OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

Meeting of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
SENTENCING ADVISORY COMMITTEE

July 17, 2014

MEMBERS PRESENT
Chief Justice Maureen O'Connor, Chair
Paula Brown, OSBA Representative
Ron Burkitt, Police Officer
Robert DeLamatre, Juvenile Judge
Derek DeVine, Prosecuting Attorney
Paul Dobson, Prosecuting Attorney
Craig Jaquith, representing State Public Defender Tim Young
Kort Gatterdam, Defense Attorney
David Gormley, Vice-Chair, Municipal Judge
Fritz Hany, Municipal Judge
Chad McGinty, Captain, representing State Highway Patrol Superintendent, Col. Paul Pride
Steve McIntosh, Common Pleas Judge
Aaron Montz, Mayor, City of Tiffin
Kenneth Spanagel, Municipal Judge
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr
Roland Winburn, State Representative

ADVISORY COMMITTEE
Eugene Gallo, Eastern Ohio Correctional Center
David Landefeld, OJACC
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Marquita Clay, Coordinator, Franklin County Drug Court
JoEllen Cline, Counsel, Supreme Court of Ohio
Garrett Crane, Legislative Service Commission
Bill Crawford, Supreme Court of Ohio
Sean Gallagher, Appellate Judge
Gloria Hampton, Ohio Community Corrections Association
Scott Lundregan, Speaker Batchelder's Office
Milt Nuzum, Judicial Services, Supreme Court of Ohio
Corey Schaal, Supreme Court of Ohio
Paul Teasley, Hanna News Network
Gary Tyack, Appellate Judge
Mindi Wells, Interim Administrative Director, Supreme Court of Ohio

Maggie Wolniewicz, Legislative Service Commission

The July 17, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair Municipal Judge David Gormley at 9:45 a.m.

Chair Chief Justice Maureen O'Connor then cleared up a misunderstanding regarding the proposed Criminal Justice Commission. She reported that the proposal to create the successor Commission to the Sentencing Commission is still on the table with Senate President Keith Faber. It will not be a creation of the Supreme Court, as some have claimed, but would be statutory and housed under the Court. Besides the duties of the current Sentencing Commission, tasks would be expanded to include more subject matter. She hopes for progress in 2015.

With the forthcoming retirement of Executive Director David Diroll, she announced that it is time to find a replacement. Noting that a job description will soon be posted, she requested four members from the Commission to be part of the interview process. The Supreme Court's Human Resource Department will handle the mechanics of the search, but the Commission's panel will be involved in the final selection.

She introduced Mindy Wells as the interim Administrative Director of the Supreme Court of Ohio, who will be assisting with the search.

Common Pleas Judge Steve McIntosh asked when the position will be posted, for how long, and when interviews are likely to start.

According to Interim Dir. Wells, they anticipate having the job posted within the next week and open for about four weeks.

The time for conducting the search and conducting interviews is rather open-ended, said Chief Justice O'Connor. There will be an initial review to verify the applicant's qualifications and names for interviews will be forwarded to the interview panel. She anticipates that only two days will be needed for interviews.

While the Supreme Court is also looking for a new Administrative Director, she was pleased to acknowledge that the transition team is getting a lot accomplished. As part of the transition, the Court is looking at the process and internal structure currently in place.

Prosecuting Attorney Paul Dobson asked about the Recodification Committee that is being established by Senate President Faber.

Chief Justice O'Connor explained that it is a focused group established for a limited time. Their report will be due by the end of 2015 or 2016. The project is likely to result in a major bill, she added.

The group will also focus on costs associated with the application of sentencing, criminal levels and the behavior of each and appropriateness of how they are classified, she noted.

Dir. Diroll remarked that another part of the Recodification Committee's initiative is to focus on *mens rea* issues.

He then explained that when the initial Sentencing Commission was established, the Executive Director position was chosen by Commission members. It is likely that whoever is chosen for that position this time will presumably be involved in the transition to the proposed Criminal Justice Commission.

OPIOIDS

In response to the increase in opioid use throughout the state in recent years, the House of Representatives assigned a committee to address the issue. The Judicial Services Division of the Ohio Supreme Court, under the direction of former Judge Milt Nuzum, recently held a symposium on the issue.

Director Nuzum reported that 1,000 people attended the Opioid Symposium on June 30, with groups of 10 from 83 or the 88 counties in Ohio. The groups included judges, legislators, law enforcement, prosecutors, treatment and mental health providers, county agencies, county commissioners, and city council members, etc. Each team was asked to examine their community's strengths and weaknesses. The symposium organizers are now in the process of compiling and summarizing that data with hopes of following up with regional activities. There has also been good ongoing legislative response.

To emphasize how the increase in opioid use in Ohio is affecting the state, he noted that since 2000, the number of prison inmates using opioids has increased by 500%. Some opioid users are as young as 11 or 12. There were over 1,900 overdoses in 2012. By comparison, there were 1,200 highway deaths in Ohio the same year.

Law enforcement was represented at the symposium and discussed interdiction and the efforts to stem the flow of heroin into the state.

Dir. Nuzum presented a video, which emphasized how the problem reaches all areas of society, thus affecting our function as a society.

The Ohio Legislature gave the Ohio Mental Health and Addiction Services $5 million to study medicated assisted treatment in five counties. The program directed the counties to partner with the Supreme Court and local drug courts. The certified specialized dockets use evidence-based practices. The intent is to see how medicated assisted treatment works to address the opiate addiction problem.

Noting that he started his career as a pharmacist before going into law, Dir. Nuzum explained that opioids are drugs derived from the seed pod of the opium or poppy plant. Refining the seed produces a variety of products including heroin, morphine, and codeine. These are narcotics that dull the sense of pain and can cause drowsiness or sleep. By federal law they are classified as controlled substances.

Under federal law (copied by Ohio), Schedule I drugs have a high potential for abuse but no recognized or approved medical use. As a schedule I drug, heroin has no recognized medical use. Schedule II–V drugs are approved for medical use. Class II substances have proven medicinal value but the most potential for abuse if used improperly. Schedule III – V are drugs that have a legitimate use.

Other derivatives of the poppy plant are semi-synthetic drugs, including Hydrocodone, Vicodin, Oxycodone, Percodan, Percocet, OxyContin, and Hydromorphone. These are very powerful Class II narcotics with a high potential for abuse.

Opioids cause addiction by stimulating the release of dopamine in the pleasure center of the brain, giving a feeling of euphoria. They are not only addictive, but tolerance builds up with time, requiring ever higher doses of the narcotic to continue giving the pleasure or pain relief. People who quit using the narcotic begin to lose the tolerance. If they relapse and start using the narcotic at the same dosage they were accustomed to prior to detox, they can easily overdose and go into respiratory arrest, sometimes dying from the overdose.

It takes skilled medical professionals to diagnose and treat any substance abuse. There is no one perfect treatment for every addicted person. Some users are able to quit cold turkey through total abstinence, although it is extremely difficult. Most need psychotherapy or other support to achieve successful withdrawal and recovery.

Dir. Nuzum reported that there are four medicines available to assist with recovery treatment:

- Naloxone (Narcan) is a non-narcotic prescription drug that is a pure opioid antagonist, with no analgesic effect. It counters the effects of opioid overdose by displacing the opioids from receptor sites thus blocking their effect. It is a life-saving drug and now available as an emergency injectable.
- Suboxone is an opioid receptor agonist/antagonist which competes for dopamine receptors with the abused opioids. It reduces the “down” or “crash” that addicts experience when they completely abstain. Someone must monitor the use, however, because in high doses, this drug can also be abused due to its possible euphoric effect.
- As an opioid receptor antagonist, Naltrexone (Vivatrol) is a complete blocker, preventing any euphoric effect from opioid use. It is used in managing alcohol and opioid dependence. It is now available in a 30-day sustained release injection that must be injected by a certified physician. There is no analgesic or euphoric effect from this drug. Unfortunately, he reported, this medicine costs approximately $1,000 per injection.
- Methadone is a narcotic analgesic drug that binds to the dopamine receptors and prevents the “down” or “crash” that is often experienced from complete abstinence. It reduces illegal drug seeking behavior and can be used for long-term maintenance or to gradually step down the dose to complete abstinence.

He stressed that whatever treatment is used should be a medical decision since people respond to medicines differently. Even with a pharmaceutical background and experience as a drug court judge, Dir. Nuzum never felt qualified to determine which treatment was best. He recommends leaving that to the treatment professionals.

He noted that many people dealing in these drugs are doing it to support their own habit. In many ways, they are atypical drug dealers.

Dir. Diroll mentioned that the Department of Rehabilitation and Correction is developing a pilot program that would involve the use of "swift and certain" sanctions for ongoing drug abuse in three separate courts. In one, the sanction would be jail time, another would use intensive supervision, and the third would use treatment.

Pros. Paul Dobson remarked that he is trying to institute a similar program in his county because it appears to be an approach that has some teeth, by combining both positive reinforcement and consequences.

The approach of sanctioning every relapse echoes the Project HOPE program developed in Hawaii, said Dir. Diroll, which the Sentencing Commission discussed a few months ago.

Research, said Dir. Nuzum, shows that the response to relapse needs to be rapid, swift and certain if you want to change behavior. Reflecting on his experience as a drug court judge, he proclaimed that he didn't like to have an offender lie to him before taking a test. He preferred honesty so that he could help them.

As a juvenile court judge, Judge Robert DeLamatre remarked that they have less intervention available for juvenile abusers because of compelling family dynamics. He inquired, however, on data regarding the use of Vivatrol in treatment programs.

Gary Yates, representing the Chief Probation Officers' Association, remarked that the treatment program used frequently by the Hamilton County Drug Court uses Vivatrol, which is partially covered by local funding. They have seen positive results, but it's expensive.

Since Vivatrol completely blocks the euphoric effect of opioids, Judge DeLamatre wondered how it prevents the abuser from seeking a "high" another way.

According to Mr. VanDine, studies show that medically assisted treatment alone is not as effective as medical treatment reinforced by some form of supportive counseling or psychological treatment.

Concern was raised by Judge DeLamatre about regulating the use of the therapeutic medications and how to wean the abuser off of them. He feels that using medication to address drug abuse needs to be better monitored. The treatment program used most in Erie County costs $200 per office visit and treatment. If the abuser does not have the $200, he doesn't get medication. For some abusers it is cheaper to seek out heroin. So the county program is like going to the drug dealer, just with a different drug.

Judge McIntosh remarked that other people at the symposium mentioned programs that offered medical treatment for addictions on a cash only basis, but without support to monitor use or offer added treatment. Some doctors prescribe Suboxone without management and one judge even found Suboxone being sold on the street in place of narcotics.

Judge DeLamatre declared that contributes to the illicit use of Soboxone on the street. He asserted that addicts will figure out a way to beat the system before we can.

Dir. Nuzum contended that there needs to be a medical standard of care when a doctor prescribes any form of pain medication.

State Representative Roland Winburn remarked that two counties in his district are trying to come up with revenue for treatment since there is little available in the area. He wondered if there are treatment facilities available within regions of the state that other communities can share or if additional programs are being planned. He remarked that the Revised Code stipulates restricted use for these facilities and that judges need approval for the redistribution of funds from the infrastructure to other possible sources. He wonders how people in other areas seek treatment if no resources are available.

Dir. Nuzum reported that this is a recurring theme being examined at high levels throughout the state, executively, legislatively, and judicially. It will be necessary for all entities to work together to achieve any success in building a statewide net to address the problem.

As Director of the Eastern Ohio Correctional Center, Eugene Gallo pointed out that many opiate addicted offenders are regarded as low risk offenders, negating them from receiving court appointed treatment through a community correctional facility.

These are the type of suggestions needed, said Dir Nuzum, so that the various entities can work together to break down the barriers.

Municipal Judge Ken Spanagel said there are indigent defendant alcohol treatment funds available at the municipal court level. These were originally just for treatment for impaired driving (OVI), but were changed to include other alcohol related crimes. The statute was recently amended to allow surplus funds to be transferred from one court to another within the same county. He noted that the money comes from reinstatement fees for OVIs. He wondered if it might be possible to amend the statute to allow treatment for other substances, as well as alcohol. He suggested earmarking part of the fines to be directed toward other forms of substance treatment. He also believes it is important to treat the mental health disorder that is the underlying cause for the addiction.

Dir. Nuzum welcomed the suggestions offered and urged everyone to keep in contact with him so that additional suggestions could be forwarded to the state committee working on this issue.

FRANKLIN COUNTY COMMON PLEAS DRUG COURT

At the request of the Commission, Judge McIntosh discussed the Franklin County Drug Court and its “Treatment is Essential to Success” (TIES) program. He said it is a drug court model similar to most others.

A person who is accepted into the program gets instructions on what to expect and what is expected of them, including a meeting with the court each week. Sanctions are imposed immediately when guidelines of the program are violated. The program is open to certain offenders of 3rd, 4th, and 5th degree felonies. TIES is divided into phases that take about 60 weeks to complete, as long as no sanctions are accumulated. The time in each phase of the program is determined for each participant by the TIES Treatment Team, and by progress made by the

participant. Anyone can refer a case, but most are referred by judges. Few defense attorneys make referrals to the program because the demands of the program are much tougher than straight probation.

Once a person is referred, Marquita Clay, coordinator for the drug court, conducts an interview to gain essential information and couples that with pre-sentence investigation (PSI) information. The team reviews the information and then brings the person in for a hearing. The individual is expected to attend all treatment sessions and hearings as well as weekly meetings. Depending on the time imposed and the needs of the individual, participants are generally started through community-based correctional facilities (CBCFs) or house arrest.

The program involves four phases, each from six to twelve weeks long. Phase I includes a weekly meeting with the judge, three drug tests per week, three 12-step meetings per week, and obtaining a sponsor. Judge McIntosh noted that the sponsor needs to be as committed as the participant and to be someone with whom the participant is comfortable.

During Phase I, the participant is not allowed to attend school or a job because treatment must be the first priority. If treatment is first, everything else will eventually fall into place. If there is no relapse for at least six weeks, the participant progresses to Phase II and is allowed to return to employment.

The Columbus Public Health Department helps to keep him apprised of the individual’s progress, said Judge McIntosh, by informing him on how often the person attends treatment sessions, as well as the level of commitment, participation, and sincerity.

In Phase II, the team tries to get the participant involved in leisure activities other than drugs. The participant must show proof of three non-use leisure activities, which might include meeting with his family or taking his children to a movie or some other event. At Phase III, he will need to provide proof of at least five non-use leisure activities, pass two random drug screenings per month, have no sanctions applied, and show involvement in volunteer activities in the community. As he progresses through each phase, the program steps down the amount of contact needed with the court and the number of random screens.

Sanctions are imposed immediately for no shows/no calls and failure of random drug screenings. If the participant is unable to attend a meeting with the court, sponsor, or treatment session, they are expected to call immediately and prove the explanation. If the participant gets lax, Judge McIntosh puts the participant back on weekly meetings with him instead of monthly ones. The goal, he said, is to finish strong and not let up so that they don’t relapse. He doesn’t hesitate to impose jail time for relapses. Most offenders prefer to accept a sanction rather than to be kicked out of the program, acknowledging that they need help to make needed lifestyle changes.

Judge McIntosh pointed out that he does not allow participants to have any medications with opiates, even if prescribed by a doctor or over-the-counter cough medicine. All participants are given a list of what is not allowed. Judge McIntosh expressed frustration over the number of doctors who continue to give a person a prescription for an opiate, knowing that they are in a recovery program. If a participant is trying

to get treatment but has a legitimate medical problem, the court is willing to work together with the participant's medical provider to find an acceptable solution.

Heroin users are monitored the closest because if they relapse they often try to use the same dosage as before, which often causes an overdose. While in treatment, their tolerance level decreases, which means a return to the old dose is more than their bodies can handle.

The program is starting to use Vivatrol more often because it blocks the urge to get high by clearing the mind. The person is then able to concentrate and participate better in more aspects of the program.

Ms. Clay noted that if a participant does not have kids, or has lost custody or contact, the sponsor then becomes more vital in providing structure and a relationship component. The drug court has three different agencies to provide the counseling component of the program.

She noted that some participants are hesitant to agree to the use of Vivatrol during recovery because it blocks euphoria and has no value if they attempt to sell it on the street.

Judge McIntosh pointed out that, while some participants refuse Vivatrol, others request it for giving them a better chance to end addiction. At the weekly meetings, he likes to hear from both the treatment provider and offender, and prefers to have both present at the same time to keep the offender honest. He has never had anyone ask to be dropped from the program because the sanctions were unfair.

Dir. Diroll asked about the recidivism rate for those who complete the program.

Those with family support, Judge McIntosh responded, have about an 80% success rate with no recidivism within two years after graduation from the program. They tend to have the greatest chance of success. Otherwise, it is about a 60% success rate.

Since the program is having success, Defense Attorney Kort Gatterdam asked about accepting drug abusers convicted of more serious felonies. Judge McIntosh responded that it would be up to the assignment judge. He added that everyone in the program has multiple offenses.

There are usually about 35 people in the program at any one time at various stages, said Ms. Clay, and there are two graduations per year with about 60% successfully completing the program.

Judge McIntosh admitted that there are some participants who fail the drug screening and quit coming.

Municipal Court Judge Fritz Hany lamented that so many drug abusers try various treatment options and still relapse.

Typically, the judge has little knowledge of a person's background, said Judge McIntosh, until he's doing the entry. Those in the drug treatment program are getting so much more support that it greatly increases their chances for success.

Not everyone who has an opioid problem is eligible for a drug treatment program, said Dir. Nuzum, but for those who are, it really makes a difference. He emphasized the importance of assuring its availability.

Judge McIntosh noted that it is much easier to get someone into treatment from the drug court than it is from the regular court dockets. From the regular dockets the offender has to fail very seriously before the treatment provider will even consider accepting them.

Judge DeLamatre agreed that the link to resources through specialized dockets is quicker and more established and data are more readily shared. In smaller counties, he noted, some kind of consolidation needs to be considered because the barriers hurt the treatment team as much as the individual.

Noting an earlier concern raised about smaller communities, Pros. Dobson wondered if multiple small counties are allowed to put a program together collectively. Perhaps something could be developed allowing a drug court judge to “ride the circuit”.

Acknowledging the suggestion as a great idea, Judge Hany suggested expanding it to include mental health, drugs, and alcohol issues.

It would likely require some restructuring by statute, said Dir. Diroll, unless magistrates are used. On another note, since municipal courts will sometimes accept cases pled down from an F-5 offense, Dir. Diroll asked what the charge becomes at that point.

According to Judge McIntosh, it has shifted approximately 900 cases from the common pleas courts to the municipal court in Franklin County.

In those cases, the new M-1 offense generally is recognized as an attempted F-5 offense, said Judge Spanagel. Although his county does not have a drug court, they can handle some things like a drug court.

In reference to the suggestion about having a drug court that “rides circuit”, Mr. Gallo wondered if, rather than having a judge or magistrate move around, perhaps the treatment program could be moved around to the smaller jurisdictions.

HIRING COMMITTEE

Dir. Diroll asked for volunteers to serve, at the request of Chief Justice O’Connor, on a panel to help interview potential candidates for the position of Executive Director. Pros. Dobson, OSBA Representative Paula Brown, Judge Gormley, and Judge Spanagel volunteered.

ONGOING APPELLATE ISSUES

After lunch, discussion returned to appellate issues in felony sentencing. Dir. Diroll noted that some consensus was emerging that §2953.08 is and would remain the only statute governing felony sentence appeals. There was preliminary consensus to include introductory language that is designed to focus appeals without being unduly limiting. It would require the appellant to delineate how the sentence falls within the grounds for appeal under this section, what issue is

being raised, indicate the specific errors, and state how the person is adversely prejudiced.

Besides the concept of including some kind of introductory phrase, there was also discussion on defining “contrary to law,” beyond the obvious understanding that it refers to something not contemplated by statute. Dir. Diroll noted that, when the Sentencing Commission discussed the proposals that became this statute, the intent was to develop limited appeals, not open-ended ones. In that context, “contrary to law” basically refers to not adequately considering the purposes and principles of sentencing, the various factors of seriousness and recidivism in §2929.12, or the guidance in §2929.13 and §2929.14 regarding time to be served in or out of prison.

At the June meeting there was also consensus on the importance of the agreed sentence exception. That is, if the prosecutor and defense counsel agree on a sentence that the judge imposes, then the sentence cannot be appealed. Dir. Diroll noted that it has served as an effective gatekeeper in a lot of counties.

From the defense side, the most meaningful areas of discussion have been consecutive sentences and maximum sentences. In concept, it was assumed that the maximum level of the sentencing range would be reserved for the worst of the worst of that offense. In practice, however, a lot of judges would sentence one notch below the maximum to avoid the possibility of an appeal, he added. Nevertheless, this led to significant reductions in the prison population.

Sentencing to the maximum of a range, or above the minimum of a range for first time prison inmates, and stacking consecutive sentences were the three things struck down by the *Foster* case. By eliminating the guidance fact finding in those cases, it gave judges more discretion to sentence to the maximum and consecutively without any appeal of right.

Then, in *Ice*, the U.S Supreme Court said that factual findings by judges are allowed prior to imposing consecutive terms. The Ohio Supreme Court reconsidered that aspect of *Foster* (in *Hodge*) and revived findings and appeals on consecutive terms, he recapped.

Against that backdrop, Dir. Diroll wondered if there should be guidelines for imposing maximum sentences.

Appellate Judge Sean Gallagher contended that some form of guidance is needed. For the sake of consistency, he suggested identifying the prerequisites that must exist for a mandatory sentence to be applied.

Countering that guidance already exists, Pros. Dobson asserted that if it is too definable, it will result in hung juries.

Option (B) of Dir. Diroll’s draft, regarding maximums, would suffice, Judge Gallagher responded.

Pros. Dobson believes there should be no more right to appeal a maximum sentence than the right to appeal any sentence.

Judge Gallagher argued that he just wants to get the judge to stop and think carefully about whether he really wants to impose the maximum.

Pros. Dobson urged caution not to create peripheral issues.

The average common pleas judge has a feel for what the sentence should be, Appellate Judge Gary Tyack contended. He believes that the less you say, the better, and the less there is to appeal.

Judge Gallagher declared there are three typical felony sentencing appeals: The first declares that the sentence is obviously contrary to law, such as imposing 15 years for an offense with a range of 3 to 11 years. The second is a resource appeal, where consecutive sentences or an extra lengthy sentence would put a strain on the jail or prison systems. The third, which comprises 95% of the appeals, is when the defendant claims that the judge did not consider the statute and has imposed a disproportionate or inconsistent sentence. The challenge, said Judge Gallagher, is how to decipher proportionality or consistency. Given the variety even within similar offenses, he insisted that there really are no similarly situated offenders.

For extraordinary circumstances, claimed Pros. Dobson, enough due process and other arguments can be made to get the case to the appellate court. But disproportionality or inconsistency is too hard to quantify into definable statutory language.

Adding to the challenge, Judge Gallagher declared, is how to rate or rank something so that it doesn't involve a "finding" under *Foster*.

Making it advisory or optional, rather than mandatory would be the best solution, Dir. Diroll responded. He explained that judicial fact finding in the Ohio judicial system is not the same type of finding that was struck down by the line of U.S. Supreme Court cases, including *Apprendi* and *Blakely*. He echoed Judge Gallagher's concern about needing to define how the maximum sentence should be imposed.

It would be necessary to determine the common threads that can be drawn among the wide range of crimes, said Pros. Dobson. The complication is to distinguish what factor can be identified for both a drug trafficking case and a robbery case to determine that they both constitute the worst forms of the offenses.

There really is no mechanism to evaluate extremely disproportionate sentences, Judge Gallagher admitted, since the very concepts of consistency and disproportionality are too abstract and vague. There is nothing tangible to measure.

Arguing that it is an exercise in futility, Judge Tyack reiterated that the less said by the judge, the better.

A common assumption among defense attorneys, said Judge Gallagher, is that if the record fails to show that the judge considered the statutes then the sentence is contrary to law, even though the sentence is within the statutory range. He declared that it creates an impossible standard of review which results in resorting to a smell test.

Dir. Diroll remarked that when this concept was first discussed 20 years ago, in reference to the "worst form of the offense," Judge Burt

Griffin assumed that a body of appellate law would be generated that would give some precision to when sentences are out of proportion.

Due to political dynamics, said Judge Tyack, you aren't likely to get agreement among Cleveland, Columbus, and Cincinnati judges.

Generally, the things that would cause a penalty to reach the maximum are criminal history and level of victimization, with the exception of drug cases, stated Dir. Diroll. One possibility might be to say that the court can only impose the maximum sentence from the range if the person had X prior offenses of violence and something to address the vulnerability of the victim.

Those are determined at the guilt or innocence stage by the judge, said Judge Hany.

In regards to the maximum term of a sentencing range, Pros. Dobson believes that option (B) in the Diroll redraft, regarding the abuse of discretion standard, is the only portion broad enough to withstand review. He noted that aggravated robbery in a small rural community versus aggravated robbery in a large city is likely to get sentenced differently because they view the seriousness differently.

Declaring that the sentencing ranges are too broad, Judge Gallagher suggested narrowing them.

Dir. Diroll offered the option of allowing a possible automatic review at some point for stacked consecutive sentences.

The likely solution to the proportionality argument, said Pros. Dobson, would be to limit the range. He does not think there would be a problem with requiring a judge to articulate a reason for going above the *minimum*. It would provide a basis since it is not a matter of making specific finding, but at least provides the judge's reasoning.

Judge Gallagher and Dir. Diroll agreed that it would be good sentencing civics to do so.

Judge Gallagher suggested stating that any sentence from within the range is acceptable, but the court should articulate its reasons, indicating that the seriousness and recidivism factors in §2929.12 had been taken into consideration. This would not involve making findings but would allow the judge to indicate which things were persuasive enough to influence his decision.

When Judge Gallagher made reference to a case involving receiving stolen property and the possibility of separate penalties for possible separate victims, Dir. Diroll agreed that a debate is needed on developing a clear standard of what constitutes allied offenses of similar import.

Judge Gallagher declared that it is unfair to appeal this stuff and expect to have any meaningful review now. Similarly, he contended that we cannot claim to be interested in consistency and disparity if we don't have a way of applying it. He asked how many offenders enter DRC with consecutive sentences and whether consecutive sentences are to blame for the increased prison population.

According to DRC Research Director Mr. VanDine, removal of the three presumptions under the *Foster* case has caused the greatest increase by adding 5,000 to 6,000 beds to the prison population.

Some offenders have received consecutive sentences amounting to more than 100 years, declared Assistant Public Defender Craig Jaquith.

According to Mr. VanDine, some courts don't have any other sentencing options because of a lack of treatment programs. He agreed to check the data more closely on the influence of consecutive sentences on the prison population.

Judge Spanagel agreed that this would help to clear out the wheat from the chaff so that we can get back to a logical appeal process.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for September 18, October 23, November 20, and December 18, 2014.

The meeting adjourned at 3:00 p.m.