OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

Meeting
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
September 19, 2013

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Ron Burkitt, Police Officer
Jim Canepa, Chief Counsel, Bureau of Motor Vehicles
Laina Fetherolf, Prosecuting Attorney
Theresa Haire, representing State Public Defender Tim Young
Kathleen Hamm, Public Defender
Thomas Marcelain, Common Pleas Judge
Aaron Montz, Mayor, City of Tiffin
Kenneth Spanagel, Municipal Judge
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr
Roland Winburn, State Representative

ADVISORY COMMITTEE
Eugene Gallo, Eastern Ohio Correction Center
Jim Lawrence, Ohio Halfway House Association
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
JoEllen Cline, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Ryan Dolan, Counsel, Rehabilitation and Correction
Gloria Hampton, OCCA
Scott Lundregan, Speaker Batchelder's Office, House of Representatives
Irene Lyons, Rehabilitation and Correction
Brian Martin, Rehabilitation and Correction
Marta Mudri, Ohio Judicial Conference
Scott Neeley, Rehabilitation and Correction
Sam Porter, Asst. Chief Counsel, Governor Kasich's Office
Mark Schweikert, Ohio Judicial Conference

The September 19, 2013 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair, Municipal Judge David Gormley at 9:50 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll welcomed Scott Lundregan from Speaker Batchelder's Office, Sam Porter from Governor Kasich's Office, Jim Canepa, from the Bureau of Motor Vehicles, and Theresa Haire, designee for State Public Defender Tim Young. He also welcomed Police Officer Ron Burkitt as the newest member of the Commission.

Dir. Diroll reported that he received an email from Parole Board Chair Cyndi Mausser regarding a study of the Parole Board Guidelines. She reported that there is a revision in the works that will include factors to be considered on release decisions.

H.B 86 – THE FIRST TWO YEARS

Dir. Diroll remarked that it has been two years since H.B. 86 took effect. The Sentencing Commission was not the primary agency involved in constructing the bill but it did offer significant input. One goal of the bill was to address prison population.

DRC Research Director Steve VanDine offered an overview of the areas in which H.B. 86 is working well and the areas where improvement is needed.

The *Foster* Effect. The ruling in the *U.S. v Foster* case in 2006 said that three of the presumptions of S.B. 2 were no longer valid, noted Mr. VanDine. One of those presumptions said that you could not have aggregate consecutive sentences that went beyond the longest single sentence for the most serious offenses unless it was an especially egregious circumstance.

The second presumption ruled invalid was that the judge should select the longest sentencing choice at each felony level only if it was an especially deserving case for that penalty. The third presumption was that if it was a first commitment to the prison system, the shortest of the prison terms available for that felony should be used unless there were special reasons for doing otherwise.

If the judge chose to ignore those presumptions and it was not the result of a plea bargain, then it was up for appellate consideration. 97% of the people who are committed to DRC do so as the result of a plea or sentencing bargain, he added.

After *Foster* there was a noticeable increase in the length of stay for those sentenced to prison. There has been almost a 7,500 increase of inmates, he said, as a result of the *Foster* decision.

He noted that other U.S. Supreme Court decisions subsequent to *Foster* said the results did not need to be quite so strong. The U.S. Supreme Court said the initial suggestions did not apply to aggregate sentences, so it was possible to reverse that aspect. By implication, the other two presumptions had less support as well, he supposed.

In an attempt to move away somewhat from the *Foster* decision, Mr. VanDine explained that H.B. 86 reversed the removal of the presumption against aggregated consecutive sentences. It also included less direct

language that intended to move sentencing back toward the other two presumptions.

His staff has been looking for shifts in sentencing patterns that might relate to that. So far the impact has been fairly modest, but the number of aggregate consecutive sentences is down. For pure H.B. 86 sentences from FY 2013, there is greater use of the top single sentence and less use of the bottom single sentence.

That isn't surprising, said Dir. Diroll, since legislators reinstated the language that had been struck by *Foster* regarding the consecutive terms. When it came to the guidelines against the maximum term and favoring the minimum term on a first commitment to prison, the House-passed version of H.B.86 would have addressed both of those and made those guidelines state policy, without the findings found troublesome in *Foster*. That changed, however, in the Senate. Ultimately, the Senate did nothing on the maximum issue.

S.B. 2 had set out purposes of sentencing and the Senate (final) version of H.B. 86 said that the purposes should be achieved in a way that imposes a minimum burden on resources. There is no appeal of right that would come out of that and no further guidance. He noted that sometimes a prison term can be less costly than another sanction, such as jail.

It is difficult to say that some changes in the sentencing patterns are just due to *Foster*, said Mr. VanDine, because there were six or seven provisions that effected sentence lengths in H.B. 86. It is more reasonable to look at the mean sentence length or mean length of stay.

Most of the felony levels show minimal change, but do reflect slightly lower lengths of stay. Since two to three presumptions don't have much impact, it suggests that the aggravated consecutive sentencing presumption is probably making a difference at the different felony levels.

Drug Offenses. One of the biggest percentage changes has to do with drug trafficking, particularly between powder and crack cocaine. Offenses for powder cocaine were given stronger sentences at the top end for dealing or possession of larger amounts. Crack cocaine offenses were given lower sentences at the bottom end.

For drug offenses there has been a slight increase in F-1s and slight decrease in F-5s. Drug possession commitments have dropped as a proportion of total cases from 10.9% to 9.5%. Drug trafficking at the F-1 and F-5 levels have seen an increase, but as a proportion of total admissions the cases have dropped from 11.4% to 8.1%.

Property Crimes. Noting that there was a restructuring of property crimes, Mr. VanDine pointed out that these are covered by some of the diversion language of H.B. 86. The threshold between the misdemeanor and felony theft levels went from $750 to $1,500 and first time property offenders committed to prison are to be diverted to a local community alternative as a first option. As a proportion of total commitments, property crimes have dropped from 14.5% in 2011 to 10.7% of pure H.B. 86 commitments.

The shifting of low level property, drug trafficking, and drug possession offenders to community sanctions has resulted in an 8% drop. That amounts to approximately 1,600 beds.

Nonsupport. Some of the other provisions in H.B. 86, said Mr. VanDine, included a provision for the offense of nonsupport of dependents, to send those offenders to community programs instead of prison. This resulted in a drop of nonsupport admissions. They believe it was because of the use of the programs rather than any statutory language.

Escape. H.B. 86 also included a new, less generic, definition of escape. Contrary to expectations, this resulted in a 9.8% increase, particularly among CBCFs and halfway houses. Other than an initial increase in the population of those facilities, they have no explanation for this increase in escapes.

As Director of the SEPTA Correctional Facility, Monda DeWeese offered a possible explanation for the increase. The higher ORAS scores required for admission to a CBCF or halfway house by H.B. 86 are indicative of an increased probability of risky behavior, including escape. She declared that many offenders have gone to CBCF's on judicial release and have no fear of returning to that sanction, as it is known to them.

Mr. VanDine admitted that they hadn't thought of that connection.

Intervention in Lieu. The option of intervention in lieu of prison was also expanded under H.B. 86, he noted, to include a second felony drug change and certain types of mental health considerations. Statewide numbers are difficult to determine for this category but it seems to be getting used more, but has not shifted for DRC to benefit.

According to Public Defender Kathleen Hamm, Wood County is finding that some offenders with mental illness issues have problems with the ability to comply under intervention in lieu.

Risk Reduction Sentencing. H.B. 86 also offered "risk reduction sentencing," which allows DRC to release an offender after 80% of his sentence if he has met and completed certain requirements established by the sentencing judge. Since the option's implementation, there have only been 21 such releases out of the 351 eligible during FY13. One contributing factor might be the long lines of offenders waiting for admission into the various programs, said Mr. VanDine. It is difficult to get them through in time for the 80% reduction, especially on shorter sentences. He asserted that it is hard to estimate the independent effectiveness because it overlaps with a lot of other sentencing release options, including judicial release.

Although the risk reduction option has to be initiated by the judge, Dir. Diroll noted, many judges are still not accustomed to it.

According to Mr. VanDine it is being used most for property and drug offenses and getting used most in Clermont County.

Representing the Chief Probation Officers' Association, Gary Yates remarked that he has found it to be suggested most by public defenders.

F-1 & F-3 Sentence Ranges. The F-1 sentencing structure changed, said Mr. VanDine, as a result of H.B. 86 by adding an 11 year longest sentence. This option does not appear to have made much difference.

H.B. 86 made several changes to F-3 sentencing patterns. The shortest sentence of one year has changed to nine months. The increments in the range are now in months rather than years. For a large portion of F-3 crimes the range has shifted from one to five years prior to H.B. 86, to a range of nine months to three years under H.B. 86. About 10% of those now being admitted are for nine months, rather than one year. There are also less four to six year sentences. As a result, the F-3 changes have been the most beneficial in terms of impact to DRC's population.

Patterns By Degree. Over the span of felony sentences, there are now more F-1, F-2, and F-3s entering DRC and fewer F-4s and F-5s. The biggest percentage point increase has been F-2s. Overall, H.B. 86 is achieving its goal to divert more F-4 and F-5s and house mostly F-1, F-2, and F-3s in prisons.

80% Judicial Release. Mr. VanDine noted that DRC did not feel it could make use of the new 80% judicial release provision until certain changes were made in fall of 2012. From January to June 2013, only 117 offenders met the new criteria. Of those, 92 have proceeded to the courts, but so far only 17 have been granted judicial release. DRC had expected much higher numbers. He suspects that part of the reason the numbers are so low may involve record keeping, which they hope to improve electronically, and the waiting lists for admission to programs. He explained that, based on evidence-based research, the preference is to give the inmate his programming during the last few years of his term before being released. This presents a challenge to early releases. They are trying to make adjustments to that.

Earned Credit. Some people in the criminal justice system really don't like earned credit, Mr. VanDine admitted. DRC feels many more could benefit if it were allowed more broadly. During FY2013 there were 828 inmates getting earned credit at the one day rate. They averaged three months worth of credit each, so they shortened their sentences by only three days. New low level offenders can earn credit at a five day per month rate and have also averaged three days per month credit during 2013. The combined result is a reduction in time to be served of 92 years. Although it is reducing the average length of stay, the inmates won't see that reduction until the end of their stay, which in turn means that it won't affect the prison population immediately.

Intake. Ohio Judicial Conference Director Mark Schweikert remarked that these numbers show reductions but the prison population has increased. He raised concern about the difference.

According to DRC researcher Brian Martin, most of this is because intake is up 3,000 over expectations during the last 18 months. The numbers presented by Mr. VanDine reflect things from the back end of the process, while numbers affecting the prison population are increasing significantly at the front end.

Noting that the latest Ohio Crime Report has just been released, Mr. VanDine reported that the overall crime rate in Ohio is the lowest it's

been since 1972. Violent crime is the lowest it has been since 1969. Since indictments are slightly higher, this indicates that law enforcement is more effective in apprehending people and sending them to court, resulting in more being sent to prison. Also, the prison population is getting older, indicating that those getting arrested more than once are getting sentenced to longer terms. There is also an increase in drug activity, particularly pharmaceuticals.

Rep. Winburn asked if there were plans for a summary document to compare data from year to year and some kind of report card system for making comparisons to recognize improvements or lack of improvements.

According to Mr. Martin, the Council of State Governments has plans to compose a summary of some of this information over time to show the impact of the entire nationwide Justice Reinvestment Project, which will include Ohio data.

Mr. VanDine added that DRC hopes to provide something more consistent from this point on.

Dir. Schweikert pointed out that the Crime Report involves crimes reported, not arrests or convictions. If more of those folks are getting arrested and convicted, then obviously the prison rate will increase while the crime rate decreases because those people have been taken off the street.

When Judge Gormley asked how the Ohio crime rates compare to national crime rates, Mr. VanDine responded that he didn't really know but had heard that the National Crime Rates have increased slightly.

DIRECTOR MOHR'S TASK FORCE RECOMMENDATIONS

Dir. Diroll reported that DRC Director Gary Mohr has suggested to the General Assembly a need for three task forces to address certain issues related to the prison population. They are:

- A judicial advisory council to link DRC and judges more formally;
- A task force to review the Revised Code and guide allocation of resources; and
- A task force to create a "RECLAIM" model for the adult system to divert more F-4 and F-5 offenders to community based facilities.

He reported that Chief Justice Maureen O'Connor offered a letter to the Sentencing Commission noting that she met with Dir. Mohr and discussed these requests. Before responding more formally, she requested input from the Sentencing Commission.

Legislative liaison for DRC, Scott Neeley, reported that there has been no further discussion at the legislative level.

Atty. Hamm remarked that she would like more information on what she envisions with the criminal justice committee. Before we can respond, it would also help to get more information on what Dir. Mohr has in mind.

Having spoken with Administrative Director Steve Hollon, Dir. Diroll explained that the Supreme Court has been discussing the possibility of

some kind of agency within the Supreme Court that would be involved in policy development. There are a broad range of criminal justice issues that go beyond sentencing that need the input of a group with a varied membership of representatives and practitioners, like that of the Sentencing Commission. He and Adm. Dir. Hollon feel the Sentencing Commission could segue into that policy group and deal with broader policy matters. That may be part of what Chief Justice O'Connor was referring to in her mention of a Criminal Justice Committee.

Dir. Diroll had these observations on the three proposals:

1) The judicial advisory council: This is already done on an *ad hoc* basis, but not quite as structured as Dir. Mohr wants.
2) The review of the criminal code: The Sentencing Commission already did this in the '90s and could do it again. We went through the entire Criminal Code and reduced it from 12 felony brackets to 5 levels and reviewed and assigned *every* felony. So there's really no need for a new group to do it.
3) An adult RECLAIM model, although used in the juvenile system, is a new concept for the adult system. The per inmate gains aren't as great in the adult system and judges have less administrative control, but, given the numbers, a more targeted program could work for adults.

Some have expressed concern of whether the Sentencing Commission is nimble enough to accomplish the task in 12-18 months. He pointed out that, over a decade, the Sentencing Commission studied and suggested revisions to over 1,000 sections of the Revised Code, many of them written from scratch.

Considering what the Commission had accomplished in the 1990's and since, with the technology advancements since then, Pros. Fetherolf asserted that there should be no concern about the capabilities of the Commission to get the job done in a timely manner.

According to Dir. Schweikert, the proposal of Dir. Mohr is not much different than what he has done in the past. His focus is to reduce the prison population, but that is not the sole purpose of this group. The Commission's priorities, he insisted, are different.

As a voice of Ohio judges, Dir. Schweikert noted that the Judicial Conference has many standing committees, one of which is the Criminal Law and Procedures Committee; another is the Community Corrections Committee. The judges that Dir. Mohr has selected for his task forces would be to advise him but they don't represent the Judicial Conference.

The Commission was created by the General Assembly to be an advisory group to the General Assembly. The Judicial Conference is also designed as an advisory group to the General Assembly. To circumvent these two groups, Dir. Schweikert contended, is ill advised since they were created by statute and would have greater credibility with the General Assembly. The prison population, he repeated, is not traditionally a sole priority for the Judicial Conference or Sentencing Commission. With that in mind, he acknowledged that Dir. Mohr may be trying to fill a void.

Dir. Diroll pointed out that the prison population was a key concern when the Commission worked on S.B 2. He noted that Dir. Mohr's request to the legislature hints at legislation to create three new groups at a time when government is shrinking.

By Dir. Mohr making a direct request to the General Assembly, said Dir. Schweikert, it could result in duplicating two advisory bodies that already exist. He wondered if Chief Justice O'Connor may be reconsidering whether the Sentencing Commission belongs in the judicial branch or the executive branch.

If Dir. Mohr is looking for proposals to ease the prison population, Common Pleas Court Judge Thomas Marcelain suggested that the Commission should offer some, since it already has statutory authority to do so.

Municipal Court Judge Ken Spanagel remarked that when he spoke with Chief Justice O'Connor at the recent Judicial Conference seminar, she stated that Dir. Mohr was looking for answers to the increasing prison population. Although S.B. 2 had provided some answers to that problem, other factors have since regenerated the problem. In addition, many things have been curtailed because of the budget, so Dir. Mohr must find some solutions that will be workable within the current budget. As far as reviewing the criminal code, he believes that Dir. Mohr is mostly hoping to revert some felonies back to misdemeanors, not necessarily rewrite the entire code. He believes that it might be useful for the Sentencing Commission to look at the RECLAIM concept, since it is a sentencing option. The Commission might be able to help sort out which crimes could apply and the type of format that might work. He added that Chief Justice O'Connor agreed with the Commission's sentiments that it should be a player in the process. He personally suggested developing a list of felonies that might be considered for reversion to misdemeanors.

A felony RECLAIM work group already started, said Judge Schweikert, at the request a couple of years ago of Sen. Bill Seitz, but it was not made up of the people on Dir. Mohr's list. This group has already determined that it is a different challenge for the adult system than it was for the juvenile system.

Because there so many differences between the juvenile and adult systems, the first step toward a RECLAIM option, Dir. Diroll remarked, should be setting up a pilot program to see how it can work in the adult system and sorting out the challenges.

Pros. Fetherolf argued that, in the juvenile system, the judge has more leeway to intervene with the entire family. He can remove the juvenile from the family situation at home and place them into a separate environment, or he can force the entire family to be involved in the rehabilitation process. It allows the judge to address the entire environment and entire situation. The judge does not have that capability in the adult system, which plays into the capability of a Reclaim system.

The theory of RECLAIM, said Judge Schweikert, centers on the idea of reinvestment, which allows the judge to spend state money on local alternative sanctions instead of prison, hopefully resulting in less recidivism.

RECLAIM, Dir. Diroll noted, is the shorthand of financial incentives for judges to keep more offenders and more juvenile justice money in the county.

There is some discomfort about financial incentives, said Judge Marcelain, and accusations of a constitutional conflict if money is going to local coffers based on sentences. That is why some counties have eliminated mayors' courts. But juvenile court judges seem to get away with it, commented Dir. Diroll.

Under the juvenile system's RECLAIM model, some practitioners put pressure on the courts, said Pros. Fetherolf, to make more local commitments under the guise of preserving jobs due to tight budgets. She declared that to claim it's tied to budget impact is inappropriate.

Regarding changing some low level felonies to misdemeanors, Atty. Hamm argued that it would be a disincentive if handled like the juvenile court does under RECLAIM. Money is not available for a misdemeanor conviction, even if reduced from a felony. Judges will fight against allowing money to be an incentive for reducing a sentence. Because of these collateral consequences, she has serious concerns about that model being duplicated in the adult system.

According to Eugene Gallo, Director of the Eastern Ohio Correctional Center, the RECLAIM option is not about reducing the prison population, but about reallocating resources from the state that is designated for programming under risk reduction sentencing. Since DRC does not have time to get these people into the programs early, it can best be done at the community level. This money would help to fund more diversion and treatment programs at the local level, with a side benefit of helping to reduce the prison population. He believes the concept deserves a fair hearing.

Representing the State Public Defender's Office, Theresa Haire argued that collateral consequences have little impact on the prison population. She contended that putting money into the front end, such as the RECLAIM concept, can save money in the long run. She strongly defended Dir. Mohr's efforts to save money and his focus on programs for inmates and concern for staff safety.

It comes down to how you measure success, Dir. Schweikert argued. Judges do not gauge success based on the number of people they do or do not send to prison. They prefer to base their success on focusing on the needs of the community, whether that means increasing the number of local programs or sending more hardcore people to prison.

Under Dir. Mohr, said Mr. VanDine, DRC has changed its focus and direction. It is much more driven now to reduce crime and reduce recidivism. That drives the policy initiatives of the department. Regardless of the prison population, the department is striving for a reduction in crime. If the prison population continues to increase, DRC will have one year to decide if it needs to build another prison. Over the past 15-20 years they have made considerable strides toward expanding community alternatives. These have reduced recidivism. Since many studies assert that prison tends to increase the recidivism rate

of some offenders, the department hopes to increase community programs. He contended that any plan needs to take that into account.

According to the letter from Chief Justice O'Connor, said Judge Spanagel, she is asking us for suggestions on how she should proceed with Dir. Mohr, and the legislators.

Atty. Hamm interpreted that request as asking us to be more specific as to the roll we should play and how that fits with Dir. Mohr's goals.

Pros. Fetherolf pointed out that the diversity of the Sentencing Commission's membership enables us to provide guidance as to the practical application of legislative changes. This allows the opportunity to weed out and address the potential problems before they occur. Our combined expertise can also prove valuable to DRC as it proceeds with these goals.

Dir. Diroll suggested that the Commission could recommend some different concepts that might help the prison population, independent of what happens structurally with some of the other proposals.

Mr. VanDine proposed that a letter of response be developed with input from all Commission and Advisory Committee members. He urged getting a consensus within a week or two, not months.

Dir. Diroll agreed to get something out promptly for review.

APPELLATE REVIEW OF SENTENCE ISSUES

After lunch, the discussion turned to certain issues that have been raised regarding appellate review of sentences.

Dir. Diroll explained that under the Sentencing Commission plan that became S.B. 2, there were some appealable provisions developed with prison population control partly in mind. Before S.B. 2 there was no formal statute on sentencing appeals. S.B. 2 created a determinate sentencing scheme with certain presumptions and guidance statues in which certain judicial findings would be subject to appellate review. The new sentence appeal was placed in §2953.08. The statute has changed somewhat over time, most notably as a result of *State v. Foster* in 2006 and the legislative reaction to *Foster* in H.B. 86 in 2011.

§2953.08 was created by S.B. 2 solely to police the new appeals of right that were created by S.B. 2 and to take note of the general ability to appeal sentences "contrary to law," implicit in preexisting abuse in discretion appeals. It was crafted as a limiting statute, Dir. Diroll noted. It carves an exception for any sentence recommended jointly by the defendant and state and approved by the judge.

Foster retained certain presumptions and findings and struck others. In an effort to address the problems created by *Foster*, H.B. 86 did some confusing things. Some findings were retained but instruction was removed for the judge to give reasons. There are also issues with minimum, maximum, consecutive sentences, sentences "contrary to law", repeat violent offenders, and sexually violent predators.

Dir. Diroll reported that he recently met with appellate judges and judicial attorneys in the 8th Appellate Court District in Cleveland about some of the challenges presented by those changes.

Judge Marcelain asked if other districts, besides the 8th Appellate Court District, were running into similar problems.

Dir. Diroll reported that Judge Sean Gallagher mentioned a lot of concerns about these issues around the state. He would like an opportunity to discuss these issues with the Sentencing Commission.

Judge Spanagel suggested contacting appellate judges to ask for input on the issues regarding §2953.08 appeals. He suggested also getting input from public defenders who handle appeals.

Atty. Theresa Haire offered to get input from some public defenders on these issues.

Atty. Hamm contended that they have run into the exact same problem regarding things on the record. They want to appeal but things are not put on the record.

The judge should be able to explain why he determines that a specific sentence outside of the norm is justified, Atty. Haire argued. She contended that *Foster* was like a bad country song.

He would mostly like to get the statute to say what it means and mean what it says, said Dir. Diroll.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for October 17, November 21, and December 19, 2013.

The meeting adjourned at approximately 2:00 pm.