

**Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
May 18, 2006**

SENTENCING COMMISSION MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Appellate Judge H.J. Bressler, Co-Chair
Staff Lt. Shawn Davis, representing State Highway Patrol Superintendent
Col. Paul McClellan
OSBA Delegate Max Kravitz
Bob Lane, representing State Public Defender David Bodiker
State Representative Bob Latta
Municipal Prosecutor Steve McIntosh
Common Pleas Judge Reggie Routson
Dave Schroot, representing Youth Services Director Tom Stickrath
Steve VanDine, representing Rehabilitation and Correction
Director Terry Collins
Prosecutor David Warren
Sheriff Dave Westrick
Prosecutor Don White

ADVISORY COMMITTEE MEMBERS PRESENT

Monda DeWeese, SEPTA Correctional Facility
Burt Griffin, Retired Common Pleas Judge
James Lawrence, Halfway House Association
Cynthia Mausser, Ohio Parole Board Chairperson

GUESTS PRESENT

Sara Andrews, Department of Rehabilitation and Correction
Malika Bartlett, Senate Democratic Caucus
Liz Bostdorff, legislative aide to Rep. Bob Latta
Jared Bottomley, legislative aide to Representative Tim Grendell
JoEllen Cline, legislative liaison, Supreme Court of Ohio
Kathrin Feldmer, exchange student from Germany
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
Jim Guy, Department of Rehabilitation and Correction
Deborah Hoffman, Fiscal, Legislative Service Commission
Maura Jaibe, Ohio Attorney General's Office
Magistrate Robert Krebs, Butler County Common Pleas Court
David Leitenberger, Probation Officer, Richland Co. Common Pleas Court
Irene Lyons, Department of Rehabilitation and Correction
Nathan Miner, Department of Youth Services
Scott Neely, Department of Rehabilitation and Correction
Phillip Nunes, Ohio Community Corrections Association
Becki Park, Senate Republican Caucus
Candy Peters, Office of Criminal Justice Services

Ed Rhine, Department of Rehabilitation and Correction

Chief Justice Thomas Moyer, Chair, called the May 18, 2006 meeting of the Ohio Criminal Sentencing Commission to order at 9:45 a.m.

DIRECTOR'S REPORT

Meeting Packets. Director David Diroll reviewed the contents of the meeting packets, which included: a staff memo regarding a factor-based context for discussing sex offenses; a staff memo on consecutive sentencing guidance after the Ohio Supreme Court's recent *Foster* decision; notes on the Department of Rehabilitation and Correction's Omnibus Package; and minutes of the April Commission meeting.

Legislative Updates. Dir. Diroll reported that that pace has slowed on numerous sex offender bills pending before the General Assembly.

Rep. Latta confirmed that the House Legislative Committee will not be voting on any sex offender related bills soon. The soonest that any additional action may be taken is late summer, he reported.

SEX OFFENDER SANCTIONS

Staff Attorney Scott Anderson reminded the Commission that current law says that two general purposes of felony punishment are to protect the public and to punish the offender. With this in mind, a felony sentence must be reasonably calculated to meet these purposes in a way that is both commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim and consistent with sentences imposed for similar offenses committed by similar offenders.

At its most recent meeting, the Commission asked staff to develop a plan for structuring needed changes needed sex offender statutes, starting with the worst offenses and offenders. The current effort begins by approaching sex offenses in a logical fashion.

The purposes and principles of sentencing, as set out by SB 2, suggest three perspectives from which to analyze the effects of criminal activity: 1) the victim, 2) the offender, and 3) the public. The factors to be considered in sentencing can be arranged in light of those perspectives and according to whether the factors aggravate or mitigate the ultimate sentence to be imposed. Atty. Anderson pointed out that, since those factors are built into the elements of many crimes, some offenses fall under several categories. Use of those factors can help to bring logic to the sex offense statutes.

"Aggravated" Factors. Several factors in current law indicated that an offense is more serious, all other things equal. They include:

- Victim-centered - Two factors relate to the victim's vulnerability and the harm caused by the offense. These include whether the injury suffered was exacerbated by the victim's physical or mental condition or age, and whether the victim suffered serious (economic, psychological or physical) harm.
- Offender-centered - The four factors in this category include: the offender offender's public office or position of trust

related to the offense in some way; the offender's occupation or profession which obligated the offender to protect the victim, instead of harming him or her; the offender's profession or reputation was used to facilitate the offense; and the offender's relationship with the victim facilitated the offense.

- Public-centered - This category includes factors involving an offender who may have committed the offense for hire or as part of a broader organized criminal activity, and if the offense was committed with improperly prejudicial motives.

"Mitigating" Factors. The factors which allow the judge to pass more lenient sentences can also be sorted by the three differing perspectives.

- Victim-centered - The victim might have induced or facilitated the offense.
- Offender-centered - The offender may have acted under strong provocation. Some factors might argue against recidivism, including not having a prior juvenile or criminal history and living a law-abiding life for a significant number of years.
- Public-centered - the circumstances of the offense might not create heightened levels of danger to the public.

Sentencing Factors and Degrees of Crime. These are factors that find their way into the elements of the crime or as specifications added to the charges. In particular, factors which might aggravate an offense for purposes of the sentence might also aggravate the offense level.

Candy Peters, from the Office of Criminal Justice Services, remarked that pending HB 95 appears to change the sentencing law, which would need to be taken into consideration if passed by the General Assembly.

Noting that the offenses can overlap and penalties can vary depending on how they are charged, Dir. Diroll noted that HB 95 simply adds mandatory prison terms to the sexual battery and gross sexual imposition offenses when the victim is under the age of 13.

Atty. Anderson explained that some of the victim-centered factors might include whether the victim was under the age of 13, or if the offender used force instead of deception, etc.

It might be best, said Dir. Diroll, to strip the offenses to their basic elements then sort out the factors that would increase penalties.

There tends to be two groups of factors, said Ms. Peters remarked. One is encouraged by the public's sense of how horrendous a crime is. The other involves research into what makes someone a worse offender and more likely to recidivate. She feels that both should be considered.

Atty. Anderson explained that was why he tried to separate them into public factors (focusing on dangerousness and risk) versus offender factors (including criminal history, potential for recidivism, or treatment needed).

Bob Lane, representing the State Public Defender's Office, liked the template offered in the memo but cautioned against using offender factors, because these are really part of the act and should be listed

as sentencing elements instead of factors. He noted that some factors, such as lack of remorse, are to be considered after the defendant is found guilty and are not to be regarded as an element of the offense.

The first step, said Prosecutor Don White, is to set the offenses up within ranges.

Atty. Lane feels the template is a good starting point for plugging in the acts, victim's age, and other factors which are traditionally used to determine the elements of the crime.

It is necessary to look at the seriousness factors, said retired Judge Burt Griffin, to determine the sentencing range, and then look at the recidivism factors to determine which sentence to choose in the range.

A lot of statutes consider the damage done, said DRC Attorney Jim Guy. He is not sure, however, whether that would fit within the victim status or offender status, or should be included as an element of the offense or sentencing factor, according to the proposed template. Otherwise he likes the template.

Atty. Anderson believes that dangerousness or risk factors could be handled in the public oriented or victim oriented categories.

Appellate Court Judge H.J. Bressler asked whether it would be best to start with the worst of the worst and work down or start with the least serious and work up.

DRC Research Director Steve VanDine suggested identifying the least and the most severe. The middle, he noted, will be the trickiest part, as it was with SB 2.

The "worst of the worst" cases, Ms. Peters noted, usually have a number of different crimes involved in the offense.

Acknowledging the positive influence of the guideline chart used for SB 179, Rep. Latta suggested that it might help legislators to better understand the nuances of sex offender laws and proposed changes if they could see the template offered in the Commission's memo.

If the focus is on the worst offender, said Dir. Diroll, then it is necessary to determine what makes them the worst.

Maura Jaibe, representing the Attorney General's Office suggested starting with the lowest level of sex offenses so that no offenses are excluded, then adding on.

The bottom sex offense, said Judge Bressler, is an M-3.

Judge Griffin suggested starting at the both ends of the spectrum.

Municipal Prosecutor Steve McIntosh suggested that the template should include a chart of all sex offenses with the current penalties for those offenses as well as the proposed penalties.

It should probably also include the specs to consider, said Judge Bressler.

Pros. White, Pros. McIntosh, Sheriff Warren, and Staff Lt. Shawn Davis (representing the State Highway Patrol) voiced support for the worst and least approach.

Regarding higher level sex offenses—rape, sexual battery, and gross sexual imposition—Dir. Diroll asked if the Commission was wedded to the current elements of those offenses.

Defense Attorney Max Kravitz feels the current scheme is rational and feels we should not tinker with those definitions. He noted that the impetus from General Assembly is on ratcheting up penalties.

For the legislators, said Pros. White, it is like a Chinese menu. Pass a bill and two hours later you're hungry again. This can result in knee-jerk reactions, particularly if a new publicized sex offense occurs in their district.

According to Pros. Warren, "conduct" versus "contact" is not the issue.

Atty. Anderson agreed that there is no need for a change to those definitions. But for a "position of trust," there are several options available.

Lynn Grimshaw, representing the Ohio Justice Alliance for Community Corrections, agreed that there is no need for major changes. He cautioned, however, that with the push of bills by legislators, it will soon be necessary to do something.

It is useful, said Dir. Diroll, to distinguish between the elements and the factors which may be better specified as add-ons. As we chart these, we can then specify which things enhance the offense or penalty. He questioned whether this should start with a base statute that is fairly streamlined and lean, and then other things that are added on as elements or specifications.

Atty. Kravitz cautioned that we may be going too far, yet feels we are not precluded from offering guidance. Ultimately, the final package should be easily understandable. He also feels that the "abuse of trust" factor should be considered at sentencing, not by the jury.

According to Mr. VanDine, there is a shift toward more indefinite sentences at the top end of sex offense sentencing. Sometimes the determination is based on a sentencing factor and sometimes it is built into the structure of the crime as a penalty.

Another reason the Commission might want to consider indeterminate sentences for some sex offenses, said Ms. Peters, is because indeterminate sentencing is less expensive than civil commitment.

The staff, said Dir. Diroll, will put together a table and have a subcommittee work on these issues further.

The following people volunteered to serve on the committee: Candy Peters, Jim Guy, Max Kravitz, Bob Lane, Steve VanDine, OCCA Rep. Phil Nunes, Dave Warren, Lynn Grimshaw, Judge Reggie Routson, OCCA Rep. Jim Lawrence, and Rep. Latta.

DRC's "OMNIBUS" PACKAGE

Dir. Diroll reported that DRC's Omnibus package touches on a variety of concerns, including prison population, prison control, and some sentencing issues. The package had been presented to the Commission at the January meeting for review.

Sara Andrews explained that, in response to concerns raised by various constituents about some of the technical language within the package, DRC hopes to have the constituents assist with amending that language.

Among the options proposed in the package, the offer of increasing earned credit from one to seven days per month raised serious concerns for the Commission, given the Commission's historic focus on "truth in sentencing," said Dir. Diroll.

Pros. Don White remarked that this is a serious concern of the Ohio Prosecuting Attorneys' Association as well. Any modification in an offender's sentence is supposed to be conducted in open court or by the judge alone.

That, said Dir. Diroll, is why SB 2 included bad time as a prison management tool.

Atty. Max Kravitz argued that an increase in earned credit would serve as a great management tool for short-term inmates who create the greatest discipline problems. Long-term prisoners have accepted that the prison is basically their home, but short-termers, on the other hand, need more incentive to behave while incarcerated.

Ms. Andrews pointed out that earned credit would not be offered across the board. It would only be available to specific offenders at specific felony levels. Certain offenders would be excluded.

Although the current earned credit program is not behavior based, Mr. VanDine said, the offender has to exhibit good behavior to be accepted into the program. He noted that since the elimination of "good time" credits, fewer inmates have been participating in the programs offered. The inmates claim that it is because of the small rewards for participation. Those who participate exhibit a lower level of recidivism, so DRC is seeking to get more inmates involved. Ultimately, it will benefit the public by helping inmates to succeed upon release.

The short-termers who are held for 6 to 12 months would not be impacted, Ms. Peters argued, because they are not incarcerated long enough to get into the programs and benefit from them.

Another controversial issue, said Ms. Andrews, is post release control (PRC). DRC would like more permissive language, granting more discretion to DRC on the implementation of PRC. Currently, the length of PRC is determined by the felony level and length of prison sentence. DRC would like to also relate it to the offender's risk level, supervision history, progress under supervision, etc. They would like the authority to decrease (or possibly terminate) or increase the length based on these things.

Dir. Diroll noted that the length of PRC for sex offenders is based not so much on what they did as what they might do. The issue over the control of the supervision of former inmates could become even more complicated given the move toward indeterminate sentences for more sex offenders.

DRC would like the PRC length to be available for up to 7 years, said Ms. Andrews. They don't mind that some PRC is mandated in some cases, but would like the authority to decrease it in some cases and possibly even terminate it in a few cases. In determining the length of time, DRC would try to relate it back to the original sentence.

Part of the omnibus package, said Ms. Andrews, merely involves administrative clean-up on a variety of issues.

When questioned about the "deadly force" provision, Mr. Neely explained that if a DRC employee uses deadly force in the scope of his duties, he will be provided with special counsel up to the point of indictment, then he would have to get his own attorney.

Under the judicial release proposal, judicial release would be allowed for those serving non-mandatory prison terms longer than 10 years and the filing deadline for F-4s and F-5s would be extended. It also shifts the duty to notify the prison administrator from the inmate to the court and adds a requirement that the notice and any later release be posted on the inmate database. It further instructs the institution to notify the court when an inmate completes rehabilitative activities and authorizes the court to consider statements from any person.

When judicial release was originally discussed before SB 2, said Judge Griffin, it was determined that any offender who gets more than 10 years must be so bad that the judge felt they didn't deserve any chance to get out sooner.

Every offender deserves some hope, Atty. Kravitz argued.

Sara Andrews pointed out that ultimate jurisdiction would remain with the sentencing court to approve any early release.

Phil Nunes asked DRC to consider the option of allowing the incentive based earned credit to carry over to the offender's supervision or PRC time.

STATE V. FOSTER

Director Diroll asked whether the Commission wanted to recommend any changes in response to the *Foster* case, which limited some of SB 2's provisions. In particular, Dir. Diroll asked members about consecutive sentences and sentencing consistency. Before SB 2, there was a presumption that the judge would sentence concurrently. And when the judge imposed consecutive terms, there was a 15 year cap on them. Many people believe that *Foster* returned sentencing to pre-SB 2 standards. But this isn't accurate, claimed Dir. Diroll, since the case did not keep the favored status of concurrent sentencing, nor did it bring back the caps on consecutive terms.

Dir. Diroll added that under the earlier *Rance* case (dealing dealt with "allied offenses of similar import"), almost every overlapping offense can be separately sentenced and, under *Foster*, the judge no longer has to give a reason subject to appeal for extending the sentence beyond the maximum.

Dir. Diroll asked if the Commission should offer some guidance on consecutives, or if it would better to take a wait and see approach.

The General Assembly wrote the law so that the offender could commit one offense and be charged with many counts, Atty. Lane contended. He feels that something needs to be done about that. In addition, although it may be too soon to act on *Foster*, he noted that some offenders are being pulled out of prison for resentencing based on *Foster*, which is making sentencing very inconsistent.

Pre-SB 2 it didn't matter how long offenders were sentenced, said Atty. Kravitz, since they went to the Parole Board after serving 15 years, minus good time. He noted that the multiple count statute was never intended to mirror double jeopardy protection. He favors the language in the expungement statute which says that when two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction, presumably the conviction which carries the greatest penalty.

There are two competing principles at work here, said Judge Routson. One has to do with whether judges should be reined in when there is no double jeopardy problem. The other is how to identify and simplify this statute and the double jeopardy clause. He doesn't feel that any judge would be opposed to looking at factors when deciding whether to oppose consecutive sentences.

Atty. Grimshaw argued that the system must not be allowed to return to a Parole Board review. It is still important to look at the specific facts of the case, he argued.

Judicial release for sentences beyond 10 years might solve that, Atty. Guy offered since it puts the decision back in the hands of the judge.

It would also be necessary to consider whether the judge can grant judicial release after the mandatory portion of a consecutive sentence is served, said Judge Bressler.

Dir. Diroll asked if another option might be to allow mandatory sentences to be served consecutively instead of concurrently.

Parole Board Chair Cyndi Mausser noted that the Board has had an increase in requests for Governor computations since SB 2.

Judge Bressler contended that when the judge gives the original sentence he imposes what he believes is most appropriate.

Atty. Kravitz feels that the maximum allowed for the most serious offense out of one incident ought to be the maximum, period.

The court must also take into account the number of victims, Judge Griffin argued.

Pros. White contended that most judges are going to make the right decision for the right reason.

Judge Bressler remarked that he is not sure action the Commission takes will have an impact until we see what the impact of *Foster* is.

Acknowledging that no one knows just where the U.S. Supreme Court will resolve some of these issues, Judge Griffin contended that the core issue pertains to what role the jury plays.

At the beginning of 2006, before *Foster* and any of the pending sex offender legislation, said Mr. VanDine, the prison population projections were expected to be 58,000 by 2015. Those projections increase are likely to increase by 1,400 as a result of *Foster*, and HB 95 could add another 1,100. Given that the prison system was extremely crowded the last time it hit 49,000 the state can build new prisons or decide where the offenders will serve the extra lengths of time. He feels that the Commission might want to consider offering a recommendation for housing the offenders with lengthy sentences.

Judge Bressler suggested that, at this point, the Commission staff should focus on *Rance* issues, options for offenders with extensive sentences, and whether it would be beneficial to make adjustments to the use of judicial release. He also recommended gathering data from DRC on offenders being resentenced as a result of *Foster*.

After lunch the discussion turned to the impact of *Rance*. Dir. Diroll asked if the Commission wanted to attempt to do something statutorily on *Rance* or consecutive sentences.

Ms. Peters asked for more data resulting from *Rance*.

DRC hopes to get a better look in July, said Mr. VanDine, at commitment sentences after *Foster*.

Atty. Lane reported that several cases that were pending with the Ohio Supreme Court have been repealed or withdrawn as a result of *Foster*.

Judge Griffin questioned how *Foster* has affected a defendant's right to have a jury trial, particularly if the defendant wants to waive a jury trial and request that the guidelines be applied.

Many had speculated that *Foster* would result in many of these defendants refusing to exercise their right to a jury trial, Atty. Lane responded, but that is yet to be seen. Many defendants whose cases have been pending with the Ohio Supreme Court, however, are waiving the additional hearing and preferring to keep their current sentence.

Another concern, said Judge Routson, is that many judges are unclear about what they can say at the resentencing hearings for those cases remanded by the Supreme Court as a result of *Foster*.

As a defense attorney, Atty. Kravitz remarked that he has taken the position that the sentence compelled by the jury finding is a sentence of nonconsecutive sentences. He argued that, at the time of a finding of guilt on various offenses, Ohio law said that the defendant could

not receive a consecutive sentence, unless there has been what has now been determined as unconstitutional judicial fact-finding. The bottom line, he explained, is that the law that existed at the time of the crime was that consecutive sentences were precluded.

When asked about other issues that should be considered, Mr. Nunes declared that there is a reversal phenomenon occurring as well. A large number of offenders with sentences of 12 months or less are entering DRC (3,500). Only about half of those are PRC violators. He contended that it is a cost issue that should be discussed.

DRC's legislative liaison Scott Neely agreed that it is a serious resource issue.

Mr. Nunes added that most of these offenders are receiving no treatment because of the short period of incarceration.

Noting that most of these offenders have had multiple prior convictions for which they were given community sanctions, Ms. Peters remarked, the administrators at the local level are often tired of dealing with them and ready to send them on. She acknowledged, however, that this group runs the gamut from first timers to multiple offenders. She offered to provide copies of a recent report on this group of offenders.

It has become a systemic problem, Mr. Nunes argued, because offenders with 12 months and less are re-entering the community with no treatment and no housing.

Part of the problem, said Judge Bressler, is community resources.

FUTURE MEETINGS; JUDGE BRESSLER

Future meetings of the Sentencing Commission have been tentatively scheduled for June 15, July 20, August 17, September 21, October 19, and November 16.

Judge Bressler announced that he has requested that Chief Justice Moyer appoint another Commission member to take his place after 11 years on the Commission.

Dir. Diroll expressed appreciation for Judge Bressler's service to the Commission in multiple capacities as a Common Pleas Judge, Appellate Judge, Chair of the Juvenile Committee, and Vice-Chair of the Full Commission. He commended him for his diligence, ability to mediate thoughtful discussions of controversial issues, and for being "a good guy."

The meeting adjourned at 1:30 p.m.