Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
June 15, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reggie Routson, Vice Chair
Rehabilitation and Corrections Director Terry Collins
Staff Lt. Shawn Davis, Representing State Highway Patrol Superintendent Col. Paul McClellan
Juvenile Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Bob Lane, representing State Public Defender David Bodiker
Dave Schroot, representing Youth Services Director Tom Stickrath
Municipal Judge Kenneth Spanagel
Public Defender Yeura Venters
Prosecutor David Warren

ADVISORY COMMITTEE MEMBERS PRESENT
Cynthia Mausser, Ohio Parole Board Chairperson

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Malika Bartlett, Senate Democratic Caucus
David Berenson, Dept. of Rehabilitation and Correction
Bill Breyer, Prosecuting Attorney
Jeff Clark, Ohio Attorney General's Office
Amanda Cooper, legislative aide to Rep. Bob Latta
Deborah Hoffman, Fiscal, Legislative Service Commission
Stephanie Kaylor, legislative aide to Senator Steve Austria
Magistrate Lori Keating, Butler County Common Pleas Court
Magistrate Robert Krebs, Butler County Common Pleas Court
Elizabeth Lust, legislative aide to Senator Steve Austria
Irene Lyons, Department of Rehabilitation and Correction
Christina Madriguera, Ohio Judicial Conference
Nathan Minerd, Youth Services
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Becki Park, Senate Republican Caucus
Candace Peters, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office
Steve VanDine, Department of Rehabilitation and Correction
Jason Warner, legislative aide to Rep. Bob Gibb

Common Pleas Judge Reggie Routson, Vice Chairman, called the June 15, 2006 meeting of the Ohio Criminal Sentencing Commission to order at 9:43 a.m.

Director David Diroll noted that Chief Justice Moyer named Judge Routson to replace Judge H.J. Bressler as Vice Chairman. Judge Routson first served on the Commission as a municipal court judge in the '90s, before being appointed in his present capacity as a common pleas judge.

SEXUAL OFFENSE REFORM

In response to the Commission's discussion in May, the staff developed a template that categorizes current sex offense based on key variables.

Staff Attorney Scott Anderson explained that the Commission is looking closely at sexual offenses to offer finer grade distinctions and craft better SORN law. The effort involves a balancing act of offenses, punishment, supervision, and registration. To simplify matters, the staff's template covers current sex offenses by age, act, and aggression elements. It recognizes different penalties based on the age of the victim. The acts also have been broken down by the elements of sexual conduct, contact, solicitation, and exploitation. The levels of aggression include force and coercion, with force increasing penalties.

Additional categories to increase a sentence include items categorized as Aggravating Elements, Aggravating Circumstances, and Aggravating Sentencing Factors. Aggravating Elements involves three current specifications that enhancing penalties based on prior incarceration, impairing the victim, and serious injury. The Aggravating Circumstances are also come from current law where otherwise non-sexual offenses, such as murder, assault, and kidnapping, carry higher penalties when committed to gratify the offender's sexual desires. Since these offenders are both violent felons and sex offenders, they earn greater punishment. Aggravating Sentencing Factors categorize offenders who: use a position of trust or authority to coerce victims; or who prey on particularly vulnerable victims.

Dir. Diroll and Atty. Bob Lane earlier cautioned against making everything the offender does an element of the offense. This was taken into account in developing these categories, said Atty. Anderson.

The chart includes the crime charged, the act, age of the victim, three kinds of aggression (force, coercion, or none), and both current and hypothetical penalties.

Additional time can be added to current penalties for specifications in sex offense law (Chapter 2971). The new potential incarceration spec., injury spec., and impairment spec., could run consecutively with the old specs as well as to the underlying offenses.

To clarify, Atty. Anderson explained that coercion could mean everything from knowing the victim is vulnerable to abusing a position of trust. He noted that the legislation that prompted this effort was SB 260, regarding rape of a child under the age of 13. He added that the age difference within the chart is broken down because of the general consensus that child victims should be treated differently.

Another bill that influenced this effort, said Dir. Diroll, is HB 95, which addresses repeat violent offenders (RVOs) and would impose mandatory penalties for sexual battery and certain gross sexual impositions (GSI) when the victim is under age 13.

Ohio Prosecuting Attorneys' Association Executive Director John Murphy clarified that GSI is a presumed prison term and sexual battery would increase to an F-2 level.

Forcible sexual conduct of any kind with a child under age 10, said Atty. Anderson, currently has a penalty of at least 10 years to life. He explained that the chart attempts to make finer grained distinctions within the charges of rape and sexual battery.

According to DRC Research Director Steve VanDine, there are some offenses that include 16 at 17 year olds as chargeable offenses.

Atty. Anderson responded that those usually involve importuning. He admitted it will be necessary to discuss them at some point.

Corruption of a minor falls into that area as well, said Dir. Diroll.

Mr. VanDine suggested adding a 16 and 17 year old category.

Public Defender Yeura Venters asked for a cost analysis or projection on how the hypothetical penalty versus current penalty would impact the prison population.

Mr. VanDine said he could develop one, but cautioned that it would require several assumptions, including how plea bargaining would factor into the overall picture.

The template *must* include a middle tier, said Atty. Anderson, or it will force prosecutors to drop a charge down to F-3 GSI. A middle tier allows for responsible plea bargaining.

Representing the Department of Youth Services, Dave Schroot stressed that juvenile sex offenders present unique circumstances. Of the three particularly challenging incidences that DYS dealt with in the past 6 months, one involved a juvenile who had a sexual history and was in the child welfare system. He never appeared in juvenile court.

Dir. Diroll acknowledged that the juvenile system has a unique challenge because it is dealing with a compressed amount of time and ages in dealing with juvenile sex offender clientele. It was noted that 27% of the DYS population are sex offenders.

By comparison, said Mr. VanDine, 21% of the DRC population committed a sex offense, but they can be kept longer within the adult system.

Of particular concern, said Mr. Schroot, is the SORN law's residential requirement which does not allow an offender to reside within 1,000 feet of a school. A juvenile sex offender cannot live within 1,000 feet of a school, yet attends school there.

According to Jeff Clark, representing the Attorney General's Office, there is an exception to that law for juvenile offenders.

Juvenile Judge Robert DeLamatre remarked that SYO cases have to be sentenced under adult law. Because there are mandatory minimums in adult law, it forces more plea bargains in the juvenile system. Public opinion, he remarked, appears to favor removing discretion from judges.

Legislation varies as to how it affects judicial discretion, said Dir. Diroll. Although a recent Ohio Supreme Court ruling granted judges greater discretion, some legislators feel a few judges need more direction and limitations.

It will be difficult to integrate SORN laws into the chart, said Atty. Clark, because of some federal limitations with funding attached for law enforcement. In an effort toward restructuring and the requirements under §2950.02 for public notification, he noted that the public wants to know what "predator" means. They assume that is means an offender which has used physical force. The public also wants to know who are *known* to be repeat offenders and who are *predicted* to be repeat offenders. The public also wants to know which sex offenders have victimized children.

He suggested a label of child victim offender that would fit across the board. He feels the age of the victim is more important than coercion.

Magistrate Bob Krebs agreed that cases involving child victims get the community most upset. He asked if there was really a distinction between the ages of 10 and 12 for a victim.

According to Atty. Anderson, the distinction comes from the rape statute, §2910.02.

Atty. Venters added that a person under 10 years old may be incompetent to testify.

According to Atty. Clark, other states make distinctions regarding who the sex offender residency requirements.

Some communities imposed additional residency restrictions, causing problems for other neighboring communities, noted Dir. Diroll.

Atty. Clark agreed that sex offenders become clustered in the areas available for residency.

Ohio Parole Board Chair Cynthia Mausser feels that the proposed chart, together with Atty. Anderson's suggestion, fills a gap in sentences for sex offenses involving child victims. Under old law with indeterminate cases, she said, the life sentences for offenders with child victims were usually cases that went to trial. Cases that involved child victims and the result of a plea bargain generally ended up with a 25 year tail, which allowed increased time beyond the initial 10 years. Under SB 2, however, if a plea bargain was accepted with a life sentence that results in an F-1 with a 20 year maximum. If something were available between the 10 and 20 years, it could make plea bargaining more palatable. She noted that the Parole Board's benchmark

is about 15 years. She contended that another option is needed in current statutes to deal with these offenders.

Discussion continued as to whether the age of the victim should be treated as an element of the offense or sentencing factor.

Judge DeLamatre noted that the age of consent in Ohio is 16, whereas the age of a minor for a sex offense is under 13. However, some 12 year olds are sexually active.

Legislators are obviously on a mission here, Atty. Venters remarked. If the Commission is hoping to offer guidance, what is the most viable way to proceed and is there enough time to do so? If needed before the November election, then he suggested focusing on guidance factors.

Dir. Diroll noted that SB 260 passed the Senate with only one opposing vote. All who voted for it also co-sponsored it, a rare occurrence.

If the Commission wants to influence SB 260, said Mr. Murphy, it will need to present recommendations to the legislature by mid-August.

DRC Director Terry Collins remarked that the Commission was striving for a logical discussion on an issue that is extremely emotional. The horse is out of the barn, he declared, and he's not sure the Commission will be able to saddle it.

Stephanie Kaylor, legislative aide to Senator Steve Austria, contended that SB 260 was not a knee-jerk reaction. Sen. Austria, she said, has been working on the bill for 1½ years and is careful to research such matters before taking any dramatic steps. She said that he welcomes input and the expertise of sources such as the Commission.

Because sex offenses are emotionally charged, added Dir. Collins, the public wants to see fast results from legislators. Obviously, this puts added pressure on legislators to develop and move bills quickly, but he recognized Sen. Austria's efforts to be thorough. He said he watched Sen. Austria take the broad scope of the sex offender laws down to a focus on the original intention of the law. He believes that, if the Commission were to give Sen. Austria some logical points for discussion, the Senator will listen.

The Commission started with this approach, said Atty. Anderson, so that it could talk about SORN law, civil commitment, supervision, and how juvenile sex offenders would be affected. At this point, the Commission is merely seeking an agreement in concept. He feels that the template might help to address all related issues.

Judge Routson wants to see consistency in both the abstract and procedural aspects based on the elements of the law. The big issue, he contended, is proportionality of conduct and punishment.

Candace Peters of the Office of Criminal Justice Services suggested starting with age groups and getting consensus on penalties.

Another option, said Atty. Anderson, would be to or start with the current penalties at each level and discuss if those are appropriate.

Conceding that the template can work well, Atty. Venters prefers more discussion before hypothetical penalties are determined.

Criminal sexual conduct against someone under the age of 10 currently has a penalty of at least 10 years to life. Atty. Anderson asked if the penalty should remain there or whether more time should be added if more aggression were used.

In his opinion, said Pros. Dave Warren, those sex offenders are the worst of the worst. It is imperative, he declared, to get them off the street and keep them off the street.

Erin Rosin of the Attorney General's Office declared that if a penalty is to be bumped up by 10 years, then it should involve physical force, as opposed to coercion.

Defense Atty. Bill Gallagher thought that forcible rape of a child resulted in life without parole.

Life without parole is the penalty, said Atty. Anderson, when a sexual act against a victim under age 13 is committed by someone who had a substantially similar prior or results in serious physical harm. He acknowledged that it may be necessary to clarify a distinction between force and coercion as elements of the offense.

It may also be necessary to determine when coercion is more than a state of victim vulnerability and to sort out distinctions between coercion and the offender's abuse of position, Atty. Venters added.

Magistrate Krebs asked if kidnapping would be regarded as a use of force although there may be no physical harm. He feels that kidnapping should be included in the upper tier of offenses.

Atty. Anderson explained that he narrowed the upper tier to rape (because it is forceful), sexual battery (because it is coercive), and criminal sexual conduct (because the statute says it is wrong). The 13-15 year old category is the most difficult, he noted, because the offenses track differently. Forcible rape of a 13-15 year old is currently an F-1. The penalty is 10 to life. In weighing the aggressive factor versus the age factor, forcible rape of a child in that age category apparently merits a greater penalty than nonforcible or noncoercive rape of a child under the age of 13. It may be necessary, he noted, to make further distinctions between force and coercion. It may also be necessary to determine whether a *mens rea* element needs to be imputed to this group and whether step-downs for each are warranted.

If the categories are kept together, it might become necessary to include mitigating factors that could decrease a sentence. He cited hypothetical cases involving a 19 year old dating a 13-15 year old and having consensual sex with parental knowledge versus a 19 year old preying on random young teens. The penalty for a single case, he noted, can vary from F-3 to F-4 to M-1 depending on the age of the offender. If there's less than a 4-year difference between victim and offender, the offense is an M-1. If there's more than a 4-year difference, it is an F-4, and if there's more than a 10-year difference, the offense is an F-3. The question, he remarked, is whether the age of the offender

should be the element that places the offender into a different category or if it should instead be a factor considered at sentencing.

Another option, said Mr. Diroll, would be to recognize the distinctions and allow them to be put at the various offense levels, as is currently done. He noted, however, that to take conduct that would be an M-1 today, and place it in the F-2 category is a dramatic change, even if the offender does not end up with a prison term. Merely the possibility of getting 8 years in prison for something that currently would only result in a possible 6 months in jail is a dramatic difference. In short, it is tough to fit the step-downs into the right categories.

After lunch Mr. VanDine offered a revised simpler template for consideration that included a ten-level scale. At the top level, the sex offender could get life without parole. If each circumstance is assigned to one of the levels, the specs would move the offender up a level and attempts would move down a level.

A judge's evaluation of the offender's likely recidivate or the level of risk would remain an element to be considered in categorizing.

<u>The VanDine Levels</u>

Specs move up 1 (or 2) levels	1. LWOP	SVP in some form remains as a high risk of future recidivism
	2. 20 – Life	
	3. 15 – Life	
	4. 10 – Life	
	5. F1 – Life	
Factors affect the sentence within each level	6. F1	
	7. F2	
	8. F3	
	9. F4	
	10. F5	

Dir. Diroll acknowledged that the VanDine chart captures the range that in current law and helps to fill some of the gaps. He remarked that it might even allow for streamlining the Code.

Atty. Venters suggested combining the VanDine proposal with the staff's template for a comparison.

Municipal court Judge Ken Spanagel suggested categorizing the offenses by class, somewhat like classes of driver's license suspensions. With drugs and sex crimes, he noted, there is a wide variety of conduct that affects people. It is the nature of the people and the offenses that determines the wide range of penalties.

Ms. Peters suggested including current penalties on the chart.

Noting that sex offenders tend to have longer criminal careers than those who commit most other offenses, Dir. Diroll remarked that the use of a template which factors in elements of the crime might offer a broader range of penalty options to address the greater likelihood of recidivism and needs for treatment.

Atty. Mausser referred to the "F-1 to Life" category as a place for an indeterminate sentence that would allow flexibility.

Dir. Diroll acknowledged that it would allow DRC and the court to evaluate the offender's amenability to treatment as a factor in determining a release date or need for additional treatment.

Ms. Peters agreed that there is a need to build in an assessment process in terms of future risk.

According to Dave Berenson of DRC, a coercive offender is likely to have a wider range of victims than an offender who uses force.

If the offender is likely to recommit, said Magistrate Krebs, an indeterminate sentence would be the better tool to control him.

Mr. VanDine noted that there are 5 states in the process of establishing the death penalty for certain rape offenses. He hopes that Ohio does not consider that as a new option.

Concerned about how reliable the assessment tools are, Atty. Venters does not want to see an over reliance on that for determining an offender's potential for recidivism.

Ms. Peters assured him that it would not be used as the only factor. Assessments would be conducted through forensic centers as clinical psychological evaluations.

Judge Spanagel again suggested listing the categories as classes, similar to those used for license suspensions. The elements would then help to distinguish the offenses within each class.

In the chart being discussed, Dir. Diroll pointed out that three new specifications are listed that would add time to the underlying offenses. The *incarceration spec* is an enhancing element that could double the maximum (like RVOs) on non-life terms or add 10 years to the minimum for life terms. This compares to the current increase for a "substantially similar" rape of a victim under age 13 which carries 10 to life or life without parole. The *injury* (Serious Physical Harm) *spec* would double the maximum (like RVOs) on non-life terms and add 10 years to the minimum for life terms. This compares to the current statutory increase for causing "serious physical harm" to a rape victim under age 13, which currently results in 10 to life or life without parole. Third, the *impairment spec* would double the minimum for non-life terms and add 5 years to the minimum for life terms. This compares to the current statutory mandatory minimum of 5 years on for rape.

He cautioned that "serious physical harm" is a definition that cannot easily be tinkered with, although he acknowledged that it does not include all the psychological harm caused by sex offenses. The gap in the current definitions, he noted, is coercion versus force.

In response to a concern raised by Mr. VanDine, it was suggested that "attempts" could be used as specs that would move the level of the offenses up or down in the range as well.

Judge Spanagel reported that the Criminal Practice and Procedures Committee of the Judicial Conference will be meeting soon. He would like a chance to present the chart to them for feedback.

Based on his suggestion to separate the levels into Classes, he recommended that Class I could be Life Without Parole, Class I (A) could be Life and work down from there.

Mr. VanDine recommended starting with Class II and stating that the offense can only move up to Class I under specific circumstances. This was agreed on by consensus.

FUTURE MEETINGS

Future Commission meetings were tentatively scheduled for July 20, August 17, September 21, October 19, and November 16.

The meeting adjourned at 1:40 p.m.