

# 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**

**January 16, 2014**

**MEMBERS PRESENT**

Chief Justice Maureen O'Connor, Chair  
Ron Burkitt, Police Officer  
Robert DeLamatre, Juvenile Judge  
Paul Dobson, Prosecuting Attorney  
Kathleen Hamm, Public Defender  
Fritz Hany, Municipal Judge  
Thomas Marcelain, Common Pleas Judge  
Chad McGinty, representing State Highway Patrol Superintendent  
Col. Paul Pride  
Steve McIntosh, Common Pleas Judge  
Elizabeth Miller, representing State Public Defender Tim Young  
Aaron Montz, Mayor, City of Tiffin  
Dorothy Pelanda, State Representative  
Bob Proud, County Commissioner  
Kenneth Spanagel, Municipal Judge  
Steve VanDine, representing Rehabilitation and Correction  
Director Gary Mohr  
Roland Winburn, State Representative

**ADVISORY COMMITTEE**

Eugene Gallo, Eastern Ohio Correctional Center  
David Landefeld, OJACC  
Cynthia Mausser, Chair, Ohio Parole Board  
Gary Yates, Ohio Chief Probation Officers' Association

**STAFF PRESENT**

David Diroll, Executive Director  
Cynthia Ward, Administrative Assistant

**GUESTS PRESENT**

Sara Andrews, Rehabilitation and Correction  
JoEllen Cline, Counsel, Supreme Court of Ohio  
Garrett Crane, Legislative Service Commission  
Monda DeWeese, Community Alternative Program  
Ryan Dolan, Rehabilitation and Correction  
Lusanne Green, Ohio Community Corrections Association  
Regina Holland, C.U.R.E.  
Steve Hollon, Administrative Director, Supreme Court of Ohio  
Andre Imbrogno, Vice-Chair, Ohio Parole Board  
Scott Lundregan, Speaker Batchelder's Office  
Irene Lyons, Rehabilitation and Correction

John Murphy, Director, Ohio Prosecuting Attorneys' Association  
Scott Neeley, Rehabilitation and Correction  
Nancy Oberacker, concerned citizen  
Amanda Parker, concerned citizen  
Mark Schweikert, Director, Ohio Judicial Conference  
Paul Teasley, Hanna News Network  
Karen Thimmes, C.U.R.E.  
Louis Tobin, Ohio Judicial Conference  
Maggie Wolniewicz, Legislative Service Commission

The January 16, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Chair Chief Justice Maureen O'Connor at 9:40 a.m.

#### **PROPOSED CRIMINAL JUSTICE COMMISSION**

Chief Justice Maureen O'Connor expressed her gratitude for the work of the Sentencing Commission. She announced a proposal for expanding the focus of the Commission into a more comprehensive entity to help all of the state's justice system partners to combat crime in an interrelated and multi-dimensional way. This would involve replacing the current Sentencing Commission with a new Ohio Criminal Justice Commission in its place.

She has submitted a proposal to Senate President Keith Faber to remake the Criminal Sentencing Commission into the Criminal Justice Commission with an expanded role to look at how to best address the many interacting issues involved with criminal justice. For years different organizations have taken on a sliver of the larger criminal justice pie only to lament that their focus was too limited or didn't include a review of the other issues that tie into the issue that they happened to be reviewing at the time, she noted. This often resulted in a piecemeal approach.

She wants this body to not only take on the issue of sentencing, but other related issues as well. Some of these might include probation and risk assessment, juvenile justice, data collection and sharing, domestic violence, specialized dockets, access to legal representation, and traffic.

She proposes that these topics, among others, be reviewed by a robust committee structure where subject matter experts take on the task of providing meaningful review of the issues with the assistance of sufficient staff. Their task would then be to report back to the larger Commission which will be responsible for connecting the dots and creating a larger mosaic of potential solutions.

She proposed that many, if not all, of the organizations represented on the current Sentencing Commission continue to serve on the newer and more engaged Commission. In addition, she foresees a support staff that harkens back to the days of 10 or 15 years ago when the Sentencing Commission had a larger staff.

She also supports the addition of monies to the proposed Commission's budget to employ such a team going forward. Further, she will propose that the Commission continue to be operated under the umbrella of the organizational structure of the Supreme Court. This is a magnificent

place to consider the topics at hand, she contends, not only because of the grandeur of the facility, but because it is seen as a neutral place - a safe haven in which to contemplate the weighty issues under consideration without feeling the influence of political forces.

She has met with Sen. Faber on two occasions to discuss her ideas and reviewed what the next steps might be to put this plan into action. He indicated that he has some ideas on how he would like to proceed on recodification efforts involving the criminal code. She believes they have made progress on the idea of moving forward on both ideas which will allow them to progress on dual tracks. She pointed out that she does not have a commitment that one of the tasks for the Criminal Justice Commission will be the recodification project. She has made that argument to Sen. Faber, and although he did not think of his plan in those terms, he did not totally reject the idea.

Both efforts would require action by the legislature. If the tracks come together where there is the establishment of this new Criminal Justice Commission and the establishment of this task of recodification, she would like to see that be the first task assigned to the Criminal Justice Commission. She stressed that she has no promises from Sen. Faber that that will be his plan.

She asked Sentencing Commission members to give her memo their earnest consideration and provide her with meaningful feedback as to how they can make this happen. She is not about to announce that it is just a done deal that has to be accepted "as is". The current members of the Sentencing Commission, she said, have been involved for years and are a wonderful resource that can look at the plan and come up with some ideas. She asked for honest input on whether it is a good plan or if there are shortcomings. She hopes that any criticisms will be accompanied by suggestions. She hopes to participate in a discussion about the proposal after Sentencing Commission members have had time to study the proposal.

Prosecuting Attorney Paul Dobson asked about how this proposal would work with Rehabilitation and Correction Director Gary Mohr's proposed advisory groups. Chief Justice O'Connor responded that she hopes it will have a longer life than what Dir. Mohr had in mind.

DRC Deputy Director Sara Andrews remarked that DRC is in the process of establishing an official Advisory Council.

Regarding recodification, Chief Justice O'Connor added that Sen. Faber is planning to establish a time-limited group on the issue. She would like to see that task assigned to the proposed Commission, rather than a separate statutorily created group with the limited purpose of recodification. If the Senate decides to set up a separate task force or committee to handle the task, she would like to see their work product then brought to the Criminal Justice Commission for review, suggestions, and sign off.

Overall, the possibilities for this Criminal Justice Commission, she said, are very fluid and would require some work with the legislature. She is willing to engage the legislature and its leadership and looks forward to establishing a stronger relationship between the courts and the General Assembly.

Representing the Ohio Community Corrections' Association, Lusanne Green asked about the timing and budget for this proposal.

It would have to be included in the next budget, Chief Justice O'Connor explained. It would still be under the Supreme Court's auspices, but the Supreme Court would incorporate what is needed depending on how the Commission is established. She noted that the Supreme Court is willing to apply current budget funds toward this goal.

Public Defender Kathleen Hamm asked how the Sentencing Commission members should share their thoughts on the proposal.

Chief Justice O'Connor suggested submitting collective comments to Director David Diroll so that he can compile them and forward them to her prior to the next Commission meeting. That would allow her time to study the comments and conduct any necessary research in order to offer a meaningful response.

Having served with the Sentencing Commission since its beginning, DRC Research Director VanDine remarked that his initial response to the proposal is favorable and noted that some of the issues suggested for the new Commission are ones that tend to fall through the cracks. He noted that the Ohio Judicial Conference has started taking on some of these issues and coordinating functions. He wonders whether that will overlap or clash with the proposed Commission.

Noting the importance of bringing many views to the table, Chief Justice O'Connor noted that the judiciary will certainly be well represented on the new Commission and the Ohio Judicial Conference will be consulted as well.

#### **PAROLE BOARD UPDATE**

Noting that the role of the Ohio Parole Board changed after the enactment of S.B. 2 in 1996, Dir. Diroll extended an invitation for Parole Board Chair Cynthia Mausser to provide an update of the Board's current role. Since the structure changed mostly to determinate sentencing under S.B. 2, mostly "life" sentences remained under the aegis of the Board, he noted. A few years later, the General Assembly gave the Board authority to review certain serious sexual offenses. At this point, the Parole Board is dealing almost exclusively with very serious offenders.

**Overview.** Chair Mausser began by explaining that the Parole Board consists of up to 12 members, and each is allowed to serve two 6-year terms, which do not have to be served consecutively. She noted that the Chair of the Board is exempt from that stipulation. They have had a victim representative on the board since S.B. 2 went into effect in 1996. That person serves a 4-year term, which is renewable with no limitations.

The primary roles for herself, as Chair, and Andre Imbrogno, as Vice-Chair, are to conduct parole release consideration hearings and to make clemency recommendations to the Governor.

There are three chief hearing officers, who supervise 15 hearing officers and oversee the notification unit. The hearing officers are responsible for assessing all incoming inmates for post-release control. They also conduct field release violation hearings.

The Board has an administrative staff and 22 parole officers. They are responsible for transitional control recommendations and some of the investigations for clemency, hearings, and ORAS (risk) assessments.

The Board's authority involves release decisions relative to any inmate sentenced to an indeterminate sentence. Since S.B. 2 went into effect in 1996, those committing crimes before that date are referred to as inmates under the "old law". Parole eligibility remains for them and is calculated by DRC's Bureau of Sentence Computation. Prior to S.B. 2 they received 30% off their minimum sentence for good time and earned credit, plus credit for time spent in jail awaiting trial and sentencing. Consecutive sentences were capped at 10, 15, or 20 years, except for aggravated murder, and depending on whether or not the inmate was convicted of murder or a sex offense. Most long-term offenders were seen by the Parole Board after serving about 10 years.

As of January 2013, there were 4,613 pre-S.B. 2 inmates incarcerated, for which the Parole Board is responsible. 2,965 of those are incarcerated for a "crime against a person", 54% of which involve a homicide. 1,400 were convicted for aggravated murder, 40 for attempted aggravated murder, 855 for murder, and 150 for a manslaughter offense. Another 1,400 were convicted of a sex offense. Only 155 current pre-S.B. 2 inmates were incarcerated for an F-2 offense, seven for an indeterminate F-3 offense and five for an indeterminate F-4 offense. They amount to only 3.6% of the total population.

She noted that the five inmates still incarcerated for a pre-S.B. 2 F-4 offense are all parole violators. This means they had been released at least once but have been returned for violating their parole. Of the seven still incarcerated for an F-3 prior to S.B.2, two were released on parole in the early 1990's but absconded and were recently rearrested and recommitted. The rest are serving consecutive F-3s for aggravated vehicular homicide. Each one has an aggregate minimum sentence of about 20 years. Between three of them, there were nine deaths caused.

She pointed out that anyone convicted of aggravated murder or murder after 1996 was subject to the release authority of the Parole Board before and after S.B. 2. According to DRC's January 2013 census report, there are 3,507 S.B. 2-era inmates and 75 H.B. 86-era inmates serving life sentences who will be subject to the discretionary release authority of the Parole Board.

The parole release consideration hearing process begins with an institution hearing. This is the initial hearing when parole can be considered after the minimum sentence has been served. If parole isn't granted at the first hearing, subsequent continued hearings occur. These must each be scheduled within 10 years of the last hearing.

All hearings are now conducted by video conference, with a majority of Parole Board members present if possible. She noted, however, that it

is possible to conduct an institutional hearing with as few as one Board member present.

Because the Parole Board is part of DRC, they have access to the inmate's institutional records. Release decisions are determined by majority vote. If that is not possible, then the hearing is continued.

The factors to be considered by the Board include the nature of the offense, the seriousness of the offense, any prior criminal history, and any feedback received from the sentencing judge, prosecutor, or victim concerning the release. Factors related to the person that are considered include institutional adjustment, conduct reports, and programming, as well as release plans. The Parole Board also may consider anything else that they determine to be relevant.

If the inmate is denied release, the Board must give a reason. One of three reasons are allowed under the Administrative Code (O.A.C. §5120-1-1-07) to justify the denial. These are: 1) there is substantial reason to believe that the inmate will engage in further criminal conduct, or the inmate will not conform to conditions of release as may be established; 2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety or that release would not further the interest of justice nor be consistent with the welfare and security of society; and/or 3) There is substantial reason to believe that serious rule infractions (O.A.C. §5120-9-06) indicate that the release would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules.

If supervision is desired after release, then the inmate must be released before the maximum has been served in order to allow time for that supervision. If the inmate is continued to the expiration of the maximum sentence, he or she must be released from the institution without supervision.

In the past, said Chairperson Mausser, the release date was usually set 60 days after the Parole Board's decision. They found, however, that the inmate often suffered culture shock upon abrupt release. They now set a projective release date and send the inmate to a Reintegration Unit to allow for transition of long-term offenders. She noted that there is no right to appeal a Parole Board decision.

The length of parole supervision short of the maximum is established by the Parole Board through a special condition. The length required for lifers is five years, while at least two years is required for non-lifer sex offenders, and for other offenders the term of supervision is based on the term required to satisfy the post-release control obligation.

She reported that the Ohio Parole Board is one of only five U.S. Parole Boards accredited by the American Correctional Association.

**S.B. 160, "Roberta's Law."** Parole Board Vice-Chair Andre Imbrogno reported that S.B. 160, the new victim's rights bill, referred to as "Roberta's Law", took effect in 2013. It expands prior law governing victims that receive notifications related to incarcerated offenders. It also changes the timeframes for providing notice to victims and

other interested parties. It affects notification procedures related to: release consideration hearings by the Parole Board; clemency recommendations; transfers of inmates to transitional control; judicial release; court hearings to consider the modification of termination of a sentence imposed under the Sexually Violent Predator Law; and post-release control.

Under prior law, notice of an upcoming parole consideration hearing was provided to any victim registered with the DRC's Office of Victim Services, the prosecutor, and the sentencing court at least 21 days prior to the hearing. Under Roberta's Law, notice must be given at least 60 days prior to the hearing. Notification has been changed from an opt-in system to an opt-out system. So the victim can still register to receive notices, but even if they don't they will receive notice. In fact, the Parole Board must now seek out the victims, and not necessarily just the immediate family.

Vice-Chair Imbrogno reported that, as a matter of DRC policy, the department offers victims/representatives and inmate supporters the opportunity to meet with a Parole Board member or other designated staff person to provide input and share information regarding the potential release of an inmate scheduled for a parole hearing. These conference days are conducted at the Parole Board headquarters in Columbus. He noted that under Roberta's Law, victims now have a statutory right to a victim conference.

With respect to notifications subject to Roberta's Law, at least three attempts to provide notice must be made. Attempts must be documented. Attempts and notices given to victims are not public record but are available to prosecutors, judges, law enforcement agencies, or members of the General Assembly.

Regarding hearings for post-release control (PRC), the Parole Board must give notice to the victim of the offender's release to PRC, the period of PRC, and the terms and conditions of PRC. This now applies to victims of all F-3 offenses of violence, not just those with "caused or threatened physical harm," the Vice Chair notes.

Vice-Chair Imbrogno remarked that an average of 100 inmates is released per week and some had more than one victim. So it takes considerable time to track down the victims and get notices out to them. The Parole Board now has a dedicated Notification Unit to handle the volume. In addition, a victim advocate now deals with the victims rather than having the victim deal with the Board directly. He added that it is a challenge to find some of the victims, now that all have to be notified unless they opt out.

**Sexually Violent Predators.** The Parole Board does not see a lot of sexually violent predators, said Chairperson Mausser. She noted that the SVP statute passed in 1998. An offender determined to be a sexually violent predator receives a sentence of a minimum period to a maximum of life. Once the offender serves the definite minimum, the Board is responsible for review. The only issue for the Board is whether the offender still poses a substantial risk of harm to others. If the Board determines that an offender still poses a threat, then a review must be set up in two years. There are currently 140 SVP inmates in DRC prisons. The Board has terminated control only of two of them. Once the

Board terminates control, a hearing is conducted, and a report is sent to the sentencing judge who then decides whether the inmate will be released.

Another 204 SVP offenders have been sentenced under S.B. 260, which was passed in 2006, and involves sex offenses involving children. That bill attached the same release mechanism and process.

About 10 of the SVP offenders come up for review each year. With a review required every two years, the review process occurs more frequently than is practical for such serious offenders. She noted that there is not enough progress that can be made within two years to warrant a change in the risk level of the offender.

**Clemency.** The Parole Board reviews all applications for clemency or commutation, which average 35 to 50 per month. The review is to determine whether there is sufficient merit in the application to warrant a hearing. If a hearing is granted, they meet with the applicant and provide notice and invite participation.

Some of the factors considered usually involve the time since the offense was committed, whether the offender has demonstrated a special need for clemency, and whether the offender has given back to the community through community service.

**Questions.** Atty. Hamm questioned the difficulty in identifying victims for notice of release hearings. She feels it should be an easy fix.

Chairperson Mausser responded that a victim is sometimes listed as "John Doe" or "Jane Doe" or sometimes has moved. She noted that the old law parole cases are the most challenging. Sometimes, as in the case of a convenience store robbery, *etc.*, the names of clerks are not listed.

In response to an inquiry about how the new policy works for death penalty cases, Chairperson Mausser responded that an interview date and hearing date are established. The inmate does not participate in the hearing but is given an opportunity to be interviewed by the Board two weeks beforehand. Only the inmate and Board members participate in the interview but counsel can be present and others can observe. There usually are two representatives from the Att. General's office and one representative from the Governor's office present. She remarked that she allows some latitude in what can be presented. Afterwards, a report is sent to the Governor within eight days. She stressed that adequate time is needed for a full review of the material prior to an execution date to prevent rush decisions.

A small provision in H.B. 86 called for a one-shot review of pre-S.B. 2 inmates and no one was released, noted Dir. Diroll. He asked about the process.

Chairperson Mausser explained that the Board did not expedite any of those hearings. There were 347 inmates that fell within that category. One third of them were going to be heard in 2011 and 2013 and another third were to be heard in 2013. The newer notice issues had a strong affect on that. In the meantime, 16 of those inmates have already been paroled, several have died, one received a judicial release, and one was released on shock probation. Many offenders had a lot of

opposition, she noted, not necessarily just from the victim but from the community or prosecutor.

In reference to victim notification issues, Chairperson Mausser remarked that there have been some cases where the victim was notified but failed to show up.

As an interested citizen, Nancy Oberaker asked why the requirement to notify all victims applied even to cases that occurred prior to S.B. 2. Since S.B. 2 was not made retroactive, she wondered why S.B. 160 was made retroactive to dates further back than S.B. 2.

Chairperson Mausser explained that they relate to totally different issues and it is up to the legislators as to what is made retroactive and what is not.

#### **DIVERSION INCENTIVE PROGRAMS**

As DRC's Deputy Director for Parole and Community Services, Sara Andrews reported that DRC recently released the requests for qualification for a new grant process that grew out of the "adult RECLAIM" initiative. The three options are for RECLAIM formula-based models, probation outcome-based model, or to fill treatment resource gaps. The application deadline is January 24<sup>th</sup>.

They hope to get applications for all three options. The three options have enough flexibility to apply to any county, regardless of size. Obviously, one will fit better for larger counties and the other two will be a better fit for smaller counties. The goal is to make sure that there is an option available that will not cause a county to lose money, she added.

#### **DISCUSSION OF CHIEF JUSTICE O'CONNOR'S PROPOSAL**

At this point the discussion returned to the earlier topic of Chief Justice O'Connor's proposal to replace the Sentencing Commission and reestablishing it as a Criminal Justice Commission, which would have a broader base of issues to address. Since the Commission members had the chance for a brief review of the proposal, Dir. Diroll asked for comments on the idea.

Municipal Judge Fritz Hany cautioned that we shouldn't lose sight of the fact that the current Commission has a lot of stakeholders represented. He feels it contains too good of a group and structure to simply disband. He does, however, favor the idea of expanding the scope and tasks of the Commission. He also sees value in the use of standing committees to spread out the tasks. He emphasized the need to keep all of the major stakeholders at the table.

Dir. Diroll noted that the Commission originally consisted of 17 members and gradually evolved to 31 as its tasks grew. There is no other statewide group that brings together as many different elements of the criminal justice system. As tasks and topics grew, some work was handled by subcommittees, with their recommendations forwarded to the full Commission for discussion and potential consensus.

Municipal Judge Ken Spanagel acknowledged how helpful that approach was for many topics.

Prosecuting Attorney Dobson remarked that DRC Director Gary Mohr saw the size of the current Commission as an issue, claiming it hampered the ability to reach consensus and sometimes diluted the effectiveness of the voice of each member and the group he or she represents. Philosophically, some may have an academic interest in a topic, but no experience or direct concern about dealing with it on a practical level. For that reason, he sees the value of a smaller core group for some issues.

Representing the Ohio Community Corrections Association, Lusanne Green remarked that some work in the past had not been evidence-based focused, but more personality driven. Changing the Commission and giving it a new focus might allow it to be more effective.

Since the new Commission would also be enabled by statute, Judge Spanagel pointed out that it might need to also set forth the types of subcommittees and their duties. He cautioned, however, against getting so detailed within the statute that it becomes unwieldy.

The current Sentencing Commission had very specific statutory duties, said Dir. Diroll, which were accomplished. The Commission's hands were somewhat tied, however, limiting its ability on other issues. With the proposed new Commission, he asked for ideas on the expansion of topics.

Pros. Dobson sees the Chief Justice's proposal as wanting to avoid keeping the tasks too narrow and limited by a statutory definition. He believes that having a broader base will be beneficial for flexibility.

The key concern raised by Eugene Gallo, Director of the Eastern Ohio Correction Center, is the need to keep the dynamic of conversation flowing back and forth between the membership at the table and the various groups throughout the state.

Since the topics of the Sentencing Commission have gradually been evolving, as well as the broader needs to be addressed, said Judge Marcelain, it only makes sense to allow the statutory guidance and title of the Commission to follow that evolution. He admitted that he is a bit nervous about the idea of recodification.

Encouraged by the discussion, Atty. Hamm hopes this effort will give the Commission more direction and effectiveness. She favors the use of subcommittees, but does not believe they should be defined too stringently by statute. They should be allowed to develop as needed.

There will probably be a need for both some standing committees and *ad hoc* committees, Dir. Diroll acknowledged. Regarding Sen. Faber's interest in recodification, he noted that, in the early 1990's the Sentencing Commission went through every criminal statute in the Revised Code. It resulted in taking the four classes of felonies with its twelve permutations and reducing them to the five felony classes in S.B. 2. It also resulted in a redefinition of the offenses of violence and standardizing the offenses of falsification. He concurs with the Chief Justice that an evolved version of the Sentencing Commission would be a logical place for the recodification discourse.

He agreed to compile everyone's thoughts on the proposal and forward them Chief Justice O'Connor.

#### **MANDATORY SENTENCES**

After lunch, the discussion turned to the issue of mandatory sentences.

There is a mandatory sentence for a second time failure to register or update residential information under the SORN law. This affects a lot of people and sometimes involves accidental misconduct, said Dir. Diroll.

The area with the most mandatory sentencing is the drug law. Unlike even offenses of violence, almost every first and second degree felony in drug law carries a mandatory sentence. Dir. Diroll pointed out that H.B. 86 changed some F-3 mandatory sentences to a presumption toward prison. At one time, drug offenders comprised 1/3 of the prison population. That percentage has now dropped to about 22%, which remains a significant figure.

The Commission has agreed in the past to consider making the penalties for drug offenses more like those for other offenses, particularly regarding mandatories and first time offenders. If nothing else, he feels the judge should at least be offered discretion in these cases.

Pros. Dobson argued that H.B. 86 already treats drug offenders more leniently.

Dir. Diroll remarked that high level offenses, except for homicides and rape, have a presumption toward prison, but not mandates. But drug offenses are mandatory. So they tend to be an enhanced group within the F-1 and F-2 levels, but are a minimized group in the F-4 and F-5 levels, under H.B. 86, which is inconsistent. He noted that the manufacturing of methamphetamines, regardless of the amount, warrants a mandatory sentence, even on first offense, but aggravated arson, aggravated robbery, or felonious assault do not.

Part of the rationale for the manufacture of meth, said Judge Spanagel, is that it is not only a dangerous drug, in and of itself, but also dangerous to manufacture. He's not sure that imposing a mandatory sentence on the first time meth manufacturer actually serves as a deterrent, however, without a significant minimum specified.

Obviously, the offenders guilty of drug use or sale at the F-1 and F-2 levels are not just casual users, said Dir. Diroll. They are generally more involved in the drug business. Someone manufacturing small amounts of meth often is an amateur.

Sometimes the more amateurish drug producers are the more dangerous ones, Pros. Dobson argued.

Common Pleas Judge Steve McIntosh contended that, since there can be such a difference, it seems fair to allow the judge some discretion.

It is not just the issue of mandating prison, Common Pleas Judge Tom Marcelain argued, but also the fact that it negates the possibility of judicial release.

Atty. Hamm added that it not only takes discretion away from the judge but also gives the prosecutor control in how the offense is charged.

This raises the question, said Dir. Diroll, of whether drug offenses at the F-1 and F-2 levels are worse than other offenses at those levels.

Prosecutors are hesitant to eliminate mandatory sentences, said Pros. Dobson, due to the fear of what will be expected next to reduce penalties for drug offenders.

Dir. Diroll noted that the presumption toward prison would still be available for any F-1 or F-2 offenses.

It almost comes down to each individual offender and what the challenges are, said Mr. Gallo. He contends that the more discretion you take away from the judge the harder it is to deal with the offender, since the judge is the one who has to determine what is best for both the offender and the public safety of the community.

When it comes to mandatory drug offenses where the judge can choose from within a mandatory range, Dir. Diroll pointed out that they usually end up with a sentence from the lower part of the range. This indicates that drug offenses are perceived as less serious than other crimes at the same felony levels, he noted.

The preference for keeping offenders out of prison at the F-4 and F-5 levels, said Mr. VanDine, is for nonviolent offenders. He pointed out that, in most cases where the offender is charged with a drug offense, there are usually other charges as well. The H.B. 86 prohibition is only for the first offense that a person has committed. Once an offender commits a second offense, they are completely eligible for a direct commitment to prison. He stipulated that the majority of the changes made over the last two years have been in response to the challenges presented by the longer sentences imposed as a result of the *Foster* decision, which increased the prison population by 7,000 beds.

Judge Hany pointed out that there are even some mandatory penalties, some including mandatory jail time, at the misdemeanor level, especially for OVIs. It does not only occur at the felony level. He noted that there are also mandatory license suspensions, some of which are for drug offenses.

It is important to note, said Judge Spanagel, that some mandatory penalties have funds attached. The federal license suspensions for drug offenses are one example of that. However, he reported that the Ohio Judicial Conference learned that if both the legislature and Governor would agree to opt out of the federal license suspension for drug offenders, then it could be done without losing federal funds.

In the felony code, there is a sentencing table for the basic felony offenses, and a separate table for drug offenses, based on the particular drug involved and the amount of the drug involved. Also, the guidance for judges is different for drug offenses than for all other

felony offenses. That, Dir. Diroll explained, is why he had separated the discussion of mandatory sentences for drug offenses from other felony offenses.

The difference in how F-1, F-2, and F-3 drug offenses are treated as compared to other felonies of the same level is a matter of actual harm versus potential harm, said Pros. Dobson. With drug offenses the potential for harm is massive in comparison to most other felonies.

It would certainly be a hard sell to convince legislators to consider eliminating the mandatory aspect of a prison term for first time offenders of manufacturing meth, said Judge Spanagel.

Shifting to Mr. Van Dine's comment about the *Foster* effect, Dir. Diroll remarked that the most dramatic and subtle impact to the prison population recently was that decision, as opposed to any other individual changes made to statute. A couple of years ago the Sentencing Commission attempted to fix the *Foster* change without affecting the *Foster* decision. The proposed fix had been approved by the House of Representatives but was amended in the Senate to say that a sentence should have minimum impact on governmental resources. Dir. Diroll noted that, with that in mind, 30 days in prison is cheaper than 30 days in jail.

Pros. Dobson remarked that he does not see the benefit of putting a policy guideline into a statute. If you were to do that, you would need to add some teeth to it or the criminal justice system wouldn't know what to do with it. Defender Hamm agreed.

#### **FUTURE MEETINGS**

Dir. Diroll noted that it had been discussed to do a subcommittee next month with the appellate court and common pleas court judges, etc. to address the appellate issues raised by Judge Sean Gallagher in November. We might want to add a full Commission segment to address Chief Justice O'Connor's proposal, he noted.

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for February 20, March 20, April 17, May 15, June 19, July 17, and August 21, 2014.

The meeting adjourned at 1:55 p.m.