

# OHIO CRIMINAL SENTENCING COMMISSION

65 South Front Street · Fifth Floor · Columbus · 43215 · Telephone: (614) 387-9305 · Fax: (614) 387-9309

Chief Justice Maureen O'Connor  
Chair

David J. Diroll  
Executive Director

**Minutes of the  
OHIO CRIMINAL SENTENCING COMMISSION  
and the  
CRIMINAL SENTENCING ADVISORY COMMITTEE  
April 21, 2011**

**MEMBERS PRESENT**

Municipal Judge David Gormley, Vice-Chair  
Staff Lt. Anthony Bradshaw, representing State Highway Patrol Supt.,  
Col. John Born  
Defense Attorney Paula Brown  
Common Pleas Judge Janet Burnside  
Juvenile Judge Robert DeLamatre  
Prosecuting Attorney Laina Fetherolf  
Defense Attorney Kathleen Hamm  
Municipal Judge Fritz Hany  
Bob Lane, representing State Public Defender Tim Young  
Prosecuting Attorney Joseph Macejko  
Common Pleas Judge Thomas Marcelain  
Senator Larry Obhof  
Municipal Judge Kenneth Spanagel  
Steve VanDine, representing Rehabilitation and Correction  
Director Gary Mohr  
Representative Roland Winburn

**ADVISORY COMMITTEE MEMBERS PRESENT**

Jhan Corzine, Retired Judge  
Eugene Gallo, Executive Director Eastern Ohio Correctional Center  
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections  
John Guldin, Counsel, Bureau of Motor Vehicles  
Joanna Saul, Correctional Institution Inspection Committee  
Jeffrey Welbaum, Ohio Attorney General's Office  
Gary Yates, Chief Probation Officers' Association

**STAFF**

David Diroll, Executive Director  
Cynthia Ward, Administrative Assistant  
Shawn Welch, Law Clerk

**GUESTS PRESENT**

Erich Bittner, legislative aide to Sen. Larry Obhof  
Noah Blundo, Hannah News Network  
Jim Brady, interested citizen  
Erika Cybulskis, Dept. of Health  
Monda DeWeese, SEPTA Correctional Facility  
Beth Florence, legislative aide to Rep. Lynn Slaby  
Lusanne Green, Ohio Community Corrections Association  
Daniel Hannon, OJAAC  
Linda Janes, Chief of Staff, Rehabilitation and Correction  
Cleve Johnson, Attorney at Law

Kevin Lottes, Supreme Court of Ohio  
Irene Lyons, Rehabilitation and Correction  
Scott Neeley, Rehabilitation and Correction  
Phil Nunes, Ohio Community Corrections Association  
Mike Schweikert, Director, Ohio Judicial Conference  
Senator Bill Seitz, Ohio Senate  
Lisa Valentine, policy aide to Speaker William Batchelder  
Steve VanDine, Research Chief, Rehabilitation and Correction  
Marjorie Yano, Legislative Service Commission Fellow

The April 21, 2011 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order at 9:47 a.m. by Vice-Chair Municipal Court Judge David Gormley.

#### **DIRECTOR'S REPORT**

Executive Director David Diroll welcomed Representative Roland Winburn and Senator Larry Obhof, who were recently appointed as new legislative members of the Sentencing Commission. He also welcomed Jeff Welbaum, who will serve on the Advisory Committee as a representative of the Ohio Attorney General's Office.

#### **LEGISLATIVE UPDATE**

Dir. Diroll noted that, as Gov. Kasich adjusts the budget bill in regards to saving prison costs, he tends to be looking at what will have the most impact in saving prison beds. Because of that, certain aspects of S.B. 10 and H.B. 86 (the nearly identical prison crowding bills introduced in each house) has been moved to H.B. 153, the biennial budget bill, which must pass by July 1. He said that Rep. Ross McGregor, who chairs a House Finance subcommittee, is willing to offer the Sentencing Commission's "Foster Fix" language as part of H.B. 153.

#### **OPERATING A MOTOR VEHICLE WHILE IMPAIRED (OVI)**

In researching OVI data, Dir. Diroll and Law Clerk Shawn Welch discovered that the numbers relating to OVI offenses differ between BMV, the State Highway Patrol, and the Supreme Court Management Section, although they show that OVIs are declining as a general trend.

John Guldin, Counsel for the Bureau of Motor Vehicles noted that convictions go into the BMV system by code. He recommended contacting John Fitzpatrick, who knows how the codes are entered into the system.

Judge Spanagel remarked that the Supreme Court numbers might also include mayor's courts reports that get transferred to the municipal court, so they might be getting counted twice. He noted that, as courts report monthly, the municipal court codes break it down by felony, misdemeanor, and OVI, etc.

According to Common Pleas Court Judge Thomas Marcelain, the felony courts' codes do not break it down that way.

Once we sort out the logistics, Rep. Winburn asked, then what can we make out of this data?

The hope, said Dir. Diroll, is to compare the data with sentencing changes to see if there are correlations. That way, we can try to better understand which of the OVI sanctions matter most. He believes that the goal of most of the mandatory changes is deterrence, rather than punishment.

Dir. Diroll noted that a study showed that when new and tougher OVI laws were heavily publicized, a dip in occurrences would result while it was heavily publicized, then would pick up again after the publicity decreased. Of the combination of publicity, regular law enforcement, and the statutes, he would like to examine which has the greatest impact. It would be beneficial to study whether other changes such as interlock, impoundment, and the like have changed the patterns.

In the early 1980's there were 3 days of incarceration mandated for OVIs, which was enforced loosely, so a bill changed that to 72 consecutive hours, noted Dir. Diroll. Then mandatory periods were added for repeat OVIs. In 1996 felony OVI was brought into the mix.

There were approximately 20 felony OVIs per year for the first couple of years, said DRC Research Director Steve VanDine, but that has now increased to about 400 per year.

It is the common man's crime, said Judge Spanagel, since almost anyone can get an OVI once. The repeat offender is the key concern.

Data from BMV and the Department of Public Safety has data on repeat offenders, but it does not break it down by 2<sup>nd</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> time offenders. It simply lists it as repeat offenders.

Atty. Welch reported that the data lists a total of 47,600 OVIs for 2009 committed by 46,000 drivers. About 19,500 of those offenders had previous OVIs.

Cleve Johnson, a defense attorney who specializes in OVI cases, served on the Sentencing Commission's Traffic Committee a decade ago. He suggested tracking how patterns in enforcement vary in comparison to federal grants received. The State Highway Patrol and police departments used to get federal grant money for overtime specifically focused on enforcement of OVI statutes. When that funding got cut, there was a significant reduction in the number of OVI arrests. Given current budget cuts, he suspects that enforcement will likely drop again. He acknowledged that publicity does help to curtail some offenders, particularly regarding the use of check points.

It might be worth noting, he said, that around 1992 was when baby boomers got through the prime drinking age, which would help to account for a decline in some of the OVI numbers at that point.

The state was told in 2008, said Judge Spanagel, that it would lose federal money if didn't comply with the new .08 standard of impairment.

Felony sentencing for OVI started in 1996, Judge Spanagel remarked. Now F-4 and F-3 OVIs can get 60 days local incarceration, up to a year or 60 days in prison with the option of an additional 6 to 30 months. A second felony OVI can get from 60 days up to 5 years in prison. Some of the changes got added in a piecemeal fashion and some in response to

terribly tragic accidents. He declared that there may be a better way to craft the structure of felony sentencing for OVI offenses.

Basically, OVI sentencing is off the charts, Dir. Diroll responded. An OVI M-1 is unlike any other M-1 offense. The penalties tend to exceed those for any other misdemeanors. Many judges contend that common pleas courts are best suited for handling all drug cases while municipal courts are best suited for handling all OVI cases.

Common Pleas Court Judge Janet Burnside warned that judges do not deal well with change. It's an expensive and complex process to keep changing the laws and there tend to be more changes made to DUI law than any other. She urged legislators to please limit further change to this segment of the law.

Even the "drugged" driving law, Dir. Diroll noted, doesn't get at all the pharmaceuticals that can impair a person's driving ability.

The law, Judge Spanagel pointed out, says that no one shall operate a vehicle while under the influence of alcohol or drug of abuse or any combination of the same.

Atty. Johnson remarked that the per se level for marijuana brings him a lot of business because marijuana can stay in the body's urine for awhile but its effects are very short lived.

There's no agreement in the scientific community, Judge Corzine acknowledged, on per se and how long marijuana and other drugs stay in the system, particularly for chronic users. It's open for debate.

Juvenile Court Judge Robert DeLamatre declared that per se limits are crazy and there is no scientific evidence to back up impairment levels. He believes this is an area that could use some changes.

Municipal Court Judge Fritz Hany agrees with Judge Burnside that OVI law is changed way too frequently. The offense and penalty section for this alone is 12 pages long. He contended that (A) (1) and (A) (1) (a) are extremely confusing to explain in jury instruction. He believes that (A) (1) (a) should be addressed in the sentencing category, not the offense category. We also need to get (A) (2) out of the offense section.

Part of the problem, Atty. Johnson contended, is that LSC insists on repeating everything in multiple places.

Some things should be add-ons, not separate crimes, said Judge Burnside.

Atty. Guldin wondered if it would be possible to get the General Assembly to accept the penalties in chart form. He believes that would simplify how to understand them.

The chart format had already been suggested, said Dir. Diroll, but LSC is reluctant to try it in chart form.

It reverts back, said Rep. Winburn, to LSC feeling it is mandated to do it as currently done.

Judge Burnside favors doing it both as a chart and in writing. She also favors Dir. Diroll's simplification recommendations offered two years ago. She feels strongly that it is a step in the right direction.

LSC opposed the simplification changes, said Dir. Diroll, because they thought they were policy changes, even though they weren't changing any statutory or legislative policies. The changes would, however, change some of their drafting policies.

The chart is really necessary when trying to decipher penalties, Judge Gormley declared.

Judge DeLamatre asked if there might be a simplified statute from another state that could be used.

In any discussion of simplification, Rep. Winburn warned, it is necessary to also discuss the cost of things, such as testing.

There are also the costs of confinement, impoundment, reinstatement fees, and increased insurance costs said Dir. Diroll.

The issue of whether mandatory jail time is sacrosanct should be included in the discussion as well, said Judge Spanagel.

An additional concern, said Atty. Johnson, should be how to make payment of reinstatement fees easier. He believes that all people should be allowed to do time payments.

It simply is not possible, said Atty. Welbaum, to duplicate every detail or niche and simplify the Code. The process of consolidation will result in some winners and losers.

Dir. Diroll sensed genuine hope in neutrally making the OVI section more readable. He again offered the option of surveying practitioners as to what is meaningful and what really serves as a deterrent.

Simplification would be great, said Common Pleas Court Judge Thomas Marcelain, but beyond that, he agrees with Judge Burnside that judges do not want continual change.

Simplification would be easier to sell, Atty. Guldin remarked. He noted that the 1923 version was only two pages long.

No one, Judge Spanagel declared, wants to be known as voting against an OVI bill, so any attempt to make statutory changes will be met with strong resistance. It will be necessary to clarify that the Sentencing Commission is not recommending changes, but only a change of format.

Let's ask for the right things, Mr. Nunes contended. Anytime fees are added, it should be explained why and what the fees are for. He stressed that reinstatement fees are an extra burden for offenders at reentry.

BMV is basically just a collection source of fees, said Judge Spanagel. They don't set the fees.

Atty. Guldin noted that it is basically a form of tax.

Dir. Diroll agreed to produce a simplified version of the OVI statutes for the next meeting.

#### **VETERANS AND THE JUSTICE SYSTEM**

Concerns have been raised, said Dir. Diroll, about how veterans are seen in the criminal justice system and how much the courts should take into account regarding issues related to the experience of the veteran. He noted that the U.S. Sentencing Commission has looked at how veterans' problems might relate to sentencing. These are addressed briefly in §§5H1.11 and 5H1.3, allowing the court to go outside the guidelines if necessary.

Offering some background, Phil Nunes, representing the Ohio Community Corrections Association, reported that Justice Evelyn Stratton has championed a new focus on veterans' issues within the criminal justice system. She is leading a charge in Ohio to create veteran specialized courts designed to address the specific needs of veterans as they enter the criminal justice system and Ohio's jails and prisons. She has determined that the Commission might be helpful in offering assistance in two areas: A need to examine how our court system evaluates the U.S. Veteran status at the time of a presentence investigation and for possible mitigating factors at the time of sentencing.

According to DRC, approximately 115 veterans are admitted for incarceration per month. Over the past 12 months the number of veterans released from DRC versus the number admitted has increased by an average of 20 more veterans. This raises issues regarding the veteran's success of reentry. Veterans comprise 5% of the prison population.

There is an economic side to this issue since resource allocation needs to be taken into consideration. He noted that veteran medical centers have resources available for this population that might be taken into consideration for alternative sanctions and treatment.

The Department of Veterans Affairs just announced a new directive that includes language for medical services related to veterans involved in the criminal justice system. Mr. Nunes noted that Ohio has four legislative liaisons available through Veterans Affairs.

Ohio is now finding that 70% of the homeless per diem have a criminal justice history. It took about 10 years before Vietnam veterans had an impact on the homeless system. Veterans from the battles in Iraq and Afghanistan are ending up within the homeless system within 9 months. In addition to those challenges, recent veterans are returning with untreated PTSD issues and traumatic brain disorders.

If many veterans' issues fit into the mental health court concept, Dir. Diroll asked why a specialized vets' court is needed.

It involves more than just mental health issues, Mr. Nunes responded. Sometimes different approaches are needed for different populations. For example, he noted that dealing with typical homeless people often needs to be handled in a totally different manner than dealing with

homeless veterans. Veterans are used to responding to a hierarchical approach while many of the typical homeless people oppose hierarchy.

Judge Corzine expressed some trepidation about the proposal, noting that the Veteran's Administration decides how much they're willing to cooperate with you. He understands the need to take individual characteristics into account and feels the current system allows that.

When asked about the outcome desired, Mr. Nunes remarked that some needs are more targeted and go deeper for veterans. People with mental health issues often come with their history known - veterans do not.

Atty. Hamm asked if efforts are being made to educate probation departments, etc. about the needs and available resources.

Gary Yates, representing the Chief Probation Officers' Association, declared that there is some money available at local Veteran Services Commissions, which exist in every county. If unused for veterans' services, it returns to county coffers. There may be a way to tap into that. He feels that some of that money should be considered first before turning to federal VA money. He added that more veterans are coming through at the municipal court level than at the felony level.

Public defender offices get swamped with social work issues, said Atty. Hamm, and there is a large gap in knowing what resources are available.

Mr. Yates acknowledged that there is a gap in making public defenders aware of available resources. This is probably because more veterans come through the municipal court level than the felony level.

Mr. Nunes suggested having a veteran's liaison come to the next meeting. He agreed that the Veteran Service Commissions are great locally but long term programs are needed as well.

City Prosecutor Jay Macejko said that a specialized veterans court was started in Youngstown last January. When he visited a similar court in Buffalo, New York, he learned that waiting until the PSI or probation is too late. Information should be gathered at intake or booking and made available at the time of arraignment. Youngstown uses a team of veteran mentors to help guide veterans through the system and process.

He noted that, as Mr. Nunes had intimated, veterans' issues include homelessness, shoplifting, theft, alcoholism, drug abuse, and other nonviolent offenses. Since those are spin-offs of their specific issues, they should be handled as such. If they commit violent crimes, however, they should be treated like other violent offenders.

Acknowledging that veterans have significant challenges in readapting to civilian life, Dir. Diroll asked what things in the sentencing code should be changed, or is the concern more a matter of making practitioners aware of the issues and needs.

The major need, said Atty. Macejko, is to make the court system more aware of the specific needs for consideration.

Not all mental health court dockets, said Judge Burnside, have the jurisdiction to deal with non-schizophrenic post traumatic stress

disorder (PTSD). Resources for mental health may be limited for the more severe issues, leaving other agencies with bipolar and PTSD cases.

According to Atty. Hamm a specificity of diagnosis is written into the Supreme Court's recommendations for mental health courts.

Kevin Lottes, representing Justice Stratton's work group on veterans' needs, pointed out that veterans' courts are new to Ohio. There are currently two, in Youngstown and Mansfield at the municipal level, and one in Cincinnati at the felony level. The biggest difference between the mental health court and the veterans' court is the VJO component. The Mansfield court has a veteran's outreach specialist from Cleveland. The Cincinnati court has a VJO right there that can meet with veterans more often. The VJO component of linking up the veteran with resources makes a huge difference. The concept of specialized dockets, he said, is that the more individualized the focus, the more effectively the sentencing and treatment plan can be formulated to prevent recidivism.

It is not just about the mental health component, said Mr. Nunes. Some veterans may need something other than mental health issues.

Although the Specialized Dockets Office currently acts as a clearinghouse and directs courts to resources, Mr. Lottes explained that standards are being drafted that include guidelines for a court in setting up the programs and post-conviction plans. He noted that the 12 standards and 10 key components are similar to those for drug courts.

Most of the funds for establishing these courts, said Mr. Nunes, come from federal grant funds.

Judge Fritz Hany acknowledged that he sees more vet cases showing up in municipal court and having a way to focus in on these needs quicker will ease the burden.

Mr. Nunes suggested compiling a veteran fact sheet and contacting other agencies and court services to help provide education on the issues.

It might be good to examine if the statutes need to address veterans' issues better, said Mr. Diroll.

#### **SEN. BILL SEITZ ON PRISON CROWDING REFORMS**

As sponsor of S.B. 10, Senator Bill Seitz offered a summary of the bill's key components, many of which now also appear in the budget bill (H.B. 153) and H.B. 86. He prefers to have S.B. 10 proceed as separate legislation from the budget bill because he feels there will be a better chance to get the details right.

He began by noting that the budget bill includes some prison crowding elements that are not in S.B. 10/H.B. 86. Those include:

- Governor Kasich proposed a reversal of the Supreme Court decision on *Foster*. Sen. Seitz chose not to take on the *Foster* issue;
- A proposal to privatize five of Ohio's prisons; and
- Ordering DRC to no longer do PSIs for some counties.

Some things in S.B. 10/H.B. 86 that are not in the budget bill:

- Extending intervention in lieu of conviction to second offenders;
- Revising the penalties for absconding supervision;
- Placing term limits on the Parole Board;
- Asking the federal government to do a pilot project on medical parole for infirm elderly prisoners and let Medicaid pay for it; and
- Cleanup language requested by DRC.

He said that he and Governor Kasich are firmly committed to:

- Expanded earned credit for inmates;
- Risk reduction sentencing (with release allowed after 75% of term);
- Increasing the felony theft threshold from \$500 to \$1,000;
- Steering felony nonsupport cases toward community programs;
- Adopting other Council of State Governments sentencing suggestions:
  - Increasing the maximum number of years for F-1 offenders;
  - Decreasing the maximum and minimum years for F-3 offenders;
  - Allow sentencing in increments of months instead of years;
  - Preventing first time nonviolent F-4s and F-5s from going to prison, unless they violate 3 years of intensive supervision;
  - Using one probation officer per offender;
  - Adopting statewide standards for probation departments and assessments;
  - Limiting funding to CBCFs unless they meet the bill's parameters on those they hold. They are to make sure the right people are there and use a continuum of sanctions for offenders, he added.

There are currently 10 to 15 amendments under consideration, he noted.

The increase in the theft threshold includes a provision to allow a county to sanction misdemeanants with less than 30 days to a separate community alternative sentencing facility and ease jail crowding.

Due to a lack of resources, said Prosecuting Attorney Laina Fetherolf, that is not a viable option for Hocking County.

The bill, said Sen. Seitz, will equalize penalties for crack and powder cocaine offenses.

Sen. Seitz noted that the Prosecuting Attorneys' Association opposes intervention in lieu for those with intellectual or developmental disabilities. Justice Stratton, however, advocates strongly for the option for those individuals.

The notion of mandating 3 years of probation supervision rather than imprisonment for F-4s and F-5s contradicts the research by the University of Cincinnati, Judge Burnside argued. That research declared that sanctions and levels of supervision should be based on a risk assessment. Evidence-based practices testify to the fact that extensive terms of supervision result in increased recidivism for some people.

This recommendation, Sen. Seitz countered, came from CSG, which, in turn, was based on that same research by U.C. CSG determined that 3 years on probation is a better option than a 6-month prison term.

Atty. Hamm argued that it also affects eligibility for expungement.

It takes away the incentive or option for a plea, declared Pros. Fetherolf.

Sen. Seitz pointed out that it only applies to first-time F-4s and 5s.

Mr. Yates noted the offender could still go to jail, just not prison.

Overall, Sen. Seitz continued, certain offenders will be allowed to earn 5 days of credit upon completion of a program, with a maximum earned credit allowance of 8% of the inmate's sentence.

When asked about proposed amendments, Sen. Seitz responded that there is concern about the term length for F-3 offenders and some clean up language for judicial release. He noted that there are two forms of judicial release in the bill. One would allow the offender to be released after serving 85% of his prison term, *including* any time served in jail. Traditional judicial release only counts prison time. There are proposals for announcing at sentencing that the offender will be eligible for earned credit and a proposal and a possibility of a certificate of rehabilitation to help a released offender's chance of employment, and a need to relax collateral sanctions.

One proposal, said Sen. Seitz, involves the application of earned credit for a repeat offender. If a repeat offender has earned credit on a previous offense, he would have that credit time added to the new offense.

Judge Burnside challenged that the Supreme Court argues that the executive branch cannot increase sentences.

Judge Corzine pointed out that the judge would need to tell the offender at the sentencing for his first sentence that if he gains earned credit and screws up, it can be added to the second offense. He would need to warn him at the sentencing of the first offense about the consequences if he screws up.

Mr. Yates raised concerns about publishing supervision policies on line. Some officers worry about their safety.

The proposal would list a graduated list of sanctions for violations, Sen. Seitz responded. He does not want to jeopardize the security of probation operations. He noted that CSG raised concerns about the lack of data related to the number of offenders in probation programs. Neither DRC nor the Supreme Court has that information available.

Although that data are generated on a monthly basis, Mr. Yates pointed out that municipal probation officers are not tied to the Supreme Court reporting unless receiving CCA funds.

Sen. Seitz pointed out that there needs to be some way to accumulate more uniform data. He is open to suggestions.

**FUTURE MEETINGS**

Future meetings of the Ohio Criminal Sentencing Commission are scheduled for May 19, June 16, July 21, August 18, September 15, October 13, November 17, and December 15, 2011.

The meeting adjourned at 2:04 p.m.