Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
November 18, 2010

MEMBERS PRESENT
Chief Justice Eric Brown, Supreme Court of Ohio, Chair
Common Pleas Judge Jhan Corzine, Vice-Chair
Victim Representative Chrystal Alexander
Defense Attorney Paula Brown
State Representative Tim DeGeeter
Juvenile Judge Robert DeLamatre
Prosecuting Attorney Laina Fetherolf
Municipal Judge David Gormley
Public Defender Kathleen Hamm
Municipal Judge Fritz Hany
Andre Imbrogno, representing Rehabilitation and Correction Director Ernie Moore
Staff Lt. Kenneth Kocab, representing State Highway Patrol Superintendent, Col. David Dicken
Bob Lane, representing State Public Defender Tim Young
Prosecuting Attorney Joseph Macejko
Mayor Michael O'Brien
Appellate Judge Colleen O'Toole
Sheriff Albert Rodenberg
Senator Shirley Smith
Municipal Judge Kenneth Spanagel

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correction Center
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
Joanna Saul, Correctional Institution Inspection Committee
Jim Slagle, Attorney General's Office
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Caitlynn Nestleroth, OSU extern
Cynthia Ward, Administrative Assistant
Shawn Welch, Law Clerk

GUESTS PRESENT
Jim Brady, interested citizen
JoEllen Cline, Legislative Counsel, Supreme Court of Ohio
Bill Crawford, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Greg Geisler, Correctional Institution Inspection Committee

Tom King, Legislative Aide to Senator Shirley Smith
Irene Lyons, Dept. of Rehabilitation and Correction
Scott Neeley, Dept. of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Matt Stiffler, Legislative Service Commission
Ed Stockhausen, Legislative Aide to Senator Shirley Smith
Paul Teasley, Hannah News Network

The November 18, 2010 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order by Chief Justice Eric Brown, Chairman, at 9:30 a.m.

Chief Justice Brown expressed his thanks for the opportunity to work with the Sentencing Commission during his interim term as Chief Justice. He reiterated his concern about the importance of the Commission's work on *mens rea* issues related to the *Colon* case. He encouraged the Commission to submit its proposed recommendations to the General Assembly for consideration.

DIRECTOR'S REPORT

After thanking Chief Justice Brown for his active participation in his role as interim Chair of the Sentencing Commission, Executive Director Diroll provided an update on the limited legislative activity in the current lame-duck session.

He reported that Senator Bill Seitz's S.B. 22 still awaits a floor vote in the Senate, but prospects are growing dim. The most controversial part of the bill is the expansion of earned credit.

JAIL TIME CREDIT

Dir. Diroll noted that the Ohio Public Defender's Office has been working on a proposal to improve the process for awarding credit for times of confinement. The proposal would amend §2929.19 and §2967.191 to ensure that the issue of credit for confinement is addressed at the offender's sentencing hearing. It recommends that the credit be transmitted to the Bureau of Sentence Computation at the Department of Rehabilitation and Correction (DRC) and allows the inmate to correct the entry when warranted.

Since the credit for confinement would be included in the sentencing entry, it places the burden upon the defense attorney for gathering the necessary information for the sentencing hearing.

Representing the Ohio Public Defender's Office, Bob Lane noted that the current draft of the proposal reflects concerns that were raised by DRC. Section §2929.19(B)(3)(c) was added to make it consistent with §2949.12, which addresses the offender's transfer to DRC. The amendment would assure that jail time credit is included in the judgment entry and accompanies the offender when transferred to prison.

§2967.191(2) was added to allow the offender to file a motion for a "special proceeding" to correct any incorrect calculation of jail time credit, he added.

There is one attorney in his office, Atty. Lane remarked, that works exclusively on getting jail time credit corrected for offenders. He claimed that this person is responsible for saving the state of Ohio 2,369 days of jail time credit, for a savings of $163,000.

Representing the Attorney General's Office, Jim Slagle wondered whether this would include or exempt jail days that occur when an offender has been granted judicial release and ends up back in prison.

Atty. Bob Lane said that would probably be exempted. Atty. Slagle feels the language might need to be massaged to account for it.

That's how the statute reads now, said Common Pleas Judge and Vice-Chair Jhan Corzine. He suggested that language could be included to state that "any time served with DRC will be computed by DRC".

According to DRC Staff Counsel Andre Imbrogno, DRC does not investigate into jail time credit. If they aren't told about it, they don't track it down or record it.

Appellate Judge Colleen O'Toole asked if credit is given for the time in custody after judgment.

In Clermont County, said Sheriff Rodenberg, the judgment entry says to credit the defendant with X number of days served. However, it can take 7 to 10 days just to process the paperwork and packet of information that accompanies the inmate to DRC.

The problem, said Atty. Imbrogno, is when DRC receives no information on jail time credit.

Because the courts will not do an independent search of records, it is left up to defense counsel to gather the information regarding time in confinement and filing for proper credit, noted Atty. Lane.

Representing the Chief Probation Officers' Association, Gary Yates said that probation officers get several weeks notice to check the count again.

Judge Corzine asked if it might be necessary to add language to clarify that DRC will include its own confinement time to the record. He noted that an account of CBCF time comes from the probation office.

If so, said Atty. Lane, it should be added in §2967.191. If DRC is exempted out from the judge's entry, then it should definitely be included in §2967.191.

Chief Justice Brown suggested that the judgment entry should include an "as of" date.

A good remedy for that concern, said Judge Spanagel, might be to include the language "date certain" in §2929.19(B)(3)(c).

It's not "detention" but "confinement", Judge Corzine declared, that determines whether the time in question qualifies for credit. Judges determine whether it qualifies as "confinement".

Judge Spanagel asked whether §2967.191(2) should say a "determination" or "redetermination". If a correction is made after sentencing, it would be a redetermination.

Atty. Lane believes "determination" covers it. "Corrected determination" might be a more fitting option, said Judge Corzine.

Atty. Hamm insisted that it is captured in the motion to correct an error in time served. Judge Corzine insisted that "redetermine" would be best because it covers everything. Judge Spanagel agreed that would make it consistent with (c).

Judge Corzine suggested referring to the motion as "a motion for a correct calculation of the number of days".

Atty. Lane agreed to amend §2967.191 by inserting language in to "make a determination or redetermination," so that it would cover both.

To address the concern about including a date in the journal entry, Atty. Lane suggested inserting language in the first sentence of proposed §2929.19(B)(3)(c) to read "… the offense for which the offender is being sentenced, as of the date to be determined, and by which the department …."

Atty. Slagle recommended making it the date of the sentencing hearing but Judge Corzine remarked that he usually uses the date of the journal entry rather than the date of sentencing hearing.

Common Pleas Judge Dave Gormley recommended adding language to §2929.19(B)(3)(c) explaining that the judge should not include any time served in a facility solely operated under the supervision of DRC.

To clarify, Atty. Lane agreed to the need to insert language in §2929.19(B)(3)(c) about the sentencing entry, that the judge does not give credit for time served in a DRC facility, and insert language in §2967.191(2) that DRC does give that credit.

Eventually, the Commission members unanimously approved Judge O'Toole's motion after it was seconded by Judge Spanagel:

> **To accept the Proposed Confinement Credit Reform Amendments as drafted by the Office of the Ohio Public Defender, subject to the recommended amendments by the Sentencing Commission.**

S.B. 291 and Expungement of Records

Dir. Diroll reported that Senator Shirley Smith has asked the Commission to offer comments on a bill she is sponsoring which would offer an opportunity for offenders of multiple offenses to get their records sealed. He noted that, currently, only first time offenders are permitted to petition to get their record sealed.

The aim of the bill, said Sen. Smith, is to give the nonviolent offender an opportunity to apply to get his record expunged. Some concerns include: "banning the box" on job applications; employer's responsibility; media use of sealed records; *etc*. She emphasized that

the bill does not try to keep the media from access to records. Some conditions, however, may need to be included regarding media access.

She declared that the premise behind the bill is that someone who has served time for a nonviolent felony deserves an opportunity to be redeemed and get a second chance to be a responsible tax-paying citizen. She pointed out that, under the bill, once the offender applies for expungement it would go to the prosecutor for objections.

The purpose behind banning the box on employment applications, she said, is because most employers will not give someone a chance if they check the felony box on a job application. She believes that the applicant should at least be given a chance to explain things in an interview. She acknowledged that there are objections to the financial penalties proposed for employers who violate or abuse this or who seek information that is already sealed.

She added that some question whether the number of offenses committed should determine the offender's eligibility.

The fundamental concern, said Dir. Diroll, is the idea of broadening the eligibility to expunge records beyond first time offenders.

Prosecutor Laina Fetherolf acknowledged that some people do get their lives straightened out after a crime. However, patterns of behavior must be taken into account to maintain public safety.

It hardly matters these days if records are sealed, said Atty. Hamm, because, with the internet, people still get access to it. Some employees, such as those in nursing, ask applicants to allow access to sealed records.

According to Judge Corzine, some people have questioned the cost and effectiveness of expungement due to internet access that almost makes the effort ineffective.

Employers need access to certain information, said Judge O'Toole, because of concerns about liability. To find out upfront about a felony record saves a lot of time and resources.

Chief Justice Brown agrees with the sentiment behind the bill and recognizes the need to help these people get a chance to start over. He pointed out, however, that there are a lot of recorded cases that are still out there even if they are later sealed. Because of that, the penalty portion of the bill could create more problems.

More credibility is needed in the expungement process, said Eugene Gallo, Director of the Eastern Ohio Correction Center. He believes that judicial discretion is needed to determine if the person deserves expungement. If so, potential employers should respect that decision and allow the record to remain sealed.

The proposal to amend §2953.06(B) to require the court to inform the defendant of circumstances under which his record may be sealed prior to accepting a plea of guilty raised concerns for Judge Corzine. He remarked that this would require the judge to list all circumstances spelled out in §2953.31 through §2953.36, which is about 20 pages,

before allowing a plea. It simply is not feasible, he declared, to ask the judge to explain all consequences. Eligibility, he said, is based on the law at the time of applying, not the law in effect at the time of sentencing. It is up to the defense attorney to explain the positives and negatives involved.

Atty. Lane agreed that it is up to the defense attorney to explain pros and cons. Criminal Rule 11 directs counsel to at least make sure the defendant is aware of possible negative consequences.

For municipal courts, said Judge Gormley, the judge does not have time to check a defendant's prior record to determine eligibility. He added that many defendants appear in municipal court without a lawyer.

Today there are currently many more collateral consequences than 30 years ago, said Atty. Lane, such as sex offender registration, immigrant issues, employment issues, *etc.*

According to Judge Hany, under §2937.06 and §2937.07 the Supreme Court determined that failure to accept an explanation of circumstances on the record would be a burden on the system. He noted that Rule 11 and the equivalent Traffic Rule, as they relate to accepting pleas, already handle what the effect of a plea is. Overall, his gut feeling is that an employer deserves the right to know if two applicants have equal job experience and qualifications but one has the baggage of a felony conviction, which speaks to his character and potential risk.

Many employers, Sen. Smith remarked, have found that the person with baggage is often a better worker than one without baggage because he knows he has to prove himself.

The box on a job application is the number one issue keeping people from becoming productive citizens again, said Mr. Nunes. He feels that this should be the primary focus of the bill.

Ultimately, victims pay for it too, said Pros. Fetherolf. If the offender can't find employment, he can't pay restitution.

Without the box, said Judge Corzine, the employer could at least interview the applicant and conduct a background check after the interview. If expungement is allowed, then he feels that employers should also be allowed to require drug tests for everyone.

Judge Spanagel voiced opposition to the proposed amendment to §2953.32 that would allow first offenders that have previously been denied a sealing application to file again one year later.

The proposal to allow offenders with multiple offenses an opportunity to get their record sealed is, in the opinion of Mr. Yates, a major resource issue, particularly given reduced budgets and loss of manpower. Yet he agrees that a lot of people with low level nonviolent offenses could benefit from it. However, the $50 fee doesn't come close to covering the cost. So it could become another unfunded mandate.

Judge O'Toole reiterated that privacy really doesn't exist anymore. She remarked that the employer should not ask if an applicant has a felony record unless the felony is directly related to the job.

According to Pros. Fetherolf, some people get excluded from jobs because of employers checking records by computer and discover a charge made but no conviction, holding even that against the applicants. Basically, she declared, technology has outpaced us.

When Victim Representative Chrystal Alexander asked how many times an offender would be allowed to apply to get his record sealed, Sen. Smith responded that she would like to have the issue determined by legislative committee.

Currently, Judge Spanagel noted, the offender only gets one bite at the apple. If the offender gets the record sealed now and commits another crime 20 years later, he cannot get it expunged again.

Noting that when a person files bankruptcy or endures foreclosure on his home, he is only obligated to reveal this on applications for seven years, whereas an offender must mark the felony box indefinitely, said Mr. Nunes. That, coupled with technology, he declared, has made the point of expungement almost obsolete.

Addressing Pros. Fetherolf's concern about charges that get dismissed preventing employment, Sen. Smith reported that she had raised this issue and Atty. Gen. Richard Cordray changed the forms to differentiate between charge and conviction.

Defense Attorney Paula Brown remarked that not all courts record that information the same way and not everyone gets their information for background checks from BCI&I.

Lynn Grimshaw raised concerns about the bill imposing an exorbitant fine of $250,000 to $1,000,000 for disclosure of information. If a victim accidentally mentions the crime, it would be victimizing the victim to impose such a penalty. Given the broad range of technology, he fears this could have some unexpected consequences.

Atty. Brown agrees with the need to expand eligibility to more offenses. She added a concern that departments or companies that provide background information should be held accountable to make sure their information is accurate or face a fine.

There at least needs to be a mechanism for getting mistakes corrected, Judge O'Toole asserted.

On the accountability issue, Atty. Slagle remarked that federal law preempts state law.

As a defense attorney, Atty. Hamm has found that even when an expungement order is issued, the court is not always aware of all parties that have participated in the investigation. Since that court order mandates the participating parties to destroy the information, she has found it necessary to file a judgment entry to include all agencies involved. Judges do not have that information at their fingertips, so it is left to the defense counsel to provide it.

Judge Hany asked whether the bill would allow traffic offenses, such as speeding tickets to be expunged.

According to Judge Spanagel, an OVI conviction currently excludes a person from eligibility as a first offender.

If speeding tickets are sealed, said Judge Gormley, then insurance companies will certainly protest since they need to take moving violations into account in setting insurance rates.

Atty. Slagle favors keeping motor vehicle offenses on record for 7 years, as currently practiced.

Sen. Smith was most appreciative to the Commission members for enlightening her on the many concerns to be taken into consideration before introducing the bill.

PRISON CROWDING

After lunch, Dir. Diroll directed the discussion toward prison crowding. As of July 1, 2011, S.B. 2 will have been in effect 15 years. Implementation of The bill initially reduced the prison population and held it relatively steady for several years. However, Ohio's prison population is now exceeding the reduced estimates. Given the current $8 billion budget deficit faced by the state, it may be time to consider some new options, particularly since DRC is one of the two biggest departments drawing from the State budget.

Efforts to make sizeable cuts are difficult to accomplish through reductions in staffing. In fact, it has been stated that if *every* state employee position were eliminated, it would only cover half of the current deficit.

A survey by the Columbus Dispatch asked people where the State should make financial cuts, he said. One of the two strongest suggestions was to cut some of the funding to local governments. In addition, 45% of the respondents said to cut money from the State prison system. Perhaps the best answer is fewer criminals, he joked.

There has been discussion of privatizing more of Ohio's prisons. Ohio currently has two private facilities. One is medium security while the other is a minimum security, noted Dir. Diroll. Private prisons are required to function at a cost that is at least 5% less than a state run facility that is comparable. A key factor, however, is that private prisons do not handle a variety of classifications at present.

A run of U.S. Supreme Court cases questioned whether it was appropriate for judges to make certain findings that would better be left to juries. In light of that, Dir. Diroll remarked that one of the consequences of the Ohio Supreme Court decision in *State v. Foster* was removal of S.B. 2 guidelines that required judges to give reasons for certain sentences, subject to appellate review. The *Foster* ruling thus allowed broader judicial discretion and the option of sentencing to consecutive terms without explanation. This resulted in judges nudging up the length of sentences and an increase in consecutive terms. According to DRC, the average prison sentence has increased by four months. As a result, the state's prison population is likely to peak at an additional 8,000 beds.

According to Judge O'Toole, judges don't like guidelines because they force discipline.

Dir. Diroll feels it might be worthwhile to recognize the judges concerns with the guidelines in S.B. 2 and use it as a forum to discuss several issues.

The constitutional issue, said Atty. Slagle, is that the defendant has the right to a jury trial on findings that may elevate the sentence. The impact on the prison population resulted from judges who started adding on an extra month or two to the sentence. If the prosecution wanted a maximum sentence, you could add a specification with the right to a jury trial.

Dir. Diroll had hoped that the Supreme Court would help to determine which findings are questions of fact for the jury and which findings are jurisprudential for judges to decide.

He noted that the *Rance*, *Foster*, and *Hairston* cases have all affected the use of consecutive sentences. In particular, the *Foster case* says that the judge no longer has to give reason for giving consecutive sentences and the *Hairston* case says that a stack of consecutive sentences it is not cruel and unusual punishment if the sentence on each individual count is within the acceptable sentence range. So long as each individual case is within the guidelines, they can be stacked beyond the range without mandating an explanation or reason.

Because of an ethical duty to follow the U.S. Supreme Court on constitutional law, Judge Corzine said that he makes a finding on every consecutive sentence that he imposes. Most appellate courts, said Atty. Lane, are differing to the U.S. Supreme Court.

Law Clerk Shawn Welch remarked that Justice Pfeiffer said, regardless of *Ice*, the Ohio Supreme Court can make a claim based on state constitutional grounds so they may just ignore the *Ice* case.

Dir. Diroll noted that Ohio's analysis relied heavily on the U.S. Supreme Court analysis and decision. The Commission could see if there's a constitutional issue post-*Ice*. He reiterated that the *Foster* decision has made the single greatest impact on the current prison population. The guidance under S.B. 2 had kept the prison population in check and the rejection of those guidelines under the *Foster* decision has increased the prison population to pre-S.B.2 levels.

S.B. 2 provided a procedural tool, said Judge O'Toole, that encouraged judicial discipline while also giving judges political cover by encouraging them to stay within a range.

Dir. Diroll pointed out that S.B. 2 shoehorned 12 categories into 5 degrees of felony. In addition it allowed judges to sentence at low end felonies in monthly rather than quarterly increments; raised the theft threshold; changed drug penalties to be based on actual weight instead of unit doses; and created life without parole as an alternative for capital cases. He contended that most practitioners like these aspects of S.B. 2.

Here suggested that the Commission focus on the more controversial areas covered by the bill, including: determinate sentences for almost all felonies; statutory guidance subject to appellate review; the "seriousness" and "recidivism" factors; and the like.

Atty. Slagle believes that some judicial guidance is good and suggested checking what other states do.

One problem with S.B. 2, Judge O'Toole declared, was the attempt to create a uniform sentencing structure. Another problem was appellate review of the worst form of the offense. How do you determine that?

Sen. Smith asserted that a lot of Senators would like to revisit S.B. 2.

On the issue of proportionality, said Atty. Slagle, there are real differences based on jurisdictions. He asserted that you'll never be able to get complete consistency.

Mr. Gallo maintained that the most popular solution is not always the most practical or best solution. He likes Dir. Diroll's suggestions for F-4s and F-5s and thinks they could work.

We need to understand, said Judge Corzine, that if we divert more to local sanctions, we can't count on the money following them there. It is imperative to remember that local jurisdictions have budget and crowding issues as well.

We need to include the implementation of ORAS (Ohio Risk Assessment System), said Atty. Slagle, which will help get the right offenders into the right placements. This will provide a better body of research to help in making decisions.

As a collateral issue, said Atty. Hamm, there are repercussions for reducing a felony to a misdemeanor, particularly within the juvenile system.

If we reduce a small amount of drug felonies to the misdemeanor level, said Judge Corzine, it would be necessary to assure money is there for treatment. Right now treatment money is available at the felony level.

Mr. Gallo contended that offenders can be punished in their own community. It is not necessary send them away to prison for that. He insisted that sometimes local punishment is more effective, plus it provides an opportunity, through community service, for the offender to give something positive back to the community.

But sometimes punishment gets left out of the equation at the local level, said Dir. Diroll. The public wants to feel that the wrong was repaid somehow.

One vital element, Judge O'Toole asserted, is a need to get the offender's impulses under control.

Rather than merely providing a list of proposals, Dir. Diroll said that he prefers to offer a package to legislators with some trade-offs. S.B. 22 offers a trade-off in the crack/powder distinction by equalizing the

penalty. Another consideration would be to equalize how we treat drug offenders versus nondrug offenders. The level of violence associated with low level drug crimes is now lower than it was in the early 1990s. It would not be reducing the penalty at all, he declared, if we equalize the drug penalties with those for nondrug offenders at the same felony level.

He also proposed sentencing low level felonies (F-4s & F-5s) in monthly increments rather than quarterly and reserving less than the maximum for post release control.

If a judge thinks a defendant is worth putting on community control, Judge Corzine remarked, then he should reserve only 75 to 80% of the maximum if the defendant violates it.

Some other considerations, said Dir. Diroll, would be to expand the intervention-in-lieu of conviction option and increase the felony theft threshold from $500. According to Judge Spanagel, the proposed threshold has been changed in S.B. 22 to $750 instead of $1,000.

After the Council of State Governments examined Ohio's corrections system, its Justice Reinvestment Group offered a few additional recommendations for "good government". In its preliminary report the group suggested making better use of risk assessment tools and standardizing probation data and services. Two additional concepts were suggested that would have a more direct impact on prisons: To disallow direct prison sentences for certain F-4s and F-5s and to impose, up front, 75% sentences on F-4s and F-5s if certain conditions are met.

Mr. Gallo pointed out that most F-4s and F-5s don't go directly to prison anyway.

Dir. Diroll noted that, according to DRC's Research Director Steve VanDine, about 1,000 F-4 and F-5 offenders go directly to DRC.

Mr. Gallo argued that those offenders are going to DRC because they have most likely been to prison before. Or as a result of a plea bargain, added Dir. Diroll.

It might also help, Judge Spanagel remarked, to keep in mind that the municipal court is better at handling DUI issues while the common pleas court is better with drug issues.

It would be interesting, said Judge Hany, to get a tally from the Bureau of Motor Vehicles on how many people get charged with or are convicted of the felony level OVI.

FUTURE MEETINGS

The next meeting of the Sentencing Commission is tentatively scheduled for December 16, 2010, with future meetings slated for January 20, February 17, March 17, April 21, May 19, June 16, July 21, August 18, September 15, October 13, November 17, and December 15.

The meeting adjourned at 2:40 p.m.