Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
June 18, 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
Prosecutor Laina Fetherolf
Municipal Judge David Gormley
Municipal Judge Fritz Hany
Prosecutor Jason Hilliard
Common Pleas Judge Andrew Nastoff
Mayor Michael O'Brien, City of Warren
Common Pleas Judge Andrew Nastoff
Appellate Judge Colleen O'Toole
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
Burt Griffin, Retired Common Pleas Judge
Lynn Grimshaw, Attorney
Jim Slagle, Attorney General's Office
Gary Yates, Chief Probation Officers' Association

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

GUESTS PRESENT
Jim Brady, Citizen without portfolio
JoEllen Cline, counsel, Supreme Court of Ohio
Bill Crawford, Supreme Court of Ohio
Brad DeCamp, Dept. of Alcohol and Drug Addiction Services
Tori DelMatto, Correctional Institution Inspection Committee
Monda DeWeese, SEPTA Correctional Facility
Irene Lyons, Dept. of Rehabilitation and Corrections

John Murphy, Executive Director, Ohio Prosecuting Attorneys Association
Phil Nunes, Ohio Community Corrections Association
Matt Stiffler, Legislative Service Commission
Ed Stockhausen, Legislative Aide to Sen. Smith
Paul Teasley, Hannah News Network

Chief Justice Thomas Moyer called the June 18, 2009, meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m. He welcomed Hocking County's Prosecuting Attorney Laina Fetherolf as the newest member appointed by the Governor to the Sentencing Commission.

LEGISLATIVE UPDATE

S.B. 22. Executive Director David Diroll reported that after a series of 5 to 4 votes on numerous amendments, Am. Sub. S.B. 22 made it out of the Senate Judiciary-Criminal Justice Committee for consideration by the full Senate. Senate President Harris has indicated a desire to get the bill out in some form, so a floor vote could occur soon. There is speculation that if the bill passes it could become part of H.B. 1, the biennial budget bill, which is currently in a Senate/House conference committee. If Governor Strickland and the House of Representatives support any changes, it could take effect July 1.

Since votes on the amendments were so close, he said, it is possible that some of the rejected amendments could reappear during discussion on the Senate floor.

Common Pleas Judge Jhan Corzine reported that a newspaper report said that the bill was dead, for now.

Dir. Diroll summarized some of the key sentencing-related provisions of the bill, sponsored by Sen. Bill Seitz:

- Increases the felony theft threshold from $500 to $1,000 and bumps up other thresholds in the theft statutes.
- Eliminates the distinction between crack and powder cocaine by increasing (from crack to powder levels) the amounts needed to move up the felony ladder at the lower end and by decreasing (from powder to crack levels) the amounts needed for the higher felony levels. This would ease crack penalties at the lower end and increase powder penalties at the upper end.
- Takes a first stab at drug "equalization" by treating F-4 & F-5 marijuana and hashish offenses the same as non-drug F-4s & F-5s, for both possession and sale. It does the same for cocaine, but only for possession. It doesn't change the guidance for any other drugs.
- Authorizes intervention-in-lieu of conviction when the offender has a prior felony, if the prosecutor recommends the defendant for the program.
- Expands earned credit to five days per month, but:
    - Caps reduction at 8% of the total sentence;
    - Only applies to those sentenced after the effective date;
    - Eliminates various high-level felons from eligibility;
    - Awards the credit on a sliding scale of one to five days, based on the underlying offenses.
- Authorizes a release hearing in open court after an inmate serves 85% of the sentence, excluding mandatory time for specifications.

    - Unlike judicial release, this option would be available to those serving more than 10 years.
  - Fills an unintended gap in judicial release eligibility for those serving flat five year sentences.
  - Counts the time to judicial release eligibility from the beginning of the stated prison term, which includes jail time credit, rather than from the date the person is delivered to prison.
  - Guides against prison terms in some felony nonsupport cases.
  - Authorizes community alternative centers to house any misdemeanant sentenced to 30 days or less.
  - Authorizes a stand-along nursing home facility for certain persons given medical releases from prison.
  - Merges with another bill that would place term limits on the Parole Board.

DRC Research Director Steve VanDine reported that the provision to increase the amount of powder cocaine needed to get to a higher felony range would save about 400 prison beds.

Replying to questions from Commission members, Dir. Diroll proceeded to explain several provisions in more detail.

The attempt to equalize guidance on drug offenses, said Dir. Diroll, was at the suggestion of the Sentencing Commission. Since the drug that fuels the prison population is cocaine, the bill attempts to equalize guidance for cocaine possession but Sen. Seitz chose not to touch the trafficking side of cocaine.

Dir. Diroll noted that several witnesses testified on intervention in lieu of prison, resulting in the provision to extend the option to someone with a prior felony on recommendation of the prosecutor.

Currently the bill expands earned credit to 5 days but with limitations, the most notable being a cap of 8% that could be reduced from the total sentence. Many high level felons would be ineligible.

The list of high level felons who are ineligible corresponds with the emergency release list, said Mr. VanDine. All violent and sex offenders would be ineligible. In fact, he noted, any sex offenders at any felony level would no longer be eligible for any earned credit at all, including the current one day per month allowance.

The bill, said Dir. Diroll, would award earned credit in that 5-day range based on a sliding scale based upon the offense that brought the offender to prison.

Regarding judicial release, the bill allows DRC to contact the court and recommend an offender for release after having served 85% of his stated prison term. There was an amendment adopted to exclude mandatory time for specifications so that the 85% would only apply to the underlying offense.

Judge O'Toole expressed confusion about how this would work with the earned credit.

The 85% release is independent of the earned credit statute, Dir. Diroll responded. The 85% is strictly based upon the stated prison term. Once the offender has reached that point, DRC can recommend release to the sentencing court. Earned credit, on the other hand, would be a matter of earning as much as 5 days, up to 8% that would be reduced from the stated sentence, without requiring any judicial review. If the offender earns those credits, the inmate gets released that number of days early. When asked about exclusions, he explained that rape, murder, and other F-1 offenses of violence were excluded from eligibility for 85% release. He added that earned credit would not be vested. It could be taken away for misconduct.

Some members expressed confusion. If the offender earns the maximum earned credit (8%) and gets recommended for release at 85%, is that 85% or 92% of his original sentence?

Mr. VanDine asserted that it would be 85% of the 100% portion of the sentence, not 85% of 92% of the original sentence.

Currently, said Dir. Diroll, judicial release is only available to people with a prison term of 10 years or less. The proposed 85% release could work against sentences longer than 10 years. He noted that the bill also corrects a mistake in judicial release eligibility for those serving flat 5 year sentences. Judicial release eligibility for all would begin at the beginning of the stated prison term, including jail time credit, not on the date the offender is delivered to prison.

The bill also would guide against prison for felony nonsupport, he noted, and encourages the use of other community sanctions instead.

Gary Yates, representing the Chief Probation Officers' Association, said that the impetus behind that originally was lack of funding. If there is no money available at the local level, there won't be any programs available as an alternative to prison.

According to Irene Lyons of DRC, if S.B. 22 passes, $14 million would be transferred to those line items.

Another bill proposing term limits for members of the Parole Board was merged into S.B. 22 by the Committee. It would partially grandfather in current Board members. Members would be limited to terms of 12 years.

The bill also includes a geriatric release mechanism. It would authorize a stand-alone nursing home facility, said Dir. Diroll, for certain persons given medical releases from prison. He remarked that Sen. Seitz colorfully said it was so that Jack-the-Ripper would not be housed along with your grandmother.

Failed amendments included motions to: return earned credit to the current one day per month maximum; remove the 85% release; provide notice to prosecutors and courts of those being released early because of earned credit, with an opportunity to object; place certain releasees on GPS for half of the release time; not include jail time credit in counting judicial release eligibility; and eliminate the proposed bias against prison for nonsupport when the offender has a prior offense.

Another failed amendment, said Mr. VanDine, addressed the contentious subject of absconders from DRC supervision. He explained that S.B. 2 had inadvertently created language that allowed someone who absconded from parole supervision to be charged with escape. S.B. 22 says these offenders can only be charged with escape if they are missing more than nine months. An amendment was presented to reverse that. He reported that there was considerable argument over the appropriateness of allowing nine months to pass before charging escape.

Dir. Diroll pointed out that once absconding gets charged as escape it becomes a mandatory consecutive, tied to the underlying offense.

The original proposal, said Judge Corzine, was 12 months. He noted that the debate is ongoing.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association reported that part of the debate has been whether it should be kept as a felony offense of "escape" but with a lesser penalty.

Judge O'Toole asked if the nursing home provision would be creating a separate class of nursing home inhabitants.

Noting that nursing homes are Medicaid driven, Dir. Diroll explained that the bill authorizes the creation of a stand-along nursing home to deal with folks released from prison.

Regarding the provision requiring GPS monitoring for certain releases, it would require GPS monitoring for 50% of the time the offender is on release, but the amendment failed in another close vote. The cost for GPS monitoring is usually passed on to the offender if he has the means to pay it.

Why spend the money on GPS, asked Gary Yates, if there are no obvious consequences when the offender enters a prohibited zone? He argued that attaching the mechanism to someone's leg does not prevent him from committing more crimes or keep him within a certain area if no one is available to react to a violation. He feels that this is not an efficient use of the state's budget.

Rep. Uecker and Sen. Smith remarked that they expect to see Sub. S.B. 22 merged into H.B. 1.

According to Mr. VanDine, a Columbus Dispatch article said that Speaker Harris intends to hold off on the bill until there is more consensus.

STAFF CHANGE

Dir. Diroll announced that he is retiring effective June 30, 2009. He will return as a volunteer in September. He assured the members that there would be no interruption in the Commission's current projects.

Chief Justice Moyer acknowledged Dir. Diroll's dedication and contributions to the work of the Commission, crediting him with the success of the Commission's numerous projects amidst considerable political changes.

Judge Spanagle remarked that Dir. Diroll had surely earned at least 60 days of earned credit by now during his time served as director.

***COLON* & RECKLESSNESS**

In the *Colon* case, the statutory absence of a clear culpable mental state ("*mens rea*") necessary for the crime led the Ohio Supreme Court to overturn the conviction. The first *Colon* case said, if statute does not clearly indicate a culpable mental state, it could default, by statute, to a standard of "recklessness" unless the General Assembly specifies a strict liability. At earlier meetings, the Commission agreed that similar gaps exist in several criminal statutes. Shawn Welch worked with others to prepare a list of deficient statutes in Title 29 (the Criminal Code). He also researched the definition of "reckless" as used by other states.

"Recklessness" is a tricky standard, Dir. Diroll claimed. Ohio's definition does not literally follow the Model Penal Code definition. Ohio's definition includes provocative language that can confuse jurors. §2901.22(C) says a person "acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk." Commentators have noted other problems in the version of "reckless" used in the Model Penal Code. Regardless of definition, Dir. Diroll noted that "recklessly" probably will remain an imperfect standard. Commission members agreed, by consensus, to make an effort to redefine "recklessly" in a way that could be better understood.

Common Pleas Judge Andrew Nastoff said it is common in jury instruction to give an example of the mental states in question. He insisted it is necessary to provide examples of "knowingly", "substantially", *etc*. so that the jury can understand the hierarchy of mental states. He agreed that the definition of "recklessly" needs to be simplified by ridding it of problematic language, but providing examples can also help to solve the problem by offering further clarification.

Judge Corzine insisted that a simple definition is needed and examples should be left to the people that handle jury instruction.

Mens rea goes to the very essence of what is criminal, said Judge O'Toole. A civil wrong involves something between two people. *Mens rea* reflects the elevation of that mindset to social wrongs that need to be acted on by the government. She argues that not every wrong should be a societal wrong. In defining *mens rea*, it needs to be clear as to where something is elevated to a wrong against society versus a wrong against an individual.

Judge Corzine moved to change the definition of "recklessly" to the language proposed by Dir. Diroll, which states: "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." Judge Nastoff seconded the motion.

According to State Public Defender Tim Young, many jurists consider "recklessly" as a higher level of mental state than "knowingly".

Many courts, Judge Corzine said, tend to define "likely" to mean "probable". "Recklessly" refers to a risk that your conduct will *probably* cause a certain result or *probably* be of a certain nature. With "negligence", the conduct *may* cause a certain result or *may* be of a certain nature. "Reckless" is higher than "negligence".

Judge Nastoff feels that the language in the Model Penal Code tracks closer to "knowingly".

Defense Attorney Paula Brown suggested removing "known" risk in both sentences of the definition because people will liken that with "knowingly". She recommended replacing "ignores" with "disregards".

Judge Corzine warned that if "known" is removed it would be spreading the net wider.

According to Municipal Judge Kenneth Spanagel "known" risk has been in statute a long time. He feels "the person ignores" is the missing link.

Atty. Young suggested "disregards an unjustifiable risk".

It all centers on whether or not you know the risk, Judge Nastoff argued. With "reckless", he said, you have knowledge of the risk, whereas with "negligence" you failed to perceive a risk. He feels that Dir. Diroll's language keeps the hierarchy of mental states in tact while simplifying the language.

Atty. Young argued that a "known" risk is not necessarily the same as an "unjustifiable" risk. "Unjustified" says that there is some level of the risk that the general public disagrees with, not just that the offender knew there was a risk but that it was above a certain level.

It is necessary to be cautious so as not to make a substantial change to the law, said Judge Nastoff. "Known" risk is not a substantial change since it is already there. He believes that the language proposed by Dir. Diroll is a neutral change that simplifies the language without making a substantial change to the statute's values.

The vote was a tie which was broken by Chief Justice Moyer voting in favor. As a result, the Commission members (with dissenting votes cast by Judges O'Toole, Hany, and Spanagel, Atty. Brown, Sen. Smith, and Reps. Uecker and Yates) approved Judge Corzine's motion, seconded by Judge Nastoff.

> **To recommend a new definition of "recklessly" in 2901.22(C): "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."**

As attention turned to individual offenses, Dir. Diroll pointed out that, for murder and involuntary manslaughter the *mens rea* of "strict liability" is bootstrapped from the underlying offense of intent to commit predicate felony.

With involuntary manslaughter it is a double strict liability, said Atty. Young.

According to Judge Nastoff, case law does not require the indictment to state what the underlying offense is. Without stating the underlying offense, he said, you can get well into the trial without knowing what mental state is required.

Judge O'Toole asked if the court is trying to prosecute the *mens rea* or the actual crime the person may have committed.

It is not always just one or the other, Dir. Diroll responded. It is a combination of the act and mental state of the person who committed the act that causes it to rise to the level of a criminal penalty. Under strict liability, the focus is on the act itself.

The question, said Judge O'Toole, comes back to whether the act is a civil wrong between two individuals, where there is no criminal culpability, or a societal wrong whereby the state needs to become involved and prosecute. She feels it might need something more than just being bootstrapped to the underlying offense.

Judge Corzine's concern is that the circumstances aren't always clear in regards to *mens rea*. He sees murder and involuntary manslaughter as strict liability. Since this whole discussion has risen out of the results of the *Colon* case, he feels it is a legislative call to make any policy judgments.

One of the purposes of the Sentencing Commission, said Chief Justice Moyer, is to have this diverse group advise the legislature.

The Commission returned after lunch to the discussion of missing *mens rea* offenses. Chief Justice Moyer noted that this issue is not time sensitive, so it might be more efficient to focus on the easier offenses and save the tougher ones for later discussion.

Judge Nastoff noticed that some of the statutes will need considerable discussion. He suggested voting on the ones with an authoritative statement. If there is no contrary district court opinion then he feels that district court authority would be good. He would like more time to consider the other statutes.

§2903.15 Permitting Child Abuse. Dir. Diroll noted this offense used to be called "child endangering". There is no *mens rea* stated but prior cases assumed a default to the "reckless" standard.

A lot of this will hinge on the definition used for "recklessly", said Assistant Prosecuting Attorney Jason Hilliard.

§2907.25 Prostitution. This is another statute with no stated *mens rea*. It includes the act of engaging in sexual activity for hire or engaging in sexual activity for hire with knowledge of having HIV. In *State v. Parrish*, the Ohio Supreme Court decided there was a need for some *mens rea* in this one. Contrary to that, however, Dir. Diroll recommended the *mens rea* of strict liability.

Strict liability, by definition, means there is no need to prove *mens rea*, said Judge O'Toole.

To commit an act "for hire" is by itself a form of *mens rea*, said Judge Griffin.

Judge O'Toole moved to make "reckless" the *mens rea* for Prostitution. Atty. Young seconded the motion.

Municipal Judge David Gormley asked how "strict liability" could be conveyed as the standard so that it does not automatically default to "reckless".

Statute is assumed to default to the "reckless" standard unless "strict liability" is clearly indicted, said Dir. Diroll.

Attorney Jim Slagle, from the Ohio Attorney General's Office suggested removing the default provision for Title 29 offenses and specifying no default for those offenses.

Perusing the list of offenses, Judge Nastoff declared that there are no easy offenses to decide on because each has its own specific nuances.

A consensus emerged to table the discussion until September.

Judge Nastoff suggested breaking the list down into smaller groups and Judge O'Toole suggested rearranging the list by types of offenses to minimize the conflicts. Atty. Slagle suggested having a subcommittee start with the main criminal offenses and Pros. Fetherolf suggested having separate groups work on different sections. Dir. Diroll suggested breaking down the list by Revised Code Chapters. Atty. Young prefers having one group instead of several to work on the task.

Eventually consensus was reached to have one subcommittee take on the task. Members who volunteered for the subcommittee to work on this assignment included: Attys. Young and Brown, Pros. Hilliard, Pros. Fetherolf, Judges Spanagel, O'Toole, Gormley, and Nastoff, and legal intern Shawn Welch.

CONSECUTIVE SENTENCING AFTER *FOSTER* & *ICE*

Turning attention to the ongoing saga of sentences affected by U.S. and Ohio Supreme Court cases, the latest attention grabber involves a semi-reversal by U.S. Supreme Court on the *Oregon v. Ice* case. As a result of the *Apprendi, Blakely*, and *Booker* line of U.S. Supreme Court cases, said Dir. Diroll, the Ohio Supreme Court struck the findings required by S.B. 2 from various sentencing statutes, including the guidance on discretionary consecutive sentences (*State v. Foster*). The gist of the ruling was that certain findings denied the defendants their right to a trial by jury. The *Apprendi* line was silent on consecutive terms. Earlier this year, the U.S. Supreme Court broke from *Apprendi* in *Ice*.

The statute governing discretionary consecutive terms (§2929.14(E)(4)) is unconstitutional under *Foster*, which relied on the U.S. Supreme Court's interpretation of the Sixth Amendment right to a jury trial. However, the provision is not unconstitutional under *Ice*, applying the

same Sixth Amendment. Confusing matters even further, the statute was not formally repealed by the General Assembly after *Foster*.

In the *Ice* case, one Justice moved over to the opposite side and ruled that the federal guidelines are valid if read as voluntary instead of mandatory findings, noted Dir. Diroll, as in the *Booker* remedy.

Following *Apprendi, Blakely, and Booker* principles, the Ohio Supreme Court found a Sixth Amendment issue with: the finding requiring the judge to reserve the maximum sentence for the worst offenders and the finding requiring the judge to consider the minimum sentence within a range for an offender's first commitment to prison. The *Foster* case went beyond the facts by stating that, by logical extension, the findings that had to be made before imposing consecutive sentences were also invalid. This gave judges extremely broad discretion. The *Foster* decision appeared to be a Trojan horse with a Sixth Amendment exterior and separation of powers interior, said Dir. Diroll.

In the *Ice* case, the Supreme Court looked at findings required before imposing consecutive sentences for the first time. It appears that an emerging majority has concluded that it went a bit far in overturning state sentencing guidelines. In Ohio, some courts feel the *Ice* decision overruled *Foster* while others say that *Foster* still prevails.

In *Ice*, said Dir. Diroll, Justice Ginsberg and Justice Stevens moved over on the remedies. This is significant because Justice Stevens wrote for the majority in *Apprendi*.

The cumulative effect of *Foster* has exacerbated the prison population in Ohio, said Mr. VanDine. He reported that, as a direct result of *Foster*, sentences for F-4 and F-5 offenders have increased by 1½ months. For F-3s the increase has been 4 months, with an increase of 8 to 9 months for F-1s and F-2s. This resulted in an increase of 4,000 to 5,000 in the overall prison population. About 1,400 or 1,500 of those are F-4 and F-5 offenders.

Under pre-S.B 2 law, said Dir. Diroll, there was a cap on consecutive sentences. A person could see the Parole Board for possible release after serving 15 years, no matter how long the sentences were stacked. With truth-in-sentencing under S.B. 2, the offender was expected to serve the actual number of years stated, even if that meant multiple consecutive sentences. Other Ohio Supreme Court cases, such as *Rance* and *Hairston*, have added pressure on the prison population as well. The question now is whether judges should be encouraged to make some findings before imposing multiple consecutive sentences.

Foster not only removed the reigns from consecutive sentencing, said Judge O'Toole, but it changed the standard of review to abuse of judicial discretion. It effectively limits review of sentences by appellate courts. By taking away the discipline in sentencing, there is no equity in sentencing and no quality control. She declared there is a need for *de novo* appellate review of sentences.

Dir. Diroll acknowledged that judges were liberated by the *Foster* ruling. He pointed out that when *Foster* decided the Sixth Amendment issue in Ohio, it did so solely based upon the U.S. Supreme Court's interpretation. When the U.S. Supreme Court ruled not to continue with

that reasoning in regards to consecutive sentencing, it placed the consecutive sentencing aspect of *Foster* on Ohio's response on shaky constitutional ground.

Judge Corzine agreed that there is no separate state constitutional basis for *Foster*. He assumes that the Ohio Supreme Court will eventually explain where that leaves Ohio courts regarding statute, whether it means defaulting back to the previous language before *Foster* (which is still on the books), or what.

In the meantime, said Judge Nastoff, judges have to make decisions based on pre and post-*Foster*.

Dir. Diroll said *Ice* opens an opportunity to bring back the findings.

Judge Nastoff remarked that he didn't mind having guidelines, pre-*Foster*, until they became a technicality by which the Appellate Court judged a ruling based on an exercise in semantics. He wouldn't mind keeping the original guidelines, so long as they are not mandatory.

Retired Common Pleas Judge Burt Griffin remarked that the *Apprendi*, *Blakely*, and *Booker* cases were redefining crimes. Ohio does not redefine the crime in the cases in question. Ohio guidelines provide the available sentencing ranges and offers criteria to be taken into account when deciding which sentence to select. This is consistent, he said, with historical practices. He feels that *Foster* would be invalidated if taken to the U.S. Supreme Court.

He remarked that Justice Scalia expressed concern that strict guidelines were allowing sentencing commissions to turn into mini-legislatures. Ohio's approach to guidelines, however, is very different. Judge Griffin added that we ducked the appellate review question 13 years ago when S.B. 2. was drafted.

The Ohio legislature eventually said that abuse of discretion is not the standard of review, but no definitive standard was offered. In contrast, the Ohio Supreme Court has since ruled that abuse of discretion *is* the standard of review. He contends that there needs to be a way to put a statute together that offers guidance. He reads into Mr. VanDine's comments that S.B. 2 worked. The goal now is how to control the prison population and have justice.

More guided discretion at the trial bench, said Judge Nastoff, means less review needed at the appellate bench.

Atty. Young noted that the defendant in the *Foster* case remains in prison as a result of having his F-5 sentences maxed and stacked for theft and property offenses. Personally, he leans toward judicial discretion but believes that some cases require a review of sentencing proportionality.

Judge Corzine declared that judicial discretion should be maximized and preserved. One case out of 10,000 creates the headlines and people overreact. He feels that the courts lost something when the cap was taken away. It is important to remember that the judge is closest to the case and evidence and you'll never be able to homogenize the judges in the state, no matter how hard you try.

A judge in a smaller jurisdiction sees fewer cases and usually less severe cases than a judge in a larger jurisdiction. He may look at similar cases differently because of it.

It boils down to system wide issues, said Judge O'Toole, not just single court issues, which is why checks and balances are needed.

Judge Corzine likes not having to make added findings to give someone a maximum sentence.

Judge Hany asked for the opinion of the legislators in attendance.

Sen. Smith remarked that she believes in judicial discretion and opposes mandatory sentencing because it interferes with judicial discretion.

Rep. Uecker said that he is a conservative ex-cop but favors judicial discretion and believes in democracy at the polls.

Rep. Yates admitted that he has a strong bias toward judicial discretion. He noted that a serious effort was made by legislative leadership to dial down committees and assure that no law would come before its time. Most bills coming before the House Criminal Justice Committee, which he chairs, request to hike a sentence, even if the issue is based on a single incident that is unlikely to be repeated. Both Republicans and Democrats are under pressure from constituents to get their bills passed. With the flurry of bills, it is sometimes difficult to give ample time to some of the constitutional and policy issues involved but his committee intends to do just that.

According to Sen. Smith, some legislators continue to press for increased penalties.

Citizens tend to fight for pet causes and fail to see the big picture, said Pros. Fetherolf, which adds to pressure on the prosecutor to find an amicable solution in seeking justice.

We really aren't that far apart in viewpoints, said Atty. Young, since both prosecutors and defense attorneys have a fundamental belief in judicial discretion. He believes that S.B. 2 gave more consistency and the system needs some of that back without impinging upon discretion.

Rep. Yates said that he and fellow legislators welcome model suggestions from the Sentencing Commission on criminal justice issues.

Sen. Smith said that she would love to see more Commission members come to Senate committees to offer a new perspective.

When the Commission worked on S.B. 2, said Judge Griffin, it worked diligently for three or four years to develop comprehensive statutes that met the objectives of the legislature. After numerous hearings, the bill was approved with few modifications. He asked if that process should be repeated to develop comprehensive statutes again. He pointed out that it would take more than six months to do so.

From my perspective, yes, said Rep. Yates.

In developing S.B. 2, said Judge Griffin, the Commission tried to come up with a system that would give guidance to judges, reduce prison crowding, and avoid disparities. In doing so, it borrowed some concepts used in the United Kingdom and Canada.

Having gained some hindsight since 1996, Judge Nastoff noted that we can reevaluate the sentencing structure and make adjustments based on what has worked and what has been problematic. He stressed that it is important to remember that no matter what decision a judge makes, there will be a push back from others, usually based on resources. Therefore, it is necessary to look at resource availability and cost as well.

Initially, when the Commission began there were two choices, said Judge Griffin: to send the offender to prison or put him on probation with no real supervision. One result of S.B. 2 was the enactment of a continuum of community corrections. There was a one year delay in the effective date in order to put alternatives in place such as CBCFs. Now there are even more alternatives available.

The biggest problem now, said Judge Corzine, is the deficit situation with funding. He feels there is not enough money following these offenders from prison to the community alternatives.

Dir. Diroll believes that it is possible to put together guidance that is not overly onerous to judges that oppose constrictive guidelines.

Judges could live with statutes that *suggest* they think about certain things when imposing sentence, Judge Corzine acknowledged, so long as the sentence is not later thrown back because they didn't give that particular issue enough weight. Plus, they do not want mandates. He believes voluntary guidelines without mandates would be acceptable.

The average victim, said Judge O'Toole, needs to know why the judge can't give the maximum sentence and how the judge arrived at his or her decision.

According to Judge Corzine, if the victim likes the sentence given, he or she doesn't care how the judge got to that decision. If he or she disagrees, no explanation will satisfy. He believes the victim's understanding doesn't go beyond the length of the prison term but he assured that he makes every effort to explain how he arrived at his decision.

Dir. Diroll assured the Commission members that some subtle adjustments could be made to the statutes to provide guidance.

In closing, Mr. VanDine thanked Dir. Diroll for having led the Commission well in its efforts to make some significant differences in Ohio's sentencing structure.

FUTURE MEETINGS

Future meetings of the Sentencing Commission were tentatively scheduled for September 24, October 15, November 19, and December 17, 2009.

The meeting adjourned at 2:33 p.m.