Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
April 19, 2007

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reginald Routson, Vice-Chair
Major John Born, representing State Highway Patrol Superintendent Col. Paul McClellan
Common Pleas Court Judge Jhan Corzine
Jim Guy, Attorney, representing Rehabilitation and Correction Director Terry Collins
Bob Lane, representing State Public Defender David Bodiker

Common Pleas Court Judge Andrew Nastoff
Dave Schroot, representing Youth Services Director Tom Stickrath
Public Defender Yeura Venters
Prosecuting Attorney Dave Warren
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT
Lynn Grimshaw, OJACC Representative
Jim Lawrence, OCCA Representative
Steve MacIntosh, Common Pleas Court Judge
John Madigan, Senior Attorney, City of Toledo
Cynthia Mausser, Chair, Ohio Parole Board
Gary Yates, Ohio Chief Probation Officer Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Sarah Andrews, Department of Rehabilitation and Correction
Jason Bottomley, legislative aide to Senator Tim Grendell
Abby Daubenmire, Senate Republican Caucus
Nathan Minerd, Department of Youth Services
Phil Nunes, Ohio Justice Alliance for Community Corrections
Diana Ramos-Reardon, Office of Criminal Justice Services
Erin Rosen, Ohio Attorney General's Office
Steve VanDine, Department of Rehabilitation and Correction

Common Pleas Court Judge Reginald Routson, Vice-Chair, called the April 19, 2007, meeting of the Ohio Criminal Sentencing Commission to order at 9:50 a.m.

The term has expired for Defense Attorney and OSBA Representative Max Kravitz as a member of the Commission, said Director David Diroll. Atty. Kravitz has requested not to be reappointed.

DIRECTOR'S REPORT

Director David Diroll noted that there is interest among prosecutors in returning to indeterminate sentencing for violent felonies in addition to sexual offenders.

Another topic among legislators and the Commission, he reported, is a renewed desire to simplify the Criminal Code. The first topic chosen for simplification is judicial release because many practitioners have called for making the statute more workable and readable.

Before discussing these issues, Dir. Diroll quickly reviewed the contents of the meeting packets, which included a memo by staff attorney Scott Anderson offering a starting point for streamlining pandering obscenity offenses, the latest legislative update, and minutes from the Commission's March meeting.

DETERMINATE v INDETERMINATE SENTENCING

Judge Routson inquired about the impetus behind the movement toward indeterminate sentencing.

Prosecuting Attorney Don White responded that prosecutors like the option of keeping additional time hanging over the head of the offender to encourage good behavior.

Prosecuting Attorney Dave Warren remarked that some offenders refuse to cooperate or comply with programs without something hanging over their heads.

Since S.B. 2 eliminated "good time", which offered early release for good behavior, Common Pleas Court Judge Andrew Nastoff asked if its elimination has caused an increase in misconduct.

According to DRC Research Director Steve VanDine, there is little data available prior to S.B. 2. He noted, however, that two research studies attempted to compare the behavior of inmates during incarceration. The results reveal that an inmate exhibits good behavior during the first year of incarceration, but the behavior worsens during the last year prior to release for those with flat sentences because they know they are getting out soon and DRC can do little to prevent it. DRC would like more tools to address this.

Public Defender Yeura Venters contended that post release control is available for minor conduct violations and new charges can be filed for felony level conduct.

Representing the Ohio Justice Alliance for Community Corrections, Lynn Grimshaw remarked that when he was a prosecutor for Scioto County, there were numerous cases of inmates urinating or spreading feces on others. Little could be done to deter the behavior because it was not regarded as a felony level crime. He pointed out that the current

option of post release control is available for violation of supervision after release from prison, not behavior before release.

Common Pleas Court Judge Jhan Corzine inquired as to the toughest disciplinary tool available to DRC to address inmate misconduct.

Parole Board Chair Cynthia Mausser and Mr. VanDine responded that DRC is limited to the use of lock up and segregation or reclassifying the inmate to another institution. Mr. VanDine noted that most of the behavior is short of committing another crime.

Judge Corzine said there should be some way to address DRC's concerns for handling bad behavior short of reviving indeterminate sentencing.

Atty. Mausser conceded that indeterminate sentencing might not deter the commission of rule infractions. With indeterminate sentencing, the offender has to earn release, so she feels it would encourage the inmates to make good use of their time.

Judge Nastoff asked if there was evidence that those with indeterminate sentences behave better or have lower rates of recidivism than those with determinate sentences.

Legislators determined a long time ago, said Judge Corzine, that prison incarceration is intended for punishment. He inquired as to whether inmates participate in programs because they really want to change and improve or go through the motions to look good to the Parole Board.

There is strong evidence, including recidivism rates, Mr. VanDine responded, indicating that inmates benefit from education and treatment programs regardless of whether they are coerced to participate. Data also shows that offenders released after Parole Board hearings under indeterminate sentences tend to have a recidivism rate 2 to 4 points lower than those released to supervision after determinate sentences.

The discussion seems to focus on negative sanctions to influence the behavior of inmates, said Atty. Venters, with little discussion of positive options or reinforcements such as good time. He would like to see more effort toward developing positive incentives.

Prior to S.B. 2, said Dir. Diroll, both determinate and indeterminate sentences were used. About two-thirds of those entering prison had flat sentences. The difference between pre-S.B.2 offenders with flat sentences and post-S.B. 2 offenders with flat sentences is that the post-S.B.2 offenders with flat sentences also have the possibility of post release control (supervision after release from prison). He asked if the specter of PRC is a factor in the offender's conduct or if it tends to be irrelevant.

It was his understanding, said Judge Routson, that some legislators recommended indeterminate sentences because they felt a prison term of 3 to 10 years was not sufficient for F-1 offenders.

Changes have been made in a piecemeal manner by legislators, said Pros. White, based on individual incidents. The OPAA, on the other hand, is focusing on what can be done about the most serious offenders overall.

Representing the State Public Defender's Office, Bob Lane noted that the impetus behind the increase in sentences for sex offenders was based on specific incidents. He pointed out that the worst offenders are rarely only sentenced on one count. There are usually multiple counts resulting in a stack of consecutive sentences.

The sentence should be determined by the sentencing judge, Judge Nastoff insisted, and not a sentence that could later be shortened by someone else, such as the Parole Board. A determinate sentence gives the victim a certainty that the offender will be serving the sentence imposed in court. For a 50 year sentence, the victim can feel assured that he will not have to appear at a hearing to persuade the Board to keep the offender behind bars for the full 50 years.

The discussion boils down to whether there are already enough tools available to maintain order in the prison, said Dir. Diroll. He noted that 15 to 20 years ago, most offenders were released at their first Parole Board hearings, but that has obviously changed. He understands that some people feel flat-time sentences are too cheap for some offenses. Are we really concerned about indeterminate versus determinate issues or more concerned that sentences for some offenses need to increase?

Pros. Warren remarked that the Ohio Prosecuting Attorneys' Association has been examining the proposals in DRC's "omnibus" bill. The OPAA Legislative Committee, he noted, feels that assault of a Crime Watch person should be increased to the felony level.

In the 1980's or early 1990's, an inmate had a Parole Board hearing at the two-thirds point into his sentence and was usually released, said Atty. Lane. He understands that "good time" was abolished because every inmate got it regardless of behavior. He feels, however, that it is time for a new mechanism, based on good behavior, by which an inmate can earn credit. He agreed with Atty. Venters that positive reinforcement is better than negative reinforcement. He asserted that, if it is truly *earned* good time, then there should be no objection.

Judge Corzine insisted that, if he wants a person rehabilitated, he does not send them to prison. If he sends someone to prison for 8 years, it is because he believes that offender deserves to serve time in prison for that specific length of time.

In response to the argument for good time, Pros. Warren contended that judicial release is the current tool available to give the offender a break if he shows improvement or good behavior.

According to Phil Nunes, the value of the rehabilitation issue has been lost in the current argument. He stressed that 90% of inmates will be released back into the community and everyone should want them to be better citizens when they return. It is an issue of public safety.

Usually if a judge sends an offender to prison, said Judge Nastoff, it is because the court has already tried rehabilitative efforts with the offender and they have failed.

Mr. Nunes claimed that post release control does not work because the Adult Parole Authority cannot supervise all of the people involved. An

additional problem is that the APA can only send an offender back for 90 days if they violate post release control.

Representing Youth Services, Dave Schroot expressed the opinion that indeterminate means unknown. When he leaves a courtroom, he wants to know that the sentence imposed is going to be served in its entirety.

Dir. Diroll asked, rhetorically, if that should also be the case in juvenile court.

Judicial release does not really offer much hope, said Mr. VanDine, because most inmates know they will not get it. He noted that those on transitional control (furlough) have a lower recidivism rate. In addition, age tends to be the biggest factor in behavior. Younger offenders exhibit the worst behavior.

DRC Counsel Jim Guy remarked that judges have a variety of tools, such as community control, CBCFs, etc. DRC is only asking for a variety of tools as well that can be used to influence the behavior of inmates.

Representing the Chief Probations Officers' Association, Gary Yates declared that the hammer of an indeterminate sentence works well as opposed to no hammer under determinate sentences. This is especially true regarding those with short determinate sentences because they know they are there for a short time and they don't care what happens.

There is frequently a perception that sentences are light for high end crimes, said Mr. VanDine. He pointed out, however, that the top end crimes under S.B. 2 serve longer actual sentences than the indeterminate sentences they replaced. He declared that those crimes cannot be moved back to indeterminate sentences without either incurring extreme prison crowding or reinstituting a cap.

Atty. Venters claimed that the current impetus to return to indeterminate sentences is based on whimsy, not empirical evidence. He sees no justification. He feels the tools are already available to accomplish what is wanted.

Erin Rosen, representing the Attorney General's Office, remarked that there has now been enough time to evaluate the results of the *Foster* case and how it has affected sentence lengths.

Since *Foster*, Mr. VanDine said that sentences have increased by an average of one month for F-4 and F-5 offenses, and six to eight months for F-1 offenses. The average increase for other offenses is somewhere between those numbers.

Common Pleas Court Judge Steve McIntosh asked where the legislature stands on the determinate versus indeterminate issue.

According to Dir. Diroll, they have taken no stand on the issue.

Pros. Warren noted, however, that the legislature is looking at doing a rewrite of the Criminal Code.

Judge Nastoff remarked that he heard a unique suggestion, involving dual sentencing mechanisms. Choosing from within a sentencing range,

the judge would choose a flat sentence to be served. The defendant would be allowed to apply for judicial release after a certain portion of the sentence has been served. However, if the defendant demonstrates bad conduct while incarcerated, then DRC would be allowed to request that the court impose an increase to the offender's sentence, up to the maximum allowed within the original sentencing range. He claimed that the difference between this option and S.B. 2's option of "bad time" is that this additional time would be judicially imposed.

Judge Corzine reminded him that the *Foster* case implies that the sentence cannot be increased without again granting the defendant the right to a jury trial and requiring a standard of fact.

Mr. Nunes suggested setting it up as a blended sentence of supervision blended with incarceration.

Atty. Venters expressed serious reservations about allowing the court to impose a tougher penalty by virtue of something that happened in prison.

SEX OFFENDER REGISTRATION & NOTIFICATION (SORN) LAW

Dir. Diroll reported that the S.B. 260 SORN/Adam Walsh Act (AWA) Work Group met recently to implement the Adam Walsh Act requirements in Ohio. He noted that the General Assembly did not address retroactivity issues, which caused serious concerns for the Commission and others.

Atty. Rosen reported that S.B. 10 gives the Ohio Attorney General's Office the duty of reclassifying all current sex offenders by December 1, 2007, since S.B. 10 would take effect January 1, 2008. It does not address the offenders whose tenure is about to end and, under Ohio law, would no longer be required to register after this year.

She noted that, although the Adam Walsh Act appears to offer an exemption for portions that would violate state constitutions, it requires a ruling by that state's Supreme Court. It might first be necessary to pass the legislation retroactively and then let challenges work their way through the courts.

There is also concern, said Atty. Rosen, about the constitutionality of the portion that says the public must have access to the offender's DNA and fingerprints. That normally is not part of the public record.

S.B. 10 is still in the Senate Criminal Justice Committee and is expected to be voted out May 2, she added.

REVISED CODE SIMPLIFICATION

General Streamlining. Given renewed efforts to simplify the Ohio Revised Code, Dir. Diroll remarked that the length of the Revised Code could be significantly reduced by simply eliminating the redundant phrase "of the Revised Code" every time there is a reference to another section in the Revised Code. He suggested stating in statute that any references could be assumed to/from another section of the Ohio Revised Code unless indicated otherwise.

Judicial Release. Currently under Judicial Release law, an "eligible offender" is a person serving a prison term of 10 years or less. A person serving a mandatory term does not become eligible for judicial release until he has served the mandatory portion.

Given changes made to consecutive sentencing by S.B. 2 and as a result of the *Foster* case, the question arises of whether the 10 year cap is still appropriate or should be changed.

According to the Rules under Section B, it depends on the level of the felony and the amount of time being served. Dir. Diroll suggested indexing or leveling judicial release to the time imposed, not the level of the offense. If sentenced to less than 2 years, the offender could petition for judicial release after having served 30 days. If serving at least 2 years but less than 5 years, the offender could petition for judicial release after having served 180 days. If 5 years or more, but less than 10, the offender could petition for judicial release after serving 5 years.

This suggestion makes sense for those serving consecutive sentences and eliminates much of the confusion related to the various types of offenses, said Judge Corzine.

Judge Nastoff noted that it takes into consideration the amount of time hanging over the offender's head while on judicial release and is more relevant than the level of the offense.

Mr. VanDine pointed out that most of the offenders receiving judicial release are low level felony offenders, serving 2 years or less.

Since a sentence of 10 years or more is usually only given for a serious F-1 offense or multiple offenses, it is doubtful that many offenders serving 10 years would be granted judicial release, said Judge Nastoff.

Judge Corzine remarked that he would like to limit an offender's ability to file for judicial release after several rejections.

Atty. Lane agreed there should be some point where they judge could say, "I have no intention of hearing or granting judicial release."

Judge Routson asked why the offender is not allowed to petition for judicial release until halfway into the term after the mandatory portion has been served, instead of right after the mandatory ends.

According to Judge Nastoff, the judge already has an idea at the time of sentencing, whether he might later consider judicial release. It is important, he contended, to preserve the rest of the sentence so that it can be imposed if the offender violates judicial release, because that is all that is available.

Since the offender has already served the minimum term, said Judge Nastoff, it no longer demeans the seriousness of the offense by granting judicial release.

Atty. Lane acknowledged that while the initial offense does not change over time, some factors of the crime might change. It might be

discovered that the victim was harmed more or less seriously than originally thought.

Dir. Diroll agreed to offer a revised draft that reflects these concerns.

In reference to division (E), Atty. Guy asked if judges have been receiving the reports on offender's conduct in the institution.

Judge Nastoff finds the report very helpful but would like for it to include a comment on what happened if it reports that an incident had occurred while the offender was in prison.

When the report states that the offender has not completed treatment or a recommended course, Judge Routson would like to know whether the offender applied and whether a waiting list prevented participation.

DRC OMNIBUS BILL – HB 130

After lunch, Atty. Guy reported that DRC's Omnibus Bill, H.B. 130, is currently in the House Criminal Justice Committee.

Mr. VanDine reported that the earned credit portion was dropped from the bill.

PANDERING OBSCENITY

Staff Attorney Scott Anderson developed a memo outlining a starting point for the Commission's discussion on how to simplify the section of the Revised Code that addresses pandering obscenity. Dir. Diroll asked the Commission to look over the memo in preparation for discussion at the June meeting.

FUTURE COMMISSION MEETINGS

Because of numerous conflicts, the May 17 Commission was cancelled and the June 21 meeting has been moved up a week to June 14. Future meetings of the Commission are tentatively scheduled for June 14, July 19, September 20, October 18, and November 15.

The meeting adjourned at 1:15 p.m.