Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
June 14, 2007

SENTENCING COMMISSION MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reginald Routson, Vice-Chair
Major John Born, representing State Highway Patrol
Superintendent Col. Paul McClellan
Director Terry Collins, Rehabilitation and Correction
Defense Attorney Bill Gallagher
Municipal Court Judge Fritz Hany
Kim Kehl, representing Youth Services Director Tom Stickrath
Bob Lane, representing State Public Defender David Bodiker
Municipal Court Judge Kenneth Spanagel
Public Defender Yeura Venters
Sheriff Dave Westrick
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Ex. Director, Eastern Ohio Correctional Center
John Madigan, Senior Attorney, City of Toledo
Cynthia Mausser, Chair, Ohio Parole Board

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

GUESTS PRESENT
Sarah Andrews, Department of Rehabilitation and Correction
David Berenson, Department of Rehabilitation and Correction
Abby Daubenmire, Senate Republican Caucus
Monda DeWeese, Community Alternative Program
Lusanne Green, Ohio Community Corrections Association
Jim Guy, Department of Rehabilitation and Correction
Debra Hearns, Department of Rehabilitation and Correction
Andre Imbrogno, Ohio Judicial Conference
Ellen Kitchens, Citizens United for the Rehabilitation of Errants
Tekla Lewin, Citizens United for the Rehabilitation of Errants
Elizabeth Lust, legislative aide to Senator Steve Austria
Irene Lyons, Department of Rehabilitation and Correction
Scott Neely, Department of Rehabilitation and Correction
Nathan Pieri, Ohio Attorney General's Office

Diana Ramos-Reardon, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office
Steve VanDine, Department of Rehabilitation and Correction

Chief Justice Thomas Moyer, Chair, called the June 14, 2007 meeting of the Ohio Criminal Sentencing Commission to order at 9:37 a.m.

Director David Diroll welcomed Eugene Gallo as the newest addition to the Sentencing Commission's Advisory Committee. Mr. Gallo is the Executive Director of the Eastern Ohio Correctional Center and represents CORJUS.

Dir. Diroll announced that Staff Attorney Scott Anderson would soon be leaving the Commission to begin a professorial position with Capitol Law University. He noted that Atty. Anderson's contributions to the Commission have been extensive and valuable as he has worked together with the Commission on juvenile law, forfeiture issues, and SORN law. Atty. Anderson has been asked to continue his involvement with the Sentencing Commission by serving on the Advisory Committee.

CROWDED PRISONS

Rehabilitation and Correction Director Terry Collins offered an update on the current status of Ohio's prison population and efforts of DRC to keep the tensions of crowding under control. When he spoke with the Sentencing Commission four months ago, Ohio's prison population was at 48,725. He reported that today's prison population is at 49,507 inmates, including 3,550 females. The system is at 131% of design capacity, with some of the correctional facilities at 204% capacity. From June 4 to June 11th, there was an increase of 308 people over the usual amount admitted into the system. This was the greatest number of people ever admitted in one week.

He reported that 60% of those entering the prison system are serving 12 months or less, with many of them serving 90 days or less. 49% of the female population serves less than 6 months and 71% serve less than one year. There are an average 400 releases per week. He noted that the female population is increasing faster than the male facilities.

Although the desire is to seek rehabilitation for offenders before release, he noted, it is not possible to get the inmates serving short terms through treatment programs. If a person is given a 6 month term, he might spend 2 months in the county jail, 57 days in a reception center, which only leaves 2 months in prison to work through a waiting list that already has 150 to 300 people in line for a program.

Although the prisons are secure, he remarked that the wrong word, in the wrong place, at the wrong time, by a staff member or another inmate can create chaos in seconds. The staff of 14,000 includes 7,200 correctional officers.

DRC has had record intake numbers for 5 consecutive years, he reported. 2007 intake exceeds 2006 by 3%. 2006 was the highest ever.

According to the 2006 Ohio Court Summary, statewide court filings are up 7%, which will result in an additional increase in the prison population. In addition, the *Foster* case has increased sentence terms

by from 1 to 15 months, depending on felony level, and female prison terms tend to be getting longer. S.B. 95 and S.B. 260 [2006's sexual offender bills] have already had an impact on the prison population and some pending bills are expected to have an even greater impact.

Only 2%, or about 1,000, of the new inmates are returning for technical violations of post-release control or parole. Risk assessments are conducted to determine which of these people can be diverted to other sanctions or facilities. After 3 years, the recidivism rate is still 38%. He noted that there is a 6% reduction in the recidivism rate among those who go through halfway houses and 3% reduction for those who go through CBCFs.

Females tend to refuse some programs and options, such as judicial release or intensive prison programs, because they do not want to contend with supervision after release from prison.

A pilot program is being developed to address the 700 people serving prison time for failure to pay child support.

Of the most difficult individuals to place, 90 have finally found placements. These include 7 severely mentally ill people, mostly sex offenders, who were due for release. If supportive placement had not been secured, the people might have ended up living on the streets.

DRC's "Omnibus Bill" (HB 130) has joint sponsorship and has progressed through four hearings with no opposition, said Dir. Collins. He claimed it is one of the best reentry bills in the country. Declaring himself to be a strong advocate for alternative community sanctions, he noted that the bill hopes to broaden the pool of those who will be eligible for alternative sanctions. Although DRC has opened 23 prisons since 1986, it is not possible, he declared, to build our way out of this problem. Stressing the need to make more alternatives available, he reported that there are currently 7,000 truly nonviolent offenders in the prison system that would be better off serving their time elsewhere.

It costs $67 per day per inmate or $24,500 per year to keep someone incarcerated in the prison system. According to Dir. Collins, it is better to send inmates to a CBCF or halfway house for the last 30 to 45 days of their sentences, rather than to send them straight out into the community without transition.

He said that a significant increase in the prison population is expected over the next 7 years due to HB 95, HB 260, SB 10, SB 97, SB 93, etc. The population could push to 70,000 in a decade.

Eugene Gallo, Executive Director of the Eastern Ohio Correctional Center, remarked that a CBCF costs approximately $10,000 per bed per year, with each bed generally being used by 1 to 4 offenders annually.

Employment, said Dir. Collins, is the biggest key to whether an offender returns to prison. Halfway houses help to get these people placed into jobs before they are totally released back into the community on their own. He reported, however, that there tends to be a 40% veto rate from judges on attempts to place qualifying offenders on transitional control [formerly furlough].

Common Pleas Court Judge Reggie Routson asked how many enter prison through direct sentencing by the judge as compared to those who come from a violation of community control or post-release control. It would helpful, he said, to know how many were first given a chance at alternative sentencing. After repeatedly giving an offender alternatives, a judge eventually feels that the offender is making little effort to rehabilitate through that means and needs a heavier sentence through serving a prison term. A clearer picture of that trend would reveal the type of offender we are dealing with, he said.

According to the 2005 intake study, said DRC Research Director Steve VanDine, 14% of the males who entered the prison system were being readmitted for technical probation violations. An additional 15% were readmitted for technical probation violations plus new crimes. 23% of the females were readmitted for technical probation violations and an additional 21% for a combination of technical probation violations and a new crime. There were 28,714 new commitments during 2006.

Dir. Collins said he knows of no new legislation pending that could reduce the prison population. He hopes, however, that H.B. 130 will help to keep the current prison population stable by allowing diversion of more offenders to community alternatives.

The prison population is expected to reach 64,700 by 2016, said Mr. VanDine. Patterns since the *Foster* case are expected to increase that number even more.

Dir. Collins noted that expected results of the Adam Walsh Act were not included in that projection.

Even with talk of getting nonviolent offenders into community alternatives, Public Defender Yeura Venters contended that the focus continues to be on punishing the offender for behavior exhibited rather than the treatment and rehabilitation needs of the offender. Since 60% of those released from prison are returning within 90 days or less, transitioning assistance reduce those odds. However, it is up to each jurisdiction whether to embrace reentry efforts. He argued for added rehabilitative efforts and better use of community resources.

Dir. Collins responded that DRC is working to break the cycle of recidivism for offenders through treatment, education, housing, employment, and community involvement. He noted that there are currently about 34,000 releasees under supervision and only 550 parole officers across the state. Approximately 50% of the inmates leave prison under supervision. As the number of people released increases, the number of people under supervision also increases.

According to Mr. Gallo, research indicates that as more prisons are built, the public safety factor decreases rather than increasing, implying that the state has reached a level of diminishing returns.

The same research, said Dir. Collins, reveals the importance of education and jobs in reducing recidivism. High school drop-out rates continue to be a strong predictor of crime and recidivism rates.

PANDERING OBSCENITY ISSUES

Staff Attorney Scott Anderson opened the discussion on simplifying sex offenses in the Criminal Code by directing attention toward pandering and possession. §2907.32 through §2907.323 prohibit pandering obscenity, as well as pandering or possessing obscene, sexually-oriented, or nudity-oriented material involving minors. The strategy for streamlining these sections, said Atty. Anderson, is: (1) shorten lengthy descriptions of similar proscribed acts and defenses by labeling them in the offense section and more fully describing them in a new "definition and defenses" section, (2) delineate between pandering (including "producing", "publishing", and "promoting" under the proposed definitions) and possession offenses, and (3) delineate between offenses that involve minors and those not involving minors.

It is necessary to include these offenses in the effort to streamline the statutes, said Atty. Anderson, because of their relationship to child pornography and the recent push toward tougher penalties and broader registration of sex offenders under the Adam Walsh Act (AWA).

Definitions. Beginning with definitions of existing pandering offenses, Atty. Anderson explained that obscene materials are criminal because they exploit a victim for commercial or financial gain. To "produce", he noted, refers to any ability to put obscene material on a screen or in material form for other people's pleasure. He explained that, if you produce, you're making it; if you publish it, you're putting it into the stream so that other people can get it; and if you're promoting it, you're advertising it as being available." In contrast to those trafficking offenses, possession includes acts to buy, procure, solicit, control, receive, or otherwise have obscene or sexually explicit materials.

When asked about file sharing, Atty. Anderson explained that it would qualify as publishing regardless of whether there is financial gain because it assimilates an attempt to put the material into the mainstream so that other people can get it.

Defenses. He pointed out that if the material or performance is for a bona fide purpose, an affirmative defense is allowed to the charge. A mistake regarding a minor's age, however, is not a defense to a charge.

Pandering Obscenity. The proposed language to simplify §2907.32 would combine §2907.32 and §2907.321 as follows:

> No person, with knowledge of the material or performance involved, shall produce, publish, or promote any obscene material or performance when the offender knows it will be used for commercial exploitation or publicly displayed, or when the offender is reckless in that regard.
>
> If the material or performance has a minor as one of its participants or portrayed observers, pandering obscenity is a felony of the second degree. If the material or performance does not have a minor as one of its participants or portrayed observers, pandering obscenity is a felony of the fifth degree.

Defender Venters raised concerns about defining the acts of buying and procuring together as part of the definition of possession.

Atty. Anderson pointed out that current statute already includes buying and procuring within the definition of possession. This proposal, however, lists "possessing obscenity involving a minor" as a separate offense. The use of those terms in the definition of "possess", he noted is in reference to the offender's manner of obtaining the material for himself. Any means of giving the material to someone else would fall under an act to "produce", "publish", or "promote". He agreed to clear up the confusion.

Currently, possession with the intent to produce is punished as production while offering or agreeing to promote is promotion. He asked if these should be treated as "attempts".

Municipal Court Judge Kenneth Spanagel responded that it would be easier to prove an attempt than an offender's intent.

Atty. Gallagher asked if there should be a distinction regarding the age of the minor. He noted that there are many cases where the offender thought the victim was 21 and found out the victim was only 15 or 17.

Although that distinction is not made in current code, Atty. Anderson agreed that it should be discussed, particularly as a mistake of fact.

This presents challenges, said Bob Lane of the State Public Defender's office, when a person has downloaded obscene material from the internet and has no idea regarding the actual age of the participant/victim.

When a person is charged with possessing obscene material on a hard drive, Judge Spanagel asked if the defendant was charged per item. If the hard drive contains 12 pictures, Atty. Anderson responded, the owner would be charged with 12 counts of the offense. He noted that each image might involve a different victim.

Possession of Obscenity Involving a Minor. In an attempt to simplify the language of §2907.321, Atty. Anderson recommended the following:

> No person, with knowledge of the material or performance involved, shall possess any obscene material or performance that has a minor as one of its participants or portrayed observers.
>
> Possessing Obscenity Involving a Minor is a felony of the fourth degree.

This is a shorter version of the original language, said Atty. Anderson, because the original pandering portion was pulled out and included in the proposed language for pandering obscenity.

There is a big difference between possessing 10 images versus 10,000 images, said Judge Spanagel. That difference is likely to matter more if the offender is involved in pandering or distribution rather than simply possession. If involved in pandering or distribution, the quantity versus the number of people distributed to should enhance the penalty. He suggested that it might be handled in a manner similar to the gun specs.

Atty. Anderson agreed that is a distinction that might be made

Pandering Sexually-or Nudity-oriented Material Involving A Minor. The language recommended for this section combines the statutes of the two different types of material or performance (§2907.322 and §2907.323) into one offense:

> No person, with knowledge of the character of the material or performance involved, shall produce, publish, or promote any sexually-oriented material or performance involving a minor or any nudity-oriented material or performance involving a minor.
>
> Pandering Sexually- or Nudity-oriented Material or Performance involving a Minor is a felony of the second degree.

Currently there's no increase for priors. Since there is an increase for priors for obscenity, it seems logical that there should also be an increase for priors for this offense.

The consent defense was removed from this language because consent may only be given for a bona fide purpose, so the bona fide purpose should be the defense. If not for a bona fide purpose, then parent complicity should be added to the charge. Atty. Anderson noted the he attempted to carry the *mens rea* element through all recommended changes.

Possessing Sexually-or Nudity-Oriented Material Involving A Minor. This proposal also combines two sections—§2907.322 and §2907.323—relating to possession:

> No person, with knowledge of the character of the material or performance involved, shall possess any sexually-oriented material or performance involving a minor or any nudity-oriented material or performance involving a minor.
>
> If the material or performance is sexually-oriented, the offense is a felony of the fourth degree. If the material or performance is nudity-oriented, the offense is a felony of the fifth degree.

Atty. Anderson pointed out that the current possession statute does not include the language "No person, with knowledge of the character of the material or performance involved …", making it a strict liability offense. Open for discussion is whether this should remain strict liability or include *mens rea*. It would require a determination as to whether the *rea* should be recklessness or something else. A decision also is needed as to which priors would bump the offense up a level.

Protection is needed, said Defender Lane, for innocent possession. A hypothetical case might involve a person who buys a home and discovers a hidden cache of porn left by a previous owner or even the common problem of unsolicited porn sites popping up on computers.

One option, said Atty. Anderson, might be offered by the new forfeiture statute which allows a pre-seizure hearing for an innocent owner.

Judge Spanagel recommended the concept of an innocent possessor defense ranging from an affirmative defense.

Both the innocent possessive defense and innocent owner defense would be good topics for further discussion, said Atty. Anderson.

Pros. Don White asked if the proposal covers assimilation of a minor.

That is another issue that needs to be discussed, said Atty. Anderson. It was currently at the core of U.S. Supreme Court case, *State v. Tooley*. It will probably be definitional and may include a need for jury instructions.

Although pandering and possessing currently do not trigger SORN issues under Ohio law, Atty. Anderson noted that the AWA tier system may affect that.

Dir. Diroll noted that S.B. 10, the bill designed to implement AWA in Ohio, was being heard at the State House at that moment. DYS Dir. Tom Stickrath was scheduled to testify on the bill regarding its possible impact on juvenile offenders. Dir. Diroll noted that the Sentencing Commission's concerns about retroactivity of the bill had fallen on deaf ears.

Regarding the AWA's application to juvenile offenders, some people have recommended narrowing its application to SYOs, but the Attorney General's Office wonders if that will qualify as meeting the requirements of compliance. It is unknown as to where they will draw the lines. Even federal guidelines fail to answer all these questions.

The juvenile portion is particularly difficult, said Atty. Anderson, because the guidelines state that anyone bound over to the adult system will be treated as an adult offender. But it also refers to juvenile offenders aged 14 and older who commit aggravated sexual assault. If the offense is rape, sexual battery or the new kind of GSI (a victim under age 12 and involving direct contact with the genitals) then it falls into Tier II. If Ohio determines that the GSI should be different, then it raises the questions of whether Ohio falls into substantial compliance with the AWA.

The issue of whether Ohio is in substantial compliance, said Atty. Lane, comes down to money – about $25 million. He argued that legislators need to realize that Ohio could spend $100s of millions to gain $10s of millions.

Attorney General representative Erin Rosen reported that the AG's Office is recommending amendments to the bill to ease compliance and implementation of the AWA act. The guidelines, she noted, do not expire until August 1. The proposed cost would be $500,000 to implement. The U.S. Dept. of Justice has set aside $25 million for states to implement the laws. Ohio would get $950,000 of that money. She noted that Dir. Stickrath had reported on DYS's concerns, particularly placement issues for those classified as Tier III offenders.

S.B. 10 creates a new subsection of GSI, 2907.05(B) which mirrors the federal language. It lowers the number of current registrants because those offenders were not adjudicated under this new sub-section.

Atty. Rosen noted that the AG's Office will not do more than the guidelines require nor will advocate for less. She does not foresee any change in the guidelines. Although reference has been made to exceptions based on State Constitutional issues, she noted that the only wiggle room allowed by the AWA involves minute matters regarding how registration is handled, not whether registration is required. She reported that judges must start notifying sex offenders of the new registration requirements by January 1, 2008.

Noting that judges are awaiting final word on S.B. 10, Judge Routson remarked that there is not much information being forwarded to judges.

Atty. Rosen has a comparison chart available of current Ohio law and law reflecting the AWA changes. She noted that under this law a sexual offender will go through a regular predator hearing then will get notice from the AG's Office by January 1.

SEXUAL OFFENDER REGISTRATION AND NOTIFICATION (SORN)

Representing Youth Services, Kim Kehl reported that DYS is offering an amendment regarding the AWA. He pointed out that the juvenile justice system affects more than just juvenile delinquents. Even in preparing a juvenile delinquent to return to the community, more than DYS or parole officers are involved. Education and child welfare issues must be addressed as well. After checking the intent of the AWA, DYS believes that the AWA was intended to address juvenile sex offenders in the current bind-over and SYO populations. It also tends to set a new sub-category of sex offenses committed at the age of 14 that, if committed by an adult would be classified as an aggravated sexual abuse offense.

Of DYS' current 615 offenders, said Atty. Kehl, 370 are sex offenders. There are 240 on parole who are committed sex offenders. There are currently 12 juveniles who exceeded their terms of DYS commitments but still are housed by DYS because they are registrants and no other accommodations can be found. Many residential facilities will no longer take registered juvenile sex offenders. Often the victim was a relative who still lives in the home, so the offender cannot return. In some cases, the offender has aged-out of the child welfare system. Even open shelters are now refusing accommodations to sex offenders.

If S.B. 10 goes forward as proposed, said Atty. Kehl, approximately 480 of the 615 juveniles in DYS are likely to be categorized as lifelong sex offender registrants under the AWA. As such, the location of where these 16 and 17 year old juveniles live, work, and go to school, along with their pictures, will be made available to the public.

There is a 12 year age designation for victims under the AWA, whereas Ohio uses a cut-off at the age of 13 for many offenses. Dir. Diroll asked how DYS plans to address this.

Atty. Kehl responded that the SYO disposition, which would trigger the AWA consequences, cuts off at the age of 10. Juveniles under the age of 10 are not housed in DYS facilities, but contracted out to agencies.

The eligible pool of juvenile offenders affected by the AWA includes juvenile offenders bound over to the adult system or SYOs. Dir. Diroll asked if it was possible for that to be narrowed by a judge's decision.

Atty. Kehl responded that AWA is based solely on the crime. Mitigating factors no longer come into consideration for discretion regarding a juvenile's classification. Proposed S.B.10, however, would allow some judicial discretion. The guidelines are still open for public comment. He noted that there some SYOs that need to be registrants, for the sake of public safety. The complexity of issues to be addressed with juvenile offenders, including mental health and rehabilitation, adds to the confusion of applying the AWA to juvenile sex offenders.

The only mandatory bindovers for juvenile offenders, said DRC Counsel Jim Guy, are for murder, aggravated murder, attempted aggravated murder, or attempted murder. There are no mandatory bindovers for rape or other sex offenses. He remarked that the discretion allowed by a judge regarding the SYO classification would also allow discretion regarding application of the AWA.

When juvenile sex offenders return home, they have different needs than adult offenders, Atty. Kehl noted. This presents a challenge in sorting out the right offenders who should be required to register.

Noting the existing presumption of privacy in juvenile court, Atty. Anderson added that it will difficult not to short circuit treatment for juvenile sex offenders by attempting to comply with the AWA registration rules.

CODE SIMPLIFICATION

Judicial Release. The most recent draft on judicial release, said Dir. Diroll, allows a cut-off whereby the court can deny a petition with prejudice, as discussed at the Commission's April gathering.

DRC may merge part of the Commission's judicial release proposal into its omnibus bill, H.B. 130. Under current law, the offender can only petition for judicial release on a nonmandatory sentence if serving a term of 10 years or less. There had been discussion of removing the 10 year cap, but that was not included. The House Criminal Justice Committee has had four hearings on the bill and it may be voted on before the summer recess, Dir. Diroll noted.

Mandatory Prison Terms. Noting the concern over repercussions of the *Foster* case, Dir. Diroll pointed out that the case did not remove the findings that relate to the in/out decision on prison for F4 and F5 offenses or the presumption of prison for F1 and F2 offenses.

§2929.13 also includes a provision offering guidance on whether or not to send a person to prison, while §2929.13(F) currently lists the offenses that carry mandatory prison terms. Dir. Diroll noted that it is not substantively necessary to have this list because there are other sections that state which offenses carry mandatory prison terms. However, since there has been a trend to add specifications to criminal offense statutes, the Legislature has made it clear under §2929.13(F) that some of these specifications involve mandatory prison time.

He hopes to consolidate or streamline the issues in §§2929.14 and 2929.15 and have them ready for the Commission's September meeting.

Atty. Guy noted that mandatory offenses listed in the sentencing statute are also listed in the definition section. However, changes are not always reflected in each area. He remarked that any effort to streamline and simplify the mandatory sentencing statutes will be greatly appreciated.

Judge Routson agreed that mandatory offenses are sometimes listed in some sections and not others and clarification is needed as to when certain sentences are mandatory or not. Specifically, he wondered if certain offenses noted as ineligible for judicial release also mean that the designated sentences are mandatory.

Others wondered if a statute does not specify a sentence as mandatory, can it then be presumed that the sentence is not mandatory.

Dir. Diroll noted that H.B. 130 requests a judge to include in the entry whether the sentence is mandatory, which will be helpful.

OVI Offenses. Judge Spanagel questioned where OVI oddities should be placed if they were consolidated.

OVI offenses are quite expansive and contain numerous specifications and enhancements. They also tend to receive continuous revisions. With that in mind, Dir. Diroll mentioned that it might be easier if OVI offenses had their own section within the sentencing statutes.

Noting that pending S.B.17 mandates forced blood draws for repeat drunk drivers, Judge Spanagel expressed serious concern about the additional mandate for repeat OVI offenders to wear a SCRAM device at their own expense while on community control (5 years). There is only one vendor for the device, he said, which costs $15 per day or approximately $5,500 per year. He would like to discuss this, along with the issues of strict liability and wrongful entrustment, at the next meeting.

***Foster* Issues.** Since *Foster* has now been in effect for a year and a half, Defense Attorney Bill Gallagher expressed a need to discuss the original intent of the Sentencing Commission with S.B. 2 regarding consecutive sentences for low level offenders.

Dir. Diroll noted that there is a bill that has been drafted but not yet introduced which intends to address numerous *Foster* issues.

FUTURE SENTENCING COMMISSION MEETINGS

There will only be a small group meeting in July to determine which portions of the sentencing structure need to be focused on for simplification. The next full Commission meetings are scheduled for September 20, October 18, and November 15.

The meeting adjourned at 1:35 p.m.