Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
July 20, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reggie Routson, Vice Chair
Major John Born, representing State Highway Patrol Superintendent
Col. Paul McClellan
Juvenile Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Jim Guy, representing Rehabilitation and Correction
Director Terry Collins
OSBA Representative Max Kravitz
Common Pleas Court Judge Andrew Nastoff
Dave Schroot, representing Youth Services Director Tom Stickrath
Municipal Judge Kenneth Spanagel

ADVISORY COMMITTEE MEMBERS PRESENT
Monda DeWeese, Community Alternative Programs
Lynn Grimshaw, OCCO
John Madigan, Senior Attorney, City of Toledo
Cynthia Mausser, Ohio Parole Board Chairperson
Gary Yates, Court Administrator, Butler County Common Pleas Court

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

GUEST PRESENT
Jocelyn Andras, legislative aide to Senator Steve Austria
Sara Andrews, Department of Rehabilitation and Correction
Deborah Hoffman, Fiscal, Legislative Service Commission
Christina Madriguera, Ohio Judicial Conference
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Becki Park, Senate Republican Caucus
Candace Peters, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office
Steve VanDine, Department of Rehabilitation and Correction

Chief Justice Thomas Moyer, Chairman, called the July 20, 2006, meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m.

Chief Justice Moyer introduced the Commission's newest member, Common Pleas Judge Andrew Nastoff, who replaces Judge John Schmitt.

DIRECTOR'S REPORT

House Arrest. S.B. 2 allows courts to charge fees to help cover the costs of sanctions. The house arrest statute says offenders may be charged "actual" costs. Director Diroll said a literal reading proscribes collecting extra money to cover indigent offenders. Columbus Prosecutor Steve McIntosh and others asked the Commission for a remedy.

Representing the Chief Probation Officers' Association, Gary Yates noted that his group shares concern about the issue.

By acclamation, the Commission agreed to instruct the staff to ask the General Assembly to make clear that small fees could be charged by the court to provide house arrest funds for offenders who are indigent.

Foster. Dir. Diroll distributed a short article he wrote for the Judicial Conference's *Bill Board* Magazine about sentencing after the Ohio Supreme Court's *Foster* decision. He raised concerns about inconsistent sentences under the now-broad sentencing ranges with little statutory guidance.

Sen. Austria. Dir. Diroll next reported that he and Staff Attorney Scott Anderson met with Senator Steve Austria recently about S.B. 260 and the Commission's work on sex offense laws. He said that Sen. Austria continues to work on the measure, but it is doubtful that any of the sex offense bills will be passed before November.

Jocelyn Andras, legislative aide to Sen. Austria, acknowledged that their office is not sure when S.B. 260 will be up for a vote.

SEX OFFENSE ELEMENTS AND PENALTIES

Picking up on the desire of Commission members to focus first on sex offenses themselves and their penalties, Atty. Anderson presented a revised version of the chart distributed in June.

The new chart lists offenses and conduct by classes. It also lists current penalties and hypothetical penalties. The offenses are listed, from most severe to least severe, with a class of "life without parole" at the top and a class of first degree misdemeanors at the bottom. The chart was sent out to everyone for comment prior to the meeting.

OSBA Representative Max Kravitz asked why the chart listed the defendant's mental state as not applicable in some categories.

The tricky part, Atty. Anderson responded, was how to capture the difference between coercion and force without talking about the offender's mental state. In some statutes, the defendant's mental state is referred to as "purposely compel", but not with the most serious offenses against child victims under the age of 13. In some circumstances, he noted, there is no listed *mens rea* for sex offenses.

In developing the chart, the intention was to include what is currently in the statute regarding the offender's mental state. It is based on the categories that were discussed at the last meeting.

Dir. Diroll explained that the offenses were not actually given names within this chart, although the intent is not to change offense elements in any significant way.

The chart lists offenses then grades them by severity, Atty. Anderson pointed out. He further explained that the chart makes coercion different from sexual battery, particularly because coercion is not included in the rape category under current law.

Rape involves physical force whereas coercion involves psychological force, said Atty. Kravitz. He argued that including coercion in the rape statute would blur the distinction and make rape over-inclusive.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, noticed that the chart does not include unlawful sexual conduct with a minor where the offender has a prior conviction.

Some sex offense statutes in current law permit a prior to enhance a penalty for a substantially similar offense, said Atty. Anderson, but not all of them (i.e., sexual battery). The question becomes whether priors of a similar offense should be applied across the chart as enhancers for all sex offenses.

It is in current law, declared Dir. Murphy, but not on the chart. He agrees that it should not be applied to all offenses, such as sexual conduct, but should be included on the chart.

Defense Attorney Bill Gallagher questioned why there are so many different categories based on the victim's age. Given plea negotiations, listing so many victim age categories, he feels, will confuse the options as prosecutors struggle with fitting the case into the right category. He particularly questioned the difference between a case involving a 12 year old as opposed to a 13 year old victim, or a 9 year old versus a 10 year old victim.

The victim age class, Atty. Anderson responded, started with the notion that child victim offenders are different and the younger the child victim is, the greater the difference. The age ranges in the chart are based on current law, he explained. If the age range makes a difference in the penalty then it is applied across the board within the chart.

According to Dir. Diroll, age 10 is still considered pre-puberty and considered to be a more damaging assault.

Instead of using arbitrary classifications, Atty. Kravitz recommended leaving it up to the judge.

Obviously, Judge Spanagel remarked, the effects differ for victims under the age of 10 from those for victims over the age of 16. It is somewhere between the ages of 10 and 16 that a line needs to be drawn.

Dir. Diroll asked whether the issue of force versus coercion and the issue of priors should be treated similarly across the board or handled differently for different offenses.

Currently, rape and GSI (gross sexual imposition) get ratcheted up if the child is 13 or younger, said Atty. Anderson.

The rape of a 14 year old could be more egregious than rape of a 12 year old, Atty. Kravitz argued, depending on the circumstances. He contended that the judge must be allowed discretion to take those differences into account.

Allowing too much discretion, warned DRC Research Chief Steve VanDine, would broaden the penalty range to too great a degree.

He asked if Atty. Kravitz would consider allowing the option of a life sentence for every case involving a child victim 10 to 15 years of age.

Atty. Kravitz responded that he would not. He said that he knows of a few judges who give the maximum if the case goes to court and the minimum if the offender takes a plea bargain. He believes that if the offender thinks he might get life without parole for rape, he'll be more likely to kill his victim. He contended that the offender must have some kind of hope.

Prior to S.B. 2, rape had a cap of 25 years, said Atty. Kravitz. Determinate sentences under S.B. 2 were determined by current sentencing practices at that time. He asked what the moving force was behind ratcheting up sentences at this time.

According to Dir. Diroll, the average sentence for sex offenders has increased since S.B. 2 in part because the Parole Board increased the amount of time served by pre-S.B. 2 sex offenders. In addition, he noted, the General Assembly determined that the S.B. 2 sentences are inadequate for some when it added indeterminate terms for "predators." Sex offenders age out of their offenses more slowly, so there is a longer fear of recidivism, leading to SORN Law and other changes.

Because the sex offense ranges include broad categories of offenses and types of offenders, Atty. Kravitz encouraged caution before considering dramatic changes.

Most of the increases, Dir. Murphy pointed out, involve child victims. Stressing that there are significant differences in a child's development between the ages of 9 and 10 or 11 and 12, he feels this chart is a logical starting point and feels that dickering over the age issue is a waste of valuable time.

Ms. Peters hopes that the Commission, at some point, can adjust the SVP (Sexually Violent Predator) definition so that it is not so broad.

Atty. Anderson expressed hope that the separate classes will address that concern so that further distinction between a Sexual Predator and Sexual Violent predator won't be necessary.

Returning to the chart, he noted that the range of paperwork on sex offenders includes the penalty, post release control supervision and sex offender registration.

Cynthia Mausser, Chairperson of the Ohio Parole Board noted that any sex offender released from prison is released under a minimum of 5 years of supervision.

City Attorney John Madigan asked if a sentence of "X to life" is an indeterminate sentence.

Referring to the chart, Dir. Diroll pointed out that under the classifications, Class 3 to Class 6 are indeterminate sentences, which differs from current statute. A sentence of 10 to Life currently means the offender is eligible for parole after 10 years. He wondered if this should be changed for the more serious F-1 offenses (Class 3-6) to provide more variety on lengthy sentences, such as (hypothetical sentences for these classes) 20 to life, 15 to life, etc. (currently from 2 to life to 10 to life).

Most sexual assaults, particularly with adult victims, do not fall in the top five categories, said Dir. Diroll, but the offenders in those categories are the worst, with a long history, crimes involving child victims, or sexual motivation behind other offenses.

Atty. Anderson explained that rape of a child under age 13 would be 25 to life and GSI of a child under 13 would be 15 to Life.

After failing to get clear direction from the Commission on whether these gradations should be used for Classes 3 to 6, Dir. Diroll agreed to table the option for the time being.

Turning to the coercion versus force argument, he pointed out that if coercion is made a distinguishing element, it will need to be defined.

Coercion is implied in the offense, said Atty. Kravitz, so he questioned why it should be separated out as an element.

Representing the Attorney General's Office, Erin Rosen declared that there needs to be more distinction between actual physical harm (less than serious physical harm) and pressuring the victim not to tell.

That was the intention here, said Atty. Anderson.

Judge Spanagel remarked that the definition offered at the April meeting covers psychological pressure coercion.

Atty. Kravitz asked for someone to clarify between an intermediate level of coercion and no coercion. He believes that any sexual offense involving a victim 11 years old or younger involves some form of coercion. He argued, however, that the threat of force is not the same as coercion.

Atty. Anderson countered that it could be. He contended that it could be implied that coercion is used when the victim is aged 9 or younger.

Regarding force versus the threat of force, Atty. Kravitz contended that the threat of force covers every thing else. He believes that the use of force and the threat of force should be equally culpable.

Dir. Murphy and Atty. Kravitz agreed that no force/coercion distinction is needed for sex offenses involving victims 10 and younger.

Juvenile Court Judge Robert DeLamatre argued that it boils down to consent, noting that offenders use coercion to pressure the younger victim into granting consent.

Atty. Anderson noted that in many cases the court system has been looking at "consent of the victim" instead of what the offender did.

When Phil Nunes asked for a definition of threat of force, Atty. Rosen replied that under §2929.11 the threat of force includes compulsion, implied force (including psychological) or the threat of force.

Atty. Anderson further explained that statute says that the use of force or threat of force includes a physical threat of harm as opposed to psychological threat.

According to Atty. Rosen, case law views compulsion as a separate element.

Relating this discussion back to question of offering gradations of sentencing ranges, Judge Routson recommended allowing the judge discretion to choose a minimum of 10 to life, 15 to life, or 20 to life for the most serious sex offenses.

Atty. Rosen suggested removal of the language "by coercion" and retaining "by force" for sex offenses committed against victims under the age of 10, so that a definition of coercion will not be necessary.

That would leave the options of 20 to life and 20 to life for victims under age 10, said Ms. Peters.

Atty. Kravitz favored the suggestion.

Mr. VanDine remarked that there is pressure in the General Assembly to make most rapes carry 25 years to life (S.B. 260).

Dir. Diroll asked if "coercion" should be retained for sex offenses committed against 12 year old victims.

John Murphy acknowledged that it would at least offer another step.

By acclamation, the Commission agreed to retain coercion for victims above age 10.

If coercion is included for victims aged 10 to 16, Atty. Kravitz wondered how that would apply to sexual battery, which provides that the offender knowingly coerced the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

Atty. Anderson pointed out that sexual battery is coercive sexual conduct. Any coercive sexual conduct with a victim aged 13 or younger is regarded as rape.

These distinctions will play out in the penalties, said Dir. Diroll.

If coercion is included in the class level involving victims under the age of 13, Atty. Kravitz wondered if it would be applied specifically to sexual battery or rape or beyond that.

Atty. Anderson remarked that he personally believes coercion is the difference between rape and sexual battery, with the key distinction playing out in the penalties.

Atty. Kravitz found this acceptable.

Common Pleas Court Judge Andrew Nastoff recommended defining the terms to set the foundation before proceeding with the penalties.

According to Mr. Murphy, a definition for coercion is unnecessary since there is a body of case law that defines it.

Establishing definitions will be helpful, said Judge Nastoff, because many people think of force as physical, not psychological.

In addition, said Dir. Diroll, the threat of force may not be actual force, but must be acknowledged within the parameters, particularly if a weapon is involved or implied.

After lunch, discussion turned to causing serious physical harm (SPH) and substantially similar priors. Serious physical harm currently applies to some offenses as an enhancement, but not all sex offenses. Dir. Diroll noted that the thought was to ratchet up the underlying conduct by one category for SPH. If so, should this apply to all sexual offenses or only to some?

One option, said Atty. Anderson, might be that the spec would only apply if force is alleged.

Dir. Diroll remarked that there would be few cases involving children under age 10 who don't suffer SPH.

Atty. Kravitz agreed that, by its very nature, the rape of a victim under the age of 10 is SPH.

Representing the Attorney General's Office, Erin Rosen asserted that SPH is well defined in statute.

Several people, including Atty. Gallagher and Judge Spanagel said that when SPH is involved, felonious assault is usually charged as well.

Mr. VanDine reported that, in 2005, 54 rapists entered in DRC with a life sentence, but only 1 offender received life without parole.

According to Judge Nastoff, menacing by stalking cases has watered down the mental harm portion of the SPH statute.

Atty. Gallagher feels the categories with penalties of 10 to life diminish the judge's discretion. He feels the enhancement forces the judge into sentencing within the 10 to life range.

An enhancement leading to post release control might be an answer, Judge Spanagel suggested.

Dir. Diroll noted that SPH enhances many offenses (robbery, etc.) besides sex offenses.

Atty. Rosen remarked that SPH is regarded as life threatening in most cases, as opposed to physical harm.

The question, said Dir. Diroll, is whether SPH is an aggravator that should be applied to offenses other than those in LWOP category.

Ms. Peters favored bumping the offense up at least one level for those cases involving young victims.

Atty. Anderson pointed out that it is not always possible to prove SPH beyond a reasonable doubt.

The next question, as Dir. Diroll pointed out, was whether prior offenses should serve as a factor to bump the offense to a higher category. If so, should it be priors within a certain time? If the current case involves a child victim, should the prior also involve a child victim?

One predictor for recidivism, according to Ms. Peters, is having a prior conviction for a sex offense.

Atty. Rosen noted that many assault or felonious assault offenses are plead down from sex offenses. The underlying offense was sexually motivated.

Mr. Yates recommended using something similar to the SORN classification when a child victim is involved.

Ms. Peters claimed, however, that the child victim classification under SORN does not require sexual motivation.

Atty. Gallagher asked if release decisions and post release control were taken into consideration.

According to Ms. Mausser, the Parole Board can consider the offender's entire record in conjunction with the risk assessment before determining release, recidivism, and parole supervision.

Judge Nastoff warned that only the nature of the conduct and the rules of evidence should be considered. There could be unwanted ramifications if we go beyond the elements of conviction. If we develop certain classifications and don't define them too broadly, he stressed, a judge would be more likely to bump the offender up to a higher classification based on the additional elements.

Dir. Diroll continued seeking for consensus on how to treat substantially similar priors. He also asked if "impairment" should be

worked into the definition of coercion, particularly regarding drug induced impairment?

If the offender slips a "mickey" to a child under 10, said Atty. Kravitz, he already qualifies for two rape charges: one for rape of a child under 10 and one for the impairment.

Atty. Anderson noted that impairment has a mandatory minimum of 5 years for rape. He asked if this should apply to other offenses.

Impairment, Mr. Murphy clarified, means the victim is unable to resist, which is not the same as coercion.

Atty. Kravitz reiterated that impairment makes for two rape charges.

Judge Nastoff questioned why it should be kicked up if it does not affect recidivism. He contended that anything which enhances a penalty should be something that makes the offense more dangerous.

Along with the categories of force and coercion, Ms. Peters suggested adding a third category of impairment.

According to Atty. Guy, deliberately induced impairment is included under the Rape Category but not in Sexual Battery.

Dir. Diroll assured the Commission that, before the next meeting, the staff will revise the chart and attempt a definition of coercion.

FUTURE MEETINGS

Future meetings of the Sentencing Commission are tentatively scheduled for August 17, September 21, October 19, and November 16.

The meeting adjourned at 1:50 p.m.