

RAPE PENALTIES

An Interim Report of
The Ohio Criminal Sentencing Commission

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OHIO CRIMINAL SENTENCING COMMISSION

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RAPE PENALTIES

Because sexual assaults are such personal and intrusive crimes, violators consistently receive longer prison terms and more restrictions on their freedoms once released than offenders who commit other serious assaults, including those that are life-threatening. Yet current penalties sometimes are inadequate or ineffective.

Last fall, several members of the Ohio House of Representatives, Buckeye State Sheriffs Association, the Department of Rehabilitation and Correction, and others asked the Ohio Sentencing Commission to look dispassionately at the jumble of sex offense statutes.

The Commission began by quietly studying the vagaries of Sex Offender Notice and Registration (SORN) Laws. However, in the spring, a well-publicized Columbus case raised questions about the adequacy of penalties for serious sexual offenses, particularly those committed against young victims.

The General Assembly's reaction was swift. The House and Senate joined forces to finalize H.B. 95 (sponsored by Rep. Bill Seitz), expanding the measure to include mandatory prison terms for sexual battery and certain sexual impositions when the victim is under age 13. The Senate approved S.B. 260 (Sen. Steve Austria) to increase the penalty to 25 years to life for almost every rape, irrespective of the age of the victim. The legislature recessed before the House acted on S.B. 260.

Given the highly charged atmosphere, the Sentencing Commission shifted gears to focus on the most serious sexual assault in the Revised Code: rape.

H.B. 95 and S.B. 260: Unintended Consequences

Both S.B. 260 and H.B. 95 could have unintended consequences. S.B. 260 calls for imposing 25 years to life in prison not only for the child rapes that were the topic of compelling testimony in the Senate, but also for almost every other rape. This "one size fits all" approach to rape will

lessen the flexibility to deal with the wide array of conduct covered by the rape statute and with the differences between people who commit sex offenses.

If those concerns seem too academic, S.B. 260 will also have more mundane consequences: more cases will go to trial; more vulnerable victims will be forced to testify; costs will increase dramatically for courts and corrections; and—ironically—there will be more acquittals or pleas to dramatically lower charges.

Separately, H.B. 95 mandates a prison term in the second degree felony range for sexual conduct involving a victim under age 13. The change was designed to fill a gap in the law by guaranteeing prison terms for persons charged with sexual battery involving young victims. However, because of its specific language, the measure could result in penalizing conduct as an F-2 that would otherwise be punished more severely as a first degree felony, since sexual conduct with a person under age 13 is also statutory rape.

The Commission's Approach to Rape

Rape covers a broad range of conduct from vicious or exploitive assaults on vulnerable victims to the casual dating encounter where one person presses an advantage and consent is a close question. That is not to minimize any rape; each is a significant crime. It is why all rapes carry mandatory prison terms and are punished more severely than other first degree felonies.

The Commission recognizes there are gaps in the sentencing structure for serious sexual assaults. It understands the sentiment underlying H.B. 95 and S.B. 260, particularly when the victims are prepubescent children.

The Commission also has great respect for the will of the General Assembly. We did not work in a vacuum on the proposals in this report. In crafting these recommendations, the Commission embraced suggestions made by the Ohio Prosecuting Attorneys Association, which has been working with legislators to assure that sex offender law is tough but workable.

The Commission's goal is to provide dramatic sanctions against those who commit the worst offenses, while also listing a series of tough terms for rape when the worst form is difficult to prove or where the conduct is, relatively speaking, less severe. In short, the proposals will assure that persons who commit the worst sexual assaults will face the longest mandatory prison terms (other than for aggravated murder) in the

Revised Code, while giving judges and prosecutors the flexibility to obtain convictions in cases where the facts are close or victims are unwilling or unable to testify effectively.

Overview of the Commission's Proposal

The Commission proposes the following:

- Increase penalties for rape and attempted rape across the board;
- Make all rapists and most attempted rapists subject to long indeterminate sentences;
- Use terms ranging from 10 years to life to 25 years to life or life without parole for rapes of victims under age 13;
- Use a range of 5, 6, 7, 8, or 9 to 25 years for rapes of older victims, while using a 10 to life term when a sexually violent predator specification is proved;
- Create a new type of review by the sentencing court, available only after the minimum term is served, which would run parallel to the Parole Board's reviews in the case;
- Better integrate rape penalties with the current SVP penalties by using language from the latter statutes as the catalyst for longer indeterminate penalties for rape. This should afford a longer supervision period for chronic offenders, lessen the need for civil commitment, and make it easier to dovetail these provisions with SORN Law;
- Recognize current repeat violent offender (RVO) penalties which can increase the definite term to 20 years;
- Increase penalties for attempted rape;
- Divide the current rape statute in two. Proposed §2907.02 would govern rape when the victim is under age 13. Proposed §2907.021 would govern other rapes.

[Note: The proposal does not specifically address sexual battery (and the issue with H.B. 95 raised earlier), sexual imposition, less serious sex offenses, the duration of post-release control for sexual offenders, juvenile sex offenders, SORN Law, or the sexual motivation specification. These will be addressed in a final report in 2007.]

Here is a summary of the plan approved by the Commission.

Penalties for Rape and Attempted Rape

RAPE OF A CHILD UNDER AGE 13 – Proposed 2907.02		
Circumstances	Current Term	Proposed Term
No Force, SPH, or Prior	Flat 3,4,5,6,7,8,9, or 10	10 to life
< 10	10 to life	15 to life
Force	10 to life (10 to life or LWOP if < 10)	15 to life
SPH or Prior	10 to life or LWOP	20 to life
SVP	10 to life	20 to life
SVP + Force	10 to life (10 to life or LWOP if < 10)	25 to life
SVP + SPH or Prior	LWOP	LWOP
Attempt	Flat 2,3,4,5,6,7, or 8	5 to 25
Attempt + <10 or Force	Flat 2,3,4,5,6,7, or 8	10 to life
Attempt + SPH or Prior	Flat 2,3,4,5,6,7, or 8	10 to life

OTHER RAPES – Proposed 2907.021		
Circumstances	Current Term	Proposed Term
Nonconsensual	Flat 3,4,5,6,7,8,9, or 10	5,6,7,8, or 9 to 25
Impaired Consent	Flat 3,4,5,6,7,8,9, or 10 (5 year minimum if use drug)	5,6,7,8, or 9 to 25
Repeat as RVO	Flat 10,11,12,13,14,15, 16,17,18,19, or 20	Flat 10,11,12,13,14,15, 16,17,18,19, or 20
+ SVP Spec	2 to life	10 to life
Attempts	Flat 2,3,4,5,6,7, or 8	2,3,4, or 5 flat or 6 to 15

KEY: LWOP = life without parole; SPH = serious physical harm; RVO = repeat violent offender

The Details

The Return of Indeterminate Sentences. A key element of the Sentencing Commission’s proposals in the early ‘90s (enacted as S.B. 2 in 1996) was truth-in-sentencing. This was manifested in “flat” or determinate sentences. The change came about because Ohioans had lost confidence in the indeterminate sentences that then prevailed for serious offenses, largely because the system was fraught with fictions.

Before S.B. 2, if a court wanted to assure that a rapist served, say, four years in prison, the judge would have sentenced the offender to “6 to 25” years. The 25 was hyperbole, given parole release practices at the time. Even the “minimum” of six years wasn’t necessarily served. Each inmate was eligible for a decrease in the minimum for good behavior. This “good time” reduction was supposed to be earned, but it was given so liberally that it appeared to be earned by breathing. These credits lopped about a third off the minimum term.

S.B. 2 shifted the power to determine the actual time an offender serves from the Parole Board—an unelected body meeting in private—to the

duly elected judge who imposes sentences in open court. Under S.B. 2, if a judge wanted a rapist to serve eight years in prison, the judge imposed eight years. That was it. The Parole Board no longer had authority over the sentence and good time and other administrative adjustments were repealed. The defendant, the victim, and the public all knew that the offender was going to prison for eight years.

While this system continues to work for the vast majority of felonies, there were concerns that the sentence ranges authorized for sexual assaults, particularly rape, were inadequate. S.B. 2 set sentence ranges based on the average terms actually served at the time it was developed. But public attitudes regarding sexual offenders were hardening.

The General Assembly responded with various measures, including “sexual predator” legislation that authorized potentially long, indeterminate sentences for certain high level sex offenders. Rapists who are deemed likely to commit future sexual assaults could get a term of, say, 2 years to life. Those who preyed on victims under age 13 were subject to terms of 10 years to life and even life without parole.

Indeterminate sentences came to make sense for serious sexual offenders for several reasons. The two most compelling probably were: one, that these crimes are viewed as the worst offenses short of aggravated murder; and two, sex offenders do not “age out” of their crime-committing years as readily as burglars, robbers, and most other serious criminals. Thus, there is a need for the longer term monitoring—and intervention therapies—available with indeterminate sentencing. Indeterminate sentences also lessen the need for a separate civil commitment structure.

Given the return to indefinite sentences for many rapes in the sexual predator legislation and the proposed expansion of such sentences under S.B. 260, the Commission focused on indeterminate sentences in the rape proposals that you are now reading.

Penalties for Child Rape. Currently, most rapes involving victims under age 13 involve coercion and result in physical harm. Many involve offenders with prior convictions. The only rapes with victims under age 13 that do not result in sentences of at least 10 years to life today are those in which there was no force, serious physical harm, or prior offense by the assailant. In that limited situation—and provided the victim was not under age 10—today’s rape law authorizes a flat sentence from the first degree felony range of 3, 4, 5, 6, 7, 8, 9, or 10 years. Because of the seriousness of even this baseline offense, the Commission recommends making the current maximum sentence into the minimum. The offender should face a mandatory prison term of 10 years to life.

The proposal builds from there, with minimum terms increasing as certain additional factors are proved. Currently, engaging in sexual conduct with a person under age 10 and forcible rape of a person under 13 each carries a prison term of at least 10 years to life. The Commission proposes increasing the minimum term to 15 years.

Presently, if the victim suffers serious physical harm or the offender has a prior conviction or is found likely to commit future sexual assaults, the offender faces at least 10 years to life or, in certain situations, life without parole. The Commission proposes increasing the range to 20 years to life.

If the rape is forced and the perpetrator is found likely to commit future violent sex crimes, the current penalty is 10 to life (or life without parole if the victim is under age 10). The Commission suggests placing the term at 25 years to life.

The penalty for raping a child under age 13, with a prior conviction or causing serious physical harm, or with a sexually violent predator specification, should remain life without parole.

Penalties for Other Rapes. The most common rape offenses do not involve children under age 13. Many more people are convicted of rape for nonconsensual sexual conduct against older victims. While these are—and should remain—the most serious crimes short of homicide in the Revised Code, they carry punishments less dramatic than those available when the victim is young. This is so because of a strong desire to shelter our most naïve and vulnerable victims and because of physical differences between prepubescent children and more mature victims.

Here is the plan. Currently, nonconsensual rape carries a flat term of 3, 4, 5, 6, 7, 8, 9, or 10 years. Rape when the victim’s ability to consent is impaired by a mental limitation or advanced age carries the same penalty. The minimum increases to at least five years when the offender used a drug to weaken the victim’s resistance or to obtain consent.

The Commission proposes increasing the penalty for nonconsensual rape and for rape where the victim was impaired by a drug, advanced age, or mental limitation (aspects not addressed by S.B. 260) to a minimum of 5, 6, 7, 8, or 9 years and a maximum of 25 years. Repeat violent offender penalties would remain for those with a prior offense, increasing the term to a fixed period between 10 and 20 years. If the offender is convicted of a sexually violent predator spec—indicating likely future sexual assaults—the penalty would become 10 years to life.

Penalties for Attempted Rape. At present, the penalty for attempted rape falls in the second degree felony range. Thus, the attempt carries a flat prison term of 2, 3, 4, 5, 6, 7, or 8 years regardless of the age of the victim. The Commission proposes placing most attempted rapes into longer, indeterminate ranges.

Specifically, attempted rape of a person under age 13 would carry a prison term of from 5 to 25 years. However, if the offense involves a victim under age 10 or force, the penalty would be 10 years to life. Similarly, if the offense causes serious physical harm, or if the offender had a prior child rape conviction, the term would be 10 years to life. In short, most attempted rapes involving young victims would fall in the 10 to life category.

The Commission proposes a novel approach to attempted rapes involving other victims. The judge would have the choice of imposing a flat 2, 3, 4, or 5 years or, for more menacing cases, an indeterminate prison term of 6 to 15 years. This will give the courts greater flexibility, while increasing the maximum term for attempted rape when warranted.

Judicial Review of Indeterminate Sentences. Since all rapists and most attempted rapists will receive indeterminate sentences under this proposal, all will be subject to review by the Parole Board after their minimum terms are served. In addition, the Commission proposes another safeguard. The sentencing court also should be given review authority that would run parallel to the Parole Board's.

Court review would be similar to the current judicial release provisions (§2929.20). The inmate could petition the court for release upon a review of the offender's conduct in prison and other factors. The court could deny the petition without a hearing, but, if it wishes to consider releasing the offender, the court would have to hold a hearing. The inmate, inmate's counsel, prosecuting attorney, victim, and the public would be able to attend the open hearing. Unlike the present judicial release statute, the court could only release the inmate *after* the minimum term is served. That is, the mandatory minimum term could not be shortened by the court.

This approach would keep the judicial control aspects of "truth in sentencing" in place for rapists. It would give judges a more tangible tool to encourage offenders to participate in treatment and rehabilitative programming. And it would have the advantage of authorizing review by the entity most familiar with the impact of the original crime on the community—the sentencing court.

Another potential advantage of judicial review is that a released offender could be placed under the supervision of local probation officers who report both misconduct and good behavior directly to the judge. The judge could deal with any violations by returning the offender to prison for a period up to the maximum term originally set at sentencing.

Obviously, the hearings could place additional burdens on courts and local probation offices. But two aspects of this plan will help to minimize that impact. First, rape cases constitute a small percentage of all crimes committed in Ohio, so the numbers would be relatively small. Second, courts could avoid any notable impact on local budgets by choosing not to use judicial releases if their budgets are too tight. Also, the Commission proposes that an inmate must wait at least two years after being denied release by the court before reapplying.

Many current statutes already foster communication between the Adult Parole Authority and the courts. The exchange of information would continue under this proposal. However, one change is in order to enhance the information exchange. Court clerks' duties should be amended to include notifying the Department of Rehabilitation and Correction if a judicial review petition were filed. DRC could then make sure that the Parole Board is aware of the court's review.

Draft Language

The Sentencing Commission's staff has sketched amendments to relevant rape, sexual predator, and judicial release statutes that could be helpful if any of these ideas are embraced. Feel free to contact us for help in drafting.