

**Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
March 19, 2009**

MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Common Pleas Judge Jhan Corzine, Vice-Chair
Major John Born, representing State Highway Patrol Superintendent
Colonel Richard Collins
Paula Brown, Ohio State Bar Association Delegate
Bill Gallagher, Defense Attorney
David Gormley, Municipal Court Judge
Mayor Michael O'Brien, City of Wooster
Appellate Judge Colleen O'Toole
Jason Pappas, Fraternal Order of Police
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction
Director Terry Collins
Timothy Young, Ohio Public Defender

ADVISORY COMMITTEE MEMBERS PRESENT

Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
Cynthia Mausser, Chair, Ohio Parole Board
Jim Slagle, Attorney General's Office
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT

Courtney Cunningham, Legal Extern
David Diroll, Executive Director
Megan Tonner, Legal Extern
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

GUESTS PRESENT

Chrystal Alexander, Office of Criminal Justice Services
Sara Andrews, Dept. of Rehabilitation and Correction
Jim Brady, concerned citizen
Bill Crawford, Supreme Court of Ohio
JoEllen Cline, Counsel, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Elizabeth Lust, legislative aide to Sen. Tim Grendell
Scott Neeley, Dept. of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Brigid Slaton, Ohio Parole Board

Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News Network

Common Pleas Court Judge Jhan Corzine, Vice-Chair, called the March 19, 2009, meeting of the Ohio Criminal Sentencing Commission to order at 10:15 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll announced that John Madigan, senior attorney for the City of Toledo, was retiring at the end of the week. He has served for many years as a municipal prosecutor on the Sentencing Commission and the Advisory Committee and has offered valuable input on how sentencing changes would impact municipalities.

Judge David Gormley, from the Delaware Municipal Court, was welcomed as the newest Commission member.

It is a busy time in the General Assembly, said Dir. Diroll. He reported that he testified at a recent budget hearing (H.B. 1) and was questioned about sentencing and prison crowding.

S.B. 74. A bill was introduced recently in the Senate that asks the Sentencing Commission to report on drug sentencing issues within the six months after the bill takes effect. The bill has not yet received a hearing, noted Dir. Diroll.

S.B. 22 and H.B. 1. Sen. Bill Seitz introduced S.B. 22, which deals with prison crowding. It contains many of the provisions suggested by the Governor that also are in H.B. 1, including:

- Expanded community corrections funding.
- A proposal to increase the felony theft threshold from \$500 to \$750. The possibility of raising it to \$1,000 has also been discussed, noted Dir. Diroll.
- Looking at the impact of crimes that were not felonies when S.B. 2 was enacted, such as nonpayment of child support. According to DRC Research Director Steve VanDine there are 700 to 800 entering DRC each year for nonsupport.
- Expanding earned credit, which, Dir. Diroll noted is the most controversial issue. He added that the Ohio Prosecuting Attorneys' Association has testified against it.

Dir. Diroll reported that, during the discussion of S.B. 22, one suggestion favored judicial review of sentences once an offender serves 85% of the prison term. Currently an inmate can apply for judicial release and the judge can deny the request without a hearing. DRC would like to flip it and say that a hearing is held only if the release is denied. Dir. Diroll added that the Commission's historical view of "truth-in-sentencing" has been that a sentence can be adjusted, but only in open court. The 85% proposal is consistent with that.

Another issue for consideration is, given the number of drug offenders that enter prison each year, whether there should be some type of "drug equalization". The sentencing guidance offered for most felony offenses does not apply to drug offenses. Generally, a nonviolent F-4 or F-5 offense is guided away from prison. For drug offenses, presumed prison

sentences begin to apply at lower felony levels. Mandatory prison terms begin at the F-3 level for drug offenses. Sen. Seitz is open to greater equalization between drug and non-drug felony sentences.

During the discussion on prison crowding and sentencing policy, Dir. Diroll said that he was asked about the Ohio Prosecuting Attorneys Association proposals on drug offenses. OPAA does not like expanding earned credit and instead suggested repealing all mandatory prison terms for drugs except those in the "major drug offender" category. They would approve expansion of intervention in lieu of conviction for some repeat offenders. He reported that John Murphy, OPAA Executive Director, also suggested reviewing all fifth degree felonies to see if some could be misdemeanors.

Dir. Diroll suggested discussing the earned credit proposals.

Mr. VanDine noted that the 85% proposal came from the Judicial Conference. He noted that, although prison intake is decreasing at the moment, DRC anticipates a gradual increase in the prison population over the next few years due to longer sentences as a result of the *Foster* decision. DRC would like to reduce the length of sentences more broadly to balance out the results of *Foster*.

Appellate Court Judge Colleen O'Toole remarked that she recognizes earned credit as providing a needed incentive for more people to participate in treatment, educational, and training programs. She also believes that encouraging judges to go through the sentencing guidelines slows them down when considering sentences so that prison does not become the primary focus.

Representing the Ohio Community Corrections Association, Phil Nunes emphasized the value of earned credit in regards to inmate management. He claimed that, in the federal prison system, a person serving 7 to 8 years gets released with 300 days of good time credit, which serves as a strong management tool. Those sent to a halfway house have an 80% success rate compared to 61% for state inmates under transitional control. He commends these credits as a good tool for encouraging compliance and reducing recidivism.

Dir. Diroll remarked that Senator Tim Grendell would like anyone released on judicial release to be put on GPS or similar electronic monitoring system.

Eugene Gallo, Director of the Eastern Ohio Correctional Center, believes that some support could be built among prosecutors for earned credits. Since a main concern is public perception, he understands why prosecutors favor judicial review before any early release.

Acknowledging that S.B. 2 replaced the use of good time with bad time, Mr. Nunes declared that when bad time was later declared unconstitutional, there was no alternative to replace it. Having a sentencing tail encourages better behavior. Somehow that tail needs to be replaced and there needs to be adequate programs available.

Mr. Gallo fears that an 85% review will prevent judges from considering some inmates for an earlier release.

Municipal Court Judge David Gormley declared that if earned credit really is earned, it serves as one of the most effective management tools. Inmates who participate in programs and behave well are the folks that judges can feel comfortable releasing. He feels that an earned credit option could be best administrated by prison officials.

Ultimately, said Mr. Nunes, the ideal system needs to effectively punish and effectively reward.

Acknowledging the complexity of the issue, OJACC representative Lynn Grimshaw suggested that, since OPAA has opened the door for some options, the Commission should move on those proposals.

Atty. Jim Slagle of the Ohio Attorney General's office suggested an indeterminate 5-year tail on F-1 offenses and a 4-year tail on F-2 offenses. That would put bad time back on the table and reinstate a good management tool. He believes that a deal could be made, but prosecutors won't like earned credit regardless. If indefinite sentences are used for F-1s and F-2s, the credit could be reserved for F-3s, F-4s, and F-5s. He believes that judicial review would be more receptive to prosecutors rather than having any form of early release administered solely by prison officials.

Defense Attorney Bill Gallagher moved to send a letter to the General Assembly in support of the concept of earned credit.

Since the Commission had originally recommended bad time and limited earned credit with no "good time," Chief Justice Moyer remarked that this would be quite a philosophical shift.

When Judge Gormley questioned the opposition to earned credit, Judge Corzine explained that many people view earned credit as a violation of truth-in-sentencing since it would allow an inmate to receive earlier release than what was stated in court by the sentencing judge. The Commission had excised good time since it was granted regardless of whether the inmate participated in treatment programs. It was replaced with bad time in case the inmate caused problems while incarcerated. Bad time, however, was struck down by the Supreme Court of Ohio.

DRC legislative liaison Scott Neeley explained that earned credit would be available for a limited list of approved treatment and educational programs and could be taken away for bad behavior.

According to Mr. VanDine, an inmate cannot get earned credit if he has an unexcused absence. He pointed out that there are long waiting lists for programs and good behavior is required to be admitted to them.

Mr. Nunes insisted that good conduct and behavior must be part of the requirements for earned credit, not merely program participation. He would like to see the programs available to all offenders, not just those serving one or more years of prison time.

Mr. VanDine cautioned that the General Assembly will not want to just penalize bad behavior and reward good behavior.

The Commission, said Chief Justice Moyer, eliminated good time, believing that good behavior should be expected of the offender. He

should not expect a reward for simply obeying the rules. Any reward needs to be for something extra.

Eventually, the Commission members unanimously approved Atty. Gallagher's motion seconded by Municipal Court Judge Kenneth Spanagel:

The Sentencing Commission should send a letter to the General Assembly in support of the concept of earned credit.

EQUALIZATION

Dir. Diroll explained that the concept of equalization refers to more than just the crack/powder cocaine distinction. However, on that topic, now that less violence is associated with crack, the time might be right to address cocaine disparities. In the last General Assembly, a bill was introduced that would raise powder to crack levels. If enacted, it would both increase and darken the complexion of the prison population, he said, since a majority of powder cocaine offenders in Ohio prisons is black.

Referring to the Commission's Drug Offense Quick Reference Guide, he noted the only change since 2007 involves possession of Schedule III, IV, and V drugs.

Mr. VanDine remarked that three-fourths to four-fifths of the drug offenders are serving time for cases involving crack cocaine. Most are at the low end of the chart. Currently, an F-5 cocaine drug offense for either possession or trafficking begins at 1 gram for crack cocaine and 5 grams for powder cocaine. To end the disparity, it has been proposed that the statutes split the current difference between powder and crack cocaine, with the first threshold at 3 grams for each. To put this in context, Mr. VanDine explained that a Sweet-n-Low packet is 1 gram.

While F-5s would involve possession or trafficking of all forms of cocaine up to 3 grams, F-4 offenses could involve 3 to 7 grams. F-3 offenses could be 7 to 18 grams, F-2 offenses could include 18 to 27 grams, and F-1 offenses could include those above 27 grams.

This obviously would mean a reduction in the amount needed for powder cocaine to reach the lower level penalties, but an increase in the amount of crack cocaine. The proposal attempts to equalize penalties and ease prison crowding. According to Mr. VanDine, the proposal could save about 150 beds for trafficking and about 195 beds for possession, a net savings of 345 beds. Anything further would involve serious changes in the F-2 range. The proposal involved side by side reviews, said Mr. VanDine, on where the cut off should be.

According to State Public Defender Tim Young, street purchases are usually a \$10 rock or 1 gram of powder.

In the late 1980s and early 1990s, said Mr. VanDine, the boom was in crack. Now it is more spread out among powder cocaine and other drugs. While there is an increase in heroin and methamphetamine cases in Ohio, it's nowhere near as pronounced as in some other places.

He noted that, during the last three General Assemblies, the move has been to move powder up to the level of crack. Before that the move had

been to move the level of crack down to the level of powder. He noted that most powder and crack offenders come in at the F-4 and F-5 levels.

Dir. Diroll remarked that federal prosecutors tend to skim off most of the high end level offenders.

According to Judge Corzine it is usually easier to let the feds handle those high end cases.

When questioned about the racial makeup, Mr. VanDine reported that 80% of the crack offenders coming in are black and 65% of powder offenders are black.

OSBA Delegate Paula Brown asked for figures on the average amount of drugs that most users are serving time for. She stressed that decisions made must not be based on an arbitrary number. She'd like to know the source of the numbers being used.

Atty. Slagle noted that federal numbers have greater disparity.

Sen. Seitz is considering a limited version of this in S.B. 22, noted Dir. Diroll.

Judge O'Toole encouraged the Commission to express a position in favor of equalization.

The Commission unanimously approved Judge O'Toole's motion, seconded by Atty. Gallagher.

To support the broad concept of equalizing not only crack and powder cocaine, but other issues of disparity in sentencing drug and non-drug cases.

After lunch, Dir. Diroll directed the discussion back toward an attempt to equalize drug offense penalties with other felony offenses of the same levels. For non-drug felony offenses, first or second degree felonies generally carry a rebuttable presumption in favor of prison. For most F-4s or F-5s, the judge is first expected to consider some kind of community sanction. If the judge chooses to send an F-4 or F-5 offender to prison, the judge must make findings subject to appeal.

In comparison, Dir. Diroll directed attention to the drug tables which list the guidance offered for felony drug offenses. Most F-1 and F-2 drug offenses carry mandatory prison terms, while some F-3s and F-4s carry presumptions toward prison.

If they were "equalized," all F-4s and F-5s would carry guidance against prison. Current F-3s with mandatory prison time would go under the "no guidance" approach. F-1s and F-2s would continue to be steered toward prison or carry mandatory time. Thus, drug offenders would be treated as other offenders of the same rank. The General Assembly could change the felony level of individual offenses where they perceive this approach would be unduly lenient or harsh.

Dir. Diroll noted that Sen. Seitz is receptive to equalizing F-4 and F-5 marijuana offenders and cocaine possession.

Atty. Brown favors treating them the same, particularly when it only involves possession, since it is not hurting anyone else.

Low level crack or powder possessors (not trafficking) seem to get sent off to prison in a mandatory fashion, Atty. Gallagher declared.

If the drug offense is an F-4, "equalization" means it would be treated as any other F-4, said Dir. Diroll.

Judge O'Toole emphasized a need to address mandatorics versus non-mandatorics. She wondered if eliminating many of the mandatorics would have a significant impact on the prison population

Mandatorics involve not only who goes to prison, but also what happens when you get there, said Atty. Gallagher.

According to Atty. Young, mandatorics have gotten in the way more than actually resolving anything. He declared that they tie the judge's hands and cost more than what they are worth.

Half the drug offenders coming to DRC are F-5s and another quarter are F-4s, said Mr. VanDine. He noted that F-1 and F-2 offenders are likely to be sent to prison anyway, irrespective of the guidance. There are about 1,000 F-3s that might be affected by mandatorics. The F-4 and F-5 levels are where equalization would make the biggest difference, mostly regarding cocaine. He added that, overall, probation violators are about 35% of intake. The rate is higher for drug offenders. About 16% of the stock population are in for possession and trafficking combined.

Mandatorics often persuade prosecutors and defense attorneys to get a conviction on a lesser charge, said Atty. Slagle.

Obviously, said Dir. Diroll, a change in plea negotiations could have a significant affect on the prison population. Since policy decisions ,au be made fairly soon as the General Assembly defines the next budget, he suggested that the Commission should provide input fairly soon.

Referring to the Commission's recent survey of judges, prosecutors, and defense attorneys, Mr. Nunes said he was surprised by how many judges thought possession penalties should be reduced, possibly even to misdemeanors for some.

Dir. Diroll noted that some judges (a minority) responded that drug use should be treated as a mental health issue rather than criminalized.

Mr. Nunes insisted that studies show overwhelmingly that the public feels treatment should come before punitive measures.

Atty. Gallagher moved to have drug possession track the general sentencing guidance. State Public Defender Young seconded the motion.

According to Mr. VanDine, there are 3,800 F-4 and F-5 drug offenders in prison at any time.

For the sake of argument, said Atty. Slagle, in discussing possession, a person might assume it means possession for personal use. However, he declared, possession of 100 grams is usually for sale.

Atty. Gallagher argued that isn't always a fair assumption.

Atty. Young contended that it would be quite unusual for someone not to go to prison for possession of 100 grams.

F-1 or F-2 possession should have guidance in favor of prison, but not mandatory, said Atty. Gallagher, and F-4 or F-5 possession should have guidance against prison. The motion, he said would include elimination of mandatories at the upper end.

Since the number of members present had dwindled, Chief Justice Moyer suggested making this issue the first topic at the next meeting.

If F-1 and F-2 possession offenses are not mandatory, Dir. Diroll asked if these should follow the general rules of guidance as non-drug cases. F-1 an F-2 trafficking and MDO (major drug offender) offenses could continue to carry a presumption toward prison. F-3, F-4, and F-5 possession offenses could match non-drug guidance by felony level.

Atty. Gallagher accepted that into his motion, but Mr. VanDine felt uncomfortable voting on it without further discussion.

Atty. Brown suggested offering a statement to the General Assembly that we are looking at felony drug offenses in light of equalization with other felony offenses.

Dir. Diroll reported that the OPAA is also looking at allowing some repeat offenders to be eligible for intervention/treatment in lieu. Currently, repeat offenders are not eligible.

The Commission members unanimously approved the motion offered by Mr. VanDine and seconded by Atty. Gallagher.

To expand the option of intervention in lieu so that some repeat offenders would be eligible.

Suggested topics for the next meeting, said Dir. Diroll, include how much of a drug gets an offender into a certain felony level and how post release control violations are sanctioned for drug offenders.

The post release control issue can differ from jurisdiction to jurisdiction, based on what resources are available, said Gary Yates, representing the Chief Probation Officers' Association.

Sara Andrews, DRC, agreed to help research this issue.

Dir. Diroll asked if there were any areas in the drug laws where trade-offs could be considered regarding penalties, but received no response.

FUTURE MEETINGS

Future meetings of the Sentencing Commission are tentatively scheduled for April 16, May 21, June 18, and July 23.

The meeting adjourned at 1:50 p.m.