Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
September 21, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reggie Routson, Vice Chairman
Shawn Davis, representing Public Safety Superintendent
Colonel Paul McClellan
Municipal Court Judge Fritz Hany
OS.B.A Representative Max Kravitz
Kim Kehl, representing Director of Youth Services Tom Stickrath
Bob Lane, representing State Public Defender David Bodiker
Steve VanDine, representing Rehabilitation and Correction
Director Terry Collins
Prosecuting Attorney David Warren
Sheriff Dave Westrick
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT
Lynn Grimshaw, OCCO
Candy Peters, representing OCJS Director Karhlton Moore
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Malika Bartlett, Senate Democratic Caucus
Jarrod Bottomley, legislative aide to Sen. Timothy Grendell
Dan Fitzpatrick, Dept. of Public Safety
Lusanne Green, Ohio Community Corrections Association
James Guy, Attorney, Department of Rehabilitation and Correction
Kelly Gwin, intern for Prof. Kravitz
Deborah Hoffman, Fiscal, Legislative Service Commission
Christina Madriguera, Ohio Judicial Conference
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Becki Park, Senate Republican Caucus
Candace Peters, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office
James Siegel, Columbus Dispatch

Common Pleas Court Judge Reggie Routson, Vice Chairman, called the September 21, 2006, meeting of the Ohio Criminal Sentencing Commission to order at 9:25 a.m.

SENTENCING FOR RAPE OFFENSES

Due to several vacancies on the Commission, Director David Diroll noted that it may be difficult to achieve a quorum for the day's meeting. Hopefully, those in attendance will be able to come to a consensus on the issues relating to the Commission's rape proposals. Although the proposal does not address the lower level offenses or SORN law, the results will affect the direction of the Commission's work on those topics.

DRC Research Director Steve VanDine reported that he set up a database to test the impact of the proposal. In appreciation, Dir. Diroll said that will provide more than speculation on how the Commission's proposal might affect the prison population.

In response to the refined proposal resulting from the previous Commission meeting, he reported that the Ohio Prosecuting Attorneys' Association has some significant refinements.

The Commission's current proposal was previously distributed by e-mail. While the worst offender categories aim toward sentences of 25 years to life, all child rapes offer a minimum period of incarceration up to life, said Dir. Diroll. A hybrid determinate/indeterminate scheme would be used for other rapes. The flat time aspects would include an additional supervision period upon release from prison. He noted that the proposal includes a switching mechanism, based on the offender's potential for committing future offenses, which would allow a sentence beyond the maximum flat time of 10 years on the first offense.

Ohio Prosecuting Attorneys' Association Proposal. Prosecutor Don White reported that the Prosecuting Attorneys' Association met last month and discussed the Sentencing Commission's proposal. In response, they have offered a separate proposal.

For rapes not involving victims under age 13, current law authorizes definite sentences of 3 or 5 to 10 years for these offenses, with 10 years to life for any additional specifications. The OPAA proposal recommends indeterminate sentences of 5, 6, 7, 8, or 9 to 25 years, with a preferred minimum of 7 years and with 10 to life for additional specifications.

While the Commission's proposal had a standard F-1 range for the base offense, Dir. Diroll noted that the OPAA proposal would move the standard range up to 7 $\pm$ 2 to 25 years without requiring the judge to make an additional finding.

Current law imposes a definite sentence of 3 to 10 years for rape of a child and 10 to life if a sexually violent predator (SVP) spec is included. S.B. 260, if enacted, would impose 25 to life for this offense, with 25 years to life with the SVP spec. The OPAA proposal recommends 10 to 25 years and 10 years to life with an SVP spec. For child rape involving the use of force or rape of a child less than age 10, the current law imposes a life sentence (10 to life with parole

eligibility after 10 years). S.B. 260 would impose 25 years to life and life without parole for the SVP spec. The OPAA proposal recommends 15 to life for this offense, with or without a spec. Rape of a child that includes serious physical harm or if the offender has committed a prior offense currently warrants a penalty of life or life without parole, while S.B. 260 recommends life without parole regardless of whether a spec is applied. The OPAA proposal recommends 15 years to life or life without parole with a spec. Pros. White pointed out that a life sentence means the offender would serve a minimum of 10 years incarceration, with parole eligibility after 10 years.

To qualify as a prior offense, Staff Attorney Scott Anderson asked if the proposed spec had to involve a child victim. According to Ohio Prosecuting Attorneys' Association Executive Director John Murphy, it would have to involve a child under the age of 13.

Determinate Versus Indeterminate Sentences. Noting that the Commission developed a sentencing plan ten years ago that focused on determinate sentences, O.S.B.A Representative Max Kravitz expressed serious concern about the proposal to now reject those policies in favor of indeterminate sentences.

Atty. Murphy responded that, under determinate sentencing these offenders are released once their sentence is complete, even though assessments through the sex offender treatment programs in prison might reveal a lack of cooperation or high likelihood that they will commit additional sex offenses. The concern is about appropriately punishing the worst offenders and ensuring public safety.

Prof. Kravitz argued that reverting to indeterminate sentences and allowing the Parole Board to decide release dates amounts to a judge subordinating a decision to faceless administrators.

Echoing those concerns, Bob Lane, representing the State Public Defender's Office, remarked that S.B. 2 was intended to halt the lengthy sentence extensions that the Parole Board had been imposing for years. He fears that returning to indeterminate sentencing, even for the "worst of the worst", could have serious repercussions for less serious offenders.

Judicial Release Versus Parole Release. Once the offender served the minimum term, Atty. Murphy argued, the judge could have something akin to judicial release that the offender could apply for after serving the minimum term of incarceration. He claimed that if the judge feels the Parole Board has been unfair to the offender, he can overrule them.

It is imperative to decide who will supervise the offender after release, said Judge Routson. Because he prefers having the local probation department supervise a released rapist rather than the Parole Board, he would like to see a judicial release mechanism developed.

Representing the Ohio Community Corrections Organization, Lynn Grimshaw interpreted the prosecutors' proposal as one that would allow the rapist to serve the minimum sentence then allow judicial release by the judge or periodic hearings by the Parole Board and eventual release.

Christina Madriguera reported that the Ohio Judicial Conference distributed the Commission's last proposal to judges who, in turn, raised concerns about the possibility of judicial release instead of release by the Parole Board.

Prof. Kravitz expressed concern about the acceptance of indeterminate sentences based on the need to keep the worst offenders incarcerated longer. Recognizing that the Parole Board finds indeterminate sentences useful as a tool to enforce good behavior from prisoners, he claimed that the Board sometimes keeps an offender incarcerated for reasons that have nothing to do with the underlying offense. Rather than setting a baseline maximum sentence of 25 years, he prefers giving the judge a range of numbers from which to choose. He believes that the judge could make a judicial release decision based on some of the same information, including treatment evaluations and reports on prison behavior that the Parole Board uses. If the judge makes the wrong call, however, he is responsible and accountable to the public, whereas the Board is accountable to no one. He declared that he has not heard a compelling reason for changing to indeterminate sentences.

Although flat sentences took effect in 1996, sex offenses have had a hybrid form of sentencing since the late 1990s, said Dir. Diroll. Although rapists of children generally get up to life terms, rapists with adult victims tend *not* to get indeterminate sentences unless they are found guilty of the SVP spec.

Regarding which system is "best," Dir. Diroll noted that the movement toward mandatory sentencing in the early 1980s was due to distrust of the Parole Board because the majority of offenders were being released at their first Parole Board hearing, often without the "minimum" sentence being served because of "good time" reductions. Sex offenses started getting treated more seriously in the late 1980s. Today's Parole Board is tougher than that of the 1970s and 1980s, so now the distrust of the Parole Board comes from the defense bar. Currently there is a sentence available of incarceration from 2 years to life for those determined to be most likely to recommit rape. The OPAA proposal intends to make all rapes indeterminate sentences. The question becomes whether determinate sentences should be kept for some of the rapes with adult victims or should all rapes have indeterminate sentences.

OCJS representative Candy Peters contended that the function of an indeterminate sentence is to allow more time for the judicial and correctional systems to evaluate and decide when to release the rapist.

The advantage, said OCCO representative Lynn Grimshaw, is to permit a sentence that has a long tail to control the offender upon release and while under supervision so that he can be reincarcerated if he violates conditions of his parole.

Sex offenders also continue to recommit as they age, said Dir. Diroll, unlike some other offenders. He noted that there are few 60 year old burglars or robber, but there are many 60-year old sex offenders.

According to Atty. Murphy, many prosecutors are concerned about S.B. 260, particularly in regard to pleas. They would prefer to be able to get the offender to plead to something rather than allow him to walk.

In essence, he declared, they are trying to prevent a potential legislative train wreck.

Mr. VanDine remarked that he is aware of some multiple child rape cases that were pled down to 3 to 4 years.

Prof. Kravitz claimed that offenders won't get offered pleas of minimum sentences if there is the potential for an indeterminate sentence to hang over their heads. The minimums, he declared, will mean nothing.

One option, said Judge Routson, might be to include a judicial release component. He noted, however, that the possibility of judicial release might result in less consistency on the bench than with a centralized decision maker like the Parole Board. He stressed a need to look carefully at the range for attempted rape as well.

John Murphy contended that the judge should be allowed to overrule release decisions made by the Parole Board.

With the inevitable passage of S.B. 260, said Pros. White, we're looking at indeterminate sentences anyway.

Prof. Kravitz inquired as to how much time the average rapist serves under the determinate sentence scheme.

On average among F-1 offenders, said Dir. Diroll, rapists serve the longest sentences.

Their sentences are generally more than 10 years, Mr. VanDine added.

S.B. 2 has only been in effect for 10 years, Probation Officers' Association representative Gary Yates pointed out. It is still too early to tell what the actual average S.B. 2 sentence is for rape.

Arguing that there is no reason to make major changes, Prof. Kravitz preferred keeping the proposals for rape with child victims, while tweaking them, but deleting those involving older victims.

Representing the Attorney General's Office, Erin Rosen remarked that the General Assembly is determined to pass S.B. 260. If we want to modify the impact of S.B. 260, the Commission will need a compromise.

Referring to data on sex offenders released from DRC in 2005, Mr. VanDine reported that most of those offenders had served flat sentences which averaged 13 years. Of rapists released in 2005, those with life sentences as the maximum actually served an average of 17 years. Sex offenders released under post release control had served an average of just over 5 years.

Dir. Diroll asked if any determinate sentences should be retained for rape with an adult victim or a victim over 13 years of age.

Prof. Kravitz suggested letting the judge choose whether the offender gets a determinate or indeterminate sentence. That option combined with judicial release, he contended, might serve as a good compromise.

Atty. Lane remarked that the State Public Defender's Office could probably live with that.

That would be feasible, said Judge Routson, especially if it means the judge does not have to make a decision upfront.

According to David Berenson of DRC, the prison treatment program is mandatory for sex offenders. He contended that DRC has restructured the program and that sex offenders are not discipline problems.

It might be easier for some people to consider indeterminate sentencing across the board for sex offenders, said Dir. Diroll, if it is coupled with some form of judicial release.

Prof. Kravitz remarked that he likes the idea but would prefer a hybrid system that gives certainty and finality for at least some rapists. A hybrid system, he contends, allows the prosecutor with a challenging case to offer a definite sentence instead of an indefinite sentence.

Judge Routson suggested leaving "attempts" as definite sentences and offering the option of an indefinite sentence for rape.

If a judicial release option were used, Dir. Diroll asked if there should be a limit as to how many times the offender can apply. Also, he wondered how judicial release and Parole Board hearings would relate. He noted that, currently, the offender can apply repeatedly, but gets only one shot at a hearing.

According to Atty. Lane, this is from pre-S.B. 2 law, under which an offender could only file one petition for "supershock" probation.

Dir. Diroll asked whether the offender would get one shot, or be allowed to more than one hearing on judicial release. He assumes the offender would have to wait until he has served the minimum term to be eligible for either judicial release or a Parole Board hearing. He asked whether these should be parallel release mechanisms and how they should relate to one another.

Atty. Lane insisted that if the offender spends years rehabilitating himself, he ought to have an opportunity for release.

Mr. Yates pointed out that 44 counties use Adult Parole Administration personnel as their probation officers, reducing the significance of the distinction between judicial release and parole release.

In 2005, Mr. VanDine reported, almost 200 incarcerated offenders were released on post-release control and 500 were released on parole.

It won't work if judicial release is the only remedy available, Prof. Kravitz declared. He acknowledged that it is unlikely that a judge will release a rapist before he has served at least 10 years. Chances are that 10 to 15 years down the road, these offenders will have to face a different judge than the original, if they apply for judicial release.

Ms. Peters reminded him that the average time served by a rapist is slightly over 13 years.

Lynn Grimshaw wondered if the courts would object to having to conduct additional hearings regarding sex offender releases.

Considering the severity of these cases and seriousness of when to release these offenders into the community, Judge Routson feels the judges would be willing to accept the burden of the additional hearings.

Mr. Yates noted that bringing these offenders back to the court for a release hearing generates publicity and judges don't want bad publicity for releasing a sex offender too early.

Some sex offenders don't want to go back to the county where they were tried and, on the flip side, said Mr. VanDine, many communities don't want them back.

Mr. Yates expressed concern that some rural counties cannot afford to do hearings or even supervise these offenders.

By acclamation, the Commission agreed that judicial control over release must be retained in some form.

Judicial Release Format. Dir. Diroll asked if this means that the judge would retain control until a certain number of years—perhaps 10 or 15—have been served, after which the Parole Board would take over release jurisdiction.

Pros. Don White responded that the date and terms of release should be left in the hands of the judge and jury.

Since sentencing matters are in the hands of the judge currently, Prof. Kravitz again questioned why indeterminate sentencing should be resurrected. It seems that the only purpose would be to retain Parole Board release mechanisms.

DRC Atty. Jim Guy said Ohio's judicial and penal systems are capable of using a system that includes both definite and indefinite sentences along with a judicial release option.

If we decide to have indeterminate sentences, Prof. Kravitz argued, then judicial release hearings should be mandatory. He contended that judges cannot be allowed to rubber stamp refusals. The judge needs to give the offender a meaningful hearing.

If the offender is allowed to petition the court every two years for a hearing, Mr. Murphy fears it will greatly increase the work load of the judge. This may cause judges not to support the proposal.

Ms. Peters remarked that this option will represent a serious financial issue for some rural or poorer counties and will likely cause opposition from county commissioners.

If petitioning for judicial release, said Atty. Rosen, the sex offender should be required to show he has actively worked toward rehabilitation through treatment participation, etc.

Prof. Kravitz expressed willingness to discuss what would trigger a hearing. He encouraged a search for resources to cover the costs.

Since few judges will want to release rapists, Mr. VanDine pointed out that there could be great disparity statewide.

Atty. Guy suggested ratcheting up the minimums, particularly for child rape.

Under a pure judicial release model, Dir. Diroll suspects that few rapists would be released early.

After lunch, Prof. Kravitz moved to develop a dual system for sentencing offender's convicted of rape and rape of a child: If indeterminate sentencing is to be used, then the judge should be allowed to retain ultimate judicial release authority throughout the time of incarceration. In addition, the Parole Board should periodically conduct reviews or hearings for possible release.

According to Atty. Guy, lines of communication are in place so that a parallel track is possible between Parole Board and judicial hearings.

By acclamation, the Commission agreed with Prof. Kravitz's concept.

The Maximum Term. Prof. Kravitz asked why the OPAA's proposed standard is 7±2 to 25 years instead of 7±2 to 10 years of incarceration for the offense of rape.

Currently, Atty. Murphy responded, the standard sentence is the minimum, but the OPAA feels the standard sentence should not always be the minimum. Moreover he feels that 3 to 10 years is too broad for a minimum. Under the proposed standard, the minimum would be 7±2 (or 5-9 years). 25 years was the maximum until 10 years ago. Under this proposal, he explained, 25 years would become the maximum again. The OPAA feels the current penalties for rape are not sufficient.

Atty. Anderson asked how the proposed indeterminate sentence would play out with the repeat violent offender spec.

According to Atty. Murphy, this is where the additional 10 to life spec would kick in.

Erin Rosen warned that if S.B. 260 passes in its present form, the Commission cannot expect to go back and change it.

If a minimum of 7 ±2 to 25 years is used for the rape of adult victims, then Atty. Anderson wondered if a similar formula should be used in determining the appropriate ranges for child victim cases.

Although it might be beneficial, said Judge Routson, it is unlikely to gain support because of the seriousness of child rape cases.

If determinate sentencing doesn't work out, then Prof. Kravitz recommended resurrecting good time. He believes that it would give inmates an incentive to participate in rehabilitative programs.

Atty. Lane declared that sentencing caps also give the inmate some hope and incentive for rehabilitation. If the Commission decides to return to indeterminate sentences but without the cap, he believes the defense bar will be unlikely to approve it.

Dir. Diroll recognized that some of the cap issues are more acute today because of some recent decisions by the Supreme Court.

Interpreting the OPAA proposal as a minimum of 5, 6, 7, 8, or 9 to 25, Prof. Kravitz suggested a combination pre-S.B.2 and post-S.B.2 range of 5 to 15.

Atty. Murphy declared that would be too short a sentence for a crime this serious. He insisted that protection must be built in against the worst offenders. He does not want to give a break to a serial rapist.

According to Ms. Peters, any cap would apply only to consecutive sentences.

Judge Routson asked how an indeterminate sentence would merge with additional determinate sentences for additional charges.

According to Atty. Lane, the mandatory and determinate sentences would get served first, then the indeterminate sentence.

Pros. White reported that OPAA representatives are to meet with Sen. Steve Austria next week to let him know where the prosecutors stand on these issues. He would like to also fill him in on where the Sentencing Commission stands.

Prof. Kravitz asked Pros. White to persuade the OPAA to move a little on some of these issues. His main concern involves the high end of the sentencing scheme for the worst sex offenders. He noted, however, that more protection is needed for the low end of the serious sex offenders.

Mr. VanDine remarked that indefinite sentences would probably add up to parole eligibility sooner than is experienced currently.

Sheriff Dave Westrick suggested allowing either a judicial release hearing or Parole Board review after 15 years has been served by an offender with a 25 year sentence.

According to Atty. Lane, before the enactment of S.B. 2, with good time, a person with a 25 year sentence could get a hearing at 9.5 years. As a result, even a serial rapist got a hearing at 9.5 years.

Dir. Diroll remarked that several years ago Pros. Greg White proposed a review of extended sentences that was designed with the cap removed, but, at that time, it failed to gain DRC or legislative approval.

Mr. VanDine suggested offering a Parole Board review of an offender's record after 20 years with the option of being able to recommend to the judge the possibility of judicial release. That way, it offers a cap to the sentence and a review by the Board, but places the ultimate release decision back in the hands of the judge.

Atty. Murphy asked what the other side of the deal would be if he takes this revised proposal back to the OPAA.

According to Mr. VanDine, the minimum range in the OPAA proposal reflects what is already happening in sentencing.

After serving 20 years, Atty. Lane contended, the sex offender should be given some hope of release sometime. He proposed that all sex offenders should get a review and hearing after serving 20 years, noting that it would not necessarily have to result in release. It could be release by either the court or Parole Board, but he would prefer the court.

Sheriff Westrick expressed concern that the Parole Board might try to use that as a way to control the prison population.

It appears, said Dir. Diroll, that according to the defense representatives, the problem with the OPAA proposal is the standard rape case which would have a potentially higher minimum and could escalate up to 25 years. It has been suggested, by defense representatives, that if indeterminate sentences are to be used for rape offenses, then it should include a review by the judge or Parole Board with a recommendation to the judge for possible judicial release at some point. He noted that, when the Senate passed S.B. 260, it placed most sex offenses in the 25 to life category. He doesn't think they were talking about the everyday type of rape crime when they proposed this, yet that is what happened. The concern appeared to focus more on rapes with child victims. With this in mind, he suggested that, based on the discussion of indeterminate sentencing coupled with hearings for possible judicial release, it might be wise to exclude the rape of a child from the review process for release.

Atty. Murphy agreed to talk with the OPAA before the next Commission meeting about these suggestions and the revised proposal.

Prof. Kravitz reiterated that he prefers a dual system. He does not want the judge to be the sole decision maker on the release issue.

Atty. Murphy said that option is unlikely to pass the OPAA.

Mr. VanDine said that he feels he has enough information to do a test run on how the revised proposal might affect the prison population.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for October 5, October 19, and November 16.

The meeting adjourned at 2:17 p.m.