Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
March 24, 2005

SENTENCING COMMISSION MEMBERS PRESENT
Staff Lt. Michael Black, representing State Highway Patrol
Superintendent Col. Paul McClellan
Prosecuting Attorney James Cole
Juvenile Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Municipal Judge Fritz Hany
Victim Representative Staci Kitchen
OSBA Delegate, Max Kravitz
Municipal Prosecutor Steve McIntosh
County Commissioner Bob Proud
Municipal Judge Kenneth Spanagel
Defense Attorney Yeura Venters
Sheriff Dave Westrick
Prosecuting Attorney Don White
Steve VanDine, representing Rehabilitation & Correction
Director Reggie Wilkinson

ADVISORY COMMITTEE MEMBERS PRESENT
John Guldin, Counsel, Bureau of Motor Vehicles
John Madigan, Senior Attorney, City of Toledo

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

GUESTS PRESENT
Becky Park, Senate Republican Caucus
Lusanne Green, Ohio Community Corrections Association
Jim Guy, Dept. of Rehabilitation & Correction

Executive Director David Diroll called the March 24, 2005 meeting of the Ohio Criminal Sentencing Commission to order at 10:25 a.m.

DIRECTOR'S REPORT

Director Diroll welcomed two new members to the Sentencing Commission: Clermont County Commissioner Bob Proud, who replaces former Commissioner John Dowlin, and Parma Municipal Judge Kenneth Spanagel, who replaces Alice McCollum, now a probate court judge.

Dir. Diroll reviewed contents of the meeting packets which included a note from Scott Anderson on *Blakely* related cases, a legislative update, a new roster, and minutes from the January meeting.

FORFEITURE

Dir. Diroll reported that the forfeiture bill has been drafted for Rep. Bob Latta, but has not yet been introduced. It closely tracks the Commission's proposed language, he reported.

Noting that some key issues had been raised after the Commission's report was forwarded to the General Assembly but before the bill was drafted, OSBA Representative Max Kravitz asked whether the resulting compromises were reflected in the bill verbatim.

Dir. Diroll recapped that the Commission's forfeiture proposal was sent to the General Assembly in March of 2003. This bill matches that proposal almost verbatim. The only changes made involve the later consensus regarding the nexus requirement (link between the property targeted by the forfeiture and conduct of the crime). As a compromise, the Commission reverted to the current language of the "used in" standard and offered guidance to the court on what that means. He explained that prosecutors had thought that "substantial connection" created a whole new standard; so a compromise was needed.

The guidance portion of the compromise uses a three prong test: 1) that the offense could not have been committed "but for" the presence of the instrumentality; 2) that the primary purpose in using the instrumentality was to commit the offense; or 3) the extent to which the instrumentality furthered the commission of the offense.

The compromise language is included in the most recent draft. Beyond that, there were only mechanical changes made to the Commission's proposed language.

Dir. Diroll noted that proposed §2981.08 lays out the proportionality review. It refers to property "substantially connected" and, in light of the compromised change previously mentioned, should say "used in".

According to Atty. Kravitz, the property referred to in that section is property that a jury has determined to be subject to forfeiture, not whether it was "used in" or "substantially connected". Therefore, he determined, it is not a nexus issue.

Dir. Diroll suggested amending the language to "property subject to forfeiture". Atty. Kravitz recommended "property subject to forfeiture by reason of . . .".

The burden of proof in the original proposal, under §2981.08, is "substantially proportionate", said Atty. Anderson, which would place the burden on the prosecutor after the property is determined to be subject to forfeiture. That doesn't make sense. It would make more sense, at that point, to have defense prove if the property is *dis*proportionate. Moreover, this was the consensus reached after the proposal was submitted to LSC.

Prosecutor Don White asked to see the proposed language for this amendment before the next meeting.

Because the House Criminal Justice Committee is difficult to predict, Dir. Diroll remarked that it may be necessary to do some leg work ahead of time to familiarize them with this bill. He noted that, when Rep. Latta first tried to get co-sponsors for the bill, some representatives were surprised at the extent of current forfeiture law.

Municipal Judge Kenneth Spanagel pointed out that ranking minority leader on the committee, Rep. Jim DeGeeter, practices forfeiture law.

Prosecutor Don White suggested providing Commission members with a list of the Criminal Justice Committee members. Dir. Diroll agreed to get lists of the committee members for both the House and Senate Criminal Justice Committees (which were distributed after lunch).

The Commission's package harmonizes the defense and law enforcement concerns, which should help, said Dir. Diroll.

He asked if there was anything new happening on the federal level regarding forfeiture law.

Atty. Kravitz likened the federal process to that of Third World countries, except more formal and with more process. It tends to involve giving the government its share to make a case go away.

***BLAKELY* FALLOUT**

Dir. Diroll reported that, after initial randomness, Ohio courts had settled into a pattern of denying challenges to Ohio statutes (based on Sentencing Commission proposals) in the wake of the U.S. Supreme Court's criminal sentencing cases of *Blakely v. Washington* and *Booker v. U.S.*. However, lately, a few cases from the 1st Appellate District argue that Ohio law should be revised in light of *Booker*.

In a challenge to Ohio's method of imposing maximum sentences (*i.e.*, that a judge must find that the offender committed the worst form of the offense or is most likely to commit future crimes), the 1st District ruled in the *Bruce* case that the finding should be made by a jury.

In its *Montgomery* case, the opposite end of the range was at issue. The 1st District held that a sentencing court should consider only the minimum sentence within the sentencing range if the defendant has no prior prison term on record. Under Ohio law, a sentence above the minimum term can be given only if certain facts are found (*i.e.*, it would diminish the seriousness of the offense, impact on the victim, etc.). While it can be argued that those are traditional judicial findings, not "facts" in the *Blakely*/*Booker* sense, said Dir. Diroll, the 1st District has found those findings suspect under *Booker*. In turn, if *Montgomery* means that any offender with no prior prison term should always get the minimum sentence, then it might be necessary to make some legislative adjustments.

Cases in the 1st District, said Staff Attorney Scott Anderson, were then limited by its decision in *Lowery*.

Before turning to that specific decision, though, some more general points regarding all of Ohio's appellate courts should be undertaken, he said. Under *Blakely* and *Booker*, the judge cannot make a finding that increases the sentence beyond what a jury can authorize. Under Ohio's sentencing guidelines, there are three basic situations in which a judge can decide to increase a sentence: consecutive sentences, imposing maximum terms, and imposing more than the minimum sentence.

The 9th, 10th, and 12th Appellate Districts hold that Ohio's sentencing scheme is indeterminate and therefore safe. Appellate Districts 1, 2, 3, 4, 5, and 8, 9, 10, 11, and 12 say that consecutive sentences are *not* implicated by *Booker* and *Blakely*. These same districts say that *Blakely* and *Booker* do not require resentencing on the minimum and maximum sentences – they're safe. Only the 1st District says that *Booker* renders Ohio's maximum and more-than-minimum terms unconstitutional.

In the 3rd District, the *Trubee* case has been certified to the Supreme Court as being in conflict with the 1st District holding in *Montgomery*. In addition, the *Quinones* (8th District) and *Elmore* (5th District) cases have been consolidated and accepted by the Supreme Court to address consecutive and maximum sentences.

Atty. Anderson explained that *Bruce* says that maximum sentences within the range are unconstitutional. *Montgomery* declares that sentences imposed for more than the minimum allowed within the range are unconstitutional. *Lowery*, limits *Bruce*. *Lowery* says that *Bruce* stands for the proposition that maximums, where the sentence is based on "the worst form of the offense", are unconstitutional. If, however, the maximum is given because the offender poses the greatest likelihood of committing crime, then the maximum is constitutional. (Under §2919.14(C) both of those factors are given as reasons authorizing a maximum sentence.) *Lowery* seems to include Ohio's "worst form of the offense" factor as a recidivism factor, a fact that can be contained in the prior conviction exception under *Apprendi*, *Blakely*, and *Booker*.

Atty. Kravitz declared that these are fact/value judgments that a judge would make.

Defense Attorney Bill Gallagher remarked that, in *Bruce*, even the defense attorney said that the defendant deserved more than the minimum sentence, given his criminal history. The argument, however, was over whether the maximum sentence should be allowed.

Related to *Lowery* is the issue of the repeat violent offender (RVO), said Dir. Diroll. There might be a *Booker/Blakely* problem with an RVO sentence, because the judge makes the necessary finding, even though it is specified in the indictment. It depends, he noted, on how wide the criminal history exception is.

Although the Commission has not previously taken a fixed position on *Blakely*, Atty. Gallagher remarked that the Commission memo recently sent to all judges has been viewed as a stamp of approval on Ohio's sentencing structure and that there is no problem with Ohio's scheme in light of *Blakely*. He prefers today's memo which is informational.

As a proponent of S.B. 2, Atty. Kravitz remarked that he would hate to see it dismantled in response to *Blakely*.

DRC Research Director Steve VanDine assumes that formal plea bargaining is not affected by this.

According to Atty. Anderson, even that is being debated in some jurisdictions, but has not yet been raised in an Ohio appellate case.

We are now in a wait-and-see mode, said Dir. Diroll. He noted that *Booker* and *Blakely* might also apply to forfeiture, noting that the issue would turn on whether judge-found forfeitures are part of the criminal penalty or used as a remedial deterrent.

According to Atty. Kravitz, since proportionality can mitigate the forfeiture, it is unaffected by *Blakely* and *Booker* issues. Civil forfeiture is unaffected by these cases as well. In criminal forfeiture, however, it is clear that forfeiture is part of the punishment. The jury decides what property is subject to forfeiture. The 6th Federal Circuit, he said, has held that *Blakely* does not apply.

Under current law, said Dir. Diroll, the forfeiture burden of proof is proof by a preponderance of the evidence. Interpretation of the *Blakely* case implies that all aspects of a criminal penalty must be found beyond a reasonable doubt.

According to Atty. Kravitz, this does not present a problem for forfeiture law, and no changes are necessary.

Municipal Judge Kenneth Spanagel reported that there are articles in the Judicial Conference newsletter regarding recent cases that might have an affect on how *Blakely, et al.*, affect Ohio law.

Atty. Gallagher reported that motions have been made to stay the *Montgomery* decision. He claimed that every judge is basically doing whatever he wants to do with sentencing. Some judges, he noted, are considering stating alternative sentences as back-ups in case the Supreme Court rules that *Blakely* applies.

Some federal circuit judges are doing the same, Atty. Kravitz admitted.

TRAFFIC

There are lingering traffic issues from the last session of the General Assembly, Dir. Diroll reported. He ran through some of them.

Classified Suspensions. S.B. 123 classified the available license suspensions. Those classes that are numbered are imposed by the court, while the ones with letters are imposed by the Bureau of Motor Vehicles. A Class 7 Suspension is a court suspension of "up to 1 year." Noting that there are occasions that call for a "mandatory Class 7" suspension, Dir. Diroll remarked that some judges have questioned what "mandatory" means in this instance. Some have speculated that a suspension of one day would qualify. Dir. Diroll rhetorically asks, "Why not one hour or one minute?"

Some judges refer to the Class 7 mandatory suspension as the "4:30 suspension", said Judge Spanagel, because they tell the defendant he is suspended until 4:30 p.m., then he can pick up his license. He argued

that a beginning number or mandatory minimum should be set to define the available range for the suspension, or else it should be optional and not mandatory.

Atty. Guldin remarked that BMV needs a start and end date and a class designation for any suspension imposed or the computer rejects it.

"Reckless" Suspension. Municipal Judge Fritz Hany raised concern about the offenses of reckless and wanton disregard and reckless operation. The options available under those offenses appear to have changed.

It used to be possible to spec a license for a moving violation that did not carry a suspension itself if the conduct was egregious, Dir. Diroll acknowledged. That option was removed and put back in as willful and wanton disregard, a Class 5 suspension, with a 6 month minimum.

Noting a case involving a driver who crosses a railroad grade and a train passing through within a few seconds, he remarked that, as judge, he would find recklessness. But a minimum 6 month license suspension is probably 4 months longer than appropriate.

Judge Spanagel agreed it might be necessary to revisit the statute.

According to Dir. Diroll, the statute says "a person has been found guilty of violating the statute or ordinance, operating a vehicle improperly, violating a motor vehicle violation of any such law or ordnance relating to reckless operation". With this broader language, he feels that the suspension applies in cases beyond the specific offense of reckless operation.

In the railroad case, said Judge Hany, the judge would not be able to impose the license suspension under that broad language, because the underlying citation would be a violation of the railroad agreement. It is not cited in the reckless operations statute.

Dir. Diroll suggested changing the language to "operating a motor vehicle with willful and wanton disregard for public safety" rather than saying "reckless operation".

City Attorney John Madigan reported that there are often cases where the judge finds reckless conduct occurred even though it may not have been charged that way.

That sounds like the court is finding a higher *mens rea* in order to authorize the suspension, Dir. Diroll commented.

According to Judge Spanagel, reckless and Class 7 suspension issues tend to roll together. He feels they could be handled easily.

Look-Back Periods. On a similar note, Dir. Diroll asked if the look-back periods to check for prior offenses should be standardized.

Judge Spanagel favors the same look-back periods for DUS and OVI.

Dir. Diroll acknowledged that a person could argue that any attempt to reconsider the look-back periods could potentially reopen the refusal and other arguments again. He noted, however, that, although the worst

misdemeanor traffic offense is impaired driving, the prosecutor is allowed a limited look-back for prior driving offenses, while a much longer look-back is allowed for offenses considered to be less threatening on the road.

OVI records go back indefinitely, Atty. John Guldin reported, while all other types of records or actions are cleared off after a certain time.

If the statute defines a longer look back, the departments will simply have to oblige and keep the records longer, Judge Spanagel declared.

No Valid Operator's License. An error in S.B. 123 erased the penalty for driving without a valid license when the driver never had a license, said Dir. Diroll. That gap was filled. The resulting difficulty, he said, is how to prove that someone never had a valid license in any other jurisdictions.

According to Prosecutor Steve McIntosh, it raises a host of issues. He noted that a license from an Indian reservation is recognized as valid but a license from some other places is *not* recognized. He's not sure how law enforcement could prove the person *never* had a license.

Judge Spanagel suggested that the defendant should be allowed an affirmative defense in this case.

If we change anything, said Judge Hany, it might need to be in the penalty section of the statute, making an NOL (no operator's license) violation an M-1. There tends to be a lot of plea negotiation around the suspension for the offense in order to prevent the mandatory Class 7 suspension. He suggested making the violation an M-1 and offering an adjustment to the suspension if the defendant can show that it has been less than 6 months since he had a valid operator's license.

Judge Spanagel agreed that that would put teeth into the statute so that the prosecutor has a valid case.

Some courts, said Atty. Guldin, claim that NOL has no points attached to it, although BMV lists 2 points for the violation.

Atty. Anderson remarked that it would be difficult to set the statute so that the defense had the burden to prove if the defendant had a valid license within the last 6 months while the prosecutor would have the burden to prove the defendant never had a valid license. He suggested an M-4 if the defendant can show it has been less than 6 months since he had a valid operator's license; an M-3 if the defendant can prove he had a valid license but more than 6 months has elapsed; and an M-1 if the prosecutor proves the defendant never had a valid operator's license. The defendant would use his having had a valid license in the recent past as an affirmative defense or to mitigate.

The Commission, said Dir. Diroll, was attempting to graduate the penalties based on how long the license was expired. It did not address whether the defendant had never been tested for competency to drive in this state or anywhere else. When that gap was filled it was brought to the attention of the Commission that confusion remains on verifying a license from other jurisdictions.

Judge Spanagel suggested inserting the language, "if the person has no license issued by this state" and allowing an affirmative defense if the defendant can show a valid license from another state. NOL would be charged if the defendant has/had no valid license from anywhere.

Atty. Guldin agreed that a provision is needed for someone who fails to renew his license within 6 months after it expires. He favors Judge Hany's idea to enhance the penalties if an offender continues to drive without a valid license.

Judge Spanagel declared that case law says that once your license has expired you are not guilty of driving under suspension because there is no underlying active drivers license. Hence, NOLs serve as impediments to a person's ability to obtain a license.

The Commission tried to fix that problem with S.B. 123, said Atty. Guldin, by stating that it is not a suspension of the license but a suspension of the privilege.

Dir. Diroll noted that S.B. 123's definition of "suspension" covers a withdrawal, by action of the court or the BMV, of the driver's license, temporary instruction permit, or privilege to obtain a license.

According to State Highway Patrol Staff Lt. Michael Black, if the driver had a license at one time and received numerous suspensions over several years, it can take 20-30 minutes between the officer and the dispatcher to try to figure out how to cite the driver. If the officer cites the driver under the wrong suspension, it makes matters even more confusing in the courtroom. If the driver has numerous suspensions over 5 years, and still does not have a valid operator's license, it would be much simpler to just cite him with NOL.

Hit/Skip Law. Dir. Diroll remarked that he has received inquiries regarding leaving the scene of an accident, the so-called hit/skip law. The offense is an M-1, but becomes an F-5 if the violation results in serious physical harm or death to a person.

Pros. McIntosh said the problem is that the prosecutor must show that the victim's harm was a result of the defendant's leaving the accident scene or the felony level penalty is negated.

Judge Spanagel contended that the statute should say "related offense" to clarify that it refers to a traffic charge related to the hit/skip.

The discussion turned to whether this referred to harm or death caused during the initial traffic offense or during or after the hit/skip. Atty. Madigan argued that the language needs to be clarified to cover every angle of the offense – before, during, and after.

Action after the hit/skip might be covered by other statutes, said Dir. Diroll, such as vehicular homicide.

According to Pros. McIntosh the old language covered the situation.

Fleeing and Eluding. S.B. 123 increased the penalties for fleeing and eluding a peace officer, said Dir. Diroll. This offense now carries a mandatory hard suspension of 3 years to life for the first offense and

a life suspension with no driving privileges for a subsequent offense. The intent was to deal with those situations regarded as the most dangerous, such as car chases. In final form, it also covered failure to heed the lawful order of a law enforcement officer (i.e. an officer directing traffic) in the 3-to-life suspension category. Although failure to heed can present a dangerous situation, it does not carry the same stakes as fleeing and eluding, he opined.

Pros. McIntosh declared that is too harsh of a penalty for failure to heed. Lt. Black argued that it is hard for an officer to prove. They agreed that it can be a serious offense but felt that a 3-year suspension is too long and should not necessarily be mandatory, unless it can be shown that it was a willful act.

Lt. Black remarked that willful action by the offender might force an officer to chase him down and pull him over. If the driver does not pull over and keeps going, the offense elevates to fleeing and eluding.

Under former law, said Atty. Madigan, there was no suspension for failure to heed.

Noting that the offense is currently listed as Class 2, Judge Spanagel suggested making it a Class 5 or 7. He contended that if it is a misdemeanor offense, it should not carry a heavier penalty than a felony car chase does with fleeing & eluding.

Judge Hany argues that the judge should at least have the option to give them driving privileges.

On a similar note, Dir. Diroll remarked that the court is not precluded from granting privileges for drug offenders, but only "occupational" privileges are permitted for drug offenders.

Atty. Guldin added that the defendant has to prove that he qualifies for a "hardship" privilege.

Judge Spanagel agreed that Ohio will not want to lose highway funds over a technicality of allowing driving privileges.

Atty. Diroll offered a draft of language for consideration.

Mayor's Courts. S.B. 123 authorizes payment plans or extensions to help drivers pay reinstatement fees, which has resulted in getting more fees paid. The bill did not allow mayor's courts to offer such plans. Dir. Diroll asked if mayor's courts should be allowed that authority. He asked, "Should a mayor's court suspension effectively be harsher than one meted out in a court of record for the same misconduct?"

It might depend on the capability of a mayor's court to set up the necessary mechanical structure for a fee-paying plan, said Judge Spanagel. If they have that capability, then he feels they should have the authority to handle payment or reinstatement through fee plans.

Atty. Guldin said BMV does not give the court notice of the termination of a driver's license suspension until fee plan payments are complete.

FR Suspensions. A driver under an FR (no insurance) suspension receives a 90 day suspension with privileges for the first conviction, a 1 year suspension with no privileges for the second conviction, and a two year suspension with no privileges for the third conviction. Judge Spanagel remarked that the offender should be allowed to get limited driving privileges once they comply by getting insurance.

City Pros. McIntosh noted that there needs to be specific language that requires the city prosecutor to represent BMV in FR privileges cases.

12 Point Suspension. Clearer language is needed in the violation section of the 12 point suspension, said Judge Spanagel.

The section about driving under a point suspension is buried in the statute, Dir. Diroll admitted, and needs to be easier to find.

Restricted Plates. Judge Spanagel pointed out a possible glitch in the restricted plate violation. If a DUI offender ordered to drive with restricted plates is caught driving a vehicle without them, it is only a minor misdemeanor with a $150 fine but no points.

Atty. Gallagher argued that it should also be an offense of violation of a court order.

According to Dir. Diroll, §4510.11 not only covers driving under suspension, but also in violation of a restriction.

Judge Spanagel acknowledged that there are alternative ways of charging it depending on how one wants to look at it, but it might be worth the Commission's time to examine this offense and penalty a little closer.

Jevenile Traffic. Atty. Anderson suggested the Commission's Juvenile Traffic Committee might want to get refocused on some of these issues.

Mr. VanDine suggested checking with new DYS Director Tom Stickrath about whether any other juvenile issues need to be addressed.

DRUGGED DRIVING LEGISLATION

As for S.B. 8, dealing with drugged driving, Dir. Diroll reported that the bill passed the Ohio Senate 30 to 1, but has slowed in the House.

Rep. Seitz questioned the *per se* standards proposed for marijuana and the affirmative defense if the driver has a prescription.

Staff Lt. Black said prescription drugs were removed from the bill.

Judge Spanagel suggested adding language that if the driver does not test within 2 hours, it is tantamount to a refusal.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission were tentatively scheduled for May 19, June 16, July 21, and September 15.

The meeting adjourned at 2:23 p.m.