

OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

**Meeting
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE**

March 20, 2014

MEMBERS PRESENT

Chrystal Pounds-Alexander, Victim Representative
Paula Brown, OSBA Representative
Ron Burkitt, Police Officer
Janet Burnside, Common Pleas Judge
Laina Fetherolf, Prosecuting Attorney
David Gormley, Vice-Chair, Municipal Judge
Kathleen Hamm, Public Defender
Thomas Marcelain, Common Pleas Judge
Elizabeth Miller, representing State Public Defender Tim Young
Gary Mohr, Director, Rehabilitation and Correction
Aaron Montz, Mayor, City of Tiffin
Dorothy Pelanda, State Representative
Roland Winburn, State Representative

ADVISORY COMMITTEE

Eugene Gallo, Eastern Ohio Correctional Center
David Landefeld, Ohio Justice Alliance for Community Correction
Joanna Saul, Director, Correctional Institution Inspection Committee
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

Sara Andrews, Rehabilitation and Correction
JoEllen Cline, Counsel, Supreme Court of Ohio
Garrett Crane, Legislative Service Commission
Chelsie Davis, intern, Rehabilitation and Correction
Jim Dennis, Director, CCNO Regional Jail
Monda DeWeese, Community Alternative Program
Ryan Dolan, Counsel, Rehabilitation and Correction
Lusanne Green, Ohio Community Corrections Association
Michael Heldman, Sheriff, Hancock County
Ryan Kidwell, Hancock County Jail Administrator
Scott Lundregan, Speaker Batchelder's Office
Marta Mudri, Ohio Judicial Conference
Scott Neeley, Rehabilitation and Correction
Frederick Pepple, Auglaize County Common Pleas Court Judge
Sam Porter, attorney, Governor Kasich's Office
State Representative Robert Sprague

Steve VanDine, Research Director, Rehabilitation and Correction
Paul Teasley, Hanna News Network
Maggie Wolniewicz, Legislative Service Commission

The March 20, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair Municipal Judge David Gormley at 10:00 a.m.

DIRECTOR'S REPORT

After reporting that there has not been movement on the proposed Criminal Justice Commission, Executive Director David Diroll mentioned that he had invited DRC Deputy Director Sara Andrews to offer an update on the new jail standards.

MINIMUM JAIL STANDARDS

Noting that DRC is responsible for conducting jail inspections, Dept. Dir. Sara Andrews explained that a research project was started in 2007 in conjunction with jail administrators for the purpose of gaining more relevant information on jails and their operations. That data was used to revise the Minimum Standards for Jails in Ohio, which had not been modified since 2003. During that time, no official inspections were conducted, although the jails were visited by staff.

The budget reductions of 2011 forced cuts within the Bureau of Adult Detention, resulting in jails being self-inspected instead of conducted by official inspectors. Results of the research project were released in 2012, further encouraging the need for revisions of the Standards and recreation of the Jail Advisory Board. The Board now includes representation from those involved in the operation of jails, sheriffs, jail administrators, chiefs of police, the Municipal League, the Attorney General's Office, county commissioners, and judges.

Once the revised Standards were agreed upon by the Board and DRC, it was decided that the Standards would be adopted as administrative rules. Before officially adopting the Standards, they were presented in two public hearings for further scrutiny and feedback.

The general Standards were accepted without controversy, said Dep. Dir. Andrews, adding that there were three "touch points": meals, showers, and visitation. As a result of the public hearings, a few changes were made. The draft standards proposed that full-service jails serve two meals per day instead of three. After the hearings, due to dietary needs for some offenders, such as diabetics, that was changed back to the original three meals per day, except on holidays and weekends. Another proposal involved changing the original standards of one shower per day to a minimum of one shower every other day. More are allowed if the jail can accommodate the request. The visitation issue involves the use of videos for those family members that are not able to do physical visits. These had been constricted by contract to 20 minutes once a week. Families saw this as a reduction in access. So the revised text clarified that the video provision was to be the minimum, but the amount of time and frequency of a physical visitation would be determined by what each jail could accommodate.

The ACLU requested that jails be requested to enroll offenders in Medicaid. Although they already attempt to do so, DRC and the Advisory Board feel they should not have to legislate it as a jail inspection standard by administrative rule.

Dept. Dir. Andrews feels the public hearings were very informative and beneficial. The effort should result in facilities that are more humane and safe for everyone while still maintaining operational efficiency.

According to Hancock County Sheriff Michael Heldman, the intent of the study was to lessen the number of standards but not the quality of standards. They cleaned them up and cleared out duplications. Rather than the original list of 240 standards, there are now 180.

Hancock County Jail Administrator Ryan Kidwell noted that there are always a few stumbling blocks when changes are made. The process used for developing these standards, however, helped to bring professionals to the table, particularly for the standards related to medical and mental health issues. It also provided an opportunity to learn from the other stakeholders. He now is anxious to get other jail administrators excited about the new jail standards.

Director of the Corrections Center of Northwest Ohio regional jail, Jim Dennis, explained that the process of revising the jail standards was a two year quest. The process involved doing a gap analysis, he explained, to evaluate Ohio's minimum jail standards and compare them to the 384 American Correctional Association standards.

Through his long experience with Ohio's criminal justice system, he has watched the evolution of the ACA standards and audit process. The study of Ohio's Jail Standards was to determine the Standards' ongoing relevancy, whether there was duplication, and whether there was case law that would require them to be modified, changed, or updated.

He noted that the ACA core standards for jails didn't come out until 2010. It was ACA's attempt to get jails more involved in the accreditation process. In the state of Ohio only five jails were accredited. Conversely, all DRC and DYS facilities are accredited.

Dir. Dennis explained that the ACA standards include mandatory and nonmandatory standards. The mandatory standards include life safety standards (such as health inspection, marshal, fire drills, fire extinguishers, etc.). Most are medical standards involving health screenings, how medical needs are identified and met, chronic illnesses, etc. For DRC's purposes the 54 mandatory standards are referred to as "essential" standards and the 126 nonmandatory standards are referred to as "important" standards. The essential standards will always be part of the annual inspection process while the important ones are to be inspected on a rotating basis, he added.

Beginning in June, 2014, said Dept. Dir. Andrews, DRC will be working with the jails to help them get used to the new standards.

Dir. Dennis added that this will include using a team approach to train the sheriffs and jail administrators on how to create policy and verify that they are complying with the standards.

Dir. Diroll remarked that he always saw the value of jail standards to help prevent potential law suits based on conditions of confinement. He referenced a recent letter to the *Columbus Dispatch*, written by former DRC Deputy Director Jill Goldhart, which noted that there used to be four jail inspectors. He asked if the Standards can be meaningful with limited inspections.

Dept. Dir. Andrews admitted that, due to budget reductions, there are now only two inspectors, but contended that efficiency in administrative paper work has been greatly improved. A lot of the follow-up is now handled by the central office staff, she added. The Jail Advisory Board is also helping with resource issues.

Sheriff Heldman responded that the standards apply to 91 full-service jails. These would include the county jails, large city jails, and four regional facilities, said Dir. Dennis. The state also has 12-day jails and approximately 280 temporary holding facilities (with only three or four cells) for offenders awaiting court dates. Since these facilities are smaller and used on a temporary basis, they are not held to the same standards.

OSBA Representative Paula Brown asked if offenders are signed up on Medicaid before they leave the system.

The first priority, DRC Director Gary Mohr responded, is to get the offenders in prison signed up for Medicaid. The goal is to make sure those with mental health issues are provided for through Medicaid. Ultimately they hope to have all of the offenders signed up.

Sheriff Heldman added that they are working with other county agencies to find a way to connect to Medicaid for continued care after release.

Noting that the system is not in place yet but is in the works, Dir. Dennis pointed out that it is a challenge to identify the needs of those who are only in jail for a few days.

Citing a tight timeline for Medicaid registration, Rep. Roland Winburn asked what happens if the person is not registered in time.

It is believed that 90% of the offenders in DRC are eligible, said Dir. Mohr. Within the first month DRC's medical staff attempts to ask each new offender the five basic questions which makes them eligible for that month, then again the next month. The goal is to make sure each offender remains eligible on an ongoing basis.

Representing the Ohio Justice Alliance for Community Corrections, David Landefeld asked what happens if a jail is not in compliance.

First noting that most jails are in compliance, Dept. Dir. Andrews responded that any jail that is not must develop an action plan on how they will correct things. Sensitivity is shown toward things that are beyond the jail's control.

OPIOID ABUSE

Dir. Diroll reported that a special committee was created by the Ohio House of Representatives to address drug addiction and healthcare

reform, with a focus on the opioid problem. The committee's Chair, Rep. Robert Sprague asked the Sentencing Commission for assistance on determining an appropriate combination of treatment and penalties for opioid abusers.

Rep. Dorothy Pelanda reported that the House, as a whole, identifies that, with regard to Medicaid reform, they had to look at the burgeoning rolls of Medicaid applications. The goal, legislatively, is to create guidelines as to how the state can give a hand up to these individuals rather than a hand out. A starting point has been to identify some of the major reasons why some people on Medicaid never leave it. The committee, she said, was set up to understand the opioid addiction from geographic, demographic, and other viewpoints.

Offering a brief overview of what the state is facing, Rep. Sprague reported that five people die every day in Ohio of a drug overdose. The majority of those die of heroin and prescription opiates. Opiates have a molecule that attaches to the receptors that release dopamine in the areas of the brain which kill pain and govern a person's survival instincts. These instincts govern one's reaction to sleep, food, exercise, pain, and other basic biological functions. As this drug releases dopamine, it creates new circuits in that part of the brain and begins to tell the person that this stuff is essential for survival and the person then becomes focused on getting access to this drug. As a result, prescription drugs have become a bridge to addiction.

40% of the people who are addicted to heroin started out on prescription pain killers for a legitimate injury. The heroin problem has become so pervasive that it is overrunning our court system and sheriff and police departments, noted Rep. Sprague.

He declared that we cannot just look at treatment for people after they have become addicted, but need to look at how to prevent addiction in the first place. Legislation has already been introduced that will alter the prescribing standards within the medical system. Another focus is to start educating the public.

He added that the chain of custody within the existing medical system needs to be closed down because too many people are already addicted to heroin and prescription opioids are diverting enormous amounts of pain medication outside of the medical system.

In regards to treatment, the statewide recovery rate for heroin addiction is only around 10%. But some institutions claim 50 to 60% recovery rates, he added. Those with the most successful results include five elements within their programs: detoxification, medication assisted treatment, intensive behavioral counseling coupled with a 12-step group program, and a strong peer sponsor to hold them accountable. Judges are using their authority to compel these people through the different stages of treatment.

Addicts, he declared, don't want treatment, they prefer the drug. The courts either send the offender directly to treatment or they send the offender to prison and punish him without offering treatment. The exclusive philosophy of one or the other, punish or treatment, does not work. It needs to be a combination of the two. Punishment is needed to compel the person to seek the help they need through treatment.

He contended that the criminal justice system serves as a funnel. There needs to be an element of punishment to compel the addict to seek treatment. This needs to happen soon in their addiction but must also include an element of treatment. He added that a lot of judicial latitude is needed so that as an offender succeeds in treatment, the judge can gradually relax the penalty part.

He has learned that drug cartels are very well organized and well run, with an extremely sophisticated distribution channel, which makes it difficult to get convictions. In comparison, heroin addicts are merely users. The heroin market is based on addiction and the economies of scale. It is now cheaper to buy a kilo of heroin than a kilo of most anything else.

Rep. Winburn reported that H.B. 251 recently passed, which deals with some of these drug cases. After learning how phones are used in the drug trade so that information is wiped out daily, and how rental cars are used, he suggested looking at whether penalties could be tied to those actions, as well as zeroing in on when an action moves from the local arena to the federal arena.

Since the problem, in many cases, seems to begin with doctors prescribing too much pain medication, Eugene Gallo, Director of the Eastern Ohio Correctional Center, asked how that is being addressed.

Rep. Sprague responded that they tried to enforce a process by which the patient would be referred to a pain medication specialist who would have a contract with the patient and explain the addictive nature of the medication, thus requiring periodic testing. The medical community rejected the proposal, declaring that they have to deal with it on a case by case basis, not as a health care epidemic.

He claims that doctors are only getting one side of the story from pharmaceutical representatives that proclaim the medications safe, effective, and cheap. Most doctors feel they only have 10 minutes to come up with an acceptable solution for the patient's pain. Since this is how the doctors are educated to prescribe, he declared that it is time to reeducate doctors. Opioids should only be prescribed for the most extreme levels of pain and for short periods. Other options should be offered for the rest.

According to Rep. Pelanda, a bill by Rep. Stephanie Kunze recently passed which said a doctor can no longer prescribe an opioid to an adolescent without the parent's consent.

Mr. Gallo acknowledged that they have difficulty getting doctors to stop prescribing narcotics to offenders with injuries, which exacerbates the problem.

Since chronic use of narcotics messes up the pain receptors and rewires the brain, those addicted to the narcotics fail to realize that typical medication is less likely to work, said Prosecuting Attorney Laina Fetherolf.

This is one of the hottest contraband items for local jails, said Dir. Dennis, noting that exchanges even occur right outside the courtroom

with family members. Attorneys threaten to sue the jails for not allowing offenders to have pain narcotics, even those serving time for narcotics. Jails end up detoxing someone every day.

Public Defender Kathy Hamm remarked that physicians are put in a difficult position when they have a true medical diagnosis of chronic pain. In terms of addressing addiction in the criminal justice system, she declared that one issue that is problematic in practice is the relapse issue. In the reality of treating these addictions, the odds are that there will be a relapse and that needs to be accounted for, even in treatment-in-lieu programs.

According to studies, the appropriate response to a relapse, said Rep. Sprague, is to ratchet up the intensity of the treatment. But it must be coupled with other consequences as well, to prevent sliding back into the desire to remain addicted.

Pros. Fetherolf contended that treatment-in-lieu of conviction is a powerful motivator for some offenders. She added that this is not a victimless offense because it affects the entire family.

Because there are not a lot of treatment options in jails. Mr. Dennis said they see many relapses there.

Dir. Mohr believes that the five steps mentioned by Rep. Sprague are right on point, adding that Ohio has some great drug courts with judges that focus on both the punishment and treatment aspects needed for successful rehabilitation. Many offenders have even praised drug courts for saving their lives.

This focus on the five steps is an illustration of the HOPE Model that was developed by Judge Alm in Hawaii, and declares that every single action of the addict needs to be addressed. It encourages an investment in the community to insure continuance of the list of sanctions that work, which ultimately results in lower rates of recidivism.

Rather than buckle to the pressure to build more prisons, he hopes to introduce the HOPE Model at an event in June with the goal of bringing all 88 counties to talk about effective methods for drug treatment and start a process to replicate the best practices.

Representing the Chief Probation Officers' Association, Gary Yates remarked that the criminal justice system tends to turn some people into criminals that don't really have any criminal thinking in their makeup. He noted that, in the past, courts did not have housewives entering the system with addictions, and most of the incoming heroin addictions began with prescription drugs. With the influx, there are not enough treatment programs available. He believes that more residential facilities are needed where a chance for detoxification can be offered, followed by continued evidence-based treatment.

Auglaize County Common Pleas Court Judge Fred Pepple argued for a multi-disciplinary approach. He contended that the opiate abuser cannot support a \$50 to \$100 a day habit without developing criminal thinking. The addiction drives them into the criminal thinking. He understands that there are people with chronic pain who need assistance. He

believes that the medical profession should spend more time looking into alternative pain practices rather than depending on narcotics.

He noted that many offenders prefer to do the jail or prison time and get it over with rather than to go through lengthy, complete treatment. Many addicts who sell, he said, do so to pay for their own addiction, compounding their criminality.

Although there are many pilot projects attempting to address the need for treatment, he claimed they are not all told to collect the same data for comparison. He stressed the need to gather the right data to find out which practice works best. Honest answers are needed, including what fails to work so that it can be modified into a more successful program.

He noted that trafficking heroin is an F-5, with the same penalty as heroin use, which seems absurd. In fact, he noted, for a lot of offenders, the conviction of a felony means nothing to them. Immediate and adequate punishment, he contended, is needed to motivate them.

Believing in Project HOPE, he argued that relapse is not part of the cure; it is part of the disease.

Rep. Sprague thanked the Commission for the opportunity to lay out the issues and problems related to the problem of opioid addiction as the legislators attempt to find solutions.

According to DRC Research Director Steve VanDine, this is the third go around regarding drug epidemics. He noted that people move based on the information they have, which is mostly drawn from headlines. He is encouraged by the fact that it is now easier to get more quantified information, such as accurate numbers on who enters the prison system, for what offenses and who returns. He said that just ratcheting up penalties was not effective in the past. He also noted that the number of prison admissions for abuse of opioids, prescription drugs, and heroin have now overtaken those for cocaine.

From 2012 to 2013 the number of overall commitments to prison from the six largest counties dropped by 434, he added. The number of commitments from the other 82 counties increased by almost 1,200 during that time. The smaller counties claim that opioid and heroin convictions are driving that increase.

When asked how the minimum jail standards address the schedule level of drugs for medication, Dir. Dennis said that the issue was not addressed in the standards. It is up to each facility to talk to the doctors and find out a person's health issues in order to determine what is really needed. The key concern is that they do not want to contribute to somebody's addiction. They would appreciate some direction on how to address that issue.

Mr. VanDine remarked that he has circulated an idea to DRC that would require some legislative change that if an offender is in a substance abuse program, if they are in a placement that is mandated, or if it is a part of relapse and they go to jail, then that time should not count against their basic sentence. Because it does create a strain on local facilities, it might be worth some financial reimbursement for those

types of penalty placements. For example, he said, Project HOPE keeps an offender out of prison by using five-day placements in a jail.

Representing the Ohio Community Correction Association, Lusanne Green remarked that the criminal justice system seems to often go to the last resort first out of desperation. Rather than build more prisons, she urges more investment in the things that work, which data shows to be the drug courts and residential detoxification programs.

Dir. Diroll asked Commission members how they would like this discussion to be structured going forward.

More information on Project HOPE was requested by Atty. Paula Brown, while Judge Marcelain requested more information on the legislation that's been introduced.

When Dir. Diroll noted that some of the bills mentioned deal with aspects of the opioid issue other than penalties, Pros. Fetherolf suggested taking a broader approach by looking at more than just the criminal sanctions. It might be helpful to get more information on how doctors approach pain management and how opioids are monitored.

Atty. Brown suggested checking the internet use of pharmacy shopping and access of pharmaceuticals from out of state.

Atty. Hamm suggested checking the many ways being attempted within the criminal justice system throughout the state to address the issue. Once we have a better view of what is already in place it will be easier to discern which options interfere with successful rehabilitation and which would complement and reduce recidivism. This might also give judges the tools to encourage a quicker sanction in response to a violation.

PERSON ON RELEASE COMMITTING A FELONY

After lunch, Dir. Diroll noted that questions have been raised, by Champaign County Common Pleas Judge Nick Selvaggio, regarding the time frame when an offender commits a new felony while under post-release control supervision.

§2929.141(A) says "Upon the conviction of or plea of guilty to a felony by a person on post release control at the time of the commission of the felony, the court may" Judge Selvaggio declares that this sets up three time frames by which the statute can be manipulated from a defense perspective to buy time that will then cut away from the amount of sanction time over the offender's head. Or, from the prosecutor's perspective, there might be a rush to get things done to maximize the time that is available and perhaps skip doing a PSI.

It might be worthwhile to refine this timeframe, said Dir. Diroll.

According to Judge Marcelain, if an offender commits a felony while on post release control but PRC ends before the offender receives his sentence for the new felony, then the judge cannot impose a post release control on him for the violation of post release control.

Mr. VanDine remarked that there are 300 to 400 people currently doing PRC time on that provision. The general policy is that if the judge writes it in the instructions then it is obeyed.

It would probably help to identify in §2929.141 which court it is talking about, said Atty. Hamm, whether the original sentencing court or the new sentencing court.

There is also confusion over where to tack on the post-release control, said Judge Marcelain. Some defendants argue that it should be deemed invalid because the sentencing judge in another county didn't apply it correctly. Sometimes the sentence entry gives that argument some credence but he can't change a sentence imposed by another judge.

APPELLATE REVIEW OF SENTENCING

The sentencing issues raised by appellate court were next on the agenda, but Dir. Diroll explained that the representatives were unable to attend. He offered to defer discussion until the next meeting. In the meantime, he has attempted to take a stab at clarifying the scope of sentencing appeals under §2953.08, which is the only statute that allows the appeal of a criminal sentence, *per se*. He tried to get through some of the issues that have been raised including possible definitions for "clear and convincing review" and "contrary to law". He invited Commission members to offer their thoughts on both his and Judge Gallagher's documents.

Given the standards listed in §2953.08 and the purposes and principles of sentencing in §2929.11, Judge Marcelain asked how a person could possibly show if a sentence is disproportionate with the seriousness of the offender's conduct and the danger of future crime that the offender poses to the public, or is inconsistent with sentences of similar conduct by similar offenders, or is an unnecessary burden on the state and other government resources.

Pros. Fetherolf claimed the "unnecessary burden on resources" standard gets used as a catch-all by just about every offender.

The "unnecessary burden on resources" standard can get confusing, Dir. Diroll responded, noting that a couple of weeks in jail can be more expensive than a month in prison.

Representing the State Public Defender's Office, Elizabeth Miller remarked that her office is very interested in reviewing this statute. She agrees the language is limiting and needs clarification.

Research will be needed, said Atty. Hamm, on the defendant's rights at the time of sentencing and what he needs to hear.

Part of H.B. 86 reflects a misreading of *Foster*, said Dir. Diroll, which struck down the minimum, maximum, and consecutive sentence guidance, but did not strike the decision on whether or not an offender goes to prison. The General Assembly took away the judges' duty to give reasons across the board, so there is now less information to form a specific appeal.

If you look at recent Supreme Court jurisprudence, said Atty. Miller, there is a case where PTSD was a mitigating factor for a veteran. The Judge considered it but totally missed the diagnosis. She believes just stating that they considered a factor may not be enough.

Atty. Hamm asked why the judge can't just say that he considered the findings and give reasons.

The cases of *Foster*, *Apprendi*, *Blakely*, etc. made the biggest difference regarding the use of findings, said Dir. Diroll. The findings set out in S.B. 2 were based on the experience of the court as opposed to findings based on the experience of a juror, which was the major issue of those cases. He feels that the Ohio Supreme Court could have made some distinctions between the kinds of findings that really get at the elements and the facts and the kind of findings that only judges are asked to make. He feels some of those findings could still be required if the distinction was legislated.

Atty. Miller asked how the Commission came up with the original language that required findings and whether it was based on what other states did.

It wasn't very common among the states, Dir. Diroll explained, so the Commission developed its own concept of guidance and review on appeal.

Judge Marcelain noted that the state of Virginia allows juries to impose the sentence from within a range.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for May 15, June 19, July 17, and August 21, 2014.

The meeting adjourned at 1:20 p.m.