OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chairman

David J. Diroll
Executive Director

MINUTES
of the
OHIO CRIMINAL SESNTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
December 15, 2011

MEMBERS PRESENT
Victim Representative Chrystal Alexander
Paula Brown, OSBA Representative
Juvenile Judge Robert DeLamatre
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Municipal Judge Fritz Hany
Andre Imbrogno, representing Rehabilitation and Correction Director Gary Mohr
Bob Lane, representing State Public Defender Tim Young
Common Pleas Judge Thomas Marcelain
State Senator Larry Obhof
Jason Pappas, Fraternal Order of Police
State Representative Lynn Slaby
State Representative Roland Winburn

ADVISORY COMMITTEE MEMBERS PRESENT
Retired Common Pleas Judge Jhan Corzine
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Lynn Grimshaw, Ohio Community Corrections Organization
Joanna Saul, Correctional Institution Inspection Committee
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Erich Bittner, legislative aide to Sen. Larry Obhof
Monda DeWeese, SEPTA Correctional Facility
Irene Lyons, Dept. of Rehabilitation and Correction
Jay Macke, State Public Defender's Office
Christine Madriguera, Ohio Judicial Conference
Brian Martin, Dept. of Rehabilitation and Correction
Scott Neeley, Dept. of Rehabilitation and Correction
Phil Nunes, Ohio Justice Alliance for Community Corrections
Alan Ohman, legislative aide to Sen. Shirley Smith
Mark Schweikert, Director, Ohio Judicial Conference
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News Network
Lisa Valentine, Speaker Batchelder's Office
Lorraine Whoberry, S.T.A.C.I.E. Foundation

Marjorie Yano, LSC Fellow

The December 15, 2011 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was informally called to order at 9:45 a.m. by Executive Director David Diroll.

DIRECTOR'S REPORT

Dir. Diroll reported that Attorney Bob Lane has served for several years as liaison for State Public Defender Tim Young's Office, but will be retiring at the end of the month. He complimented Atty. Lane for his dispassionate and articulate approach. He welcomed attorney Jay Macke in his place. He also noted that Warren Mayor Michael O'Brien is retiring at the end of the month as well and complimented the mayor for taking an active interest in topics that go beyond the traditional municipal role. Both men will be missed.

JAIL TIME CREDIT

Dir. Diroll noted that the Ohio Judicial Conference raised concerns about the mechanics of the Commission's recommendations on jail time credit. The Commission's approved proposal would put the burden on defense counsel to assure that all information on jail time served is made available at the sentencing hearing. Part of the problem involves additional time served that is not discovered until after that hearing.

Retired Common Pleas Judge Jhan Corzine reported that the Judicial Conference favors the recommendation that the burden should be on the defense attorney to provide all data on jail time to be credited and make that information available at the sentencing hearing. If new information is discovered after the sentencing hearing, the Conference is not opposed to allowing a post-sentencing motion after the sentencing hearing. The problem, he said, is when the defendant has been serving time for multiple convictions, some consecutively and others concurrently. Some offenders attempt to get credit for time served for other offenses not related to the case at hand. For any post-sentencing motion, it will necessary for the defendant or his attorney to provide information on the period for the credit sought, the reason they are entitled to credit, and a list of other charges he was held on during that period. The more specific the information offered in a post sentencing motion, the easier it will be to sort things out and clarify matters for the judge.

Christine Madriguera, from the Judicial Conference, remarked that the main sticking point tends to be whether a special proceeding would actually solve the problem and whether this should be in the statute.

Mark Schweikert, Director of the Judicial Conference, acknowledged that judges agree that the practice of calculating credit has become lax in some courts, and is seen as an administrative matter. If there is disagreement in the amount of time to be credited, it needs to be discussed at sentencing, he contended. If a clear credible analysis later determines that an error was made, then a hearing to correct the error is justified. He declared that there should not, however, be unlimited appellate reviews allowed with no time limit, as has been originally proposed by the State Public Defender's office.

Atty. Macke argued that the problem involves jail time served which is being overlooked or completely denied to inmates. It is time that the inmates have already served locally and the goal is to make sure they get credit. The overall problem is enough to mandate the full-time use of one staff person in the Public Defender's Office to address the issue and compile statewide data on miscalculated or missing jail time credit. As a result, in the last calendar year, the state saved $94,372.46 in costs of housing inmates by working to have jail time credit properly applied.

He noted that at least nine appellate districts are barring jail time credit motions as *res judicata*. There is no intent by the Public Defender's Office to encourage frivolous motions. The reason, he contended, that the calculation cannot always be completed at the sentencing hearing is because some information may not be available in time if the defendant has served time in other jurisdictions that might be applicable for credit.

Common Pleas Judge Thomas Marcelain contended that if the information is not available in time, then the sentencing should be rescheduled.

Counsel to the Department of Rehabilitation and Correction, Andre Imbrogno, remarked that DRC does not have access to all the information needed to determine the credibility of an inmate's motion if jail time credit has been missed. So it needs to be resolved by the courts.

DRC can only apply credit that they have been given, said Atty. Macke, and sometimes it may arrive 6 months or more after sentencing.

According to Judge Corzine, his county sees more *pro se* motions. If an inmate wants credit after the sentencing hearing, then he needs to make sure the court has the following information: the period of time for which they want credit, why they are entitled to that credit, the charges involved, and any other charges for which they were being held.

Every jail time credit motion adjustment should not require another hearing, Atty. Macke contended. A "special proceeding" under the draft does not necessarily mean "hearing". It just allows it to be appealed if it qualifies for a meritorious appeal.

The two problems observed by Dir. Schweikert are the lax application of jail time credit and the determination by defense counsel that all of the necessary information is available at the sentencing hearing. He acknowledged that some judges claim it is *res judicata*, when later information arrives, and the court does not have authority to fix the problem. He agreed that if there is a miscalculation then the court needs authority to fix it. The key focus, however, should be on getting it done at sentencing.

Atty. Bob Lane declared that the State Public Defender's Office is putting the onus on criminal defense attorneys to get the job done at the sentencing hearing, on the record. DRC does not have responsibility to get the record corrected.

Unfortunately, not everything gets done correctly, Atty. Lane lamented, even with the best of intentions. Even if an appellate attorney claims the judge got it wrong, he needs a record that demonstrates that.

Dir. Schweikert agreed that the judge should be willing to let it be on the record. The only disagreement, he declared, is the request for a special proceeding.

Because resources are not available to provide counsel for every inmate that declares a miscalculation of their jail time credit, a *pro se* motion becomes the norm, Atty. Lane explained. It is not fair to declare that an inmate's motion is frivolous just because it's not filed by an attorney. Regardless, the burden is on the inmate to prove the validity of any post-conviction motion. To further complicate the situation, no one from the sheriff's office, hospital, probation officer, or any other source of confinement is officially required to provide documentation to an inmate verifying time served. This means that the inmate has legitimate time served that he must gather on his own, before filing a motion and defending his right to proper credit.

Public defender Kathleen Hamm argued that if information is not available to the defense attorney at the time of sentencing, then a legal window is needed to get it corrected later.

Representing the Ohio Chief Probation Officers' Association, Gary Yates remarked that, in his county, every *pro se* motion goes to a unit for another investigation of jail time. He admitted it is time consuming.

To be fair, said Atty. Macke, many counties are doing it correctly, but about half are not.

According to Dir. Schweikert, Criminal Rule 32 used to say that it needs to be done at sentencing, but it was repealed for other reasons.

Judge Marcelain agreed that jail time needs to be put on the record at the time of sentencing.

Those are the easy cases, said Atty. Hamm. The biggest problem involves the offenders who are in and out and moved around.

A lot of offenders want credit for time at a halfway house, said Judge Marcelain, which doesn't count. He contended that if their request for credit has merit then they get it. They just need to be sure to show the merits of their request.

Atty. Lane reiterated that part of the problem is when there is nothing on the record to reflect the error. He agreed that there is a lack of discipline to get the issue dealt with at sentencing but it is the defendant who has to pay the price.

The request, said Atty. Lane, is that, under §2929.19(B)(2)(c)(i)-(iii) the court should retain jurisdiction to address the issue. He noted that (B)(2), as listed in the proposal, is the original language.

Judge Marcelain pointed out that the middle paragraph of the proposed §2929.19(B)(2)(c)(ii) says the court shall "conduct a hearing if one is requested", which sounds like another hearing is required besides the sentencing hearing.

If there's a disagreement, said Atty. Lane, as to the number of days to be credited, it should be settled at the sentencing hearing. He is willing to clarify that better in that paragraph (ii).

It's like the challenges of addressing restitution in the municipal court, Judge Corzine remarked, when you don't yet know the total amount needed to cover someone's injuries at the time of sentencing.

Cautioning against leaving a door open to let appeals go on forever, Dir. Schweikert suggested the language "correct any error not previously raised at sentencing".

Defense Attorney Kurt Gotterdam referenced a case where everyone had the dates and information needed but someone calculated the math wrong and the defendant was shorted credit of 2 years time served.

Dir. Schweikert perceived the only disagreement to be the reference to a "special proceeding" in the last two sentences of proposed §2929.19(B)(2)(c)(iii), and defining it as in §2505.02(a)(2).

§2505.02, said Atty. Lane, refers to a final appealable order. The last sentence of §2929.19(B)(2)(c)(iii) distinguishes this from a typical post-conviction motion by eliminating the hard deadline. He said that it is in the inmate's best interest to get this matter settled as soon as possible, and not wait until a month or two before release.

Presentence investigations can help, said Mr. Yates, but PSIs are not always conducted and sometimes information regarding the amount of time served is wrong. There is also the problem of some offenders who try to get credit from time served on a different crime.

Atty. Lane noted that DRC supports the proposal as written. Acknowledging that there will probably never be unanimity on the issue, he asked if some type of form could simplify the process. The major issue, in his opinion, is that the amount of jail time credit must be appealable if the court gets it wrong at sentencing. He recommended voting to adopt or endorse the proposal as written.

Atty. Lane admitted that he was emotionally and professionally invested in this effort, but urged the Commission members to approve the proposal as rewritten so that inmates will no longer be cheated of credit for legitimate time served.

Atty. Hamm seconded the motion offered by Atty. Lane to approve proposed §2929.19(B)(2)(c)(i)-(iii).

Dir. Diroll announced that the motion carried by one vote. In the split vote, the defense bar and DRC favored the revised language and the judges, FOP, and legislators opposed.

H.B. 86 CLEANUP

Dir. Diroll reported that Supreme Court of Ohio Counsel JoEllen Cline has been chairing a group of representatives from a number of entities to consolidate a list of recommendations to clean up numerous issues that have arisen from the enactment of H.B. 86.

He presented a group of additional corrections being proposed by CorJus, the Ohio Prosecuting Attorney's Association, DRC, and the Ohio Judicial Conference. Also among those proposals are a list of cleanup issues raised by discussions among the Sentencing Commission, and a Judicial Conference proposal on the issue of concurrent supervision of people being supervised by more than one probation department.

He noted that probation officers are discussing how to implement H.B. 86's requirement that ORAS be used by both common pleas courts and municipal courts.

Dir. Diroll reported that he recently had a conference call with Sen. Bill Seitz regarding the perceived impact of H.B. 86 on county jails. The bill says that certain F-4 and F-5 offenders must be diverted to community sanctions rather than prison. Jails are one of the options available as a residential sanction, for felons. Rep. Seitz had assumed that only nonresidential sanctions would mostly be used. He felt it might be necessary to clarify that jails are not an available option for one year sentences to community sanctions.

Monda DeWeese, Executive Director of the SEPTA Correctional Facility, reported that new regulations are about to be implemented that will impact the eligibility of CBCFs to be used as residential sanctions for these offenders. That could apply further pressure to local jails.

Dir. Diroll noted that the Cline workgroup seeks unanimity. So, there are several issues that need to be addressed, but aren't included in the "agreed" package because there isn't unanimity on the solution. He began by recapping some of the items on the Commission's list.

Effective Date Issues. H.B. 86 clearly makes September 30, 2011 the effect date. As such, old law governs pre-H.B. 86 cases and new law governs post-H.B. 86 cases. One exception is allowed, however. The act allows the application of §1.58(B) to theft and drug crimes that were committed before the bill's effective date, but not sentenced until after that date. This would allow the benefit of a reduced penalty in some cases. A problem remains, however, because the act is silent on whether the changes necessitate modified *charges*. Some offenses that were originally charged as felonies might now qualify for a misdemeanor penalty. Dir. Diroll believes that, §1.58(B) applies to the *penalty* for the offense, but doesn't change the charge. He acknowledges that others reasonably disagree with his interpretation, so a resolution is needed.

There are also some questions about how H.B. 86 intends for guidance and sentencing ranges to be applied in light of §1.58(B), he added.

Drug Penalty Guidance. In an effort to make drug offenses more like non-drug offenses at the same felony levels, H.B. 86 removed the presumption in favor of prison at the F-4 trafficking and possession levels and replaced it with guidance that generally goes against imposing a prison term. Unfortunately, the bill inadvertently made the guidance for F-5s stricter than that for F-4s. There is unanimous agreement to get this corrected.

Limits on Prison for Certain F-4s and F-5s. In diverting F-4 and F-5 offenders to community control sanctions, the bill states that if the judge cannot locate an appropriate community sanction, the judge must

suspend the sentence and ask DRC to make a recommendation within 45 days. The judge is then bound to impose that recommendation. This raises an issue of separation of powers. No unanimous solution emerged.

The Problemmatic "*Foster* Fix". The Senate version of H.B. 86, said Dir. Diroll, may raise more *Foster* issues than it solves. The *Foster* case focused on the original provision that required judges to make post-conviction *findings*. The Senate version of H.B. 86 requires the court to impose a minimum sanction that does not impose an unnecessary burden on state or local government resources. By requiring a court to "determine" the adequacy of sanctions, said Dir. Diroll, it sounds very much like making a "finding", which created the *Foster* problem in the first place. He suggests that the General Assembly might want to reconsider the House-passed language which simply encourages the minimum term on an offender's first commitment to prison, without requiring "findings", "determinations", or special appellate review. Again, there isn't unanimity on how to fix this.

Earned Credit Notice. The bill requires judges, at the sentencing hearing, to notify the offender "regarding earned credits". The provision makes the task more complicated than necessary by referencing requirements laid out in multiple statutes. Many practitioners have agreed that it would be simpler to merely require the judge to inform the defendant, if eligible, that the sentence may be reduced by up to 8% for credits earned while in prison, but that the credits are not automatic. The group unanimously decided to remove the notice.

Concurrent Probation Supervision. The bill attempts to minimize duplicate supervision when an offender is subject to supervision by more than one probation department. The provisions offered by the bill, however, are rather complicated. The group is looking at the Judicial Conference's new proposal.

Photos Possessed by Sex Offenders. The bill creates a new M-1 offense for illegal possession by a sex offender of photos of a minor child. It does not, however, address the possession of photos from magazines or newspapers. The working group concluded that this statute be repealed or at least rethought.

Dir. Diroll summarized the recommendations offered by other groups.

Judicial Conference's H.B. 86 Cleanup Items

1) F-4/F-5 45-day Offender Placement Language – As noted, fundamental differences between DRC and judges prevent unanimous agreement.
2) Consecutive Sentence Appeals – Judges believe that the standard of review for these appeals should be reduced to abuse of discretion, which the Commission and Public Defender opposed.
3) Major Drug Offender – H.B. 86 repealed the surpenalty for the MDO specification but left the specification in the statute. Should it come out? The prosecutors see some value in keeping it.
4) Felony Penalties/Reduced Prison Terms – Sections §§2929.14(B)(3) and 2967.19 need to be reconciled.
5) Community Alternative Sentencing Center – Some cleanup is needed to clarify confinements of 30/60 days for DUS offenses.

6) Corrections Commissions - A technical correction is needed here to move the county auditor provision from the judicial advisory board to the corrections commission itself.
7) ,8), and 9) deal with juvenile offenses – These issues are being addressed by a separate group.

DRC's Cleanup Items

1) Clarify that the "supervised release" that follows a "risk reduction" prison sentence is post-release control – DRC recommends amending §5120.036 to provide that offenders released early pursuant to a risk reduction sentence are subject to post-release control for at least as long as the time that would have remained to be served on the sentence had the offender not been released early. According to Atty. Imbrogno, DRC has decided to handle this by rule.
2) Remove the requirement that offenders placed on post release control who received 60 or more days earned credit receive (get put on) GPS monitoring.
3) Expand probation improvement and incentive grants to municipal courts.
4) Certificates of achievement and employability – DRC would like to add a provision to the applicable statutes specifying that DRC will not be civilly liable for any claims arising out of the Department's issuance of, or refusal to issue, a certificate.
5) Contacting DRC for available community control sanctions for F-4 and F-5 offenders – There is major disagreement between DRC and the Judicial Conference on this issue. DRC would like to eliminate the requirement that the list of sanctions provided by DRC to the court total one year or more in duration. The Department prefers to consider the one year time frame as a combination of sanctions to equal one year.

Some additional items being recommended by DRC include the following:

1) Preparation of PSI's: Authority to use a private entity - This provision would address concerns about the use of a private entity to conduct presentence investigations for the courts and have access to LEADS.
2) Ohio Criminal Sentencing Commission jail time credit proposal – DRC supports the Sentencing Commission's proposal to require that courts include jail time credit in sentencing entries. It would also allow post-conviction motions in the event that the court fails to put the credit in the sentencing entry or enters an incorrect amount of credit.
3) Remove references to "medical release" in §2967.03.
4) Authorize the Division of Parole and Community Services to administer the transitional control program.
5) Full parole board hearings – This would allow more flexibility for full board hearings and substitutions.
6) Halfway house ancillary services – This would allow an increase in the percentage of funding, from 10% to 15%, used for contracts with nonresidential facilities for offenders under the APA's supervision.

Prosecuting Attorneys' Association Cleanup Items

1) Suggest adding Involuntary Manslaughter, Abduction, and Endangering Children to the list of F-3 crimes warranting extended prison terms due to severity.
2) Request clarification on how the effective date applies to certain offenses in light of the application of §1.58(B).
3) Suggest the allowance of an 11 year prison term for an F-1 offense by a major drug offender.
4) Suggest some mechanical corrections for the new 80% release statute.
5) Suggest clarification and rephrasing regarding the use of assessments in the language for Intervention in Lieu of Conviction.
6) Suggest cleanup of language in §2951.041(B)(4).
7) Suggest clearer definition of a person with intellectual disability.
8) Suggest clarification that an indictment need not contain notice of priors.
9) Address confusion regarding the provisions of §2951.022.

Dir. Diroll noted that the OPAA proposals included a couple of memos addressing other issues.

1) From the appellate division to Prosecutor Vigluicci, regarding prior offenses of violence within two years. The issue is whether it should apply only to felonies or also misdemeanors.
2) From Prosecutor Keller Blackburn regarding the application of F-4 and F-5 diversion cases when the offender has multiple convictions.

CORJUS Cleanup Proposals

1) F4-F5/Offender Placement Language – CORJUS agrees with the Judicial Conference suggestion to seek clarification that this is cumulative and can include CBCFs and Halfway Houses.
2) 45-Day Requirement – Agrees with concerns raised by the Judicial Conference and the Sentencing Commission regarding the requirement that courts are mandated to follow DRC's suggestion for community sanctions when the judge cannot find a local sanction that he deems appropriate.
3) Limits on Prison for Certain F-4s and F-5s – Agrees with the Sentencing Commission that clarification is needed over whether the 2-year rule applies only to misdemeanors or also to prior felonies.
4) Expand issuance of inmate identification cards to residents upon release from a CBCF as well as DRC.
5) In further discussion of any cleanup legislation, CORJUS supports providing the judge full discretion in sentencing felony offenders.

Dir. Diroll reported that JoEllen Cline hopes to finalize the "agreed" (i.e., unanimous) cleanup by January 23, 2012.

It would be helpful, said Rep. Lynn Slaby, to have a draft of proposed legislation where there is accord. For issues where further agreement is needed, it may be necessary to address those in committee.

STANDARDIZING THEFT STATUTES

After lunch Dir. Diroll turned the discussion to standardizing the theft statutes.

In 1996, S.B. 2 had attempted to standardize theft thresholds, but later bills changed the basic theft statute to create F-1 and F-2 level thefts and inserted lower thresholds when the victims are at least 65 or disabled. These bills did not uniformly apply the changes to all thefts and frauds. H.B. 86 sets the new felony threshold at $1,000 and increases F-4, F-3, F-2, and F-1 thresholds by 50%. Because of the other changes, however, a person must individually look at each theft, fraud, and offense before applying the new thresholds. The legislators have deferred to the Sentencing Commission the task of standardizing these statutes.

Some of the issues include:

- Certain crimes are felonies, irrespective of the amount involved. Typically, the new $1,000 threshold moves these offenses to F-4s. Usually the thresholds step up one degree across the board. Sometimes they don't or use different maximums.
- Some offenses follow the elderly/disabled table, but most don't.
- Some offenses use the elderly/disabled thresholds, irrespective of the age or disability of the victim.
- Most thefts and frauds do not carry penalties higher than F-3.

In short, contended Dir. Diroll, people could be charged with different level offenses for stealing the same value, depending on the theft or fraud charged.

Since some crimes are felonies, irrespective of the amount involved, Dir. Diroll asked if the penalty ranges should remain one step higher than for §2913.02 thefts. He also wondered if the maximums in each of these ranges should be standardized. He also asked if there should be an enhancement for offenses that have victims who are over 65 or disabled. Instead, it might be worth considering some other measure for enhancing penalties based on a victim's vulnerability. Another option would be to leave it to the discretion of the judge to assess the impact of the crime without an enhanced table. If an enhancement based on age or disability makes senses, the next question is whether it should apply to all thefts and frauds. He also asked whether there should be F-1 and F-2 level penalties for all thefts and frauds.

According to Judge Corzine, common pleas court judges have typically preferred to regard a penalty based on the offense, rather than the classification of the victim. He raised concern that if these are standardized, it might result in statutes with more specialized penalties for special groups of people. On the other hand, if the classification of elderly or disabled victims were to be removed, the political repercussions would likely be extensive. He feels that most of the statutes should be left alone.

Instead of ratcheting things up based on arbitrary determinations (age 65, etc.), Atty. Lane prefers to leave it to the judge's discretion.

A $1 million theft in cash, said Dir. Diroll, is an F-2 whereas a $1 million theft by using credit cards is an F-3.

Atty. Macke pointed out, however, that a person is never going to be able to steal $1 million from a credit card in one transaction. That

kind of theft is more likely to result in multiple charges and possibly consecutive sentences.

Atty. Hamm does not favor having the Sentencing Commission pursue this at this time, because it would raise penalties, running contra to the spirit of H.B. 86.

By acclamation, the Commission tabled the issue.

OTHER ISSUES

Judge Corzine raised concern about a case where an individual with a tiny amount of marijuana on the tongue, which is a minor misdemeanor for possession, ended up with an F-3 conviction. He is noticing that many cases tend to get jacked up to the F-3 level under the guise of tampering with evidence. He feels that prosecutors need to exercise more discretion, but also feels that the offenses of tampering with evidence should not carry a penalty higher than the offense being investigated. He would like the Sentencing Commission to take a look at it. He even offered to draft something to that effect.

FUTURE SESNTENCING COMMISSION MEETINGS

Future Sentencing Commission meetings have been tentatively scheduled in 2012 for January 19, February 16, March 15, April 12, May 17, and June 21.

The meeting adjourned at 1:40 p.m.