

# OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor  
Chair

David J. Diroll  
Executive Director

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

**December 18, 2014**

**MEMBERS PRESENT**

Maureen O'Connor, Chair, Chief Justice  
David Gormley, Vice-Chair, Municipal Judge  
Chrystal Pounds-Alexander  
Paula Brown, OSBA Representative  
Ron Burkitt, Police Officer  
Derek DeVine, Prosecuting Attorney  
Paul Dobson, Prosecuting Attorney  
Kort Gatterdam, Defense Attorney  
Kathleen Hamm, Public Defender  
Fritz Hany, Municipal Judge  
Craig Jaquith, representing State Public Defender Tim Young  
Thomas Marcelain, Common Pleas Judge  
Steve McIntosh, Common Pleas Judge  
Gary Mohr, Director, Rehabilitation and Correction  
Aaron Montz, Mayor of Tiffin  
Dorothy Pelanda, State Representative  
Kenneth Spanagel, Municipal Judge

**ADVISORY COMMITTEE**

Eugene Gallo, Eastern Ohio Correctional Center  
David Landefeld, OJACC  
Joanna Saul, Correctional Institution Inspection Committee  
Gary Yates, Ohio Chief Probation Officers' Association

**STAFF PRESENT**

David Diroll, Executive Director  
Cynthia Ward, Administrative Assistant

**GUESTS PRESENT**

Ashley Buecker, student, Ohio University  
Emily Busch, student, Ohio University  
Garrett Crane, Legislative Service Commission  
Monda DeWeese, SEPTA Correctional Facility  
Carrie Diroll, interested citizen  
Ryan Dolan, Rehabilitation and Correction  
Sean Gallagher, Appellate Judge  
Darryl Graves, Reentry Administrator, Rehabilitation and Correction  
Lusanne Green, OCCA  
Alyssa Holznagel, student, Ohio University

Lesli Johnson, Ohio University  
Tony Kremer, Legislative Service Commission  
Marta Mudri, Ohio Judicial Conference  
Scott Neeley, Rehabilitation and Correction  
Whitney Pesek, Correctional Institution Inspection Committee  
Tania Peterson, Rehabilitation and Correction  
Norman Robinson, Rehabilitation and Correction  
Mark Schweikert, Director, Ohio Judicial Conference  
Solveig Spjeldnes, Ohio University  
Paul Teasley, Hannah News Network  
Gary Tyack, Appellate Judge  
Steve VanDine, Rehabilitation and Correction  
Scott Weaver, SEPTA Correctional Facility  
Mindy Wells, Interim Administrator, Supreme Court of Ohio  
Josh Williams, Ohio Judicial Conference  
Maggie Wolniewicz, Legislative Service Commission  
Gwendolynn Woods, Rehabilitation and Correction

The December 18, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Chair Chief Justice Maureen O'Connor at 9:40 a.m.

#### **DIRECTOR'S REPORT**

Executive Director David Diroll reported that State Representative Roland Winburn has served a couple of terms as a valuable member of the Sentencing Commission but recently lost his election to continue. He sent a letter commending the Commission on the magnitude of issues that it is willing to address and high level of expertise.

Dir. Diroll noted that cabinet agencies have submitted their budget proposals to the Governor for inclusion in the Executive Budget. He invited Director of Rehabilitation and Correction, Gary Mohr to comment.

Director Mohr pointed out that the budgets are not made public until mid-February. He hopes the new budget will provided a reform-oriented way to provide a significant increase to the community side of rehabilitation for offenders. Operating one prison for two decades, he noted, costs \$1 billion. He believes in investing in people rather than brick and mortar, so there will not be any new prisons built while he is director. 19.8% of the people coming to prison are being incarcerated for the offense of drug possession. He maintains those people could be handled more effectively at the community level and he would like to help them acquire the means to do so. DRC hopes to provide judges with more discretion and opportunity to divert offenders to local resources.

Dir. Diroll noted that the General Assembly moved on several items of interest to the Commission during the lame duck session.

Noting that the Sentencing Commission has spent considerable time on *mens rea* issues, Dir. Diroll reported that S.B. 361 addresses some of those and passed the Senate before the end of the session, and was pending in the House of Representatives.

Another topic addressed by the Commission in the past was various driver's license suspensions that must be imposed, irrespective of whether the offense was traffic related. The most important one, he noted, is the Federal mandate that most drug offenses carry a suspension. The fear long has been that the state would lose highway funds if the suspension was not maintained. Dir. Diroll reported that the State of Ohio has petitioned the Federal Government for an exemption to this suspension. He noted that the Judicial Conference was active in this effort.

State Representative Pelanda reported that the House of Representatives completed a busy session the previous evening, including the *mens rea* bill. She remarked that they had heard from many judges requesting removal of the mandate for suspension of the driver's license, noting that it was detrimental to their ability to work out drug treatment plans for offenders. In the next General Assembly, legislators will draft appropriate legislation to deal with the suspension on a state level.

According to Municipal Judge Kenneth Spanagel the suspension has been eliminated as a mandate but it was still available as an option.

#### **OFFICIAL SELECTION OF NEW SENTENCING COMMISSION DIRECTOR**

Chief Justice O'Connor recalled Dir. Diroll's visits, when she was the county Prosecutor in Summit County, to help train her assistants on newly enacted legislation. Recognizing the significance of his role as Executive Director of the Sentencing Commission as the end of an era, she expressed thanks for his service, commitment and direction. She expressed little doubt that his knowledge and expertise will continue to be a valuable resource.

The Supreme Court received many applications for the position. Several were selected for interviews by the screening committee and she interviewed the final two candidates. She feels that, with the experience that DRC Deputy Director Sara Andrews brings to the table, choosing her as Director will be a benefit to both the Court and the Department.

Commission members unanimously approved the motion presented by Prosecuting Attorney Paul Dobson and seconded by Common Judge Thomas Marcelain and Municipal Judge Kenneth Spanagel:

**To officially appoint Sara Andrews as the new Director of the Ohio Criminal Sentencing Commission.**

#### **OTHER LEGISLATIVE ACTION**

**"Pay Bill"**. On another note, Chief Justice O'Connor expressed concern about an issue that had recently been brought before the Ohio General Assembly. She explained that a bill had been recommended to increase the salaries of elected officials, which would include judges. The bill passed the House but bogged down in the Senate. She noted that Ohio Judicial Conference Director Mark Schweikert helped to lead the fight.

Rep. Pelanda raised concern about a particular nuance about pay bills that will cause problems until it is fully addressed and rectified. Pursuant to a constitutional provision from the 1880's, there is an appointment prohibition which prohibits legislators from seeking an appointment to any office for the

period of one term in which a pay raise was received, plus one year. She noted that the Senate had offered a resolution requiring a constitutional amendment that would appoint a Commission to decide pay raises in the future for elected officials. It would also eliminate the appointment prohibition. Unfortunately, she said, that particular resolution hasn't received a hearing in the House and the House bill was never granted a hearing in the Senate. She pointed out that when the appointment prohibition was enacted in the 1880's the idea of term limits for legislators did not exist.

Chief Justice O'Connor questioned the relevance of the provision.

**Potential Criminal Justice Commission.** Chief Justice O'Connor reported that her recommendation to revamp the Sentencing Commission to become a Criminal Justice Committee is in a lull. Senate President Keith Faber hopes to finish his project of recodifying the criminal code, she explained, before tackling the concept of a new criminal justice group. In the meantime, she intends to proceed, within the current body, to implement some of the ideas that had been discussed.

#### **GOALS OF THE NEW DIRECTOR**

Newly appointed Executive Director Andrews thanked Chief Justice O'Connor and the Commission. She offered a run-down of some of the goals that she has for the Commission. She plans to begin by focusing on solidifying the Commission's membership so that there is adequate representation. She hopes to strengthen the Commission's presence and visibility across the street at the Statehouse.

She thanked David Diroll for the strides he made in developing and leading the Commission through the many years of accomplishments. She also thanked Dir. Mohr for his leadership at DRC and helping her to expand her expertise in the criminal justice field.

She hopes to see the Commission take an active role and presence in Sen. Faber's recodification group, as well as the Justice Reinvestment Initiative. She sees an opportunity for the Commission to weigh in and support other state agencies and their budget submissions. This might include helping DRC work with the directions of community treatment centers, such as how it should work and what offenders should be eligible. She pointed out that the statute that established the Commission encourages it to work closely with DRC. Although she has worked with DRC for 24 years, she assured the Commission members that her allegiance will now be to the Commission.

Recognizing a focus on the current issues of opiate addiction and substance abuse in general, she asked Commission members to step forward with other priorities and issues that the Commission can help to address.

#### **RISE IN CRIME IN RURAL COUNTIES**

**Recent Prison Population Trends.** Traditionally, surges in crime figures have been largely an urban phenomenon, said former Dir. Diroll, but that pattern appears to be changing. He had invited DRC Research Director Steve VanDine and researchers from Ohio University to share data on new crime patterns and on a reentry study that targeted several rural counties.

By the nature of focusing on data related to Ohio's prison population and the types of offenders entering the prison system, Mr. VanDine said that he often notices patterns or fluctuation in the patterns as he reviews numbers.

At one point, more than 70% of the women entering DYS were African-American, but that has since dropped to 35-40%. As he further examined those data, he discovered that most of the women were no longer coming from the "Big 6" most populous counties (Cuyahoga, Franklin, Hamilton, Lucas, Montgomery, and Summit). The recent increase came from the other 82 counties.

As he monitored that trend over the last 3 to 4 years, he noticed that other patterns were correlating with that. The overall percentage of inmates coming from large counties was declining while the recidivism rates were increasing from smaller rural counties.

He turned attention to Table I which looks at five decades of commitments to DRC. The total number of commitments in 1975 was 7,219 with 58% coming from the Big 6. That was a year, he noted, when the crime rate was higher than it is today. In 1984 there were 9,928 commitments, with 59.7% coming from the Big 6. The commitments in 1994 reflect a large increase of 19,243 with a larger percentage of 64.6% from the Big 6. The number of commitments increased again in 2004 to a number of 23,866, but the proportion from the Big 6 decreased to 55.5%. Both the number of commitments and proportion from the Big 6 revealed a decrease in 2014, with 20,120 commitments and only 42.8% coming from the Big 6 urban counties. The peak year for intake was 2007 with more than 29,000 commitments. These data reflect a dramatic shift in terms of the proportions of people entering DRC.

Since 1992, DRC has tried to facilitate the placement of truly nonviolent (TNV) offenders, which refers to offenders who have no history of an indictment or conviction for either a violent felony or misdemeanor. In 1992, 44.4% of the commitments were TNV, while the 2012 sample reflects a proportion of just under 25% TNV. In comparing the proportion of TNV commitments from the Big 6 counties versus the other 82 counties, the intake numbers of 2003 show that 32.8% were from the Big 6 and 33.5% from the other 82 counties. That decreased to 28.6% from the Big 6 in 2008 and increased to 35.5% from the other counties. 2013 reflected an overall reduction for all counties with 20.5% from the Big 6 and 29.5% for the other 82 counties.

When the crime rates were urban-dominated, rehabilitation services were concentrated in those areas. Some of those resources now need to be shifted to the rural counties, he noted.

There has been a surge of opioid use throughout the state, said Mr. VanDine, but even more disproportionately so in rural counties, particularly in southern Ohio.

Table III focuses on 5 year intervals of commitments by different categories. It reflects a reduction in African American commitments in the Big 6 counties as well as the rural counties over the past 10 years, but an increase in white commitments statewide over the same period of time.

Although the proportion has increased in the Big 6 counties for commitments of crimes against persons, sexual crimes, and burglary, it is believed that diversion alternative financing has contributed to the drop in commitments

for property and drug offenses, which changes the proportions. The rate for drug and burglary offenses in rural counties, however, has grown, he said.

Table IV refers to the overall incarceration rate by county and the proportion of DRC commitments that are technical community control violators, with no new felony convictions.

Texas Christian University developed an instrument that measures an offender's need for substance abuse programming. The data bases of community corrections technical violators were matched with those who have gone through previously funded community alternative programs, particularly those for substance abuse. The results show that urban counties don't need to send as many people with high needs for substance abuse treatment to prison, whereas smaller counties have a greater need in that regard. Overall, it is time to find ways to direct more resources to rural counties in a cost efficient manner, he maintained.

Mr. VanDine remarked that, because the recidivism rate has increased among rural counties, DRC sought a federal grant to provide a variety of services to less populous counties.

Eugene Gallo, Director of the Eastern Ohio Correctional Center, speculated that some judges may have less patience with drug offenders from outside their county.

**Ohio Rural Recidivism Reduction Project.** DRC Reentry Administrator Darryl Graves works with the offender reentry process in south central and southeast Ohio. He teamed with researchers from Ohio University to conduct an evaluation of the impact of resources on recidivism rates in rural counties.

The Big 6 counties usually received the most attention in studies. As a result, most programs designed to reduce recidivism were focused on those counties, Mr. Graves noted. As those programs are succeeding, statistics are now showing a significant increase in the levels of recidivism in rural counties. Offenders returning to rural communities tend to face challenges distinct from their counterparts who are transitioning back into urban or suburban areas. A key factor for rural counties tends to be the lack of access to services, mostly due to geographical remoteness, which, in turn, tends to prevent successful reintegration into the community for the offender. Few services exist in the rural communities to assist with reintegration, and those that exist are often spread over a large area with little or no transportation available. The goal of this project was to bring forth a model that would be available in rural areas.

Although the statewide recidivism rate was 31.2%, 9 of the 10 targeted rural counties had higher rates. Two had recidivism rates that exceeded 40%. The goal of the Ohio Rural Recidivism Reduction Project (OR3) was to reduce recidivism by 20% over a two year period.

The project focused on 400 felony offenders (both men and women) who were returning to the community on supervision, were medium to high risk level, and would remain on supervision for the length of the project. The project operated through three hubs.

Evaluation Overview. One Ohio University researcher on the project, Solveig Spjeldnes, explained that the project operated through three hubs in Athens, Highland, and Ross counties, and later added Scioto County. The program implemented strategies that addressed the challenges posed by reentry, to increase public safety, and reduce recidivism. She claimed that reentry is not a program, but a process that begins when the offender enters the system.

The project looked at the development and implementation of a coordinated reentry system, local reentry systems, participant needs, and the overall experience of the participants and how the systems were working for them.

It reviewed the statewide infrastructure to discover what was available and how the resources collaborated and coordinated with each other. Surveys were conducted through a Social Network Analysis and Coalition self-assessment survey to determine changes in collaboration among the resources and hubs. Interviews were conducted during coalition site visits, including interviews of 65 participants, Prof. Spjeldnes added.

Evaluation Activities and Outcomes. Leslie Johnson, another Ohio University researcher, explained that the data on 383 OR3 participants were matched with the variables of 411 individuals from other rural counties. This included the date of release (within 30 days), the type and severity of crime committed, and risk of recidivism as measured by ORAS (the Ohio Risk Assessment System). The comparison was based on the hub level, crime type, and release type.

29 (7.6%) of the OR3 participants recidivated, while 42 (10.2%) of the comparison group committed new crimes or returned to prison due to technical violations, Prof. Johnson noted. Recidivism Rates by HUB revealed some reduction for Highland County but more significant reductions by Ross County and Scioto County, she added.

Social Network Analysis reveals levels of interaction and cooperation between departments, parole authorities, and local community representatives. It revealed a shift in power and decision-making from ODRC to the hubs. This resulted in a decrease in the hierarchical relationships among OR3 representatives. That was followed by an increased level of communication among the OR3 representatives and an increased role among the communication leaders.

The number of peripheral members increased as more people became interested and involved in the effort of the project. As greater communication occurred, it resulted in a growing lever of trust and greater sharing of resources.

Reported Needs Upon Release. As another Ohio University researcher on the project, Leslie Johnson reported that, upon release from prison, the offenders face numerous challenges and have several needs that affect their ability to move forward in their transition back into the community. This includes obvious material and financial needs in addition to health, behavioral, social, and emotional needs.

Two of the first needs are housing and assistance in finding a job. That in turn requires transportation assistance to get to the job, meetings with parole officers, and medical or treatment appointments, she said. This might include bus passes or rides, or assistance in getting a new driver's license and gas cards to help with fuel expenses. Even the ability to get a copy of a

birth certificate can be a barrier that hinders the ability to get a job, license, or suitable transportation. Prof. Johnson said many need assistance with getting medical care or even a medical card. Most importantly, all need support and encouragement to deal with daily challenges.

She stressed the importance of the case manager is in helping a releasee adjust and connect to the community resources. The family is also critical to the person's adjustment. Sometimes, however, there are family members or friends with whom the releasee must break off all contact, which is more difficult in a smaller rural community.

Barriers. In a rural community there is a greater stigma attached to the widespread knowledge about serving prison time. This can affect the ability to get hired for a job and reactions from customers and staff in the job environment.

Child support becomes a barrier since large amounts of overdue child support and fines can prevent the releasee from obtaining a driver's license. Or it may diminish a paycheck by great amounts if the wages are garnished to pay the support.

Suggestions. When the releasees were asked their opinions about what improvements are needed in the program, Prof. Johnson said suggestions included providing information packets and more job assistance. The packets might include a list of available services, a list of businesses that refuse to hire felons, and a list of education options. Another common suggestion was to get assistance with custody issues and child support laws. This involves the struggle to gain more visitation time with their children in addition to the struggle to catch up on child support.

Prof. Johnson reported that 36% of the participants were incarcerated for property charges, 32% were drug related, 15% involved an action against a person, and 9% were convicted of sex offenses. The highest recidivism rate tends to be among those convicted of property and violent crimes.

Conclusions. The partners worked well together and developed a good system for providing reentry services, she noted. Although the three hubs differed in formation, maintenance, and management of reentry coalitions, the overall effort had a positive impact on the recidivism rate.

They learned how critical it was to include a case management model for connecting the participants to the various services. Many releases did not know where their birth certificate or social security cards were, so assistance was needed to get those tracked down or replaced. Once medical cards were acquired, it was easier to get into treatment programs.

The Next Chapter. Mr. Graves reported that the project applied for another grant to expand the model to include 10 new counties, including beyond Southern Ohio. This will require an increase in case managers and training so a budget of \$1 million per year over 3 years is expected. This should also improve the options for cognitive behavioral therapy in rural counties.

The project has now produced resource guides and manuals and will continue to focus on strategies and effective models for rural counties. They hope to focus more on the people with the greatest needs.



When Dir. Diroll asked what would happen when the grants end, Prof. Johnson explained that some of the money is already gone but assistance from local partners is helping. Some are helping with transportation and other needs.

According to Prof. Spjeldness, many people have been impressed with the progress they have seen and numerous participants and practitioners have found it refreshing that they have a better understanding of how resources can interlink. Mr. Graves added that they now look closer at how other internal decisions might impact people reintegrating into the community.

Atty. Hamm remarked that her county has a reentry coalition but they are searching for other resources that can be tapped for assistance with case management.

According to Ms. Johnson, the hubs that were more regional than just single county hubs were able to make better use of their case management. She agreed that funding for effective case management is one of the biggest hurdles.

Since numerous studies on effective reentry programs stress the importance of case management, Mr. Graves said that they are hoping to include additional funding for that need in the plans for expanding the model. One consideration might be to have case management funded separately.

Atty. Hamm asked if it might be possible for some of the community diversion resources to dovetail with the smaller counties on reentry.

Dir. Mohr assured her that, as the State is working on development of the next statewide budget, this need is certainly being discussed. They are seeking how to effectively expand resources to fill the needs without duplicating those resources.

#### **FELONY SENTENCING APPEAL ISSUES**

Former Dir. Diroll explained that, as the Sentencing Appeals Committee has been working on the felony appellate review statute, it found a need to define the standard of "contrary to law" for purposes of appeal. In so doing, it has raised concern among defense counsel that doing so might narrow the standard too much. In response to that concern, the latest draft of the committee's effort rewrites the proposed "scope" clause (proposed §2953.08(A)) to tie appeals under this section to statutory issues and clarify that constitutional claims still can be raised.

There has been ongoing discussions regarding whether there should be some kind of appeal based upon the length of sentence imposed by the court. Former Dir. Diroll explained that S.B. 2 discouraged judges from sentencing beyond the minimum for a first commitment to prison. Judges were also discouraged from imposing the maximum term in the sentencing range except for the worst kind of offenders or worst offenses. The *Foster* case struck that language along with limits on consecutive sentences, noted the erstwhile director. That resulted in incremental changes in the length of sentences being imposed by judges and eventually adding over more 5,000 beds needed by DRC. It was a stealth process, he added, without a "tough on crime" bill. In the draft an appeal would be allowed if the sentence imposed is above the median of the range, rather than the minimum.

A third change in the instant draft suggests a repeal of guidance in imposing a prison sentence for certain F-4 or F-5 offenses because other provisions are clarified and H.B. 86 imposes certain limitations. Most other cases would be covered by the proposed definition of "contrary to law," he added.

The draft retains the prosecutor's appeal when a presumption in favor of prison for an F-1 or F-2 offender isn't followed, or later if one is granted judicial release. Dir. Diroll added that the draft adds a new review for offenders receiving consecutive sentences of 15 years or more.

Municipal Judge Kenneth Spanagel asked how soon the subcommittee might have a final proposal available for consideration by the full Commission.

Dir. Diroll responded that the subcommittee hopes to get something refined within the next couple of months. With the recent election, there are changes occurring with the leadership in the House of Representatives, but not the Senate. He hopes that the legislature will be organized enough by February that the Commission will soon be able to present these proposals for consideration.

The question at this point, said prior Director Diroll, is whether there should be an appeal, or at least a review, based on the duration of the sentence. It had been suggested that a defendant should have the right to appeal if sentenced to a term from the upper half of the sentence range and either the court failed to state (and include in the record) the factors that were persuasive in selecting the term or the sentencing court stated those factors but the record does not support that the stated factors were present.

Since S.B. 2 helped to stabilize the prison population until the *Foster* case upset the apple cart by removing the limitations, Dir. Diroll asked Mr. VanDine how this provision might affect the appellate courts and, ultimately, the prison population.

Mr. VanDine offered a comparison of sentence choices for each felony level, before and after H.B. 86 in 2011. The data looked at the most serious offense of the offender, then looked at the aggregate minimum or total sentence and distributed it across the sentencing options for each felony level.

For admissions to DRC during FY 2014 for H.B. 86, there were 299 people entered with an F-1 aggregate minimum sentence of 3 years or less. 277 entered with a 4 year sentence, 202 with a 5 year sentence, 119 with a 6 year sentence, 102 with a 7 year sentence, 102 with an 8 year sentence, 77 people with a 9 year sentence, 94 with a 10 year sentence, 72 with an 11 year sentence, and 273 with an aggregate minimum sentence of more than 11 years.

The aggregate minimum sentences for F-2 offenders ranged from 2 years to greater than 8 years, with the majority ranging from 2 to 4 years. F-3 offenders had minimum aggregate sentences ranging from 9 months to greater than 61 months, with the majority ranging from 10 to 48 months. Some of those offenses, he explained top out at 60 months. The aggregate minimum for F-4 offenders ranged from 6 months to greater than 18 months, with the majority running 12 months, 18 months, or more than 18 months. F-5 offenders had minimum aggregate sentences ranging from 6 months to greater 12 months, with the majority at 6 months, 9 months, or from 11 to more than 12 months. He

explained that this reflects what the sentence would be without taking into account good time or jail time credit or other possible adjustments.

Jail time credit, said retiring Dir. Diroll, comes off the "stated prison term," a defined phrase that includes all time imposed on the offender for all offenses at that sentencing. He explained that the proposal regarding choosing a sentence above the median of the sentencing range addresses the maximum term allowed for individual offenses, not the total of multiple offenses or consecutive terms.

Under proposed §2929.19(A)(2)(a) in imposing a prison term, "the court shall state, in open court on the record, the seriousness and recidivism factors that were present and persuasive in selecting the term." This would apply if the court selected a term above the median of the sentencing range. The other offers an appeal on duration as opposed to whether the factors were stated. §2953.08(B)(1)(A) gets to the "contrary to law" aspect.

Appellate Court Judge Sean Gallagher contended that, in most cases, the defendant is going to assert that a sentence is "contrary to law." He believes there will be two basic kinds of appeals - contrary to law on whether the judge went out of the sentencing range or whether the judge failed to consider the necessary findings, and/or the record does not support that. He believes that (B)(1)(b) covers the case where the judge imposed a sentence above the median within the sentencing range and stated his findings and reasons on record, but the defendant stills claims that the length of the sentence was contrary to law.

Pros. Dobson asked what the appellate court's remedy would be in that case. He wondered if the appellate court would impose a different sentence or remand the case back to the sentencing court to resentence the defendant to a lower term.

According to statute, said Dir. Diroll, the appellate court is allowed to resentence, reverse, uphold, modify a sentence, or remand a case back to the sentencing court.

Pros. Dobson argued that that would limit the impact of victims, who only appear before the sentencing court.

Judge Gallagher asserted that it is very rare for an appellate court to exercise the power to resentence a defendant.

Dir. Diroll pointed out that §2953.08(G)(2) allows the appellate to increase, reduce, or otherwise modify a sentence that is appealed or vacate the sentence and remand the matter to the sentencing court for resentencing. But the appellate court must not use "abuse of discretion" as the standard of review in the appeal because statute calls for a clear and convincing standard.

There is a potential problem constitutionally with resentencing by the court of appeals, Appellate Judge Gary Tyack argued, since the victim or victim's family have the right to be present when sentencing occurs. In fact, this would allow a resentencing without the prosecutor and defense attorney present. The appellate judge is able to review what is on record but was not present to witness the dynamics of the initial trial. He believes that

because the prosecutor, defense attorney, and sentencing judge know more about the case than the appellate judge, the case should be remanded for any resentencing. He would recommend removing the provision that allows the appellate court to do any resentencing.

Remanding the case to the sentencing court is the preferred mechanism, said Pros. Dobson. If the appellate court resorts to resentencing the defendant, then he contends that the appeals court must follow all other statutory sentencing guidelines.

Judge Gallagher suggested moving the standard of review language to §2953.08(A)(1),(2), or (3) to assure that everyone understands the standard of review upfront. At some point he believes the court will need to make findings for consecutive sentences. The appellate court, he said, is basically seeing two kinds of appeals for consecutive sentencing: 1) either the judge did not make any findings; or 2) if the judge did make findings, the evidence does not support those findings.

Judge Tyack reported that his district (Franklin County) is reversing consecutive sentences on a weekly basis because they have not made express findings as to §2929.14(C)(4). He noted one case where the judge offered great dialogue on the record about why he was sentencing a certain way but he did not make specific findings based on §2929.14(C)(4), so his court was compelled to remand it back to the court.

Cautioning against taking away the judge's discretion, Judge Gallagher declared that clear and convincing should be clarified as the standard of review for all appeals. He also feels that if the appellate court remands a case back to the trial court, it should give them instructions explaining what needs to be done, noting that the appellate court might send a case back to the trial court for reasons other than an issue of findings. He likes the new definition of "contrary to law" but feels the defendant must be compelled to tie the error specifically to the record. They should be required to show in the body of the brief that the judge failed to consider a certain finding, or clarify in some way what concern is considered to be contrary to law. They need to provide clarity.

Judge Gallagher expressed concern about proposed §2953.08(B)(2) regarding "inconsistent & costly sentences," particularly (a), which declares that a sentence is inconsistent with the purposes and principles of sentencing if it is "inconsistent with the sentences imposed for similar crimes by similar offenders under similar circumstances in that jurisdiction". He doesn't believe there is such a thing, declaring that the defendant stopped being a similarly situated offender the second that his accomplice plead guilty and agreed to cooperate but the defendant didn't.

Pros. Dobson declared that neither he nor the Ohio Prosecuting Attorneys' Association will ever agree with that provision or the one on a sentence being too costly to the government. He believes that defense attorneys and judges should be concerned about that provision because reduces the judge's discretion and prevents the judge from making an exception in a particular case.

The judge needs to articulate something to justify a sentence that differentiates, Atty. Hamm insisted.

Recognizing that the goal was to achieve more consistency, Judge Marcelain pointed out that that was why they added the clarifier "in that jurisdiction."

The appellate court should be looking at that level of inconsistency in only the most extreme circumstances, Pros. Dobson argued.

The appellate court could easily declare that a higher sentence is arbitrary and inconsistent but not an abuse of discretion, said Atty. Craig Jaquith.

Former Director Diroll pointed out that under §2929.11's general principles of sentencing, current law already requires that sentences be consistent with sentences of similar offenses. It also requires that the sentence should not be an unnecessary burden on the state or local government resources. So the issue will not go away.

It presents difficulty for defense counsel, said Atty. Hamm, because of the lack of access to some information, such as the pre-sentence investigation (PSI). She unable to do a fair comparison of her client's PSI to another offender's PSI.

Admiring Mr. VanDine's chart of comparison of sentencing choices, Judge Gallagher asked that it be made available to judges. He views it as a neutral tool that can help determine how to keep sentences consistent. He expressed a desire to have access to that information more often.

Atty. Hamm feels that more information is needed than that.

Former Dir. Diroll pointed out that there are variables and factors that are not included in that kind of data. He wondered if there was a way to measure consistency.

When Dir. Diroll raised the question of whether there was interest in looking at issues concerning the merger of offenses, Judge Gallagher noted that it is less of a problem at the appellate level now.

#### **FUTURE MEETINGS**

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for January 15, February 19, March 19, April 23, and June 18.

The meeting adjourned at 3:25 p.m.