OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

Minutes
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE

September 20, 2012

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Public Defender Kathleen Hamm
Jay Macke, representing State Public Defender Tim Young
Common Pleas Judge Thomas Marcelain
Senator Larry Obhof
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE
Eugene Gallo, Director, Eastern Ohio Correctional Center
David Landefeld, Ohio Justice Alliance for Community Corrections
Lora Manon, Attorney, Bureau of Motor Vehicles
Gary Yates, Chief Probation Officers' Association

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

GUESTS PRESENT
Scott Anderson, Professor, Capital Law School
Sara Andrews, Rehabilitation and Correction
Monda DeWeese, Community Alternative Programs
Lusanne Green, Ohio Community Corrections Association
Irene Lyons, Rehabilitation and Correction
Christine Madriguera, Ohio Judicial Conference
Scott Neely, Rehabilitation and Correction
Marjorie Yano, LSC Fellow, Speaker Batchelder's Office

The September 20, 2012 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair, Municipal Judge David Gormley at 9:50 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reported that progress is being made with the Legislative Service Commission on the OVI draft for Sen. Larry Obhof.

He added that discussions continue with interest groups and Sen. Bill Seitz regarding the Sentencing Commission's proposals on *mens rea* issues. The current consensus is for making "knowingly" the default mental state.

We have been waiting on the Governor's Office of Boards and Commissions to make appointments to various vacant slots on the Commission. Dir. Diroll reported that he received word from the Governor's Office that the vacancies might be filled soon. He then welcomed David Landefeld as the replacement for Lynn Grimshaw on the Advisory Committee as the representative for the Ohio Justice Alliance for Community Corrections.

Dir. Diroll apologized for altering the agenda, noting that the issue of jail mentoring is not yet ripe for discussion.

Department of Rehabilitation and Correction (DRC) Deputy Director Sara Andrews reported that, while the Bureau of Adult Detention no longer exists but within the Division of Adult Parole and Community Service, the Department still conducts jail inspections. In addition, the Jail Advisory Board has been resurrected and has offered some suggested revisions to the jail standards. A task force from the Attorney General's Office has also offered input on suggested revisions.

INCORPORATING INDETERMINATE ELEMENTS INTO THE SENTENCING STATUTES

Dir. Diroll reported that the number of disturbances in prisons led Director of DRC, Gary Mohr, to convene a group to discuss revising the sentencing structure in a way that would create some tools to better manage the inmates. He has asked this group to take the current system and find a way to offer something other than flat sentences alone.

Dir. Diroll would like some feedback from our Sentencing Commission to take back to this group.

Christine Madriguera, representing the Ohio Judicial Conference, reported that she attended a meeting and held a conference call with several judges on this issue. They offered some amendments but did not come to a solid conclusion.

Both State Public Defender Tim Young and Summit County Prosecutor Sherri Bevan Walsh offered separate proposals that addressed the use of "bad time," noted Dir. Diroll. Pros. Walsh's staff researched how to reinstitute bad time constitutionally—and carefully. Defender Young insists that if bad time is reinstated, then it must be matched with the option to reduce sentences by motivating an individual to change.

Dir. Diroll explained that the bad time concept was originally built into S.B. 2 to help manage the prison population in a system of essentially flat sentences. It was struck down by the Ohio Supreme Court, which said that since the bad conduct had to be tantamount to a crime, then it gave too much power to the executive branch to undermine a decision by the judicial branch. The decision is confusing, opined Dir. Diroll, since the Court later gave the executive branch more power by upholding the post-release control aspects of S.B. 2.

The Summit County proposal suggests not calling the triggering misconduct an "offense," and suggests building on some kind of indeterminate sentencing that would allow disciplinary time to be included in the sentence up front. It also suggests expanding the sentencing ranges and touched on issues of procedural due process to avoid constitutional issues.

The DRC staff laid out four options:

- A presumptive release at 80%, presuming that the person would be released once 80% of their sentence has been served with good conduct. If the person exhibited bad conduct during their term, 100% of the term would have to be served.
- Bifurcated sentencing – This type of sentencing would include two prongs – confinement time and supervision time. The supervision time could be used as a discretionary post release control, supervised by the Executive Branch.
- Max term of 150% - DRC release could be made by the Parole Board after a minimum has been served.
- Serve X% of the sentence to be eligible for release which would be dependent on good behavior.

DRC staff also discussed the due process needed to avoid constitutional issues.

"Judges' Proposal" put forth by Auglaize County Common Pleas Judge Fred Pepple and retired Ross County Common Pleas Judge Jhan Corzine:

- Convert the existing terms at each level of felony into "minimum" terms. Add an indeterminate maximum. Keep the maximum tail shorter than under pre-S.B. 2 law. The indeterminate tail would allow time to keep the person in the prison system or under some form of supervision.
- Require that the minimum be served, subject to existing reductions for judicial release, risk reduction sentencing, *etc*.
- Any mandatory court imposed post release control would continue. Any optional post release control would be determined within 60 days of release.
- Institutional conduct and risk assessments would be used and no presumptions would be made about whether or not a person is to receive any additional time.

Dir. Diroll noted that Judge Pepple emphasized a need to reserve the decision regarding credits until late in the sentencing term, so that misconduct could be taken into account as well.

No determination was made in the judges' proposal as to who would make the final release decision within DRC.

Responding to a question about risk reduction sentences, Dep. Dir. Andrews said that the judge determines at the time of sentencing if the offender is to be considered for a risk reduction sentence, then DRC determines the programming that must be completed to qualify.

Dir. Diroll noted that most judges don't want the cases coming back to court for final release, other than for judicial releases, favoring an administrative decision regarding release once the minimum is served.

Based on the discussions over the past month, Dir. Diroll offered an "unofficial" proposal, which, like Judge Pepple's, does not involve resurrecting bad time.

Under his plan the judge would give a flat sentence from the appropriate range. Any offender with no mandatory time would have to serve at least 80% of the time imposed. Any reduction would not be automatic but earned through credits and successful risk reduction programming under H.B. 86. Reductions would not be vested and may be denied or reduced for misconduct. The judge would state these rules at the time of sentencing. To make the plan population neutral, current maximums within the sentence ranges would be nudged upward to move the 80% threshold higher for the worst criminals. Release decisions between 80% and 100% would be determined by DRC, based on the inmate's conduct. The judge would be allowed, at the time of sentencing, to state if he wants control over the sentence. If the judge chooses to have control, the case would return to court for a hearing. Otherwise, DRC could grant the release, giving notice to the court, prosecutor, and victim. To further discourage misconduct, any offense committed in prison that leads to a conviction in court, would carry a mandatory term that runs consecutively to any remaining prison term. This plan is an effort to standardize the various release mechanisms.

Representing the State Public Defender's Office, Jay Macke remarked that these proposals presume one offense, one crime. Most offenders, however, have multiple offenses, multiple convictions, multiple crimes and multiple sentences. He is not against indeterminate sentencing but he's not sure these proposals get us to where the state needs to go.

Defense Attorney Kort Gatterdam questioned what action or conduct would determine what causes an inmate to get the extra time and whether there is any review of that.

The previous bad time provision under S.B. 2 said that the conduct had to be tantamount to a crime, noted Dir. Diroll. Some serious rules infractions are not tantamount to a crime (*e.g.*, getting a tattoo). DRC is working on determining the manner of misconduct that would warrant the additional time under any new proposal.

Dep. Dir. Andrews noted that Dir. Mohr's focus at this time is on the most serious assaults.

DRC Legislative Liaison Scott Neely remarked that the earned credit rules establish that serious rule violations could cause a person to lose 100% of credit earned. Based on this, there are already some objective criteria that could be used. By those established standards, there are five serious rule violations identified that could cause an inmate to lose earned credit.

When asked about the prosecution of assaults on staff, Ms. Andrews responded that only 11% of those cases have been prosecuted.

If a judge sentences an offender to X years for a crime and the offender then gets it doubled for getting into a fight while in prison, but no court hearing is involved, Atty. Gatterdam argued that it causes the concept of truth-in-sentencing to be thrown out the window. If local prosecutors could be encouraged to prosecute more of those cases,

there would be no need to redo the sentencing guidelines to address this problem.

David Landefeld, representing the Ohio Justice Alliance for Community Corrections acknowledged that the purpose of S.B. 2 and determinate sentencing was to have truth-in-sentencing. In 2011, H.B. 86 basically got rid of the truth-in-sentencing concept. As a former prosecutor, he contended that it is easier to deal with victims and the entire system if there is some certainty as to what the sentence will be. Judges want to be able to say “here’s the certainty”. They want the defendant to understand that “Here is the sentence. You are expected to behave while serving this sentence. If you can’t behave, here are the consequences.”

In response to the argument for truth-in-sentencing, Public Defender Kathleen Hamm argued that, on the defense end, she didn’t see it. With the initiation of post-release control and sending an offender back for violation of community controls, she found that many offenders felt there was no end to their sentences. She feels the rhetoric of truth-in-sentencing is not lived up to.

Dir. Diroll suggested a finite minimum. The judge’s proposal, he feels, does not offer certainty because it does not mandate that a set percentage of the so-called “minimum” must be served.

Dep. Dir. Andrews remarked that most of the assaultive behavior tends to occur early on in the offender’s incarceration. This had spurred Judge Corzine to question whether DRC was concentrating on giving offenders an integration experience. Once that adjustment period is finished there usually are no more conduct reports. This suggests that more attention might be needed at reception regarding integration.

DRC is taking a closer look at the assaultive incident reports, she noted, to determine what the contributing factors are for these cases of assault not being prosecuted. This might involve the investigation itself, or funding, or even the perception that misdemeanor judges don’t want prisoners in their courtroom. Out of more than 300 cases prosecuted last year, only 11% resulted in convictions.

These cases could be kept out of misdemeanor court, said Judge Marcelain, if it was mandated that offenses of assault while in prison would be mandatorily served consecutively with the current terms.

If the offense was a misdemeanor level offense Atty. Gatterdam argued, they still deserve to be heard and to receive a misdemeanor level penalty.

Director of the Eastern Ohio Correctional Center, Eugene Gallo noted that if the judge states that the offender can do up to “X” amount of time, it gives the defendant an opportunity to determine his sentence. If he behaves, he’ll serve the minimum, but if he misbehaves he’ll serve the maximum. If he makes a serious effort to improve through educational and treatment programs then he can reduce his sentence. As long as the judge determines the minimum, said Mr. Gallo, he still sees it as truth-in-sentencing.

Atty. Macke declared that the judges’ proposal offers no carrot but a lot of stick.

The judges, said Ms. Madriguera, mostly want to make sure that any sentencing tail is kept relevant to the degree of the offense. They want to keep things as similar to the current law as possible, with the least amount of change.

Dep. Dir. Andrews acknowledged that there are horror stories of how the Parole Board, in the past, would use the long tails on sentences. That is why DRC intends to have several people involved in the decisions regarding release, not just the Parole Board.

Given that there is no certainty as to how risk reduction sentencing, good conduct, or earned credit will work, Defense Attorney Paula Brown asked how anyone can expect any kind of certainty or assurance at this point that extensions for misconduct won't be abused.

Sen. Seitz was generally comfortable with Judge Pepple's proposal, said Dir. Diroll. DRC also seemed comfortable with it. He admitted that he was the dissenting voice. Sometimes when a judge has sentenced an offender to a community sanction and that sanction gets violated, he will be tougher on the violation than he was on the original offense. That concerns him. He feels the range of the tails listed in the judges' proposal is too broad. He's concerned that DRC will punish prison misconduct more severely than the original crime with far less process due. He recommends an 80% to 100% range which offers a finite range to play with for both misconduct and good time. Conduct that is not prosecuted, he feels, should not get more time than conduct that is prosecuted. The most severe assaults should be prosecuted.

Atty. Gatterdam remarked that he would feel more comfortable if DRC had a mechanism to send it back to the sentencing judge.

Most judges won't want that, Dir. Diroll noted.

Representing the Correctional Institution Inspection Committee, Dir. Joanna Saul remarked that they get a lot of complaints from inmates regarding the limited amount of evidence needed for a rule infraction to be sent before the Rule Infractions Board. Since this whole discussion is focused on inmates exhibiting the worst behavior, she suggested setting an evidentiary standard and also looking at the inmate's RIB record.

Determining what misconduct gets an inmate in more trouble and more time and what process is due are key factors to be worked out, Dir. Diroll acknowledged.

Atty. Landefeld declared that repeat offenses will be treated more severely, but he doesn't see judges or DRC operating to the extreme that Dir. Diroll suggested.

Atty. Macke reminded everyone that misconduct is not the norm for most inmates. It is a small number of inmates for whom the sentencing tail mechanism is needed.

In his opinion, said Atty. Landefeld, the offender puts himself into prison, not the prosecutor.

If we start with the current prison population and just add tails, said Mr. VanDine, it will definitely increase the prison population.

Under the judges' proposal, said Dir. Diroll, any time added through the tail would be at DRC's discretion. Wardens want a mechanism to deal with someone who offends or assaults prison staff, and wouldn't mind adding a little time to that inmate's term.

Unless due process is added, Atty. Macke argued that he could not approve of the system proposed by the judges.

Since people seem to favor some form of indeterminate sentencing (which S.B. 2 had before bad time was removed), Dir. Diroll asked how it should be structured in terms of due process. Within the range of a minimum and maximum, what conduct, he asked, should take the offender from the minimum level to the maximum, while in prison? Rules infractions or what?

Those details need to be worked out, Mr. Neely responded.

Mr. VanDine noted that there are five major offenses tantamount to crimes that need to be addressed and cause the offender to get harsher punishment while in prison. These include:

1. Causing, or attempting to cause, the death of another.
2. Causing, or attempting, serious physical harm to another.
3. Causing, or attempting, physical harm to another with a weapon.
4. Non-consensual sexual conduct (penetration) with another, compelled in certain ways.
5. Non-consensual sexual contact (touching) with another, compelled in certain ways.

When asked how many people fall within those categories, he reported that, in 2011, there were 16 people who committed #1, 207 who committed #2, 137 committed #3, 11 committed #4 and 18 committed #5.

CIIC Director Saul asked if the decisions would be based on one incident or a pattern of conduct by the offender.

If the structure chosen is an indeterminate range, said Mr. VanDine, there will likely be more of a focus on patterns of conduct. But if the structure chosen is a bad time format, then the conduct is likely to be individual episodes.

The pattern of conduct is most relevant to the post-release control screening, Dep. Dir. Andrews added.

When asked if there is a particular rule to address assaults on staff, Mr. VanDine noted that Rule Violation #25 is "Intentionally grabbing, or touching a staff member or other person without the consent of such person in a way likely to harass, annoy or impede the movement of such person". There were 165 violations in 2011. He noted that if the conduct is against an inmate versus an offense against staff, the penalty is usually stiffer when it is conducted against staff.

Since the judges suggested delaying a decision on release time until much of the sentencing term has been served, Atty. Gatterdam asked for clarification on whether that really meant that if the act were

committed during the early portion of the sentencing term, the inmate would not find out the full consequences until after he has served the majority of the term, perhaps several years later.

That seems to be one of the proposals, Mr. VanDine admitted. He pointed out that according to studies on deterrence, that kind of delay when imposing a penalty lessens the effect. An immediate response seems to deter better, he added.

Prior to S.B. 2, Dir. Diroll explained, there was a hybrid of both determinate and indeterminate sentencing. The worst levels of offenders were generally given indeterminate sentences, while the lower level offenders received mostly flat sentences. The Parole Board made most release decisions for the indeterminates. If a similar system of indeterminacy were revived, he asked if the Parole Board should be reinstated as the gatekeeper.

The indeterminate sentences given before were too random, Atty. Gatterdam argued, causing many people to keep getting continuances that went on and on. Since data shows that there were only 390 convictions for these prison offenses in one year, it might be worth taking the cases back to the judge.

Atty. Macke feels the Parole Board process has transparency problems.

The legislature should put in a mechanism for transparency, Ms. Saul declared.

Under S.B. 2's bad time, noted Mr. VanDine, there was a 3-step process. There was a finding of guilt, then a recommendation to the warden to be considered for bad time. The warden had to sign off on that, and then it went to the Parole Board for a review process, expecting that it would be a standard review across all institutions.

Since the defense attorney needs to be aware of all possibilities in regards to the potential sentence, argued Atty. Hamm, any uncertainty puts the attorney in a bad situation when taking a plea. She insisted that if we go to indeterminate sentences then we'll need to be specific about what kind of infractions can result in what kind of consequences. If the Supreme Court finds that indeterminate sentences are acceptable, then she contended that there should be a cap available.

Dir. Diroll reminded her that a truth-in-sentencing type of proposal with the 80% to 100% range provides the tight range she seems to be looking for. It would also be constitutional.

Judge Marcelain believes that if the cases go to the Parole Board there will likely be better and more consistent outcomes than if they all go back to different courts.

If the case goes back to the judge, Atty. Gatterdam countered, the inmate will at least have an advocate.

In reference to the issue of transparency, Lusanne Green, representing the Ohio Community Corrections Association, asked why Parole Board hearings are closed.

Atty. Macke said that they are not public hearings and there is no advocate involved. Most are now conducted by teleconference. He likes Mr. VanDine's suggestion to use the post-release control hearing model because it would address due process concerns, but knows it would be expensive.

Dep. Dir. Andrews remarked that the Sentencing Structure Committee will be following up on the following suggestions:

- Analyzing Rules Infraction Board data and determining when offenders are committing these offenses;
- Reconsidering the integration experience;
- The possibility of treating transitional control offenders who commit a new crime as post-release control violators where they can go back before the court for a judicial sanction;
- Determining who should handle the process and hearings;
- Revising the screening criteria for post-release control and possibly delaying it until later during the inmate's term so that all behavior may be taken into consideration;
- How to consider misdemeanor time and whether it should be consecutive with the original sentence;
- Look at the violent and disruptive incidents and determine any factors that may have led to the lack of prosecution; and
- How to deal with the tail of an indeterminate sentence.

She said that they hope to have a draft of some kind of proposal available within the next few weeks.

On a final note, she reported that there have been 254 risk reduction sentences given since the option became available on September 30, 2011. Two of those offenders have been released. Most of those sentences have come from southern Ohio.

Mr. VanDine noted that the Department had expected 15% to 20% of the intake population to be entering with risk reduction sentences. Instead the low number of 254 represents less than 2%.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for October 18, November 15, and December 20, 2012.

The meeting adjourned at 1:15 p.m.