OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer
Chairman

David Diroll
Executive Director

Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
October 19, 2000

SENTENCING COMMISSION MEMBERS PRESENT

Appellate Judge John Patton, Co-Chair
Victim Representative Sharon Boyer
Common Pleas Judge H.J. Bressler
Assistant Prosecutor James Cole
Municipal Judge "Fritz" Hany
Juvenile Judge Sylvia Sieve Hendon
Becky Herner, representing State Public Defender David Bodiker
OSBA Delegate Max Kravitz
Ann Liotta, representing Youth Services Director Geno Natalucci-Persichetti
Gahanna Mayor James McGregor
Police Chief James McKean
Lt. Michelle Scott, representing State Highway Patrol Superintendent, Col. Kenneth Marshall
Steve VanDine, representing Rehabilitation and Correction Director Reggie Wilkinson
Public Defender Yeura Rommel Venters
Prosecutor Greg White
Juvenile Judge Stephanie Wyler

ADVISORY COMMITTEE MEMBERS PRESENT

John Guldin, Chief Counsel, Bureau of Motor Vehicles

GUESTS PRESENT

Amy Frankart, Legislative Budget Office
David Muhak, Lorain Co. Prosecutor's Office
Laura Potts, Legislative Budget Office
Jack Reil, Department of Youth Services
Joe Rogers, Legislative Budget Office
Lusanne Segre, Ohio Association of Child Care Agencies
Holly Simpkins, Legislative Budget Office
Mercy Sutyak, administrative aide to Representative Ed Jerse
Susan VanKley, *Hannah News Network*
Ed Yim, Montgomery County Prosecutor's Office

STAFF PRESENT

Scott Anderson, Juvenile Coordinator
David Diroll, Executive Director
Rick Dove, Supreme Court Liaison
Fritz Rauschenberg, Research Coordinator
Cynthia Ward, Administrative Assistant

The October 19, 2000, meeting of the Criminal Sentencing Commission was called to order by the Vice Chair, Appellate Court Judge John Patton, at 10:15 a.m.

DIRECTOR'S REPORT

Director David Diroll pointed out that no future meeting dates have been set. The Commission agreed to meet next on December 14, 2000.

Mr. Diroll reviewed the contents of the meeting packets, which included: a section-by-section summary of SB 179; a comparison of SB 179 as introduced, based on the Commission's proposals, and as it currently exists; a memo outlining forfeiture issues; and minutes from the August meeting.

Reporting on the status of the Commission's proposals currently before the General Assembly, Mr. Diroll noted that the bad time proposal has been well received. It is not clear which piece of legislation it will go into, but he believes it could be included in a bill before this General Assembly adjourns.

The Commission's proposal regarding sobriety test refusals, said Mr. Diroll, has not been greeted as warmly. It probably will not be added to any bill this session. He suggested deciding how this should be handled when the Commission meets in December.

Research Coordinator Fritz Rauschenberg interjected that some other bills have been introduced which deal with the refusal issue. He is not sure what will happen with them.

JUVENILE ISSUES

Mr. Diroll compared Sub. S.B. 179 with the Sentencing Commission's original proposals. Of the Commission's more important original proposals, the following have been retained in some form:

> New 2152 Chapter; broadening the Juvenile Code's purposes to include public safety, restoration of victims, and offender accountability; blended (SYO) sentences; new rights in SYO cases, including competency; DYS eligibility lowered from age 12 to 10; new definition of "unruly"; and permissible violations bureau for some traffic offenders.

The following proposals, said, Mr. Diroll, have been removed from the bill:

> Bindover reform (fewer mandatories, some presumed); extended juvenile jurisdiction beyond age 21; graduated minimums by degree of offense; direct sentencing to local detention; and competency (other than SYOs).

Mr. Diroll pointed out that the House bill version of S.B. 179 makes clearer that the competency issue can be raised in SYO cases. Some legislators, he added, still had concerns about the minimums for the gun specs.

The bill has had about 30 hearings, he noted.

"Minimum" DYS Terms (§2152.16). The Senate version created ranges of possible DYS time based on the level of offense, as proposed by the Commission. These ranges included staggered minimums. F-1s could get from 1 to 5 years, F-2s from 1 to 3 years, and F-3s from 6 to 20 months.

DYS's opposition to this became apparent in the House. When coupled with changes in gun specs, DYS estimated that two new facilities would be needed. In response, the House Criminal Justice Committee returned to current law: 1 year for F-1s and F-2s; 6 months for F-3s, F-4s, and F-5s.

It seems ludicrous, said Mr. Diroll, that a juvenile should face the same DYS term for stealing $100,000 as for stealing $500. In addition, F-3 offenses like extortion, abduction, and gross sexual imposition are much more serious than F-5 offenses.

Prosecutor Greg White agreed that staggered ranges are needed between the various degrees of felonies. The initial periods that were originally recommended are not as important as having some staggered dispositions based on the level of offense, he acknowledged.

Mr. Diroll asked if any members had some compromise ranges to offer that might not have the fiscal impact feared by DYS. The initial proposal, he noted, had shorter minimums than current law, but allowed the judge to choose a longer sentence for the worst forms of each degree of felony.

Pros. White noted that, as it is, judges rarely sentence juveniles to the period currently allowed. He feels that any proportionate compromise on those figures would be acceptable, so long as an option is available to judges for imposing a more serious disposition for the more serious cases.

Juvenile Judge Stephanie Wyler remarked that, if the court imposes the minimum 6 months, then the judge has to grant judicial release in order for the juvenile on probation to reappear before the judge before the half-point minimum of 90 days. The court, she said, could impose judicial release more effectively if a range beyond 6 months were available. With a 6-month sentence, half of it is spent at the Circleville facility, which leaves little time to find out about rehabilitation. The court, in effect, is forced to make a decision within 90 days, which can be too soon.

Victim representative Sharon Boyer reminded other members that the juveniles in DYS custody who were interviewed by the Commission declared that the juvenile system was not tough enough during early encounters with the system.

According to Juvenile Judge Sylvia Hendon, the Commission probably has little chance of changing these ranges. She remarked that the Commission should choose which issues are the most important to pursue. The Juvenile Judges Association, she reported, has decided it can no longer support S.B. 179 since the mandatory bindovers have been reinstated and the competency provision omitted. She declared that, due to the changes made to the bill by legislators, particularly reinstating the mandatory bindovers, few juveniles will be left to fit within the SYO category and most of those are likely to be bound over to the adult system. That means there is little or no chance for rehabilitation of those youth.

There was consensus, said Mr. Diroll, in the Senate majority caucus to keep the mandatory bindovers. He noted that testimony from Mike Elrod of the Attorney General's Office implicitly suggested the compromise of retaining mandatory bindovers for Category I offenses, while offering leeway on some Category II offenses.

Judge Hendon remarked that Senator Finan, the Senate President, said that removing mandatory bindovers would make the bill soft on crime. Meanwhile, other legislators and constituencies said it is Draconian.

Assistant Prosecutor James Cole stressed that limiting gross sexual imposition (an F-3) to 6 months creates a serious issue because DYS has the best treatment program for these offenders but 12 to 18 months is needed for successful completion. Six months does not allow enough time.

Public Defender Yeura Venters declared that the maximum extends to age 21. He stressed the disposition needs to be tied to treatment and the time needed to complete treatment. He added that a juvenile sent to DYS for a sexual crime is usually there for 18 months, regardless of the minimum, because the disposition is tied to treatment.

OSBA Representative Max Kravitz expressed concern that the Commission needs to quit bothering legislators with minor issues in the juvenile bill. He fears it may be causing the Commission to lose credibility.

The problematic crimes, said Judge Hendon, are the ones lumped in Class II (some F-2s and F-3s). With SB 2's reclassification, she noted, the F-3s have become more serious crimes. She wondered if one solution might be to include these with the ranges for F—1 and F-2 offenses. This would allow a longer range and would provide a better opportunity for the judge to bring the juvenile offender back into court for evaluation of the treatment and consideration of a local program. She agreed with Judge Wyler that it is tough to make these decisions within 90 days.

Consensus was reached to continue efforts on this issue.

Purposes (§2152.01). In line with the Commission's plan, the Senate version moved away from pure "care and protection" and rehabilitation to include protecting the public, holding the offender accountable, and restoring the victim, as well as rehabilitation. The Commission's version implied that "care and protection" were still included as purposes in new Chapter 2152 by referring to Chapter 2151 purposes for most delinquency offenses.

In response to criticism that the bill "abandons children" and is "mean spirited", the House explicitly stated "care and protection" as a purpose in Chapter 2152 and listed it first.

Mr. Diroll told House members that the Commission has no qualms about adding "care and protection" to the list of purposes, since it was implicit already, but feels it should not overshadow public safety and offender accountability.

If necessary to pick and choose which issues are worth fighting for, said Judge Hendon, then this one is not that important.

Pros. White was not opposed to including "care and protection" within the purposes, but feels it would fit more appropriately in Chapter 2151 than Chapter 2152. He feels it should not be more important than restoring the victim.

According to Mrs. Boyer, victims have always been considered last in the justice system.

In order to deal with the worst offender adequately, the process must include accountability, Pros. White declared.

Consensus was reached that this issue is not as important as the ranges for dispositions.

Dispositions for Young Murderers (§2152.11). In line with the Commission's proposals, the Senate version placed 10, 11, 12, and 13 year old murderers in the mandatory SYO (blended sentence) category if they committed the offense with a gun or had a prior DYS commitment. Otherwise, they were in the discretionary SYO category. The House version places all 10, 11, 12, and 13 year old murderers in the discretionary SYO category.

Since these are the worst crimes and since juveniles aged 10 through 13 cannot be bound over, the Commission thought a mandatory SYO made sense, said Mr. Diroll. That would give the juvenile system time to learn if the offender can be rehabilitated or is sociopathic. In a MSYO, the adult sentence could only be invoked for serious misconduct after age 14 and is not automatic.

As long as the SYO classification is discretionary, the judge has the option of whether or not to impose the blended sentence, said Judge Hendon.

Consensus was reached to take no action on this issue.

Gun Specs (§2152.17). The Commission's proposal made the gun specs mandatory, but gave judges a range of times. The Senate saw this as reducing the gun specs, preferring instead to make the current periods clearly mandatory.

DYS's cost figures gave the House pause. The House bill reverted to the Commission's initial proposal. It made the time to be served consecutive to time on the underlying offense. The mandatory periods are 1 to 3 years for using, indicating, brandishing, or displaying a gun and 1 to 5 years for having an automatic or silenced weapon and for drive-by shootings. Up to one year would be available for mere possession, consecutive to the term for the underlying offense. The gang spec would be 1 to 3 years.

Mr. Diroll recommended accepting the House version since it makes the gun specs clearly mandatory and consecutive, but allows the judge to tailor them to principal offenders versus accomplices, etc.

Asst. Pros. Cole asked how this would apply to accomplices.

Part of the reason for a range, said Mr. Diroll, was to allow the judge to treat the accomplice differently than the principal offender. The Commission's original proposal included some language about how to treat accomplices, but this was later removed from the Senate version. Instead, the bill now says to handle the accomplice issue in a manner as handled in the adult court.

Some adult perpetrators, said Pros. Cole, hand the gun over to a juvenile to avoid getting stuck with the gun spec themselves, knowing that a juvenile will get off easier.

Under this proposal, said Pros. White, if the offender has a gun but does not use it to facilitate the offense, then the gun spec is not mandatory. If the gun is used to facilitate the offense, the gun spec is mandatory, but the judge has a range from which to select.

Juvenile Coordinator Scott Anderson noted that John Murphy, Director of the Prosecuting Attorneys' Association, has a bill before the legislature that would address that provision.

10 and 11 Year Olds to DYS (§5139.05). As recommended by the Commission, the Senate version permitted commitment of 10 and 11 year old offenders to DYS. The House version allows 10 and 11 year old offenders to be committed to DYS provided they have been convicted of murder, violent F-1s or F-2s, or arson.

Mr. Diroll noted that the Commission could live with either view. The key is having a place that cannot reject or eject very violent 10 and 11 year old offenders. The provision was never intended for low-level felons, he added.

The change from 12 to 10, said Mr. Diroll, produced more testimony and media coverage than anything else in the bill. He feels the message is finally getting through that this would not make commission to DYS mandatory, but

would make young serious offenders eligible for rehabilitation in a secure juvenile setting. He noted that Rep. Peter Lawson Jones felt it should not include lower-level arsonists. Mr. Diroll added that, by excluding F-3s, it eliminates F-3s like extortion, abduction, and gross sexual imposition.

Judge Hendon agreed that this provision is needed for violent F-3s. Arsonists, she said, are in there because it is difficult for the courts to find a placement for juvenile arsonists. Public Children Services Association of Ohio (PCSAO) should like this option for young arsonists, she noted. Although admission to DYS sounds terrible for children this young, she remarked that it is often the best option, and sometimes the *only* option, available. The main concern for judges, she said, is that there is a "no eject, no reject" treatment facility available for these children.

Dispositions to the Child Protection System (§2152.19). Responding to the Public Children's' Services Agencies Organization, the Senate version eliminated using abused, neglect, and dependency dispositions in cases involving SYOs who are at least 14 years old. The House version allows child protective placements as aftercare for SYOs, unless they had a prior SYO.

In the House, Mr. Diroll argued that the Commission favors no restriction, but if a choice must be made, the House version is preferred. He noted that there are times when group homes and foster care are appropriate for juvenile delinquents, even SYOs, particularly if, upon release from DYS, it may be unwise to return them immediately to their homes and neighborhoods.

According to Judge Hendon, the House version is subject to residential placement first.

Lusanne Segre, representing the Ohio Association of Child Care Agencies, reported that both judges and legislators are talking about changing the provision, so that a DYS placement is required first.

Reiterating that the Commission prefers that the provision remain as flexible as possible, Mr. Diroll pointed out that the House version clarifies that the juvenile must be "designated" SYO, not just "eligible" for an SYO disposition.

Invoking the Adult Part of a Blended Sentence (§2152.14). Along lines suggested by the Commission, the Senate version stipulated that the adult portion of a juvenile's blended sentence could be invoked for rules violations tantamount to a felony or a violent M-1 offense and for acts seriously jeopardizing programming or treatment.

Under the House version, the adult portion of the blended sentence can be invoked for a felony or violent M-1, but not for jeopardizing treatment or programming. Instead, concerned about vagueness, the House rewrote the switch language to cover engaging in conduct that "creates a substantial risk to the safety or security of the institution, community, or victim."

Ann Liotta, representing Youth Services, remarked that Director Geno Natalucci-Persichetti was comfortable with these changes.

Mr. Diroll said he is concerned that limiting the switch mechanism to criminal-like conduct may cheapen the value of a blended sentence. A child in DYS should already know that another crime gets him or her in trouble.

One amendment that had been introduced, he said, was to allow transfer only upon a finding beyond reasonable doubt, (as opposed to the bill's standard of based on clear and convincing evidence), that the behavior warranted transfer.

If prosecuted for another felony, said Pros. White, the appropriate burden of proof would be beyond a reasonable doubt. He noted that the blend provides the juvenile a chance to rehabilitate himself within the juvenile system. If he is unwilling to do that, then a mechanism is needed to address it, because he is wasting DYS resources and time.

Although no action was taken at this time, Mr. Diroll noted that the issue will probably come up again.

Blended Sentencing Rights (§2152.13). Since the Senate version extended full adult rights, the right to counsel was assumed and the possibility of raising competency issues was implied in SYO cases. It was silent, however, on competency issues caused by the child's mental illness or retardation.

The House version makes the right to counsel nonwaivable and expressly allows the defendant to raise competency issues. It requires the court to consider the child's mental illness or retardation.

Mr. Diroll said Rep. Womer Benjamin is willing to look at juvenile competency procedures next session. Otherwise, the court must revert to the adult competency standards.

Direct Sentencing to Detention (Removed from §2152.19). The Senate version allowed courts to sentence delinquents to local detention for up to 60 days for felonies and up to 30 days for misdemeanors. The County Commissioners Association argued this would be costly. The House removed these provisions.

Since courts already use the fiction of "evaluation" to hold young offenders in detention for up to 90 days, the Commission did not envision any significant increase in costs, said Mr. Diroll. The provision would merely make the law more honest and hold juveniles more directly accountable for their actions. In fact, Mr. Rauschenberg noted that the new capital budget provides money for new detention beds, which would help to offset any costs for this provision.

Judge Hendon remarked that the Juvenile Judges Association favors the direct sentencing provision but admits it is a moot point unless enough detention beds are available.

Atty. Kravitz admitted that direct sentencing to detention is better than the current fiction of "assessment" time in detention.

Presumed Transfers (Removed from §§2152.11 and 2152.12). The Senate version kept the new category of "presumed" bindover for 14 and 15 year old murders and attempted murders and for 16 and 17 year old violent, enhanced F-1s, when these cases were not subject to mandatory bindover. The House version eliminated presumed transfers and put eligible offenders in the SYO category.

Since presumed transfers were left for relatively few juveniles, and since the Commission's other bindover reforms were rejected by the Senate, the Commission staff did not object to the House action, reported Mr. Diroll.

Pros. White remarked that he wants to go on record as saying that he favors presumed transfers if some of the mandatory transfers are eliminated.

Since the Senate reinstated mandatory bindovers, Atty. Kravitz feels that many of them will get pled down to SYOs.

This raises major concerns, said Judge Hendon, because the SYO category is not intended to be a catch-all for mandatory bindovers that get pled down.

Racial Impact Study (§6). Given statistical disparity that exists in prisons and DYS facilities, several legislators voiced concern about the impact the bill might have on racial disparity. The Senate version is silent on this subject, while the House version instructs the Governor's Council on Juvenile Justice to study the racial impact of the bill.

Given the Commission's duty to monitor any of its proposals that become law, the staff would keep an eye on this issue anyway, said Mr. Diroll. However, he had two concerns with the bill's language. First, the GCJJ may have an institutional bias, since it exists to distribute Federal OJJDP Funds. Second, there is nothing in the section to assure that the study controls for "legitimate" factors that can explain statistical disparity, such as criminal history. Without considering such factors, the study will be incomplete and do little to advance knowledge in this area. Mr. Diroll expressed a desire that the study be conducted in a manner that will prove useful and not merely stereotype the issues.

Future Legislative Intent (§7). The Senate was silent on this issue, while the House version states the General Assembly's intent to address juvenile competency, review "and continue to support RECLAIM Ohio and alternative schools", and review and address costs related to implementation of the bill.

Other Discussion. Judge Hendon remarked that, since the major provision in the Commission's proposal was blended sentencing, it is seriously flawed if current mandatory bindovers remain intact. She is puzzled as to why the legislators do not understand that.

Echoing those concerns, Pros. White said no association supported retaining the current mandatory bindovers. This aside, even with all current mandatory bindovers, he feels there still is a place in the law for blended sentences.

Atty. Kravitz declared that retention of all mandatory bindovers undermines the concept of blended sentencing that the Commission and legislature are trying to promote.

FORFEITURES

Simplicity. Mr. Anderson summarized concerns raised at the previous meeting about forfeiture statutes. He noted that general consensus had been reached that the forfeiture law should be simplified, because, currently, it is scattered through the Revised Code. A concern stemming from this, involves how to handle the division in the Code between criminal and civil forfeiture.

The forfeiture laws, said Atty. Kravitz, are unintelligible. He noted that §2933.43 is labeled as civil forfeiture and requires a civil action, but the bottom line is the prosecutor gets summary judgment because he has a conviction and there is usually a nexus between the property and the underlying offense. The "civil forfeiture" is actually a penalty imposed after conviction and should be part of the criminal case. He feels there should be a uniform forfeiture law.

There are a few statutes, he said, that provide for civil forfeiture without a conviction. He feels there should be an election available whereby the prosecutor could proceed civilly and get the benefit of an easier burden of proof, with the trade-off of not being permitted to bring a criminal case. The defendant, he stressed, should not have to defend both a civil and criminal case at the same time with different proceedings, different courts, and different counsel. Let the prosecutor decide, he urged, between proceeding civilly or making the forfeiture a part of the criminal proceeding. He would

like to see all offenses subject to forfeiture rolled into uniform law.

Pros. White disagreed and was unconvinced of the value in having a single statute to cover all forfeitures. He feels it is more efficient to leave the forfeiture statutes where they are, with the statutes related to the underlying offense. Not all forfeiture law is the same, he noted.

David Muhak, Assistant Prosecutor in Lorain County, remarked that each forfeiture provision was drafted with a particular purpose in mind and each addresses the purposes within separate contexts. To consolidate forfeiture statutes and factor in every nuance of every underlying offense into a single chapter could make things even more complex, he declared.

Atty. Kravitz felt that it would greatly simplify matters to add a forfeiture specification to each offense in the indictment. He is puzzled why Ohio law characterizes these forfeitures as "civil" when, in his opinion, they should be handled as part of the criminal case. After all, he said, civil forfeiture is often a penalty imposed for a criminal conviction.

There is a distinction between the criminal and civil forfeitures, said Asst. Pros. Muhak. The vast majority of the forfeiture cases are prosecuted not under §2933.43, but rather under the forfeiture statute affixed to the substantive offense statute. Some examples include corrupt activity, drug offense, and disposition of evidence, which he acknowledged are criminal proceedings. The civil aspect, however, comes in the form of what happens after the forfeiture takes place.

According to Atty. Kravitz, under Federal law, if the original party has his property ordered forfeited, and a third party files a claim early in the process, that claim is adjudicated by the court that has the criminal case.

Pros. White said he does not want to be forced to handle such a claim civilly.

According to Asst. Pros. Muhak, forfeitures are handled at different levels in different courts because of the nuances involved. Not all scenarios can be handled the same way, he contended, because some require a jury verdict and others do not.

Atty. Kravitz wants one statute of uniform application for forfeiture.

There is a corrupt activity forfeiture statute, a vehicle forfeiture statute, a drug forfeiture statute, a statute covering forfeiture for shooting animals out of the car, etc., and each of these covers that particular offense, said Asst. Pros. Muhak. He contended that to mix these under one chapter or statute would mean spelling out all of the specific differences of each situation.

Atty. Kravitz's complaint is that they are not consistent in the process to be used. The offense may differ, he said, but the procedure for all forfeitures should be the same. Under the corrupt activity statute, he said, the property to be forfeited has to be stated in the indictment and adjudicated by the jury. At least then, he said, there is a conviction beyond a reasonable doubt. There is a bifurcated process, with a guilty finding and a subsequent forfeiture phase. He suggested adapting that process for all forfeiture cases.

In looking at the forfeiture laws, said Mr. Diroll, a lot of language is the same, and there are a few nuances. He suggested developing a forfeiture chapter to address the common provisions, then breaking it down into the four main categories to deal with the other nuances. He recommended standardizing the portions that are identical because it tends to be too confusing to have to wade through the similarities first as currently written.

Asst. Pros. Muhak admitted that he had the same impression at first. However, after working with the current system for several years, he prefers the way it exists. There is a method to its madness that actually works, he declared.

Nexus Between Property to be Forfeited and the Underlying Offense. Mr. Anderson reported that Federal law delimits the nexus between property to be forfeited and the offense which justifies the forfeiture. It draws a distinction, he said, between "proceeds" and "property used to facilitate criminal activity". He asked if the Commission should follow this procedure and, if so, how should misdemeanors be handled?

Property should *not* be grabbed for trivial offenses, declared Atty. Kravitz. There is a difference between proceeds of criminal activity and property used to facilitate criminal activity. Proceeds, by their nature show a nexus between the activity and the property. Property used to facilitate criminal activity, however, creates a murkier atmosphere. This, Atty. Kravitz said, is where proportionality comes into play. He maintained that there should be a substantial nexus to the criminal activity before property can be forfeited.

Pros. White feels that proportionality is a legitimate issue that should be addressed by the court through the appellate process. Requiring a "substantial" nexus, however, will not address the proportionality issue,' he declared. He maintained that it is a "used in" issue, not a "used in" versus "substantial connection".

According to Atty. Kravitz, the taking of property should be both a proportionality and a nexus issue.

According to Municipal Judge Fritz Hany, the "but for" test is often used in criminal negligence cases.

Some examples were discussed, including cases involving a computer to download child pornography and to contact children for sexual encounters, or an apartment being used by a manager for the cultivation of marijuana. What should be forfeitable?

Pros. White continued to argue that the issue was not about the standard, but about proportionality, which he insisted could only be determined by the court, not by statute.

Asst. Pros. Muhak said the issue involves property used *in the commission of a crime*. It is basically the same, he said, as criminal tools which, by statute, must be forfeited because of the intent to use it criminally.

Atty. Kravitz continued to insist that the forfeiture statute needs to specify if there is a "substantial connection" so that the forfeiture guidelines can be applied uniformly and not arbitrarily across the state.

Ed Yim, Assistant Prosecutor from the Montgomery County Prosecutor's Office, feels the statute should enable the justice system to have the option of forfeiting the property, but allowing the jury to determine its proportional connection to the commission of the offense.

Atty. Kravitz agreed that the jury should find if there is a substantial connection between the property and the criminal activity.

Criminal and Civil Forfeiture. In an effort to seek a compromise on some forfeiture issue, Mr. Anderson asked the Commission to consider how due process should change in regards to civil forfeiture.

With both criminal and civil forfeitures, there is first a seizure, then a substantial time before either the claimant's or defendant's interest is adjudicated. Atty. Kravitz feels that a statute needs to be developed offering, for both criminal and civil forfeitures, the right to a post-seizure, pretrial, adversarial, probable cause hearing where a judge determines whether there are reasonable grounds to believe that the property seized is subject to forfeiture. He acknowledged that the law permits a warrantless seizure for personal property, since personal property can be moved and law enforcement usually has to act quickly to seize it. Once property is seized, law enforcement's interest is diminished, while the property owner's interest increases. If unfairly seized, there can be a hardship for paying bills, retaining counsel, etc. Therefore, Atty. Kravitz feels a statutory procedure is needed for both civil and criminal forfeiture. Once personal property is seized, he declared, the claimant should have a prompt preliminary hearing where the government has to make some showing that the property is subject to forfeiture.

Pros. White maintained that such a procedure already exists.

Atty. Kravitz maintained that the procedure needs to be clarified so that, if $100,000 is seized and only $10,000 can be connected with the criminal activity, then the remainder should be released at the beginning of the legal procedure, rather than at the end.

He continued by noting that the statute guiding civil forfeiture offers no provision for an attorney. Many forfeiture cases go uncontested because it often costs more for the defendant to hire an attorney to litigate than what the seized property is worth. In fact, even if the defendant could normally afford an attorney, it is difficult to retain counsel because all of his assets may be tied up in the forfeiture. Atty. Kravitz believes the claimant should be compensated for damages if an unjustified forfeiture creates a hardship for him. Redress, he insisted, is needed at the end of the procedure for citizens who have been wronged, including reimbursement for attorney fees.

According to Atty. Kravitz, federal law addresses these concerns. In the Equal Access to Justice Act for civil cases it provides that if the government was not substantially justified in instituting the proceeding, then the claimant can be reimbursed attorney's fees. Likewise, under the Hyde Amendment, a claimant in an unjustified forfeiture can recover damages and attorney fees.

Pros. White agreed that no one should be subjected to an unjustified forfeiture. If redress is to be offered, he said, then it needs to be carefully defined.

In Montgomery County, Asst. Pros. Yim responded that, once a conviction is obtained, a separate petition for forfeiture is filed and from that point it is treated as a separate civil case.

Atty. Kravitz insisted that, although it may be treated as a civil case, it is really a penalty for being convicted, beyond a reasonable doubt, of a felony offense and should be adjudicated within the context of the criminal case.

Once the property is subject to forfeiture upon conviction, then the court adjudicates third party claims. This process is easy and simplifies matters to one proceeding, said Atty. Kravitz.

Judge Hany asked about cases when the car is an actual element of the offense, such as OMVI, and whether there would still be a need for a pretrial, probable cause hearing. Although he favors simplifying forfeiture statute, he feels

that the uniqueness of some specific situations should be retained.

Acknowledging that forfeiture of a car can produce a hardship, Atty. Kravitz declared that the party should be able to post bond. If, however, he or she is unable to post bond, then the party should be subject to a criminal charge if he or she fails to protect the property. This should include any property pending forfeiture, whether owned exclusively by the defendant or by another party. Cars, he admitted, create the greatest challenge in this issue. He would like to see a preliminary hearing that would allow this matter to be settled early in the process rather than at the end.

Due Process. Mr. Diroll asked if anything could be agreed upon regarding due process.

Atty. Kravitz claimed that, in Toledo, a municipal ordinance allows a john's car to be seized for forfeiture if used to pick up prostitutes. There is no innocent owner provision in the Toledo ordinance. So, if a man is arrested while using his wife's car, to proposition a prostitute, the wife will not be allowed to have the car returned even though she had no knowledge of the activity. Mr. Kravitz feels there should be a standard innocent owner defense that is mandated to apply uniformly to every forfeiture law in the State, whether a local ordinance or a State statute.

Advisory Committee member John Madigan, Chief Attorney for Toledo, was unable to attend the meeting but outlined his concerns about forfeiture issues in a letter. He stated that, "property, such as a car, could be released pending a forfeiture action provided the defendant posts a bond. When the case is concluded, Toledo often accepts the cash bond in lieu of the vehicle."

Also, according to Mr. Madigan, "property subject to forfeiture has been traditionally considered 'an evil chattel'. As such, the innocence of the owner is not relevant." The only exception he recommended making to this is if the owner can prove that the property was taken without the owner's consent.

Pros. White questioned whether any prosecutor would actually force the forfeiture of a car in the example given. He said innocent owner is confusing in cases where a drug trafficker uses a vehicle that he purchased in a relative's or girlfriend's name in hopes of getting around the forfeiture law.

Asst. Pros. Muhak declared that, under State law, there is no way that a prosecutor could take the vehicle in the prostitution case without a civil action for which there is a remedy and an opportunity to be heard.

Atty. Kravitz maintained that there should be a prompt post-seizure hearing so that innocent third party seizure can be litigated at the beginning of the process. The innocent owner should not be forced to spend exorbitant amounts for litigation in an attempt to get property returned, he declared.

Judge Patton remarked that the appellate courts see cases where a juvenile has used his parents vehicle, without permission, to traffic in drugs or go on a criminal spree.

Pros. White agreed that a definition is needed for "innocent owner".

Judge Hendon observed that a timely method is apparently needed to post bond or to get a day in court prior to a conviction, so that any innocent owner issues can be settled early in the process.

According to Pros. White, that option already exists.

In the four years that Judge Bressler has served in common pleas court, he said that he has never had a civil forfeiture case. In the criminal forfeiture cases, 99% of the forfeitures, he said, are by agreement. In the rare cases where there is dispute on whether the property should be forfeited, the cases proceed on motion and a determination is made by the court. He sees nothing broken in the process that needs to be fixed.

Judge Hendon suggested setting up standards by which the court could be guided for some uniformity as to how forfeiture statute should be applied. It could include some time elements and definitions.

Pros. White said he has no problem with developing a definition to address the innocent party issue, but he insisted that there is case law and statutory procedure in place to handle the other forfeiture issues through litigation.

Currently, these problems result in a motion pursuant to Rule 41, an injunction, or a civil conversion case, said Atty. Kravitz. He prefers to draft something that could be uniformly applied. It would include an innocent owner statute and a right to counsel in civil proceeding, he said, but would not need to include adversarial rules of evidence. If the third party innocent owner is not adjudicated at the front end, then they would not have a voice until after the defendant is convicted and the property is found subject to forfeiture.

Perhaps the most reasonable approach, said Judge Hendon, would be to codify a provision allowing the defendant or innocent owner to post bond.

Pros. White insisted that there is no need to add another expensive statutory proceeding. It will do nothing but create a bigger mess to fix something that is not broken, he declared.

Although it is often done, Judge Bressler admitted that there is no formal provision for an innocent party to intervene in a criminal case to seek return of property. Thus, a hole seems to exist in the criminal forfeiture procedure.

According to Judge Patton, one type of case that might get to the appellate level is a case of armed robbery where a group robs a bank while the driver is sitting outside in his parent's car. If the driver is charged with possession of a criminal tool, the car is forfeited.

Pros. White agreed that the defendant can be convicted for possession of a criminal tool, but he declared that the truly innocent owner's vehicle would not be forfeited. The question, he noted, is the issue of innocence.

It becomes burdensome, said Judge Patton, and amounts to trying the criminal case twice (to determine if there is an innocent owner involved).

If there is no compelling need for the prosecutor to retain the property, then it should be released, Atty. Kravitz contended.

Even a defendant has a right to post bond, said Judge Hendon, so, in the absence of showing that the property is needed as evidence, she suggested allowing the release of the property if bond is posted.

Pros. White strongly insisted that it is a matter of prosecutorial decision as to whether property is a legitimate piece of evidence in the case. That, he declared, cannot be set by a statutory standard, nor decided by a judge before the case itself has been presented. He said the judiciary has no right to tell him how to present a case.

Becky Herner, representing the State Public Defender's Office, remarked that, for DUI cases, there is already a procedure written in statute for an innocent owner to come into the procedure up front, at the beginning of the case, and offer proof to get the seized car back. The car is part of the evidence, yet is allowed to be released in some cases.

The Traffic Committee, said Mr. Diroll, moved away from the innocent owner issue because of how difficult it is to prove. Instead, the committee had suggested beefing up the wrongful entrustment statute. He feels that something can be worked out in the forfeiture laws to address the innocent owner issue.

Atty. Kravitz suggested reviewing 21 U.S.C. §881 on civil forfeiture and §853 on criminal drug forfeiture to examine the Federal process.

Pros. White emphasized that the Commission should caution against mixing concepts of innocent owner, forfeiture, and evidence.

Judge Patton agreed that the prosecutor should not have to reveal the State's case before the trial by being forced to address the innocent owner issue up front in a pretrial hearing.

Mr. Diroll agreed to work on some language for the innocent owner definition. The other issues will continue to be addressed at the next meeting.

The next meeting is scheduled for December 14, 2000.
The meeting adjourned at 3:00 p.m.