

**Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
February 15, 2007**

SENTENCING COMMISSION MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Director Terry Collins, Rehabilitation and Corrections
Common Pleas Court Judge Jhan Corzine
Staff Lt. Shawn Davis, representing State Highway Patrol Superintendent
Colonel Paul McClellan
Victim Representative Staci Kitchen
Dave Schroot, representing Director of Youth Services Tom Stickrath
Municipal Court Judge Kenneth Spanagel
Prosecuting Attorney Dave Warren
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT

Cynthia Mausser, Chair, Ohio Parole Board
Burt Griffin, Retired Common Pleas Court Judge
James Lawrence, Ohio Halfway House Association
Gary Yates, Ohio Chief Probation Officer Association

STAFF PRESENT

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

GUESTS PRESENT

Sarah Andrews, Department of Rehabilitation and Correction
Liz Bostdorff, legislative aide to Representative Robert Latta
Jason Bottomley, legislative aide to Senator Tim Grendell
Jeff Clark, Ohio Attorney General's Office
Jim Guy, Attorney, Department of Rehabilitation and Correction
Kim Kehl, Department of Youth Services
Elizabeth Lust, legislative aide to Senator Steve Austria
Irene Lyons, Department of Rehabilitation and Correction
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Becki Park, Senate Republican Caucus
Diana Ramos-Reardon, Office of Criminal Justice Services
Michael Randle, Asst. Director, Dept. of Rehabilitation and Correction
Erin Rosen, Ohio Attorney General's Office
Sally Steciw, research assistant to OSBA Delegate Max Kravitz
Bob Swisher, Office of Criminal Justice Services
Steve VanDine, Department of Rehabilitation and Correction

Chief Justice Thomas Moyer, Chair, called the February 15, 2007 meeting of the Ohio Criminal Sentencing Commission to order at 9:50 a.m. Chief Justice Moyer explained that Magistrates Bob Krebs and Lori Keating were unable to attend due to inclement weather conditions. They were to present information on possible constitutional issues resulting from the Adam Walsh Act. Therefore the day's agenda would be adjusted.

FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION (SORN) LAW

Representing the Attorney General's Office, Jeff Clark remarked that the Criminal Justice Services' "Adam Walsh Act Report to the General Assembly" is a road map for achieving compliance with the new federal SORN law. The study group created by S.B. 260 is expected to start convening soon to examine the Adam Walsh Act from a legislative perspective. Because some of the requirements of the Act are ambiguous, it will be necessary to pass legislation to aid implementation. He noted that the "SMART" group is also working to develop federal guidelines for state implementation.

After consulting with the Federal Department of Justice, Atty. Clark confirmed that no new felony offenses need to be created to comply with the Act. Any current Ohio offense that falls within the AWA standards will require registration. He noted that, although Ohio does not currently have an offense for human trafficking, it will be required to register any offender from out of state who has been convicted of that offense elsewhere. The test for Ohio's SORN law will be "substantial compliance" with the AWA, as determined by the Attorney General.

MONITORING REPORT: A DECADE OF SENTENCING REFORM

In developing the latest version of the Sentencing Commission's biennial monitoring report, Dir. Diroll explained that he chose to offer a condensed summary of the progress made over the past decade.

Regarding felony sentencing, the report recaps S.B. 2 and changes that have occurred since it went into effect in 1996. It notes the return to indeterminate sentencing for sex offenders and covers how the *State v Foster* case has changed the guidance recommended by S.B. 2.

The report also covers the Commission's enacted proposals on misdemeanor sentencing, juvenile offenders, traffic law, and asset forfeiture law. After summarizing the effects of those changes, a section was included that deals with topics yet to be addressed.

Complexity. S.B. 2 was relatively easy to understand, Dir. Diroll noted. However, there have been continuous overlays added since, which made the Code difficult to read and very complex. Many practitioners have expressed a desire for the Criminal Code.

One of the original purposes that the General Assembly gave for establishing the Sentencing Commission, said Chief Justice Moyer, was to simplify the criminal portion of the Revised Code.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association suggested reversing the order within the statutes so that the crime is listed first and the exceptions are listed last.

A key concern, said Dir. Diroll, is readability of the Revised Code. The problem is not a matter of accuracy, but readability. Any effort toward finding a remedy would have to be one that the General Assembly endorses. By acclamation, the Commission agreed that a suggestion should be forwarded to members of the General Assembly to initiate a process for simplifying the Revised Code to make it more readable.

Indeterminate Sentencing. Next, said Dir. Diroll, is the need to look more systematically at indeterminate sentencing.

Atty. Murphy remarked that, among prosecuting attorneys, indeterminate sentencing is the preferred course for sentencing F-1 and F-2 levels of violence. In fact, he noted, the OPAA also has a back-up proposal to expand indeterminate sentences with a 3-strike type of enhancement. The third felony—any felony—would double the sentence.

This proposal has a lot of support from members of the OPAA, said Prosecuting Attorney Don White.

Dir. Diroll asked where and how judicial control would come into play. He asked how indefinite terms jibe with truth-in-sentencing.

Common Pleas Court Judge Jhan Corzine declared that DRC's proposed clean-up bill would force more F-4 and F-5 offenders out of prison. This would raise additional concerns about truth-in-sentencing.

Atty. Murphy questioned why indefinite sentences are not regarded as "true". He argued that if the judge sentences an offender to 5 to 15 years or 10 years to life and the offender serves at least the minimum, that is the truth.

It is a matter of public perception, Judge Corzine argued. With a sentence of 5 to 15 years, the public assumes that at least *some* offenders will serve the full 15 years.

Sex Offenders. A glut of sex offender bills were introduced in 2005 and 2006, said Dir. Diroll, resulting in tougher penalties for rape and other offenses. The next question, he remarked, is whether non-assault sexual offenses should be addressed, including misdemeanors.

Victim Representative Staci Kitchen urged a focus on such offenses, since they sometimes lead to more serious offenses.

A look at the offense of child pornography was urged by Municipal Court Judge Kenneth Spanagel, with agreement from Ms. Kitchen. Judge Spanagel contended, however, that there is not a great need to look at most misdemeanor sex offenses.

According to Atty. Clark, current penalties reflect those sentiments. He noted that the Adam Walsh Act now requires child pornography to be a registered offense.

Sentencing Guidance After *Foster*. Dir. Diroll recapitulated how *State v. Foster* affects the state's sentencing guidelines. S.B. 2 guided judges to sentence within the prescribed ranges. The guidance that addressed minimum, maximum, and consecutive sentences was struck down by the Ohio Supreme Court in the *Foster* and *Mathis* cases. The rulings

also affected the findings needed to get to repeat violent offender (RVO) and major drug offender (MDO) sentences. A bill was drafted to strike the unconstitutional provisions in hopes of easing confusion. Separately, some claim that *Foster* will now result in more sentencing inconsistency and would prefer to see the guidelines remain as advisory. DRC forecasts that *Foster* will create a demand for more prison beds.

Retired Common Pleas Court Judge Burt Griffin remarked that the rulings declare that it is unconstitutional for the judge to make the findings instead of the jury. Some states, he said, have gone to jury determinations and do not require findings.

One option, said Dir. Diroll, might be to keep the current language but as non-binding guidance.

According to Judge Griffin, federal judges are still making findings of fact to explain why they think a sentence is reasonable.

Judge Corzine believes it would be worth finding a way to keep the guidelines for the sake of consistency.

PRISON POPULATION

Overview by Director Collins. An original goal of the Sentencing Commission, said Dir. Diroll, was to develop suggestions that might help ease prison crowding.

According to Director of Rehabilitation and Correction Terry Collins, Ohio's current prison population is 48,725. Approximately 100 inmates are admitted per week. In the past two years, the population increased by 4,000 to 5,000, putting it at 129% of design capacity. 60% of the inmates serve less than 12 months and this is a growing population.

The female prison population is growing more quickly than the male number, Dir. Collins reported. There were 3,554 women in Ohio's prisons in October 2006. 5,214 female inmates are expected by mid-2016. The increase can be attributed to more women committing felonies and receiving longer prison terms. DRC is seeking alternatives, particularly for truly nonviolent offenders.

Dir. Collins attributes part of the increase to an increase in offenses that were not felonies 10 years ago and to better technology in police departments which has increased the number of people arrested and ultimately going to prison.

Another safety factor involves the ratio of correctional officers per inmate. The ratio used to be 1 correctional officer per every 5.3 inmates but is now 1 correctional officer per 6.5 inmates.

DRC reopened some units that were closed a few years ago, accounting for an additional 1,720 beds. The Department has also expanded the number of CBCF beds. Halfway Houses are full as are CCA facilities, CBCFs, and jails. The entire system is saturated, he claimed.

This population increase is a problem not just for DRC, but also the County Commissioners, Dept. of Children and Family Services, and other

state agencies. Since the enactment of S.B. 2, about 50% of the inmates leave prison under some form of continued supervision. About 34,000 released offenders are in the community under supervision of the Adult Parole Authority. This reinforces the need for good reentry plans.

Projections. Noting that 70% of the states use a similar simulation model, DRC Research Director Steve VanDine explained how his department develops its projections. After determining the number of people coming in to DRC, the numbers are sorted by the kind of sentence (determinate or indeterminate), gender, felony level, length of sentence imposed, and when they are likely to be released. The people currently in prison are described by the same characteristics.

For those entering with indefinite sentences, it is necessary to check and see if they have a parole hearing date coming up. If they are likely to stay longer, it is necessary to determine for how long.

They also examine the population of offenders under supervision (both parolees and those on post-release control) and determine when they are likely to end supervision and how many are likely to fail and re-enter the prison system.

Since S.B. 2 was enacted, the number of admissions is the hardest portion to predict. Sentence lengths are more predictable than before, however.

He predicts an increase in the prison population of 3.5% over the next year. Then he expects the increase to diminish by 2%. Even with only a 2% increase per year, it will result in an increase of 35,623 inmates by 2016. Female increases are even higher. He noted that January and February tend to be the months with the largest growth.

He remarked that if there is no increase in population commitments, there will still be a growth by 14,000 people because it takes awhile for inmates to work their way through the intake process.

Mr. VanDine pointed out that the projections do not take into account the impact of the *Foster* decision, H.B. 95, or S.B. 260. He expects HB 95 and SB 260 to generate an additional 1,000 inmates in 10 years and 2,500 over 30 years, particularly in the male prison population.

His department just did its first analysis of the impact of the Supreme Court ruling in *Foster*. After the *Foster* decision, F-1 offenders are averaging longer prison terms by 6 months. F-2 and F-3 offenders tend to be serving an additional 1 month and F-4 and F-5 offenders are serving ½ month longer. It is suspected that this is because the judge is no longer guided against reserving the highest sentence for the worst offenders. It works out to 9/10 of a month longer per offender. Given the large number of offenders, this means 2,100 extra beds, the equivalent of one large prison.

Proposals. Dir. Collins reported that DRC is looking more closely at the reentry process and how to make the transition back into the community smoother in hopes of reducing recidivism.

DRC also hopes to expand CBCFs to include female beds for female offenders with less than 6 months to serve.

He pointed out that bed turnover is not a fast process. This presents a challenge for DRC's being ready to receive the increased number entering the system.

DRC has no control over who enters or exits the prison system, said Dir. Collins. Someone else makes those decisions. Many offenders have difficulty getting into programs that can help their rehabilitation. The problem is exacerbated for short time offenders.

DRC cannot be everything to everybody, from low level property offenders to murderers, he declared. The fact that the majority of offenders enter prison with substance abuse problems only adds to the challenge.

Since most inmates are going to reenter society at some point, it is necessary to examine the reentry options in hopes of preventing recidivism. Noting that over 1 million people are registered as family and friends of inmates, any progress toward true rehabilitation and reducing recidivism can have wide-range effects.

Ohio has one of the widest continuum of sanctions available but even more are needed. Dir. Collins insisted that Ohio cannot build its way out of this situation. He is a proponent of more community alternatives rather than more prisons. If, however, it becomes necessary to build more facilities, he recommends building on existing prison grounds, perhaps by adding dorms. He noted that other states are talking about the same problems and are considering the same alternatives.

According to Gary Yates of the Ohio Chief Probation Officer Association, research shows that more supervision is needed along with treatment for offenders upon release.

Acknowledging that treatment dollars are hard to find, Dr. Collins noted that it was recently necessary to cut back on education staff because of lost funding, although he knows that education can help reduce recidivism. There are currently 265 positions for which he must find alternative funding.

Atty. Murphy believes that the higher prison population is a result of tougher sentences and has had a direct influence on lowering the crime rate. He declared that, ultimately, the increase in the prison population saves money by keeping the crime rate down.

Dir. Collins urged a solution that will balance the overall system of criminal justice.

According to Mr. VanDine, from 1980 to 1992 there was an increase in the crime rate at the same time that the prison population doubled. The crime rate then decreased from 1992 to 2005 as the prisons filled with the more violent offenders and lower level offenders were being diverted to community sanctions. This signifies that there are more factors influencing the crime rate than merely filling the prisons. 30% of the drop in crime rate was later determined to be related to the prison population increase. He noted that, for what it costs to operate a prison of 2,000 inmates with 5,000 staff, the same amount of money could put 500 more cops on the street.

The Community Based Correctional Facilities (CBCFs) have helped, said Dir. Collins, but most have long waiting lists.

Some offenders are committing a second felony while waiting to get into a CBCF, said Pros. White. He contended that more CBCFs are needed.

Representing the Halfway House Association, Jim Lawrence claimed that some offenders are staying in CBCFs longer than they are supposed to.

To be cost effective, said Judge Corzine, it is necessary to turn a CBCF bed over three times a year. Some offenders may be coming in on an F-4 or F-5 offense, but it may be their fifth or sixth felony conviction. That data would be helpful to the Sentencing Commission in any attempt to seek a solution.

According to Mr. VanDine, approximately 65% of the offenders serving 3 to 6 months and 70% of those serving 6 to 12 months have had at least one prior adult felony conviction. 51% of those serving 3 to 6 months and 57% of those serving 6 to 12 months have already served time in prison at least once.

Dir. Collins reminded the Commission that some jurisdictions do not have a wide variety of alternatives available. So a larger percentage of offenders from those areas will end up in prison.

There are some people for whom prison time would have little meaning, said Judge Griffin, such as repeat petty thieves or shoplifters, because the amount of time they serve is so short. Some of those lower level offenses were declassified with S.B. 2 in an effort to divert them to community sanctions.

Judge Spanagel remarked that, in his jurisdiction, these offenders usually get probation and a fine or a small amount of jail time. He cautioned against revisiting those offenses. He agreed that more CBCF data would be helpful.

According to Judge Corzine, many offenders are experiencing 3 months in jail waiting for space in a CBCF. He favors any available options.

According to Mr. VanDine there are between 1,800 and 1,900 CBCF beds.

Dir. Collins declared that people across the state are asking for more options. Adding to this problem is the increased difficulty in finding locations for halfway houses.

Due to inflation, Judge Spanagel suggested that it might be necessary to raise the threshold on the amount that makes theft a felony.

MONITORING REPORT REDUX

After lunch the discussion returned to the Commission's monitoring report.

Murder Penalties. The Commission recently agreed to suggest tougher penalties for rapes, making some of the penalties tougher than those for murder, noted Dir. Diroll. Generally, murder is regarded as a worse

offense than one that causes serious harm but leaves the victim alive. Some people feel it may be necessary to revisit the murder penalties to assure that they are proportionate.

Pros. White argued that the penalty for murder should be 25 to life with no chance of parole so that it will mean something. He recommended life without parole for aggravated murder.

When the subject of capital punishment was raised, Judge Corzine contended that it should be included in the discussion on penalties for murder and aggravated murder. He feels that increasing penalties for non-murder offenses to murder levels gives the offender an incentive to kill his victim so that no witnesses are left behind.

The availability of life without parole may have influenced the reduction in capital cases, said Dir. Diroll. He suggested taking a look at the actual penalties as a matter of scale, to assure that they step up in a logical progression.

According to Parole Board Chair Cynthia Mausser, offenders convicted of murder are currently serving 18 to 22 years in prison, while those convicted of aggravated murder are serving about 25 to 30 years.

As of July 2006, said Mr. VanDine, there were 1,822 inmates on death row who were given life sentences under S.B. 2 and 136 inmates who were pre-S.B. 2 on death row. There were also 4,000 other pre S.B. 2 inmates with indefinite sentences that could culminate in life sentences. He said that there are a total of about 6,000 lifers.

Juvenile Offenders. Dir. Diroll reported that some studies have been conducted regarding mechanical issues which tend to be deterring the use of blended sentences for juvenile offenders. As a result, more cases might be bound over to the adult system rather than kept in the juvenile system. There is general consensus that the blended sentencing law needs to be simplified.

The counties that do use blended sentencing are using it as a plea bargaining tool to offer an alternative to binding the juvenile over to the adult system, said Atty. Anderson.

Besides a review of the SYO process, it may be time to reopen the issue of competency for juvenile offenders, said Dir. Diroll.

Representing Youth Services, Kim Kehl reported that Justice Evelyn Stratton's work group on competency issues has developed a draft of recommendations focusing on competency determination and restoration. The biggest problem, he said, involves placement for juveniles considered incompetent to stand trial. Judges and treatment providers have differing opinions on how funding should be handled. Because licensure and funding are challenges, a quick remedy is unlikely.

Adult Penalties in Juvenile Court. S.B. 260 moved through the legislature quickly. Late in the deliberations, there was concern about how the changes would apply to juvenile offenders, particularly since sentences like "25 to life" are dramatically different than traditional juvenile penalties. Dir. Diroll explained that, in an effort to exempt certain juvenile from the bill, a very narrow provision was inserted

that applies to relatively few juveniles. He asked the Commission if they wanted to examine the resulting legislation and its affect on juvenile sex offenders.

Since the Commission's juvenile representatives need to be present for this discussion, Judge Spanagel suggested tabling the issue until then.

Misdemeanor Sentencing. Jail crowding is always an issue with misdemeanor sentencing, said Dir. Diroll. Some of the things contributing to an increase in jail populations are drunk driving convictions, the preferred arrest policy for domestic violence cases, and tighter bail for certain offenses (which affects pretrial felons).

In 1993, there were only 8 offenders in the prison system for assault, and there are now 301 offenders in prison for assault. Part of the reason for this increase is that assault of a police officer has been raised to the felony level, reported Mr. VanDine. Some other misdemeanors that have been made felonies since 1993 include domestic violence, and a fourth DUI conviction. In addition, SORN law went into effect since 1993, requiring sex offenders to register with sheriff's department where they reside; failure to do so is now a felony charge as well. A look at those offenses alone reveals a clearer picture about the increase in prison populations:

	<u>1993</u>	<u>Admissions</u>	<u>2006</u>
Assault	8		301
Domestic violence	115		856
Failure to register - SORN	0		350
DUI	24		453

Dir. Diroll remarked that if some of the jail crowding tensions were alleviated it might reduce some of the pressure on the prison population caused by the low level offenders moving in and out of the prison system within a year.

Judge Spanagel questioned whether 3 years was a broad enough range for an information base. He contended that, for those who are unable to make bond on felonies while awaiting trial, it is a local issue not a Commission issue. He noted that he often will invoke 45 days of house arrest rather than 30 days in jail because of the lack of jail space.

Judge Corzine argued that house arrest does not qualify as confinement.

As a community control sanction, Judge Spanagel declared that he was justified in using house arrest if jail space is unavailable. He generally calculates 3.6 days of house arrest as equal to 1 day in jail. A sentence of 10 days of jail time could be served as 5 days of jail plus 18 days of house arrest, with the defendant paying for the cost of house arrest.

Noting that jails are the most expensive option for sentencing purposes, Dir. Diroll asked if the Commission should spend time on jail crowding issues.

Judge Spanagel pointed out that the Commission is not authorized to deal with pre-sentence issues, such as bail. He noted that minimum security jails are supposed to be limited to nonviolent offenders.

Mr. Lawrence prefers to give sheriffs the discretion on how the jail space is utilized.

Fines and Costs. There is great disparity on how fines and cost revenues are assessed and collected, said Dir. Diroll. This creates controversy because it sometimes pits municipalities against counties on how the funds are dispersed. The Commission studied the issue several years ago but the legislators took no action on the proposals. He wondered if the issue should be reopened.

According to Judge Spanagel, there is a lawsuit in Cleveland regarding court costs and what they cover. He acknowledged that this is an issue that involves more entities than merely the court itself. It also affects the Municipal League, clerks of court, and county commissioners.

Mr. Lawrence noted that some courts are including ancillary services in their court costs.

Judge Spanagel recommended offering a philosophical statement regarding court costs and fines.

Traffic Reforms. S.B. 8 set per se levels for drug impairment. Dir. Diroll noted that it only addresses 7 or 8 street drugs. The list tends to be both over-inclusive and under-inclusive. Heroin and LSD are included, but not ecstasy, methadone, or other central nervous system depressants. Some questioned whether a person should be exempted if impaired due to a prescription drug.

Judge Spanagel remarked that prescription drugs were eventually eliminated from the list.

Expressing disapproval of the bill, Judge Corzine declared that there is no set level that triggers impairment with these drugs. In fact, many of the drugs remain in the body even after the effects have worn off. He suggested postponing further discussion of the bill for a year to allow time to see how it shakes out.

Mayor's Courts. Chief Justice Moyer had recommended a reduction in mayor's courts. Judge Spanagel reported that some legislators have discussed the possibility of basing the availability of a mayor's court on a 1,500 or 1,600 population threshold.

H.B. 461, which allows reinstatement fee plans to be handled in any court of residence, including mayor's courts, takes effect April 2007.

Dir. Diroll admitted that the charm of mayor's courts is that many of them offer evening sessions that make it more convenient for people who would otherwise have to leave work and travel farther to reach court.

Forfeiture. Two forfeiture issues linger, said Dir. Diroll. The first involves forfeiture involving wild animals and hunting deer out of season. The question is whether it should have the same process as that used for instrumentality forfeitures under H.B. 241 or whether it should continue to be a summary forfeiture.

The second issue involves trademark violations and whether there should be more due process when the value of the property being forfeited goes beyond the value of the ill-gotten goods. The Commission recommended no action at present.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for March 15, April 19, May 17, June 21, July 19, August 16, September 20, October 18, and November 15, 2007.

The meeting adjourned at 1:50 p.m.