

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 ADVISSORY COMMITTEE**

January 17, 2013

MEMBERS PRESENT

Municipal Judge David Gormley, Vice chair
OSBA Representative Paula Brown
Janet Burnside, Common Pleas Judge
Robert DeLamatre, Juvenile Court Judge
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Fritz, Hany, Municipal Court Judge
Jay Macke, representing State Public Defender Tim Young
Thomas Marcelain, Common Pleas Judge
Chad McGinty, representing State Highway Patrol Superintendent,
Col. John Born
Steve McIntosh, Common Pleas Judge
Harvey Reed, Director, Youth Services
Steve VanDine, representing Rehabilitation and Corrections
Director Gary Mohr
Roland Winburn, State Representative

ADVISORY COMMITTEE

Jhan Corzine, Retired Common Pleas Judge
David Landefeld, Ohio Justice Alliance for Community Corrections
Lora Manon, Attorney, Bureau of Motor Vehicles
Joanna Saul, Director, Correctional Institution Inspection Committee
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT

David Diroll, Executive Director
Nick Fiorelli, Extern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

Sara Andrews, Rehabilitation and Correction
JoEllen Cline, Legislative counsel, Supreme Court of Ohio
Cedric Collins, Youth Services
Monda DeWeese, SEPTA Correctional Facility
Ryan Dolan, Counsel, Rehabilitation and Correction
Ryan Gies, Youth Services
Lusanne Green, OCCA
Tom legislative aide to Sen. Obhof
Jamie Hooks, Correctional Institution Inspection Committee
Kim Kehl, Youth Services

Sam Porter, Governor Kasich's Office
Paul Teasley, Hannah News Network

The January 17, 2013, 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 introduced the Sentencing Commission's newest extern, Nick Fiorelli, from Northern Ohio University Law School. He then announced that the Governor's Office has appointed Wood County Prosecutor Paul Dobson as the newest member of the Commission. He noted that Sen. Larry Obhof is stepping down from the Sentencing Commission.

OVI Bill. The Commission's draft to streamline impaired driving law is being redrafted in form for the 130th General Assembly. The key change recommended by the Commission was to put the statutory penalties in tabular form to make it easier to reference.

Mens Rea and Culpable Mental States. Our recommendations have been bouncing around and there is legislative interest in pursuing this issue. There is also interest from outside groups. Dir. Diroll added he will have more news next month.

DEPARTMENT OF YOUTH SERVICES

Since being appointed to his position a couple of years ago, Youth Services Director Harvey Reed said he has worked to refocus the staff and help them better understand why DYS exists. This includes a stronger focus on the youth, families, and communities.

DYS currently has four facilities holding a total of 465 youth. One issue is that the population is getting older, on average. Many admitted at ages 12, 13, and 14 are still there. 50% of those staying more than a year received no visits from family members.

DYS developed a "Close to Home" program which allows the Department to enter contracts for transportation to provide bus service to family members for visitation, beginning last Mother's and Father's days. One young man never met his father until then, Dir. Reed noted. The program has successfully increased the number of family visits and contacts.

DYS stresses education, noted Dir. Reed. Youth are encouraged to graduate or get GEDs and continue in programs once they achieve those goals, including some college introductory classes. Dir. Reed said that he stresses to the youth "Don't let where you are define who you are, and what you become."

He noted that when most youth enter DYS, they are 2 to 4 years behind in educational level. He tries to get the teachers to focus on making school cool so that the youth will want to attend. They also work with local schools to help assure that the youth are better prepared to return to mainstream classrooms.

Parole staff often has to work with the whole family. Some have entered the judicial system for generations. Even if that is not the case, he said, it is still essential to get the family involved to ease the transition when the youth returns home. Often the family expects the youth to behave like an adult when they return, but he may not have matured that much yet. Regardless, the incarcerated youth needs to know that his family still cares.

Another new program is the "Baby Elmo" program which focuses on incarcerated youth who are parents themselves. It provides opportunities for their children to visit and get to know them as a parent. It also helps them learn more about the responsibilities of being a parent.

Dir. Reed said that DYS is starting a project with pilot dogs to have the youth help housebreak and train sight dogs.

He noted that DRC has a high prevalence of youth with mental health issues. Families often do not recognize the issue or think the child will grow out of it. On many occasions, no one is willing to treat it. It is the population most in need now, he added.

When asked about shrinking the overall DYS population to 465, Dir. Reed gave credit to the RECLAIM program which keeps youth closer to home and family. He acknowledged that that progress has resulted in a tougher crowd that gets diverted to the state facilities. DYS works hard to provide a safe environment but must remember who they're dealing with. They focus on keeping the youth active, directing their entrepreneurial skills, and preparing them for the real world. He noted that it is a small group that creates 90% of the incidents. For instance, gang members often don't commit assaults themselves but intimidate others to commit the assaults.

DYS Population Profile. DYS Executive Assistant Kim Kehl reported that more than 50% of the youth in DYS are on the mental health caseload, which means they have been assessed as having a MH need, are being seen by a psychiatrist or psychologist, and are on psychotropic medications. About 10% of those reside in a MH unit. These would involve youth who would pose a threat to the general population, or the general population would pose a threat to them.

He noted that the mental health diagnosis does not include "conduct disorder," since that is already recognized as a standard problem for most youth that enter DYS. Many have multiple MH issues and most had MH treatment prior to commitment to DYS. About half of the youth are eligible for special education and the majority also has a diagnosed substance abuse disorder.

The average age of the current DYS population is now 17.9. At 18, they may no longer be eligible for public mental health services, he added.

Although DYS is making progress with getting the family more involved in the youth's rehabilitation, MH issues are often considered a taboo subject by the family. Many family members often deny the illness. Some have a history of their own mental health challenges. That exacerbates the difficulty in preparing the youth for successful reentry back to the family home and community.

DYS now focuses on treatment and providing necessary MH services, added Mr. Kehl. It has increased the range of diagnostic testing and maintains a licensed social worker and psychology staff. The focus is on Cognitive Behavioral Therapy through a Strength-based Behavior Management System. Schedules have been expanded to provide evening and weekend services. They now use standardized documentation so that it can follow the youth from one facility to another.

In 2011, House Bill 86 established the Ohio Interagency Task Force on Mental Health and Juvenile Justice. The membership is made up of 24 people appointed by either the Governor, or DYS Director or Director of the Department of Mental Health. The task force is charged with duties that include reviewing staff training, protocol, funding, and services and other practices and treatment, investigating other mental health treatment models for youth, and visiting DYS mental health units.

The task force concluded that the MH and behavioral needs of youth were not being met. That causes a disproportionate number of youth with serious emotional disturbances to end up in DYS and child welfare systems, while taxing educators. Limited financial and community based resources support a cycle in which these youth show up in the juvenile justice system because their needs are undetected and untreated.

The task force offered 26 recommendations which include: developing a residential treatment facility to offer intense, focused mental health treatment; looking at Medicaid eligibility in hopes of finding a way for youth to be able to continue treatment when he returns to the community; collaborating with the Health and Human Services cabinet agencies for intensive home based treatment as a step-down/transition program; making linkages back to the community mental health services; and piloting a standardized mental health screening instrument specific to mental health and trauma to be used at the earliest contact points youth enter the juvenile justice system, reported Mr. Kehl.

Some of the goals are to divert more kids from deeper involvement in the juvenile justice system, increase family participation and engagement at all levels, and increase collaboration among agencies to develop specialized treatment for youth with the most serious mental health conditions.

Mr. Kehl assured Atty. Jay Macke, from the State Public Defender's Office, that the task force has been looking at the model of care implemented in other states. They remain open to other options.

When Common Pleas Judge Janet Burnside asked how collective bargaining affects training for the employees, Mr. Kehl explained that DYS spends time and money offering additional training to certified practitioners so that they are qualified to deal with this type of youth. If DYS closes a facility, then collective bargaining creates a trap where some union employees who are not as well qualified bump another who IS better qualified. It has caused DYS to lose good people and can result in a shortage of qualified and certified people.

Concerns were voiced by Public Defender Kathleen Hamm about who handles reentry. According to Mr. Kehl, this is handled by parole staff and a plan is begun when the youth first enters the system.

One challenge, he noted, is the age of most youth when they leave the juvenile justice system. At 18, adult services aren't necessarily available yet. The adult MH system has different criteria for qualification, part of which involves the person's ability to be self sufficient. At 18, many still have weak functional living skills.

Atty. Hamm acknowledged that she knows of some people in the juvenile justice system who attempt to bump up a youth's charges to the felony level to get him into a community based residential facility for treatment because other resources are not available.

The Ohio Youth Assessment System, said Mr. Kehl, is set up to assure that any youth housed in any kind of residential facility is there because of his criminogenic risk and need. He agreed that the juvenile system needs to reexamine resources missing in some localities.

When a question of cost was raised by Dir. Diroll, Dir. Reed explained that the average current per diem is about \$465, noting that it is expensive because they are covering room and board, education, and medical needs. There are no copays and everything is paid at 100%.

DYS has been hiring more MH practitioners than in the past but most, as soon as they get trained and experienced, go on to another job where they can make more money. That, coupled with the "bumping" issue, makes it a challenge to keep good staff. However, when some practitioners transfer to a different agency, they are still useful because they already have a knowledge and understanding of the needs of these youth.

Juvenile Judge Robert DeLamatre remarked that, sometimes the best treatment is to work with youth in some way outside of the office, through activities or in-home therapy, but that's not "billable". As DYS looks at Medicaid funding for treatment options, he would like to see an expansion of options, especially for youth transitioned back into the community.

Community Continuum. Deputy Director Ryan Gies reported that, a few years ago, he and others from DYS had presented their plan for building a community continuum and now he welcomed the chance to report on the progress of that plan.

He recapped that DYS currently has 465 youth in the four DYS facilities and 521 total youth in custody. This compares to more than 1,800 in custody in 2008. DYS' extended partnership between the juvenile courts and local entities shows the importance of the State's investment in the local infrastructures so that these youth have some options.

With a focus on family involvement, RECLAIM continues to be the backbone of a lot of the reform because it is a statewide funding system that focuses on community based treatment as opposed to incarceration. It tries to have the money follow the youth as much as possible. They have built onto this RECLAIM theme with Targeted RECLAIM and objective risk assessment, he added.

Research has shown that some key components for achieving success are keeping youth in their communities, keeping them in smaller facilities, gearing treatment programming toward behavioral change, and matching

programming and supervision to assessed risk and need levels. Dep. Dir. Gies noted that they previously didn't have objective measures on the likelihood to reoffend. The OYAS system has helped to rectify this gap.

"Targeted RECLAIM" started in 2010 with a focus on the 6 largest counties: Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Summit. In FY 12 this was expanded to Allen, Ashtabula, Licking, Lorain, Mahoning, Medina, Stark and Trumbull counties.

It involves a coordinated effort with the Behavioral Health/Juvenile Justice Initiative (BHJJ), which began as a way to enhance judicial options for juvenile justice involved youth with serious behavioral health needs. It now is more strategically focused on the identification and diversion of deep-end offenders with serious behavioral health needs as identified by the participating courts. By zeroing in on therapy and developing a cognitive behavior treatment program, with evidence based practices, this coordinated effort between Targeted RECLAIM and BHJJ has provided more opportunities for community treatment so that only those youth who are not eligible for the community alternatives are then directed to DYS facilities. As hoped, Dep. Dir. Gies added, it has resulted in a decrease in the number of youth adjudicated and reduction in DYS admissions.

Appreciating the community alternative options, Judge DeLamatre asked about the sustainability of these programs. Deputy Dir. Gies responded that the courts have worked on sustainability plans and, with DYS in partnership under RECLAIM and Targeted RECLAIM, it's a combination of program and practice that will help to sustain these programs.

Noting the focus on return on its investment for larger counties, Atty. Hamm asked what options are available for smaller counties to mirror the options that are available in larger counties.

Deputy Dir. Gies assured her that every county has the opportunity to make use of RECLAIM funds and DYS has tried to make evidence based training programs available to every county through various groups.

Although some youth enter DYS with a gun spec, said Deputy Dir. Gies, most youth only stay about a year. Prior to FY10, there were usually about 300 transfers to the adult system, but both FY10 & FY11 saw a decrease in that number. He noted that the local detention center populations have decreased as well.

Dir. Diroll asked if there are many in the "serious youthful offender" (SYO) category with a blended sentence. According to Dir. Reed there are not many, and very few ever get transferred to the adult system.

DYS currently has nine Community Correctional Facilities (CCFs) available statewide and will soon have 12. Each has 20 to 44 beds, for a total of 365 beds, with only about 300 now used. Through the CCF, youth benefit from intensified treatment and a shorter length of stay, usually 4 to 6 months.

The target of the **JDAI** (Juvenile Detention Alternatives Initiative) is an attempt to change how detention is used and objectify how decisions are made. The hope is to expand this initiative to smaller counties.

Recent Legislation. DYS Legislative Liaison Cedric Collins offered perspective on the juvenile aspects of two bills that passed in the past year or so. S.B. 337, the collateral consequences bill, took effect September 28, 2012. It reduces barriers that impact juveniles after release. Two key components of this bill involve the sealing and confidentiality of juvenile records. It reduces from 2 years to 6 months the amount of time a youth must wait after discharge from parole to apply to have records sealed. It also prevents offenses committed as a juvenile from being revealed on a background criminal records check.

H.B. 86 took effect October 1, 2012, offering sentencing reforms that include a provision allowing the juvenile court judicial discretion for release and complicity gun specifications. It included a provision for "reverse bindover" which, on conviction in adult court on a reduced or lesser charge, the juvenile can be returned to the juvenile system for disposition. Atty. Collins noted that there have only been three cases affected by this so far. The bill also expanded judicial release.

Another key component of H.B. 86 was legislation crafted with input by Justice Stratton to establish competency guidelines for juveniles. It established uniform standards for competency across the state and established procedures for the court in regards to restoring competency for the youth.

Judge DeLamatre claimed that there have been 5 or 6 reverse bindovers occur in his district, some of which are still in process.

Of bindovers that occur, Dir. Diroll asked what percentage is mandatory. Dep. Dir. Gies responded that the numbers are not yet in.

According to Judge DeLamatre there tends to be a lot of plea bargaining among the bindover cases.

Representing Governor John Kasich's Office, Sam Porter remarked that he had previously worked in the Franklin County prosecutor's office and noticed that some mandatory bindovers were pled to discretionary bindovers. Overall, they found bindover cases to be a pain.

In two cases that Common Pleas Judge Steve McIntosh knew of, he understood that, as part of the plea bargain, once the cases returned to the juvenile court the youth would be declared as not amenable.

Judge DeLamatre declared that the judge should know what a juvenile has been charged with before making a decision on the bindover issue. He claimed that most courts would like to have fewer bindovers and more SYOs. Personally, he would bind over fewer involuntary manslaughters than aggravated murders.

ASSAULTS, DISTURBANCES, VIOLENCE, AND PROSECUTION IN DRC

After lunch, DRC Research Director Steve VanDine reminded the Commission that one of the main reasons that DRC would like to see a return to some form of indeterminate sentencing is because of the need for another tool to address assaults in Ohio prisons. Indeterminate sentencing would offer an option for extending an inmate's sentence, if necessary, for assaultive behavior while incarcerated.

DRC submitted a report, on December 31, 2012, to Governor Kasich and the General Assembly on an empirical study of the assaults, disturbances, violence, and prosecution in DRC.

Among some of the highlights in the report, he explained that inmate-on-staff assault rates over the last six years include physical assaults, sexual assaults, inappropriate physical contact (touching staff in any way), and harassment (which includes flinging substances). The rate of inmates on staff assaults, after dropping to below 19 per 1,000 inmates in 2010, increased nearly 6% in 2011 and is projected to increase another 4.5% in 2012, driven largely by an increase in harassment assaults. Serious injury assaults on staff members have doubled over the past 6 years.

Other significant increases show a doubling of the serious injury inmate-on-inmate assaults and a 300% increase in disturbances involving four or more inmates. Mr. VanDine noted that the serious physical assault inmate-on-inmate started to decrease in 2011.

The number of attempted and completed sexual assaults gradually decreased. It is believed that educational programs for inmates in avoiding and reporting these assaults have helped. DRC has a staff inspector to investigate and determine whether an alleged sexual assault can be substantiated. Just because it can't be substantiated doesn't necessarily mean that it didn't happen. Once a sexual assault is substantiated, the case is turned over to the State Highway Patrol for possible prosecution.

The violent rule infraction rate includes all fights where someone intends to harm another. This has increased by about 50% from 2007 to 2011. The number of inmate disturbances tripled from 2007 to 2011, then showed a slight decrease in 2012.

Prosecution Process. If something appears to be a crime, DRC calls in the Highway Patrol, which determines whether prosecution is warranted.

During 2012, 82 incidents were sent to the State Highway Patrol. 35 of those were inmate-on-staff and 47 were inmate-on-inmate with a weapon and outside medical attention was needed. Of the inmate-on-staff cases, 27 were presented to the prosecutor, 6 are pending prosecution, 5 were rejected by the prosecutor, 16 were prosecuted, and 10 were convicted. The average sentence given was 7.6 months. For the inmate-on-inmate with a weapon cases, 20 of the 47 were presented to the prosecutor, 4 are pending prosecution, 8 were rejected by the prosecutor, and 8 were both prosecuted and convicted. The average sentence was 16 months.

Atty. Hamm asked what other options are available for disciplinary purposes.

Mr. VanDine responded that the inmate can lose privileges, be confined to his bed or cell, given disciplinary cell days, or even given a recommendation for review of their security status, whereby they might get transferred to a different prison.

Proposed §2929.14 re Indefinite Prison Terms. §2929.14 is the statute that lays out prison terms for felons. The latest proposal retains sentences as they are now but standardizes the tail. For first degree

felony, Dir. Diroll noted that the current sentences would become the so-called minimum and the maximum would be 3 additional years, which could be used for disciplinary purposes. For F-2s the maximum would be 2 years additional time. For F-3s the maximum would be an additional 18 months. The F-4 maximum would be an additional 12 months. For an F-5, the tail would be 6 months. The sentencing judge would set the minimum and maximum but DRC would then have the discretion to determine whether to release the inmate after serving the minimum sentence or whether to invoke all or part of the maximum. That determination would be made based on the inmate's behavior while in prison.

Proposed §5120-X-XX Rule re Regional Release Panels. This proposal sets out the rule for implementing the changes that are discussed in the draft of §2929.14 for indeterminate prison terms. It sets up Regional Release Panels which would review the inmate's behavior while in prison and make the final determination regarding his date of release.

The panel would conduct a hearing to determine whether or not to conditionally delay the inmate's release beyond the minimum term. The panel would articulate the reason(s) for its decision and explain to the inmate that his record of institutional conduct will be periodically reviewed. If (s)he demonstrates good behavior and positive change during the remainder of his incarceration, the decision to delay the release date could be rescinded. Decisions of a regional release panel are not appealable.

There is a renewed effort, said DRC Deputy Director Sarah Andrews, to improve the information needed for making an informed release decision.

Atty. Jay Macke sees it as a tool that will increase the prison population since the minimum terms would be the same as the current terms being served.

Prosecutor David Landefeld disagreed. He sees it as a way to discourage behavior that could result in the additional time.

Those who are discouraged, said DRC Atty. Ryan Dolan, can now apply for 80% release and judicial release.

Judge Corzine believes that when the rules are finally drafted they'll be narrow enough, noting that DRC has a financial self interest not to increase too many sentences.

Atty. Dolan emphasized that the proposal includes a chance for the inmate to redeem himself.

Atty. Hamm feels that we need to move quickly on this proposal.

The statute and rule will need to be harmonized better to make it work smoothly, said Dir. Diroll.

Previously the earned credit and good time took off as much as one-third of the sentence, Mr. VanDine noted. That was replaced with bad time. Even during a time of great crush due to serious overcrowding, DRC was willing to take on the burden of extra time for those people who caused problems.

Previously, with indeterminate sentencing, Atty. Hamm argued, there was no way to accurately advise the offender of how much time he would actually serve. She doesn't want to return to that.

If adopted, Judge Corzine noted, the process might reduce the number of cases that would go to the prosecutor.

When an inmate exhibits misconduct, Atty. Dolan contended, it is necessary to look at the context in which the act occurred, not just the act itself. The regional release panel is intended to help prevent any warden from just going after an inmate.

Dir. Diroll noticed that there doesn't seem to be any burden of proof required, just a finding. He questioned whether there shouldn't be some evidentiary standard for that finding.

Laws are written, Atty. Macke noted, to let people know the minimum standard of behavior that is expected.

Judge Marcelain suggested that the statute should say "shall" be released upon completion of the minimum range of the sentence unless there have been rule infractions.

Some offenders wait until the last second of the minimum term, said Mr. VanDine, and then spit in someone's face as an act of spite and revenge.

The panel doesn't have to assess the additional time, Atty. Dolan noted, if they don't feel it is necessary. Other institutional means can be used instead. The intent is to "prevent" future misconduct.

Before this is finalized, Atty. Dolan said that he would like feedback on any possible constitutional issues this might raise.

Judge DeLamatre feels there might be some constitutional issues in regards to implicit due process pertaining to timing and also issues with severity of the offense.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for February 21, March 21, April 18, May 16, June 20, July 18, and August 15, 2013.

The meeting adjourned at 2:35 p.m.