Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
January 20, 2005

SENTENCING COMMISSIO MEMBERS PRESENT
Staff Lt. Michael Black, representing State Highway Patrol
Supt. Paul McClelland
Common Pleas Judge H.J. Bressler, Co-Chair
Prosecuting Attorney James Cole
Juvenile Judge Robert DeLamatre
County Commissioner John Dowlin
Defense Attorney Bill Gallagher
OSBA Delegate, Max Kravitz
Bob Lane, representing State Public Defender David Bodiker
Municipal Prosecutor Steve McIntosh
Defense Attorney Yeura Venters
Prosecuting Attorney Don White
Director Reggie Wilkinson, Dept. of Rehabilitation & Correction

ADVISORY COMMITTEE MEMBERS PRESENT
Monda DeWeese, SEPTA Correctional Facility
Retired Common Pleas Judge Burt Griffin
Karen Huey, Office of Criminal Justice Services Director
John Madigan, Senior Attorney, City of Toledo

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Jeff Harris, Intern
Jason Tam, extern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Lisa Bagdonas, Senate Republican Caucus
Jill Beeler, State Public Defender's Office
Dr. Doug Berman, Professor of Law, Ohio State University
Bill Breyer, Attorney
Lusanne Green, Ohio Community Corrections Association
Jim Guy, Dept. of Rehabilitation & Correction
Fritz Rauschenberg, Department of Alcohol and Drug Addiction Services
Ed Rhine, Department of Rehabilitation and Correction
Dan Sabol, student, the Ohio State University
Corey Schaal, Specialized Dockets, Supreme Court of Ohio
Steven Taylor, Franklin County Prosecutor's Office
Steve VanDine, Research Director, Dept. of Rehabilitation & Correction

Judge H.J. Bressler, Vice Chairman, called the January 20, 2005 meeting of the Ohio Criminal Sentencing Commission to order at 10:15 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll announced changes in the Sentencing Commission's membership. Judge Sylvia Hendon will no longer represent juvenile courts on the Commission, since she recently won a seat on the First District Appellate Court. Seventh District Appellate Court Judge Cheryl Waite finished her term with the Commission. Judge Bressler, recently elected to the court of appeals is being considered by the Chief Justice as a replacement for Judge Waite.

Judge Burt Griffin retired from the Common Pleas Court in Cuyahoga County. An original member of the Sentencing Commission, he continues to have a significant impact on the format and structure of sentencing in Ohio, said Dir. Diroll, noting that Judge Griffin has agreed to continue his service as a member of the Advisory Committee.

Director Diroll also complimented another long-serving member, Hamilton County Commissioner John Dowlin, as a consistent voice for local government. Comm. Dowlin's term recently ended.

Dir. Diroll noted that Staff Lt. Michael Black will be taking the place of another valuable member, Capt. John Born, as the State Highway Patrol's representative.

Director Diroll reviewed the meeting packets, which included: an updated traffic law primer and tables; the Reentry Committee's certificate of good conduct proposal; an outline of the Commission's latest report Monitoring Sentencing Reform; a summary of *Blakely* cases in Ohio; and a summary of the U.S. Supreme Court's recent holdings in the *Booker* and *Fanfan* cases.

REENTRY: CERTIFICATE OF GOOD CONDUCT

Director of Rehabilitation and Correction Reggie Wilkinson reported that Governor Taft established a State of Ohio task force on offender reentry. This group consists of 12 agencies, including the State Highway Patrol, Department of Aging, Department of Mental Health, Department of Health, and the Office of Criminal Justice Services. The group hopes to present omnibus legislation later this year.

Fritz Rauschenberg of the Ohio Department of Alcohol and Drug Addiction Services remarked that the Reentry Committee's concept of a Certificate of Good Conduct was originally presented to the Commission last March.

In reviewing the proposal, Mr. Rauschenberg explained that a person with a felony record must be "off paper" at least three years before applying to the local common pleas court for a Certificate of Good Conduct. The proposal, he noted, targets felons since the stigma for misdemeanants is not as great. To keep costs low, the applicant is responsible for gathering and presenting documents needed to verify good conduct and to complete required sanctions and programs. All financial duties (taxes, restitution, fines, child and spousal support, etc.) must have been paid.

The applicant must also show evidence of employment and completion of treatment plans for any substantive abuse.

Mr. Rauschenberg noted that the application can be denied without a hearing. If denied, there is a one year wait to re-apply. In addition, the victim has an opportunity to object to the certificate. The certificate would not seal the applicant's criminal records. Subsequent offenses committed after receiving the certificate would show up in the offender's BCI&I record.

Commissioner John Dowlin asked how many people the committee expected to apply for the certificate. Noting that a similar plan was first offered in New York, Mr. Rauschenberg reported that New York gets about 2,000 applicants each year. He suspects that, if adopted, Ohio would probably see a spike in applications at first.

Comm. Dowlin also expressed concern about the cost to local government. Mr. Rauschenberg responded that an application fee, paid by the offender, should cover the cost.

Comm. Dowlin wondered if the judge would have the ability to waive the fee. According to Bob Lane, representing the State Public Defender's Office, that option was never discussed by the committee. He noted that the $150 fee is expected to be paid up front when the person applies for the certification. He pointed out that, in comparison, the cost for expungement of criminal records is $50.

Some judges loathe house arrest, said Comm. Dowlin, because the judge gets blamed if that offender commits another crime while under house arrest. He expects that judges will view the Certificate of Good Conduct in a similar light.

After meeting with members of the Common Pleas Judges' Association, Judge Bressler agreed that it will be difficult to persuade judges to grant the certificate, particularly since it excludes no one, such as rapists or murderers. Judges would likely prefer that DRC handles granting certificates. The courts will not be able to handle a 30-day turn around for the process. He does not believe that $150 will suffice to cover the cost.

Corey Schaal, Mental Health Program Manager for the Ohio Supreme Court wondered if the New York practice created a second class citizen of felons who do not have a certificate. He opined that it might create the expectation that all offenders need a certificate to get a job.

Dir. Wilkinson agrees that the burden of determining who should receive the certificates probably should not fall on the judges. Some documentation, he acknowledged, should come from DRC and the Adult Parole Authority. On the other hand, many probationers would have to go to judges for this because DRC doesn't have contact with them when they are placed on probation through the local courts. He stated some concerns. If the offender has problems during the three year period, he is not going to bother applying for the certificate. For are unemployed, the $150 application fee will be a huge burden.

Dir. Wilkinson would like the Committee to turn the proposal over to DRC for consideration by the Governor's Offender Reentry Agency along

with other options. He noted that it might carry more weight if included in a package with other proposals. It would also give the group a chance to compare the certificate with other options.

Public Defender Yeura Venters fears that, as written, the proposal will generally be denied by judges. He favored deferring to DRC and the Governor's group.

Considering the work that has gone into this proposal, Dir. Wilkinson said that he would like to see it tied in with something more specific and significant. He noted, however, that most offenders need something more immediate rather than having to wait three or four years.

OCJS Director Karen Huey added that something more than a certificate is needed from DRC to aid typical offenders in pursuing jobs.

City Prosecutor Steve McIntosh remarked that judges might be more willing to sign off on something for offenders who have not served time in DRC, but who have successfully completed all requirements of community control and behaved three years beyond that.

After being seconded by Pros. Don White, the Commission, by consensus, approved Comm. Dowlin's motion to table the proposal.

LEGISLATIVE UPDATES

Forfeiture Draft. Dir. Diroll reported that Commission's forfeiture package, as revised by the Commission in 2004, is being redrafted in bill form at the behest of Rep. Bob Latta.

Drugged Driving Legislation. Dir. Diroll noted that a bill on drugged driving was introduced late last year based on a Governor's Task Force recommendation. The bill includes certain *per se* standards for certain "street" drugs and an exception for lawfully prescribed medicines. He noted that it would be challenging to set *per se* level of pharmaceutical that effects impairment. The bill is likely to be reintroduced soon, said Dir. Diroll. Lisa Bagdonas of the Senate Majority Caucus agreed.

MONITORING REPORT

The Commission has a statutory duty to monitor the effectiveness of its proposals once enacted. Because the misdemeanor and traffic plans have not been effective long enough for meaningful results, noted Dir. Diroll, the latest report focuses on felony sentencing patterns under the Commission's plan that was enacted as S.B. 2, effective in 1996.

Prison Patterns. Commission intern Jeff Harris outlined the major changes and reforms made by S.B. 2 and noted some key post-S.B. 2 legislative changes. Some of the expectations of S.B.2, he reported, included: an initial drop in prison population; a prison population consisting of more violent and repeat offenders; a slower rate of increase in the prison population; a diversion of low offenders to community facilities; stronger uniformity in sentencing; and more offenders receiving supervision after release.

In 1987, most offenders were imprisoned for property crimes. Now, the types of crime are more evenly distributed, with most offenders being imprisoned for crimes against persons. Atty. Harris that these figures do not include technical violators of post-release control or parole.

DRC Research Director Steve VanDine remarked that the peak intake of first-timers in 1996 was largely a reflection of the emphasis on getting drug offenders off the street. Since then, the gradual decrease of first-timers and the increase of second and third-timers show the effect of veteran offenders and judges' frustration with giving those offenders breaks. Repeat drunk driving charges, he noted, have also significantly affected intake during the last several years, as more repeat DUIs are entering the prison system. Overall, Atty. Harris noted, the data reflects a drop in the general prison population but an increase in intake. The average growth rate from 1973 to 1996 was 6.3%, while the average growth rate from 1997 to present has been 2.8%.

Atty. Harris pointed out that more violent "higher level" offenders are entering prison. As inmates sentenced under pre-S.B. 2 law leave prison, they are not being replaced as quickly under S.B. 2 with the same mix of both high and low level, first-time and repeat offenders.

County Jails. Atty. Harris next reported that there has been a dramatic increase in Ohio's county jail populations and capacities since 1990. Possible factors, said Atty. Harris, include S.B. 2's increasing the felony theft threshold to $500 and, making repeat theft offenders eligible for diversion to local jails instead of prison.

Dir. Diroll remarked that domestic violence offenders and DUIs have contributed more significantly to increased jail populations, independent of S.B. 2.

Atty. Harris said offenders held in county jails have increased each year as has the number of beds. In 1990, he noted, the large counties had more jail capacity per capita than other counties. As of 2003, the smaller counties now have more jail beds per capita and per crimes committed than large counties. In addition, while larger counties have a large percentage of their jail beds filled, the smaller counties send a larger percentage of offenders to prison. Over time, however, all counties have increased the percentage of felons they send to prison.

Release Mechanisms. It is important to note, said. Atty. Harris, that S.B. 2 eliminated shock parole and time off or good behavior. Other early release tools, however, were left in place, albeit with such decisions ultimately left to the sentencing judge. During FY 1996, the majority (59.2%) of pre-S.B. 2 inmates released from prison were released with no supervision. By comparison, during FY 2003, almost two-thirds (62.3%) of those released post-S.B.2 come out under supervision (post-release control or PRC).

In 1996, 13.2% of felony offenders were released on shock probation, 17.3% were released on parole, and 59.2% were released due to expiration of a definite sentence, with no supervision as noted. In comparison, in 2003, only .2% of the felony offenders were released on shock probation (pre-S.B. 2 offender), 5.9% were released by judicial release, 15.9% on parole (also pre-S.B. 2 inmates), 35.3% under some

other form of post-release control, while only 3.6% were released due to the expiration of a definite sentence.

Felony OVIs. A major sentencing change since S.B. 2's enactment concerns operating a vehicle while intoxicated (OVI). The fourth conviction in six years is a felony. This has had an impact on both jail crowding and the prison population, said Atty. Harris. There has been a slight decrease in OVI arrests, but, as one would expect, a significant increase in felony OVI prison intake. The intake of OVI offenders has begun to level off, hopefully as a deterrent effect of the tougher penalty, he added.

According to Judge Griffin, less than 1% of OVI arrests go to prison.

Atty. Harris acknowledged that, of the large number of OVI offenders who seem to be eligible for prison terms, only a small percentage get sent to prison. Some judges sentence F-4 OVI offenders to local jails, which affects jail crowding. Dir. Diroll added that these offenders would have been in local jail under the old law as well.

Felony Sentence Ranges. Under S.B.2, a judge electing or required to incarcerate an offender must choose a definite term from within an appropriate range. Atty. Harris attempted to determine the most common prison term lengths imposed on offenders at each felony offense level.

Atty. Harris reported that for F-5s, judges tend to prefer the minimum 6-month terms. For F-4s, the preference was toward the minimum of 6-months or the middle-ground of 12-months. The majority of F-2 and F-3 offenders generally receive the minimum 1 or 2-year terms. F-1s, on the other hand, receive a wider range of sentences, with a number of them receiving either the minimum 3-year term or the maximum term of 10 or more years. Overall, there tends to be more uniformity in sentencing by judges at each felony offense level than before S.B. 2's enactment.

Summary. Ultimately, said Atty. Harris, S.B. 2 appears to have achieved some significant goals. It has succeeded in locking up, over time, more violent and repeat offenders while diverting lower level felons to community-based sanctions. It has achieved stronger sentencing consistency at each felony offense level. It has also assured that significantly greater numbers of ex-offenders remain supervised after being released from prison.

JUDICIAL DECISION MAKING: *BLAKELY* AND ITS PROGENY

After lunch, Staff Attorney Scott Anderson discussed how the U.S. Supreme Court's decision in *Blakely v. Washington* has affected sentencing decisions in Ohio courts. He reported that 48 cases have gone through Ohio appellate courts that mentioning *Blakely* and that half of those decisions cited *Blakely* as the reason for affecting a lower court's sentence.

One appellate court ruled that *Blakely* does not apply to Ohio law because Ohio has an indeterminate sentencing scheme since it authorizes a range of sentences within each felony level from which a judge can choose an appropriate sentence.

A second group of challenges have been to provisions related to consecutive sentences, sentences greater than the minimum sentence, and maximum sentencing. Each of these provisions arguably requires a constitutionally suspect judicial determination of facts to increase a defendant's sentence under Ohio law, said Atty. Anderson.

Ohio appellate courts have determined that, since *Blakely* only prohibits a judge from increasing *a* sentence beyond the maximum permitted, then sentences on *multiple* offenses do not unconstitutionally circumvent that prohibition. Hence, consecutive sentences do not seem to be affected by *Blakely*.

To date, Ohio appellate courts have also determined that *Blakely* is not triggered if the judge sentences at the maximum of the range. *Blakely* impacts only those sentences that stretch beyond the maximum. In addition, said Atty. Anderson, the 1st, 5th, 8th, 9th, 11th, and 12th Districts have rejected *Blakely* challenges to "more than minimum sentences". Unless the maximum is breached, these courts have held that *Blakely* does not apply.

In an effort to address future challenges, Ohio appellate courts have rendered opinions on procedures that might be used to circumvent anticipated *Blakely* problems. One court in Cuyahoga County has suggested that juries should be used to sentence defendants in criminal cases. However, the Ohio Supreme Court has held that the judge has no jurisdiction to enact a system of jury sentencing to determine facts that might increase a defendant's sentence under *Blakely's* provisions. Other judges have held that jury waivers would be a cure-all for the problem.

So far, there has been no appellate case on repeat violent offenders (RVOs) or major drug offenders (MDOs), said Atty. Anderson. Yet, those seem to be the Ohio sentencing provision most susceptible to a *Blakely* attack, he opined.

The *Booker* and *Fanfan* cases, just decided by the U.S. Supreme Court, also affect sentencing in light of *Blakely*. Atty. Anderson pointed out that, in *Blakely*, the offender was charged with F-2 kidnapping. The sentencing scheme in Washington allowed the judge to go beyond the range based on certain sentencing factors that the jury could not decide. *Booker* and *Fanfan* involved two drug cases in the federal system. The cases raised the issue of whether *Blakely* meant that the Federal sentencing guidelines are unconstitutional. The *Booker* case involved possession of drugs with the intent to distribute. The sentence allowed on the jury verdict of guilty was a possible minimum of 10 years and a maximum sentence of life in prison. The "mandatory" federal guidelines said that the defendant could get a minimum of 210 months to 260 months (21.8 years). At the sentencing hearing, the judge imposed a 30 year sentence. The *Fanfan* case involved possession with conspiracy to distribute, with a possible maximum sentence, based on the jury's verdict of guilt, of 6.5 years. At the sentencing hearing additional facts were found that would allow the judge to increase the sentence to 15 years, but the judge did not impose an increase.

The two cases were merged, but resulted in two majority opinions. The first involved the Court's constitutional analysis. The question is whether the federal scheme was unconstitutional in light of *Blakely*.

Ultimately, under this analysis, if a fact does not increase the maximum sentence a defendant could otherwise receive, that fact need not be determined by a jury. In addition, there is no *Blakely* problem in sentencing schemes that permit a court to select a sentence within a specified range. The problem in *Blakely, Booker,* and *Fanfan*, said Atty. Anderson, is that the Washington State and federal criminal sentencing guidelines mandate the selection of particular sentences. The *Booker* court stated that "everyone agrees that the constitutional issues presented by these cases would have avoided entirely if Congress had omitted...the provisions that make the Guidelines binding on district judges".

The second opinion answered the question, "If the federal guidelines are unconstitutional, then what should the court do about it?" The remedial majority decided that this constitutional infirmity should be addressed by excising the provision in the federal guidelines that "requires sentencing courts to impose a sentence within the applicable Guidelines range". This would make the boxes within the grid advisory, not mandatory.

It is worthy to note, said Atty. Anderson that the Court refused to require a jury determination of all facts that might increase a defendant's sentence.

Director Diroll noted that the same five Justices who were in the majority with *Apprendi* and *Blakely* are the five who formed the Constitutional majority on *Booker* and *Fanfan*. But the remedy was largely written by the dissenters, as Justice Ginsburg switched sides.

Atty. Anderson reported that the constitutional majority held that:

> [a]ny fact, (other than a prior conviction), which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

In this statement, he declared, the Justices give a clue as to what they mean by "maximum authorized by facts established by a jury verdict". Basically, the maximum sentence a judge can give is the maximum sentence a jury could authorize. Atty. Anderson pointed out that that statement is different than "the maximum sentence a judge can give is the maximum sentence a jury *does* authorize".

Referring to the Commission's prior discussions about the two ways of reading *Blakely* (the "historical" reading and the "strict" reading), Atty. Anderson explained that, under the first analysis, as long as the jury *could* determine that the facts can increase the penalty up the maximum, then it is okay. The second analysis says that, if it is a fact that increases the sentence, then a jury has to determine it. It basically becomes a question of "*Could* a jury authorize it?" versus "*Did* a jury authorize it?"

According to Atty. Anderson, the constitutional question is answered in *Booker* and *Fanfan*. The relevant factual determination concerns only those facts that "increased the sentence that the defendant could have otherwise received".

Whether every fact that increases the sentence has to be determined by the jury is not part of the constitutional analysis. Rather, the constitutional analysis reduces to what a jury could have authorized for that specific offense and whether the judge exceeded that.

Justice Stevens, who wrote the majority opinion on the constitutional issue, dissented in the remedial portion of the opinion. To fix the constitutional infirmity, he said, the jury should determine every fact that increases a sentence.

That recommendation was explicitly rejected by the remedial majority, which said that the Sixth Amendment right to a jury trial is not about which facts (or fact-findings) are appropriate and increase sentences. Rather, it is about increasing facts beyond the maximum sentence.

According to Atty. Anderson, the major issue of whether juries must determine every fact necessary to increase a defendant's sentence has been resolved, in the negative.

Noting that the major question is determining the maximum sentence a judge can give and the maximum sentence a jury can authorize, the majority says that the problem is the mandatory nature of the boxes in the grids of the felony sentencing structure and the Washington State sentencing structure. The remedial majority recommends making those boxes advisory, not mandatory.

In Ohio's sentencing structure, guidelines are offered within ranges from which to choose, rather than a mandatory structure or grid. Since Ohio uses guidelines and not boxes with mandatories, *Blakely* does not present a problem, Atty. Anderson said.

On the other hand, Atty. Anderson feels repeat violent offenders (RVOs) and mandatory drug offenders (MDOs) need to be addressed because these categories have specifications that allow the judge to increase the sentence post-verdict.

OSBA Representative Max Kravitz asked how Atty. Anderson defines the sentencing ranges under Ohio's sentencing guidelines.

A statutory maximum can be given for a particular offense, under Ohio's sentencing structure, said Atty. Anderson. If the range for a particular offense (say an F-2) is 3, 4, 5, 6, 7, or 8 years, the issue is whether the judge can go beyond that range (beyond 8 years) to sentence the defendant. The analysis and the order of that analysis are important, he declared. It must first be determined if there is a particular range that can be given for the offense, and then whether the judge can go beyond that range.

If statutory direction limits the sentencing range, asked Atty. Kravitz, then what is a fact that needs to be determined by a jury? Is it a fact or a value judgment?

According to Common Pleas Court Judge Burt Griffin, it boils down to the nuances of statutory interpretation. He noted that §2929.13(A) "shall . . . unless" mandates how the judge should exercise his discretion.

Under *Blakely*, said Atty. Anderson, the jury could not have found facts that could have authorized the extra time added to the sentence. That is the crucial fact in the case.

Although some of these "facts" are regarded as value judgments, Atty. Gallagher declared that Texas courts are allowed to decide future dangerousness which, in Ohio, is akin to likelihood of recidivism.

Both majorities—all nine judges—ruled that the entire scheme does not have to be advisory, only the internal boxes within the ranges.

The facts that cause problems, said Judge Bressler, are elements, such as the amount of drugs, seriousness of the offense, etc. In Ohio, he noted, these are all facts already being determined by a jury and, in turn, trigger a mandatory minimum. He understands the U.S. Supreme Court rulings to direct judges to apply the guidelines and to sentence within the range. But if the judge chooses to exceed the mandatory minimum, he must state the reasons behind that decision.

Atty. Kravitz acknowledges that the judge is exercising an inherent function of sentencing by making a value judgment regarding the seriousness of the offense or potential of recidivism. At the other end of the spectrum, however, he raised concerns about a "traditional" fact determination which can increase the maximum of the sentence, such as whether physical harm occurred, when that element has not been submitted to a jury.

Those elements, said Dir. Diroll, help the judge determine where to place the offender within the statutory range.

Judge Griffin recommended comparing how Washington and U.S. statutes are set up versus how Ohio's statutes are set up. The most likely interpretation of Ohio statute, he feels, is to set up a structure for judicial discretion within the range proscribed in §2929.14(A). Ohio's statute in §§2929.13 and 2929.14 gives the judge the discretion, and then sets out the structure for that discretion. Washington and U.S. guidelines don't do that. He pointed out that the statute is more than advisory because it sets up a mandatory thought process.

For a person's first commitment to prison, said Dir. Diroll, the judge looks to the minimum sentence, unless he finds certain factors that must be taken into consideration. Those factors are the type of considerations that fit within a judge's historic role and that a jury cannot typically find, such as demeaning the seriousness of the crime, etc. The jury's experience with the system is only one case old so it cannot really have a perspective on that kind of issue. As such, the systems are different in kind, he declared.

It is not a distinction in kind, Atty. Kravitz argued, but a continuum where, at some point, the levels of discretion involve things a jury would not be able to effectively determine, but might also include some more simplistic facts that a jury *could* determine.

According to DRC Counsel Jim Guy, jury authorization is the key component of this ruling. In Ohio, he noted, jury authorization opens the sentencing option for judges to sentence within a range.

Atty. Kravitz argued that §2929.14(A) says "the court shall impose the shortest prison term unless…". Inclusion of the word "unless" involves findings to be made. He interprets the U.S. Supreme Court ruling to say that those findings must be made by the jury.

According to Judge Griffin, that statute is not advisory, but directive, taking the judge through certain thought process. He noted that it is not to the defense's advantage to turn S.B. 2 to simply advisory guidelines.

On behalf of the Commission, Judge Bressler wondered if it might be best to sit tight and watch these cases go to the Ohio Supreme Court. In the meantime, it might be best to fix obvious areas of concern, such as RVO (which elevates the maximum sentence to 10 years).

Atty. Kravitz argued against rewriting Ohio's sentencing statutes. He agreed that RVO cases will need some attention since the court must make certain findings that clearly increase the maximum sentence.

According to Dir. Diroll, MDOs are more problematic than RVOs. The RVO is tricky, he noted, because it takes sentencing beyond the basic range with a judge-made finding regarding criminal history. And facts regarding criminal history do not have to go to a jury under the *Apprendi* line of cases. However, an MDO determination does not involve criminal history. Rather, it focuses on the amount of drugs involved, a fact-finding that could be made by a jury.

According to Atty. Kravitz, RVO is more volatile than MDO in light of *Blakely*.

The law, declared Judge Bressler, does not authorize the judge to submit an RVO to the jury.

Asst. Prosecutor Steve Taylor feels there is no *Blakely* problem with the minimum sentences, especially for F-3, F-4, and F-5 offenders. He feels the problem is with F-1 and F-2 offenders. If these rulings are interpreted incorrectly, he fears that a large number of serious offenders will not be punished adequately. The findings the judge has to make to go beyond the minimum, he declared, are not worth the risk. He noted that the finding determines how the court proceeds with the case. He expressed serious concern about the risk that F-1 offenders could end up with a 3-year sentence.

Atty. Kravitz expressed concern about how these U.S. Supreme Court rulings would affect consecutive sentencing in Ohio.

Ohio's use of consecutive sentences is based on the offender's history of criminal conduct, the need to protect the public, and the seriousness of the offense, said Judge Bressler.

If a guideline level existed above the statutory maximum, Atty. Kravitz wondered if the judge could use consecutive sentencing to achieve that maximum.

Judge Bressler acknowledged a consensus against making wholesale changes, but continuing with a cautious look for problems that might exist under the current sentencing structure.

Judge Bressler asked the staff to make an overview of the problems raised by these rulings.

Professor Doug Berman, from the Ohio State University, stressed that the fundamental obligation is to the Sixth Amendment, not the Supreme Court decision on *Blakely*. Noting that this is an area where everyone is seeking direction, he urged the Commission not to forget about the common law obligation to universal justice. He encouraged the Commission to give the Sixth Amendment a second look.

OSU law school student Dan Sabol, feels there are parallels between Washington and Ohio sentencing structures. He believes that the Ohio statutes are implicated by the *Blakely* and *Booker* cases.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission were tentatively scheduled for February 17, March 24, April 21, and May 19.

The meeting adjourned at 3:00 p.m.