.
- (10) To report as directed to the court or the probation officer and to permit the probation officer to visit his home.
- (11) To pay such fine as has been imposed.
- (12) To participate in drug or alcohol treatment programs.
- (13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

(14) To remain within the premises of his residence during the hours designated by the court.

## 8.5 THE SENTENCING HEARING

### A. The Defendant's Right to Counsel

Proceedings relating to the imposition of a criminal sentence constitute a critical stage in the criminal proceedings, therefore, absent waiver, the defendant must be represented by counsel. **Commonwealth v. D'Amato, 579 Pa. 490, 516-517, 856 A.2d 806, 821-522 (2004).**

- Pursuant to the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, a person accused of a crime and the subject of a criminal prosecution has a constitutional right to counsel at every stage of a criminal proceeding where substantive rights of the accused may be affected. **Commonwealth v. Johnson, 574 Pa. 5, 13, 828 A.2d 1009, 1014 (2003).** Pa.R.Crim.P. 704(c)(1) adopts the right to counsel at sentencing and provides that the sentencing judge must afford counsel for both parties the opportunity to present information and argument relative to sentencing.

#### 1. Pre-Sentence Investigation Report

In **Commonwealth v. Phelps, 450 Pa. 597, 301 A.2d 678 (1973)**, the Pennsylvania Supreme Court held that when the trial court orders a presentence investigation report, defense counsel has a right to examine its contents before sentencing and, if he contests any portion, to offer evidence in rebuttal. *See also, Commonwealth v. Martin, 466 Pa. 118, 351 A.2d 650 (1976).*

In **Philps**, the Supreme Court also adopted the American Bar Association's Standards for Criminal Justice Sentencing regarding disclosure. The current standard is as follows:

#### **Standard 18-5.7 Disclosure of report to parties**

- (a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.
- (b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford *a reasonable opportunity for challenge and verification of material information in the report.*
- (c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

## B. The Defendant's Right to Allocution

The right to “allocution” is the opportunity for the defendant to make a “statement ... to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.” *Black's Law Dictionary* 75 (7th ed. 1999).

In Pennsylvania, it is well established that a defendant is entitled to the right of allocution. *Commonwealth v. Green*, 862 A.2d 613, 620 (Pa.Super. 2004)(en banc), *appeal denied*, 584 Pa. 692, 882 A.2d 477 (2005). The sentencing court must advise the defendant of his right to speak *prior* to being sentenced. *Commonwealth v. Thomas*, 520 Pa. 206, 209, 553 A.2d 918, 919 (1989). *See also, Commonwealth v. Hague*, 840 A.2d 1018, 1020 (Pa. Super. 2003), *appeal denied*, 583 Pa. 687, 878 A.2d 863 (2005) (“the significance of allocution lies in its potential to sway the court toward leniency prior to imposition of sentence. Permitting the defendant to speak after sentence has been imposed fails to meet the essence of the right of allocution.”).

The right to allocution is included in the Pennsylvania Rules of Criminal Procedure:

**Pa.R.Crim.P. 704**

...

**(C) Sentencing Proceeding.**

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

Consistent with established case law, the appellate courts have adhered to the principle that a defendant who is not permitted to address the trial judge prior to sentencing is automatically entitled to a new sentencing hearing. *See, e.g., Commonwealth v. Newton*, 875 A.2d 1088, 1090 (Pa.Super. 2005), *appeal denied*, 586 Pa. 724, 890 A.2d 1058 (2005). Furthermore, an alleged denial of the right of allocution relates to the legality of the sentence, and is therefore not waived on collateral review if not raised on direct appeal. *Id.*

## C. Victim's and Prosecutor's Right to Speak at Sentencing

In accordance with Section 201 of the Crime Victim's Act,<sup>42</sup> the victim of a crime has the right to be present at sentencing and make comment before the pronouncement of sentence:

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<sup>42</sup> The Crime Victims Act, Act of November 24, 1998, P.L. 882, *as amended*, 18 Pa.Stat. §§ 11.101 - 5102.

§ 11.201

Victims of crime have the following rights:

...

(5) To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

18 PA.STAT. § 11.201.

Additionally, Pa.R.Crim.P. 704(c)(1) provides that the sentencing judge must afford counsel for *both* parties the opportunity to present information and argument relative to sentencing. Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded “the entire panoply of criminal trial procedural rights.” ***Commonwealth v. Medley***, 725 A.2d 1225, 1229 (Pa.Super. 1999), *appeal denied*, 561 Pa. 672, 749 A.2d 468 (2000), *quoting Commonwealth v. Wright*, 508 Pa. 25, 36, 494 A.2d 354, 360 (1985), *affirmed*, 477 U.S. 79 (1986).

- ***Commonwealth v. Gaddis***, 639 A.2d 462, 470 (Pa.Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994): In case involving charges of sexual, physical and emotion abuse of children, the testimony from the trial, arguments of counsel, and the pre-sentence report, which include the defendant's prior record, constituted the relevant and material information required to impose a reasonable sentence.

## Pennsylvania's Maximum Sentencing Provisions

GRADE	LONGEST ALLOWABLE MAXIMUM SENTENCE (1)	LONGEST ALLOWABLE MINIMUM SENTENCE (2)	MAXIMUM ALLOWABLE FINE (3)
<b>Felony 1</b>	<b>20 Years</b>	<b>10 Years</b>	<b>\$25,000</b>
<b>Felony 2</b>	<b>10 Years</b>	<b>5 Years</b>	<b>\$25,000</b>
<b>Felony 3</b>	<b>7 Years</b>	<b>3.5 Years</b>	<b>\$15,000</b>
<b>Misdemeanor 1</b>	<b>5 Years</b>	<b>2.5 Years</b>	<b>\$10,000</b>
<b>Misdemeanor 2</b>	<b>2 Years</b>	<b>1 Year</b>	<b>\$5,000</b>
<b>Misdemeanor 3</b>	<b>1 Year</b>	<b>6 Months</b>	<b>\$2,500</b>
<b>Summary</b>	<b>90 Days</b>	<b>45 Days</b>	<b>\$300</b>

(1) 18 Pa.C.S. §1101-§1105

(2) The minimum may not exceed one-half the maximum sentence that is imposed: 42 Pa.C.S. §9755(b) and §9756(b). The guideline ranges are limited by the longest legal minimum sentence for a crime, even where the sentence recommendations exceed the longest legal minimum sentence. [See §303.9(g)].

(3) Or any higher amount equal to double the pecuniary gain derived from the offense by the offender or any higher or lower amount specifically authorized by statute.

## Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3121 (a)	<b>Rape</b>	F 1	<b>12</b>	<i>4</i>
3121 (a) INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Rape</b>	18 Pa. C.S. § 905	<b>11</b>	<i>3</i>
3121 (b)	<b>Rape (uses substance to impair victim)</b>	F 1	<b>13</b>	<i>4</i>
3121 (b) INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Rape (uses substance to impair victim)</b>	18 Pa. C.S. § 905	<b>12</b>	<i>3</i>
3121 (c)	<b>Rape (child &lt; 13 years)</b>	F 1	<b>14</b>	<i>4</i>
3121 (c) INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Rape (child &lt; 13 years)</b>	18 Pa. C.S. § 905	<b>13</b>	<i>3</i>
3121 (d)	<b>Rape (child &lt; 13 years, serious bodily injury)</b>	F 1	<b>14</b>	<i>4</i>
3121 (d) INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Rape (child &lt; 13 years, serious bodily injury)</b>	18 Pa. C.S. § 905	<b>13</b>	<i>3</i>
3122.1	<b>Statutory Sexual Assault</b>	F 2	<b>7</b>	<i>2</i>
3123 (a)	<b>Involuntary Deviate Sexual Intercourse</b>	F 1	<b>12</b>	<i>4</i>
3123 (a) INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Involuntary Deviate Sexual Intercourse</b>	18 Pa. C.S. § 905	<b>11</b>	<i>3</i>

## Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3123 (b)	<b>Involuntary Deviate Sexual Intercourse (child &lt; 13 years)</b>	F 1	<b>14</b>	<i>4</i>
3124.1	<b>Sexual Assault</b>	F 2	<b>11</b>	<i>4</i>
3124.1 INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Sexual Assault</b>	18 Pa. C.S. § 905	<b>11</b>	<i>3</i>
3124.2	<b>Institutional Sexual Assault</b>	F 3	<b>5</b>	<i>1</i>
3125 (a)	<b>Aggravated Indecent Assault</b>	F 2	<b>10</b>	<i>4</i>
3125 (b)	<b>Aggravated Indecent Assault (child)</b>	F 1	<b>12</b>	<i>4</i>
3125 INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Aggravated Indecent Assault</b>	18 Pa. C.S. § 905	<b>10</b>	<i>3</i>
3126 (a) (1) (6), (8)	<b>Indecent Assault</b>	M 2	<b>4</b>	<i>m</i>
3126 (a) (7)	<b>Indecent Assault (child &lt; 13 years)</b>	M 1	<b>5</b>	<i>1</i>
3127	<b>Indecent Exposure (person present is 16 years of age or older)</b>	M 2	<b>3</b>	<i>m</i>
3127	<b>Indecent Exposure (person present is less than 16 years of age)</b>	M 1	<b>4</b>	<i>1</i>

## Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3129	<b>Sexual Intercourse with Animal</b>	M <sub>2</sub>	<b>2</b>	<i>m</i>
4302	<b>Incest</b>	F <sub>2</sub>	<b>9</b>	<i>4</i>
4302 INCHOATE	<b>Attempt/Solicitation/ Conspiracy to Incest</b>	18 Pa. C.S. § 905	<b>9</b>	<i>3</i>
6312 (b)	<b>Sexual Abuse of Children (photographing, etc.)</b>	F <sub>2</sub>	<b>7</b>	<i>2</i>
6312 (c)	<b>Sexual Abuse of Children (dissemination, etc.; second/ subsequent offense)</b>	F <sub>2</sub>	<b>8</b>	<i>2</i>
6312 (d)	<b>Possession of Child Pornography (first offense)</b>	F <sub>2</sub>	<b>5</b>	<i>1</i>
6312 (d)	<b>Possession of Child Pornography (second/ subsequent offense)</b>	F <sub>2</sub>	<b>8</b>	<i>2</i>
6320	<b>Sexual Exploitation of Children</b>	F <sub>2</sub>	<b>9</b>	<i>2</i>

Guideline Matrix for Crimes of Sexual Violence

LEVEL	OGS	EXAMPLE OFFENSES	0	1
LEVEL 5 State Incar.	14	Rape (child < 13 years old)	72-SL	84-SL
	13	Attempt, Solicitation, or Conspiracy to Rape (child < 13 years old)	60-78	66-84
	12	Rape; Involuntary Deviate Sexual Intercourse	48-66	54-72
	11	Sexual Assault	36-54 BC	42-60
	10	Aggravated Indecent Assault	22-36 BC	30-42 BC
	9	Sexual Exploitation Children; Incest	12-24 BC	18-30 BC
LEVEL 4 State Incar./RIP Trade	8 [F1]	Sexual Abuse of Children (2nd Offense); Possession of Child Pornography (2nd Offense)	9-16 BC	12-18 BC
LEVEL 3 State/ County Incar. RIP Trade	7 [F2]	Statutory Sexual Assault; Sexual Abuse of Children (photographing, etc.)	6-14 BC	9-16 BC
	6	Sexual Abuse of Children (dissemination, etc.; 1st offense)	3-12 BC	6-14 BC
LEVEL 2 County Incar. RIP RS	5 [F3]	Indecent Assault (child < 13 years)	RS -9	1-12 BC
	4	Indecent Assault	RS -3	RS -9
	3 [M1]	Indecent Exposure	RS -1	RS -6
LEVEL 1 RS	2 [M2]	Sexual Intercourse with Animal	RS	RS -2
	1 [M3]	Most Misd. 3's	RS	RS -1
<p><b>KEY:</b> BC = Boot Camp Eligible  REVOC = Repeat Violent Offender Category  RIP = Restrictive Immediate Punishments</p>				

2	3	4	5	RFEL	REVOC	AGG/ MIT
96-SL	120-SL	168-SL	192-SL	204-SL	SL	+/-12
72-90	78-96	84-102	96-114	108-126	240	+/-12
60-78	66-84	72-90	84-102	96-114	120	+/-12
48-66	54-72	60-78	72-90	84-102	120	+/-12
36-48 BC	42-54	48-60	60-72	72-84	120	+/-12
24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/-12
15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	N/A	+/-9
12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	N/A	+/-6
9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	N/A	+/-6
3-14 BC	6-16 BC	9-16 BC	12-18 BC	24-36 BC	N/A	+/-3
RS <12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	N/A	+/-3
RS-9	RS <12	3-14 BC	6-16 BC	12-18 BC	N/A	+/-3
RS-3	RS-4	RS-6	1-9	6-<12	N/A	+/-3
RS-2	RS-3	RS-4	RS-6	3-6	N/A	+/-3
<p><b>KEY:</b></p> <p>RS = Restorative Sanctions</p> <p>RFEL = Repeat Felony 1 and Felony 2 Offender Category</p> <p>RIP TRADE = Shaded Areas Indicate RIP May Be Imposed as a Substitute for Incarceration</p>						

