Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
April 20, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Major John Born, representing Highway Patrol Supt., Col. Paul McClellan
Defense Attorney Bill Gallagher
Victim Representative Staci Kitchen
OSBA Delegate Max Kravitz
Bob Lane, representing State Public Defender David Bodiker
Nathan Minerd, representing Youth Services Director Tom Stickrath
Common Pleas Judge Reggie Routson
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction
Director Reggie Wilkinson
Public Defender Yeura Venters
Prosecuting Attorney Dave Warren

ADVISORY COMMITTEE MEMBERS PRESENT
Monda DeWeese, SEPTA Correctional Facility
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Sara Andrews, Department of Rehabilitation and Correction
Malika Bartlett, Senate Democratic Caucus
David Berenson, Director of Sex Offender Services, DRC
Elizabeth Bostdorff, legislative aide to Rep. Bob Latta
Bill Breyer, Prosecuting Attorney
Jeff Clark, Senior Deputy, Attorney General's Office
Shawn Davis, State Highway Patrol
Jim Guy, Rehabilitation and Correction
Deborah Hoffman, Legislative Service Commission Fiscal
Stephanie Kaylor, legislative aide to Senator Steve Austria
Elizabeth Lust, legislative aide to Senator Steve Austria
Heather Mann, legislative aide to House Speaker Jon Husted
Scott Neely, legislative liaison, Dept. of Rehabilitation & Correction
Phil Nunes, Ohio Justice Alliance for Community Correction
Candy Peters, Office of Criminal Justice Services
Jason Warner, legislative aide to Rep. Bob Gibbs

Director David Diroll informally called the April 20, 2006 meeting of the Ohio Criminal Sentencing Commission to order at 9:45 am.

DIRECTOR'S REPORT

The meeting packets included: a memo from Director Diroll and Staff Attorney Scott Anderson on reorganizing sex offenses; a memo on sex offense bills pending in the General Assembly; a memo summarizing the status of HB 95 and repeat violent offenders; a memo on Ohio felony sentencing after *Foster*; recaps of *State v. Foster* and *State v. Mathis*; notes on DRC's Omnibus Package; and minutes from the April meeting.

LEGISLATIVE UPDATE

SB 8. Director Diroll reported that Senator Austria's SB 8 passed and awaits the Governor's signature. The bill sets *per se* levels for street drugs (marijuana, cocaine, heroin, LSD, methamphetamines, etc.) under the OVI statute. The bill makes an exception for pharmaceuticals if lawfully prescribed and used in compliance with the directions.

Some issues with the bill, said Municipal Court Judge Kenneth Spanagel, will be probable cause and the means used for testing, which will mostly be by blood and urine, rather than a breathalyzer. This, in turn, raises issues of facilities qualified to conduct the tests.

HB 461. Liz Bostdorff, legislative aide to Rep. Bob Latta, reported that an amendment has been offered for HB 461 to address issues regarding drawing blood. It would certify ODH to draw blood and would set the standard of probable cause for a peace officer to pull a driver over to submit to a test for the presence of drugs or alcohol.

HB 95. Rep. Seitz's HB 95 began as a repeat violent offender (RVO) measure, but also became a vehicle for some sex offense changes, said Dir. Diroll. As for the RVO aspects, some felt the current RVO sentences were not being used much, so the bill made the law easier for prosecutors to use. The bill no longer contains juvenile offenses in the list of prior offenses. The bill would no longer require proof of a prior prison sentence before imposing an RVO penalty. The bill passed both houses and awaits the Governor's signature.

Atty. Anderson reported that there is also added discretion in giving the RVO classification. Under current RVO law, the judge is required to give the maximum within the range and can then impose additional years to that. Under HB 95, the judge "may" do the same if so desired. Imposing the additional range of penalties is not required until the fourth conviction in 20 years; then it is mandated. The defendant is also given the right of appeal if the additional RVO sentence is more than 5 years. The recent Ohio Supreme Court decision in the *Foster* case, however, may change that.

Dir. Diroll added that HB 95 also makes the penalties mandatory within the range for sexual battery and gross sexual imposition involving victims under age 13.

DRC Research Director Steve VanDine remarked that he thought the RVO part of HB 95 changed the requirements for demonstrating the level of physical harm.

Atty. Anderson responded that, currently, F1 and F2 have to include a demonstration of physical harm. Under HB 95 the eligibility criteria for being designated RVO are F1 and F2 offenses of violence.

It can be listed as physical violence but not tangible harm actually shown in that case, said Dir. Diroll.

SB 260. Dir. Diroll reported that this bill, sponsored by Sen. Steve Austria, recently passed the Senate. It would make rape of a victim under 13 and forcible rape of another result in 25 to life. Attempted rape of a victim under 13 would change to 15 to life.

Malika Bartlett, representing the Senate Democratic Caucus reported that an emergency clause was added by the Senate.

SB 245. Senator Cates' Public indecency bill also passed the Senate. This bill would increase the penalties from an M-1 to an F-5 when the victim is a minor and when the offender is a repeat offender.

HB 269 & HB 545. Rep. Willamowski's and Rep. Hughes's importuning bills are pending in the House. HB 269 would increase the threshold age for increased importuning penalties from 13 to 14 years of age. It would also increase each of the current penalties one felony degree. HB 545 also would increase the penalty for importuning and would require a mandatory 1 year prison term.

HB 118. Dir. Diroll reported that, among the numerous SORN bills, the House passed HB 118 which requires that a SORN registrant may not live within 1,000 feet of a preschool. Ms. Bostdorff remarked that this bill has returned to the Criminal Justice Committee for amendments and reconsideration.

HB 227. The House also passed HB 227, Rep. Faber's civil commitment and satellite monitoring bill, which would require that "sexually violent predators" be tracked by GPS devices during post-release control and would authorize the civil commitment of a "sexually violent predator" as redefined.

SB 17. Sen. Spada's bill requiring on clergy accountability passed both the House and Senate and is awaits the Governor's signature.

Heather Mann, attorney aide to House Speaker Jon Husted, reported that SB 17 creates a sister requirement to SORN, by requiring the offender to be put on the civil registry if he would have been found guilty but for the statute of limitations.

HB 310. Rep. Oelslager's voyeurism bill was signed by the Governor. Current law prohibits the surreptitious photographing of someone else to gratify one's sexual desires. This bill adds other media (videotape, film, etc.) besides photographs.

SEXUAL OFFENSE REORGANIZATION

Victim Representative Staci Kitchen remarked that the idea that physical harm is worse than other harm is good in theory, but it is necessary to recognize other types of harm that are not physical.

In reference to the memo regarding "Reorganizing Sex Offenses", Dir. Diroll explained that cases involving physical harm are typically ranked higher than those that do not include physical harm. He recognized that, implicit in Ms. Kitchen's question, is concern about how the law deals with psychological harm and the lasting impacts of crimes that are not measured by bruises. Currently under §2929.0101(A)(5), serious physical harm is defined as: any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; physical harm that carries a substantial risk of death; physical harm that involves permanent incapacity whether partial or total or that involves some temporary substantial incapacity; physical harm with permanent disfigurement; or physical harm with acute pain of sufficient duration to result in substantial suffering. Mr. Diroll acknowledged that this does not recognize the long-lasting emotional or psychological harm suffered by a rape victim without requiring in-service or prolonged psychiatric treatment.

Defense Attorney Bill Gallagher added that there is an aggravating factor regarding the mental anguish caused by the offender.

In weighing the nature of the harm, Dir. Diroll noted that the factor could push the judge toward deciding in favor of a prison term. In fact, he noted, some of the sex offense bills pending before the legislature reflect the intuitive acknowledgement of mental anguish and physical harm caused to children under the age of 13 by sex offenders. In the hierarchy of sex crimes, behavior against children is obviously considered worse than the behavior against others.

In response to suggestions made by the Commission, Dir. Diroll reported that the staff has attempted to craft an intuitive hierarchy of sex offenses.

This memo, said Atty. Anderson, responds to the Commission's request for a draft that starts with the worst kinds of offenders. The memo sketches a comprehensive revision of sex offenses starting with the worst offense and provides a starting point for addressing the assignment given to the Commission by the General Assembly.

The effort begins with a list, based on current law and public perceptions, of what makes some sex offenses worse than others:

- "Sexual conduct" (body cavity insertion) is worse than "sexual contact" (erogenous zone touching).
- Behavior against younger victims is worse than behavior against others.
- Forcible conduct is worse than unforced conduct.
- Behavior resulting in serious physical harm is worse than behavior that produces less or no physical harm.
- Repeated behavior is worse than an isolated act.
- Likely future recidivism is worse than unlikely recidivism.

- Behavior by someone in a position of trust is worse than behavior where no such position is abused.
- Knowing conduct is worse than reckless conduct, which is worse than negligent conduct.

There are additional aspects reflected in legislation which might receive less agreement:

- Likely future recidivism can be worse than repeated past misconduct.
- Likely future recidivism can be worse than causing serious physical harm.
- A violent crime with sexual motivation is worse than violent crime without such a motivation.
- Conduct against a non-spouse is sometimes worse than conduct against a spouse.
- Potential improvement through treatment is not formally recognized.
- Some sex offenses are worse than murder.

By treating some sex offenses worse than murder, the increased penalties suggested in pending SB 260 create a somewhat perverse incentive. The penalty for murder starts at 15 to life, while some penalties for sex offenses exceed 15 to life. This may cause some offenders to kill their victims.

This should not be taken lightly, Public Defender Yeura Venters argued. He stressed a need for the Commission to encourage legislators to consider the consequences of toughening some of these penalties. It is vital, he argued, to recognize that some changes could backfire.

Representing the Attorney General's Office, Jeff Clark noted that there are different purposes for some of the changes. It is not always a ranking. The goal may be simply to get these offenders off the street.

Atty. Venters contended that some of the changes recommended by legislators tend to exceed the policy goals of proportionality and of providing comparative penalties.

Atty. Kravitz argued that tinkering with the law has no effect on the behavior of offenders. He contended that this could destroy the incentive for the offender to commit the lesser crime and, instead, would encourage more offenders to commit murder so that there would be no witnesses. He argued that judges can accomplish the same thing today with consecutive sentences.

We have SB 2 on one hand and political reality on the other, Atty. Anderson remarked. Mediation is needed between what exists now in sex offender law and what is about to exist.

Atty. Venters questions whether mediation is possible since there appears to be no compromise offered by the legislators.

It depends, said Mr. VanDine, on what you consider the baseline, noting that there is a good chance that by 2007 the penalty for rape will be 25 to life.

Representing the Office of Criminal Justice Services, Candy Peters remarked that it may be necessary to return to a decision-making mechanism that allows indeterminate sentencing.

Today's sex offender law is not as simple as that established by SB 2, said Dir. Diroll. Given the numerous changes to statute through the past ten years, sex offenders now seem to have their own world of penalties, many of which already are indeterminate.

Atty. Kravitz argued that the sex offense laws need to be simplified, but without taking determinate sentencing to the extreme.

One option for simplifying the Code, said Dir. Diroll, would be to list the various sex offense enhancements (from the Sex Offender Chapter, Sexual Predator Chapter, and SORN Law Chapter) together in one section and refer to them in the substantive offenses, when relevant. He offered the following as a start:

> When relevant for purposes of imposing punishment under this chapter, the following specifications may be included in the indictment and proved beyond a reasonable doubt:
> (A) Specification A: The victim is under age 10.
> (B) Specification B: The offender is found likely to engage in a future sexually violent offense [*the current sexually violent predator spec*].
> (C) Specification C: The offender caused serious physical harm to the victim.
> (D) Specification D: The offender has a "substantially similar" prior conviction.

Atty. Anderson explained that this just puts into specification form what is addressed in current law.

Why bother with these tiers of specifications, Atty. Bill Gallagher asked, if pending legislation—particularly Am. Sub. H.B. 260—will result in penalties of 25 to life anyway? If Am. Sub. HB 260 passes, it will make the use of such tiers moot.

Judges have given testimony at hearings on HB 260 declaring that the bill won't work as drafted, said Atty. Anderson. He feels that something like this tier system might help.

The tier system might enable a judge to envision more penalty options for the offender, particularly rapists, said Dir. Diroll, rather than feeling limited to a choice between 25 to life or freedom.

For juries, said Atty. Clark, the mandatory minimum is sometimes so high that it causes "jury balking" resulting in a verdict that nullifies the offense. A penalty of 25 to life might cause more of that, resulting in fewer offenders getting convicted.

Jurors are not supposed to know that the penalty might be 25 to life, argued, Atty. Kravitz, so this would cause jurors to consider factors that they are not permitted to consider according to the instructions of the judge.

Atty. Clark agreed that jurors are not supposed to know the penalty, yet they often do and occasionally tend to decide verdicts accordingly.

Dir. Diroll noted that several judges have said that jurors are reluctant to come down hard on a defendant based solely on the testimony of a young child.

According to Common Pleas court Judge Reggie Routson, the recent case of *Crawford v. Washington* suggests that the testimony of a child must come directly from the child and not through a police officer because the offender must be given the right to confront his accuser.

When questioned about the list of persons in a "position of authority over the victim", Atty. Anderson explained that since legislators keep adding to the list of people in position of authority, the list offered in the memo was an effort to tighten and simplify the list in statute.

Atty. Kravitz cautioned against using such a list as a baseline and urged basing the offense statutes on the realities of life.

Ms. Peters contended that practitioners need this kind of list.

In addressing another point in the memo, Atty. Anderson explained that "coerce" is used in the proposed draft to differentiate between "force" and "coercion". He noted that committing an act is different from threatening to commit it and the penalties should differ as well.

A lot of the pending bills are reactive legislation, remarked Judge Spanagel, with focuses on deterrence and retribution. The list of specifications seems to address the *Foster* issue, he noted, and offers a jury component. Rehabilitations addresses that fact that the offender's sex drive will always be there, so he recommends increasing post release control period. Remarking that the specifications would be a good response to SB 260, he recommended presenting this option to the legislators while also addressing the unintended consequence issue.

Common pleas judges do not favor specifications, said Judge Routson, since they shift control to prosecutors and require more jury time.

Atty. Kravitz agreed with the need to segregate the child victim sex offenses out, but expressed concern about creating new elements for sex offenses. He believes the current ones are sufficiently intelligible.

The intent, said Atty. Anderson, was to do to the sex offense statutes what SB2 did to burglary.

Dir. Diroll added that the intent was to offer some form of ranking, without dramatically undoing the elements.

Ms. Peters suggested a list that compares current and proposed law.

More Concerns Re SB 260. Returning to Atty. Gallagher's point, Phil Nunes of the Ohio Justice Alliance for Community Corrections asked if the discussion is moot, given the momentum behind the SB 260.

Ms. Mann noted that SB 17, regarding clergy accountability, has already passed. HB 95 and SB 260, both regarding sex offense victims under the age of 13, are regarded as a package.

It is necessary to better differentiate between the various sex offenses, as in our draft, so that the court can determine what penalties and which treatments are best and how SORN should apply, said Atty. Anderson.

It is hard to know, said Dir. Diroll, just how much effect our efforts will have on these bills, particularly since SB 260 is likely to become law in some form.

Ms. Bostdorff said that Criminal Justice Committing hearings will begin again May 3rd on some of these bills.

Atty. Bartlett remarked that, although many of these bills are on a fast track, issues could still be raised at the May hearings.

Mr. Nunes stressed serious concerns throughout the state about these bills. He argued that as these bills get tougher, in a backwards way, it hinders public safety because it makes transition back into the community impossible. Some communities are unwilling to allow sex offender treatment programs anywhere and the result could mean that the offender is more likely to recommit.

Mr. VanDine pointed out that DRC is extremely concerned about the sizable impact that SB 260 will have on prison population.

Ms. Peters liked that the staff draft would move child victims out of the basic rape statute. She added that the justice system must somehow allow for plea bargains when there are evidentiary issues.

These bills tend to have less sensitivity for the victim by forcing the victim to testify, Atty. Venters argued.

Echoing this sentiment, Ms. Peters added that the result could mean less reporting of crimes by family members.

Ms. Bartlett said that she was hearing issues during this discussion that she needs to take back to her caucus, including the potential danger to victims when sex offender penalties exceed murder penalties.

Mr. VanDine believes that some of these bills will pass regardless of intervention by the Commission. The Commission may be the best source down the road, however, at offering some workable structure for these changes and laying a foundation for any further legislative work.

DRC legislative liaison Scott Neely reported that the Department has met with legislators regarding the impact of these bills on the prison population. He noted that the 25 to life requirement for rapists of victims under the age of 13 in SB 260 could result in a need for 8,000 to 9,000 beds, which requires an additional $150 million, or possibly an additional 4 large prisons.

Ms. Bostdorff remarked that Rep. Latta and members of the House Republican caucus will be meeting with Speaker Husted soon to discuss the bills. They are aware, she noted, of the Commission's concerns.

Prosecutor Dave Warren reported that the Ohio Prosecuting Attorneys' Association has taken no position on the bills, but wants to address some of the topics covered by the measures.

Atty. Kravitz favors ignoring the current bills, separating out the child victim offenses, and working on those statutes.

Atty. Venters felt it is imperative to gain the additional voices of the OPAA and the judges' associations to back up the Commission's concerns about the bills.

Dir. Diroll assured him that some of that is already occurring.

Atty. Kravitz suggested beginning a draft of a letter expressing various concerns to the General Assembly.

Dir. Diroll acknowledged the broad sweep and dramatic changes proposed by some of the bills. He cautioned against cheapening the legitimate sentiment legislators have expressed about the victims of these crimes and the other constituents that are concerned about these offenses. He noted that mandatory sentencing has an understandable appeal to people without legal expertise.

Based on the Commission's discussions, Ms. Peters summarized issues that could be addressed in the letter: penalties for murder versus rape; potential decrease in the reporting of crimes; reduction in plea bargaining; loss of witnesses; fiscal impact; increase in trials; and more victim trauma.

Atty. Venters noted that more details will be needed to explain these concerns rather than merely listing them as bullet points.

Judge Routson and Atty. Kravitz reiterated that the impact of *Crawford v. Washington* must be taken into consideration regarding testimony by child victims and the additional trauma that it will cause.

Mr. VanDine noted that 97% of the prison population has entered prison under plea bargains. Ms. Peters remarked, the higher the stakes, the more likely the case will go to trial.

Pros. Warren concurred that SB 260 will mean more trials and more acquittals.

Mr. VanDine claimed that OPAA Executive Director John Murphy is telling people that the OPAA is against SB 260, but that was when the bill also covered gross sexual imposition penalties.

Atty. Venters stressed that the Commission will need the backing of victims on the potential consequences of these bills.

There is an assumption, said Ms. Kitchen, that young victims cannot handle the trauma of testifying, but that is not always the case. She agrees that victims should not be further traumatized, yet they need to

be warned that this bill could result in sex offenders getting off if the victim refuses to testify.

Ms. Bostdorff reported that several people have spoken up at hearings on the various sex offender bills and made note that their concerns echo those of the Commission. She agrees that a letter voicing those specific concerns to the legislature would be a good idea.

Upon reaching broad accord, Dir. Diroll agreed to draft a letter to the legislature outlining the Commission's concerns.

Judge Spanagel offered to get word about the letter to the Criminal Practice and Procedure Committee of the Municipal Judges' Conference, which will be meeting soon.

FOSTER DECISION

After lunch, the Commission's discussion turned to the Ohio Supreme Court's decision on *Ohio v. Foster*.

Representing the State Public Defender's Office, Bob Lane reported that the Ohio Supreme Court denied the motion to reconsider the *Foster* remedy. Some cases say that judicial determination violates the *ex post facto* principles through the due process clause, but since the Court denied the motions, these arguments will be made in federal courts. He noted that several cases were on the coattails of *Foster* but the Ohio Supreme Court has decided any of those. Most of them, he contended, should be reversals on the constitutionality issue. He expects that *ex post facto* arguments will be made.

Any case that goes back for resentencing, said Dir. Diroll, is taking a chance that the judge may have felt constrained on sentencing options during the initial sentencing hearing. Now that the constraint has been removed, there is the possibility of a higher sentence, which, in turn, discourages pursuing the resentencing.

Mr. Diroll reported that Rep. Latta had a bill drafted—that's not yet introduced—that addresses the literal holdings in *Foster* by striking the provisions severed by *Foster* to make the statute more accurate.

OTHER STATES' RESPONSES TO _BLAKELY_

The Commission staff, said Dir. Diroll, examined how other states have responded to the *U.S. v. Blakely* decision.

Atty. Anderson said the most significant changes have been made by Indiana and Tennessee. Those states changed their guidelines from presumptive to advisory sentencing ranges, with aggravated and mitigating factors to be considered in the judge's discretion.

Indiana specifically made its presumptive range advisory, listing aggravating and mitigating circumstances that a judge can use to determine the sentence. Each felony sentencing range includes an advisory range of fixed terms. Indiana gives the judge a fulcrum number in the middle of the range as the advisory sentence. The judge can then use aggravated and mitigating factors to move up or down from that

point. Tennessee does the same but without the preferred number in the center.

Kansas implemented a very different legislative fix, said Atty. Anderson, under which any upward departure must be determined by a jury. Six or seven other states soon followed suit.

Long before *Blakely*, Virginia was unable to get consensus on binding sentencing guidelines, so they adopted a voluntary pattern. The Commission may wish to examine Virginia's approach more closely, said Dir. Diroll.

Although many of the presumptions that were created to encourage sentencing consistency have been cancelled out by *Foster*, Mr. Diroll noted that other presumptions were kept. He asked if the stricken presumptions should be made advisory. In *Foster*, the Ohio Supreme Court referenced §2929.14 regarding prison ranges and guidance about the maximum and guidance above the minimum. This was struck out as was similar consecutive sentence language. The language providing appeals to defendants based on these provisions was also severed in the *Mathis* case. In another context, however, similar fact-finding was kept. This includes the in/out presumptions in §2929.13 of whether or not the offender should go to prison for a first and second degree felony and when F-4s and F-5s should go to prison. When deciding within the range, the Supreme Court ruled that judges have free range. So, at least when deciding on whether or not to send the offender to prison, there is still some guidance and presumptive language, Mr. Diroll added.

Except for using the magic word advisory, said Atty. Anderson, our system is a lot like Tennessee's. Rep. Latta's bill, with the presumptions stricken from §2929.14, but retaining factors that are balanced under §2929.12 and the guidance in §2929.13, gives judges similar discretion, he maintained.

A good faith measure, suggested Atty. Kravitz, would be to convey to the General Assembly that we trust judges to make good decisions and offer them more discretion.

Atty. Venters agrees with granting judges discretion but favors an advisory range with some guidance, especially for inexperienced judges. He also favors returning some teeth to the law for those who abuse that discretion.

Atty. Gallagher expressed concern about *Foste*r gutting the constraints of SB 2, since the judge no longer has to state reasons for sentencing beyond the maximum, it will now be much more difficult to appeal a case based on abuse of discretion.

Dir. Diroll said former Commission member, Prosecutor Greg White, used to say that an appeal based on abuse of discretion is not appeal at all.

Two recent cases magnify concerns about consistency, said Dir. Diroll. In one, a sex offender with 20 charges of rape was given probationary sanctions rather than a prison term. While the case had nothing to do with *Foster* directly, it illustrates a sentence below what is typical for the crimes. The second situation illustrates the opposite problem:

unfettered discretion leading to exceedingly harsh penalties. It involved the burglary of several homes where the victims were bound and forced to undress. While an argument can be made that the conduct ranked with the worse forms of burglary, a judge stacked consecutive sentences to 130 years (well beyond what a murderer might get). SB2 said such consecutive sentences were subject to appeal, but *Foster* removed that. He noted that many people still feel judges should give reasons for veering from the norm.

If those men had thought they would have gotten 130 years, Atty. Kravitz declared, they would have killed those people instead of just tying them up. He suggested reviving caps on consecutive sentences for offenses that are essentially the same misconduct. He insists that there has to be an incentive to commit the lesser crime.

It would help, said Atty. Anderson, if there was some way for a judge to show that the sentence he imposes is consistent with that given by other judges.

The difficulty, Judge Routson remarked, is in setting the parameter as to whether the level of consistency is locally, within a particular court or appellate district, or statewide.

Atty. Kravitz conveyed the need for a database as the starting point.

Most Sentencing Commission states have a database on sentencing patterns, said Dir. Diroll.

Dir. Diroll asked whether there should be a benchmark from which to work or guidance for unusual cases.

Atty. Kravitz again suggested offering some kind of statutory cap for multiple count indictments.

Mr. VanDine noted that DRC currently holds more than 500 people with sentences of 30 years or more.

Before SB 2, the law had caps on consecutive sentences and also a presumption of concurrence, said Dir. Diroll. Perhaps, he suggested, something in between is needed, without giving defendant’s free crimes.

To prevent the offender from getting free crimes, Atty. Kravitz suggested grouping provisions under the guidelines to create an incremental boost in the penalty for certain additional convictions. It might involve an additional 2 years if harm was caused, rather than allowing the judge to stack the maximum penalties of several sentences. Noting the *Rance* case, he argued that a mechanism is needed to cap consecutive sentences on multiple counts.

An alternative, suggested Atty. Anderson, might be to establish a maximum incremental level for a single course of conduct.

In lieu of a multiple counts statute, Atty. Kravitz suggested focusing on developing a definition similar to the one under §2953.31(A): “When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction.”

Some "same conduct" situations might need to be handled differently, said Dir. Diroll.

Reverting back to an earlier question, Ms. Bostdorff asked if Rep. Latta's bill should just address the literal *Foster* decision, or should they wait to address these other issues as well.

As good civics, the statutes should be amended to reflect what the Supreme Court severed, said Dir. Diroll. Anything further can be added when the Commission and others reach consensus, he added.

Atty. Kravitz agreed that it is a good bill and should not be delayed.

Atty. Gallagher remarked that he would like to see the Commission revisit the issue of intervention in lieu of conviction. His particular concern involves a case where a person has been refused intervention in lieu because she acquired her drugs through her employment as a nurse, which violated a position of trust, even tough she acquired the drugs for personal use and no one else was involved. Atty. Gallagher feels that this is exactly the type of person for whom the treatment in lieu option was created, so it might be necessary to fix the statute.

Dir. Diroll responded that he had anticipated that the problem might be resolved with the DRC Omnibus package because other changes to the intervention in lieu statute are already included in it.

FUTURE MEETINGS

Future meetings of the Sentencing Commission are tentatively scheduled for May 18, June 15, and July 20.

The meeting adjourned at 2:12 p.m.