Minutes of the
CRIMINAL SENTENCING COMMISISON
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
February 19, 2009

MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Major John Born, representing State Highway Patrol Superintendent
Colonel Richard Collins
Paula Brown, Ohio State Bar Association Delegate
Director Terry Collins, Rehabilitation and Correction
Bill Gallagher, Defense Attorney
Juvenile Judge Robert DeLematre
Jason Hilliard, Prosecuting Attorney
Atty. Bob Lane, representing State Public Defender Timothy Young
Common Pleas Judge Andrew Nastoff
Mayor Michael O'Brien, City of Wooster
Appellate Judge Colleen O'Toole
Jason Pappas, Fraternal Order of Police
Municipal Judge Kenneth Spanagel

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
John Madigan, Senior Attorney, City of Toledo
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
Courtney Cunningham, Legal Extern
David Diroll, Executive Director
Megan Tonner, Legal Extern
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

GUESTS PRESENT
Chrystal Alexander, Office of Criminal Justice Services
Scott Anderson, Professor, Capital Law University
Sara Andrews, Dept. of Rehabilitation and Correction
John Barron, Legal Counsel, Senate Majority Caucus
Douglas Berman, Professor, Ohio State University College of Law
JoEllen Cline, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Jim Guy, Dept. of Rehabilitation and Correction
John Judkins, legislative aide to Rep. Bill Batchelder
Elizabeth Lust, legislative aide to Sen. Tim Grendell
Irene Lyons, Dept. of Rehabilitation and Correction
Scott Neeley, Dept. of Rehabilitation and Correction

Phil Nunes – Ohio Justice Alliance for Community Corrections
Thomas Rees, Dept. of Rehabilitation and Correction
Lisa Siefker, Senate Majority Caucus
Jim Slagle, Attorney General's Office
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News Network
Juli Tice, President, Chief Probation Officers' Association
Cheryl Trzaska, State Public Defender's Office
Steve VanDine, Dept. of Rehabilitation and Correction

Chief Justice Thomas Moyer, Chair, called the February 19, 2009 meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m. and invited everyone to introduce themselves. They did.

DIRECTOR'S REPORT

Executive Director David Diroll explained that when OSU Professor Doug Berman arrives, the Commission will review the recent U.S. Supreme Court case of *Oregon V. Ice* regarding findings prerequisite to imposing consecutive sentence findings on the right to a jury trial and the impact of the case on Ohio law. The Supreme Court ruled that post-conviction findings required before imposing consecutive sentences do not violate the rules laid out in the line of cases from *Apprendi*, through *Blakely*, *Booker*, and *Cunningham*, he noted.

In anticipation of Director Terry Collins's presentation on prison crowding concerns, Dir. Diroll noted that S.B. 22 was recently introduced by Senator Bill Seitz to help address prison population issues.

According to DRC Research Director Steve VanDine, the state prison population is currently 50,719. The all time high was reached in November 2008 with a prison population of 51,356. This broke the previous record which had been set prior to S.B.2.

Dir. Diroll noted that the growth in prison population has been slower than it was prior to the implementation of S.B. 2 in 1996. There are numerous causes for the current increase, including the elevation to felony status of certain crimes such as OVI and nonsupport. He noted that Dir. Collins will be reporting on DRC proposals to increase the allowable amount of earned credit and possible alternatives for short term offenders and parole violators.

OREGON v. ICE

Professor Douglas Berman, of the Ohio State University Law School, characterized "the *Apprendi* revolution" as the Supreme Court's "push back" on the inclination of Sentencing Commissions and legislatures to structure sentencing by limiting what judges have discretion to do. The *Apprendi* line suggested that there were constitutional problems with the fact finding involved in sentencing determinations.

Although the rulings of the *Apprendi* and *Blakely* cases proved to be destructive as they filtered down into the sentencing scheme of the *Foster* case in Ohio, he contended that *Ice* portends that policy makers need not fear constitutional issues with the state and federal sentencing structures and judicial fact finding, claimed Prof. Berman.

It wasn't until the *Blakely* case in 2004 that Sixth Amendment issues were found to be more seriously problematic for the use of judicial fact finding to increase sentences, he said. This was then applied by the Ohio Supreme Court to the cases of *Booker* and *Cunningham*.

In Ohio, he said, *Foster* anticipated that the Supreme Court would not tolerate efforts to say that a state sentencing system was different because it didn't have the same structure as the federal sentencing system. He believes that *Foster* got ahead of the curve in recognizing that the Supreme Court was going to apply *Apprendi* and *Blakely* to such state systems.

Many agree that judicial fact finding to increase the sentence for a particular crime is constitutionally problematic. But the next issue is what to do with statutory rules that call for judicial fact finding to make the consecutive versus concurrent sentencing decision.

One of the things that made Ohio's system valuable to some of the country's more sophisticated sentencing reforms was not only regulating how much time a judge could give for a particular crime but also having a set of rules for when sentences could run consecutively rather than default to running concurrently, said Prof. Berman. The U.S. Supreme Court dodged this issue with *Blakely* until it was revived with *Oregon* v *Ice*, where the Oregon Supreme Court had determined that the implications of the *Blakely* principle should also apply to judicial fact finding to run sentences consecutively, he added.

The federal Supreme Court said the consecutive/concurrent determination is different from the sentence for a particular offense, thus excusing the need to apply the *Apprendi/Blakely* principles. It determined that there are no constitutional problems when a judge has to make findings to run sentences consecutively, he reported.

Although the *Ice* decision is contrary to the judgment made by the Ohio Supreme Court in *Foster*, Prof. Berman believes that *Ice* is notable in ruling that there are no constitutional issues with judicial fact finding prerequisite to consecutive as opposed to concurrent sentences. As a result, he believes that the *Apprendi/Blakely* revolution, if not completely over, has at least run its course for the time being.

One noteworthy observation, said Prof. Berman, was that the majority opinion in *Ice* included Justices Ginsberg and Stevens, who had been forceful advocates of the *Blakely* principle regarding the Sixth Amendment rule.

He noted that Justice Scalia, who has been one of the most vocal proponents of the Sixth Amendment Rights, declared that nothing new was presented in *Ice*, as compared to the previous cases of *Apprendi*, *Blakely*, *Booker* and *Cunningham*.

Overall, he believes the *Ice* ruling was an effort to tell sentencing commissions to go back to the task of regulating sentencing without hyper-concern about jury findings and to allow sentencing commissions, within limits, to continue structuring judicial discretion and authorizing judges to make factual-findings to increase sentences.

He contended that it is possible to limit judges' abilities to increase sentences without making certain findings, just not in violation of the *Apprendi/Blakely* principle. Don't do it to allow increases of prison sentences for a particular offense. For consecutive/concurrent determination, findings for fines, or remanding for probation, he declared that the Supreme Court will be disinclined to further limit the authority of legislatures and sentencing commissions to operationalize fact-finding in the hands of judges rather than juries.

Pros. Berman believes the Ohio Supreme Court applied the logical implication of *Apprendi* and *Blakely* to consecutive/concurrent determinations in *Foster*. The concern about *Foster*, he added, has been that it enables judges to increase sentences because the discretionary remedy removes limits on judicial authority to impose longer sentences. *Hairston*, he said, again reflects that in different ways.

Ultimately, he believes that the courts, legislatures, and state sentencing commissions should no longer be haunted by the constitutional issues that *Apprendi* & *Blakely* raised.

Common Pleas Judge Andrew Nastoff remarked that the *Ice* case and Justice Scalia's dissent tend to raise concerns about reducing sentences to less than the maximum, presumptions in favor of the minimums, and consecutive sentence issues.

In the *Ice* case, said Prof. Berman, there was a lot of discussion about giving the defendant the right to object to judicial fact finding which has resulted in the removal of any limits on judicial authority. This has caused the application of the Sixth Amendment to be less favorable for the defendant than originally intended. It also adds to why the results of these rulings are so unpredictable.

Judge Nastoff remarked that the type of fact finding the judge would make in determining consecutive or concurrent sentences is similar to the type of fact finding the judge would traditionally make in determining an appropriate sentence from within a range for a particular offense.

A functional approach of the *Blakely* principle, Prof. Berman explained, would be that if it looks like it goes to the elements of the offense, that's what the jury would determine. If they are classic sentencing considerations, the judge would decide.

Prof. Berman pointed out that S.B. 2 is still on the books, requiring certain findings. He could make the argument that this aspect of the *Foster* remedy could evaporate because it is conditional, but could also make the argument that, to the extent that the legislature has indirectly accepted the *Foster* remedy and allowed the system to continue in this lull for as long as it has, is an inference that they are comfortable with and have embraced the remedy universally.

Dir. Diroll noted that the same U.S. Supreme Court Justices were consistent with the rulings they made on the *Apprendi, Blakely,* and *Booker* cases, except Justice Ginsberg, who switched on the remedy in *Booker*. Since these cases are so evenly divided and Court membership could change soon, he wondered if we can trust *Ice* to be important in a lasting sense.

Mandatory minimums and judicial fact finding that have supported mandatory minimums have always been controversial, said Prof. Berman. He remarked that, since the federal sentencing structure has gone to an advisory set of guidelines, there has been a willingness to allow acquitted conduct to enhance penalties. He recommended doing the best to be respectful of the principles of *Apprendi* and *Blakely*, but not to be hung up on them. He noted that, currently, the U.S. Supreme Court is resisting any cases that readdress *Apprendi* and *Blakely* principles, preferring to let each state figure it out for themselves.

DIRECTOR COLLINS AND PRISON CROWDING

Director of Rehabilitation and Correction Terry Collins addressed the Sentencing Commission regarding concerns about the increase in the state's prison population which is at 132% of the rated capacity. The population decreased after S.B. 2 was enacted in 1996 but began increasing again in 2005. The all time high occurred in November, 2008 with 51,356.

On a typical day, 124 offenders enter the prison system as 116 are leaving it. There were six years in a row, 2002 to 2007, with record intakes and a peak of 29,069 in 2007.

2008 saw a drop in intake but an increase in the average length of stay, probably as a result of the Supreme Court's *Foster* decision. Most offenders are now staying 1 or 2 months longer. Multiply 1 or 2 months by 15,000 inmates and it has a significant impact.

Since February 2005, the population increased by 7,000. Part of that can be attributed to the fact that many offenders are coming to prison for offenses that weren't felonies 15 years ago. Those include domestic violence, non-support, and DUI felonies.

Additional bills enacted in the 127th General Assembly are projected to add over 1,000 additional beds within 10 years. DRC projects a steady rise in the prison population to almost 60,000 by 2018.

Folks forget that the more people who go to prison, the more that eventually get out and more supervision is needed. 28,039 inmates were released in 2008. Although 37,500 are currently under supervision of the Adult Parole Authority, many get released with no supervision. Although 62% of the offenders do well after release, 38% return to prison within 3 years and 8.1% of those are technical violators.

About 57% of the new commitments are short term offenders (STO) who serve less than 12 months. Most are drug and property offenders.

Dir. Collins said that DRC would like to take these STOs out of the transfer unit and place them in a separate STO unit. Many new inmates, he said, have been given community control sanctions. He noted that 20% of the prison population is from Cuyahoga County.

He noted that DRC now has a larger population of females who are generally white, from rural counties, and serving for drug offenses.

When Appellate Court Judge Colleen O'Toole asked how many of those have children, Dir. Collins responded that most of them do not want to talk about their kids, because they are afraid of Children Services getting involved. As a result, many of the kids end up with grandparents or another relative.

Possible explanations for the prison population increase include full jails and community programs and veteran, repeat offenders that are more likely to return to prison, even for relatively less severe crimes. As mentioned before, an expanded Criminal Code also contributes to the increase.

Nearly 800 offenders are committed each year for nonpayment of child support. In an effort to address this group of offenders, DRC has set up funded nonsupport alternative pilot programs in seven counties.

At intake it costs $200 per man and $400 per woman to get inmates into a bed that first night, which is a fixed cost. DRC continues to add beds to make doubles and has reopened some beds in closed units at existing prisons. It is important to remember that an increase in the prison population means decreased security and an increase in tension.

It is important to understand, said Dir. Collins, that we cannot build our way out of the problem of prison crowding. We need "to separate those who are bad from those we are mad at" for committing their crimes. "Being smart on crime is not the same as soft on crime," he opined. He believes that more low level felons (4^{th} and 5^{th} degree) could be placed in community sanctions. The State's budget increases Community Corrections Act money by $4.3 million for prison and jail diversion programs, which involves programs that already exist.

Dir. Collins reported that Senator Bill Seitz introduced S.B. 22 which offers some suggestions for sentencing reform. He feels this is good timing since 85% of the respondents to the Sentencing Commission's survey said that expanding nonprison sanctions should be a priority.

Prior to S.B. 2, inmates could get both "good time" and "earned credits." Contrary to popular belief, the two provisions were not the same. "Good time" was awarded as soon as the inmate entered the prison system, regardless of activity or behavior. "Earned credit" makes the offender work for it and earn it. Good time was eliminated by S.B. 2. DRC would like to increase earned credit from one day to seven days per month because these programs are documented to reduce recidivism.

He recommended letting the Adult Parole Authority deal with parole violators and allowing them to use other sanctions rather than merely send them back to prison. He also encourages raising the theft threshold from $500 to $750, which could save 300 annual prison beds. In addition, diverting low level offenders to alternative sanctions could save up to 6,736 prison beds.

H.B. 130 should help, said Dir. Collins, noting that the bill was recently signed and goes into effect April 7, 2009. It addresses re-entry and sentencing reforms, offers treatment in lieu language, reduction of some mandatory sentences, and increases the options for judicial release.

Representing the Ohio Attorney General's Office, Atty. Jim Slagle asked how many inmates would qualify for earned credit.

Approximately 85% of the prison population could qualify to participate in earned credit programs, said DRC Research Director Steve VanDine, but not all of those would participate.

Anyone born since 2001 has a 1 in 15 chance of ending up in prison, said Phil Nunes of the Justice Alliance for Community Corrections. The prison population is now 12,399 over capacity. He asked what qualifies as the tipping point for the governor to declare a crowding emergency.

No one can give an exact number, Dir. Collins responded, because there are many factors to take into account. To save money he has to reduce the staff. He cut 500 last year and might have to cut another 500 this year. He stressed the need to get more people to understand the urgency. The state budget situation helps to emphasize the problem.

Municipal Judge Kenneth Spanagel asked how many OVI offenders have almost served their time by the time they reach DRC.

Surprisingly, said Dir. Collins, DRC does not get as many OVI offenders as you would expect.

Before S.B. 2, said Dir. Diroll, if the judge wanted to assure a person served 4 years in prison, he would impose 6 years, given the roughly 1/3rd good time reduction. He asked whether something similar would happen again if earned credit were increased. He argued that it would result in a counter-intuitive effect. Since 20% of the prison population consists of drug offenders, he asked Dir. Collins if DRC has considered proposing changes to drug sentences.

The Director said it has been discussed.

Mr. Nunes stressed the need to give focus to the backend of the release system as well, since many get released into homelessness. He also emphasized the need for additional structured treatment facilities.

Dir. Collins contended that most who get released into transitional control do not return to prison, but 50% of those who leave prison have no supervision.

Judge Nastoff said that he understood that transitional control could only be considered during the last 6 months of a sentence. However, he's getting the notice for transitional control more than 6 months before release. If there is too much time left to be served, he won't sign it because he doesn't want them to be released early based upon his signature.

According to DRC Atty. Jim Guy the request for transitional control often is sent out prior to the last 6 months to allow time for screening and preparation.

Transitional control is usually less than 90 days, said Mr. Nunes.

Dir. Collins remarked that 197 lawsuits were filed last year by inmates alleging that they were being kept too long.

Judge O'Toole wondered if there is some way for judges to be covered from perceived liability if an offender released early commits another violent offense before his original sentence would have been completed.

DRC usually takes the heat in those cases, said Dir. Collins. The general public doesn't know the difference between judicial release, parole release, etc. They just know that DRC let the offender early out early, so they blame DRC.

If the judge doesn't want to be on the hook for his sentencing decisions, said Judge Nastoff, then he shouldn't run for reelection.

Dir. Collins concluded by thanking the Commission for an opportunity to share DRC's concerns about the prison crowding situation and for their consideration in helping to seek alternatives and remedies.

H.B. 130

DRC's Sara Andrews reported after lunch that H.B. 130, better known as DRC's omnibus bill, goes into effect April 6, 2009. She offered a summary of what had originally been introduced in the bill, the compromises made, and the final outcome. She noted that agreement could not be achieved on proposals involving foreign offender transfers and treatment in lieu.

She offered copies of proposal on judicial release, which was not included in the bill. It grew out of Sentencing Commission discussions and attempts to clean up language about who is eligible and how non-mandatory prison terms and mandatory prison terms affect eligibility. She noted that there had been agreement, with the exception of the Prosecutors' Association, to lift the 10-year cap on judicial release.

Dir. Diroll remarked that the Sentencing Commission had recommended for judicial release to be available only to offenders serving sentences of 10 years or less. But the Commission also recommended that anyone serving 15 years or more should have a review at some point. That was stricken from S.B. 2.

The foundation of S.B 130, Ms. Andrews said, has been strong communication among interested parties. They are now preparing to update the policy procedures and release provisions.

Prior to release, said Atty. Guy, the Bureau of Sentence Computation would set up a conference in advance with the county to get information and calculate the time served and release date.

Ms. Andrews remarked that the bill addresses some collateral sanctions that offenders face when they are released. These include removal of non-relevant prohibitions to employment, review of barriers to social services, and reducing the barriers of identification.

Atty. Guy remarked that DRC will eventually send letters to judges when the offender has completed all required rehabilitative activities and has benefited as much as possible from the rehabilitative efforts of DRC and the court might want to consider judicial release. H.B. 130 gives authority to do this through an institutional summary report.

According to Mr. Gallo, the court will pay more attention if the offender includes his ally in the process.

The problem with the 10-year limitation, said Bob Lane of the Public Defender's Office, is that it takes away judicial discretion for a case in which the defendant has demonstrated significant change 30 or 40 years after the crime was committed. He declared that there are already safeguards in place since it only takes a letter from a prosecutor, judge, or victim to stop a parole and the Parole Board hearing itself that could prevent an unjustified release. He noted that there are even cases where the victim's family agrees with judicial release.

Atty. Slagle suggested a two-tier mechanism where two people have to give approval.

Atty. Brown asked if the purpose of DRC is for rehabilitation or punishment. If the purpose is rehabilitation, then credit should be given once rehabilitation has been accomplished.

Most prison sentences are constructed, said Judge Nastoff, with a focus on confinement.

The main purpose, said Atty. Guy, is to punish and protect. He explained that judicial release means the judge already knows the case or is having a hearing to review the case and determine the amount of rehabilitation that has been achieved. If so desired, the judge can deny the request for judicial release with prejudice which means "don't ask again".

A hearing is already allowed at 30 years for an offender with 30 to life, said Atty. Lane.

Atty. Guy pointed out that this is *judicial* release, not a release decided by an unelected panel. It's the Swiss army knife of post conviction release.

Dir. Diroll suggested that, at a future meeting, the Commission could focus on what the *Ice* case means for Ohio, the recommendations of DRC, S.B. 22, and the theft threshold.

Regarding *Ice* and *Foster*, Judge Nastoff asked whether judges should operate as if the statutory fact-finding guidelines are reinstated.

Atty. Guy speculated that, since the Ohio Supreme Court struck certain statutes, those statutes would have to be reinstated legislatively.

The question, said Judge O'Toole, is whether the U.S. Supreme Court trumps the Ohio Supreme Court decision to strike legislation.

Judge Nastoff pointed out that the *Ice* ruling does not say that you have to make findings.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for March 19, April 16, May 21, June 18, and July 23, 2009.

The meeting adjourned at 2:05 p.m.