Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
September 20, 2007

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reginald Routson, Vice-Chair
Major John Born, representing State Highway Patrol
Superintendent Richard Collins
Common Pleas Court Judge W. Jhan Corzine
Defense Attorney Bill Gallagher
Kim Kehl, representing Youth Services Director Tom Stickrath
Bob Lane, representing State Public Defender David Bodiker
Common Pleas Court Judge Andrew Nastoff
Mayor Michael O'Brien
Appellate Court Judge Colleen O'Toole
Municipal Court Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins
Prosecuting Attorney David Warren
Sheriff Dave Westrick

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Ex. Director, Eastern Ohio Correctional Center
Lynn Grimshaw,
Jim Lawrence, Ohio Halfway House Association
John Madigan, Senior Attorney, City of Toledo
Gary Yates, Chief Probation Officer's Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, Extern

GUESTS PRESENT
Sarah Andrews, Department of Rehabilitation and Correction
Monda DeWeese, Community Alternative Program
Jim Gorman, Department of Alcohol and Drug Addiction Services
Jim Guy, Department of Rehabilitation and Correction
Roman Jerger, legislative aide to Senator Timothy Grendell
Jeff Kasler, Legislative Service Commission
Tezla Lewin, Citizens United for the Rehabilitation of Errants
Irene Lyons, Department of Rehabilitation and Correction
Becki Park, Senate Republican Caucus
Erin Rosen, Ohio Attorney General's Office

Corey Schaal, Ohio Supreme Court
Matt Stiffler, Legislative Service Commission
Lisa Valentine, legislative aide to Representative Bob Latta

Common Pleas Court Judge Reggie Routson, Vice-Chair, called the September 20, 2007 meeting of the Ohio Criminal Sentencing Commission to order at 9:50 a.m.

Director David Diroll welcomed the two newest members to the Commission, municipal representative Mayor Michael O'Brien from Warren and Judge Colleen O'Toole from the Eleventh District Appellate Court, also located in Warren.

JUDICIAL RELEASE

Director Diroll reported that, when the Department of Rehabilitation and Correction developed its "omnibus bill," H.B. 130, the Sentencing Commission was asked to revisit issues regarding judicial release. As a result, when the Commission drafted a proposal a few months ago that simplified the judicial release statue by tying eligibility to the length of the sentence, rather than to the class of felony. The judicial release procedure would remain the same, whereby the judge would hold an open hearing before granting a release. The initial proposal also suggested allowing an offender to file a judicial release petition as soon as a mandatory prison term ends instead of requiring the offender to wait 30 or 180 days. The Ohio Prosecuting Attorneys Association, however, argued that the change would be unfair to offenders serving time for nonmandatory offenses, who must wait at least 30 days to file. As a result, the latter provision is not included in the current version of the bill.

INTERVENTION IN LIEU OF CONVICTION

Another issue addressed in H.B. 130 is intervention in lieu of a conviction. DRC suggests making the statute more flexible for offenders who have a prior conviction without having served prior prison time. According to Sarah Andrews or DRC, the bill would narrow application of the statute so that F-1, F-2, and F-3 drug offenders would not be eligible. F-4 and F-5 drug offenders would only be eligible if no prior prison time had been served. The final determination would be at the judge's discretion and a prosecutorial veto would be allowed on cases involving F-4 offenses.

Judge O'Toole remarked that the Judicial Conference is currently studying specialized dockets, such as mental health and drug abuse dockets, with a focus of getting the offenders into treatment. Noting that mental health dockets are handled under the treatment in lieu statute, she raised concern about how the proposed amendment would affect that statute.

If taken literally, Dir. Diroll noted, the old treatment in lieu statute took a zero tolerance stance by mandating imprisonment for any violation of the treatment sanction. Since research shows that substance abusers rarely recover without some backsliding, the Commission's proposal offered a broader range of options that would

take this into account. It was embraced by the General Assembly when the name was changed to "intervention" in lieu of conviction.

Common Pleas Court Judge Andrew Nastoff noted that his uses intervention with its drug court. Most drug courts, he remarked, realize that zero tolerance will not work with substance abusers.

The judge has to be careful about suggesting mental health, said Judge O'Toole, because it might be perceived as intervention in lieu.

Ms. Andrews reported that the bill has proceeded through four hearings in the House Criminal Justice Committee and, with recent agreements, she is optimistic that it can pass out of Committee. She noted that the bill also creates the Reentry Coalition which makes sure that various treatment agencies are represented with the drug courts.

Judge O'Toole asked whether this bill addresses costs and fines. She noted a case where a man could not get eligibility for medical benefits due to exorbitant fines and costs owed.

Some of those concerns are expected to be addressed in a future bill, said Ms. Andrews.

IMPAIRED DRIVING

Dir. Diroll reported that Substitute S.B. 17 has passed the Senate and awaits hearings in the House of Representatives.

Monitoring Devices. H.B. 279, which deals with interlock devices, was introduced by then-Rep. Seitz in June but has not been heard yet.

The latter bill encourages a greater use of the ignition interlock device as a condition for obtaining limited driving privileges when convicted of OVI. With OVI suspensions, the first period is regarded as a "hard" suspension, with no driving privileges. After serving the hard suspension, the offender can petition for limited driving privileges to work, school, or medical appointments. As a condition of driving privileges, the offender may be required to use an ignition interlock device on his vehicle. The use of this device is not free.

While many courts charge the per diem to the defendant, Judge O'Toole noted that indigent defense fees are also funneled into court costs.

The sentencing change in the bill involves the current mandatory jail term for the first time offender, said Dir. Diroll. Rather than the current 6-month to 3-year suspension, it allows flexibility by offering the option of an intervention program in lieu of jail and a Class 5 suspension that must last at least 270 days and the use of a trans-dermal alcohol monitor.

Alcohol Monitoring System has a monopoly in the industry, Gary Yates of Butler County contended, since it is the only company that provides the trans-dermal SCRAM (Secure Continuous Remote Alcohol Monitor) device which monitors 24 hours a day. It places an additional financial burden to the court, which must provide personnel to monitor the device.

Municipal Court Judge Kenneth Spanagel opposes giving a statewide monopoly in the Revised Code. He acknowledged that many judges offer probation on condition that the offender wears this device. In fact, use of the device is often a mandatory condition of bail on the second offense. He clarified that he has no problem if use of the device is optional but he opposes making it mandatory.

Denying bail, said Judge O'Toole, could become a constitutional issue. Noting that recidivism is extremely high among offenders given treatment in lieu of imprisonment, she acknowledged that it is likely that such an offender will engage in substance abuse while on bail.

Judge Spanagel declared that SCRAM does not deter someone from driving. He prefers use of the interlock system because it is better designed to prevent a person from driving while intoxicated. He feels that mandating the use of SCRAM also creates challenges to the funding structure for indigents.

Mandating the use of SCRAM and making the offender pay for it, said Judge O'Toole, creates a challenge in providing a speedy trial. It can increase jail crowding if indigent offenders cannot afford the device.

Judge Spanagel was unsure whether those issues were addressed in the bill.

Forced Testing and Refusals. The bill, said Dir. Diroll, encourages, if the offender has two or more priors, the arresting officer to "use any means necessary" to subject the suspect to a chemical test. There is language included that exempts officers from liability.

Judge Spanagel noted that state troopers in California are being trained as phlebotomists so that they can draw blood for substance abuse tests.

Representing the State Highway Patrol, Major John Born remarked that in some Ohio counties a search warrant is issued to transport the offender to a hospital for a blood draw.

Dir. Diroll noted that the bill looks at prior refusals as well as prior convictions in counting the driver's prior violations.

Refusal in connection with a prior conviction now becomes an element of the current offense, said Judge Spanagel.

A longer administrative suspension can be imposed because it gets at the prior behavior, said Dir. Diroll. Additional changes would include mandating driver intervention and expanding the immobilization or forfeiture provisions to apply to all vehicles owned by the defendant, irrespective of registration.

The three main aspects to the proposal, said Judge Spanagel, include potential treatment, assessment, and a drivers' intervention program. Current law mandates alcohol treatment on the second offense but does not clarify whether that is short-term (2 or 3 days) or long-term treatment, or on an inpatient or outpatient basis. He stressed that a 3-day program qualifies as an educational program, not treatment. The

proposal mandates an assessment on the second offense. It is not mandatory that the court acts on that assessment the first time.

Representing the Ohio Halfway House Association, Jim Lawrence believes the judge should be expected to follow up and act on the assessment on the second offense. Driver intervention programs, he noted, are supervised by DADAS. He echoed Judge Spanagel's concern that most 3-day programs do not offer treatment.

Judge Routson remarked that the hard core class of repeat offenders has been around forever.

Mr. Lawrence noted a drop in the number of first offenders but an increase in the number of repeat offenders.

Major Born reported that available data does not capture or link the level of alcohol with a repeat offender, or with a crash.

According to Judge Spanagel, alcohol levels are now being listed on convictions.

Unfortunately, said Major Born, the problem is not getting any better with repeat offenders.

Mr. Lawrence contended that if a repeat offender does not get into treatment, he is going to keep driving under the influence.

Contrary to popular belief, said Major Born, alcohol related crashes have decreased by about 50% in the last 20 years, from over 800 to a little over 400 per year. Regardless there will always be 33,000 habitual alcohol offenders in Ohio, as an accumulated number.

If the jail time penalty is doubled, Mr. Lawrence pointed out, it also doubles the cost to the county.

Judge Nastoff remarked that when a defendant enters his court with a felony DUI, he knows that defendant has not been through any meaningful treatment program. He has only had 3 days of watching a video.

The treatment argument tends to be somewhat abstract to legislators, said Dir. Diroll, because treatment may or may not work.

If it gets the offender to stop driving, Judge Spanagel argued, then some progress has been made.

Representing DADAS, Jim Gorman reported that the most effective treatment programs last a minimum of 90 days.

It is surprising, remarked Mr. Lawrence, how many third time offenders have had no treatment. He contended that, if the offender's license is suspended but no treatment is ordered, the offender will only end up drinking and driving again.

Major Born declared that repeat DUI offenders are treated differently than other repeat offenders with discussions centering around treatment versus other kinds of penalties. He pointed out that this debate has already taken place in the legislative committee hearings.

Mr. Lawrence claimed most people would rather have DUI offenders get treatment than be punished. They want to change the behavior of the offender. This is reinforced by the knowledge that punishment without treatment doesn't change anything.

A good data base is needed, declared Judge Spanagel.

A sentence of up to 2 ½ years, said Judge Nastoff, usually means 6 to 10 months in prison then treatment on the way out, leaving 15-18 months hanging over the offender's head if he violates post-release control.

Representing the Attorney General's Office, Erin Rosen reported that there was consensus at a recent legislative hearing that the blood alcohol test had to be conducted by someone licensed to do so, not by an officer on the side of the road.

A refusal of the sobriety test used to guarantee conviction, said Judge Routson, but that no longer seems to be the case.

Now, said Atty. Rosen, if the driver doesn't have the sobriety test, the jury doesn't want to convict him of OVI.

The problem is exacerbated by the fact that people don't trust the police as much either, Judge O'Toole added.

According to City Attorney John Madigan the odds of conviction seems to depend on the probable cause the officer had for pulling the driver over initially.

Common Pleas Judge Jhan Corzine noted that the public perception of refusals tends to differ from county to county.

It differs particularly between rural versus urban counties, said Mayor O'Brien.

Dir. Diroll sought input on where to place the focus regarding sobriety test refusals.

Judge O'Toole expressed concern over the language which allows law enforcement to pursue sobriety testing "by any means necessary". She recommended amending the language to read "by any reasonable means necessary".

Judge Nastoff feels certain that law enforcement would appreciate guidance on procedural and conduct issues regarding refusals.

Dir. Diroll noted that some judges use warrants to ease the problems associated with testing requests.

It is imperative, said Judge Routson, is that the blood is drawn by a qualified person.

Judge O'Toole suggested charging the offender under both the refusal and OVI statutes.

Dir. Diroll asked if there is a need to minimize the confrontation between the arresting officer and the accused.

Atty. Bill Gallagher fears that if a defendant has two or more priors on his record, then law enforcement will automatically take him to a facility to have his blood drawn before even asking for voluntary consent or for a field sobriety test.

A driver theoretically gives implied consent when he gets his license, said Dir. Diroll.

Atty. Madigan agreed that the language regarding a driver's refusal or not needs to be clarified.

Some people may be willing to do a breathalyzer and/or urine test, said Atty. Gallagher, but not a blood test.

Judge O'Toole suggested amending the language to encourage law enforcement to use "the least invasive means."

Atty. Madigan contended that there should be consequences for making the police go through such a detailed process.

The intent, Judge Nastoff pointed out, is to develop a way to gain compliance without going to the trouble of acquiring a warranty. The challenge is when a warrant is issued and the offender still refuses. He feels that, if there is existing law that addresses analogous cases, we should draw on that for creating better language within the statute.

Judge Routson declared that some hospitals refuse to get involved or conduct a blood draw without a search warrant.

Many hospitals, said Mayor O'Brien, have only one phlebotomist on staff during the night. This statute would require them to stop everything and coerce an uncooperative driver to submit to a test that he doesn't want. He declared that it opens up a lot of other issues regarding practicality. Although the bill may legislate a mandatory blood test, it may not be practical to implement.

A multiple offender who refuses to give a breath sample must be advised that law enforcement has the right to take him into custody and transport him to a medical facility for a blood test to determine his sobriety level. This could result in a charge of refusal as well as the initial OVI charge, said Atty. Gallagher

The key, said Judge O'Toole, is how long the chemicals stay in the blood system.

Under current law, said Judge Nastoff, law enforcement is not required to stop at the point of refusal.

Wrongful Entrustment. Director Diroll noted that, under the wrongful entrustment statute, the owner of a vehicle is guilty if owner knew or should have known that the person to whom they entrusted the vehicle was intoxicated, under suspension, uninsured, etc. The bill would make this a strict liability offense, he added. An affirmative defense could

be made of the owner did not have knowledge after a reasonably diligent inquiry or a reasonable reliance of observing the person.

Judge Routson argued that there needs to be a funding mechanism in place to handle the costs of impounding vehicles under this statute.

Judge Spanagel remarked that his jurisdiction "clubs" the car pretrial rather than towing it.

According to Mayor O'Brien, there are occasions when the price of the tow lot exceeds the price of the car.

Assessments Again. Mr. Lawrence insisted that, in regards to repeat OVI offenders, current law needs to be retained regarding mandating an assessment because if an assessment determines that the offender needs treatment then, on a second DUI, the judge is mandated to provide treatment. For many offenders this is the only way to assure that they will get the treatment needed.

Judge Spanagel favored mandating assessments but argued that the judge should not be mandated to order treatment. He preferred offering the judge discretion on that issue.

According to Mr. Gorman, assessments could be mandated for everyone without requiring the driver intervention program.

S.B. 17 wants a second-time offender to go to a 3-day treatment program plus get an assessment, said Judge Spanagel, then mandates that the judge order treatment for the offender if the assessment determines that it is needed.

Mr. Lawrence favors the provision that if the offender needs treatment, then it should be mandated that he receive it.

Judge O'Toole moved to recommend making use of a SCRAM optional and deleting the 3-day mandatory intervention in lieu of an assessment.

Judge Spanagel recommended an amendment to the motion to oppose the driver intervention program as a vehicle to treatment. He also stressed that the recommendation to make the use SCRAM option should apply to both post-sentencing and pretrial bail. He then seconded the motion.

Votes. The Commission unanimously approved Judge O'Toole's motion as amended and seconded by Judge Spanagel:

> **To recommend that the driver intervention program and use of SCRAM as an alcohol monitoring device be optional in S.B. 17, coupled with a mandatory assessment of any defendant alleged to have committed a second OVI.**

Atty. Gallagher recommended sending a letter to legislators stating that the Commission would like to weigh in on the issues addressed in S.B. 17 and H.B. 279.

The Commission unanimously approved Judge Spanagel's next motion, seconded by Judge O'Toole:

To oppose making wrongful entrustment proposal into a strict liability offense.

Other Issues. Judge Spanagel then expressed support the concept of the public internet registry to keep track of OVI offenders. Judge O'Toole pointed out the value of working in collaboration with the Ohio Court Network which is networking all of the dockets throughout Ohio.

Judge Spanagel remarked that he prefers ordering the use of interlock devices because they are more specific to the crime and actually serve well to keep the offender off the road when he has been drinking. They are also more affordable than the SCRAM devices, which require the additional cost of monitoring.

According to Atty. Gallagher, interlock devices tend to report a lot of false positives.

For indigents, said Mr. Lawrence, it will eat into the treatment funds which are already in short supply. He urged the need to express our concerns about HB 279 before it goes too far.

***FOSTER* FALLOUT**

Judge O'Toole remarked that the Appellate Courts really need help with understanding and administering the Ohio Supreme Court's ruling in *State v. Foster*. She stated that the case has caused confusion as to whether the court has to make any findings, no findings, or some findings.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for October 18, November 15, and December 20, 2007 and January 17, February 21, March 20, April 24, May 22, June 19, and July 17 in 2008. The October 18 and November 15, 2007, meetings will be for the Simplification Committee only. The full Commission will next meet December 20, 2007.

The meeting adjourned at 2:50 p.m.