

**Minutes of the  
CRIMINAL SENTENCING COMMISSION  
And the  
CRIMINAL SENTENCING ADVISORY COMMITTEE  
July 21, 2005**

**SENTENCING COMMISSION MEMBERS PRESENT**

Staff Lt. Michael Black, representing State Highway Patrol  
Superintendent Col. Paul McClellan  
Appellate Judge H.J. Bressler, Co-Chair  
Defense Attorney Bill Gallagher  
Municipal Judge Fritz Hany  
Victim Representative Staci Kitchen  
Defense Attorney Bob Lane, representing State Public Defender David  
Bodiker  
Municipal Prosecutor Steve McIntosh  
Common Pleas Judge Reggie Routson  
Common Pleas Judge John D. Schmitt  
Municipal Judge Kenneth Spanagel  
Steve VanDine, representing Rehabilitation & Correction  
Director Reggie Wilkinson  
Juvenile Judge Stephanie Wyler

**ADVISORY COMMITTEE MEMBERS PRESENT**

Monda DeWeese, SEPTA Correctional Facility  
Karhlton Moore, Office of Criminal Justice Services

**STAFF PRESENT**

Scott Anderson, Staff Attorney  
David Diroll, Executive Director  
Jeff Harris, Research Assistant  
Cynthia Ward, Administrative Assistant

**GUESTS PRESENT**

Lisa Bagdonas, Senate Republican Caucus  
Bill Breyer, Assistant Prosecuting Attorney, Hamilton County  
Lusanne Green, Ohio Community Corrections Association  
Jim Guy, Department of Rehabilitation and Correction  
Greg Lewis, Ohio Commission on African-American Males  
Jeremiah Martin, Northland High School student  
Malek Stewart, Westerville South High School student  
Steven Taylor, Franklin County Prosecutor's Office  
Mike Weinman, Legislative Liaison, City of Columbus, Division of Police

Judge H.J. Bressler, Co-Chair, called the July 21, 2005, meeting of the Ohio Criminal Sentencing Commission to order at 10:15 a.m.

## **DIRECTOR'S REPORT**

Director David Diroll reviewed contents of the meeting's packet, including: a short version of H.B. 241, the asset forfeiture bill based on the Commission's recommendations; a list of Senate Judiciary-Criminal Justice Committee members; a summary by Staff Attorney Scott Anderson and intern Sara Carlsson on *Blakely* cases in Ohio; an *Ohio Lawyer* article by former Judge Burt Griffin and Professor Lew Katz on "Sentencing Consistency: The Linchpin of Ohio's Sentencing Reform"; a memo by Atty. Anderson on "The Defense of Marriage Act and *State v. Newell*" regarding domestic violence cases; the latest legislative update; and minutes from the May Commission meeting.

Dir. Diroll introduced Judge Reggie Routson as the Commission's newest common pleas court Judge member, noting that he is also an old (or former) Municipal Court Judge member of the Commission. He also welcomed Karhlton Moore as the new Director of the Office of Criminal Justice Services.

## **TRAFFIC**

Traffic recommendations from the last meeting are being drafted for Rep. Kevin DeWine. The bill would primarily address issues in S.B. 123 (the major traffic reform bill of 2004 based on Commission proposals). It also contains an amendment to the mandatory prison term for aggravated vehicular assault.

## **MAYOR'S COURTS**

The misdemeanor package enacted as H.B. 490 required annual registrations by mayor's court, and quarterly reports on case management. Dir. Diroll reported that, based on the first year of reporting (2004), there are 333 mayor's courts located in 68 of the State's 88 counties. The three most populous counties have one-fourth of the state's mayor's courts. On average, there are 976 cases filed per mayor's court as compared to an average of 12,387 cases filed per municipal court. The busiest mayor's court appears to be in Dublin, with 9,369 cases filed. The report does not provide information on the percentage of municipal revenues provided through mayor's courts.

## **FORFEITURE LAW CHANGES**

Dir. Diroll reported that H.B. 241, based on the Commission's asset forfeiture package, passed the House 91-4 with a few amendments. He noted that the staff initiated, or agreed to, all of the changes. Here they are:

- The proposed criminal forfeiture specification was given the new number of §2941.1417;
- Minor misdemeanors were removed from the definition of "offense" (under §2981.01(B)(10)), making the new forfeiture chapter inapplicable to MMs;
- The section dealing with provisional title and hardship release (§2981.03) was reordered to flow more chronologically;

- A sentence was added to language dealing with challenges to seizures. It now states that, if the motion is filed by a third party, it would not be treated as a motion to suppress;
- The bill contains presumptive language to help courts to ascertain which part of proceeds relate to the misconduct. In the first draft, the wording was applicable to all property. The bill now properly narrows clauses to cover property alleged to be proceeds;
- The bill sets up two time frames regarding the state's provisional interest in the property: one is a 90 day limit and the other is a 10-day limit under an ex parte order. Under the 90-day limit the court may extend the order if good cause is shown. Legislators wanted something more than a good cause showing. Language was added requiring the prosecutor to demonstrate that the need to preserve the reachability of the property still exists. Under the 10-day limit the prosecutor must make a showing that a hearing would jeopardize the availability of the property or for other good cause shown;
- The proposed burden of proof for criminal forfeitures was changed from "beyond a reasonable doubt" to "preponderance of the evidence" (§2981.04(B));
- Language was added to clarify that the state or political subdivision would have clear title to the property only to the extent that other parties' lawful interests in the property are not infringed;
- The original draft used one section (§2981.08) to cover both the right to a jury trial and the right of proportionality review. The House amended this to move proportionality to new §2981.09;
- Initially, the defendant had a right to trial by jury but the state and third parties did not. The House Judiciary Committee decided to remove that prohibition, leaving the law open (§2981.08);
- The bill provides that property may be forfeited to the extent that the amount or value is proportionate to the severity of the offense. The House added language that clarifies the owner of the property has the burden of going forward and the burden of proof by a preponderance of the evidence that the amount or value of the property forfeited is disproportionate to the severity of the offense (§2981.09(A));
- The effective date remains set at July 1, 2006. However, language was added to address pending cases at the time the bill goes into effect, allowing a case-by-case application (Section 4).

Dir. Diroll expects the bill to start through hearings in Senator Jim Jordan's Senate Judiciary-Criminal Justice Committee early in the fall. He noted that, due to term limits, there are few legislators who have voted on previous forfeiture bills or who have deep knowledge of forfeiture laws. That makes it difficult to explain the bill at times.

Municipal Court Judge Kenneth Spanagel asked whether criminal and civil forfeiture cases are expected to be bifurcated.

The forfeiture statute within the criminal code does not specifically state that there is bifurcation, said staff Attorney Scott Anderson, but the courts have the inherent power to order bifurcation.

## **BLAKELY UPDATE**

Atty. Anderson reported that the Ohio Supreme Court will hear oral arguments on three *Blakely*-related cases July 26th. The cases, *Foster*, *Quinones*, and *Elmore*, should address whether *Blakely* impacts Ohio sentencing based on 1) more than the minimum, 2) maximum, and 3) consecutive sentences. Other pending *Blakely* cases are on hold until the Supreme Court rules on the three. He added that no *Blakely* related RVO or MDO cases have been brought before the Ohio Supreme Court.

Atty. Anderson noted that the *Bruce* and *Montgomery* cases in Hamilton County were stayed in light of the pending Supreme Court cases. The court then overturned the stay it requested by continuing to decide *Blakely* issues in pending cases.

Prosecutor Bill Breyer remarked that courts in Hamilton County have not been consistent on this. They are keeping the appellate cases alive until the current Supreme Court cases are decided.

The Eighth District, said Judge Bressler, has recently decided in the *State v Lead* case that *Blakely* has no impact on maximum or consecutive sentences in Ohio.

Noting that every district in Ohio has now ruled on at least one *Blakely* related case, Atty. Anderson reported that the Sentencing Commission staff has sorted out the options on possible remedies if the Supreme Court rules certain portions of Ohio's sentencing statute unconstitutional based on any number of *Blakely* issues.

## **TRAFFIC PROPOSALS**

Common Pleas Court Judge Reggie Routson asked about a rumor that there is a movement to delete the enhancement requiring a mandatory sentence for a person who committed OVI offenses that resulted in aggravated vehicular assault.

The only aggravated vehicular assault that carries a mandatory prison term, Dir. Diroll responded, is when the alcohol impairment is shown as part of the conviction. Some legislators, he noted, want to make sure that someone who has been convicted of prior OVIs does not avoid a mandatory prison term, but also want to assure that a first-time OVI offender is not thrust into prison.

He noted that the OVI statute is the most complicated criminal statute in the Revised Code.

## **DRUGGED DRIVING**

Dir. Diroll reported that H.B. 8 is a parallel bill to S.B. 8, which sets out *per se* standards for drugged driving. S.B. 8 passed the Senate, but stalled in the House Criminal Justice Committee over issues regarding the marijuana standard and impairment levels. The bill applies Nevada standards regarding street drugs (marijuana, cocaine, LSD, etc.)

According to State Highway Patrol Staff Lt. Michael Black, Rep. Seitz wants the penalty levels for possession or sale of marijuana raised.

Judge Spanagel declared that the bill originally included an affirmative defense for prescription drugs, but those were removed, and it now only applies to street drugs.

Prescription drugs almost killed the bill, said Staff Lt. Black. He added that the drugs proscribed by the bill are quantified.

Dir. Diroll remarked that the case could still be prosecuted without the *per se* levels specified in statute since the affirmative defense does not exempt a person from that.

#### **FELONY SENTENCING**

Dir. Diroll reported that some legislators are interested in raising penalties for F-1s and F-2s. They have expressed concern that a three year prison term seems trivial for first degree felonies, particularly sex offenses. In fact, he noted, a bill was almost introduced to double penalties for F-1 sex offenses. There has also been an interest in returning to indeterminate sentencing for higher felonies. He asked Commission members for input on what to consider as an option for toughening sentences for serious felony offenders, noting that the argument is to at least bump up the minimum for these offenders.

Judge Schmitt asked where this push was coming from and whether all minimum sentences are being regarded as insufficient.

Dir. Diroll remarked that part of it is emotional, particularly regarding rape cases.

Victim Representative Staci Kitchen asked how the minimum prison term for sex crimes compares with other serious F-1 crimes.

Some sex offenders, responded Dir. Diroll, get more extraordinary penalties and can even be placed within the violent sexual predator specification range of three years to life.

Judge Routson declared that the sex offender registration bill does not seem to do what it promised to do.

According to Ms. Kitchen, there are major discrepancies based on who the sentencing judge is. Declaring that there are many pieces to this puzzle that have not been considered, she expressed a need to discuss and address the differences between some of these sexual crimes.

Before any changes can be considered, data is needed from DRC on the average sentence being served by these offenders, said defense attorney Bill Gallagher.

DRC Research Director Steve VanDine was asked for the aggregate sentence served by an offender for F-1 rape. Relating to data for 2004, he reported that 41 out of 282 sex offenders were given a 3 year sentence, while 41 were given a 4 year sentence, and 40 were given a 5 year sentence. Less than half have been given the 6 year sentence expected. In regards to aggregate sentences, he reported, 38 out of 342

sex offenders had an aggregate of 3 years, while 36 offenders had an aggregate of 4 years, and 44 offenders had an aggregate of 5 years. This amounted to about 10% each for the lower levels. He said that he would be able to provide better data in a few days.

Judge Bressler asked for recidivism data on F-1s and F-2s since the effective date of S.B. 2.

When asked about the recidivism rate for high level sex offenders, Mr. VanDine explained that DRC checks if the offender returns to the prison system within three years after release. On that basis, sex offenders tend to have the lowest recidivism rate of all high level offenders.

Judge Bressler remarked that most sex offenders have almost no record of prior convictions as compared to other offenders. One possible reason for this is that most sex offenders do not get caught or convicted until after they have already committed the crime against several victims, most of which go unreported.

Ms. Kitchen asked if there was a way to research how many sex offenders had their charges pled down. Mr. VanDine offered to come up with an estimate.

Dir. Diroll acknowledged that the data in this area is tricky, particularly since sex offenses tend to be underreported when compared to other offenses. It often results in a long but hidden history of offenses committed by the perpetrator.

Judge Bressler asked Mr. VanDine to check if, proportionally, felony sex offenders are more likely to be sent to prison than others.

The range of conduct for F-1 rape is very broad based on conduct, Mr. Diroll noted.

Representing the State Public Defender's Office, Atty. Bob Lane declared that a person who commits the worst form of an offense does not get a minimum sentence.

The Commission was asked to look at these penalty ranges because someone intends to make some changes one way or another, said Judge Bressler.

Judge Routson maintained that §2929.50's registration is not adequate supervision for certain classes of sex offenders.

It would probably be best, said Judge Bressler, to start by having a subcommittee weed out these F-1 and F-2 penalty range issues.

Juvenile Court Judge Stephanie Wyler nominated Prosecutor Don White, in absentia, to serve on the committee.

Other members who volunteered to serve on the committee included Judge John Schmitt, Mr. VanDine, Ms. Kitchen, Atty. Lane, and Atty. Gallagher. The Penalty Range Committee agreed to meet August 25th.

Judge Schmitt requested more statistics from DRC to aid the Committee.

## SENTENCING CONSISTENCY

Discussion turned to an article on sentencing consistency, authored by retired Common Pleas Judge Burt Griffin and Case Western Reserve Law School Professor Lew Katz (both formerly affiliated with the Commission), and recently published in the Bar Association magazine.

Dir. Diroll reported that, ultimately, Judge Griffin would like the Appellate Courts to develop benchmark decisions to foster consistency, while Prof. Lew Katz is a longtime proponent of consistency in sentencing statewide. Knowing there are different opinions on the Commission regarding the meaning of consistency, Dir. Diroll asked what steps the Commission should consider at this time. The first concern might be to develop a more concise view of what consistency is.

Although it is possible to get general data on sentences and the rate of consistency, said Judge Bressler, that doesn't give you the data on specific cases.

Dir. Diroll noted that states using grid systems for sentencing usually require reports from the judges. Ohio judges wanted to stay away from reports on every case because of potential reporting biases and concerns about dossiers being developed on judges and offenders. The Commission did not come up with a streamlined approach. Of course, the greatest consistency comes from mandatory sentencing, he noted.

According to Judge Routson, Judge Griffin's goal is for more comparative consistency from county to county or at least within individual counties or jurisdictions.

Dir. Diroll acknowledged that Judge Griffin is looking for consistency beyond just the individual judge, but recognizes that the Ohio sentencing structure calls for consistency not uniformity.

Judge Bressler reiterated that no data gathering process can provide the various nuances that affect each case.

It becomes more problematic if consistency is expected among all of the various options in community sanctions, said Judge Routson. He asked if there is any empirical evidence of statewide inconsistency.

In the Sentencing Commission's monitoring report there was nothing that jumped out signaling systematic inconsistency, said Dir. Diroll.

DRC Atty. Jim Guy asked if the Commission was implying that, under Ohio guidelines, there are too many variables to achieve consistency?

There is consistency, Judge Bressler asserted, because of the use of definite sentences within fairly narrow sentencing ranges.

As soon as you imply inconsistency, Atty. Guy argued, you fail to take into account all the variables.

If the legislature leans too far toward consistency, it means going to grids, which in turn means *Blakely* problems, Judge Bressler cautioned.

Judge Routson argued that there will always be some built-in inconsistencies based on community standards, values, and logistics. He contended that no one can expect to achieve statewide consistency.

Judge Schmitt remarked that every judge already has a feel for the logistics and sentencing patterns of his own community.

Atty. Gallagher agreed that judges see certain patterns of criminal behavior that other people may not see.

The goal of consistency, said Dir. Diroll, is not rigid uniformity but a way to help judges impose more informed sentencing by knowing how other judges sentence on certain types of offenses. He recognizes that judges as a whole would be least likely to want to do this.

Judge Bressler suggested waiting until Judge Griffin or Prof. Katz can join the discussion.

Judge Spanagel suggested seeking input from judges on what factors would be important if we decide to conduct a study.

#### **DOMA'S APPLICATION TO DOMESTIC VIOLENCE PROSECUTIONS**

Several courts have had to address issues on the application of domestic violence law under the Defense of Marriage Act (DOMA) approved by the voters last fall.

The issue, said Atty. Anderson, is whether DOMA renders a charge of domestic violence to be unconstitutional if the offender is not married to the victim. In the *Newell* case the appellant's argument was not accepted because the offense occurred six months before DOMA became effective. The *Newell* court went further and argued that DOMA would not apply to the domestic violence statute because DOMA is about defining marriage while the domestic violence statute is about proscribing criminal conduct.

H.B. 161 has been introduced by Rep. Healy as a legislative attempt to cut off the *Newell* argument. Some contend that it only delays the argument.

Judge Spanagel remarked that this case is likely to eventually end up in the Supreme Court.

According to Judge Bressler, decisions on these and similar issues are going both ways.

Noting that he has received calls from legislators asking if DOMA would present additional problems in Ohio, Dir. Diroll clarified that the Commission staff just wanted to put this out to help keep Commission members informed of new legislation being introduced.

#### **FUTURE MEETINGS**

Future Sentencing Commission meetings have been tentatively scheduled for September 22, October 20<sup>th</sup>, November 17, and December 15.

The meeting adjourned at 1:35 p.m.