

**Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
December 20, 2007**

SENTENCING COMMISSION MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reginald Routson, Vice-Chair
Major John Born, representing State Highway Patrol
Superintendent Richard Collins
Paula Brown, OSBA Delegate
Common Pleas Court Judge W. Jhan Corzine
Defense Attorney Bill Gallagher
Bob Lane, representing State Public Defender David Bodiker
Common Pleas Court Judge Andrew Nastoff
Appellate Court Judge Colleen O'Toole
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins
Prosecuting Attorney David Warren
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT

Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Lynn Grimshaw, OCCO
John Madigan, Senior Attorney, City of Toledo

STAFF PRESENT

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, Extern

GUESTS PRESENT

Sarah Andrews, Department of Rehabilitation and Correction
Kaitie Eberhard, legislative aide to Speaker Jon Husted
Jim Gorman, Department of Alcohol and Drug Addiction Services
Lusanne Green, OJACC
Jim Guy, Department of Rehabilitation and Correction
Roman Jerger, legislative aide to Senator Timothy Grendell
Heather Mann, legislative aide to Speaker Jon Husted
Erin Rosen, Ohio Attorney General's Office
Parvinder Singh, legislative to Speaker Jon Husted
Bob Swisher, Office of Criminal Justice Services
Lisa Valentine, legislative aide to Representative Bob Latta

Chief Justice Thomas Moyer, Chair, called the December 20, 2007 meeting of the Ohio Criminal Sentencing Commission to order at 9:45 a.m. He welcomed Attorney Paula Brown as the newest member of the Commission.

DIRECTOR'S REPORT

Congressman Latta. Executive Director David Diroll reported that Representative Bob Latta's recent election to Congress forces his resignation from the Commission. He noted that Rep. Latta had been diligent as a legislator and willing to sponsor the Commission's sentencing reform proposals. He will be missed, said Dir. Diroll.

Drug Cards. Dir. Diroll announced that an update of quick reference drug cards was completed and laminated cards are being mailed to common pleas court judges, police chiefs, sheriffs, county prosecutors, public defenders, and bar associations. Some additional copies are available.

Crack v. Powder Cocaine. A report was recently released by the Justice Policy Institute regarding drug offenses, said Dir. Diroll. Jim Gorman of DADAS prepared a summary of the report. The report noted the disparity between penalties for crack and powder cocaine.

Under federal guidelines, noted Dir. Diroll, the amount of powder cocaine it takes to reach a certain felony level is 100 times greater than the amount of crack cocaine required to reach the same level. In Ohio, the disparity isn't as great, he added. At the lowest level, there is no distinction between crack and powder. At the highest (F-1) level, it takes about 10 times as much powder cocaine to reach the equivalent penalties for base ("crack") cocaine.

When the Ohio Criminal Sentencing Commission worked on the drug portion of S.B. 2, legislators and individual citizens from inner city areas asked us to get tougher on crack offenders because of its intensity and impact on inner city neighborhoods. At that time, law enforcement officers reported that they were receiving more calls regarding crack cocaine than for powder cocaine offenses, Dir. Diroll recapped.

While both are forms of the same substance, cocaine cooked to its base form is said to get into the blood system quicker causing a quicker "high" and a quicker low, noted Dir. Diroll. Combine that with its relatively cheap cost and crack cocaine has more addictive potential.

Sen. Ray Miller has introduced a bill intended to end Ohio's statutory disparity between crack and powder cocaine by raising the powder penalties to crack levels. Contrary to popular belief, noted Dir. Diroll, the bill is unlikely to make the prison population less African-American. In fact, despite stereotypes, the bill would bring more young black males into prison because the majority of people entering Ohio's prison system for powder cocaine offenses are African American.

Following on the heels of the *Apprendi*, *Blakely*, *Booker*, and *Foster* cases, the U.S. Supreme Court and Ohio Supreme Court have said that the federal and state sentencing guidelines are advisory only. The U.S. Supreme Court's recent *Kimbrough* case gave federal judges the authority to go below the guidelines in crack cases. Dir. Diroll opined that the

case may have no effect in Ohio, however, since there is no "going below" the statutory range in the Revised Code.

Mr. Gorman remarked that the ratio of African Americans to Caucasians for crack cocaine is 10 to 1 in prisons across the country. Among probation officers, he noted, a drug arrest for blacks is seen as personal failure but for Caucasians, external factors are usually blamed. That is an issue that he feels should be given closer scrutiny.

The drug of choice plays into this factor as well, said Dir. Diroll. The drug of choice is often marijuana outside the central cities, and cocaine in the inner city. Cocaine possession is a felony. Marijuana possession can be a misdemeanor.

Defense attorney Bill Gallagher argued that the premises under which crack and powder cocaine were treated differently have been proven wrong. That, he contended, is why the federal court has back-pedaled to correct the disparity.

Dir. Diroll pointed out that the ratio of African American drug offenders to white drug offenders follows the same ratio of arrest data. DRC estimates that increasing powder cocaine penalties could raise the stock prison population by about 1,000.

Representing the State Public Defender's Office, Bob Lane asserted that 1,000 more people entering the prison system usually means people going through quickly and not receiving any treatment. It increases the number of people with a prison record but no treatment

Common Pleas Court Judge Jhan Corzine opposes allowing an offender to get through the prison system with no exposure to treatment. Most are not sent to prison solely for drug abuse. He contended that there is almost always another offense involved.

The most serious problem, said Mr. Gorman, is that it is an underfunded system. He noted that treatment usually takes 6 months.

Judge Corzine prefers to place these offenders in a treatment facility rather than prison, but a lack of funding limits the space available.

Appellate Court Judge Colleen O'Toole suggested transforming unused prisons into treatment centers.

Director Eugene Gallo, of the Eastern Ohio Correction Center, declared that if the public is told that the current system of sending a drug offender to prison for a short term is less effective than treatment, then they tend to side with the need to get the offender into a treatment program rather than wasting time in prison. They recognize that their communities are not safer if the drug offender does not receive the treatment needed.

It is imperative, insisted Judge Corzine, to remember that most drug offenders are sentenced to prison for more than simply a drug offense. They generally have additional charges that have placed them there. When the public is aware of the additional charges, they tend to agree that the offender should be serving time in prison and not just a local

treatment program. This emphasizes the importance of combining prison time with treatment programs.

We could talk for hours about drug prevention programs, said Atty. Lynn Grimshaw, but legislators will do what is politically advantageous.

It is necessary to go back and fix what *Foster* ruined, Atty. Gallagher contended. He declared that since the ruling on *Foster*, judges have ratcheted up sentences for low level F-4 and F-5 offenses, causing even more people to serve time in prison who should instead be sent directly to treatment programs.

Judge O'Toole declared that, without "good time" the prison population is going to keep rising.

Representing the Office of Criminal Justice Services, Bob Swisher, reported that a study conducted by the University of Cincinnati revealed that drug courts in Ohio save \$4.73 for every dollar spent. He suggested inviting Ed Latessa to speak about the study.

According to the Justice Policy Institute Report, Cuyahoga County has the highest prison admission rate for drug offenses. This, Dir. Diroll claimed, is partly because there is no community-based correctional facility in Cuyahoga County.

Dir. Gallo remarked that the main thing an offender learns in a CBCF is how to make better decisions. He suggested that it might benefit Commission members to see a CBCF in action.

CODE SIMPLIFICATION

Dir. Diroll reported that he talked recently with Speaker Husted's Office about this project.

Because there is a constant temptation to discuss policy, Judge Nastoff stressed a desire to engage in a policy-neutral streamlining.

Sentencing Factors. Some judges are confused about making findings on the §2929.12 seriousness and recidivism factors after the Ohio Supreme Court's ruling in *Foster*. Dir. Diroll declared that *Foster* didn't really change this statute. The draft reflects that.

Besides simplifying the language, the only noteworthy change proposed in the draft concerns the ninth seriousness factor. It involves committing a domestic assault in the presence of a child. The subcommittee suggested applying this across the board to all offenses, not just those in domestic settings.

Judge O'Toole doubts that a judge would use this because most judges don't want to make a finding.

Heather Mann, legislative aide to House Speaker Jon Husted, remarked that it would be easier to sell the Commission's recommendations to the legislators if you clarify that it only changes the wording but does not change the substance of the law. She suggested that the recommendations could be best sold to legislators as a clean-up bill.

Many sentencing judges would probably prefer to have this list in the sentencing statutes rather than the statute of the underlying offense, said Judge Nastoff, but he prefers the opposite so that a prosecutor or judge can find earlier in the process if there is anything unique or unusual about that crime that should be taken into consideration. He believes that these factors should apply to any crime to which a sentence is being applied.

Unanimously, the Commission approved the motion by Judge Nastoff, seconded by Judge Corzine:

To retain the list of aggravating factors based on the presence of a child, but to include it in the statutes of the underlying offenses, rather than in §2929.12.

Guidance on Prison v Community Control. §2929.13 guides the "in-out" decision and lists the situations carrying mandatory prison terms. It is complicated, Dir. Diroll noted, by language that is specific to impaired driving offenses.

The Simplification Committee suggests consolidating and moving the OVI exceptions into one statute. OVI presents a unique challenge because the statutes tend to get amended every year, Dir. Diroll added.

Mandatory Prison Terms. §2929.13(F) lists felony activities that carry mandatory prison terms. Dir. Diroll acknowledged that the sentencing code does not have to contain such a list, but it is useful for practitioners to gather all mandatory terms in one place. He included in the language "... and any other offenses as provided by statute" in order to clue the reader that the General Assembly may have added others without amending this statute. The list was reordered to group similar offenses.

Atty. Lane remarked that if a statute is going to mandate a prison sentence, then it should be specific. He feared that the language "and any other offense" opens it up to a need to peruse the entire Revised Code for anything that might have been missed. If the mandatories are listed merely by offense, the judge will have to review the entire Revised Code, said Atty. Lane. He prefers to have the list in one place.

With Judge Corzine casting the only dissenting vote, the Commission approved a motion offered by Judge O'Toole, seconded by Atty. Lane:

To delete "...and any other offense as provided by statute" from the first sentence in the §2929.13(F) draft.

Current (F)(8), (9), (13) and (14) cover certain specifications but do not mention other specifications carrying mandatory prison terms. Since the list grows during each legislative session, Dir. Diroll suggested the following shorthand description: "Any mandatory prison term imposed for a conviction on a specification under Chapter 2941."

§2929.13 Miscellany. Division (H), regarding DNA/Sexual Predators, would be more appropriate in §2929.19, Dir. Diroll suggested.

Similarly, division (J) on SORN duties is covered by the sentencing hearing statute (§2929.19) already and need not be repeated here.

Dir. Diroll added that the work group suggested moving (L)'s authority to place sexual predators on global positioning monitoring to the general list of non-residential sanctions in §2929.17, thereby making it an option in all cases.

Basic Prison Terms. §2929.14 lays out the basic prison terms. Divisions (B) and (C) were severed by *Foster*. They cover the findings before imposing maximum and more-than-the-minimum terms.

Repeat Violent Offenders. Dir. Diroll said that questions have been raised about the status of the mandatory RVO statute (§2929.14(D)(2)(a)(iv) & (v)) after *Foster*. *Foster* kept the Repeat Violent Offender (RVO) classification, but it did not keep the RVO findings, he added.

Judge Corzine declared that the statute seems to require some unconstitutional findings. The judge can give reasons but cannot make any findings, said Judge Corzine.

Judge Nastoff questioned whether it was even the Commission's job to determine whether or not *Foster* even applies to this.

There's no non-policy answer to this, said Dir. Diroll.

Judge Nastoff recommended leaving it in, but Judge Corzine declared that it must be removed just like all of the other *Foster* sections. He moved to strike the language under §2929.14(B)(2)(iv) and (v) regarding findings with an explanation that it is to bring the statute within compliance of *Foster*.

Judge Nastoff pointed out that this involves an "interpretation" of *Foster*. It is not just a clean-up.

With Judge Nastoff casting the sole dissenting vote, the Commission approved the motion offered by Judge Corzine, seconded by Judge O'Toole:

To strike the language of §2929.14(B)(2)(iv) & (v).

However, the efficacy of the vote came into question as the Commission continued its discussion.

§2929.14(D)(2)(e) requires the court shall state "findings explaining the imposed [RVO] sentence." Because there are areas where the judge has to go into higher ranges, Dir. Diroll asked whether (e) should be struck.

Since no findings are required for (B)(2)(b), Judge Corzine questioned why a judge should explain the imposed sentence.

Judge Nastoff remarked that it creates a slippery slope.

We need a serious discussion about what *Foster* means, said Dir. Diroll.

Judge Nastoff moved to establish a committee or work group to focus on the implications of *Foster* and interpret how it applies to the sentencing guidelines of Ohio.

Judge Corzine and Judge O'Toole volunteered to serve on the committee.

Unanimously the Commission approved Judge Nastoff's motion, seconded by Atty. Lane:

To assign a work group to interpret the *Foster* decision and how it applies to the sentencing guidelines of Ohio.

Unanimously the Commission approved a subsequent motion by Judge Nastoff, seconded by Judge Corzine:

To reconsider the previous motion to strike the language of §2929.14(B)(2)(iv) & (v) until the *Foster* Work Group has determined how the *Foster* decision applies to Ohio's sentencing statutes.

The Commission agreed by acclamation that any changes regarding *Foster* should be remanded to the subcommittee.

Dir. Diroll remarked that since *Foster* has an impact on consecutive sentences under §2929.14(C) as well, then it should be reviewed by the Work Group.

New Felony Committed on PRC, etc. §2929.141 governs certain violations by persons being supervised after leaving prison, noted Dir. Diroll. The language originally was enacted by S.B. 2 as part of the post-release control (PRC)/parole chapter. It was moved here to make it more visible to sentencing judges, practitioners, and literate offenders, he added. Unfortunately, it was drafted too broadly to cover not only PRC violations but also parole violations. Dir. Diroll suggested narrowing the application to PRC, as originally intended.

DRC Research Director Steve VanDine noted that this would be a substantive change.

Dir. Diroll explained that, for new offenses the court can impose time for the new offense plus the remainder of the offender's post release control time or up to one year, whichever is greater.

According to Judge Nastoff, a lot of judges never knew they could do this. Now that they do know, they are hitting offenders hard with it.

Arguing that it has implications for those who take a plea, Atty. Gallagher remarked that it causes great confusion for a lot of offenders, particularly in trying to determine when they will be finished with their sentences.

Since this issue is already being discussed by legislators as part of DRC's "omnibus" bill, Judge Nastoff recommended waiting to see how it gets handled.

Aggravated Vehicular Homicide Surpenalties. According to Dir. Diroll, §2929.142 was added by H.B. 461 last session to cover certain aspects

of felony aggravated vehicular homicide sentencing. He recommended gathering all AVH sentencing oddities here.

Community Control Generally. §2929.15 lays out some basic rule for imposing non-prison sentences on felons. It should make clear that the offender cannot leave the state without permission—a general rule applicable to all community control. The Work Group recommends deleting the portion that warns the offender not to use drugs, since it is subsumed in the provision warning offenders not to commit new crimes.

Residential Sanctions. §2929.16 deals with sanctions other than prison. Division (A)(5) affords the option of using “alternative residential facilities.” To date, no such alternatives have been created, so Dir. Diroll asked if it should be kept. He noted that CBCFs and halfway houses are already covered.

Mr. Gorman asked if an offender would be allowed to pay for his own treatment at a facility.

That could still be done under §2929.17(D) for drug treatment, said Dir. Diroll.

Judge Nastoff suggested leaving it in place so that the option remains open.

If that language remains, said Mr. VanDine, DRC will likely make an attempt to find or develop more alternatives, particularly with the increase in prison crowding.

The Commission agreed by acclamation:

To retain language authorizing alternative residential facilities in §2929.16.

Contagion Testing. Dir. Diroll noted that §2929.16(E) on contagion testing is redundant to the prison and jail statutes. He suggests striking it as redundant and unnecessary to the sentencing statutes.

The Commission agreed by acclamation:

To recommend eliminating the redundant contagion testing language from §2929.16(E).

Non-Residential Sanctions. §2929.17 is cluttered, said Dir. Diroll. He proposed eliminating surplus language that impedes the logical flow of the provision. Other than general streamlining, he recommended making clear that GPS monitoring is available for all offenders.

Day Fines. §2929.18(A)(2) governs “day fines” which are never used for felons.

Judge Nastoff remarked that one judge imposes a fine based on an offender’s pay stub.

Judge Routson favored keeping it in case someone wants to try it. He added, however, that it needs to include a maximum.

Arson Cases. §2929.18(A)(5)(c) allows reimbursement for the costs of both investigation and prosecution in arson cases. Dir. Diroll asked if it belongs here. By acclamation the Commission chose:

To make this option clear in both the arson and damages statutes.

Mandatory Drug Fines. Judge Routson remarked that he always assumed that the maximum financial penalty for an individual crime could never be higher than the maximum for that entire category. He asked how a judge is to advise an offender on the maximum penalty in financial sanctions if they plea, particularly if forfeiture may be involved.

Dir. Diroll agreed to work on how to refine the language on that.

Financial Sanctions Enforcement. Judge O'Toole asked about a penalty for failure to pay restitution, especially if the offender is indigent.

Judge Corzine said that he usually treats it as contempt of court.

Civil collection could also be used, Dir. Diroll responded.

Mr. Gorman remarked that most probation officers won't let the offender off until he has fully paid a restitution order.

Pros. David Warren reminds the offender that an agreement had been made. If the offender does not pay restitution, then the deal is void.

Indigents can be charged with day fines, said Dir. Diroll, and since the fines are much smaller, the collection rates tend to be higher.

Sentencing Hearing. §2929.19 has been redrafted to streamline and reflect *Foster*, said Dir. Diroll.

Division (B)(2), concerning findings on minimum, maximum, and consecutive terms, was struck by *Foster*. A judge can give reasons for imposing consecutive sentences, but not findings, said Judge Corzine.

Under (B)(3)(d), the judge must warn the offender that up to half of his sentence can be imposed as an additional term for violating PRC. Judge Corzine contended that if the judge warns the offender at the plea hearing he should not have to at the sentencing hearing. He prefers to have to do so only once.

According to Atty. Jim Guy of DRC, the judge needs to state the warning at the sentencing hearing and include it in the sentencing entry.

General Matters. Dir. Diroll reported that if the Commission can get a proposal to the General Assembly soon, the Speaker's Office is ready to find someone to introduce it.

Judges O'Toole and Corzine, and Atty. Bob Lane agreed to serve on the work group that will examine how to streamline statutes affected by *Foster*. Dir. Diroll said he would invite John Murphy, Executive Director of the Prosecuting Attorneys Association of Ohio, to serve on the work group as well.

The discussion on the future tasks of the Sentencing Commission was tabled until a later date.

FUTURE MEETINGS

On January 17, 2008, the Simplification and *Foster* work groups will convene. The full Sentencing Commission is tentatively scheduled to meet February 21. Other tentative dates are March 20, April 24, May 22, June 19, and July 17, 2008.

The meeting adjourned at 2:40 p.m.