Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
May 19, 2005

SENTENCING COMMISSION MEMBERS PRESENT
Capt. John Born, representing State Highway Patrol Superintendent Col. Paul McClellan
Appellate Judge H.J. Bressler, Co-Chair
Defense Attorney Bill Gallagher
Victim Representative Staci Kitchen
OSBA Delegate, Max Kravitz
Defense Attorney Bob Lane, representing State Public Defender David Bodiker
Municipal Prosecutor Steve McIntosh
Municipal Judge Jeff Payton
Municipal Judge Kenneth Spanagel
Defense Attorney Yeura Venters
Prosecuting Attorney Don White
Steve VanDine, representing Rehabilitation & Correction Director Reggie Wilkinson

ADVISORY COMMITTEE MEMBERS PRESENT
Monda DeWeese, SEPTA Correctional Facility
Burt Griffin, Retires Common Pleas Judge

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Jeff Harris, Intern
Richard Jenson, Extern
Jason Tam, Extern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Bill Breyer, Prosecuting Attorney
Dave Gormley, Legal Resources, Supreme Court of Ohio
Jim Guy, Department of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Rebecca Parks, Senate Republican Caucus
Steven Taylor, Franklin County Prosecutor's office
Beth Vanderkooi, legislative aide to Senator Timothy Grendell

Judge H.J. Bressler, Co-Chair, called the May 19, 2005, meeting of the Ohio Criminal Sentencing Commission to order at 9:35 a.m.

DIRECTOR'S REPORT

Director David Diroll reviewed contents of the meeting's packet, including: an expurgated form of H.B. 241 (the asset forfeiture bill based on Commission proposals); a memo outlining Rep. Bill Seitz' suggestions regarding that bill; a summary of the bill; a memo on the Ohio Supreme Court's reaction to cases relating to the U.S. Supreme Court's *Blakely* decision; a memo from Asst. Franklin County Prosecutor Steven Taylor addressing §2929.14(B) in response to *Blakely*; a memo on traffic issues to be discussed; and minutes from the March meeting.

***BLAKELY* ISSUES**

Staff Recap. Staff Attorney Scott Anderson noted the memo on *Blakely* cases before the Supreme Court of Ohio, including a list of cases that claim a *Blakely* challenge, but have been rejected by the Ohio Supreme Court due to procedural difficulties or because they raised only statutory or factual concerns and not constitutional questions.

He announced that three cases have been accepted by the Court for briefing on *Blakely* grounds: 1) *State v. Elmore*, a capital case, 2) *State v. Foster*, a case involving consecutive sentences, and 3) *State v. Quinones*, a case involving consecutive and maximum sentences.

In *State v. Rose*, from the 1st District Court of Appeals, held that, once a defendant waived his right to a jury trial, he waived any rights subsumed under that right, including potential *Blakely* rights. He pointed out that this case was rejected by the Supreme Court of Ohio.

Also of note are two cases discussed at the March Commission meeting: *State v. Bruce* and *State v. Montgomery*. Both were granted stays as requested by the 1st District Court of Appeals. The Court also certified a conflict in *Bruce*. These cases deal with the minimum and maximum allowable sentences under Ohio guidelines.

Dave Gormley, with Legal Resources of the Ohio Supreme Court, remarked that the cases probably will be addressed by the Court in the fall.

Taylor Issues. Franklin County Assistant Prosecutor Steve Taylor expressed concern about how *Blakely* might affect more-than-minimum, maximum, and consecutive sentences in Ohio. He fears that if *Blakely* overturns Ohio's statutory approach to imposing more than the minimum sentences, it will, in turn, reduce the maximum prison term for felons. (Under the Commission's proposals codified by S.B. 2 in 1996, a court must make various findings in order to impose a more-than-minimum sentence, maximum sentence, or consecutive sentence, to impose a prison term for certain F-4s and F-5s, or to impose maximum or additional prison terms on major drug offenders and repeat violent offenders.)

Because of the risk, Pros. Taylor believes that a legislative remedy should be sought soon rather than wait for the Ohio Supreme Court to rule on the issue. He has contacted the Ohio Prosecuting Attorneys' Association and Ohio's Attorney General about these concerns. He proposes an amendment that would avoid the *Blakely* issue but would adhere to the S.B. 2's basic intent regarding minimum prison terms. By reversing the findings and placing them *before* the presumptive "shall impose" language, his amendment would allow the guidance favoring a

minimum term to be triggered *after* the court has considered the criteria. Hence, instead of the court needing to make findings to get out of the minimum-sentence box, the court would need to make findings to get into the box, thereby avoiding the *Blakely* problem.

He emphasized that other prosecutors have agreed with this proposal, and the Ohio Prosecuting Attorneys' Association is likely to vote on it soon. He stressed the need to cut the risk of the minimum term becoming the maximum available, especially for F-1s and F-2s.

Prosecutor Don White reported that the Ohio Prosecuting Attorney's Association would meet later that day to discuss the proposal.

Judge Bressler questioned whether any quick move to amend the statutes made sense.

Pros. Taylor acknowledged that he is encouraging quick action on this proposal, rather than wait on a decision from the Ohio Supreme Court, because he fears that F-1 sentences could be limited to three years.

Dir. Diroll believes that the more-than-minimum standard will withstand challenges in the Ohio Supreme Court, but senses that Pros. Taylor feels it will not hold up to a Federal challenge under *Blakely*.

Pros. Taylor said that it is a toss-up whether sentences beyond the minimum will survive in Federal courts.

Given that the Ohio sentencing system is more benign than the federal guideline system, retired common pleas Judge Burt Griffin found it unlikely that the federal courts will be less sympathetic to Ohio's guidelines than our Supreme Court. If federal judges press for more guidelines on our State system, it will open the window for requiring more guidelines on the federal system, which is a move that the federal judges are already fighting. He stressed the need to wait until the issue gets resolved at the Ohio Supreme Court level, then, in light of that decision, take a patient and serious look at the state statutes to see what needs to be done. He warns against doing anything piecemeal.

If a judge does not find that the shorter sentence will adequately protect the public, asked Judge Bressler, how, under Pros. Taylor's proposal, would that be different from what a judge does now, and how would it withstand a *Blakely* challenge?

Pros. Taylor contended that moving the finding before "shall impose" makes it negative rather than positive regarding how the presumption kicks in. It is his understanding that *Blakely* issues hinge on when the presumption kicks in and what happens after that presumption.

Literally read, said Dir. Diroll, there is no presumption against prison for F-4s and F-5s. The General Assembly amended out the word "presumption" in the initial proposal for a reason. The legislature preferred "guidance" over "presumption". He feels that much of the *Blakely* debate so far can be reduced to an issue of semantics or formalism. He claimed that Pros. Taylor's proposed language would make it *difficult* to sentence to the minimum, a significant change. He noted that, according to the Commission's 2005 Monitoring Report, guidance toward the minimum seems to have an effect.

These findings are not necessary to impose a minimum, Pros. Taylor argued, but the findings, under this proposal, are necessary to create a presumption of a minimum.

To impose the minimum sentence, Judge Bressler contended, the judge has to find that the minimum will adequately protect the public and will not demean the seriousness of the crime. He declared that that is a required finding.

Pros. Taylor disagreed and argued that the proposal does not require the judge to make those findings to impose the minimum.

It is possible now to impose the minimum without having to make these findings, said Common Pleas Judge John Schmitt.

Pros. Taylor argued that his proposal tries to stick with S.B. 2 language as much as possible to impose the minimum unless certain findings are made.

Dir. Diroll remarked that this proposal almost does the opposite. By advising the court not to impose the minimum unless none of these findings are made, he wondered if it wouldn't raise the possibility of an appeal of right.

Pros. Taylor argued that this would not be appealable. Acknowledging that the General Assembly wants the maximum to be available he declared that some people fear that *Blakely* will cause a loss of the maximum. There could be an even bigger battle, he noted, as a result of *Booker.*

Judge Griffin remarked §2929.12(A) says the judge has discretion to find the most effective way to impose a sentence while abiding by the overriding purposes of the sentencing structure. Federal guidelines, don't say anything about discretion. That, he declared, is an argument in favor of our structure.

Pros. Taylor said he simply is worried about how interpretations of *Blakely* will affect F-1 and F-2 offenders.

Perhaps any amendment should be limited to those cases, Judge Griffin suggested, noting that otherwise it will cause great disparity among drug cases and will increase prison crowding.

Pros. Taylor urged consideration to change the statute to put the nail in the coffin lid of *Blakely*.

Defense Attorney Bill Gallagher remarked that when the *Apprendi* decision came out in 2000, the U.S. Sentencing Commission declared that the entire federal court would shut down unless someone developed immediate legislative and statutory remedies. The legislators took a wait and see approach and the system has not fallen apart as predicted, even after *Booker*. Pros. Taylor's proposal, he declared, would involve changing the philosophy on minimum sentences.

If anyone moves too quickly to make changes before the Ohio Supreme Court has a chance to rule, it will appear that the Ohio sentencing scheme has problems, Judge Bressler cautioned.

According to Pros. Taylor, this memo addresses that issue. He feels the issue needs to be addressed now, repeating that the Sixth Circuit District Court causes him great concern.

Dir. Diroll pointed out that *Blakely* takes away judicial power in favor of juries, while *Booker* ironically solves the problem by expanding judicial power without concern for juries. If the whole range is contemplated by the jury's verdict, as he believes is the case in Ohio, then it seems likely that the Sixth Circuit Court would give deference to the Ohio Supreme Court regarding State statute.

Pros. Taylor expressed doubt that they would do so.

Judge Bressler expressed concern that this proposal would invite a challenge to every sentence beyond the minimum.

Blakely is already being raised as an issue on appeal in many non-minimum cases, Pros. Taylor argued. He contended that the General Assembly wants to avoid future litigation over *Blakely.*

OSBA delegate Atty. Kravitz agrees that to recommend anything now would send the wrong signal. Noting that Ohio's statutes talk about mandatories, he stressed that there's no other reference point for sentencing in Ohio than these statutes. If necessary, he offered, all "shalls" could be made advisory, which would effectively make Ohio's sentencing scheme indeterminate once again along *Booker* lines.

He pointed out that, when the federal system held that the guidelines were advisory, they were advisory in the context of statute §18 USC 3553(A) that there are seven factors to be determined in reaching an appropriate sentence. The guidelines were one of seven factors that were mandatory until *Booker* and *Fanfan*. Now they are advisory in the sense that the sentencing guidelines have to be considered in addition to six other general factors that have been considered by Congress as relevant to sentencing.

If the Ohio Supreme Court determines that these mandatory directions are advisory, he remarked, and essentially that Ohio has an indeterminate sentencing scheme, it would probably alleviate most *Blakely* concerns. However, he doesn't think that is what the Ohio Supreme Court wants to do. He personally feels it would result in the worst of all worlds. He argued that Pros. Taylor's proposal does not alleviate the *Blakely* problem.

Atty. Gallagher declared that the proposal would effectively prevent judges from sentencing to the minimum segment of the range.

According to DRC Research Director Steve VanDine, if the current structure were to be overturned, the legislative response could be a disaster. If the average prison stay were to increase by only one month, it would mean an additional 2,100 inmate beds.

The proposal puts the judge in a difficult position, Judge Bressler warned, noting that judges will look at this as the same requirement regarding findings for a sexual predator.

If cost is a key reason for not doing this, Pros. Taylor conceded, maybe it shouldn't be done.

Judge Griffin suggested strengthening the discretion in S.B. 2 in light of *Booker* with language stating that current §2929.11(B) is legislative guidance for finding the sentence that is most reasonably calculated to achieve the overriding purposes.

Pros. Taylor feels that would still leave some uncertainty.

In *Apprendi* and *Booker*, said Judge Griffin, the courts were looking at the conduct of the offender who committed the offense and facts that had to be found or not found in the conduct evidenced in the offense. That, he argued, is not what Ohio's statute deals with. It does not require any additional finding of fact with respect to the conduct of the offense. It relates to the conduct of the offense that is already found and its relationship to the appropriate punishment. He feels that many people are overreacting to *Blakely, Apprendi, Booker,* and *Fanfan*.

Atty. Gallagher fears that if the favored presumption is thrown out, we'll lose the intents and purposes of the sentencing guidance.

Preferring to wait for a decision by the Supreme Court, Pros. White suggested taking some precaution by looking at what kind of decisions might need to be made in the event of a negative decision by the Ohio Supreme Court. It might behoove the Commission to consider how to limit potential damage.

Noting that it is likely that the Ohio Supreme Court will be taking action on some of these cases soon, Judge Schmitt urged the Commission to wait for that guidance.

Atty. Kravitz cautioned that the Ohio Supreme Court could end up crafting a remedy that no one would anticipate. He feels S.B. 2 gives good direction but, under the worst case scenario, he fears that Ohio might be forced back to indeterminate scheme and lose today's guidance. He does not want to see dramatic consequences arise out of these cases. Acknowledging that the changes brought about by S.B. 2 work well, he does not want to see that progress unraveled.

On a motion by Pros. White, seconded by Judge Schmitt, the Commission unanimously agreed to:

Take no action at this time on Pros. Taylor's proposal.

Pros. Taylor thanked everyone for hearing him out.

FORFEITURE

Dir. Diroll reported that the forfeiture bill based on Commission proposals (H.B. 241 sponsored by Rep. Bob Latta) has had two hearings before the House Criminal Justice Committee. Rep. Bill Seitz, he noted, had concerns about the pre-trial procedures anticipated by the forfeiture bill. These involve possible *ex parte* orders and standards for pretrial "hardship" release. Rep. Seitz has concerns regarding the levels of proof required to make a showing of appropriate circumstances to deny property release.

On the *ex parte* orders, Rep. Seitz wants to make sure that there is a reasonable showing before any 10-day extension. Atty. Anderson clarified that Rep. Seitz feels that "good cause shown" does not present a high enough standard. Rep. Seitz feels that the same standard that initiated the 10-day period should be used to continue it.

Regarding the standards for pretrial hardship release, the state must show "by preponderance of the evidence" certain things to exercise authority over the property. Atty. Anderson reported that Rep. Seitz fears that under a "near probable cause standard", the owner will not be able to show hardship. He suggested making the standards the same; i.e., the standard for having provisional title should be the same standard that the State has to show that the property is contraband, proceeds, or evidence. As soon as the sale makes that showing, there is no pretrial hardship release for that kind of property. With this in mind, it has been suggested to eliminate the probable cause standard under proposed §2981.03(A)(2) and to insert the standard that the State had to meet to get provisional title in the first place.

When there is no good reason why the defendant had the property except due to the commission of the offense, Rep. Seitz wants the standard changed back to a "preponderance of the evidence" standard. Showing "probable cause" would be too low of a standard. Atty. Anderson gave Rep. Seitz credit for doing a good job of digesting a difficult bill.

Atty. Kravitz asked for more insight on the hearings on the bill.

Dir. Diroll reported that the House Criminal Justice Committee meets at 2:30 p.m. on Tuesday afternoons. Noting that some legislators are confused about the current forfeiture law, he encouraged other Commission members who have worked on the bill to consider testifying at the hearings. Given term limits for legislators, he noted that few of the current legislators have ever voted on a forfeiture law.

It has been difficult trying to get past the mistrust of people who have no knowledge of current forfeiture law, said Atty. Anderson. Once that was achieved, however, Rep. Seitz saw the importance of this bill. This bill is more rights-oriented and will be good for both prosecution and defense.

It would be good, said Atty. Anderson, for legislators to hear from both prosecution and defense member of the Commission as to why these changes are important.

TRAFFIC ISSUES

"Mandatory" Class 7 Suspension. Dir. Diroll noted that Class 7 suspensions last for up to one year at the judge's discretion. Some are optional and some are mandatory. Questions have been raised about "mandatory" suspensions of "up to" one year, he said. Judges wonder if they are allowed to impose a mandatory period of "0" or if some actual time is required. Some judges feel they must impose at least a one day suspension. He wonders if one minute or one hour will suffice. John Guldin, of the Bureau of Motor Vehicles, has pointed out that BMV needs a precise start and end date in order to properly enter the suspension.

Dir. Diroll suggested that the Commission review the "mandatory" Class 7 suspensions and decide if some of these should be optional. These include: §4510.11(C)(1) – driving under suspension or in violation of a restriction; §4510.12(D) – driving without a valid license when the offender has one or more prior offenses within three years or when the license expired more than six months ago; §4510.14(E) – driving under an OVI suspension; §4510.16(B)(1) – driving under a financial responsibility (FR) suspension; & §4511.203(C) – wrongful entrustment.

Under wrongful entrustment, the court will not take an innocent owner's vehicle, but if the owner *knew* that the defendant was under suspension, or had no valid driver's license, etc., he/she does not fit under the definition of "innocent owner" and should lose driving privileges.

Judge Spanagel argued that OVI and wrongful entrustment should remain mandatory.

The goal, Public Defender Yeura Venters contended, should be to get these people driving lawfully.

The FR suspension, said municipal court Judge Jeff Payton, happens for various reasons, some of which may be completely unintentional.

Judge Spanagel said maybe there should not be any hard-time suspensions under Class 7. He feels that all drivers under this suspension should be eligible for driving privileges. Others countered that driving under an OVI suspension should remain mandatory.

Judge Payton contended that most of mandatory Class 7 suspensions are cases where the offender cannot get a license reinstated without appearing before a judge again. Adding a mandatory suspension, he said, does not cure the behavior. He suggested making certain mandatory suspensions discretionary by changing "shall" to "may" or taking the suspensions that were mandatory before S.B. 123 and make them mandatory again and make the rest discretionary.

Discussion continued regarding noncompliance issues involved in FR suspensions and questions regarding the rationale for distinction between mandatory and discretionary suspensions.

Eventually, the Commission unanimously approved Judge Spanagel's motion after it was seconded by Pros. McIntosh:

> **Recommend that the General Assembly change "shall" to "may" on Class 7 suspensions that did not previously have a mandatory suspension and keep "shall" under those that did have a mandatory suspension before S.B. 123.**

Dir. Diroll asked what the minimum required time should be for those that remain mandatory.

Judge Spanagel recommended a 30-day minimum, which will give the court time to get notice of the suspension to BMV, giving BMV time to get it in the computer, and because a 30-day suspension does not trigger an additional reinstatement fee.

Most of the people facing Class 7 suspensions are already under some kind of suspension anyway, said Judge Payton.

Unanimously, the Commission approved Judge Payton's motion, seconded by Judge Spanagel:

> **To recommend that the minimum range of a Class 7 Suspension should be 30 days, with no additional reinstatement fee.**

"Reckless" Driving Suspension. Before S.B. 123, judges had discretion to suspend a license if they found that the driver's conduct was reckless. This option fell aside in S.B. 123 but was resuscitated in H.B. 52. However, Dir. Diroll noted, it was placed in Class 5, which carries a 6 month to 3 year suspension, rather than Class 7's up to one year. Since the suspension is optional, it seems odd to require a six month minimum, he added.

Judge Spanagel suggested adding a reference to the old language in §4511.20's definition of reckless operation and placing this within the struck language of new §4510.15.

After some discussion, the Commission approved Judge Spanagel's motion, seconded by Judge Payton:

> **To propose amending §4510.15 by deleting "violation of any such law ordinance relating to reckless operation" and inserting "in a manner that creates a significant risk to public safety" and by changing Class 5 to Class 7.**

Hit/Skip Law. Failure to stop and disclose one's identity at a crash scene on a public way or at any other public or private place is an M-1. The penalty increases to a felony "if the violation results in serious physical harm or death." In other words, said Dir. Diroll, the offense is *skipping*, not *hitting*. Prosecutors have had difficulty proving that the serious physical harm or death was caused by leaving the scene rather than by the collision itself. City Attorney John Madigan suggests clarifying that the penalty escalates when severe harm results from either the collision *or* the later fleeing.

Mr. Diroll suggested that, if the accident or the fleeing leads to serious physical harm or death, then a felony penalty kicks in.

Judge Spanagel's motion, seconded by Judge Payton, was approved:

> **To recommend inserting language in §§4549.02 and 4549.021 to clarify that, if the "accident, collision, or this violation" results in serious physical harm or death, then the offense becomes a felony.**

State Highway Patrol Capt. John Born noted that, given recent changes in terminology, the word "accident" needs to be changed to "crash".

Fleeing, Eluding, and Failing to Heed. Dir. Diroll stated that fleeing and eluding are serious offenses, and each carries a hard mandatory three year suspension. However, S.B. 123 included failure to heed (*i.e.*, while directing traffic), in this mandatory suspension provision, which seems harsh. Flexibility is needed, said Dir. Diroll.

He proposed language that would split "failure to heed" off and make it a less serious suspension.

Capt. Born noted that testimony on this offense came from the Columbus Police Department and others.

Dir. Diroll pointed out that the offense previously was a minor misdemeanor with a 30-day to 3-year suspension.

Some cases where this may be charged are somewhat harmless occurrences, Pros. McIntosh acknowledged. Where it is more serious, other charges can usually be made as well, which would allow tougher penalties.

Capt. Born acknowledged that he understands the desire for more discretion on the lesser offenses.

Judge Bressler recognized a need to leave teeth in the statute but suggested toning it down. Class 5 would keep it mandatory but would reduce the minimum to 6 months. Thus it would not weaken the charge.

Atty. Anderson asked if failure to heed could be made a separate offense so as not to diminish the crimes of fleeing and eluding.

The Commission approved Capt. Born's motion, seconded by Judge Spanagel:

> **Recommend making the failure to heed suspension discretionary when it does not risk serious physical harm. If failure to heed involves serious physical harm, it would carry a mandatory Class 5 suspension.**

Out-of-State Drug Suspension Privileges. Currently, the language for driving privileges for those drivers given suspensions under the drug laws of another jurisdiction is limited to "occupational" privileges. Dir. Diroll suggests amending the language to make the privileges consistent with in-state drug suspensions which allow "limited driving privileges". By acclamation, the Commission agreed:

> **To recommend amending §4510.17 to make out-of-state drug conviction suspension consistent with in-state drug suspensions by allowing "limited driving privileges".**

Driving Under a Points Suspension. Driving under a 12-points suspension is an M-1, with a mandatory 3-day jail term. Because the penalty for this offense is buried in the points law (§4510.037(J)) there tends to be confusion over its application and penalty. Dir. Diroll recommended making the penalty more visible by placing it with other DUS offenses in new §4510.18.

Judge Spanagel suggested adding an optional Class 7 suspension.

The language "In addition to any other penalties authorized" and "mandatory term of not less than three days", said Judge Payton, suggests that anything over 3 days is mandatory, which would suggest that a suspension over 30 days would be mandatory as well.

The language, said Judge Spanagel, should read "No court shall suspend the first three days imposed" as opposed to "mandatory not less than".

Atty. Venters seconded Judge Spanagel's motion to include an optional Class 7 suspension, but the motion failed in a close vote.

No Valid Operator's License. An error in S.B. 123 erased the penalty for driving without a valid license when the driver never had a license. That problem was identified by the Commission and corrected last summer. However, the solution may require the prosecution to prove that the person *never* had a valid license in any jurisdiction, commented Dir. Diroll.

Judge Payton contended that those who have never had a license need to be separated out from those who have allowed a license to expire.

By acclamation, the Commission approved the following proposal:

> **To propose striking the following language in §4510.12(B)(1): "If the trier of fact finds that the offender never has held a valid driver's or commercial driver's license issues by this state or any other jurisdiction" and insert "Except as provided in division (B)(2) of this section".**

Driving Without Restricted Plates. Dir. Diroll remarked that confusion remains about which law is violated when an offender who is ordered to display scarlet-letter plates drives without them. Some have argued that the driver is guilty of an M-1 DUS, while others argue that he is driving in violation of a §4510.11 restriction.

Judge Spanagel suggested pulling it out of the restricted plate section (§2945.03) which describes what to do if you have the plate. He declared that the offense is a minor misdemeanor with no points because the offender is driving outside of a restriction imposed by the court.

There could be a suspension for the violation, said Atty. Gallagher, because the offender is violating a court order.

Judge Payton recommended making the offense an M-1, noting that the penalty should be more severe than for a minor misdemeanor because the offender is violating a court order and is not driving within the realm of the privileges. He questioned, however, whether another member of the family caught driving the vehicle, without the restricted plates, would be in violation of this statute.

Dir. Diroll clarified that the requirement does not go to the vehicle, but to the driver. Therefore, other members of the family can legitimately drive the vehicle without the plates.

By acclamation, the Commission agreed:

> **To take no action at this time on the statute related to the violation of driving without court-ordered restricted plates.**

Certifying Electronic Monitoring Devices. When a court orders electronic monitoring, the device must be "certified". Certification had been conducted by the Bureau of Criminal Identification and

Investigation until H.B. 490 went into effect. At that time, said DRC Counsel Jim Guy, people falsely assumed that the process of certifying these items was transferred to DRC from BCI&I.

Unanimously, the Commission approved the motion offered by DRC designee Steve VanDine and seconded by Judge Payton:

> **To recommend reviving the process for BCI&I certification of monitoring devices, to be placed in §2929.01 and §109.66.**

Financial Responsibility Suspensions. Under S.B. 123, a driver under an FR (no insurance) suspension receives a 90-day suspension with possible privileges on first conviction, a one year suspension with no privileges on second conviction, and a two year suspension with no privileges on the third conviction, noted Dir. Diroll.

Judge Spanagel argued that if the driver gets a suspension, and cleans it up by getting insurance, he should be allowed limited privileges.

Noting that this is an administrative suspension for noncompliance, Dir. Diroll said that some practitioners believe it should come back to court, and not go to the Bureau of Motor Vehicles. In court cases, Asst. Pros. Steve McIntosh argued that language is needed to make clear that the city prosecutor represents BMV in local FR privileges cases.

The Commission approved Judge Spanagel's motion, seconded by Atty. Venters:

> **Recommend amending §4509.101(A)(2)(c) so that a driver under FR suspension has the same privileges potential as a driver under (2)(b) but with a 30-day hard time suspension instead of a 15-day suspension. In §4509.101(N), specify that the city prosecutor, or similar legal authority, represents BMV in FR privileges cases.**

OVI "at the Time of Operation". OVI law says that, for a violation, the person must be impaired "at the time of operation". Mr. Diroll noted that a driver may have ingested enough alcohol to be over the limit when tested one or two hours after the stop, but may not have reached unlawful impairment at the time of the stop.

Judge Payton remarked that law enforcement cannot test "at the time of operation".

Although dissenting votes were cast by Attys. Venters, Gallagher, and Lane, the Commission approved the motion offered by Asst. Pros. McIntosh and seconded by Judge Schmitt and Judge Spanagel:

> **To recommend amending §4511.19 by deleting the language "at the time of the operation" as a prerequisite to OVI prosecution.**

OVI Vehicle Forfeiture. On conviction for a third OVI, the vehicle must be forfeited if owned by the offender. Some defendants transfer the vehicle's title to another to avoid forfeiture. Magistrate Gary Schaengold of the Fairborn Municipal Court would like to see the law amended to place an administrative block on such transfers to discourage avoiding the penalty and to protect innocent purchasers.

According to Judge Spanagel, if the vehicle is transferred, the Blue Book Value of the vehicle can be added to the penalty.

Acknowledging that similar language exists in proposed forfeiture law, Dir. Diroll agreed to examine this further within other statutes for clarification.

Terminating ALS. §4511.197(D) states that a refusal ALS continues even if the driver is later found not guilty of OVI, while the positive test ALS terminates if the person is found not guilty. Due to an oversight by the drafters, §4511.191 fails to terminate the positive test ALS on a not guilty finding.

By acclamation, the Commission approved Dir. Diroll's suggestion:

> **To propose amending §4511.191 to make it consistent with §4511.197(D).**

Mayor's Court Reporting Deadline. Mayor's courts now must make annual reports. A time constraint exists, however, because registration is required in January when many mayors are new. More time is needed to allow mayors time to comply with this requirement.

By acclamation, the Commission agreed:

> **To propose amending §1905.033 to change the mayor's court registration month from January to February.**

Mayor's Court Payment Plans. Courts are allowed to order payment plans for license reinstatement fees, said Dir. Diroll, but the authority is not extended to mayor's courts. By acclamation, the Commission agreed:

> **To recommend amending §3410.10 to authorize mayor's courts to offer payment plans for driver's license reinstatement fees.**

FUTURE MEETINGS

Future Commission meetings are tentatively scheduled for July 21 and September 22.

The meeting adjourned at 1:20 p.m.