Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
October 16, 2008

MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reginald Routson, Vice-Chair
Paula Brown, Ohio State Bar Association Delegate
Common Pleas Judge Jhan Corzine
Juvenile Court Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Prosecuting Attorney Jason Hilliard
Atty. Bob Lane, representing State Public Defender Timothy Young
Mayor Michael O'Brien, City of Warren
Jason Pappas, Fraternal Order of Police
Dave Schroot, representing Youth Services Director Tom Stickrath
Prosecuting Attorney, Jim Slagle
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
John Madigan, Senior Attorney, City of Toledo

STAFF PRESENT
Andrea Clark, extern
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, intern

GUESTS PRESENT
Amanda Blust, legislative aide to Speaker Jon Husted
Monda DeWeese, SEPTA Correctional Facility
Jim Guy, counsel, Rehabilitation and Correction
Scott Longo, Attorney General's Office
Heather, legislative aide to Speaker Jon Husted
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Phil Nunes, Ohio Justice Alliance for Community Corrections
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News

Chief Justice Thomas Moyer, Chair, called the October 16, 2008, meeting of the Ohio Criminal Sentencing Commission to order at 9:50 a.m.

DRIECTOR'S REPORT

Director Diroll reported that the newest battleground in the Apprendi, *Blakely*, *Booker* line of federal cases is *Oregon v. Ice*, dealing with the jury's role in the factfinding needed to impose consecutive sentences. The Ohio Supreme Court anticipated the issue and addressed it in *Foster*, but the federal decision could still have consequences here, he noted.

Commission legal intern Shawn Welch reported that the case could increase the jury's power. He offered a summary of recent Ohio court decisions on criminal sentencing issues and pending United States Supreme Court cases.

Defense Attorney Bill Gallagher remarked that fact finding regarding consecutive sentences in *Ice* will affect whether the Ohio Supreme Court went too far regarding *Foster*.

Commission legal extern Andrea Clark recently attended a symposium focused on the recent inclusion of neuroscience and evidentiary aspects used in legal cases, particularly in place of lie detectors. The new fields of "brain fingerprinting" and "brain mapping" are being purported as more accurate forms of lie detectors through the use of EEGs. She is still researching the topic and hopes to present a summary at the next Commission meeting.

SENTENCING SURVEY

Dir. Diroll provided a final summary of the findings from the Commission's recent Felony Sentencing Survey. The survey was mailed to all common pleas court judges with felony jurisdiction, every elected county prosecuting attorney, the 34 county public defenders, and the 60 members of the board of the Ohio Association of Criminal Defense Lawyers. Over 200 practitioners responded.

Dir. Diroll segregated the findings by judges, prosecutors, and defense attorneys and compiled a list of the topics where there seems to be broad agreement. Judges and prosecutors tended to concur with one another more than with defense attorneys. The areas showing the broadest agreement involved the least provocative issues, he noted. Dir. Diroll summarized the findings as follows:

Broad Consensus. There was sweeping consensus that it is time to consider a fresh revision of the felony sentencing statutes (at least 2/3rds of each group) and that the Sentencing Commission should play a prominent role in that process.

Overwhelmingly, over 80% of the respondents in each group favors the current five degrees of felonies and a determinate sentencing system. A few would like to expand indeterminate sentencing to additional serious felonies.

While a majority in each category feel that the statutory lists of community control sanctions are adequate, a smaller majority said that the actual options available in their counties are sufficient. Of those raising concerns, several called for more treatment options, whether

for drug offenders or those with mental health issues. Over 85% in each group believes that expanded nonprison sanctions should be a high budget priority for the state.

Despite significant post-S.B. 2 increases in penalties for certain sexual offenders and serious vehicular offenses, a majority of judges (73%), defense attorneys (96%), and prosecutors (60%) doubt that Ohioans are any safer as a result.

There is general agreement that enough crimes carry mandatory terms and no additional ones are needed (85% of judges, 69% of prosecutors, and 95% of defense attorneys). On the other side of the question, the defense bar contends too many crimes that carry mandatory sentences, but the majority of judges and prosecutors disagree. When asked where to cut mandatory sentences, several judges and defense attorneys targeted all or certain drug offenses.

In 1996, at the Commission's suggestion, the felony theft threshold was raised from $300 to $500. At that time, retailers felt it was too high and could encourage shoplifters. Twelve years later, survey respondents indicated that the threshold is now too low (85% of defense attorneys, 58% of judges, and 50% of prosecutors). Many suggested raising the threshold to $750.

If we examine that issue closer then Common Pleas Court Judge Jhan Corzine believes that we should also look at the types of property involved in theft and other statutes.

Respondents expressed almost no interest in restricting eligibility for placing offenders in Community Based Correctional Facilities. In fact, the majority of judges and defense attorneys believe that eligibility should be expanded. Prosecutors were more circumspect.

Rough Consensus. When asked to rank sentencing goals, there was close consensus among judges and prosecutors, favoring punishment and protecting public safety, while defense practitioners leaned more toward rehabilitation as a top priority. However, public safety and recidivism ranked in the top three for each group. Consistency and cost effectiveness did not rank so high, which does not mean that they aren't important, but that other things are more important.

There also was rough consensus on recidivism. To varying extents, each group favored treating recidivism as either one factor in deciding the sentence or as a factor that increase the penalty within the same offense level. Only a minority in each group favored having recidivism increase the degree of the offense or result in mandatory prison terms.

Dir. Diroll reported that there was general agreement that there should be some kind of sentencing guidelines. A majority of each group felt that some guidance—beyond the basic ranges and options—is needed. But the majorities were smaller among judges (52%) and prosecutors (60%). The overwhelming majority of judges and prosecutors who favor guidance prefer voluntary guidelines over the S.B. 2 approach. Conversely, a majority of defense attorneys favored guidelines with appellate review.

As for particular guidance issues, a majority in each group said that the lists of seriousness factors (§2929.12) should remain. The

majorities were large among judges (79%) and prosecutors (76%), but smaller among defenders (54%). Similarly, the recidivism factors were popular with judges and prosecutors. However, defense attorneys were nearly split on their value, with 46% favoring and 54% opposing them.

A majority in each group support guidance in favor of a prison sentence for some offenders (§2929.14). The groups divided more sharply on whether there should be statutory guidance against prison terms. The judges split almost evenly, prosecutors opposed the notion 58%-42%, and defenders supported it 80%-20%.

Three in four defense attorneys favored revisiting the notion of reserving the maximum sentence for the worst offenders, which was struck by *State v. Foster*. But only about a third of the judges and prosecutors agreed. The groups were similarly divided on returning to the guidance in favor of the minimum term on first commitment to prison, also struck by *Foster*. Only 27% of the judges and 37% of the prosecutors agreed, while about 80% of the defense bar wants to revisit the issue.

There was partial consensus on prison terms and fines. Regarding the current determinate sentence ranges, for first degree felonies, a significant majority of prosecutors (71%) and a majority of judges (55%) believe the 10 year maximum should increase. Only 2.4% of the defense bar concurred. Half the prosecutors would also increase the 3 year minimum for F-1s, while judges would keep it the same and defense attorneys were split between keeping it and reducing it.

Judges and defense attorneys tended to be satisfied with the current F-2 maximum of 8 years, and prosecutors are split on whether to increase it keep the current term. Nearly 3/4ths of the judges would keep the current 2 year minimum. A slight majority of the prosecutors (54%) agree. The defense split between decreasing it (51%) and keeping it the same (46%).

Judges (89%), prosecutors (66%), and almost half the defense (48%) would keep the current F-3 maximum of 5 years. The pattern is almost identical regarding the one year F-3 minimum.

Regarding fourth degree felonies, 2/3rds of the judges and defense attorneys are satisfied with the current 18 month maximum, while 61% of the prosecutors prefer an increase. A majority of all three groups would leave the 6 month minimum intact, although 44% of the prosecutors would increase it.

As for F-5s, 3/4ths of the defense and judges would keep the present 12 month maximum. Half the prosecutors agree, with 44% pushing an increase. A majority of each group would leave the 6 month minimum alone, although 46% of the defense would decrease it.

Substantial majorities of judges and defense attorneys accept prison terms of less than one year for felons. Prosecutors were split on the issue.

Neither the judges (39%) nor the prosecutors (16%) want to craft sentencing statutes that are sensitive to prison population levels, a dramatic difference from the defense bar (90%). Similarly, a majority

of judges and prosecutors would make prison construction a high budget priority, although a significant number of judges (47%) joined the defense bar (98%) in disagreement, unlike the figures on expanding community sanctions.

The overwhelming majority of prosecutors and judges would keep the current felony fine schedule. But 2/3rds of the defense attorneys would decrease the fines.

There was broad consensus on multiple offenses/consecutive terms. Judges (84%), defense attorneys (100%), and prosecutors (58%) agreed the course of conduct matters more than crime charged.

A substantial majority of judges (76%) and prosecutors (89%) say there should not be a limit on consecutive sentences. Conversely, only 10% of the defense attorneys agreed. However, the defense (85%) and prosecutors (55%) generally agreed there should be some statutory guidance on consecutive sentencing. Judges were split fairly evenly (45% for guidance; 55% against). Judges (63%) and prosecutors (68%) generally opposed appellate review of consecutive sentences. The defense bar (93%) dramatically disagreed. Similarly, prosecutors (92%) and judges (77%) disagreed with reviving the cap on consecutive terms, while defense attorneys favored the revival (85%). Only defense attorneys (89%) generally favored addressing the ability to stack multiple counts under *Rance*. 61% of the prosecutors and 59% of the judge disagreed.

Turning to prison management tools, each group seemed comfortable with an administrative release mechanism for aged or infirm inmates, although the prosecutors' concurrence (54%) was smaller than that of defense attorneys (93%) and judges (65%).

Judges (73%) and prosecutors (82%) would revive S.B. 2's "bad time" concept. Only 20% of the defense attorneys agreed. Conversely, only defense lawyers (100%) supported expanding the system of earned credits for participating in prison programs. Judges were fairly split (52% against) while prosecutors overwhelmingly disagreed (81%).

The idea of reviewing long-term inmates for administrative release was rejected by judges (72%) and prosecutors (88%), but embraced by defenders (95%).

Respondents sent mixed signals on the "Boot Camp" process. When asked whether the process for placing inmates should change, simple majorities of prosecutors (58%) and defense attorneys (53%) agreed. Judges disagreed (57%). The close votes, lack of details in the question, and comments jotted on the survey indicate this process could be improved, however.

Dir. Diroll categorized the findings on drug sentencing "provocative." A rough consensus emerged that the distinctions between drug and non-drug sentencing at the same felony levels may be obsolete. 95% of the defense lawyers, 68% of the judges, and 50% of the prosecutors agree that the distinctions should be eliminated. Only the prosecutors as a group have significant mixed feelings on the topic, reflected in their 50-50 split.

Relatively few respondents would increase drug penalties. In fact, 97% of the defense bar and 33% of the judges would decrease the penalties for possession, a high number given the political sensitivity of the response. 78% of the prosecutors and 63% of the judges would keep the same possession penalties. Slightly higher percentages would retain current trafficking penalties. Of course, independent of the actual terms, many judges would like drug penalties to be non-mandatory as seen in other responses.

61% of the judges and 95% of the defense attorneys favored enacting misdemeanor levels for possession of street drugs in addition to marijuana. About a quarter of the prosecutors agree, with the remaining 75% dissenting.

A majority of the judges (53%) and all defense attorneys would expand eligibility for intervention-in-lieu of conviction. A substantial majority of prosecutors (81%) disagree.

Most prosecutors (84%) and a smaller majority of judges (57%) favor keeping drug offenses within the criminal justice system. Again, given the political sensitivity, it surprised me that 43% of the jurists favored shifting possession into the public health system. 83% of the defense attorneys would decriminalize certain possession offenses.

Over 2/3rds of each group believe that OVI sentencing should more closely mirror that for other offenses of the same degree. While some of this reflects a desire to simplify the Code, there also are philosophical concerns at work here. The verdict was split on whether these cases should remain in misdemeanor courts. A solid majority of the prosecutors said no (76%), and an equally substantial majority of defenders said yes. But judges were more split. 46% agreed that the cases don’t belong in felony court; 54% disagreed.

Discussion. Chief Justice Moyer said the survey confirms that the Sentencing Commission has something of value to offer to the legislative procedure and criminal justice system. He recommended that subcommittees should take sections of the survey and review what changes might be needed based on these responses.

Atty. Gallagher suggested contacting legislators to assure that our efforts to address these concerns will be received well.

Not knowing who will be in leadership, Chief Justice Moyer cautioned that we cannot expect any interest until after the election in November. He acknowledged a need to follow-up with legislative heads when the new leadership team is forged.

Although some legislators, said Dir. Diroll, have hinted at a need for another S.B.2 type of reform, it is a little too early to know what to expect from whom. Nevertheless, it might be wise to start working on some segments of concern as revealed by the survey.

Eugene Gallo, Executive Director of the Eastern Ohio Correctional Center, remarked that local officials from the community see the Sentencing Commission as a voice for them when it comes to recognizing changes needed in the criminal sentencing structure. He strongly

recommended sharing the results of this sentencing survey with the Council of State Governments.

OJACC representative Phil Nunes remarked that the response to the question about the Commission's role in future reforms reflects a strong declaration of confidence by the criminal justice community to have the Sentencing Commission act on their behalf. He added that there are some current bills that raise serious concerns among the criminal justice community and warrant the attention of the Commission.

DRC Research Director Steve Van Dine reported that Senate leadership would like to move forward with the "3 strikes" bill, S.B. 208, in conjunction with H.B. 130, DRC's "omnibus" bill. He noted that this will increase the prison population by 14,000 in 10 years. He remarked that 3/5 of the current prison population stays less than 1 year and 80% of those only serve 8 months.

Prosecutor Jim Slagle argued that it is unlikely that the bill will increase the prison population to such an extent. The question, he contended, is who should make up that prison population. He feels it is time to examine what trade-offs should be considered.

Chief Justice Moyer reported that he has not heard any update on the status of the survey to be conducted by the Council of State Governments and what they are likely to recommend. He believes that new leadership will want the Sentencing Commission to help. The first step, he suggested, should be to condense the areas of focus identified by the survey.

Dir. Diroll asked if the focus should be on another comprehensive rewrite of the felony sentencing statutes or on fewer topics.

Given that the most revealing area of the survey is the drug offense category, Mr. Nunes asked how many crimes are drug-related.

Atty. Lynn Grimshaw remarked that he has seen steady growth in the number and percentage of offenses that are in some way drug-related.

33% of prison intake, said Mr. VanDine, consists of offenders entering on a drug offense.

Since the overwhelming majority of survey respondents urge more funding for non-prison sanctions, Pros. Slagle recommends focusing on that.

Don't forget, Judge Corzine remarked, if we urge money for that, it will be taken from someplace else.

If the population shifts from prison to community sanctions, said Dir. Diroll, you can argue to have the money transfer as well.

Atty. Nunes was shocked at the survey response that a slight majority of judges agreed with the overwhelmingly majority of defense attorneys that misdemeanor levels should be available for possession of street drugs other than marijuana.

The problem, said Judge Corzine, is that it would result in transferring those offenders to overcrowded jails, etc. There are basically no resources available for misdemeanor drug offenders.

If we revise the felony sentencing structure, Atty. Gallagher urged that it needs to be done as a whole, not piecemeal.

Mr. VanDine reported that the prison population ran over 51,000 last Monday. He noted, however, that the numbers are not being driven by increased intake. It points more clearly to increases in prison terms generated by *Foster*. He suggested that a more comprehensive approach is needed to solve the problems rather than a smaller approach.

This increase, said Atty. Gallagher, could mean that things were artificially suppressed pre-*Foster,* which reinforces the need to take a comprehensive approach.

Representing the Department of Youth Services, Dave Schroot remarked that the trick will be if the new legislature will support doing a comprehensive approach versus a specific approach. He cautioned that it might open Pandora's Box.

Judge Corzine suggested trying a dual-track approach, noting that some tweaks could make a bigger difference than others. If legislators pass H.B. 130 right away, he noted, they might not be inclined toward another comprehensive overhaul too soon.

If he legislators don't want to hear from the Commission in an advisory capacity, but would be receptive to having us working on something at their will, it would help to determine the appropriate approach, said Mr. Nunes. We don't want to produce a negative piece of legislation.

Local practitioners are concerned about changes that are predicted to take place during the lame-duck session, said Mr. Nunes, while everyone is also gauging the new leadership. He feels it is imperative that the Commission focuses energy on getting a voice on some of these bills.

Judge Corzine also expressed fear about some of the legislation that might get through during the next couple of months and urged the Commission to "bird dog" those bills and point any deficiencies.

Urging the Commission to request a slowdown on S.B. 260 and H.B. 130, Atty. Gallagher moved to send a letter to the legislative leadership concerning pending legislation and its impact. The letter, he suggested, should explain that the Commission would like time to offer incremental changes for consideration.

OSBA representative Paula Brown suggested including some of Mr. Van Dine's data.

Some survey results should be included as well, said Mr. Nunes.

Atty. Gallagher recommended suggesting that the legislators should not make incremental changes when a comprehensive approach is the way.

If we ask the legislators to wait, said Pros. Slagle, then we need to offer a time table of when they can expect something from us.

After lunch, Dir. Diroll suggested that, in light of the survey results, one subcommittee might want to focus on guidance issues while another focuses on some of the drug offense issues. Other areas of focus might include OVI penalties and determining which community sanctioned programs achieve the best results. The programs are wide spread and different approaches tend work for different people.

The focus now, said Judge Corzine, appears to be on the multiple offenders with 5 or 6 OVI convictions.

Juvenile Court Judge Robert DeLamatre questioned who is best equipped to deal with multiple OVI offenders. If the focus is on reducing recidivism, then he wondered how guidance plays into that.

Simplification is needed for OVI offenses to make them easier to understand, Dir. Diroll acknowledged.

By the time the OVI offender has hit the fifth offense, said Judge Corzine, he's already been through the whole treatment gamut or at least had the opportunity for treatment.

According to Judge Reginald Routson many OVI offenders know how to avoid the progression of treatments and can get to a sixth offense without ever completing treatment.

Judge Corzine pointed out that there is no guarantee of success with any treatment program.

It might be best to set up a committee to focus on guidance and ranges, another for drug and alcohol offenses, and a third for community sanctions, said Dir. Diroll. He noted that these are likely to overlap a bit.

Acknowledging that definite sentences might work well for lower level offenses, Pros. Slagle declared that indefinite sentences are needed for F-1 and F-2 offenses.

Culpable Mental States

When the Ohio Supreme Court released its decision in *State v. Colon*, it held that the failure to include the applicable mental state in a criminal indictment was "structural" error that could be raised on appeal. Many practitioners feared that the repercussions could affect many additional criminal statutes that do not list mental states.

Before the September meeting, Shawn Welch drafted a list of crimes that may be affected by *Colon*. Commission members were asked to peruse the list and offer recommendations for the *mens rea* of each.

Judge Corzine remarked that the Ohio Prosecuting Attorneys Association would like to look at the possibility of removing the default to recklessness in §2901.21.

The default should be removed and "reckless" or another appropriate mental state should be inserted wherever it is needed in statute, said Pros. Slagle. The goal is certainty. Part of the problem, he declared,

is how to instruct the juries without waiting 4 or 5 years for cases to get sorted out by the Supreme Court. It involves determining when elements are needed and not needed. Removing the default solves the problem. The prosecutor would proceed by whatever element is included.

Dir. Diroll wondered if something was needed that says there's no strict liability when no other mental state is listed.

It was suggested that the statutory definition of "reckless" under §2901.22(C) might be a suitable place to start. §2901.22 lists the degrees of culpability attached to mental states. Division (C) defines "recklessly" as follows: "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

According to Judge Corzine the word "perversely" should be removed. Reckless is heedless indifference so he feels that something is needed that means more than a substantial lapse.

Some prosecutors use a standard of "knowingly" to avoid problems with the definition of recklessness, said Pros. Slagle.

Dir. Diroll cautioned that the elimination of a mental state may not permit the prosecutor to shop around for any one that he wants.

Judge Corzine suggested "gross disregard for the consequences" or "gross indifference to the consequences" which would identify that he disregards the known risk of the circumstances. He believes that a modifier such as "gross" is needed to raise it above negligence.

Since no one really uses the word "heedless" in today's world, Pros. Slagle suggested deleting "heedless" and changing "perversely" to "willfully", so that with "indifference to the consequences", the person "willfully disregards a known risk".

Dir. Diroll agreed to prepare a draft that removes the current default statute and fills in some of the gaps.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, offered to compile a list of any other offenses that might be of concern regarding the issue of mental states and offer recommendations on which mental states should be listed.

FUTURE COMMISSION MEETINGS

Future meetings of the Sentencing Commission have been tentatively scheduled for November 20 and December 18, 2008.

The meeting adjourned at 2:10 p.m.