

# 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  
CRIMINAL SENTENCING ADVISORY COMMITTEE  
May 16, 2013**

**MEMBERS PRESENT**

Municipal Judge David Gormley, Vice Chair  
Victim Representative Chrystal Alexander  
OSBA Representative Paula Brown  
Janet Burnside, Common Pleas Judge  
Laina Fetherolf, Prosecuting Attorney  
Kort Gatterdam, Defense Attorney  
Kathleen Hamm, Public Defender  
Jay Macke, representing State Public Defender Tim Young  
Thomas Marcelain, Common Pleas Judge  
Gary Mohr, Director, Rehabilitation and Correction  
Aaron Montz, Mayor, City of Tiffin  
Jason Pappas, Fraternal Order of Police  
Albert Rodenberg, Sheriff  
Kenneth Spanagel, Municipal Judge

**ADVISORY COMMITTEE**

Eugene Gallo, Eastern Ohio Correction Center  
David Landefeld, OJACC  
David Picken, Criminal Justice Section Chief, Attorney General's Office  
Joanna Saul, Director, Correctional Institution Inspection Committee  
Gary Yates, Ohio Chief Probation Officers' Association

**STAFF PRESENT**

David Diroll, Executive Director  
Nick Fiorilli, extern  
Cynthia Ward, Administrative Assistant

**GUESTS PRESENT**

Sara Andrews, Rehabilitation and Correction  
Ed Banks, Rehabilitation and Correction  
Monda DeWeese, SEPTA Correctional Facility  
Nicole DiLaura, Rehabilitation and Correction  
Ryan Dolan, Counsel, Rehabilitation and Correction  
Phillip Elms, Rehabilitation and Correction  
Jonathon Fulkerson, Deputy Chief Counsel, Oh Attorney General's Office  
Steve Gray, Chief Counsel, Rehabilitation and Correction  
Irene Lyons, Rehabilitation and Correction  
Marta Mudri, Ohio Judicial Conference  
Scott Neely, Rehabilitation and Correction  
Sam Porter, Asst. Chief Counsel, Gov. John Kasich's Office  
Carol Robinson, Correctional Institution Inspection Committee

Joellen Smith, Rehabilitation and Correction  
Matt Stiffler, Legislative Service Commission  
Ginine Trim, Warden, Ohio Reformatory for Women  
Steve VanDine, Rehabilitation and Correction  
Marjorie Yano, LSC Fellow, Speaker Batchelder's Office

The May 16, 2013, meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair Municipal Judge David Gormley at 9:30 a.m., at the Ohio Reformatory for Women in Marysville, Ohio.

#### **THE OHIO REFORMATORY FOR WOMEN**

After a tour of the facility, directed by DRC Director Gary Mohr and Warden Ginine Trim, Executive Director David Diroll welcomed Criminal Justice Section Chief David Picken to the Advisory Committee as the new representative from the Ohio Attorney General's Office.

Dir. Mohr proudly reported that Warden Trim has served as warden at the Ohio Reformatory for Women for four years and was recently selected Warden of the Year. He credited her with changing the culture of the facility.

The facility currently holds 2,305 women ranging in age from 18 to 80, plus five babies. There is one woman on death row. The average term served is 4½ months. Notably, there has not been an escape from ORW.

The intent at ORW, said Warden Trim, is to foster a safe environment for a positive structure which includes learning how to treat other people with respect. She remarked that they are working to establish or expand partnerships with different entities in the communities as they discern the issues and barriers faced by inmates upon reentry to the community.

As part of the introduction of the three-tier system, Dir. Mohr noted that they hope to eventually have six reintegration centers available around the state.

With the focus on rehabilitation and reentry, all inmates are kept active through community service projects and training for jobs to enhance their skills for employment upon release. Programs include making products, including custom flags, rescuing greyhounds from being euthanized, and training dogs to assist disabled people or as comfort dogs. A community service project involves weaving plastic grocery bags into mats for homeless people. ORW also has an art guild that is responsible for graphic designs throughout the facility. A mural in Director Mohr's office was painted by a former member.

Dir. Mohr reported that ORW recently hosted TV's Dr. Phil McGraw for two days as he conducted a focus on women inmates raising babies while incarcerated.

Under H.B. 86, which went into effect in 2011, limitations placed on third degree felons affected eligibility for some pregnant offenders to use ORW's nursery. Dir. Mohr reported that proposed legislation has recently been drafted which would address this issue.

Noting that there are two categories of F-3 offenders, he clarified that this would pertain to those in the 9 to 36 month range, as opposed to the 12 to 60 month range.

According to DRC legislative liaison Scott Neely, the proposed legislation will probably be a stand-alone bill and will only involve a simple change.

Judge Gormley asked if there were any legislative changes or ideas from other states that they would like to see implemented in Ohio to improve the prison system.

The most common offenders, Warden Trim responded, are serving time for drugs and theft, so treatment programs are optimal.

Dir. Mohr had recently been updating the Sentencing Commission on the increase of disturbances among inmates and staff over the last few years, noted Dir. Diroll. He asked what kind of disciplinary problems are most common at this particular facility.

Gangs are not a major issue at this facility, Warden Trim noted, and both inmate on staff assaults and inmate on inmate assaults are minimal. The main problems are dysfunctional relationships because most of the women tend to be unforgiving and don't know how to have proper relationships and get along with one another.

Prosecuting Attorney Laina Fetherolf remarked that when boys are at odds with one another, they tend to fight it out and they're done with it. Girls, on the other hand, continue to dredge up issues over and over and over. Some woman might hold a "never-ending" grudge against another woman because of something that happened several years before.

Dir. Mohr noted that the population at the Ohio Reformatory for Women has been reduced from 3,000 to 2,300. The results indicate a correlation between density, multiple crowding, and violence.

If an inmate is being considered for judicial release, Judge Gormley asked about the level of communication with common pleas judges.

Warden Trim responded that she lets judges know if someone is not ready to go home early and explains why they're not ready. Any request for a progress report or consideration for judicial release first comes to her office then goes out to the appropriate unit so that a unit evaluation can be processed.

Sarah Andrews, Deputy Director of Parole and Community Services, explained that the new Justice Reinvestment Officers handle that. They gather the information needed and get it to the person requesting it. They serve as the liaisons between and the court and the institutions. If they don't have an immediate answer for an inquiry, they search until they find one.

**ATTORNEY GENERAL MIKE DEWINE & SEN. JIM HUGHES'S FIREARM PROPOSAL**

After lunch, Dir. Diroll welcomed Jonathon Fulkerson, Deputy Chief Counsel for Ohio Attorney General's Office, to offer some insight into

Ohio Attorney General Mike DeWine's proposed "Violent Career Criminal Act" which targets repeat offenders. The proposal would impose a new mandatory prison term for having a weapon under disability for those offenders with a history of violent felonies and require a double gun specification for those with a prior felony involving a firearm. The day's meeting packets included what Dir. Diroll called a "Reader's Digest" version with key elements listed.

Atty. Fulkerson announced that Gen. DeWine's proposal was recently introduced as S.B. 121. After the *Columbus Dispatch* published a series of articles in May, 2011, about gun violence, Gen. DeWine wondered whether more could be done about the problem. He formed a gun crime advisory group to find solutions for dealing with violent gun crime and repeat felons. Seeking a data-based plan, he enlisted social science Professor Deanna Wilkinson.

The group examined both BCI&I arrest and conviction data for violent offenses and DRC incarceration data to see which people are repeat gun offenders, from 1974 to 2010. BCI records showed arrests of repeat firearm offenders increased 1400% over the past 40 years with a 236% increase in persons with multiple firearms arrests over the past 10 years for offenders under age 20.

According to DRC data, from 1974 to 2010 there have been 230,288 offenders convicted of at least one violent felony, 80,274 convicted of two or more violent felony crimes, and 31,278 offenders convicted of three or more violent felony crimes. The 80,274 offenders with two or more violent felony offenses have been responsible for 60% of all of Ohio's violent felony convictions. Dr. Wilkinson concluded that a small number of violent career criminals are responsible for much of the violent crime in Ohio, particularly with a firearm. That is the group that the gun crime advisory group decided to target.

The gun crime advisory group focused on particular offenses of violence, including aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, F-3 domestic violence, aggravated robbery, robbery, aggravated burglary, burglary, aggravated arson, F-3 or higher sex offenses, kidnapping, abduction, extortion, making terroristic threats, and felony terrorism. Repeat violent offenders convicted of these offenses would be regarded by the advisory group as violent career criminals.

Sen. Hughes worked on the two proposals, the Violent Career Criminal Act and a proposal to double existing firearm specifications.

The Violent Career Criminal Act would cover offenders with two or more prior violent felony convictions. Under Sen. Hughes' proposal, a felon with two prior violent felonies followed by a new conviction of possession of a firearm or dangerous ordnance would face a mandatory 11 years in prison. The proposal targets two-time violent offenders who have twice been forbidden from having guns. Since the Wilkinson determined that these felons are generally responsible for 60% of violent felony convictions, it is believed that strict, mandatory penalties on these offenders can have a long term impact on reducing gun crime recidivism. Atty. Fulkerson pointed out that, under federal law, any felon possessing a firearm or ammunition faces a 10 year prison term.

Atty. Fulkerson reported that Sen. Hughes wants to double the existing mandatory firearm specifications if the offender has previously been convicted of a crime while in possession of a firearm and discharged, brandished, or otherwise used that firearm to facilitate the commission of the previous offense.

56% of the violent felony offenders came from the four counties of Cuyahoga, Summit, Hamilton, and Franklin. 83% came from those four counties in addition to Montgomery, Stark, Lucas, Lorain, Butler, Lake, Clark and Mahoning Counties, he reported.

The federal Armed Career Criminal Act of 1984 targets people of violence and imposes a mandatory time of 20 years for people with three or more convictions of certain types of violent crimes. And yet, there is some reluctance for the Justice Department to take up a lot of armed career offenders.

At the state level, there are currently only 30 offenders in prison who are classified as RVO (repeat violent offender). For several reasons many people have felt the RVO classification is not effective.

In an attempt to find a solution, said Atty. Fulkerson, that is not quite as drastic as the Armed Career Criminal Act but more effective than the RVO classification, it has been proposed that if a person has two or more violent felony convictions and is caught with a gun in his possession, he should get a mandatory penalty of eleven years imprisonment. It would include a 15 year look back time/period between violent criminal acts that would qualify a person as a Violent Career Offender

He pointed out that this would not replace the existing RVO. Under §2929.14 the judge can impose the maximum within the range and possibly an additional 1 to 10 years if certain conditions happen.

Another part of the proposal involves a suggestion that came from Dr. Wilkinson and some of the non-lawyer members of the group. With the assistance of social service groups this is an effort to get the community to call out repeat violent offenders and put pressure on them to stop using firearms. A version of this is currently being attempted in the Akron area.

He reiterated that the proposal is aimed at people who have been told twice by a judge not to possess a gun and they still don't seem to get the message. In addition, it is a targeted approach, as an attempt to get the message to offenders while they are still young.

Judge Janet Burnside agreed that the RVO definition is hard to apply. It was simple when it began, she said, but has since become too complicated. If the Violent Career Criminal designation is adopted, then she encouraged getting rid of the RVO classification.

DRC Research Director Steve Van Dine clarified that approximately 30 RVO's come into the prison system per year, not that there are a total of 30 RVOs all together.

According to Atty. Fulkerson, prosecutors call the RVO classification impractical because it is hard to prove and judges rarely apply it.

Noting that the original RVO came out of the Sentencing Commission proposals that became S.B. 2 in 1996, Dir. Diroll explained that the Commission was trying to come up with a more precise solution than California's 3-strikes approach, by narrowing the strike zone to second time, truly violent offenders. Senator Seitz attempted to simplify it in 2004.

Under the AG's proposal, noted Dir. Diroll, if someone has been convicted of two prior aggravated murders and pulls a pistol on a third victim, few people would have trouble imposing a mandatory term of 11 years. He raised concern, however, about how the proposal could also affect someone who has committed two F-2 (non-aggravated) burglaries with no weapon involved but then possesses a weapon during a third burglary. Under the proposal, that person would also face the mandatory 11-year term. He feels the proposal's strike zone needs to be narrowed.

That type of situation, where there was a weapon under disability, said Atty. Fulkerson, was discussed by the study group. While there was some sentiment that a judge should not impose the mandatory 11-year term on just one act involving a gun, the bigger issue, they feel, is that this person has already been placed under disability twice by the court, and should not possess a gun.

Judge Burnside remarked that her court sees multiple burglary cases. With the current widespread activity of copper thefts from abandoned homes and oxycodone thefts, there are many offenders entering the court with multiple charges and prior convictions of these crimes. This proposal could affect a large class of people with prior non-gun cases.

Defense attorney Paula Brown argued that if a person has two prior nonviolent violent felony offenses and later gets pulled over with a gun in the car, he could end up with a mandatory 11 years. In contrast, if an offender commits two violent felony offenses with a gun and the third time there is no gun, he could get much less time than the first person on the third offense.

Defense Attorney Kort Gatterdam asked if the group considered choosing a mandatory from a range (as is done with many other mandatory terms) and leaving the amount of time up to the judge.

There was a lot of dissatisfaction with the use of ranges, said Atty. Fulkerson, because too often the offender gets something from the lowest end. The group wanted something mandatory with more impact.

Representing the State Public Defender's Office, Jay Macke noted that, as currently written, there is nothing in the proposal's language that would prevent a gun specification from being attached to a Violent Career Criminal prosecution. This would mean that the offender might end up with something more than just an 11 year mandatory term. It could mean a 12 or 13 year mandatory term.

Also, in most cases, said Atty. Macke, when someone is convicted of a violent felony, he's usually convicted of more than one offense. It might be best to clarify whether the focus is on offenders with two or

more violent felonies or two or more trips to prison for violent felonies. It would help to merge arrest records with DRC records.

According to Atty. Fulkerson, the crimes that would be excluded from the list of "offenses of violence" in this proposal include assault, child abuse, aggravated menacing, menacing by stalking, menacing trafficking in persons, arson, terrorism, inciting to violence, aggravated riot, riot, inducing a panic, intimidation, intimidation of a terrorist witness victim, improper discharge of a firearm in a school safety zone, endangering children, and felonious sexual penetration. This decision was based on the data collected regarding the crimes most often committed by violent career criminals involving the use of a firearm.

This proposal, Pros. Fetherolf declared, will make things extremely complicated for prosecutors.

If you look at the prison population, Dir. Diroll remarked, the gun specs seem to be underused, because there are lot more people who could have had 1- or 3-year specs added. But the possibility of gun specs often leads to a guilty plea and a longer sentence on the underlying offense. Given how the system has adjusted to the basic gun specs over their 30 year history, he suspects that the double gun specs in Sen. Hughes's proposal will simply up the ante in plea negotiations. Given the 11 year duration, he feels it would be imposed even less than the 1- and 3-year specs, making it something of a legal fiction.

According to DRC Research Director Steve VanDine, only 20% of the people admitted to DRC who qualify for a gun spec actually enter with one attached to their sentence. Still, it is estimated that, overall, this proposal could result in an increase of a little over 1,000 beds.

A new technology being considered, said Atty. Fulkerson, is the use of "shot spotters" in some cities. Those are microphones that can triangulate where gunshots come from.

The 15 year look back period, said Atty. Fulkerson, was decided on based on data in an attempt to narrow the strike zone.

Dir. Diroll pointed out that most violent offenders will be serving more time in prison, so when released they will have a shorter time frame, within the look back period, to behave, since the 15 year clock begins to tick at the beginning of their 11+ year prison sentence. He also noted that most look back periods include reference to attempts and conspiracy and complicity, but this proposal did not include conspiracy and complicity. He wondered why.

Atty. Macke suggested checking how the release from disability provisions might play into the prior violent career criminal designation.

Atty. Fulkerson reiterated that they want to get at the people who've already received two warnings from a judge about the potential consequences if they possess or use a gun.

He thanked the Commission for the input received, noting that it's early in the bill's process and changes will be considered.

**FUTURE MEETINGS**

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for August, 15, September 19, October 17, November 21, and December 19, 2013.

The meeting adjourned at 1:40 p.m.