

PRISON CROWDING: THE LONG VIEW, WITH SUGGESTIONS

2011 Monitoring Report

By David J. Diroll

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OHIO CRIMINAL SENTENCING COMMISSION

Chief Justice Maureen O'Connor, Chair

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EXECUTIVE SUMMARY

Most of this report takes you through the recent history of Ohio's prison population (see **A Short Primer on Prison Crowding**, beginning on p. 4). As Ohio faces record deficits and record prison populations, that primer should be worth 15 minutes of your time. The **table on p. 6** is especially useful. Several informed suggestions designed to ease the problem begin on p. 14. Here are a few of the report's highlights:

- Ohio prisons now hold about 50,500. That's 6½ times the number held in 1974. That puts the prison system 31% over its rated capacity, with about 12,500 more inmates than the prisons were built to hold (**p. 4**).
- Crowding gives the state a perverse bargain. Extra inmates add relatively little to total costs. Adding inmates in an over-capacity system only costs about \$16/day in food, clothing, and medical care. To save the \$60+ "total" prison costs—including construction, debt service, and added staff—the population will have to move below capacity. Many different ideas will have to be considered (**p. 4**).
- Ohio undertook an expensive prison construction project from the mid-'80s to the mid-'90s, adding over 17,000 beds. But the number of inmates and their sentence lengths continually grew to exceed the system's expanded capacity (**p. 7**).
- For years, the prison population increased as prison intake grew. However, recent growth in Ohio's prison population—even with mandatory sentences and scores of bills that increase penalties for particular offenses—is not driven primarily by *intake* (although it is a factor). It's largely fueled by increases in inmates' average *length-of-stay* (**pp. 4-14**).
- In the past 35 years, the only period in which the Ohio prison population remained relatively static was the first decade under S.B. 2, from 1997-2006. That bill increased the actual time served for high level offenders but made tradeoffs for others, including meaningful checks on length-of-stay (**pp. 8-10**).
- A peculiar line of U.S. Supreme Court cases led the Ohio Supreme Court to strike down S.B. 2's key length-of-stay restrictions in 2006. Even when accounting for other factors, these decisions led to an increase in average time served of almost 5 months per inmate. The cumulative "*Blakely/Foster* effect" so far has been well over 4,000 beds. None of this growth came from tough-on-crime legislation (**p. 14**).
- Sentencing Commission suggestions include:
 - Reenact a constitutional alternative to *Foster* (**pp. 15**);
 - Seriously consider the changes proposed in S.B. 10 (**p. 15-16**);
 - Treat drug and non-drug cases alike within the same sentencing range (**pp. 16-17**);
 - A sampling of other ideas begins on **p. 18**.
- Separately, simplify the Revised Code (**p. 20**) and address the "missing" elements in various criminal statutes (**p. 20**).

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INTRODUCTION

Background. The Sentencing Commission was created under R.C. §§181.21 to 181.26 to study the criminal laws of the state, develop and propose comprehensive sentencing plans to the General Assembly, help implement them, and monitor the impact of any of those enacted. **The Commission is the only statewide body that routinely brings together judges, prosecutors, defense attorneys, law enforcement, victims’ advocates, and state and local corrections officials.** Based on the Commission’s recommendations, the General Assembly adopted:

- Comprehensive legislation dealing with adult felons, effective in 1996;
- Changes in juvenile dispositions in 2000;
- Major traffic law reforms in 2004;
- Misdemeanor sentencing revisions in 2004; and
- A consolidated asset forfeiture package in 2007.

These bills affected several hundred sections of the Revised Code. The vast majority of the statutes used today in sentencing criminal and juvenile offenders—in common pleas, municipal, county, and juvenile courts—began with the Commission.

Focus of this Report. By law, the Commission must produce a monitoring report every biennium (§181.25(A)(2)). The reports are, by nature, backward looking documents. They’re not always interesting, even to us. This one’s different. With record levels of prison crowding despite historically low crime rates, the report provides a history of the problem and suggests solutions. Most data used in this report come from the fine work of Steve Van Dine’s research division at DRC.

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A SHORT PRIMER ON PRISON CROWDING

The Department of Rehabilitation and Correction (DRC) is the state's largest agency. It has a budget of about \$1.8 billion and over 13,000 employees. As of February 22, 2011, Ohio prisons held 50,461, 6½ times the number held in 1974. DRC estimates that the prisons are now 31% over capacity. That's about 12,500 more inmates than the prisons were expected to hold.

A Perverse Bargain

It will take many different ideas to achieve meaningful savings in the current prison system. Here is why. When prisons are over capacity, the state gets a perverse bargain. DRC doesn't have to expand its staff for each new offender squeezed into the system. It only needs to pay the costs of feeding, clothing, and providing medical care to the new inmate. These are the "marginal" costs of confinement, which average about \$16 per day. Costs only soar to the overall total, exceeding \$60 each day—including construction costs, debt service, and additional staff—when new facilities are built.

Put another way, if an inmate gets released and isn't replaced, the crowded system only saves the \$16/day marginal costs. To achieve more meaningful savings, the population must be reduced to the point of closing a wing or an entire prison. In short, although we can debate what true capacity is, **the prison system needs to move below 100% of capacity before the state can save the \$60+ a day per inmate.**

That said, it is still logical to look to the prison population as the best way to contain the DRC budget. Obviously, restrictions on the salaries and benefits of state employees might be enacted that apply to all state agencies. But it may be tough to get significant additional savings through the DRC payroll unless prisons close. The vast majority of DRC's employees work at facilities scattered around the state. Prisons must be staffed 24 hours each day, seven days each week, 365 days each year. Even Ohio's privatized prisons are only asked to deliver savings in the range of 5%. You can't just lay off the third shift.

A Simplified Crowding Equation

Analyzing prison crowding can be complex. It requires making various assumptions about human behavior, especially that of offenders and judges. A sophisticated study weighs: demographic and economic trends; crime, arrest, conviction, and incarceration rates; the penalties available and sentencing patterns; recidivism rates; and other factors.

Let's simplify this for our purposes. You can roughly calculate the prison population by seeing how many people come in, multiplied by how long they stay. That is:

Intake x Length-of-Stay

If the product exceeds the number of inmates released over the period, the prison population will rise.

Crime rates across Ohio and the U.S. are down. DRC data show that the number of new offenders admitted to Ohio prisons has declined significantly in each of the past four years (28,178 in 2007, 26,993 in 2008, 25,031 in 2009, and 23,191 in 2010).

So why haven't we seen a decrease in prison costs? **With crime rates and intake down, the reason for record levels of crowding in Ohio's prisons comes from the second part of the equation. On average, inmates are staying longer than before.**

The General Assembly's Role

Many factors contribute to prison crowding. Obviously, the core blame rests with the people who commit crimes. But policy choices by the General Assembly have a significant impact. These include deciding:

- Whether an act should be a crime;
- Whether it should be a felony;
- Which degree of felony (and its range of incarceration options);
- Whether it deserves mandatory incarceration;
- Whether any enhancements apply based on the age, infirmity, or nature of the victim, prior offenses, *etc.*;
- Whether there are any limits on consecutive sentences; and
- Whether the sentencing structure contemplates prison population and other resource pressures in a systemic way.

Each decision affects how many people come to prison and how long they stay.

A Little History

The Rise of Mandatory Sentencing. In 1974, Ohio prisons held fewer than 8,000 inmates, less than one-sixth the current count. Yet Ohio's overall population hasn't changed much over this period. Did Ohioans suddenly become more evil in the mid-'70s? Or are other factors at work?

By 1984, the population more than doubled, surpassing 18,500 prisoners held in space designed to hold 13,000. Let's discuss some reasons for this, beginning (and only beginning) with mandatory sentences.

Until the mid-1970s, Ohio's criminal code had few mandatory sentencing statutes. The "tough on crime" era began in the late '70s with the enactment of compulsory sentences for certain drug offenses.

Ohio Prison Population, 1974-2011*

Year	Capacity**	Intake	Population	Crowding Level
1974	9,590	5,905	7,717	0.805%
1975	9,950	7,456	9,326	0.937%
1976	9,950	7,352	11,421	114.8%
1977	10,390	6,944	12,628	121.6%
1978	11,190	6,551	12,846	114.8%
1979	11,190	7,432	13,350	119.3%
1980	11,190	8,329	13,360	119.4%
1981	11,190	9,838	13,138	117.4%
1982	12,125	10,449	14,796	122.0%
1983	12,225	10,210	17,147	140.3%
1984	12,430	9,635	17,766	142.9%
1985	13,032	10,000	18,351	140.8%
1986	14,530	10,438	20,539	141.4%
1987	14,890	10,942	22,175	148.9%
1988	20,075	12,466	23,943	119.3%
1989	21,561	16,506	25,849	119.9%
1990	22,697	17,409	30,300	133.5%
1991	24,954	19,646	31,501	126.2%
1992	24,954	20,594	35,446	142.0%
1993	25,964	19,834	37,991	146.3%
1994	27,017	19,198	40,253	149.0%
1995	30,258	19,915	41,609	137.5%
1996	32,482	19,184	44,338	136.5%
Senate Bill 2 in effect				
1997	34,337	17,600	45,962	133.9%
1998	34,706	18,253	47,808	137.8%
1999	37,245	18,325	48,171	129.3%
2000	37,245	19,721	46,619	125.2%
2001	39,927	20,669	45,505	114.0%
2002	39,650	22,411	44,868	113.2%
2003	36,270	23,126	45,284	124.9%
2004	36,526	24,662	44,350	121.4%
2005	35,429	25,841	44,142	124.6%
2006	35,611	28,714	45,189	126.9%
Foster decision neutralizes part of Senate Bill 2				
2007	37,610	28,178	48,482	128.9%
2008	37,610	26,993	49,864	132.6%
2009	38,320	25,031	50,884	132.8%
2010	38,665	23,191	50,783	131.3%
2011	38,389	NA	50,857	132.5%

*This table was prepared by the Sentencing Commission using data provided by the Department of Rehabilitation and Correction. Population and capacity information are from January 1 of the year. The 2010 intake data are preliminary.

**Uses DRC “design capacity” through 1985. Uses American Correctional Association “rated capacity” from 1985 on.

In the '80s, the General Assembly added mandatory terms for a broader array of crimes. The signature bill of the era—S.B. 199 (1984)—mandated longer terms for high level “aggravated” felons, especially on repeat offenses, and for those who have guns while committing felonies. Similar legislation added longer mandatory terms to misdemeanor law, with increased penalties required for impaired drivers. (This led to the era of task forces and new construction, summarized in the next section.)

The '90s saw impaired driving elevated to a felony for the first time and new mandatory sentences for drunken and drugged drivers were added by nearly every session of the General Assembly thereafter, slowing only in recent years. Moreover, the last 15 years saw dramatic new mandatory terms for sexual offenders.

However, blaming mandatory sentencing for prison crowding requires a more subtle argument than you might think. After all, most of these bills targeted the worst criminals. Even before the mandates, judges were routinely sentencing high percentages of these criminals to prison. This began a subtle shift in how prisons become crowded, from the intake side of the equation to the length-of-stay side.

Since many of the mandatory sentencing bills targeted people who were already prison bound, the required term didn't always have a dramatic impact on prison intake. However, since the mandatory sentences almost always carried longer prison terms than the same crimes did before the mandatory was enacted, **the length-of-stay averages began to push upward.**

Additionally, during this era, the Parole Board grew more cautious, releasing far fewer offenders at their first parole hearings. This also increased the average time that offenders were held.

Task Forces and New Construction. Once S.B. 199 enacted the most sweeping mandatory terms in Ohio's modern history, the prison population was expected to hit new heights. That, in part, was the bill's intent. The measure led Richard Celeste to create the bipartisan Governor's Committee on Prison Crowding.

In its 1986 report, the Committee stalemated over whether the state should build more prisons to meet the challenge, rewrite the felony sentencing structure, or both. Several of the Committee's less contentious proposals (at the time) were enacted or funded by the General Assembly with bipartisan support. These included creating an incentive earned credits program, fostering the greater use of halfway houses, encouraging the adoption of parole guidelines, expanding community-based correctional facilities (CBCF), and enacting provisions to govern sentencing reductions if an overcrowding emergency occurs.

Ohio also began a half-billion dollar (in '80s dollars) prison construction program that significantly expanded the capacity of the system over the next decade. Despite a net gain of over 17,000 beds, **as new prisons opened, the number of inmates grew to**

again exceed capacity. In the words of a popular movie at the time, “If you build it, they will come.”

By 1989, Governor Celeste put together a second blue ribbon panel of judges, prosecutors, law enforcement officers, legislators, defense attorneys, and state and local officials. By the time the Governor’s Committee on Prison and Jail Crowding reported in March 1990, the prison population had reached 31,268 in space designed for 19,848.

In short, the number of prison inmates grew by nearly 400% in the 16 years between 1974 and 1990. The second Crowding Committee decided that systemic change was needed. It recommended that the General Assembly create a sentencing commission to develop comprehensive plans to deal with crowding and a range of other sentencing goals including public safety, consistency, and proportionality (have the punishment fit the crime).

Acting on the task force’s recommendation, the General Assembly created the Ohio Criminal Sentencing Commission later in 1990 as part of S.B. 258. The Commission began meeting in 1991 and issued a felony sentencing report in 1993. The report became the basis for S.B. 2 (effective July 1996), the bill that largely controls felony sentencing today. It was enacted with only a handful of dissenting votes in the General Assembly. It had the support of Governor George Voinovich.

The “Crack” Era. We sometimes joke that officials have addressed 10 of the last one drug epidemics. That one was crack cocaine, which became a scourge in the late ‘80s. If it were legal, crack would be a wonder drug. The process takes relatively expensive powder cocaine, cooks it to its base form, and cracks off small “rocks” that can be sold rather cheaply. Because it is smoked, it quickly enters the bloodstream, producing fast highs, but also swift lows, fueling more purchases. In the early ‘90s, the crack trade was disorganized and associated with sudden violence. Certainly crack remains troubling. But the problem mercifully peaked by the mid-90s and is now linked to less violence than before. The crack surge clearly added to prison intake and its heightened penalties linger on the length-of-stay side.

Non-Mandatory Legislation. In addition to the mandatory sentencing movement, in the ‘80s and ‘90s, the legislature made felonies out of offenses that were formerly misdemeanors (such as domestic violence, nonsupport, and impaired driving). This increased intake, sometimes significantly. Even more frequently, the General Assembly increased penalties for individual offenses, an ongoing process. The latter approach largely impacts lengths-of-stay.

Nevertheless, **the most far-reaching piece of crime-related legislation in the past 35 years was Senate Bill 2**, sponsored by then-Senator Tim Greenwood at the behest of the Sentencing Commission. For upper level felons and those facing consecutive terms, the measure reflected the tough-on-crime trend. In 1995, the year before S.B. 2 took effect, the average sentence for first degree felons was 7.4 years. That average

jumped to 10 years in 2001 and reached a peak of 10.46 years in 2004, before gradually dropping down below nine years after 2006. Increases in the actual length-of-stay for high end offenders with definite sentences under S.B. 2 occurred, even though the indeterminate sentences under prior law *sounded* longer.

However, S.B. 2 also had a “smart-on-crime” goal. To assure adequate prison space for the most menacing offenders, there had to be trade-offs. **S.B. 2 was the *only* major sentencing bill since the early ‘70s that systematically reduced penalties for certain offenders**, typically at the lower levels, reducing intake. As a result of compromises, between 1996 and 2006, the prison population did not begin to grow to pre-S.B. 2 levels until parts of S.B. 2 were neutered in 2006.

The Role of S.B. 2’s Sentencing Guidelines. Senate Bill 2 was a massive bill, touching every aspect of felony sentencing and reclassifying hundreds of criminal offenses. It contained scores of provisions that are widely accepted today on a broad range of topics, including:

- Shoehorning 12 sentencing categories into the current five degrees of felony;
- Making sentencing more open and finite;
- Organizing community sanctions into three sections, expanding the “continuum” of such tools, and largely standardizing eligibility for them;
- Keeping petty thieves in misdemeanor courts;
- Adding life without parole as an option in capital cases;
- Allowing judges to sentence low-level felons in monthly, rather than quarterly, increments;
- Creating a one year gun spec, removing mere possession from the three year spec;
- Creating a presumption in favor of prison for high level felons;
- Using actual weight—instead of unit doses—for more street drugs;
- Consolidated victims’ rights; *etc.*

Given S.B. 2’s scope, you are bound to hear complaints. However, concerns usually involve relatively few provisions, particularly the bill’s guidelines that attempt to steer judicial discretion.

S.B. 2 was never intended as a crash diet for prisons. It was weight management. After all, S.B. 2 was the truth-in-sentencing bill, probably the most honest one enacted in the country. (Most other states defined “truth” as 85% of the truth.) As we saw, it was tougher on high level offenders, with various sentencing enhancements and a broader authority to impose consecutive terms.

But S.B. 2 was also a “truth-in-resources” bill. To this end, the bill contained several provisions to ease prison crowding. There were provisions to reduce intake (guiding judges against a prison term for most F-4s and F-5s, removing enhanced petty thefts from prison eligibility, *etc.*). If the judge decided to send an offender to prison, **these three key priorities were crafted to limit the length-of-stay:**

- **Preference for the Minimum Term.** S.B. 2 instructed judges to impose the minimum sentence in the appropriate range for offenders who had not been to prison before. The judge could exceed the minimum, but had to make certain findings to justify doing so, subject to appellate review. (See §2929.14(B).)
- **Discouraging the Maximum Term.** The bill told judges to reserve the maximum sentence in the range for the worst forms of the offense and the worst offenders. Again, the judge could sentence to the maximum term, but had to give reasons (findings) subject to appellate review. (See §2929.14(C).)
- **Justifying Consecutive Terms.** S.B. 2 removed the cap on consecutive sentences and replaced it with a requirement that the sentencing judge make findings to justify non-mandatory consecutive sentences, subject to appellate review. (See §2929.14(E).)

In this regard, a look at the table on p. 6 shows that the guidelines worked pretty well. In January 1997, the beginning of the first full year under S.B. 2, the prison population was 45,962. The count spiked briefly. But, as the bill kicked in, the population held fairly steady and dropped to 44,142 by 2005. The percentage over capacity dipped by about 7% during the first decade under S.B. 2.

This decade of “weight management” under S.B. 2 saw the most significant leveling of the inmate population since 1974, despite the tougher penalties on high end felons. It is the only prolonged period with a static prison population in several decades.

There are many reasons for the stable prison population figures. Some of the decline can be attributed to two significant court cases that changed parole practices for pre-S.B. 2 inmates. Also, crime rates decreased. Taking certain serious offenders off the streets for a longer time probably played some role. Moreover, the expansion of community sanctions in S.B. 2—and their funding—had a significant impact.

So S.B. 2 wasn’t the only factor at work during this period, but it was the *constant* one and provided the most significant statutory constraints on prison crowding in recent Ohio history.

The Road to *Foster*

While the required findings weren’t universally popular with judges, no one dreamed that S.B. 2’s provisions preferring minimum terms, discouraging maximum terms, and requiring justifications for consecutive terms were unconstitutional at the time they were enacted. However, a line of seemingly unrelated U.S. Supreme Court cases, designed to augment the Sixth Amendment’s right to a jury trial, had surprising consequences.

These cases came out of nowhere to cast the findings required by S.B. 2 in a new light. **The federal cases, including *Blakely v. Washington*, led the Ohio Supreme Court**

to invalidate each of the three provisions of S.B. 2's guidelines that directly affected length-of-stay in 2006. (*State v. Foster*, 109 Ohio St. 3^d 1.)

Before discussing the consequences of the *Blakely/Foster* line, let's take a brief sojourn along the road to *Foster*.

Apprendi and Blakely. In these two cases, the U.S. Supreme Court ruled that state statutes were unconstitutional because they required sentencing-related *findings* by judges, rather than juries, after the defendant's conviction. The Court found the statutes violated the defendant's Sixth Amendment right to have a jury determine such critical facts, unless the defendant admitted them in a guilty plea. The vote was 5-4 in each case. And the majority in each was formed by unlikely bedfellows: Justices Scalia, Thomas, Stevens, Ginsberg, and Souter.

Apprendi was convicted of a weapons offense. At sentencing, a New Jersey statute allowed the judge to impose a penalty beyond the basic statutory range after finding that the offense was a hate crime. The judge made the finding and added to the sentence. The Court held (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)):

Other than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.* [Emphasis ours.]

Blakely also faced additional time under a Washington state statute once the judge found that he acted with "deliberate cruelty" (*Blakely v. Washington*, 542 U.S. 269 (2004)). By emphasizing the literal language of *Apprendi*, noted above, the decision sent temblors through state courts.

These cases have their logic. After all, it doesn't take judicial expertise to find that a defendant acted with a racial motivation or deliberate cruelty. In effect, these findings relate to the defendant's motive and should be proved, like other elements, beyond a reasonable doubt to a jury. At a glance, you might say, "What's the big deal?" Ethnic hatred or deliberate cruelty sound like facts that a jury can figure out.

Here's where things get tricky. **The Court favored giving all "findings" to juries, unless admitted by a defendant when pleading guilty.** The only exception relates to facts about the defendant's criminal history. Those, of course, could be highly prejudicial if known by the jury while weighing the defendant's guilt.

What mattered for Ohio law, as we shall see, is that **the U.S. Supreme Court didn't distinguish between findings on things like racial motivation, that seem like elements of the crime, and other judicial findings that are "sentencing factors" designed to put the decision into the broader experience of the judge.** In fact, the Court discouraged such hair-splitting.

Booker. In *Booker*, the U.S. Supreme Court was asked to apply the *Apprendi/Blakely* logic to the federal Sentencing Guidelines. In federal drug cases, the trier of fact (judge or jury) decides whether the defendant possessed or sold controlled substances. Then, after conviction on the underlying act, the judge alone makes a finding as to the amount of drugs involved and imposes a sentence. Obviously, the amount of time served, if any, largely depends on the latter finding. (*U.S. v. Booker*, 543 U.S. 220 (2005).)

On the Sixth Amendment issue, the same 5-4 majority found the guidelines deficient because the finding on the amount of drugs doesn't go to a jury. **But a funny thing happened on the way to a remedy. Justice Ginsberg switched sides.** This gave the four long time dissenters sufficient votes to decide the impact of the case on the federal guidelines. Sure enough, the new 5-4 majority scarcely mentioned the importance of juries. They found that the Guidelines should be applied as discretionary. That is, **by eliminating the required fact-finding, judicial findings, and the federal guidelines themselves, were saved in optional form.**

Foster. Such was the confused state of relevant federal constitutional law when the Supreme Court of Ohio decided *Foster*. Following the federal example, the Court did not delineate between which facts were appropriate for judges and which were within the ken of juries. It cut the Gordian Knot with a remarkably straightforward solution. **By requiring judges to make certain findings before imposing certain sentences, Ohio statutes violated the Sixth Amendment** under *Blakely*. Then, using the *Booker* remedy, the Court found that Ohio sentencing statutes are constitutional so long as judges have *discretion* to sentence from the whole §2929.14 range available for each offense.

The Court then invalidated the required findings in S.B. 2 that affected length-of-stay—the guidance in favor of the minimum, limiting the maximum, and on consecutive terms—as well as provisions that subjected these findings to appeal.

Analysis. The Ohio Supreme Court painted with a wide brush. For starters, the *Apprendi/Blakely/Booker* line never questioned judicial findings made before imposing consecutive sentences, as the more recent *Ice* case (discussed below) made clear. *Foster* not only struck down the consecutive findings, it also eliminated the presumption of concurrent sentencing that had been part of Ohio law at least since 1974. In fairness, this reading seemed to be consistent with the spirit of *Blakely*.

As for the other stricken length-of-stay provisions, the Court followed the literal language of *Apprendi* and *Blakely* in holding that any “finding” increasing the potential sentence that isn't made by a jury or admitted in a plea violates the Sixth Amendment.

Yet **many findings under S.B. 2 don't resemble those struck down in *Apprendi*, *Blakely*, and *Booker*.** To enhance *Apprendi*'s sentence, the judge had to find the defendant was racially motivated. *Blakely*'s term grew longer when the judge found deliberate

cruelty. And Booker faced more time when the judge found the actual amount of drugs involved in the case. Unlike those jurisdictions, each of these findings are jury questions in Ohio—they go to the *elements* of the crime—before and after the *Apprendi* line of cases.

For the most part, **S.B. 2 instead required judges to make length-of-stay findings that weren't "facts" in the jury's bailiwick.** Judges were asked to find such things as:

- Whether “the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime” (§2929.14(B)(2));
- To “impose the longest prison term ... only upon offenders who committed the worst forms of the offense, upon those who pose the greatest likelihood of committing future crimes ...” (§2929.14(C));
- To “require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive service is not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public ...” (§2929.14(E)(4)).

Deciding whether a particular term “demeans the seriousness of the conduct,” is the “worst form of the offense,” or “is not disproportionate to the conduct” are logically issues for the judge based on his or her sentencing experience. After all, the jury’s experience with the criminal justice system is only one case old.

This isn't to criticize the Ohio Supreme Court. It felt bound by the broad rulings in *Apprendi* and *Blakely*, which showed little patience for such distinctions. In fact, the Court may have concluded that differentiating between types of findings would not pass muster with the U.S. Supreme Court.

Still, the argument can be made that ***Foster* was a Trojan Horse. On the outside, it wore the badge of the Sixth Amendment’s right to trial by jury. But in its belly was a strong sense of separation of powers that was offended by S.B. 2’s attempts at meticulously guiding judicial discretion.** After all, the case didn't really do much to reinforce the right to a jury trial, especially since it ultimately gave judges more power to sentence without restrictions. To carry the Greek metaphor further, *Foster* was a Pyrrhic victory for the defendant.

The Court sensed that the decision could cause problems. In writing for the Court in *Foster*, Justice Judith Ann Lanzinger volunteered, “It may well be that in the future the Ohio Criminal Sentencing Commission may recommend *Blakely*-compliant statutory modifications to the General Assembly.” She also suggested to the legislature that “it may also well consider rewriting the statutes to restore guidelines for imposing consecutive sentences.”

The Impact of *Blakely/Foster*

As we have seen, each of the three guidelines struck by the *Blakely/Foster* line relates to the offender's length-of-stay in prison. Those provisions contributed to the fairly level prison population between 1996 and 2006. In fact, they were probably underappreciated in that regard. Glance back at the table on p. 6 and focus on the two columns on the right (prison population and crowding levels) for the period from 1997 to 2007, then note what happened after 2007, the first full year after *Foster*.

Further note that it's only been since the length-of-stay guidelines were struck down that the prison population finally broke pre-S.B. 2 records. Even though appellate courts were often deferential to trial courts when these issues were appealed, the legislative preference stated in S.B. 2 steered judges toward the minimum, away from the maximum, and against lifelong consecutive sentences. **Clearly, the factors struck by *Foster* mattered. They changed the psychology of felony sentencing in Ohio.**

Stripping away other elements that affected the prison population over the same period, **DRC estimates that the *Foster* decision—while increasing sentences by just under five months per inmate—accounts for a gain of 4,000+ inmates since the ruling, with a projected final impact of about 8,000.**

You can also look to more specific DRC data that show that the number of offenders receiving the minimum sentence favored by S.B. 2 on first commitment to prison has declined after *Foster*. DRC also has data showing that the use of the maximum term, disfavored by S.B. 2, has appreciably increased since *Foster*.

The ironic thing is that this didn't happen because of tough-on-crime legislation. Not one penalty range was changed in statute. Nobody campaigned on the issue. And few argued that public safety was jeopardized under the old rules. The change happened quietly as an unintended result of a good faith interpretation of a peculiar line of U.S. Supreme Court cases, cases that, themselves, are now in flux.

Court Action After *Blakely/Foster*

The U.S. Supreme Court's new majority continued to back away from the *Blakely* approach in *Oregon v. Ice*, 555 U.S. 160 (2009). The Court found that state statutes requiring judicial findings before imposing consecutive sentences are valid. This led the Ohio Supreme Court to rethink its position on judicial findings prior to imposing consecutive terms. At the end of 2010, in *State v. Hodge*, 2010-Ohio-6320, the Court acknowledged that, given the holding in *Ice*:

[T]he General Assembly is no longer constrained by *Foster's* holdings regarding the constitutionality of the consecutive-sentencing provisions invalidated in *Foster*.

The Court added that the decision does not automatically reinstate the S.B. 2 findings or to create new ones. Instead the General Assembly must act. Whether the guidance stricken by *Foster* on minimum and maximum terms might also be viewed differently was left to another day, because they weren't at issue in *Hodge* or *Ice*.

SUGGESTIONS

As noted earlier, no one idea will cure the budgetary problems faced by the prison system. So, let's look over some options.

1. Revive the S.B. 2 Length-of-Stay Guidance in Some Form. The Sentencing Commission is working on a draft that could have as much impact as any other proposal being considered. As we have seen, the main driver in the recent surge in Ohio's prison population was unintentional. The *Foster* decision was an effort by the Ohio Supreme Court to faithfully interpret the U.S. Supreme Court's ruling in *Blakely* and related cases.

The Commission is working on restoring checks on consecutive sentencing in light of the *Ice* and *Hodge* cases. In addition, the Commission is tackling the trickier issue of reviving some form of guidance that favors the shortest prison term in the felony range for a person's first commitment to prison and that reserves the longest term in the range for the most menacing offenders. This is a very nuanced discussion, since we can't (nor necessarily want to) revive those identical provisions *per se*. They remain unconstitutional under the *Blakely/Foster* line of cases, even as the cases' Sixth Amendment reasoning has grown more tenuous. And we also must balance legitimate concerns of sentencing judges about making the approach too cumbersome.

Nevertheless, the work is very important, since the *Blakely/Foster* decisions alone have increased the prison population by well over 4,000 beds since 2006, far more than any other single factor. And none of this was driven by the General Assembly.

Another advantage of tackling length-of-stay issues is that they effectively reduce prison costs, but don't necessarily add to the cost of community corrections.

2. Consider Senate Bill 10/House Bill 86. These companion bills largely grew out of Sen. Bill Seitz's work with S.B. 22 last session. The Sentencing Commission was involved in many of the discussions during the past two years and suggested items that became part of the bill. In particular:

- We proposed provisions to treat drug offenders more like other offenders in the same felony range (see Drug Penalty "Equalization" below);
- We worked with DRC's on eliminating the crack/powder cocaine sentencing distinctions in a balanced way;
- We had a hand in drafting the intervention-in-lieu of conviction and 85% judicial review changes, consistent with S.B. 2;

- We see the change in the felony theft threshold as the logical extension of distinctions drawn by S.B. 2;
- We welcomed the move away from incarceration for felony nonsupport since a prison term virtually assures that support will not be paid.

The Commission has not yet formally reviewed the items suggested by the Justice Reinvestment Initiative, recently added to Sub. S.B. 10. These include:

- Disallowing direct prison sentences for certain F-4s & F-5s. They could only be sent to prison for violations of community sanctions;
- Adding one year to the maximum prison term available for F-1s, while allowing shorter sentencing increments and a lower maximum for F-3s;
- Imposing 75% sentences on F-4s and F-5s if they behave properly during their prison stays. In recognition of the truth-in-sentencing approach, the 75% option would be clearly stated in open court so that the victim, media, and others will not be surprised when, say, a one year term becomes nine months.

3. Drug Penalty “Equalization.” During the so-called “War on Drugs” era (mid-’80s to mid-’90s), we saw significant violence associated with the drug trade. “Kingpins” became bad. “Czars” became good. And “drive-by shooting” was added to our lexicon. Mercifully, this side of Mexico, the drug business is less violent today.

S.B. 2 was enacted at the tail end of this era. Reflecting the times, the bill retained mandatory sentences already in place, although it gave the judge discretion to set the actual terms. It also created sentencing rules for drug offenses that are more punitive than that for other offenses at the same felony levels.

To illustrate, let’s compare the basic sentencing rules for non-drug offenses that are currently in effect (§2929.13) to the dramatically different rules for cocaine possession and trafficking. We selected cocaine because, whether in powder or base (crack) form, it is the drug with the largest impact on the Ohio prison population.

RULES FOR NON-DRUG SENTENCING	
FELONY LEVEL	GUIDANCE RE PRISON TERM
F-1 & F-2	Presumption in favor of prison
F-3	No particular guidance
F-4 & F-5	Guidance against prison ¹

¹ Unless certain factors are found (sex offense, weapon, physical harm, *etc.*).

COCAINE TRAFFICKING SENTENCING ¹	
FELONY LEVEL	GUIDANCE RE PRISON TERM
F-1, F-2, & F-3	Mandatory Prison Term
F-4	Presumption in favor of prison
F-5	No particular guidance

COCAINE POSSESSION SENTENCING ¹	
FELONY LEVEL	GUIDANCE RE PRISON TERM
F-1, F-2, & F-3	Mandatory Prison Term
F-4	Presumption in favor of prison
F-5	Guidance against prison ²

¹ Covers both crack and powder cocaine, but does not include enhancement for offense near a school or juvenile.

² Unless certain factors are found (sex offense, weapon, physical harm, *etc.*).

The differences are significant. The presumption *in favor* of a prison term, which applies to first and second degree felonies in non-drug cases, reaches all the way down to the F-4 level in cocaine cases. Moreover, mandatory terms dip as low as F-3s, which is almost unheard of for non-drug crimes, even those F-3s involving involuntary manslaughter, significant assaults, and extortionate threats. In fact, very few non-drug F-1s carry mandatory terms on first offense, unless other factors are present.

Drug offenders routinely constitute anywhere from a quarter to a third of prison intake in Ohio. The General Assembly should take this opportunity to clearly consider whether we need separate drug and non-drug sentencing tables. Does it really make sense to have a person who possesses drugs in an amount that the legislature calls an F-4 face a presumption of prison, when most non-drug F-4s face guidance against prison?

Even a glance at the profiles of small time, F-4, cocaine *sellers*, a touchier subject, rarely includes people who are truly in the drug business. Many people arrested at the F-4 trafficking level look like F-4 users. Typically, they don't sell drugs for their livelihood. The General Assembly could place those who do so at a higher felony level, as it could do with any other drug offenders that may be in a felony class that's too low if the guidance between drug and non-drug offenses were made the same.

At our suggestion, Sub. S.B. 10 would take a few *modest* steps in the direction of treating drug offenders more like non-drug offenders at the same felony level. For cocaine, the S.B. 10 change is at the F-4 *possession* level, where the guidance against a prison term would apply, rather than a presumption in favor of prison. It's worth considering a broader change along these lines. But that's a small step.

Note: eliminating the distinctions between drug and non-drug cases would not entail reducing the degree or penalty range of any drug offense. The same prison terms would still be available. It merely changes the instructions we give to judges on how certain drug cases are to be handled.

While it's tough to gauge the precise impact of these changes on the prison population, they would significantly alter the psychology of sentencing in drug cases.

4. Other Ideas on the Sentencing Commission’s Radar. These concepts have been discussed, but not voted on, at Commission meetings:

- **Shorter Increments for F-1s, F-2s, & F-3s within the Current Ranges.** When a judge adjusts a sentence for a first, second, or third degree felon upward—whether exercising newfound discretion under *Foster*, choosing a term to impose for a post-release control violator, or otherwise—the only choice is to increase the prison term by at least one full year.

Several people suggest allowing smaller increments, similar to what is done under S.B. 2 for F-4s and F-5s. You could consider monthly or quarterly increments within the same basic range. The assumption is that such a change will decrease average sentences a little without amending the scope of available penalties. An aspect of this—for F-3s at the lower end—has been merged into Sub. S.B. 10.

- **A Market Based Approach.** In the juvenile system, the RECLAIM Ohio program provides juvenile courts with a pot of money for offenders. If they send someone to a state facility, they must, in effect, “buy” the bed being used. (There are exceptions for high level offenders, which the state must take.) If the court keeps the kid in local sanctions, which are (usually) less expensive, they can use the money to beef up the range of local sanctions available. This economic model has worked pretty well from a crowding perspective. The Department of Youth Services houses far fewer juveniles today than a decade ago.

When floated last summer, neither DRC, the Judicial Conference, nor the Ohio Prosecuting Attorneys Association warmed to applying this idea to adult offenders. We know that judges in adult courts don’t have the quasi-administrative authority of juvenile judges who, for instance, control the local detention facility. This makes it tougher to implement a RECLAIM approach for adults, even among the willing.

But a more focused RECLAIM model might work in the adult system and not draw as much fire from judges. The current felony sentencing guidelines steer most F-4s and F-5s toward community corrections, yet many find their way to prison. These short-term, largely non-violent offenders exacerbate crowding and create numerous problems for DRC. They fill beds in reception centers and spend relatively little time in the less costly dormitories of regular prisons. Many F-4s and F-5s come to prison after failing on community control. But a significant minority is sentenced directly to prison.

Since F-4s and F-5s are the categories with the broadest sentencing discretion today (almost none face mandatory prison terms) and tend to dominate prison intake numbers, we could try to apply the RECLAIM model to them. Here’s how it might work. Initially, DRC could divert the marginal costs of qualified F-4s and F-5s from each county into a local corrections fund for each county. Of course, to truly save money, we would have to divert enough people to go

beyond marginal costs shifted to counties. The state would have to close prisons or wings to gain the \$60+ per day savings, which could happen if enough other changes are made.

The state could create a pilot program that allows sentencing judges to retain complete discretion to sentence the offender to prison or to community sanctions. If the judge orders the person to prison, money from a fund would shift back to the state. If the judge orders a local sanction, the fund would pay the cost of the local program. (Presumably, this would be done in bulk, rather than case-by-case.) There could be exceptions made for public safety reasons.

While there are devilish details to address, there are clear advantages to thinking along these lines: judges keep their discretion; the program would be a funded non-mandate, with money available to encourage local creativity, fostering a broader range of sanctions; offenders kept in the community would cost less overall, *provided their recidivism doesn't increase*; and the program could help assure adequate prison space for the most menacing offenders.

Moreover, the work on standardizing risk assessment (DRC's ORAS initiative due soon) could give judges better information to make these judgments.

- **Trace Cocaine Levels.** The two most commonly abused street drugs in Ohio are marijuana and cocaine. Many low level marijuana offenders fall into misdemeanor categories and don't come to prison. But even the most microscopic amount of cocaine can be prosecuted as a felony.

Some courts already fudge on the topic, discouraging felony charges in trace amount cases, but most don't. One thought is to set a misdemeanor penalty or limit the F-5 felony sanctions for very small amounts of cocaine. Admittedly, it's a hot-button issue. But it would ease prison crowding and partially address statistical racial imbalance (more blacks than whites come to prison for both crack *and* powder cocaine in Ohio). We can't be naïve to the likelihood that the offender possessed a larger amount and was nabbed late in the possession cycle. But our penalties are based on the amount found. The "gateway" drug argument—which may or may not be valid (tobacco and alcohol being more likely gateway drugs)—must be discussed. If misdemeanor penalties were considered, we can't ignore that felony courts have a broader range of drug treatment options available. And we must be vigilant not to exacerbate local jail crowding in the process.

Alternately, surveys show there is a measure of public support for treating low-level drug violations as health concerns rather than as crimes. That, too, is controversial, but, perhaps, worthy of consideration.

- **Reserving Less Than the Maximum for PRC Violations.** A judge imposing a prison term must also advise the offender of post-release control (PRC) and the

possibility of punishing a PRC violation. Since a judge cannot impose more time for PRC than he or she reserved, many judges routinely warn the offender of the maximum time available in the sentence range and then choose a specific time up to that maximum when applied to the violation.

If judges were encouraged to use an amount less than the maximum in giving the warning, the time eventually imposed would be less. Arguably, it would better fit the initial crime, rather than reflect the judge's later view. Perhaps an exception could be carved for more extreme violations, although new criminal charges often are the best remedy in those situations.

- **Jail Time Credit.** Offenders are entitled to credit against their prison terms for any time spent incarcerated while awaiting trial and sentencing or otherwise as a result of the offense. The Commission has a proposal that would help to assure an accurate count, which will marginally reduce the time certain offenders stay in prison and save DRC and the State Public Defender's office untold hours spent investigating these issues.

SIMPLIFICATION & "INCOMPLETE" CRIMINAL STATUTES

Setting aside prison crowding, recent reports of the Sentencing Commission call on the General Assembly to address two broad issues.

First, the criminal code (Title 29) has grown increasingly complex. In *A Plan for Simplifying the Revised Code*, released in 2008, the Commission showed how the Code could be condensed by hundreds of thousands of words without changing any meaning, simply by changing certain drafting conventions. The Commission also worked to streamline Title 29 as an example. These proposals led to discussions with the Speaker's office in 2008 and preliminary drafting by the Legislative Service Commission staff. The Commission remains willing to work with the General Assembly on this project. While tough to quantify, reducing the Code by miles of words would make life much more efficient for legislators, citizens, and practitioners.

Second, in January, you received a report on "missing" elements in scores of criminal statutes (*Criminal Statutes after the Colon, Horner, and Johnson Cases*). These gaps cause untold delays in the courts and should be filled to make the law more workable for judges, prosecuting and defense attorneys, defendants, and victims. The Commission would gladly help the General Assembly work through these issues.