Minutes of the
CRIMINAL SENTENCING COMMISSION
And
CRIMINAL SENTENCING ADVISORY COMMITTEE

March 20, 2008

MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reginald Routson, Vice-Chair
Paula Brown, OSBA Delegate
Common Pleas Court Judge W. Jhan Corzine
Staff Lt. Shawn Davis, representing State Highway Patrol Superintendent Richard H. Collins
Juvenile Court Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Bob Lane, representing State Public Defender Timothy Young
Appellate Court Judge Colleen O'Toole
Municipal Court Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Corrections Director Terry Collins

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Lynn Grimshaw, Ohio Community Corrections Organization
Jim Lawrence, Ohio Halfway House Association
John Madigan, Senior Attorney, City of Toledo

STAFF PRESENT
David Diroll, Executive Director
Rebekah Meister, Extern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Sarah Andrews, Rehabilitation and Correction
Monda DeWeese, SEPTA Correctional Facility
Jim Guy, Rehabilitation and Correction
Roman Jerger, legislative aide to Sen. Timothy Grendell
Stephanie Krider, legislative aide to Rep. John White
Heather Mann, legislative aide to House Speaker Jon Husted
Sean McCullough, legislative aide to Rep. John White
Phil Nunes, Ohio Justice Alliance for Community Corrections
Parvinder Singh, legislative aide to House Speaker Jon Husted
Paul Teasley, Hannah News

Chief Justice Thomas Moyer, Chair, called the March 20, 2008 meeting of the Ohio Criminal Sentencing Commission to order at 9:43 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reported that DRC's "Omnibus" Bill, H.B. 130, has had several hearings in the House Criminal Justice Committee. It addresses three issues that the Sentencing Commission has discussed during recent meeting: judicial release; violations of post release control; and intervention in lieu of conviction. Through the concept of post-release control, S.B. 2 had provided additional supervision upon release from prison for those offenders not released on parole, Dir. Diroll noted. However, the penalties for violation of that post release control were also mistakenly applied to parole violators. H.B. 130 would correct the error. The bill initially expanded eligibility for qualifying for intervention treatment in lieu of conviction. But the current version looks more like existing law.

Sarah Andrews, from the Department of Rehabilitation and Correction, reported that the department is optimistic about passage of the bill.

Noting that many practitioners offer their expertise to the Sentencing Commission, though not officially members of the Commission, Dir. Diroll reported that one such contributor recently passed away. Judge John Adkins of the Circleville Municipal Court played a very active role on the Traffic Subcommittee. Dir. Diroll said the state will miss the judge's insight and wit.

SENTENCING COMMISSION'S FUTURE

Noting that there was significant interest at the February meeting about the future role of the Sentencing Commission, Chief Justice Moyer opened the topic for further discussion.

Before making extensive plans, Dir. Diroll reminded the Commission that there was consensus to allow time to examine how things settle since the S.B. 2 guidance on sentencing has been removed as a result of the *Foster* case.

Appellate Court Judge Colleen O'Toole stressed a need to look at consistency in sentencing among the courts.

That was an original goal of the Commission's work on S.B. 2 (1996), said Dir. Diroll. He explained that consistency does not mean uniformity. The list of findings in S.B. 2 was intended to help gain more consistency statewide. Since *Foster* has found some of those findings to be unconstitutional, it opens the possibility for more inconsistency.

It presents a challenge from the Appellate Court's perspective, Judge O'Toole remarked, when strict or lenient sentencing depends on who the sentencing judge was.

Some people might think the court should go to a computer program and enter data on the factors of the case and let it spit out a standard penalty, said Common Pleas Court Judge Jhan Corzine, but it just doesn't work that way. Judges wouldn't even be needed.

Defense Attorney Bill Gallagher asked if the Commission still agree with the original philosophies of S.B. 2 and key elements that sold the package. Some of those highlights were that low level nonviolent offenders would be diverted from prison; consecutive sentences would be reserved for the most serious offenders; and people going to prison for the first time would be serving the minimum sentence. He suggested that it might be time to readdress the philosophy behind those provisions.

He noted that S.B. 2 changed the sentencing structure to definite sentences for the sake of truth-in-sentencing and so that the offender and victim could know when the offender would be released. Currently, however, sentences tend to be considerably longer.

He believes the Commission should reconsider caps on sentences, because without them some offenders are receiving sentences that are very excessive. He also believes that sentences should be considered in units of months rather than years, to provide judges with more sentencing options.

Pre-S.B. 2, said Dir. Diroll, if the judge wanted to assure that the offender served 4 years, he would sentence the offender to 6 to 25 years. The 6 years would be reduced to 4 years with "good time". S.B. 2 said if the judge wants the offender to serve 4 years he should say 4 years and it should mean 4 years.

Outcries about the potential for offenders to get away with "free crimes" prompted legislators to remove the cap on consecutive sentences. When the cap was removed, the sentencing ranges were narrowed and findings were needed to extend beyond the ranges. Some kind of mechanism may still be needed for extended sentences, especially since the appeal of consecutive terms was effectively neutered by *Foster*.

Judge O'Toole contended that consecutive sentences are being stacked up for charges generated from the same criminal action. She recommends expanding the sentencing range instead of stacking the sentences.

Dir. Diroll pointed out that there was a bias toward concurrent sentences before and after S.B. 2, but *Foster* removed it.

Much of this argument is fact specific, Judge Corzine argued. There is a difference between filing six charges for the same crime versus the sixth time the offender committed this particular crime. If it is the sixth time the offender has committed this specific crime, then it is time to put him away for awhile, which means that consecutive sentences are needed.

When we talk about the future of the Sentencing Commission, we're not just talking about the Commission itself, but the direction we want the future of sentencing to go in Ohio, said Eugene Gallo, Executive Director of the Eastern Ohio Correctional Center.

Representing the Ohio Justice Alliance for Community Corrections, Phil Nunes asked whether the future direction of the Commission is to work within subcommittees or take on tougher issues and help to shape sentencing practices and policies, as it has a rich history of doing. He recently testified before the legislators on the "3 Strikes" bill

and was surprised that the Commission wasn't even present to weigh in on the issue, particularly considering its potential to undo a lot of the Commission's work.

The discussion tends to boil down to two questions, said Chief Justice Moyer: 1) What impact should the Sentencing Commission have on the current sentencing structure; and 2) Is there a role for the Commission to recommend a different structure? If so, how receptive would the General Assembly be to that? If the Commission wants to recommend a different direction, it needs to make sure the General Assembly agrees with a need for that.

He explained that the Commission had a clear vision of what the legislators expected when it worked on the earlier projects of S.B. 2 and juvenile law.

Noting that the federal Sentencing Commission introduces legislation, Atty. Gallagher feels that the Ohio Commission should focus on identifying problems and act as an advocate for the current sentencing structure. To be consistent, he feels it is necessary to speak up and defend the changes that were made by S.B. 2.

Noting that the Judicial Conference develops judicial impact statements for criminal bills, municipal court Judge Spanagel asked if a similar statutory requirement could be developed to mandate sentencing impact statements from the Commission.

According to Chief Justice Moyer, the authority of the Commission, as established by the enabling statute, is broad, but he warned them to "be careful what you wish for". To be expected to weigh in on all of the massive number of criminal justice bills could be overwhelming.

And perhaps meaningless, added Dir. Diroll. He noted that the Legislative Service Commission provides a fiscal analysis of every bill, but it is seldom read.

Ten years ago, argued Mr. Lawrence, the legislature would not allow criminal bills to move forward until they received input from the Commission. He claimed that some legislators agree that kind of input is needed again.

The Commission is not set up to do that now, said Mr. Gallo.

Part of the question, said Monda DeWeese, director of the SEPTA Correctional Facility, is how much power the Commission wields when it testifies on the impact of legislation. If that impact has diminished then it is time to examine why.

The legislators of the 1990's were familiar with the Commission's expertise and wanted input, Judge Spanagel acknowledged. The newer legislators hardly know us and tend to be more focused on re-elections.

Acknowledging that things have changed drastically with term limits, Judge O'Toole emphasized the value of the Commission's broad membership and its neutral voice.

Mr. Nunes contended that the last time the Commission had an impact was on S.B. 260 in 2006, when it sent the legislators a list of potential consequences if the bill was passed as written. The Commission's impact changed that bill dramatically.

Representing the State Highway Patrol, Staff Lt. Shawn Davis remarked that sometimes the legislators move so fast that we're still arguing a point while the Governor is already signing the bill.

Because the legislators already put a hold on certain bills until they receive input from the Ohio Judicial Conference, Judge O'Toole argued that they should be doing the same for us regarding criminal bills.

Declaring that the legislators do not want to pass a lot of bills that will cause problems, Mr. Lawrence urged the Commission to approach legislative leadership to establish a stronger bond so that they will seek the Commission's expertise more often.

We don't always have to be *re*active, said Mr. Gallo, but should certainly be more *pro*active.

The Ohio Revised Code, said Steve VanDine of DRC, was rebuilt in 1953, 1973, and 1996. Other than the overhauls every 20 years, there was a major change made in 1983. Since S.B. 2 went into effect, effects have been felt from the *Foster* case and removal of the "bad time" element. In addition, there are now 5,000 people per year entering the prison system for crimes that either did not exist or did not result in prison time prior to 1996. Most result in at least a year of prison time. These include repeated OVIs and domestic violence.

He recently examined bill analyses from 1996 through 2006. There was a significant drop in the prison population from 1996 to 1999. Since 2000, however, the prison population has been building up again. With this in mind, there is an accumulation of concerns mounting up with a broad scope. For awhile, legislators were not interested in criminal justice issues because they were allowing time for S.B. 2 to have an effect. Now they are again interested in these issues. There was a level of urgency for revision in the early 1990's due to high crime rates, severe overcrowding, and the Lucasville riot which created a crisis. That level of urgency does not exist among the legislators right now. He contends that we are nearing another point where a major overhaul may be needed.

Chief Justice Moyer agreed that he needs to meet with the leadership of both the House and Senate about this.

Atty. Gallagher asked about the philosophy of the Sentencing Commission when they developed the parts of S.B. 2 that was removed by *Foster*.

Part of S.B. 2's "truth-in-sentencing" philosophy, Dir. Diroll responded, was that "honesty is the best policy". Rather than stating a sentence of 5 to 20 and allowing the offender to be release after 4 years, it is more honest for the judge to state a sentence of 4 years and mean 4 years. He noted that current budget problems might be pushing legislators to make some changes. He asked if the Commission should be proactive in that.

It is imperative to remember, said Chief Justice Moyer, that the General Assembly created the Commission and gave us our mission. Therefore, our mission was their mission.

Because of that focus, Dir. Diroll added, when Commission members testified on S.B. 2, they were able to focus on the concerns of the legislators that created the Commission.

Mr. VanDine added that every major interest within the criminal justice system had something they wanted the Commission to address or consider.

Mr. Nunes suggested that the Commission should consider meeting with legislative leadership once a year to discuss its justice and sentencing concerns. Taking a preventative approach as well as a proactive approach might work best.

It might help to find out the legislators' perception of this body now as opposed to when they had given us a specific mission and focus, said Atty. Jim Guy. The current legislators need to recognize the expertise of the Commission.

Mr. Lawrence declared that the legislators don't know much about us and our capabilities as a group since they have little or no history with us. It is time to get reacquainted.

CODE SIMPLIFICATION – Draft #6

After making the changes recommended at the last meeting, Dir. Diroll remarked that the Commission's latest draft for simplifying the Revised Code appears to be almost finished.

Some of the changes included adjustments to definitions, an attempt to clear up *Foster* confusion, and clarifying the prison term language regarding 4th and 5th degree felony OVIs.

The list of felonies that carry mandatory prison terms, said Dir. Diroll, was moved from current §2929.13(F) to §2929.14(B).

Gross Sexual Imposition. Under §2929.14(B)(7)(a)&(b),gross sexual imposition becomes mandatory under certain circumstances. One instance would be if the victim is under 13 and "the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation". Mr. Diroll feels this raises a substantive issue: should this "more guilty" corroboration be kept in the sentencing statute?

According to Judge Corzine, there is a precedent for something like that in the sexual imposition misdemeanor statute. He personally believes that, the way it is currently written, it impinges on the constitutional right to trial by jury. If evidence other than the testimony of the victim is admitted in the case, corroborating the evidence, it can only come in through a trial. A person who pleads the offense never has evidence involved that would fit this description, so the defendant could never be subject to a mandatory sentence. A defendant who exercises his right to a trial by jury, which would allow the admission of such evidence, runs the risk of being subject to a mandatory sentence. He recommended getting rid of it.

Bob Lane, representing the State Public Defender, said that it needs to remain since we are merely trying reduce redundancies to shorten the Criminal Code, not make any serious or substantive changes.

Common pleas Judge Reggie Routson recommended including a portion in the draft that lists issues that might involve substantive changes.

Heather Mann, from Speaker Husted's office, agreed.

Judge Corzine eventually conceded to leave the statute alone.

The Commission reached a consensus to leave the language in the statute.

Listing Mandatories. Atty. Guy declared that it is important for DRC to have clarification regarding mandatory sentences. When a person is admitted to prison, DRC to know whether any portion of the offender's sentence is mandatory so that determinations can be made about the application of earned credit. The entry rarely includes information about whether evidence other than the testimony of the victim was admitted, if the victim was a peace officer, or if there was extreme harm or any of the other intangibles that go into a mandatory sentence. He insisted that a notation is needed in the sentencing entry as to whether the sentence is mandatory. He noted that, through H.B. 130, DRC hopes to ask courts to include that information in the sentencing entry.

Sometimes a potential sentence is not mandatory, said Judge Routson, but then a plea is offered that might make it mandatory.

Atty. Lane agreed that the sentencing entry should reflect any mandatory status of a sentence.

"Entered on the Journal". Dir. Diroll struck the language "entered on the journal" in §2929.19(B)(2)(c) regarding notification to the offender about mandatory post release control supervision. He believes the language is repetitive, but asked if it should be retained.

A journalization entry may imply a duty that must be carried out by court staff, said Judge Corzine.

Judge Spanagel remarked that there is a difference between a journal and a judgment entry. The judgment entry, he insisted, is the written document.

Under criminal law Rule 32, said Atty. Lane, you don't have a conviction until there is a signed and journalized sentence entry.

The Rule says that the judge shall sign the judgment and the clerk shall enter it on the journal, said Judge Corzine, so the judgment is the written document.

The language "entered on the journal" is redundant, said Atty. Lane, if you are clear about what you mean by judgment conviction.

Judge Corzine reiterated that the entry is not effective until the clerk journalizes it. He argued that 32(C) says it is effective only when it is journalized.

Ultimately, Dir. Diroll said the point was a minor one and it might be best to leave the language in the statute.

Judge O'Toole agreed with the need to make a wish list on possible substantive changes.

Definitions. Atty. Guy turned attention to the definition section, §2901.01, noting that under the definition of "mandatory prison term" it states that "the court shall not reduce the term pursuant to …". He pointed out that the court does not reduce the term – DRC does. Therefore the draft should say "the term shall be reduced".

Offering further correction, Judge Spanagel declared that it should say "term shall not be reduced pursuant to …."

Concurrent and Consecutive Sentences. Judge Routson expressed concern about §2929.41(D) regarding sentences imposed consecutive to another jurisdiction's prison term. He remarked that it implies that the consecutive sentence could be imposed on future sentences since "imposed" means that it is already in effect. There has to be something to attach a consecutive sentence to, he declared.

Judge Corzine suggested footnoting it.

Dir. Diroll explained that, in division (A), the adjustments reflect the spirit of *Foster* and covers both misdemeanor and felony sentences.

He asked for opinions on whether the last paragraph of "(E) Certain Driving-Related Optional Consecutives" was even necessary since it is typically addressed to misdemeanors.

It is redundant, declared Judge Corzine, because (A) says you can sentence consecutively on *any* misdemeanor or felony sentence. He moved to strike all of (E). Judge Spanagel seconded that motion.

Dir. Diroll suggested retaining the last paragraph just in case there is a question of which term should be served first.

Judge Corzine conceded that the last paragraph should stay.

Judge Spanagel argued that the first paragraph of (E) might need to remain since it explains which type of OVI would be served in jail and which type would be served in prison.

This isn't written just for one judge, argued Judge Routson. The offender might be getting sentenced in more than one court. He contended the last sentence of the first paragraph should be retained.

By acclamation, the Commission agreed to accept Judge Corzine's amended motion, seconded by Judge Spanagel:

> **To propose deleting all except the last sentence of §2929.41(E) regarding certain driving-related optional consecutive sentences.**

Judge Corzine referred to *State* v. *Barnhouse* where a judge imposed consecutive jail terms for violations of community control sanctions that were being served for various felonies. The defendant ended up with 18 months in prison. The Supreme Court ruled that community control sanctions could be served concurrently with each other. He would just as soon leave it all concurrent.

Dir. Diroll agreed to look at the *Barnhouse* case.

Sentence Appeals. Judge Routson asked about Judge O'Toole's concerns regarding §2953.08.

Judge O'Toole remarked that *Foster* struck guidance on minimum, maximum, and consecutive sentences but left the appeal on (2) but removed the findings. As a result, it leaves no substance on which the defendant can base an appeal.

In the spirit of *Foster*, said Dir. Diroll, the draft leaves the appeal of right in place but removes the findings so that no findings would be on record. He noted that (G) gives the appellate court authority to remand the case for resentencing.

Judge O'Toole contended that the appellate court still needs to refer to something on the record to find consistency.

Judge Corzine asked how one jurisdiction can be expected to know how another jurisdiction is sentencing.

Motion on Draft 6. Chief Justice Moyer asked for a final consensus on the latest draft on Streamlining the Sentencing Code.

The Commission unanimously approved Judge Corzine's motion, seconded by Judge Spanagel:

> **To adopt and send to the General Assembly the final draft of the Commission's "Streamlining the Sentencing Code", pending the final corrections to be made, as discussed.**

Judge Corzine commended Dir. Diroll for the work on the simplification effort.

Dir. Diroll said that he would next like to take the simplification approach into the misdemeanor sentencing statutes, §§2929.21-2929.28.

Judge O'Toole wishes the legislature would send drafts of bills to the Sentencing Commission ahead of time so that we could get input a little quicker.

FUTURE MEETINGS

Future meetings of the Sentencing Commission have been tentatively scheduled for April 24, May 22, June 19, and July 17.

The meeting adjourned at 12:30 p.m.