

# **Monitoring Sentencing Reform**

**A Sentencing Commission Staff Report**

**By Fritz Rauschenberg and Ray Johnson**

**January 1, 1997**

**Ohio Criminal Sentencing Commission  
Chief Justice Thomas J. Moyer, Chairman  
David Diroll, Executive Director**



## **Introduction**

Section 181.25 of the Revised Code requires the Sentencing Commission to monitor the impact that sentencing reform (Senate Bill 2) has had on state and local government. This memo is the first installment, due on January 1, 1997. The Commission staff will continue to study the impact of Ohio's sentencing law, and report its findings.

S.B. 2 went into effect for crimes committed on or after July 1, 1996. Because the system takes a few months to move most offenders through from crime to conviction, any results that we report now are tentative. However, some patterns are emerging.

Also, we have some information on S.B. 2's implementation that we were able to glean by monitoring the county planning process. Counties were encouraged to study their local systems and report on the likely impact of sentencing reform.

In a nutshell, state prison intake has decreased by about five percent. Counties and DRC's Bureau of Community Sanctions have worked through a detailed planning process. And as far as we know, there have not been any felony sentences that have been heard in the Court of Appeals.

## **S.B. 2 Background**

S.B. 2 changed hundreds of sections of the Revised Code and reworked the way that judges sentence convicted felons. Some key provisions of the act are:

-**"Truth in Sentencing"** -- The time said by the judge in open court is the time served by the offender. "Good time" as previously known was abolished. Parole as previously known was abolished.

-**Tougher on many high level offenders** -- Especially repeat violent offenders. Judges are guided toward prison on high level offenders. Judges can guarantee 20 years in prison on serious repeat violent offenders. Limits on consecutive sentences were removed for those sentenced under S.B. 2.

**-Community sanctions at the low end --** The act provides guidance for judges for lower level felons. Judges are guided to sentence low level offenders without histories of violence or drug trafficking to sanctions within their community. Additional state funding was made available for expanding community sanctions.

**-Appellate review of sentencing --** In certain limited circumstances, the prosecutor or offender is able to appeal a sentence imposed by a judge.

**-Many other components --** There are many facets to Senate Bill 2. The Sentencing Commission and its staff are available to answer any questions that you might have. They can be reached at 466-1833.

### **Prison Intake**

The first place that we can see a measurable statewide impact of S.B. 2 is in prison intake. The Department of Rehabilitation and Correction has been tracking the S.B. 2 cases as they come in. As of mid December, there had been 1,165 prison commitments under S.B. 2, and the number is expected to increase rapidly.

DRC's budget is based on the assumption that 4,140 offenders who would have gone to prison under prior law would be punished in the community under S.B. 2. Assuming baseline intake of 20,000 offenders, the budget assumes a decrease in intake of 20.7%. If our estimates are correct, DRC will start seeing a decline in prison intake as theft offenders and nonviolent felons who committed crimes after July 1 move through the system. In the long term, the population will grow, as more serious felons begin serving the stiffer sentences meted out under S.B. 2. The prison population will continue to rise, and will have on average, a tougher class of criminals.

In July through November of 1996, 7,921 offenders entered Ohio's prisons. This is 404 offenders, or 4.85% less than the 8,325 that came during the same period in 1995. Annualized, the 404 difference for five months would be 970. This is far lower than our estimated 4,140 annual diversions. However, it is still early. While it is too early to draw any definitive conclusions, the prison system has not unloaded onto the local justice system

the way some had feared. Here is a comparison of prison intake from court since S.B. 2 became effective versus intake for a comparable period before S.B. 2 went into effect:

**Total Prison Intake Pre and Post S.B. 2**

Month	1995 Prison Intake	1996 Prison Intake	Pct Change
July	1,550	1,633	+5.35%
August	1,769	1,644	-7.07%
September	1,669	1,443	-13.54%
October	1,760	1,725	-1.99%
November	1,577	1,476	-6.40%
	=====	=====	=====
Total	8,325	7,921	-4.85%

**Impact of the Felony OMVI Law**

It is unclear how diversion estimates will dovetail with the new drunken driving law. S.B. 2 diverted some offenders from the state prisons to community sanctions starting July 1. Starting in mid October, 5th time drunken drivers will begin to be diverted from local jails into the state prison system. This makes analyzing state prison intake under S.B. 2 tricky.

**Contingency Fund**

Am. Sub. H.B. 117 (the FY 96-97 state budget bill) creates a contingency fund of up to \$1.6 million if certain prison diversion targets are met. The theory is that if diversions are higher than anticipated levels, the impact of S.B. 2 is greater than estimated. This would mean that more money would be needed for community corrections, and less would be needed for prison operations.

The language calls for a transfer of funds by September 30, 1996, by the Director of Budget and Management. DRC is required to reassess its estimated number of diversions by January 1, and distribute the money to counties soon thereafter. It is too soon to tell whether the contingency funding will be invoked, but given the prison intake thus far, the time it takes for offenders to work through the system, and the effect of the new drunken

driving law, it is unlikely the targets will be met to trigger the contingency.

### **County Planning Process**

In an effort to help assess the needs of local communities in response to S.B. 2, the state provided \$2.2 million for community planning. Plans were to be prepared and submitted by local community corrections planning boards. The purpose of these boards is to evaluate local correction resources, analyze the expected impact of Senate Bill 2, and help develop a plan to deal with the anticipated increase in locally punished offenders. The corrections planning boards consist of various members of the county's criminal justice community. The reports were prepared by members of the board, other local criminal justice officials, as well as various criminal justice consultants under contract with the correction planning boards. The hope is that many of these boards can continue to meet, oversee, and plan the local justice system on an ongoing basis.

Under S.B. 2, local communities, not DRC, will be supervising the punishment of certain offenders. The way in which the county decides to punish these offenders is not limited to the amount of local jail space or the number of probation officers available. S.B. 2 gives communities the chance to develop and implement creative prison alternatives. These alternatives can prescribe punishments that are tailored to fit particular crimes.

By applying the guidelines and principles under S.B. 2, the local community has a unique opportunity to develop a plan that can give the public a sense of retribution, and provide a safer community, while shortening criminal careers through rehabilitation. There are suggested alternatives to prison found in sections 2929.16 to 2929.18 of the ORC. The list includes residential incarceration, such as a community based correctional facility or local jail, non-residential sanctions, like a day reporting center or intensive supervision, and financial sanctions, such as day fines and restitution. These are not exhaustive of all possible punishments. They merely illustrate examples of alternatives available to a county.

For example, a low level drug abuser might be ordered into a chemical offender program. This program could encompass

punishment for the crime, as well as some counseling and treatment for the offender. By providing such a service, there is a sense of justice, along with providing a safer environment for the community. Some counties have either instituted or plan to begin specialized domestic violence programs, mandatory parenting classes, court ordered budgeting classes, and a court order to find employment. These are examples of how the counties can use S.B. 2 to specifically address local needs while still issuing some measure of punitive sanctions.

### **DRC's Role**

The counties developed the plans last winter, and then used the plans to apply for funding via the DRC's Bureau of Community Sanctions this past spring. DRC provided technical support, and encouraged all of the counties to form a planning board and submit a report. All 88 counties submitted something to DRC.

As the counties submitted plans to DRC, they also applied for Community Corrections Act funding. This is money that comes from two subsidy line items in the state budget: Community Nonresidential (line item 501-407, targeting nonresidential sanctions for felons) and Community Misdemeanor (line item 501-408, targeting residential and nonresidential sanctions for jail bound offenders). DRC began allocating money to counties in anticipation of S.B. 2 last fiscal year. In those line items, there was an additional \$2.7 million for nonresidential felons, and \$4 million for misdemeanor jail diversions for this fiscal year.

The Bureau of Community Sanctions reviewed all of the county reports, and their funding applications. In June, the Bureau issued their funding grants. They allocated just under \$3.5 million in misdemeanor grants and just over \$1 million in felony nonresidential grants. Counties were generally more interested in applying for misdemeanor money than felony money. The money was awarded to 55 new programs and 29 new counties - bringing the total number of counties receiving state funding to 70.

In September, 1996, the Controlling Board transferred about \$1 million from DRC's Division of Parole and Community Services operating budget to the community corrections subsidy budget. This meant that 12 additional counties were given funding for

community nonresidential and misdemeanor programs, bringing the statewide total to 82.

DRC's Bureau of Community Sanctions worked hard to make sure that the each county had access to adequate state funding to cover the increased cost of community sanctions under S.B. 2.

### **Planning Difficulties**

Unfortunately, the majority of reports submitted by the counties did not show a full understanding of the impact of S.B. 2. Many counties chose to focus on the number of offenders being diverted from state facilities. This is an appropriate starting point. However, many counties overestimated the number of individuals that would be affected under the new sentencing guidelines. Take for example the theft threshold. Under former law, a thief stealing less than \$300, would be a felon if the thief had any prior theft convictions. S.B. 2 changed the threshold for petty theft from \$300 to \$500 and did away with the felony enhancement. This would be an expected source of diversions from prison. Yet, most reports simply took every theft from the previous year, and assumed that they would be sentenced to community corrections. For the most part, the reports did not select cases, e.g., those offenders convicted of stealing less than \$500. A theft was considered an automatic diversion, which is not the case.

Likewise, some counties simply looked at their low level felons, such as the F3s and F4s under prior law, and assumed that all of those who went to prison would now be punished in the community. This is far from accurate, since most low-level felons who were prison-bound under prior law, remain prison-bound under S.B. 2. Most counties did estimate the number of offenders that they thought would be diverted from prison, but the methods used were often unreliable.

Drug offenses presented another problem. Several counties perceived a tremendous outpouring of dangerous, drug offenders into community corrections. That is not what the law intends. S.B. 2 does not recommend that all drug offenders be placed in community corrections. Only nonviolent drug possession offenders are guided toward community control sanctions. And, not all of those eligible offenders will actually be placed in the community.

Often in the plans, the expectation was that community resources would be used to punish more violent, dangerous offenders. Sentencing factors (from section 2929.12) were often overlooked. These are indicators that show that an offender is likely to repeat a crime, as well as indicators showing that an offender is less likely to repeat his crime. There are circumstances that make a crime either more or less serious.

A key failing in most plans was that the "Division (B)" factors from ORC section 2929.13 were often not considered when assessing low level offenders, and whether or not they would go to prison or the community under S.B. 2.

The "Division (B)" factors serve to regulate who will be punished locally, steering dangerous low level felons to prison. The factors also add to the predictability of the law. Applying the factors to a data set on offenders is the best way to estimate how many formerly prison bound offenders would likely be punished in the community. Many of the counties collected data on offenders, but few of them collected the necessary bits of information to even approximately apply the factors.

Overall, the county planning reports showed a recognition that S.B. 2 will affect the community's correctional resources. They also showed a very general understanding of who will be punished locally, and who will still be sent to prison. In some cases, expected diversions were misunderstood. Some counties expect to divert more prisoners locally than they sent to prison in previous years, an unlikely scenario. Others estimate that every 4th or 5th degree felon will be housed in their local jail, which is also unlikely given local jail costs and space restrictions. The expected diversions are offenders whose punishments are more suited toward a community sanction. S.B. 2 gives the sentencing judge the power to evaluate offenders and their amenability toward community control sanctions. There will be more offenders being punished in the community. However, the county is not confined to use only the traditional incarceration methods. S.B. 2 gives the local corrections board the flexibility to design punishments that fit the needs in the community. Once the initial growing pains are relieved, the impact of S.B. 2 will not be as dramatic as some counties expect.

## **Why the Difficulty?**

Why did the counties have so much difficulty assessing the impact of S.B. 2? At least a couple of reasons have been reported to us by those who worked on plans. First, was timing. After the budget bill passed on July 1, 1995, county boards had to get up and running. The reports were due to DRC by April 1, 1996 if funding was requested. This gave counties at best nine months to assess their local communities, estimate the impact of S.B. 2, find gaps in their sanction continuums, and apply for state money. Realistically, most boards did not get appointed and start meeting until that fall, giving them about six months to complete the task. And in fairness, S.B. 2's size and scope makes it difficult to master.

Hiring consultants could make the process even more rushed as they can sometimes require lengthy purchasing procedures. Just over half of the counties reported hiring a consultant. Consultants varied in expertise as well. Some were well versed in S.B. 2, but most were not. To estimate the number of diversions, it was important to understand the factors in S.B. 2, along with the changes in theft and drug offenses before starting to collect data so that the right elements could be gleaned from files. Consultants were often learning the provisions of the law along with the local officials. Of all the consultants, only one applied the "Division (B)" factors to a data set to generate an estimate of S.B. 2's impact.

Some counties felt that the opportunity to plan their local justice system, in the hopes of making it run more efficiently was a goal that transcended S.B. 2. Therefore the specifics of the new law were not as important as ways in which the overall efficiency of the system could be improved. Other counties focused on issues that are not related to S.B. 2 directly, but certainly come out of state law. The common example here was domestic violence, where counties saw the burden of the recent presumptive arrest law as more significant than any of S.B. 2's burdens. These counties used S.B. 2 planning and additional state subsidy money to address domestic violence, not felony sentencing writ large.

Perhaps the biggest obstacle for getting a good sense of the expected impact of S.B. 2 was the lack of data. Several counties

contacted us, and many more contacted DRC looking for good data that could be used for local planning. In many counties, existing reports or database records were inadequate. Conversely, counties that did the best jobs of assessing S.B. 2, looking at target populations, analyzing their continuum of sanctions, and identifying gaps that could be filled with state funding are counties that had a good handle on the numbers.

### **Data Needs**

In order to effectively implement the monitoring duties, it would be useful to collect data. In the past, the Commission staff has relied extensively on data provided by DRC for information on prison bound offenders. Typically, this is the richest information available. The Supreme Court publishes an annual court summary reporting court caseloads from the prior year. Using this data, we have compiled criminal court caseload data going back as far as 1961. Since this data just reports caseloads, and not dispositions, it is not as useful for impact analysis.

For information on offenders punished in the community, the commission staff has relied on anecdotes from program administrators, and small samples of data collected through field research. Educated guesses can be made by combining the information on prison bound offenders from DRC, along with the court caseload information from the Supreme Court reports, and sample data collected in the field.

The Commission staff, DRC, and others who work in the criminal justice system at the state level are often asked by local government officials for information that can help them in their planning efforts.

What is needed, is a centralized source of information on every convicted felon in Ohio. Ideally, that source would have consistently reported information that can be summarized and analyzed with relative ease.

Creating such a data source would be a difficult task. It would require local officials to complete forms on every offender who goes through their system, then reporting that information to a centralized state agency where the information from all 88

counties can be compiled, analyzed, published, and distributed back to local decision makers. The centralized agency would have to expand staff and computer capability. The task would be large, but the rewards would be great as well.

### **Ongoing Monitoring Duties**

Revised Code section 181.25 was amended in S.B. 2 to give the Sentencing Commission some additional duties to monitor the impact of sentencing law changes on the state prison system, the political subdivisions, and the appellate court system. The Sentencing Commission also has the duty to monitor legislation, and assess the impact of proposed changes in law on correctional resource. The Commission is also responsible for providing information on the costs and burdens associated with the appellate review provisions of S.B. 2, which will be used in distributing money by the Oversight Commission.

Beginning with this report, the Commission staff will periodically report on the impact of sentencing reform on the state and local justice system.

The task becomes more and more difficult as the legislature enacts new laws such as the recent drunken driving and sexual predator laws. The legislation will change all the numbers regarding prison intake and population projections. As time passes, it will make it very difficult to disaggregate the effects that can be attributed to S.B. 2.

Thus, monitoring S.B. 2 probably should not be done in a vacuum. Resources permitting, the Commission will try to assign costs to S.B. 2, but may also indicate the impact of other legislation on the state and local justice systems. Ultimately, this should be more useful to the General Assembly.

### **Felony Sentencing Appeal Cost Oversight Commission**

This group was established in S.B. 2 as a means of distributing money to counties to cover any increased costs associated with the appellate review provisions. The Sentencing Commission staff serves as the staff of the Oversight Commission. The Oversight Commission is made up of eight members, including a state representative, senator, appellate judge, common pleas judge,

state public defender, prosecutor, Supreme Court chief justice, and director of the office of budget and management.

The budget appropriated \$2 million to cover the cost if needed, to be distributed to counties based on the findings of the Oversight Commission. The Commission staff will use data from the Supreme Court's caseload statistics, which in raw form contains information on criminal appeals arising out of common pleas courts.

Anecdotal reports have not turned up any appeals under S.B. 2's sentencing appeal procedures. In conversations with the State Public Defender's office, we do not know of any sentence appeal that is currently being considered. This is especially surprising since as of October 8, 24 offenders have come into state prison at the top of the sentencing range for their level of offense, which makes them eligible for an appeal of right. It is even more surprising given the dire prediction of some, particularly in the defense bar and appellate bench over the number of cases that would be appealed.

The Commission staff will also track and monitor appellate court decisions regarding sentences.

### **Summary**

It is too soon to definitively measure the impact of S.B. 2 on state and local government. But we do know some things. Prison intake is measurably down. Counties and DRC's Bureau of Community Sanctions are working to make the continuum of sanctions available to all judges. And it is truly too soon to assess the impact of the felony sentence appeal provisions of S.B. 2. Finally, the effort to measure the impact on the justice system is handcuffed by the lack of available data.

