Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMTTEE
November 16, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reggie Routson, Vice Chairman
Major John Born, representing State Highway Patrol Superintendent
Colonel Paul McClellan
Common Pleas Judge Jhan Corzine
Juvenile Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Kim Kehl, representing Director of Youth Services Tom Stickrath
OSBA Representative Max Kravitz
Bob Lane, Representing State Public Defender David Bodiker
Prosecuting Attorney Steve McIntosh
Common Pleas Judge Andrew Nastoff
Steve VanDine, representing Rehabilitation and Correction
Director Terry Collins
Public Defender Yeura Venters
Juvenile Court Judge Stephanie Wyler

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Sarah Andrews, Department of Rehabilitation and Correction
Liz Bostdorff, legislative aide to Representative Robert Latta
Jarrod Bottomley, legislative aide to Senator Timothy Grendell
Jamie Doskocil, Fiscal, Legislative Service Commission
James Guy, Attorney, Department of Rehabilitation and Correction
Stephanie Kaylor, legislative aide to Senator Steve Austria
Elizabeth Lust, legislative aide to Senator Steve Austria
Christina Madriguera, Ohio Judicial Conference
Heather Mann, legislative aide to House Speaker Jon Husted
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Becki Park, Senate Republican Caucus
Erin Rosen, Ohio Attorney General's Office

Common Pleas Court Judge Reggie Routson, Vice Chairman, called the November 16, 2006, meeting of the Ohio Criminal Sentencing Commission to order at 9:55 a.m.

DIRECTOR'S REPORT

Director David Diroll reported that he anticipates hearings in the coming weeks on the Sentencing Commission's forfeiture reforms (H.B. 241, sponsored by Rep. Bob Latta) and on Sen. Steve Austria's S.B. 260 regarding sex offenses.

Liz Bostdorff, legislative aide to Rep. Latta, noted that the Commission's concerns about S.B. 260 have been forwarded to the House Judiciary Criminal Justice Committee. The Committee plans to take action on the bill by the second week of December.

SEXUAL OFFENSE PENALTIES

Psychological Report

Common Pleas Judge Andrew Nastoff provided copies of a sample psychological report used by the courts in Butler County.

Whenever a defendant is convicted of a sexually oriented offense, said Judge Nastoff, his court has an evaluation done to assist the court in the sex offender classification hearing. This is used in conjunction with a pre-sentence investigation (PSI) to provide a good picture of the offender which, in turn, helps the judge in sentencing.

Jim Guy of the Department of Rehabilitation and Correction (DRC) asked if the report accompanies the offender to prison.

Since it is intended for use in the sex offender classification hearing, Judge Nastoff assumed that it was eventually passed on to DRC.

According to Defense Attorney Bill Gallagher and Asst. State Public Defender Bob Lane, the exhibit generally does not get sent to DRC. They contended that it would be quite useful if the psychological evaluation were passed along.

Rape and Attempted Rape

Dir. Diroll reported that the only change made to the rape table of penalties, as a result of the last meeting, was to remove the repeat violent offender category (RVO) from the table. The Commission instead decided to recommend that the additional penalty of 1 to 10 years for the RVO enhancement should be served first, before the penalty of the indeterminate sentence for the underlying offense kicks in.

The group also agreed that the presumption in favor of continued prison for F-1s and F-2s should not apply to this new type of judicial release *after* the mandatory portion of the prison sentence was served.

Sexual Battery

An amendment to the RVO bill passed earlier in this legislative session (H.B. 95) required a mandatory prison term for sexual battery of a victim under the age of 13. Because sexual battery is a sexual con*duct* offense, as is rape, the bill may have unintentionally reduced the penalty for statutory rape. In light of this, said Dir. Diroll, the Commission agreed at the last meeting to eliminate the F-2 offense in

the "under 13" segment of the sexual battery offense, to make clear it is superceded by the rape statute.

There was a split at the last meeting about whether any aspect of sexual battery should be F-2 (rather than an F-3). Some members felt that when the offense involved an abuse of trust situation, it should be increased to the F-2 level. Dir. Diroll expects the issue to recur in the legislature. In fact, he noted, there are already one or two bills pending that would increase it to an F-2 offense.

Unlawful Sexual Conduct With a Minor

This offense, previously known as "corruption of a minor," is the only sex offense where the *offender's* age is a critical factor in determining the penalty. The basic offense is an F-4, but the penalty varies from a misdemeanor to an F-2 based on the offender's age. In fact, Dir. Diroll noted, the act is only regarded as an offense if the offender and victim are certain ages. The victim has to be 13, 14, or 15 and the offender has to be at least age 18. The penalty drops as the age difference between the offender and victim narrows. The penalty increases as the age difference increases. There is an enhancement for any prior commission that bumps the offense up to an F-2.

That happens even if the first offense was a misdemeanor, said Common Pleas Judge Jhan Corzine.

Judge Nastoff argued that it seems disproportionate for two misdemeanor violations to jump all the way up to an F-2, which otherwise makes sense for prior felony violations.

Judge Corzine pointed out that the statute covers sexual conduct with a person aged 13, 14, or 15, without force or coercion. If coercion is a factor, the offense becomes sexual battery or rape.

According to City Prosecutor Steve McIntosh, Columbus gets several cases where the parents file the misdemeanor charge in an effort to keep their daughter away from a certain boy. The daughter, he noted, is usually totally uncooperative. Rarely does the victim seek the prosecution. Other than the penalty enhancement, he believes the statute works well today and would not amend it.

According to Atty. Gallagher, there is a small window where the offender would be able to commit a second offense under this statute and could end up in a different age category too quickly. He noted that, if the behavior continues as the offender ages, the offense will kick up into the felony level.

If the offender has a prior under this statute, Juvenile Judge Stephanie Wyler recommends bumping the penalty up one level, rather than automatically to an F-2.

Judge Nastoff agreed. Atty. Guy, however, felt that many people would regard that as reducing the penalty too much. He believed that the F-2 penalty could be mitigated with a judicial release.

One option, Staff Attorney Scott Anderson offered, might be to require that the prior has to be a felony before bumping it up to an F-2.

Dir. Diroll noted that the list of priors also could be expanded to include gross sexual imposition, which is a felony.

Judge Wyler then recommended kicking the offense up one level if the prior was a misdemeanor.

DRC Research Director Steve VanDine remarked that, of about 250 offenders of this type released during 2005, there were only four F-2 offenders and they served an average of less than 2½ years, which makes them the least severely punished F-2s in prison.

Dir. Diroll summarized the consensus reached by the Commission: If the prior were a felony, the penalty for unlawful sexual conduct with a minor should continue to be F-2. Gross sexual imposition should be included as a possible prior to enhance the penalty. If the prior were a misdemeanor, the penalty would increase by one level to an F-5.

Dir. Diroll noted that the various sexual assault statutes use different language to describe when an enhanced penalty applies. He asked if these should be standardized.

Judge DeLamatre recommended that *any* prior sexually oriented misdemeanor, including sexual imposition, should enhance the offense of unlawful sexual conduct with a minor to an F-5.

Cautioning against widening the net to include *any* prior sexually oriented offense, Judge Nastoff said the list of priors probably should not include prostitution or pandering obscenity.

Atty. Anderson suggested limiting the enhancement to sex offenses involving sexual conduct or sexual contact. The definition of a sexually oriented offense, he noted, is likely to change every time someone changes something in SORN law.

Public Defender Yeura Venters said he is unsure whether the law should enhance for all sexual *contact* offenses.

Atty. Gallagher reminded the others that, the situation only applies to 18 and 19 year old offenders under the unlawful sexual conduct with a minor offense.

Judge DeLamatre explained that he was thinking about including gross sexual imposition and sexual imposition rather than prostitution, importuning, etc.

Summarizing, Dir. Diroll clarified that the F-2 penalty level would apply to §2907.04 when the prior is a felony. The penalty would increase by one degree if the prior was a misdemeanor violation of this statute or gross sexual imposition or sexual imposition. He asked if the list of priors should include other prior sexual misdemeanors.

To prevent the list from getting too broad, Judge Nastoff suggested stating that it includes a prior sexual imposition or sexual contact offenses.

Another option, said Dir. Diroll, would be to add gross sexual imposition and sexual imposition to the priors that would enhance the penalty and clarify that the penalty only increases to an F-5 if the prior was a misdemeanor.

By consensus, the Commission agreed:

> **To recommend the following penalty enhancements for prior offenses under §2907.04's prohibition against unlawful sexual conduct with a minor: (1) Priors should include all of the sexual conduct or contact offenses, including rape, sexual battery, this offense, GSI, and sexual imposition; (2) The penalty would be an F-2 unless the prior was a misdemeanor violation of one of those. If the prior were a misdemeanor, the penalty would be increased by one degree.**

Gross Sexual Imposition

Historically, said Dir. Diroll, the elements and penalties for GSI ran parallel to rape at a lower level. Currently, however, the enhancements are applied differently even when the concepts are the same.

If the victim were younger than 13, Dir. Diroll noted, GSI is an F-3 with a mandatory prison term if the offender had a prior offense of rape, sexual battery, or GSI, or if corroborated by another witness, according to the changes enacted recently in H.B. 95.

According to Christine Madriguera, representing the Ohio Judicial Conference, that is the same standard proposed in Senator Austria's new bill, S.B. 39. That bill specifies that gross sexual imposition would be an F-1 if the victim is under age 10 and evidence other than the victim's testimony is admitted and the defendant has a previous conviction of felonious sexual penetration, sexual battery, or rape.

Atty. Gallagher wondered who would make the factual determination of corroboration.

Under *Apprendi*, said Judge Corzine, it would have to be determined as a finder of fact and not merely on the basis of personal testimony.

Judge Nastoff moved to recommend deleting the corroboration requirement from the §2907.05 statute. Judge Wyler seconded the motion.

Judge Routson noted that there is no clear definition of what is meant by corroboration in the new law.

By consensus, the Commission agreed:

> **To recommend that the F-3 prison term for gross sexual imposition under §2907.05 should be discretionary, irrespective of whether the victim's testimony is corroborated.**

Atty. Venters asked for clarification. He wondered if it meant a lowering of the threshold to get to the enhancement or the mandatory prison term.

Currently, said Dir. Diroll, if the victim is under 13, the offense is an F-3 with a presumption for prison. The statute requires a mandatory prison term if the offender has a prior conviction for rape, sexual battery, or GSI or if corroborated. The motion was to delete corroboration from the list of enhancements to a mandatory term.

Judge Corzine suggested eliminating the requirement that the prior was committed against a victim under 13. He feels that if the defendant committed a prior offense that was that serious, it should not matter whether the prior victim was under 13. He also recommended that a prior should enhance the penalty for §2907.05 to an F-2 with a presumption for prison, if the current victim is under age 13.

A rough consensus was reached to recommend that, under the penalty for gross sexual imposition (§2907.05), if the victim is under age 13 and the offender has a prior sexual conviction of rape, sexual battery, or GSI, the penalty should be enhanced to an F-2, regardless of the age of the prior victim.

Judge Corzine continued by noting that under §2929.13 in the sentencing code, priors include rape, former offenses of felonious sexual penetration, gross sexual imposition, or sexual battery. He feels it should include unlawful sexual conduct with a minor.

DRC could potentially receive a couple of hundred of these offenders per year, said Mr. VanDine. Since an F-2 would increase their prison time, it could end up costing the equivalent of half of a small prison.

Because these are people who have committed similar sex offenses before, it is a matter of public safety, said Judge Corzine, so the financial cost should not be the key issue.

As a judge, said Judge Nastoff, he wants more discretion in selecting the appropriate term for these cases and would prefer the penalties to be discretionary rather than mandatory.

Dir. Diroll noted that to change the penalty from mandatory to discretionary would be a tough sell.

Judge Corzine contended that §2929.13(F)(3) currently requires a mandatory prison term that cannot be reduced, which means that no judicial release would be allowed.

In summary, said Dir. Diroll, the pending proposal says that a prior does not have to involve a victim under 13. The list of priors includes rape, sexual battery, GSI, and a *felony* conviction of unlawful sexual conduct with a minor.

The question becomes whether the penalty level should be changed. Currently, a prison term is mandated within the F-3 range if the offender has a prior and the current victim is under the age of 13. Should this be left alone or enhanced to an F-2 with a discretionary prison term, regardless of the age of the prior victim, as recommended by Judge Corzine?

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, noted that sexual battery is an F-2 and does not have an enhancement for priors.

That is taking into consideration that "sexual conduct" is regarded as worse than "sexual contact", said Dir. Diroll.

Judge Nastoff suggested sorting more of the individual nuances of specific sexual offenses before deciding whether or how to change the penalty for GSI of a victim under 13 when the offender has a prior.

Enhancements Discussion

Age. Dir. Diroll noted that unlawful sexual conduct with a minor is the only offense where the defendant has to be a certain age – age 13, 14, or 15. A repeat violent offender (RVO) enhancement is limited to F-1s and F-2s. The age of the victim matters mostly when a child (under the age of 13) is involved due to the child's vulnerability. Enhancements for victims under the age of 10 occur only under the rape statute. The victim's age is generally irrelevant for sexual imposition except when corroboration is involved. For the offense of sexual imposition, if the victim is 13-15, there is strict liability and the possibility of an enhancement if corroboration exists. Dir. Diroll asked if that oddity should remain. He noted that, other subcategories require something to be proven, but under sexual imposition, the age alone is enough to cause an enhancement.

After brief discussion, it was determined that no action was needed on the age factor regarding sexual imposition.

Serious Physical Harm. Dir. Diroll noted that the only sexual assault that includes an enhancement for serious physical harm, other than the RVO enhancement, is the rape statute when the victim is under age 13.

Drugging Victim. The drugged victim factor enhances penalties in cases of rape and gross sexual imposition. It increases the minimum penalty for rape to 5 years. It increases the penalty by one degree for GSI.

Judge Nastoff pointed out that, if the Commission's rape proposal were adopted, then the minimum would be increased to 5 years, regardless of an enhancement for the use of drugs. Therefore, only gross sexual imposition would have the drugged factor as an enhancement. If drugs are used, it is a factor that the judge is going to consider in *any* case, said Judge Nastoff. He argued that it needs to be consistent throughout the statute.

Dir. Diroll asked if it should apply more broadly or less broadly in other statutes.

If treated as the overriding of the victims' consent, Judge Nastoff contended that it should be treated similarly throughout the sex offense statutes.

Dir. Diroll then asked if the use of drugs to impair should affect the penalty in all sexual assaults.

Judge Corzine noted that some of the other sex offense statutes include the use of drugs, but without enhancing the penalty unless the victim is under 13. He opposes adding this element to other sex offenses as an enhancement because it will add unnecessary complexity.

Judge Nastoff feels that it should be taken into consideration as a sentencing factor, but wouldn't necessarily need to create a new category in the statute. He's more concerned about whether the offender has exhibited prior conduct of the same nature.

Judge Corzine suggested leaving the drug issue in GSI as an F-4 rather than having it enhance the penalty.

Judge Nastoff recommended removing drugs as an enhancement factor from GSI and adding an enhancement for sexual battery and GSI.

In medical tort cases, drugging someone without their consent is considered a form of battery. Raping is also a form of battery. With that in mind, a victim might declare that two batteries (drugging without consent and rape) are worse than one, said Atty. Anderson.

You could make that argument for every sex offense, Judge Corzine remarked. He's more concerned about the use of force.

Dir. Diroll suggested leaving it as an F-4 but acknowledging that drugging a victim is another way the offense can be committed by force.

Consensus was reached that the "drugged" enhancement is not needed in the GSI statute, since force is already included in the subdivisions.

Other Substantial Impairment. Dir. Diroll said "substantial impairment" enhances the penalty for rape if the impairment is by reason of a mental or physical condition or advanced age. It enhances sexual battery if the victim is unaware that the offender was not his/her spouse or was mistaken for their spouse. It enhances gross sexual imposition if a medicinal drug was given without consent. It is also an enhancement for sexual imposition, without specific conditions listed. Dir. Diroll asked if this should be standardized in some way. He offered to draft language that might simplify the application of "substantial impairment" to these offenses.

Priors. After lunch, the discussion returned to the chart of penalty enhancements for sex offenses. Dir. Diroll noted that priors work differently for different offenses. Among prior convictions that would enhance penalties, a prior involving a victim under the age of 13 or a "substantially similar" prior with a victim under the age of 13 are listed as enhancements for rape (§2907.02). No prior enhancements are listed for sexual battery (§2907.03). A prior rape, sexual battery, or unlawful sexual conduct with a minor qualify as enhancements for unlawful sexual conduct with a minor (§2907.04). No prior enhancements are listed for gross sexual imposition (§2907.05). A prior rape, sexual battery, unlawful minor sex, gross sexual imposition, or sexual imposition qualify as enhancements for sexual imposition (§2907.06).

There is no better predictor of future risk than prior convictions, said Atty. Guy.

Judge Corzine contended that any prior serious sex offense should enhance the penalty regardless of the age of the victim.

The enhancement of a prior is focused on the defendant's status, not the victim, and should remain so, Judge Nastoff insisted.

Atty. Murphy suggested striking from the under 13 rape enhancements, the language requiring that the "substantially similar prior" was committed against a victim under age 13. By stating "substantially similar prior" the language already covers any case involving a victim under 13.

Judge Nastoff declared that rape should be enhanced by rape. He noted that, in researching records to determine whether the defendant deserves the repeat violent offender (RVO) classification, the priors sometimes are extremely old and difficult to keep track of.

H.B. 95 eliminated RVO, said Atty. Murphy, because it was problematic.

Mr. VanDine reported that DRC only gets 15 to 20 RVOs per year. He noted that Rep. Seitz's bill intends to increase that.

Judge Corzine recommended standardizing the enhancements under rape to include any prior serious felony sex offense such as gross sexual imposition, unlawful sexual conduct with a minor, sexual battery, and rape. He feels it is necessary to list the offenses so that offenses such as obscenity, etc. are not inadvertently included as possible priors for enhancing the more serious felony sex offenses.

Judge Nastoff contended that the term "substantially similar" is needed to cover cases from other states.

Currently the list of serious felony sex offenses would not enhance sexual battery or gross sexual imposition, while certain ones would enhance unlawful sexual conduct with a minor and sexual imposition. Judge Nastoff recommended allowing the list of prior serious felony sex offenses to enhance all felony sexual offenses and bump them up one level. If the victim is 10 years or younger, then the prior would bump the penalty up two levels.

Judge Corzine agreed with this concept, so long as the penalty is not mandatory. He would prefer, however, to leave sexual imposition as is regarding priors, since a misdemeanor in that category can currently enhance it by multiple levels.

Atty. Murphy warned that the legislators won't approve removal of the mandatory aspect even if it is a trade-off for a tougher penalty.

If we can't sell it, Judge Corzine conceded, then we should fall back to the current statute or original proposal, with F-2 discretionary or F-3 if they insist on keeping it mandatory.

Attys. Murphy and Guy suggested offering Plan A and Plan B.

Dir. Diroll agreed to work on how to phrase it, with an emphasis on increasing the base offense by one level and removing the mandate.

Defendant's Position of Trust. The defendant's position of trust is only used as an enhancement in two categories, said Dir. Diroll. In sexual battery it is an enhancement if shown to be an element/evidence of coercion. It serves as an enhancement for sexual imposition if applied as an element by a mental health provider. He asked if this should be standardized.

Scott Neeley, from DRC, recommended adding the language "or authority".

It was agreed by consensus that the only change needed is to add "or authority" to the description of "position of trust".

Liz Bostdorff, legislative aide to Rep. Bob Latta, reported that H.B. 537 defines "position of trust". It also addresses rape, sexual battery, unlawful sexual conduct with a minor, and GSI.

Asking if it should enhance the penalty, Dir. Diroll agreed to develop language for a clearer definition.

Atty. Gallagher stressed the importance of clarifying that it would enhance the current penalties not proposed penalties.

PENDING LEGISLATION

Dir. Diroll noted that during a lame-duck session, the bills to watch are the ones that have already made it through one session.

Ms. Bostdorff noted that the Legislators are likely to pass the Forfeiture bill and S.B. 260.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for January 18, February 15, and March 15, 2007.

The meeting adjourned at 1:25 p.m.