OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer
Chairman

David J. Diroll
Executive Director

Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
July 15, 2004

SENTENCING COMMISSION MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge H.J. Bressler, Co-Chair
Capt. John Born, representing State Highway Patrol
Superintendent Paul McClellan
Prosecuting Attorney James Cole
Police Chief Woody Eldredge
Defense Attorney Bill Gallagher
Common Pleas Court Judge Burt Griffin
Jim Guy, representing Rehab. & Correction Director Reggie Wilkinson
OSBA Delegate Max Kravitz
Bob Lane, representing State Public Defender David Bodiker
State Representative Robert Latta
Municipal Prosecutor Steve McIntosh
Defense Attorney Yeura Venters
Appellate Judge Cheryl Waite
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT
Karen Huey, Office of Criminal Justice Services Director
Professor Lew Katz, Case Western University Law School
John Leutz, County Commissioners' Association
John Madigan, Toledo Senior Attorney

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

GUESTS PRESENT
Sara Anderson, Legislative Service Commission
Terron Baker, Ohio Commission of African American Males
Carley Ingram, Montgomery County Prosecutor's Office
Dennis Langer, Montgomery County Common Pleas Court Judge
Greg Lewis, Ohio Commission of African American Males
Christina Magriguera, Ohio Judicial Conference
Shay Steele, student, Case Western Reserve University Law School
Steve VanDine, Research Director, Dept. of Rehabilitation & Correction
Holly Wilson, Legislative Service Commission

Common Pleas Court Judge H.J. Bressler, Commission Vice-Chairman, called the July 15, 2004 meeting of the Ohio Criminal Sentencing Commission to order at 10:30 a.m.

DIRECTOR'S REPORT

Meeting Packets

Director David Diroll reviewed the meeting packets, which included: A list of refinements in the traffic code titled Scions of S.B. 123; an updated Misdemeanor Sentencing Primer (also available on the website); A memo on *Blakely vs. Washington* which includes an outline of some predecessor cases; and minutes of the May meeting.

Mr. Diroll reported that he will soon finish an updated Traffic Primer.

He noted that the *Blakely* memo addresses covers the U.S. Supreme Court's late-June decision on criminal sentencing.

Legislative Update

H.B. 52. Mr. Diroll pointed out that H.B. 52, which took effect June 1, 2004, was enacted in the form discussed at the last Commission meeting.

- Vehicular Homicide and Vehicular Assault. The major impetus was to increase penalties when various forms of the offenses occur in construction zones. Also, if a person commits a vehicular homicide and has three or more prior OVIs, or if the victim is a peace officer, the bill calls for added mandatory prison terms.
- Restitution. H.B. 52 addressed confusion over H.B. 490's (based on the Commission's misdemeanor sentencing plan) changes to the restitution statute. The bill defines economic loss by making clear that non-economic losses aren't covered (pain and suffering, loss of society, punitive damages, *etc.*). It makes restitution unavailable for minor misdemeanors and "waiverable" (Rule 13) traffic offenses.
- OVI Situs. S.B. 123 inadvertently narrowed OVI's venue to public or private roads "used by the public for vehicular travel and parking." H.B. 52 clarifies that OVI can occur anywhere in the State.
- "No Ops". H.B. 52 filled an unintended gap by making clear that a driver never obtains an operator's license is guilty of an M-1 if stopped for driving without a valid license.
- DUFRS Look Back. It reinstates the 5 year "look back" for prior offenses for purposes of driving under a financial responsibility suspension (typically driving without insurance) penalties.
- "Reckless" Suspension. H.B. 52 revives the optional suspension for traffic offenses involving willful and wanton disregard of safety.
- Non-Resident Privileges. H.B. 52 allows an out-of-state resident to petition for limited driving privileges in Franklin County (as before) or in a court of record in the county "where the offense occurred" when privileges are allowed under a BMV suspension.
- Street Racing. Makes penalties consistent by making the license suspension range 30 days to 3 years.
- Modifying Long Suspensions. Clarifies procedures for modifying a suspension of 15 years or more.

H.B. 163. Mr. Diroll noted that the bill includes some changes for both felonies and misdemeanors. He said H.B. 163 does not contain an emergency clause, so it doesn't take effect September 23rd.

- Restricted Plates. A compromise was reached which makes the "scarlet letter" plates optional for first time offenders who test less than .17% BAC, if they are granted driving privileges after the hard suspension period ends. The plates remain mandatory for high-test first offenders and all repeat offenders who are granted driving privileges. If a driver refuses the sobriety test, he gets the special plates upon conviction.
- Look Backs. While the 6 year look-back remains, the bill offers an additional 20 year look-back for priors that can affect OVI penalties. If the driver has 5 or more priors within the 20 year period, it calls for an additional 1 to 5 year mandatory prison term, irrespective of the number of priors in 6 years.
- 50 Year Records. To make longer look backs work, the bill includes a 50 year record-keeping requirement for municipal, county, and common pleas court clerks. Records must cover each criminal conviction and guilty plea. The record must be in a form (paper or electronic) that is admissible as evidence of a prior conviction in a criminal case.
- Continuous Alcohol Monitoring. This is a new misdemeanor sanction which is similar to electronic monitoring. Coupled with house arrest, it can be an alternative to part of OVI's mandatory jail terms for repeat offenders in jurisdictions with crowded jails.
- Sober Parents. This originally was an amendment offered by Rep. John Willamowski as part of H.B. 324. It prohibits someone under OVI-level alcohol impairment from serving as an accompanying adult for purposes of the temporary instruction permit law. Mr. Diroll noted that the driver gives implied consent to be tested.
- Felony OVI. Uncertainty clouded felony OVI law when it came to whether judicial release with community supervision was available to those sent to prison. Conversely, if a local incarceration were imposed, sanction violators could not be sent to prison. H.B. 163 tries to clarify language to retain traditional sanctioning tools.
- Boating OVI. H.B. 163 corrects a mistake in the *per se* impairment level set by H.B. 87 for blood serum or plasma tests of violations.
- Limited Retroactivity. Allows persons under before H.B. 123 took effect to petition for limited driving privileges. Also allows persons under a suspension of 15 years or more to count years before H.B. 123 took effect if they seek to modify the suspension.

What's Not In the Bills. Mr. Diroll explained that there are items that had been recommended by the Commission but did not make it into either H.B. 52 or H.B. 163.

- Fleeing & Eluding v. Disobeying. The longer mandatory suspension for fleeing or eluding a law enforcement officer wasn't intended for failing to heed the signal of an officer directing traffic;
- Vehicular Homicide/Assault Consistency with OVI. These offenses should be made consistent with OVI by referring to the offense in a "motor vehicle" rather than a "vehicle";
- Class 7 Ambiguity. A Class 7 (up to 1 year) suspension is "mandatory", but for how long? One month, one week, one minute? It should be optional.

- Terminating ALSs. A refusal ALS continues even if the driver is later found not guilty, while the positive test ALS terminates if the person is found not guilty. §4511.191, however, fails to terminate the positive test ALS on a not guilty finding. It should at least be consistent with the refusal ALS.
- Wrongful Entrustment. The suspension for wrongfully entrusting a vehicle to an uninsured, unlicensed, or drunk person, or to one under suspension, was optional under former law and inadvertently made mandatory under S.B. 123. The Commission proposed making the optional on the first offense (Class 7), while retaining S.B. 123's mandatory 30 day vehicle immobilization and license plate impoundment for first offenders, and progressively harsher sanctions for repeat offenders;
- FR Privilege Mechanics. Clarity is needed in the details which allow persons given BMV suspensions for driving without insurance to petition a *court* for privileges;
- Reinstatement Fees. Clarity is needed on how driving privileges can be used with extensions and payments plans. Also clarity is needed as to what constitutes a "pending case" eligible for extensions;
- Restricted Plates for Non-OVIs. Statute includes a provision requiring special plates when driving privileges are granted after impounding regular tags for DUS, DUOVIS, DUFRS, and failure to reinstate. The Commission suggests making restricted plates optional in these situations;
- Mayor's Courts. The Commission had suggested: Authorizing mayor's courts to make reinstatement fee plans, at least from their own cases; Authorizing mayor's courts to serve as a venue for out-of-state petitions for driving privileges when allowed under BMV suspensions, etc.; and Delaying the annual registration date from January 15 to February 15 to allow new administrations time to file;
- Modifying Long Suspensions. To qualify for modifying a suspension of 15 years or more, a person must show that at least 15 years elapsed since the suspension began. The Commission proposed clarifying that the petitioner must demonstrate that he or she meets various conditions during the 15 years *immediately before* petitioning;
- Driving Under Points Suspensions. Penalties should be stated in a manner consistent with other suspensions in Ch. 4510.
- High End Penalties for Refusals. Capt. John Born, representing the State Highway Patrol, remarked that H.B. 163 includes a provision that addresses OVI refusals and OVI repeat offenders who refuse the sobriety test. Those drivers who are arrested for OVI two or more times within 6 years, who refuse to take the chemical test and are convicted, will get the same penalty as someone who tests .17 and above. This will apply from the second conviction on if the driver refuses the test. He noted that officers will advise the driver of the possible consequences if he/she tests .17 or above.

Commission to Study DUS Law?

Mr. Diroll reported that Director Ken Morckel of the Department of Public Safety asked the Commission to look again at DUS law with an eye toward streamlining it.

***BLAKELY* v WASHINGTON**

Recap. Mr. Diroll turned the discussion to the recent U.S. Supreme Court decision in *Blakely v. Washington*. Before offering a brief summary of *Blakely*, he noted that the case does not stand alone. There are at least two other cases that play into what the decision means.

In *Apprendi v New Jersey* (2000), the U.S. Supreme Court struck down a sentencing provision that permitted a judge to find that, if the offense were racially motivated, the penalty could go beyond sentences in the basic range.

The court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be "authorized by the jury's verdict." The reason given was that it violates the Sixth Amendment right to a jury trial and proof beyond a reasonable doubt.

Outlining the facts of the *Blakely* case, Mr. Diroll explained that defendant kidnapped his wife after receiving news of her filing for divorce. He duct taped her, forced her at knife-point into a box in the back of his truck, and drove her two states away. Waiving his right to a jury trial, he pleaded guilty to second degree kidnapping, domestic violence, and use of a firearm.

The Washington state uses a sentencing guidelines grid with presumptive boxes which to determine sentences. It allows a judge to depart upward from that box up to a statutory maximum of 10 years (for these crimes) if certain exceptional factors have been found.

In this case, the judge found that defendant was deliberately cruel and imposed an additional 90 months.

Justice Antonin Scalia cited *Apprendi* and wrote that the relevant statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. He found that the factor of deliberate cruelty was neither admitted by the defendant nor found by a jury. Thus the judge could not impose the exceptional 90 month sentence solely on the basis of the facts admitted in the guilty plea.

In their initial analysis, Mr. Diroll and Staff Attorney Scott Anderson determined that, assuming that Ohio's overall (non-grid) structure is constitutionally valid, the Commission should focus on the factual determinations anticipated by the following provisions:

- Factors a judge must consider in felony sentencing;
- Sentencing guidelines for various degrees of offenses;
- Factors a judge must consider in deciding not to impose a minimum prison term authorized for a felony offense;
- Factors a judge must consider in imposing a maximum prison term authorized for a felony offense;
- Factors a judge must consider in imposing consecutive sentences; and
- Factors a judge must consider in imposing an additional term under a specification to an underlying offense, where that terms is within a specified range, particular for specifications of Mandatory Drug

Offenders (MDOs), Repeat Violent Offenders (RVOs), and Sexually Violent Predators (SVPs).

Discussion. Judge Bressler started the discussion regarding this decision by assuming that *Blakely* does away with an RVO finding in trial court since it is not found by the jury.

OSBA Delegate Max Kravitz acknowledged that it is not feasible to expect a full understanding of the *Blakely* decision so soon. It will take some time to see how it plays out, he remarked, particularly in relation to the Federal Sentencing Guidelines.

With that in mind, he interprets Blakely to say that, if RVO is specified in the indictment but not submitted to the jury and the court makes additional sentencing findings that enhance a sentence, then it results in a clear violation of the Sixth Amendment right to a jury trial. He claimed that some explicit language in *Blakely* creates a one-way street for defendants. When a judge inflicts punishment that the jury's verdict alone does not allow, he said, the jury has not found all of the facts which the law makes essential to punishment and the judge assumes improper authority. It results, he declared, in the defendant, with no warning in the indictment or plea, seeing his maximum sentence balloon not based on facts proven beyond a reasonable doubt, but on facts compiled by a probation officer. It creates a one-way street for defendants, meaning that judges are free to consider whatever mitigating factors the judge chooses but are not free to make judicial findings that are aggravating factors, except for prior criminal convictions which are expressly accepted.

He feels the *Blakely* decision affects Ohio's sentencing scheme concerning the statutory direction to a judge to impose the minimum sentence unless certain findings are made by the judge to show that a longer term would be inappropriate. He also believes that it affects the imposition of the maximum within the range because there is statutory direction that the maximum shall not be imposed. He does not believe that it affects the presumptions in favor of incarceration for F-1s and F-2s, because that has been legislatively directed. He also believes it affects a judge imposing a sentence of incarceration on F-4s and F-5s where the judge has to make judicial findings that a sentence of community control sanction is inappropriate.

Atty. Kravitz continued by stating that he believed the case of *Harris v. U.S.*, which came between *Apprendi* and *Blakely*, to be irreconcilable with the other two cases.

Mr. Diroll noted that the Commission took pains with S.B. 2 to require that the facts leading to extraordinary penalties—those going beyond the basic range—should be specified in indictments and proved beyond a reasonable doubt.

If there has to have been an injury involved in a prior case for the defendant to get the RVO classification, noted Common Pleas Court Judge Burt Griffin, to add even one year onto the maximum for the underlying offense, the court must balance the factors in §2929.14(2)(b).

The two major questions in light of *Blakely*, said Atty. Kravitz, are whether the status of being an RVO has to be submitted to a jury and,

assuming that the jury finds an RVO, to what extent do the factors used in determining the additional range have to be submitted to the jury?

The determination of whether a defendant is to be declared a repeat-violent-offender (RVO) does not go to a jury, said Judge Bressler.

In the *Blakely* case, said Judge Bressler, the plea and sentence were agreed upon, but then the judge decided to add time onto that agreed upon sentence. A key part of the case, he remarked, is that the defendant did not know about the possibility of additional time, and thus was unable to defend it or make an intelligent decision to go forward with a jury trial based upon that information. He believes that *Blakely* determines that, in a state that uses a grid sentencing structure, the judge cannot sentence beyond the maximum unless it is found by a trier of fact by proof beyond a reasonable doubt. The Ohio sentencing structure, he noted, has few specs that are not determined by a trier of fact.

Case Western University Law School Professor Lew Katz feels that *Apprendi* decided the RVO issue, but was incorrectly applied by Ohio courts. He believes it is important to keep in mind that Justice Scalia redefined "maximum" sentence for the purposes of *Blakely*. That maximum sentence is the sentence alone, without any additional findings, allowed by the jury's verdict. A defendant convicted of any felony, who never went to prison for prior convictions, under §2929.14(B), has a presumption in favor of the minimum sentence. In order to go above the minimum, the judge would have to make a finding that the minimum sentence will demean the seriousness of the offense or the factors indicate a great likelihood of recidivism. He believes that *Blakely* now requires the state to give the defendant the option to have a jury make that finding. It also changes the burden of proof to "beyond a reasonable doubt". He believes that *Blakely* makes the maximum the minimum under §2929.14(B). He believes that *Blakely* will affect to §§2929.13(B), 2929.14(B), (C), & (D), and possibly §2929.13(D).

Under §2929.13(B), he noted, in order to send a 4th or 5th degree felon to prison the judge must find that certain factors exist. Maximum punishment, without additional findings, would be commitment to community control in a CBCF.

Mr. Anderson interpreted Prof. Katz's analysis to mean that the 90 month sentence under Blakely would be allowable. The reason is that, if judicial determination of a factor is allowed to be included in the definition of "maximum", then that determination can also be applied to time beyond the maximum.

The Blakely decision, said Prof. Katz, specifies that the statutory maximum is based on what the jury verdict would allow without additional findings. The judge could not make the finding, without a jury trial, of deliberate cruelty in order to increase the sentence. He feels that is comparable to the findings judges make in Ohio.

Under the same analysis, said Mr. Anderson - §2929.14(B), the statutory maximum would be determined on what the jury verdict will allow, without any additional finding of fact. In fact, he said, it is crucial to the Blakely analysis that you cannot look back at additional findings of fact when determining the statutory maximum. So there is a

range that could be given after the jury verdict of guilty is imposed. Once that determination is given, that's the maximum sentence. Only then can you look back to see if there were any other judicial factors that could be given that could increase the sentence. That's why applying *Blakely* to the Ohio statute is wrong. To apply *Blakely* to §2929.14(B), you have to take the potential sentence the jury could give for the felony (from the specified range) and then consider the factor that can increase the sentence.

The problem, said Atty. Kravitz, is the statute says the judge "shall sentence" to the shortest prison term authorized for the offense.

The phrase "without any additional fact", said Mr. Anderson, is crucial to understanding how *Blakely* applies in sentencing.

Judge Griffin argued that those findings have to be made by a jury.

Other than the fact of a prior conviction, Judge Bressler contended, any fact that increases the penalty beyond the prescribed--legislatively ascribed— statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The courts in Washington considered their grid system to be a presumptive sentencing scheme, Atty. Kravitz declared. Ohio's, he claimed, is the same.

Mr. Diroll said that Ohio's guidelines do not force a judge to choose penalties from presumptive ranges within a larger statutory range. We have no box within a box he argued.

Quoting *Blakely*, Prof. Katz said the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant statutory maximum is not the maximum a judge may impose after a finding of additional facts, but the maximum sentence he may impose *without* any additional findings.

Yet he does not believe that the *Blakely* decision will have a heavy impact on Ohio's system, but will have *some* impact.

Judge Griffin declared that this reflects the findings in §2929.14(C), of whether the judge can impose the maximum sentence. The finding of fact in this statute is akin to the finding under *Apprendi*, he said: Committing the "worst form of the offense" or "posing the greatest likelihood of committing a future crime". In order to impose a maximum sentence under §2929.14(A), he contended, one of the findings would have to be made by the jury.

He reported that he has started using a written plea form to address the issue, noting that §2905.05 provides that jury waivers must be in writing and filed with the clerk.

Assuming this interpretation is correct, Atty. Kravitz noted that a new challenge may be presented if the defendant wants a jury trial on the issues of guilt, but not on the findings concerning aggravating factors or his potential toward recidivism.

After lunch, Mr. Diroll suggested walking backwards and examining some of the cases that led up to the *Blakely* decision.

Mr. Anderson referred to a statement made earlier in the meeting that, if *Blakely* means that *every* case has to be heard by a jury then, *Milton*, *McMillan*, and *Harris* are irreconcilable. If *Blakely* means that every aggravating factor that can increase a sentence has to be submitted to a jury, then he might agree. However, by tracking the principles of those cases, rather than taking *Blakely* at face value, he believes that the cases can be reconciled.

Procedurally, he said, Justice Scalia is the person to watch in these cases because he ruled with the majority in all of them. *Apprendi* was the first case that required a particular aggravating factor to be submitted to a jury and proved beyond a reasonable doubt. Justice Scalia agreed.

In *Harris*, the dissenters said that it was not just any aggravating factor that could increase the maximum sentence that should be sent to the jury, but also anything that could increase the minimum sentence. Those same four dissenters voted in the majority on the *Apprendi* case, with Justice Scalia. But in *Harris*, Justice Scalia abandoned then for a new majority.

Then in *Blakely*, he wrote for the majority. The most important factor, Mr. Anderson feels, is to determine the meaning of "on the basis of the verdict alone", which is used in all three decisions. In *Blakely*, it appears that those words mean "on the facts that the jury determined". Another way of reading it, he said, is not as a "fact-based analysis", but a "maximum-sentence-based analysis". Examining the phrase "on the basis of the verdict alone" under a maximum-sentence-based analysis, a maximum sentence could be given based on of the jury's determination of guilt, irrespective of the particular facts that are found.

If you follow Justice Scalia's opinions through *Apprendi*, *Ring*, *Harris* (which was decided on the same day as *Ring*), and *Blakely*, he concurs that every fact should be given to the jury to be decided beyond a reasonable doubt, but then adds that indeterminate sentences are okay. "Will there be disparities? Of course. But the criminal will never get more punishment than he bargained for when he committed the crime. And his guilt of the crime, and hence the length of the sentence to which he is exposed will be determined beyond a reasonable doubt by the unanimous vote of twelve of his fellow citizens." He said similar things in *Blakely*, tying together the jury determination of guilt, not with the facts to be determined, but with the length of the sentence to which the defendant can be exposed.

Hence, Mr. Anderson surmised, *Blakely* is not based upon the facts, but upon the length of the sentence to which the defendant is exposed. That, he contended, is how you tie in the notion of "maximum sentence" with the Sixth Amendment Right to a jury trial. The jury determination of guilt means how much the defendant could stand to lose. Based on that analysis, especially in following Justice Scalia's opinions through the line of cases, he shifted his views from a fact-based analysis to a maximum-sentence-based analysis. Given that analysis, he believes that *McMillan*, *Harris*, *Ring*, *Apprendi*, and *Blakely*, as well as indeterminate sentencing structures, can all be reconciled.

There are times when the prescribed statutory maximum can equal the punishment based on the jury's verdict alone, Mr. Anderson said. *Blakely* does not mean that all statutory maximums must be reduced. The analysis simply means that a judge cannot sentence to something greater than a jury could give in determining the defendant's guilt. The key phrase, he said, is "based on the jury verdict alone", not "based on sentencing facts". If you focus on sentencing facts, you distort the analysis for *Blakely*, because the deliberate cruelty fact was a sentencing factor. It was explicitly excluded in determining what the "statutory maximum" was for purposes of the Sixth Amendment. Thus, we should not be thinking that, if X is an aggravated fact proved by a judge that increases the sentence then X is a problem. Those aggravating facts that increase a sentence beyond the statutory maximum, he said, are the only troublesome facts under *Blakely*.

The ultimate question, said Mr. Diroll, is what "maximum" really means?

According to Judge Griffin, *Harris* only dealt with whether the court can raise the mandatory minimum. *Apprendi*, on the other hand, said that any fact that is extending the defendant's sentence beyond the maximum authorized by a jury's verdict would have been considered an element of an aggravated finding by the framers of the Bill of Rights. That cannot be done without increasing the minimum. Hence, the jury's verdict authorized the judge to impose the minimum with or without the finding.

Mr. Diroll reiterated that Justice Scalia ruled with the majority in *Apprendi*, which was the same as the majority in *Blakely*. In *Harris*, however, Justice Scalia abandoned the original four Justices and ruled with the four Justice on the opposite side.

Judge Bressler believes that the issue is going to resolve itself quicker than we can resolve it because federal courts are already paralyzed by this U.S. Supreme Court decision. That alone is going to necessitate a clarification decision from the U.S. Supreme Court.

Judge Griffin does not think the U.S. Supreme Court decision on the federal guidelines will answer our questions regarding how it affects Ohio's sentencing guidelines. He wonders if there is any kind of practical guidance that the Commission could or should give to Ohio's judge on this issue.

Atty. Kravitz remarked that, although he thinks Ohio's system has worked well, he has carefully considered how, and to what extent, *Blakely* will affect us. Admitting that he does not like the federal sentencing guideline system, he noted that some judges are holding bifurcated trials - one for guilt and one for sentencing. The elements of the offense are being tried and if there is a guilty verdict then the jury reconvenes. The biggest problem, he feels, will be the issue of proof, for both the prosecution to prove and the defendant to defend against (seriousness, recidivism, worst possible case, etc.).

Since presentence reports already enable a judge to discern those issues, Judge Griffin feels the reports could make the job easier for juries as well.

Representing the Department of Rehabilitation and Correction, Jim Guy reported that DRC is looking at the most vulnerable cases-those with maximum sentences-to determine how many might be affected by this ruling. He perceives §2929.14(C) as the most vulnerable point, if the defendant cannot get the maximum sentence without an additional finding, particularly since that comes after the jury has gone.

Judge Dennis Langer suggested that the Commission should recommend a legislative correction to the statute, and take away the presumptions. He feels that if nothing is done, there will be massive confusion.

The Commission has some duty, said Mr. Diroll, to sort things out and make recommendations to the General Assembly.

Atty. Kravitz warned that the Commission won't want to unravel a lot of the good that has been accomplished with its sentencing guidelines.

Judge Griffin again suggested developing a waiver process.

Judge Bressler emphasized the need to make some recommendations for cases involving RVOs. He suggested finding the things that need to be changed and making the necessary recommendations.

Because of its novel approach, Ohio will be the last state to have these issues decided by the Supreme Court, contended Judge Griffin. So, unless the Commission comes up with a solution that everyone agrees with, the legislature will feel compelled to come up with something to address it.

Prof. Katz urged the Commission to develop procedures to protect Ohio's system. He believes that *Blakely* won't be relevant if adequate waivers are developed, so long as *Blakely* is incorporated into the proposals.

Atty. Kravitz senses a need to attach the *Blakely* argument to each individual case because they are all different.

Pros. White recommended retired Prosecutor Bill Breyer as a good source to help with this effort.

Acknowledging a need to sort out the main trouble points, Mr. Diroll asked judges, prosecutors, defenders and other interested parties to participate in the discussions on this issue.

FUTURE MEETING DATES

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for September 23 [later moved to September 30], October 21, November 18, December 16, and January 20.

The meeting adjourned at 2:00 p.m.