

OHIO CRIMINAL SENTENCING COMMISSION

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Thoughts on Applying S.B. 2 to “Old Law” Inmates

By
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For some time now, inmates have petitioned courts to address the Adult Parole Authority’s (APA’s) treatment of prisoners sentenced for felonies committed before July 1, 1996 (“old law”), the day Ohio’s “truth-in-sentencing” measure went into effect (“new law”).

On August 31, Judge David Cain of the Franklin County Common Pleas Court found that the APA has, for numerous old law inmates, violated the right to make contracts (to enter meaningful plea agreements). He ordered the Parole Board to immediately rehear the cases (*Ankrom, et al. v. Hageman, et al.*).

This memo recaps the differences between old and new law, gives my thoughts on APA’s Parole Guidelines, reviews Judge Cain’s decision, and discusses why it is difficult to apply S.B. 2 retroactively.

Background

S.B. 2 (121st G.A.) was the major revision of the felony sentencing law that grew out of the Sentencing Commission’s recommendations. It applies to offenses committed on and after July 1, 1996. S.B. 2 was not made retroactive, so earlier crimes still follow the law in effect when the offenses were committed.

S.B. 2 likely is the nation’s most *honest* truth-in-sentencing law. Most persons sent to prison serve the exact sentence imposed in open court. Ohio judges have greater control over the time actually served by the offenders they sentence than they did under prior law. With S.B. 2, the Ohio General Assembly found that honesty is the best policy.

Here’s a quick comparison of the law before and after S.B. 2. (Footnotes could be added to many of the boxes to explain minor exceptions, but they aren’t germane to this discussion. S.B. 2 also consolidated, standardized, and expanded local sentencing options, but that too is irrelevant to this debate.)

Prison Sentences Under S.B. 2 & Prior Law

Prison Terms	Old Law—Before S.B. 2	New Law—Since 7.1.96
Type of Sentencing	Largely Indeterminate	Determinate
Administrative Reductions	1/3 rd Off “Minimum” Term	Virtually None
Administrative Programs with Early Release	Boot Camp Type Prisons & Transitional Furloughs	Same—But Judge Can Veto Any Placement
Administrative Releases	Shock parole & parole	None
Supervision Available After Prison	Yes	Yes
Judge’s Release Options	“Shock” & “Super Shock” Probation After Mand.Term	Judicial Release from Non-Mandatory Terms
Cap on Consecutive Sentences	Yes. To Board in 15 Years Minus (4-5 Yrs.) Good Time)	No Cap No Good Time Reduction
Appellate Review—Sentence <i>Per Se</i>	No	Yes

Under S.B. 2, if a judge sentences a felon to four years, the inmate serves four years. The sentence can be shortened, but only by the judge (judicial release) or with the judge’s acquiescence (before placing an inmate on furlough, in a boot camp prison, etc., DRC must notify the judge, who can veto the placement).

S.B. 2 eliminated the caps on consecutive sentences. Under the old law, a rapist with five victims could have been sentenced to five consecutive 7 to 25 year sentences. The rapist would have faced a prison term of 35 to 125 years. But not really. A statutory cap made the offender eligible for parole release after 15 years minus good time, or between 10 and 11 years. Conversely, a rapist given five consecutive 7 year terms under the new law would actually serve 35 years.

S.B. 2 eliminated the Parole Board’s release authority (except for old law inmates and those given life sentences). And it repealed administrative “good time” which subtracted about one-third of each offender’s sentence. While good time was to be earned, in reality it was earned by breathing, since relatively few inmates were denied good time.

These changes grew out of:

- A sense that the public found indeterminate sentencing confusing. In practice pre-S.B. 2, “6 to 25” never meant 25 and often didn’t mean 6, since parole eligibility came after about 4 years.
- The knowledge that the inmate’s actual time served was not determined by the elected judge in a public forum, but by the Parole Board—an unelected body meeting in private.
- A sense that the Parole Board sometimes acted arbitrarily. Board decisions have varied widely over the past three decades.

- A desire to give greater control over sentences to judges, so that all concerned—court, defendant, victims, and public—know that stated sentences equate more closely to time actually served.
- A desire to foster a broader range of correctional alternatives; and
- A desire to make prison populations more predictable for fairness and budgetary purposes.

Parole Guidelines

Since the 1980s, the APA has used a parole guidelines grid to assess the likely risk to society imposed by each eligible inmate. The grid was created in part to give the Parole Board objective standards that could produce consistent and just results for inmates, while being mindful of public safety. Parole guidelines remain relevant primarily because of the number of old law inmates still in Ohio's prisons.

In developing the grid, the APA looked to many factors, including the obvious: the nature of the offense and the offender's criminal history. As the Board began using the guidelines, it found itself exceeding the grid in a growing number of cases, particularly regarding sex offenders.

In 1998, the APA adopted a revised grid with these upward departures in mind. The new grid was "tougher" and more nuanced. One goal was to recognize the Board's belief that some offenses were undervalued by the old standards. By making the grid more accurately reflect parole practices, the APA theoretically provided "truth-in-parole" by putting inmates on notice of the tougher standards.

Both sets of guidelines were applied retroactively.

However, even under the 1998 guidelines, Board decisions are more likely to exceed the maximum guideline range than they were to fall under the minimum. Here are some reasons for upward departures:

- In the early 1990s, the Parole Board was burned by some high profile crimes committed by parolees. Some officials blamed them on early releases.
- In 1996, S.B. 2 ended the Board's release authority over most new inmates. Some contend that the Board—consciously or unconsciously—started giving longer "flops" to stay in business.
- Also in 1996, a victims' representative became part of the Board and DRC created a victims office. The office actively presents victim-based information to the Board in most old law cases.
- The Board sometimes considers criminal conduct alleged or indicted, but not ultimately proved beyond a reasonable doubt.

Limits Placed on the APA by the Supreme Court

The latter point led the Ohio Supreme Court to hold that the Parole Board must determine eligibility for old law inmates based on the offense or offenses leading to the conviction (*Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456 (2002)). The Board was not to use other offenses charged or indicted if the inmate was not ultimately convicted of those violations.

Judge Cain's Ruling in *Ankrom*

On August 31, Judge Cain issued a decision in the *Ankrom, et al. v. Hageman, et al.*, a case involving the numerical disparity between prison stays of old law inmates (at least those still in prison) versus those who arrive under the new law. The *Ankrom* case sits at the tip of a class-action iceberg that consolidated at least 24 cases against the Adult Parole Authority in Franklin County. No doubt the decision raised Cain in APA circles.

Judge Cain made several findings. He noted:

- Most class members claimed they were convicted of or pled guilty to “lesser and fewer crimes than indicted” and were assigned offense categories higher than those required by their offenses of conviction in violation of *Layne*.
- As for those placed in proper categories under *Layne*, in “numerous situations” inmates are still denied “meaningful consideration” for “unreasonable lengths of time after becoming eligible for parole.”
- “Use of the guidelines to deny meaningful consideration at earliest eligibility not only violates the language of *Layne* and the doctrine of separation of powers, it denies the rights of contract to inmates who entered negotiated plea agreements.”
- The APA “intentionally disregarded new statutory sanctions for the same offenses as well as the sentences rendered by judges.”
- “Some are serving two or three times the length of time they would be serving for the same offenses either under the new laws or the old parole policies.”
- The APA denies rights when it uses the new guidelines: to increase the minimum term originally imposed; to consider acts in addition to the offense(s) of conviction; to “flop” (continue the case until a later hearing) for more than five years; and to deny a re-hearing under post-*Layne* procedures.

Judge Cain then found that the APA unilaterally changed the bargain defendants struck in negotiating plea agreements. Offenders who would have been released under the old parole guidelines found they were not eligible under the 1998 version.

Stating that contract and statutory law entitle the plaintiffs to “meaningful parole consideration that consists of true eligibility” and a hearing that complies with *Layne*, Judge Cain ordered the APA to “immediately re-hear and grant meaningful consideration for parole” to any inmate whose contracts were breached by the conduct above.

The Catch: Why Retroactive Application Is Difficult

Basis for the New Law Ranges. This may come as a surprise, but the sentence ranges in S.B. 2 generally reflected the time actually served by inmates in the early 1990s under prior law. That is, while the sentences were honestly stated and sometimes sounded shorter than the hyperbole of the old law, most prison-bound offenders were to serve about the same time for similar offenses before and after S.B. 2.

Some faced potentially longer sentences. For example, S.B. 2 contained enhancements at the upper end for repeat violent offenders (RVOs), major drug offenders (MDOs), and more flexible consecutive sentencing rules. Conversely, certain lower end offenders were subject to less strict sentences. For instance, repeat petty thieves were felons before 1996. Now they are misdemeanants unless they steal \$500 or more. This said, on balance, the *typical* prison-bound offender’s actual time served under S.B. 2 was to be similar to the actual time served under old law.

However, as Judge Cain notes, the Parole Board routinely began to go above its own guidelines, thereby lengthening sentences for old law inmates, sometimes dramatically so. This created or enhanced disparity for certain offenses under old and new law.

Creating Two Classes. *Ankrom* points out that the non-retroactivity of S.B. 2 means the legislature created two classes of inmates serving different amounts of time for the same offenses. In fact, with or without S.B. 2, *every* bill that changes penalties creates such classes (albeit smaller ones) in the prisons and jails as well as on community and post-release control rolls. Does doing this generally violate the Constitution or even a defendant’s “right” to negotiate a plea contract? Probably not.

Shortly after S.B. 2 passed, the Ohio Supreme Court held that retroactive application is not constitutionally required. The Court upheld the line

drawn by the legislature between pre- and post-S.B. 2 crimes. It did not address the contract issues that are pivotal in Judge Cain’s decision.

Arguments Against Retroactivity. Regarding the failure to make S.B. 2 retroactive, Judge Cain opined:

“The Ohio General Assembly refused to make the new laws retroactive—apparently for no reason other than political expediency—and therefore created two classes of inmates serving different amounts of time for all but the most serious offenses.”

To be fair, in addition to the sense that new sentences generally would equate with old sentences once administrative reductions were repealed, there were reasons for not applying S.B. 2 retroactively.

- The General Assembly makes very few criminal sentencing bills retroactive. Doing so can lead to endless confusion, particularly in areas (such as OVI sentencing) where the law changes frequently.
- Offenders are sentenced under the law they broke. Unless the law is unconstitutional, or applied unfairly (as in *Layne* and *Ankrom*), courts generally consider it legitimate, irrespective of later changes.
- The Sentencing Commission generally suggested a clean line between old and new law under S.B. 2 (subject to a one-shot review discussed in a minute).

Why did the Commission want a clean line? The answer lies in how difficult it is to translate sentences issued before S.B. 2 into the new law. The easy approach would be to simply compare the time already served by the *Ankrom* inmates with the sentence ranges available for their conviction offenses under current §2929.14. Those over the maximum would be released.

However, that approach would not be true to S.B. 2. Here are some of the problems:

- To truly apply S.B. 2 retroactively, rather than simply look at new sentence lengths, courts or the Board must formally review the seriousness and recidivism factors relevant in each case under the bill. Since the *Ankrom* inmates were sentenced long ago, it’s hard to patch this information together. Similarly, it’s hard to apply S.B. 2 concepts like “demeaning the seriousness of the offense,” “poses the greatest likelihood of future crimes,” and the impact of victims’ statements at sentencing to these cases.
- Sentences prior to S.B. 2 were subject to “good time” and other administrative tools that reduced the “minimum” term imposed by

the sentencing judge. This lopped about one-third off the time it took to get to a first Parole Board hearing. Many offenders were released before their minimum term was served. While this point probably is moot for the *Ankrom* class, it leads to the next one.

- Old law placed lids on consecutive sentences. S.B. 2 lifted those caps. Remember the example of five rapes sentenced consecutively to 35 to 125 years? Under the old law cap and good time, the offender would appear before the Parole Board after little more than 10 years. That's not to say the inmate would be released before serving 11 years. But *historically* it meant that release occurred well before the 35 year "minimum". This point, too, may be moot, except:
 - Generally, the class of offenders in *Ankrom* would have left prison by now if they were not convicted of serious crimes. They were often charged with, and sometimes sentenced for, multiple serious offenses.
 - Under old law, prosecutors often dismissed some charges in multiple offense cases since the cap negated them.
 - While it is wrong for the Parole Board to consider allegations that were pled away under *Layne* in release decisions, it isn't equally wrong to consider them when objectively comparing the class's sentences to those possible under S.B. 2.
 - After all, S.B. 2 allows unlimited sentencing to consecutive terms (provided certain things are found). How can we reconstruct prosecutorial options years after sentencing? Yet, to equally sentence old law inmates under S.B. 2, the Board or a court would have to do so.

This aside, a practical political problem with retroactivity is that it would invariably lead to the release of serious offenders. As noted earlier, old law inmates who remain in prison committed serious crimes and/or have troublesome institutional records.

And retroactivity at this late date cannot be softened by including minor felons. Lesser felons who might have benefited under S.B. 2 have finished their prison terms. For example, S.B. 2 made repeat petty thieves into misdemeanants and provided that misdemeanants are no longer eligible for prison terms. Any petty thief in prison at the time S.B. 2 passed could fairly argue that he or she would have been in less trouble under the new law. If S.B. 2 is made retroactive, do these offenders have a remedy or are their cases moot? They've already been released. Could they seek damages for "wrongful" imprisonment? Would it be fair to exclude their cases?

A Missed Opportunity. As noted, the Sentencing Commission recommended against retroactively applying S.B. 2 to old law inmates generally. But the Commission also recognized that there would be tension between old and new law sentences. It suggested that—during the period between the bill’s passage and its delayed effective date—the Adult Parole Authority should conduct a one-shot review of all old law inmates’ sentences.

This limited “retroactivity” might have nipped many problems in the bud. However, on behalf of the APA, the Department of Rehabilitation and Correction opposed the one-time reviews and the language was deleted from S.B. 2. Unfortunately, that change, coupled with changing Parole Board practices, puts us in the current predicament.

Conclusion

There are people in prison under the old law who would not have been held as long under S.B. 2. However, it is likely that there are other inmates whose perceived maximum under S.B. 2 understates their situation. Some—perhaps many—would have received consecutive terms under the new law but did not receive them under the old law because of the artificial cap that then existed. Thus, the Parole Board may have to release both the deserving and the undeserving under *Ankrom*.

Of course, it is very hard to determine today who would receive tougher sentences (consecutives, repeat violent offender enhancements, etc.) under the new law. That may be why, after bemoaning the lack of retroactivity under S.B. 2, Judge Cain based his decision on the contractual principles involved in plea bargaining.

Here’s a solution, but it’s a long shot. The Governor could preempt the debate by using his clemency power to honor *Layne* and *Ankrom*, while guiding the APA as it tries to make better informed decisions about where the old law inmates fall under new law.