OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

Meeting of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
SENTENCING ADVISORY COMMISSION

MEMBERS PRESENT

Municipal Judge David Gormley, Vice Chair
Chrystal Pounds-Alexander, Victim Representative
OSBA Representative Paula Brown
Ron Burkitt, Police Officer
Paul Dobson, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Thomas Marcelain, Common Pleas Judge
Elizabeth Miller, representing State Public Defender Tim Young
Gary Mohr, Director, Rehabilitation and Correction
Aaron Montz, Mayor, City of Tiffin
Dorothy Pelanda, State Representative

ADVISORY COMMITTEE
Eugene Gallo, Eastern Ohio Correction Center
David Landefeld, OJACC
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Sara Andrews, Rehabilitation and Correction
JoEllen Cline, Counsel, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Ryan Dolan, Counsel, Rehabilitation and Correction
Lusanne Green, Ohio Community Corrections Association
Scott Lundgren, Speaker Batchelder's Office
Marta Mudri, Ohio Judicial Conference
Scott Neeley, Rehabilitation and Correction
Paul Teasley, Hanna News Network
Steve VanDine, Rehabilitation and Correction
Maggie Wolniewicz, Legislative Service Commission

The May 15, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair, Municipal Judge David Gormley at 9:45 a.m.

DIRECTOR'S REPORT

After reporting that there has not been any further development on the proposed Criminal Justice Commission, Executive Director David Diroll mentioned that Representative Dorothy Pelanda had asked for feedback on some legislation she was hoping to introduce soon.

A few months ago Representative Pelanda asked judges for input on legislation that would help address some of their concerns with sentencing appeals. One issue is appeals that involve a mistake that doesn't prejudice the appellant. She proposes that an appeal of a sentence must be based on something more than simply being "contrary to law" - it must also be regarded as prejudicial. She hopes it will work to reduce an automatic appeal. The proposal, she said, is in bill form but could also be done as an amendment.

Dir. Diroll feels that adding "prejudicial" to the language will please some judges, particularly appellate Judge Sylvia Hendon, but may cause some blow back from the defense bar. He offered to present it to the appellate court judges on the subcommittee that would be meeting that afternoon.

OPIOID LEGISLATION

At the last meeting, Rep. Sprague had mentioned several bills that had been introduced addressing opioid issues. Dir. Diroll offered a quick summary of some of those bills.

- **H.B. 314** deals with requiring informed consent when a minor is being prescribed opioids.
- **H.B. 332** is still in introduced form and sets standards which discourage prescribing opioids for pain in non-cancer situations.
- **H.B. 341** passed the House and pushes subscribers (doctors, etc.) to check patient records closely.
- **H.B. 359** was just introduced and attempts to develop an information sheet on the addictive nature of opioids to be given to patients.
- **H.B. 363** is also in an introduced form and provides limited immunity for someone who offers an opioid in a medical emergency.
- **H.B. 366** passed the House and deals with the policy for opioids at Hospice Care and the disposal of opioids.
- **H.B. 367** has passed the House and requires schools to provide instruction in the dangers of opioid use.
- **H.B. 369** has not yet had a floor vote and addresses a review of local boards.
- **H.B. 378** has seen no movement at this time but tells subscribers that patients have to be involved in an appropriate treatment of counsel.
- **H.B. 381** targets the new breed of opioid, Tramadol.
- **H.B. 501** had hearings this week and addresses Zohydro by lifting it up a level on the drug schedule.

Dir. Diroll noted that most of these do not carry criminal penalties, other than some with fines. Rep. Sprague asked for input from the Commission on whether something more might be needed.

HOPE PROBATION MODEL (Hawaii's Opportunity Probation With Enforcement)

At the last Commission meeting, DRC representatives and others mentioned a probation model, titled "HOPE," that originated in Hawaii. (The acronym stands for Hawaii's Opportunity Probation with Enforcement.) HOPE uses quick penalties for violations of community sanctions, particularly for drug offenders. Several Commission members asked for more information on this model. Dir. Diroll reported that there are now 17 states using it in some form. The state of Washington seems to be using it the most systematically.

The model was created in 2004 by Judge Steven Alm, a former U.S. District Attorney, who felt there was too much relapse by drug offenders, with sanctions for probation violations used fitfully.

Judge Alm believed that to send an offender back to prison for violating parole as a drug offender was too extreme, particularly for nothing more than testing positive. He wanted to develop an alternative that was quick, short, and to the point. The resulting model targets high risk offenders who are likely to violate their community sanctions. It emphasizes a quick sanction – a few days in jail – for *every* violation to better hold offenders accountable.

The offender must call a hot line each day to find out if he's been randomly selected for a drug test that day. If he tests positive that day, he will immediately go to jail for a term of 2 to 4 days. He gets more jail time if he fails to show up for the test. A hearing is held on the violation within two days.

Dir. Diroll pointed out that, although the offender comes back to the court for the sanction, this is not a probation revocation. When the offenders get out, they're still on probation. Treatment is only ordered after repeated violations, once the offender proves he cannot stay clean on his own. Once established, it requires less treatment and court time than drug courts.

The political appeal for this model, Dir. Diroll opined, is that it involves zero tolerance and swift sure penalties without increasing overall costs of confinement. The program also has potential for reducing crimes through its consistency of sanctions. There is cost-saving in the treatment realm since the offender does not go to treatment until he earns his way there.

DRC Director Gary Mohr agrees that we need to explore this model further and he already sees examples of this in Ohio.

As a common pleas judge who runs a drug court, Steve McIntosh expressed curiosity about what the HOPE project does differently than the drug courts. He also focuses on the high risk offenders but directs them toward treatment at the beginning of their sentence. Referring to the February 2012 study by NIJ/OJP which reported that 15% of HOPE probationers completed the program after 6 years, without substance abuse treatment, he asked which offenders were targeted. He does not believe that opiate or heroin offenders are capable of ending their drug addictions without treatment.

Representing the Chief Probation Officers' Association Gary Yates remarked that it was aimed at methamphetamine offenders when it began, but the focus now is on heroin offenders.

Dir. Diroll reported that in a controlled study that compared probationers assigned to HOPE to those given regular probation, it was found that HOPE participants were: 55% less likely to do new crime; 72% less likely to test positive for drugs; 61% less likely to miss appointments with probation officer; 53% less likely to have probation revoked; and serving 48% fewer days of incarceration.

An NIJ/OJP study found that HOPE uses treatment resources more effectively. Because only a small fraction of participants receive mandated treatment, the program can afford to use intensive long-term residential treatment, rather than relying so much on outpatient drug-free counseling. Because the treatment mandate follows repeated failures, it helps break through denial. If treatment is mandated, a HOPE probationer must abstain from drug use (not merely comply with an order to appear for treatment) to avoid a prison term.

The federal BJA reported that "HOPE probationers cost more for the probation department but there are savings to the entire system due to reduced jail time, revocations and future victimizations".

Referring again to the February 2012 study by NIJ/OJP, Prosecuting Attorney Paul Dobson pointed out that although 15% of the probationers received no treatment, 85% did get treatment.

How do you deal with the excuses, Pros. Dobson asked, such as an inability to get off work or lack of transportation?

In his drug court, said Judge McIntosh, the offender cannot miss a drug test or he goes to jail. Even lack of transportation is not accepted as an excuse. If the offender calls ahead and can provide documentation to validate why he was unable to comply, then he's excused. Offenders appear in front of him every week and meet with a probation officer weekly. He communicates with the probation officer and treatment program on a regular basis about the offender's progress. He will not accept any excuses if they don't do what they are supposed to do, but he noted that prison is the last option.

According to Public Defender Kathleen Hamm, lack of transportation is a major problem in her area. There is little public transportation available and, if the offender has no driving privileges, he is dependent upon others for transportation, but that is difficult to find if required on a weekly basis.

One thing that has helped in Franklin County, said Judge McIntosh, is the offer of free bus passes.

Dir. Diroll believes HOPE is less hands-on than drug courts.

Dir. Diroll added that HOPE has critics. It requires an exacting level of cooperation between the courts, prosecutors, defenders, and treatment providers, as well as law enforcement. It places an extra burden on probation officers and drug testers. The heavy load of hearings – after every dirty urine - tax judges, court clerks,

prosecutors, and defenders. It narrows the sanctioning discretion of judges. It adds to police workloads and puts pressure on jailkeepers to process and find space for the violators. It saves money for the state but can increase local costs. It also carries more public safety risks than prison. Because of its intensity, HOPE costs more than twice as much per probationer than routine probation supervision. But it yields overall savings by encouraging compliance. He noted that the studies so far look only at HOPE's short term effects, but more thorough evaluations are due within the year.

Among practitioners, HOPE is regarded very favorably among probation officers and judges, but less so by prosecutors, he added.

Noting that a lot of drug courts have implemented the principles of the HOPE project but not the direct model, Dir. Mohr strongly agreed with Judge McIntosh that the principles can be tailored to each offender's needs based on the local resources.

Victim Representative Chrystal Pounds-Alexander raised concern about the public safety risk, since the report noted that some HOPE participants abuse their relative freedom by committing other crimes.

Dir. Diroll noted that, overall, the program reduces the number of arrests. He reported that there are more studies being done on the results of the HOPE model, particularly as many want to embrace some elements of the program, but not the whole package. Questions that arise include examining which components of HOPE are most important? What is really making it work where it is successful? Is it the quick response, the constant testing, or the combination or what? What types of offenders respond best to the HOPE program?

The key, said Mr. Yates, is that the consequences have to be swift and consistent.

It is more vital to stick to the principles, said Mr. Gallo.

Pros. Dobson asked if the intent of the discussion was to consider codifying Project HOPE or hoping to get more jurisdictions to apply the principles.

Some judges are not in favor of drug courts or specialized dockets, said Judge McIntosh, but might be open to applying the principles to a certain docket within their own courts.

Dir. Mohr believes that judges should help to write the principles of any portion of the HOPE model that they choose to apply. DRC is ready to proceed with some of this as they determine the elements that are the most effective.

DRC Deputy Director Sara Andrews remarked that the Department plans to apply for a federal grant to implement HOPE principles in Ohio. They would appreciate a letter of support from the Commission for this grant.

DRC is working in conjunction with the Supreme Court by asking three judges to apply some of the principles of Project HOPE with three different swift sanctioning options. One will use electronic

monitoring, another will use residential treatment in a halfway house, and the third will use a jail component. She noted that all three of those courts have Parole Authority support.

Asking for more information on how Judge McIntosh's drug court works, OSBA Representative Paula Brown remarked that she favors the combination of consequences and positive reinforcement. She feels the Commission should offer a letter of support for DRC's efforts to get the grant.

Judge Gormley suggested offering more information to judges on the HOPE principles, perhaps through a CLE course or training through the Ohio Judicial Conference or Judicial College.

Reiterating that these options would not apply to all probationers, Mr. VanDine pointed out that eligibility is based on very clear, specific, and measurable data. Those who qualify have had dirty urines and/or missed appointments.

By consensus, the Commission agreed to support DRC's application for a grant to pursue the application of HOPE principles through pilot programs.

POST-SENTENCE INVESTIGATIONS

Cuyahoga County Common Pleas Court Judge Nancy Russo reported that she has been a reentry court judge since 2008. She claims that her court has an 85% success rate (15% recidivism). She has conducted five seminars regarding the use of judicial release and recently took a prison tour, where she learned more about some of the personal barriers being faced by offenders upon their reentry back into the community. As a result, she believes it is time to take another look at the judicial release statute.

The first barrier she discovered is that if no presentence investigation (PSI) was conducted for the offender during the judicial process, then that person is not eligible for judicial release while incarcerated. A PSI is generally conducted during the 30-day delay between the time of the offender's plea and the sentencing hearing. (PSIs are not routinely done for obviously prison-bound offenders.) If no PSI were conducted, she believes DRC should be allowed to prepare a *post*-sentence investigation report if an inmate has sufficiently progressed in prison.

DRC has a three-tier program within the prisons, based on progress made by the inmate and levels of safety factors. As the inmate demonstrates progress in rehabilitative efforts, including treatment and educational programs, and behavior, he/she can progress through less secure facilities. For any judge considering judicial release for an inmate, the tier system allows the court to identify inmates by risk. She believes that the statute needs to be tweaked to allow DRC to develop a document to make the offender eligible if there is no PSI. One benefit, besides making the offender eligible for judicial release, would be to alleviate the burden to jails who typically house the inmate while having the PSI conducted. It would also open the doors to other communities who want to do reentry and would offer legislative support to DRC's tier system.

The lack of a PSI is not a barrier for all counties, Judge Marcelain exclaimed, noting that the judge can still do a PSI, even after imposing the sentence.

Representing the Ohio Judicial Conference, Marti Mudri claimed that there's already an amendment being processed to address the issue.

Judge Russo explained that this would be done at the discretion of DRC, not in lieu of a PSI. Acknowledging herself as a tough judge, she also maintains that DRC is making progress in rehabilitating offenders and believes those offenders need credit for their improvement and a chance to be considered for judicial release.

Having received several requests for judicial release from inmates who claim they have no PSI, Judge McIntosh asked what mechanism would prompt DRC to do the PSI.

Judge Russo declared that a judicial request is likely to speed up the process, particularly since DRC is eager to work with judges on judicial releases.

The first priority is documentation for those in reintegration centers, said Dir. Mohr.

Wondering what information would be required on a DRC implemented PSI, Pros. Dobson noted that a court PSI includes a victim impact statement.

The DRC PSI would have more information since it would include the progress made by the inmate while incarcerated, said Judge Russo.

According to DRC legislative liaison Scott Neely, there is language proposed in S.B. 143 that will address the need for an additional PSI after incarceration.

TRANSITIONAL CONTROL

Another concern raised by Judge Russo involved the use of transitional control. She said she used to believe that she knew better than DRC whether an offender should be considered for the program. But she has seen cases where a judge's veto on transitioning an inmate into treatment programs can create an ethical dilemma. She now feels it is inappropriate for a judge to say yes or no to that opportunity for an inmate and recognizes that DRC is in the best position to determine the offender's need as he progresses through the three-tier system. A veto interferes with DRC's administrative function and could mean interfering in the offender's well-being.

According to Dir. Diroll, this process goes back to the enactment of S.B. 2 and truth-in-sentencing, when it was determined that the judge should have final say in whether time in prison sentence should be shortened by transitional control or any other option.

Pros. Dobson feels the judge is the most appropriate person to make those decisions since he knows all of the details regarding the underlying offense and the offender's criminal history. He acknowledges that Ohio's truth-in-sentencing policy has been gradually eroded since

1996, due to additional bills that have passed and court cases that have caused changes.

Representing the Halfway House Association, Jim Lawrence declared that if you want offenders to stop committing crimes, then their transition back into the community needs to be gradual and include some assistance and supervision.

Atty. Hamm remarked that the judges in her district do not seem to be aware of what all DRC has available. Some have no idea what risk reduction or transitional control mean.

Judge Russo feels the Ohio Judicial Conference has been lax in educating judges on transitional control, the three-tier system, and risk assessment. It is important to know the ramifications of putting numbers or scores on people, she declared, noting that an inmate has a higher risk factor if he has no visitors. It fails to take into account that the inmate might be incarcerated in Cleveland while his family lives in Cincinnati, making it extremely difficult for them to visit. This is a factor outside of the inmate's control. Due to a lack of education for both judges and lawyers, they do not understand the implications of those numbers.

Transitional control from an evidence-based standpoint has a positive effect, said Dir. Mohr. He pointed out that he does not support elimination of the judge's veto power. He favors enhancing judicial discretion in every area. He does not believe the judicial veto will be eliminated but is certain that there will be some agreement between judges and community corrections on transitional control issues.

Judge Marcelain declared that he had attended full day training on transitional control.

According to Dept. Dir. Andrews, there has been training available on transitional control but not on an annual basis, and no training on the tier system.

Judge McIntosh doubts that he would release anyone without some sort of supervision or transitional control. He believes everyone needs some help in transitioning back into the community, but he also recognizes that some judges oppose it. Without sufficient education on what is offered by DRC and the benefits of transitional control, he believes it will be difficult to convince judges to give up their veto power.

MAKE JUDICIAL RELEASE RETROACTIVE TO PRE-S.B. 2 INMATES

The criminal justice system has changed since the enactment of S.B. 2, Judge Russo asserted. She insisted that it is necessary to more fairly align the old sentencing law with the new law. She feels it is unfair to only allow one chance for the offender to apply for judicial release. She believes it should be taken into account that DRC's three-tier system has changed the previous predictable outcomes.

Dir. Diroll remarked that some judges feel that to do so would cause them to be "papered to death."

It is time to get rid of the pre-S.B. 2 “one and done” policy, Judge Russo argued, as an issue of fairness.

Defense Attorney Kort Gatterdam contended that this should have been done years ago.

Dir. Diroll cautioned against giving false hope to pre-S.B. 2 offenders but conceded that it should be available as an option.

Dir. Mohr affirmed that this would not involve a large number of people.

The Commission reached consensus that some type of option should be considered.

DRC legislative liaison Scott Neeley reported that Sen. Shirley Smith has drafted an amendment to H.B. 483 that she hopes can resolve this problem.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for June 19, July 17, August 21, September 18, October 23, November 20, and December 18.

The meeting adjourned at 12:45 p.m.