Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
May 21, 2009

MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Common Pleas Judge Jhan Corzine, Vice-Chair
Chrystal Alexander, Victim Representative
Paula Brown, Ohio State Bar Association Delegate
Municipal Judge David Gormley
Municipal Judge Fritz Hany
Prosecutor Jason Hilliard
Jason Pappas, Fraternal Order of Police
Senator Shirley Smith
Municipal Judge Kenneth Spanagel
Representative Joseph Uecker
Steve VanDine, representing Rehabilitation and Corrections Director Terry Collins
Sheriff Dave Westrick
Representative Tyrone Yates
Timothy Young, Ohio Public Defender

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Jim Slagle, Attorney General's Office

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

GUESTS PRESENT
Jim Brady, concerned citizen
JoEllen Cline, counsel, Supreme Court of Ohio
Bill Crawford, Supreme Court of Ohio
Brad DeCamp, Dept. of Alcohol and Drug Addiction Services
Monda DeWeese, SEPTA Correctional Facility
Greg Giesler, Correctional Institution Inspection Committee
Lusanne Green, Ohio Community Corrections Association
Bob Lane, State Public Defender's Office
Scott Neeley, Dept. of Rehabilitation and Correction
Phil Nunes, Ohio Community Corrections Association
Michael Rodgers, Legislative Aide to Rep. Zehringer
Matt Stiffler, Legislative Service Commission
Ed Stockhausen, Legislative Aide to Sen. Smith
Paul Teasley, Hannah News Network

Chief Justice Thomas Moyer called the May 21, 2009 meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m.

Chief Justice Moyer started the meeting by introducing the Commission's newest members, Senator Shirley Smith, Representative Joseph Uecker, and Representative Tyrone Yates.

DIRECTOR'S REPORT

Executive Director David Diroll announced that defense attorney Bill Gallagher has resigned as a member of the Commission. He complimented Atty. Gallagher for his thoughtful comments and focus on the importance of judicial discretion.

Dir. Diroll reviewed the contents of the meeting packet, which included: a copy of the intervention-in-lieu statute; a memo on the issue of mental states raised by *Colon* and a possible revised definition of recklessness; a report on "Technocorrections - Hardware and Psychotropic Drugs as Alternatives to Incarceration" by University of Cincinnati Law School externs Courtney Cunningham and Megan Tonner; a Judicial Update; a Legislative Update; and April meeting minutes.

LEGISLATIVE UPDATE: H.B. 1 AND S.B. 22

At the previous meeting, the Commission discussed aspects of H.B. 1—the pending budget bill—that could ease prison population pressures. While removed from the version of the bill passed by the Houses, many of the provisions remain in Sen. Bill Seitz's S.B. 22, said Dir. Diroll. These include changes regarding additional earned credits, nonsupport penalties, absconding from supervision differentiated from escape, and a higher felony theft threshold. In H.B. 1, the felony theft threshold would have moved from $500 to $750. An amendment to S.B. 22 has been drafted to increase that to $1,000. House members felt that sentencing and prison population issues should be dealt with in the Criminal Justice Committee. An increase in funding for community corrections remained in the bill as it left the House, Dir. Diroll added.

Rep. Yates reported that there is not much appetite in either the House or Senate for dealing with the prison population at this time. He claimed that Sen. Seitz is having a difficult time in the Senate and, absent a crisis in the prison system, that bill may not move.

Sen. Smith said the issues should be in one bill. If S.B. 22 isn't consolidated into H.B. 1, the changes might not happen at all.

INTERVENTION-IN-LIEU OF CONVICTION

The Commission has been looking at how drug laws might be adjusted to help ease some of the prison crowding, since drug offenses account for about 30% of prison intake, are generally nonviolent, and often don't have victims. One significant option, said Dir. Diroll, would be to expand the intervention-in-lieu of conviction option.

This option, said Dir. Diroll, has been available since the mid-1970s in one form or another. It allows a drug dependent offender to petition

the court for admission into a drug treatment program. Success in the program results in having the conviction dropped.

§2951.041(B)(1)-(9) lists who is eligible for invention-in-lieu. F-5 drug offenders are eligible and F-4 possession offenders are eligible on recommendation by the prosecutor. Repeat offenders and traffickers are ineligible.

Dir. Diroll reported that John Murphy, Director of the Ohio Prosecuting Attorneys Association, had testified that prosecutors were opposed to the earned credit aspects of H.B. 1, proposing instead that adjustments be made in drug sentencing. One suggestion was to expand the eligibility of intervention-in-lieu to include some repeat offenders.

Dir. Diroll asked whether the option should be expanded to allow F-4 possession offenders without a recommendation from the prosecutor.

State Public Defender Tim Young feels that the criminal justice system has failed to acknowledge evidence-based solutions. He declared that 30 years of evidence testify that treatment is the only successful solution for drug possession and addiction. The evidence also shows that the offender will fail at treatment two or three times before achieving successful rehabilitation. He stressed a continued need to track the reality of treatment success rates. He urged expansion of intervention-in-lieu to F-4 possessors without a prosecutor's referral and allowing drug offenders at least two chances at treatment. The benefits are plentiful, he said, since it would divert them out of the prison system, avoid a felony tag, keep them employable, and recognize that addiction is a process of recovery, not just a one-time shot.

According to Phil Nunes, representing the Ohio Community Corrections Association, community correctional treatment programs had many first time offenders 20 years ago, but that's rare today. Most are repeaters. He declared that, based on research by the Justice Institute, for every $1 spent on treatment, the taxpayer saves $18. He claimed that intervention-in-lieu has a much greater success rate than prison only.

Jim Slagle, representing the Ohio Attorney General's Office, asked whether all prior felonies should eliminate a person from intervention-in-lieu, just prior felony drug offenses, or only specific prior felony drug offenses.

Common Pleas Judge Jhan Corzine explained that while in a treatment program under this option, the person is under probation supervision, as with any other community control sanction. If he violates supervision, conditions of supervision can be toughened and additional sanctions imposed. At worst, the offender can be sent to prison.

Sheriff Dave Westrick asked about the impact this would have on the jails. He noted that many jails are already being forced to lay off officers due to budget constraints.

The possibility exists that they could get jail time, Judge Corzine admitted, that is unlikely to happen.

Since some first time drug offenders are currently sent to jail rather than prison, DRC Research Director Steve VanDine contended that intervention-in-lieu could actually end up saving some jail beds.

Atty. Young pointed that intervention-in-lieu cases process faster so they are immediately spending less time in jail.

Eugene Gallo, Director of the Eastern Ohio Correctional Center, stressed the need to beef up local resources since they are becoming extremely limited.

Sen. Smith said the goal cannot be limited to reducing the prison population, but must include reducing recidivism through treatment.

Representing the Chief Probation Officers' Association, Gary Yates remarked that if offenders with prior felonies are to be considered for eligibility then offenders who have previously been admitted to the treatment programs should also be considered, even if they failed the program the first time. He pointed out that it would be difficult to determine if the offender has already been through the intervention-in-lieu program, since the prior case would have been dismissed and the record likely sealed.

Sheriff Westrick agreed that an offender who has been through the intervention-in-lieu program may deserve a second chance.

Currently the offender has to request intervention-in-lieu. If the offender does not request this option, Chief Justice Moyer asked if there was sentiment for allowing the court do it on its own motion.

If the attorney decides not to recommend it, Said Judge Corzine, there is usually a good reason why.

Rep. Yates acknowledged that he would support allowing the court to request intervention-in-lieu on its own motion.

You want the person to want treatment, said Chief Justice Moyer, since it shows he is interested in rehabilitation. Plus, treatment has a better chance of success if the person enters willingly.

Appointed counsel are generally poorly compensated and not the most zealous in searching for available treatment beds for their clients, said Rep. Yates. Some find it easier to skip that option. If the defendant is not advised or doesn't know to ask about the option, the judge may be the person who knows that the defendant is eligible.

Atty. Young pointed out that the lawyer is not a treatment expert. He can only say if the offender is amenable to treatment. Some defense attorneys make great effort to track down available treatment beds for clients. Some counties run all their available beds through their probation departments. He contended that most ask their clients if they want to explore that option and let the probation department find an available bed in a treatment program.

According to Mr. Yates most defendants go through drug courts where they are available.

The systems that are centralized through an organized process are the ones that work the best, said Atty. Young, where the lawyer simply files a motion and makes sure the client is amenable to treatment.

Claiming that some drug courts are bursting at the seams, Mr. Nunes said he fears that intervention-in-lieu could overburden those courts.

Most F-4 and F-5 drug traffickers, said Judge Corzine, are drug addicts selling a small amount to another addict in order to buy their own next fix. Since intervention-in-lieu is at the discretion of the judge, he recommended expanding the option to the F-4 and F-5 trafficker where there is no presumption in favor of prison.

According to Municipal Judge Fritz Hany the biggest stumbling block is the one year abstinence requirement. He wondered what the treatment-in-lieu option offers that the prosecutor diversion program doesn't offer.

If a person was drug dependant, he could not get in to the prosecutor diversion program, said Judge Corzine. However, that was just recently amended. In addition, certain drug offenses themselves are specifically statutorily excluded from the prosecutor diversion program.

There is also a procedural difference, said Atty. Slagle, since the defendant offers a guilty plea with the intervention-in-lieu case.

Atty. Young testified that F-4 and F-5 clients are usually addicts who sell merely to support their habits. The demarcation occurs more at the F-3 level where the dealers and traffickers prey upon people for a profit rather than addiction.

The market in the U.S. is endless for the low level user, Rep. Yates declared. He stressed a need to revisit the larger trafficker. The public rarely hears about a large trafficker getting convicted.

Gary Yates declared that those offenders usually get significant prison time for multiple charges.

Judge Corzine remarked that the larger traffickers are generally handled at the federal level.

Mr. Nunes noted that there is an amendment pending to S.B. 22 regarding intervention-in-lieu, stipulating that any offender with a prior felony offense of violence would continue to be ineligible.

Dir. Diroll summarized the prevailing issues as: (1) Should someone with a prior felony be eligible for intervention-in-lieu? (2) Should prior intervention-in-lieu people be eligible for a second chance? (3) Should *any* trafficker be eligible? (4) Should the prosecutorial veto in (B)(4) remain regarding F-4 possession? (5) Should the court be able to put the offender into the program on its own motion?

Judge Gormley believes that many judges are unaware of the availability of intervention-in-lieu. He sees it as a valuable community sanction that should be used more and if judges were more familiar with it.

Unanimously, the Commission approved Judge Gormley's motion, seconded by Judge Spanagel:

To recommend allowing the court, on its own motion, to place an offender into an intervention program in lieu of prison time.

Assistant Prosecutor Jason Hilliard pointed out that this could cause a problem for the prosecutor if he has already arranged a plea and now the judge says he wants to put the offender in treatment in lieu.

Dir. Diroll asked whether the court must hold a hearing if it initiates the intervention-in-lieu process.

An assessment and hearing will be needed anyway, said Judge Spanagel.

Rep. Yates said that a Common Pleas judge in Cuyahoga County claimed she gets 16,000 requests for probation reports per year at a cost of $800 per report. It seems that the requirement for an assessment in every case might defeat the savings incurred.

Atty. Young said defense attorneys are not drug experts and are not qualified to ascertain that an offender is drug dependant. He can't imagine why it would cost $800 for a drug assessment or PSI.

Mr. Gallo pointed out that PSIs cover extra information that the judge needs at the hearing.

The statute requires a drug assessment, not a PSI, Judge Corzine noted.

Gary Yates reported that Butler County does both. He noted that the PSI shows if the offender has a prior felony record.

The reality is that many judges are reluctant to consider something if they don't have the resources, said Dir. Diroll. Therefore, some judges won't consider intervention-in-lieu if they can't afford an assessment.

According to Mr. Nunes many jurisdictions are already looking at how to intervene earlier in the process.

The next consideration, said Dir. Diroll, is whether §2951.041(B)(1) should be changed to allow intervention-in-lieu for offenders with prior felonies or offenders who have already been through the program.

Atty. Young moved to expand intervention-in-lieu both to offenders with prior felonies and those who have already been in the program, regardless of their success or failure in the program. Sen. Smith seconded the motion.

In an effort to track the amendment of S.B. 22, Judge Corzine offered an amendment to the motion to exclude prior offenses of violence.

Mr. Yates contended that allowing treatment in lieu is already at the discretion of the court anyway.

Judge Corzine agreed but noted that statute doesn't lay out the parameters of that discretion very well.

Atty. Young asked if Judge Corzine's suggestion would include misdemeanor offenses of violence.

It is not excluded for misdemeanor offenses, just felony offenses, Dir. Diroll responded.

Representing the Fraternal Order of Police, Jason Pappas asked how the option would apply to an offender who already failed a drug program.

The offender could get another chance at another drug program, said Judge Corzine.

If an offender failed intervention-in-lieu and received a conviction with prison time, then is charged with a new drug offense, Mr. Pappas opposed offering him another chance at intervention-in-lieu. He would not, however, oppose to allowing a second shot of intervention to an offender who successfully completed the program, had his record cleared, then relapses. If the offender already failed a drug treatment program, he argued, there should be a limit on how many chances he gets. He should pay the consequences and his record should not be expunged of the felony offenses. At that point, if the judge wants to use an alternative to prison, he should choose a different one.

Some don't really "get it" the first time, Sen. Smith contended. Sometimes it takes multiple times, even as many as eight or nine, in the program before true success is achieved. Ultimately, it impacts their family and employment opportunities because of having a felony on their record. They need a chance to redeem themselves or the problem ends up costing the state more money in the long run.

Atty. Young reminded everyone that relapse is part of recovery. He believes that *why* a person relapses is more important than *when* he relapses. Since there may be different reasons for failing a program, he contended that the judge needs to make the decision of whether that offender deserves another chance.

That is what the judge is there for, said Mr. Gallo, and he is not going to recommend another chance at intervention-in-lieu for an offender if he does believe he is worth the risk. The judge realizes that, ultimately, the offender's eventual success or failure also reflects back on him as a judge of character.

Atty. Young moved to delete "The offender previously has not been convicted of or pleaded guilty to a felony …" from §2951.041(B)(1), thus expanding the option of intervention-in-lieu of conviction to include offenders with prior felony convictions. Rep. Yates seconded the motion.

Sen. Smith asked whether this meant all felonies or would exclude F-1s and F-2s.

Atty. Young clarified that it would include all felonies.

By a single vote, the motion failed.

Judge Spanagel suggested approving the motion in concept, then listing exclusions in another motion.

Dir. Diroll noted that excluding "offenses of violence" may still be more sweeping than intended, since it would preclude low level offenses such as aggravated menacing. He recommended stating a prior first, second, or third degree felony offense of violence. That way it is dealing with the most assaultive and threatening offenses of harm.

Judge Spanagel moved to expand the eligibility for intervention-in-lieu of conviction to offenders with prior felony convictions under §2951.041(B)(1) by including the language "with a list of exclusionary offenses to be determined".

There was confusion about how this differed from the previous motion. Atty. Brown asked for further clarification on Atty. Young's motion.

Judge Spanagel moved to reconsider Atty. Young's motion to expand intervention-in-lieu to all offenders with prior felonies. Atty. Brown seconded the motion to reconsider. The motion failed on a tie vote.

Since the motion was defeated, it leaves the statute as currently written regarding prior offenses. Dir. Diroll asked if the statute should be expanded to allow eligibility for offenders who have *some* prior felony convictions.

Judge Corzine suggested a shift to discussing the *number* of prior felony convictions, regardless of the type, that an offender could have before being declared ineligible for intervention-in-lieu of prison.

Atty. Young attempted a new motion to expand intervention-in-lieu to offenders with prior felonies that weren't F-1s and F-2s. Rep. Yates seconded the motion.

Judge Corzine pointed out that F-1s and F-2s carry a presumption of prison while F-3s, F-4s, and F-5s do not.

When asked why the cut-off should be between F-2 and F-3 offenses, Pros. Hilliard explained that F-3s are a middle ground charge. Some of them are violent and some are not. Some are no more violent or dangerous to the community than an F-5 offense and some are riskier. This is the range where judicial discretion is particularly important.

With the exception of Pros. Hilliard, Ms. Alexander, Mr. Pappas, and Sheriff Westrick, the Commission approved Atty. Young's motion, seconded by Rep. Yates.

> **To propose amending intervention-in-lieu of conviction under §2951.041 to extend eligibility to offenders with prior felony convictions, at the judge's discretion, other than F-1s and F-2s.**

At this point the discussion turned to whether the statute should be expanded further to include offenders who failed previous attempts at intervention-in-lieu of prison.

Something else that needs to be considered, said Judge Spanagel, is how many chances a person should be given. Upon completion of the intervention-in-lieu program, the offender's record is sealed. He feels there should be some kind of record kept as to how many times the offender was offered this opportunity, even if the offense was

dismissed with a sealed record. Otherwise, it could be difficult to know how many times the offender has already been through treatment.

It is not mandated to seal the records after completing intervention-in-lieu, said Judge Hany. If the offender wants his record sealed, he requests it under §2953.31.

Although opposing votes were cast by Pros. Hilliard, Mr. Pappas, and Sheriff Westrick, the Commission eventually approved the motion offered by Judge Spanagel and seconded by Mr. VanDine:

> **To propose deleting "previously has not been through intervention-in-lieu of conviction under this section or any similar regimen" from §2951.041(B)(1), making eligible persons who previously went through the program, regardless of whether they succeeded or failed in that program.**

Attention turned to §2951.041(B)(3) regarding drug traffickers that are not eligible for intervention-in-lieu. Dir. Diroll asked whether the option should be expanded to low-level traffickers under §2925.03. The traffickers that are truly in the business of selling drugs usually fall within the F-1, F-2, or F-3 range while those that are largely indistinguishable from drug users often fall in the F-4 and F-5 ranges.

Mr. VanDine moved to amend 2951.041(B)(1) by deleting §2925.03 from the first list of statutes and moving it to the second half of the sentence to read: "The offender is not charged with a violation of section 2925.02, 2925.04, or 2925.06 of the Revised Code and is not charged with a violation of section 2925.03 or 2925.11 of the Revised Code that is a felony of the first, second, or third degree." He said that the statute should also recognize that the judge still has to find that substance abuse led to the criminal offense for the offender to be eligible. Atty. Young seconded the motion.

When the offender's action moves to selling drugs, said Pros. Hilliard, it harms others regardless of whether the purpose is to make a profit or to fuel one's own drug addiction. He contended that that action is crossing the line and does not deserve the benefit of having a felony trafficking conviction dismissed and sealed.

Judge Corzine contended that many F-4 and F-5 offenders traffic only to supply or pay for their own habit. If the action occurs near a school, it kicks up to an F-3. He argued that F-4 and F-5 trafficking offenses should be eligible for intervention-in-lieu, unless there is a presumption in favor of prison, then he agrees that they should not be eligible for the option.

It is a supply and demand problem, Atty. Young declared. He insisted that you have got to treat the demand side because you are never going to defeat the supply side.

We are using too wide of a brush here, Sheriff Westrick asserted. We mustn't keep giving the offender a third, fourth, and fifth chance, even if they are only trafficking to supply their own habit. He insisted that that is not helping them. He doesn't mind giving them one or two chances, but not three or four, especially when trafficking is

involved. They must be held accountable for those actions. He feels that the public perception *does* play a factor in this.

Narcotics officers want to catch the bigger trafficker, said Pros. Hilliard. If the low level trafficker knows ahead of time that he will get a shot at treatment in lieu, then he won't roll the heavier dealer. The prosecutor needs to retain the tool of offering to drop the charge to a lower level that would make them eligible for intervention-in-lieu of prison in order to get that offender to roll the higher dealer.

That tool, Sheriff Westrick contended, is used at least 75% of the time and the success rate is approximately 50% in providing useful information toward catching the higher dealer.

Atty. Slagle noted that the majority of F-4s and F-5s aren't going to prison anyway.

With Sheriff Westrick, Pros. Hilliard, Mr. Pappas, Ms. Alexander, and Judges Hany and Gormley dissenting, the Commission narrowly approved the motion offered by Mr. VanDine, seconded by Atty. Young:

> **To recommend amending §2951.041(B)(3) to allow an F-4 and F-5 trafficker to be eligible for intervention-in-lieu, at the discretion of the judge.**

After lunch, the Commission continued by examining §2951.041(B)(4), which allows an F-4 possession offender to be eligible for intervention-in-lieu only if recommended by the prosecutor. In the last motion, the Commission elected to allow 4th degree trafficking offenders to be eligible and those cases are considered more serious that 4th degree possession offenders. With that in mind, Dir. Diroll asked if the prosecutorial veto power should be removed here.

When asked when or why a prosecutor uses discretion in these cases, Atty. Slagle noted that a person charged with F-5 possession is automatically eligible for intervention-in-lieu. An F-4 possession usually involves a larger quantity of substance which is why some prosecutors might choose to veto the option of intervention. The judge, however, has the ultimate discretion to design whether or not either offender would be granted intervention-in-lieu.

If intervention-in-lieu of prison is allowed for F-4 traffickers and not F-4 possessors, than application of the statute will appear to be inconsistent, said Rep. Yates.

Rep. Yates moved to do away with the prosecutorial veto power regarding F-4 possession. Judge Corzine seconded the motion.

Some prosecutors, said Mr. VanDine, would veto every case if allowed.

In observing the court process, Rep. Yates noted that judges are mindful of prosecutors' objections. In practice, if there is not a veto, a prosecutor's strong assertion that this should not occur still carries significant weight.

Mr. VanDine pointed out that, as currently written, the statute only refers to 2925.11. He would prefer to change it to §2925.03 instead of

§2925.11, which would make F-4 possession offenders eligible for intervention-in-lieu but allow the prosecutor to veto that option for F-4 trafficking offenders.

Atty. Young remarked that he never understood why prosecutors were allowed veto power in these cases. In fact, he sees it as a separation of powers issue and prefers to leave it to the discretion of the judge.

With the exception of Victim Representative Chrystal Alexander, the Commission approved Rep. Yates' motion, seconded by Judge Corzine:

> **Delete §2951.041(B)(4) so that an offender charged with F-4 drug possession shall be eligible for intervention of lieu of prison without requiring a recommendation from the prosecutor.**

Pros. Hilliard moved to allow prosecutorial veto power for an F-4 trafficking offender to be eligible for treatment-in-lieu of prison. Mr. VanDine seconded the motion.

Mr. VanDine said that he would argue the strength of this amendment based on the deal-making that goes on with the low level drug offenders. He feels that this would retain some of the leverage needed for police officers to persuade low level offenders to provide helpful information to get the higher level offenders.

Rep. Yates argued that there is too much discretion within the veto that impacts various segments of the population unevenly. He contended that the judge needs open debate with all of the factors on the table.

With votes of dissention cast by Attys. Brown and Young, Sen. Smith, Rep. Young, and Rep. Uecker, the Commission narrowly approved Pros. Hilliard's motion, seconded by Mr. VanDine:

> **To propose reinserting §2951.041(B)(4) with the prosecutorial veto for F-4 trafficking under §2925.03 rather than F-4 possession under §2925.11.**

The next step, said Dir. Diroll, is to determine if intervention-in-lieu should be extended to include a defendant who has a mental health or developmental disability issue. Instead of diversion to a substance abuse program, however, the diversion would be to relevant MH or DD programs. He noted that this issue has been raised in an amendment to Sen. Seitz's S.B. 22.

Mr. VanDine moved for the Commission to recommend that the concepts represented in §2951.041 should be applied to a similar provision for mental health and developmental disability cases. Judge Spanagel seconded the motion.

Many rural counties may not have the resources for the necessary programs, said Judge Corzine.

Ms. Alexander and Judge Hany expressed concern about how this would address cases involving a person with mental health issues who goes off medication or the aging population which includes Alzheimer patients who get violent. Judge Hany thought there was a mechanism already in place for some of these people.

There is a tiny percentage of people, said Atty. Young, who have mental health issues but are not incompetent or incapable of assisting in their defense or understanding right and wrong. The criminal justice system has become a holding place for that population without providing any real treatment. He remarked that 8 out of 10 of the clients handled by public defenders have a drug or mental health problem or both.

Atty. Slagle believes that a different statute is needed because there are different issues involved within each mental health problem. It may need to be handled more comprehensively.

The motion on this issue was dropped.

DRUG "EQUALIZATION"

Dir. Diroll turned the discussion to equalizing the guidance given to courts for drug offenders as compared to other offenders at the same level. He pointed out that F-4 drug possession offenses have a presumption in favor of prison when judges are guided toward community sanctions for other F-4s. The presumption toward prison does not exist for other offenses below F-2 except for a few sex offenses. He asked whether it makes sense to sentence drug offenders more harshly than other offenders at the same level. He pointed out that when drug offenders get sentenced, judges, even with guidance, tend to sentence them at the lower ends of the sentencing ranges when compared to other offenses of the same felony level.

Atty. Young suggested equalizing everyone except the Major Drug Offenders (MDOs).

The extra toughness, Dir. Diroll explained, was devised at a time when drug wars were at a peak. From law enforcement's perspective, it is necessary to either buy your way up the criminal enterprise or get someone to turn and testify against someone else, he explained. The presumption toward prison for a low level offense gave more leverage for law enforcement.

Mr. VanDine moved for equalization between drug offenses and nondrug offenses at the same level.

Atty. Slagle expressed concern about how this would affect the few statutes under F-2 that include mandatories.

With Pros. Hilliard dissenting, the Commission approved Mr. VanDine's amended motion which was seconded by Atty. Young:

> **To recommend equal guidance for drug and nondrug offense at the same felony level, except for containing mandatories, in regards to presumption for or against prison.**

***COLON* AND RECKLESSNESS**

Last year a case, *State v. Colon*, came before the Ohio Supreme Court involving an offense that did not specify a culpable mental state, noted Dir. Diroll. This raised concerns about similar statutes that

don't specify a mental state. Dir. Diroll said the current choice is to default to recklessness or to specify strict liability.

He said that the current definition of "recklessness" is problematic. Commission intern Shawn Welch reported that most states follow the definition used in the Model Penal Code, while a handful do not. Ohio is one of those that do not. One concern about Ohio's definition is that it includes an element of "perversely disregarding a known risk."

Consideration was given to using the Model Penal Code definition. However, Dir. Diroll noted an Ohio State Law Review article that raises new issues with that definition. Dir. Diroll suggested taking a straightforward approach to redefining recklessness.

To use less stilted language, he suggested saying, "A person acts recklessly when the person ignores a known risk that his or her conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when the person ignores a known risk that such circumstances are likely to exist."

A list was compiled of the Title 29 offenses that do not currently specify a culpable mental state. Based on input from the Commission at previous meetings, "knowingly" or "strict liability" were assigned to each offense on the list in an effort to get it pinned down to those that define a strict mental state. Otherwise the mental state defaults to "recklessness". This, said Dir. Diroll, should help judges know clearly what the benchmark is. He noted that some states don't have recklessness at all as a standard. Some states default to "knowingly" rather than "recklessness".

Atty. Slagle liked the definition offered by Dir. Diroll and remarked that any effort to define the mental element in each statute would do a service for all practitioners.

Dir. Diroll suggested moving on this at the next meeting.

In regards to the importance of clarifying the culpable mental state, Dir. Diroll reported that there was a recent U.S. Supreme Court case regarding an illegal immigrant who used an invented social security number and was charged with aggravated identity theft because a person already had the number. The issue was whether the person "knowingly" used someone else's number. The Court said "knowingly" applies to all elements that had to be proved subsequent to the word "knowingly".

The problem, said Judge Corzine, is that because this case deals with *mens rea*, due process enters in and the question becomes whether that would also apply at the state level. It all comes down to how you read a sentence, he said, because the U.S. Supreme Court said in this case that "knowingly" applied to all of the elements thereafter. As a result, it will be necessary to read each statute in the context in which they come up.

CONSECUTIVE SENTENCES AFTER *FOSTER* AND *ICE*

The last subject of the day addressed applying the latest in a series of U.S. Supreme Court cases to Ohio. *Apprendi*, *Blakely*, and *Booker* line

of U.S. Supreme Court Cases dealt with how various findings that judges made prior to imposing sentences impinged on the defendant's 6th Amendment right to a jury trial. In applying that line of cases, the Ohio Supreme Court said in *Foster* that certain findings under Ohio's sentencing statutes, including those before imposing consecutive sentences, were also invalid.

Under the more recent *Oregon v. Ice* case, the U.S. Supreme Court changed its analysis and said that findings required before imposing consecutive terms were valid. Since the consecutive sentencing findings in Ohio law were never formally amended out of the statue, the question now is whether those findings again become valid, Dir. Diroll said.

Since this related to a likely Ohio Supreme Court case, Chief Justice Moyer excused himself from the discussion at this point.

Mr. VanDine reported that DRC has the latest numbers looking at the average sentence length prior to and after the *Foster* decision. One of the factors involved is guidance on consecutive sentences. The data shows that prison intake has dropped by 11% over the last two years but the prison population is increasing, mostly due to the *Foster* decision. S.B. 2 had offered some valuable guidance such as sentencing first time offenders to the lower portion of the sentencing range, reserving the upper portion for the worst cases, and limiting the use of consecutive sentences. Unfortunately, those provisions were neutered by the *Foster* decision. He claimed that, if those were reinstated, most of Ohio's prison crowding would be eliminated. He contended that some kind of language is needed to get around the dilemma that *Foster* has induced into the sentencing structure.

Atty. Slagle suggested reenacting the existing guidance language.

Part of the question, said Dir. Diroll is whether we want the same language or need to streamline it a bit.

The issue was tabled for the next meeting.

FUTURE MEETING DATES

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for June 18, September 17, October 15, November 19, and December 17.

The meeting adjourned at 2:10 p.m.