

**Minutes of the  
OHIO CRIMINAL SENTENCING COMMISSION  
and the  
CRIMINAL SENTENCING ADVISORY COMMITTEE  
January 20, 2011**

**MEMBERS PRESENT**

Chief Justice Maureen O'Connor, Supreme Court of Ohio, Chair  
Common Pleas Judge Jhan Corzine, Vice-Chair  
Staff Lt. Shawn Davis, representing State Highway Patrol Superintendent  
Col. John Born  
Defense Attorney Kort Gatterdam  
Municipal Judge David Gormley  
Public Defender Kathleen Hamm  
Bob Lane, representing State Public Defender Tim Young  
Prosecuting Attorney Joseph Macejko  
Director Gary Mohr, Dept. of Rehabilitation and Correction  
Mayor Michael O'Brien, City of Warren  
Appellate Judge Colleen O'Toole  
Jason Pappas, Fraternal Order of Police  
Senator Shirley Smith  
Municipal Judge Kenneth Spanagel

**ADVISORY COMMITTEE MEMBERS PRESENT**

Eugene Gallo, Executive Director, Eastern Ohio Correction Center  
Lynn Grimshaw, Ohio Community Correction Association  
James Lawrence, Ohio Halfway House Association  
Joanna Saul, Correctional Institution Inspection Committee  
Gary Yates, Ohio Chief Probation Officers' Association

**STAFF PRESENT**

David Diroll, Executive Director  
Cynthia Ward, Administrative Assistant  
Shawn Welch, Law Clerk

**GUESTS PRESENT**

Scott Anderson, Professor, Capitol University School of Law  
Sara Andrews, Rehabilitation and Correction  
Jo Ellen Cline, Legislative Counsel, Supreme Court of Ohio  
Bill Crawford, Supreme Court of Ohio  
Brad DeCamp, Department of Alcohol and Drug Abuse Services  
Monda DeWeese, SEPTA Correctional Facility  
Kristin Hintz, Student, Capitol Law University  
Andre Imbrogno, Counsel, Rehabilitation and Correction  
Linda Janes, Chief of Staff, Rehabilitation and Correction  
Tekla Lewin, Citizens United for the Rehabilitation of Errants  
Irene Lyons, Rehabilitation and Correction  
Brian Martin, Rehabilitation and Correction

Scott Neeley, Rehabilitation and Correction  
Phil Nunes, Ohio Justice Alliance for Community Corrections  
Allen Ohman, legislative aide to Sen. Shirley Smith  
Ed Rhine, Rehabilitation and Correction  
Michael Rodgers, Ohio Judicial Conference  
Mark Schweikert, Director, Ohio Judicial Conference  
Matt Smith, legislative aide to Sen. Shirley Smith  
Matt Stiffler, Legislative Service Commission  
Paul Teasley, Hannah News Network  
Lisa Valentine, policy aide to Speaker William Batchelder

The January 20, 2011 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order by Chief Justice Maureen O'Connor, Chair, at 9:49 a.m.

Executive Director David Diroll introduced Chief Justice O'Connor as the new Chair of the Sentencing Commission and welcomed her in her new role.

Justice O'Connor responded that as a former prosecuting attorney, common pleas court judge, and Director of the Department of Public Safety, she is anxious to bring her perspective to the Commission as the new Chief Justice. She reported that newly-elected Governor John Kasich has said that we have a clean slate to move forward. She looks forward to that. She assured the members that she plans to fill the judicial vacancies on the Commission very soon. She hopes to see the Commission used as a "go-to" group for all branches of government as they deal with criminal justice issues.

Common Pleas Judge Jhan Corzine, Vice-Chair, remarked that he serves on the Criminal and Law Procedure Committee for the Ohio Judicial Conference and he has heard remarks that the legislators are open to discussion of some of the issues currently being addressed by the Commission. He asked if she sensed that this might be an opportune time to consult with legislative leadership on common concerns.

Justice O'Connor expressed optimism that the Supreme Court, Ohio Judicial Conference, and Sentencing Commission can come together and cooperate as a united front on common issues. She cautioned against squandering such opportunities.

Dir. Diroll announced that this was Judge Corzine's last meeting before he retires from the bench. Noting his extensive knowledge of the Code sections and dedication to issues of the court, Dir. Diroll expressed a desire to keep him as an advisor to the Commission in some way.

Among other changes in the Commission membership, it is losing Prosecuting Attorney Jason Hilliard, who recently accepted a position with a law firm in Cincinnati. The Commission is also losing Appellate Judge Colleen O'Toole as a member but there is hope that she will help in an advisory capacity. With Col. John Born's appointment as the new Superintendent of the State Highway Patrol, it brings Staff Lt. Shawn Davis back to the Commission on occasion as a representative of the State Highway Patrol. Since both have been active participants through the years, this will bring an additional level of expertise, noted Dir. Diroll. As the new Director of Rehabilitation and Correction, Gary Mohr will be able to offer his wide range of expertise to the Commission

from both his experience as a former DRC warden and in the private sector of corrections, added Dir. Diroll.

#### **DEPARTMENT OF REHABILITATION AND CORRECTION REPORT**

New DRC Director Mohr expressed optimism for meaningful reforms in light of the impressive degree of collaboration among the various segments. Having left DRC 8½ years ago as a deputy director, he noted that DRC is not the same department that he left then.

**Prison Crowding.** Due to a significant increase in the prison population over the past three years, seven of Ohio's prisons are now triple bunking inmates that have violated rules because they do not have the space to segregate them. With the exception of the aftermath of the 1993 Lucasville riot, he noted that this is the first time in 30 years that DRC has triple bunked anyone in segregation. Many are waiting to be transported to facilities with higher levels of custody but there are currently no beds available for them.

**Disturbances Involving 6 or More Inmates.** The American Corrections Association defines a "disturbance" as an event involving six or more inmates, and an act of violence or serious destruction of property. In 2007, DRC had only 1 disturbance every 28 days. In 2009, there was 1 every 24 days. In 2009 that increased to 1 every 14.5 days, and in 2010 it was 1 disturbance every 7.6 days. Dir. Mohr noted that within the last 2 to 3 months the events on two occasions involved more than 100 inmates. Ten staffers were assaulted by inmates in the last two weeks

When asked if there tends to be a clustering of these incidents within certain prisons or across the board, Dir. Mohr responded that they are occurring in both the open medium security prisons and the close security prisons.

Senator Shirley Smith asked if any of the disturbances and violence are due to gangs being mixed in the prison.

It is not the traditional gangs causing disturbances, Dir. Mohr responded, but some of the assailants are youth oriented gang members coming out of medium security, not high security.

He feels that teams of unit managers are needed that include counselors experienced in security and a case manager trained to program, listen, and respond. While working in the private sector he was able to implement unit team management that reduced disturbances in 67 prisons by being responsive to the concerns of staff and needs of the inmates.

As of January 18, 2011, the prison population is 50,459, which is at 131.44% of the single cell capacity. With this crowding, there are inmates with violent backgrounds being triple bunked with lower level offenders. He said he would like to establish diversified management teams trained to deal with the higher security inmates who are the greater threat. This team would provide proactive leadership by using a team approach to work with those inmates, spotting concerns, and managing the culture and climate.

**Decline in Intake Numbers.** It must be noted, said Dir. Mohr, that while the prisons are becoming more crowded, it cannot be blamed so much on

intake, since those numbers are decreasing. During 2007, there were 28,178 admitted to prison. In 2008, 4.2% less, or 26,993 were admitted. The number dropped another 7.3%, with only 25,031 admitted in 2009, and a 7.3% drop in 2010 to only 23,191 admissions.

**Recidivism.** DRC measures recidivism based on whether an offender returns within three years of release. Ohio's rate of recidivism is 36.4%. The national average is 50%. This is DRC's lowest rate in nine years. DRC can claim an obvious note of improvement in its strides toward rehabilitation, said the Director.

**Future DRC Direction.** The current major concern for the department is that this rate of violence cannot continue. Dir. Mohr promotes transformation change to find the most effective way to reduce the population. He stressed a need to be data driven to determine the trends and discern the reasons behind the disturbances in order to stabilize the situation. It is necessary, he insisted, to be proactive in order to be predictive.

Another factor in transformational change involves short term offenders. 48% percent of the 26,000 offenders entering the correctional system serve less than one year. Many never get past the reception center before their prison term is completed. Since the reception center is not designed to handle major disturbances, it may be necessary to think outside the box and reconsider alternatives for the lower level offenders, added Dir. Mohr. These goals go hand-in-hand with DRC's effort to develop more effective evidence-based programs.

**Guiding Principles.** To establish priorities, DRC is researching how to refine these areas and strive toward the following goals:

- Reduction of nonviolent offenders;
- Reduction of violence in the prisons;
- Developing a budget that meets expectations and guiding principles while addressing precipitating issues;
- Leading, developing, and caring for employees;
- Building a seamless continuum from court to the facilities and back to the community;
- Dealing with correctional health care; and
- Emergency preparedness.

He credited that Council of State Governments with pulling multiple departments and agencies together toward common goals to help reduce Ohio's prison crowding. The Justice Reinvestment group has established the three major goals to be a reduction in the number of low level offenders in the system, increased use of community corrections programs for appropriate offenders, and restructuring Ohio's "patchwork" probation system.

**Ohio Risk Assessment System.** The effort to develop Ohio's Risk Assessment System (ORAS) is expected to result in an instrumental continuum that will benefit decision makers and professionals in every segment of an offender's transition from court interaction to intervention, community sanctions, or transfer to prison and back.

**Estimated Impact of Foster Decision.** Dir. Mohr admitted that he was unaware two weeks ago of the impact of the *Foster* decision on DRC's population. This decision has caused the prison population to grow

significantly, he maintained. Based on current data, if the recent *Foster* decision had not occurred, DRC's population would be between 46,000 to 47,000 instead of the 51,000 we now have. The increase in sentencing resulting from the *Foster* decision in 2005 has been four to five months per sentence. He believes that this has been one of the single greatest contributors to the increase in prison crowding and outcome of disturbances and assaults on staff.

He asked for help from the Sentencing Commission for suggestions to address these concerns in hopes of reducing crowding, disturbances and assaults on the staff.

If a person looks solely at number of admissions to DRC and the length of stay per offender or sentence, said Dir. Diroll, then it is relatively easy to determine how crowded the prisons will be. Since the trend since 2007 shows a continual decline in the intake numbers, the obvious conclusion regarding the overall population increase is that the length of stay has increased. This impact was not the result of tougher criminal legislation from the General Assembly.

Representing the Research Department of DRC, Brian Martin reported that, based on current data, they expect the prison population to level off around 54,000 in 2020.

Sen. Shirley Smith wondered if it was true that it costs more to keep low level offenders than high level offenders.

Time in the reception center is very costly, Dir. Mohr responded. As the offender moves to a medium security facility the cost per diem goes down. If low level offenders are spending a high percent of their time in reception, then percentage of their cost is relatively high.

Recognizing that Sen. Smith's concern stemmed from costs related to mandatory post release control, DRC Asst. Dir. Linda Janes pointed out that because the mandatory post release control statute is felony driven rather than risk driven, there are some low level F-4s and F-5s that do not receive post release control. As a result, there is a higher recidivism rate for that population.

Judge Corzine was curious about how the risk factor is determined. He had always understood that past human behavior is the best predictor of future behavior, yet the ORAS does not seem to give much weight to this particular factor.

Asst. Dir. Janes admitted that Prof. Ed Latessa, of the University of Cincinnati, could better answer the question, since the assessment tool was based significantly on his research of four years on risk factors. She explained however, that DRC will be putting a variety of information into a data base and constantly reevaluate it to validate the information by jurisdiction.

Jim Lawrence, representing the Ohio Halfway House Association, raised concerns about the number of offenders released with no supervision. Asst. Dir. Janes responded that about 48 to 50% are released with no supervision. She believes the high risk offender should be released with supervision regardless of whether it was originally ordered.

Asst. Dir. Janes explained that Parole and Community Services supervises some probationers as a courtesy to courts, but there are many independent probation departments that go by their own standards. The department is working diligently to fine-tune programs with evidence-based practices and training. In doing so, they have their recidivism rates down by unit and officer so that they can determine where intervention is needed.

As Deputy Director of Parole and Community Services and Chief of the Adult Parole Authority, Sarah Andrews remarked that it is a constant struggle to provide good case management and supervision to encourage the released offender to be successful. As they work with numerous jurisdictions, they have made tremendous strides in providing tools for success. This includes implementing more positive incentives for behavior and family intervention programs.

Phil Nunes asked what DRC needs at this point from the Commission.

Dir. Mohr said the impact of the *Foster* decision needs to be addressed. In addition, he recommended that the Commission work with the Council on State Governments and implement their policy recommendations. He reemphasized that he believes strongly in strategic management as a method for getting things done.

Dir. Diroll noted that the things struck from statute by the *Foster* case were things that had been implemented by S.B. 2 in an effort to help control the prison population. This included reserving the maximum level of the sentencing range for the worst offenders and using the minimum term in the range for first commitments to prison. It also allowed appellate review of nonmandatory consecutive sentences.

Prior to *Foster*, said Judge O'Toole, if an F-4 or F-5 offender had not been to prison before then the judge would not send them now. The *Foster* case also took away the *de novo* appellate review of sentencing.

Judge Corzine noted that health care is also problem. Many local facilities don't want an offender with health issues so they send them to DRC.

Dir. Mohr feels this is an opportunity to think of options for offenders with medical or mental health issues. He believes that a cluster of practitioners and departments need to think about it, particularly given the current economic situation.

Judge Spanagel pointed out that Sen. Patton had discussed the option of establishing a prison "nursing home" for ill and/or older inmates.

Some of the health care issues, said Asst. Dir. Janes, relate to costs and Medicare coverage.

Mr. Nunes contended that, since S.B. 2, there have been numerous constitutional issues, so it is obviously time for some sentencing reform. He asked if there has been much discussion of this in the discussion of statewide budget reform. He would like to see the Commission work more on sentencing reform.

The time of developing a budget, Dir. Mohr admitted, presents an additional challenge

Dir. Diroll remarked that Sen. Seitz plans to reintroduce S.B. 22 on February 2.

Dir. Mohr acknowledged that "earned credit" is the most controversial issue but insists that it needs to be considered. The best option, he feels, is an evidence-based program so long as practitioners are properly trained.

Since the reception center is the most costly part of incarceration, especially for F-4s and F-5s who have short terms, Judge Spanagel wondered if there is a way to reduce that cost.

A driving part of that cost, Dir. Mohr responded, is the health and mental health assessment.

#### **RECAP OF RECENT SENTENCING RELATED CASES**

Dir. Diroll reported on recent activity from the Ohio Supreme Court. One case relates directly to the *Foster* ruling, opening the door in the area of consecutive sentencing after the U.S. Supreme Court case *Oregon v. Ice*.

Another case affected the Commission's recommendations on how to address statutes that do not clearly state a culpable mental state. The Commission's resulting "*Colon* Report" asks the General Assembly to fill the gaps in those statutes. It also suggests rewriting the default statute and clarifying when "strict liability" is the intent. He explained that the report was about to be sent out to legislators when the Ohio Supreme Court released a decision on point.

*State v. Johnson* dealt with the culpable mental state issue more broadly. That case, if applied to all statutes listed in the Commission's report, will only affect about 30 of those. There are still several that need to be addressed. He noted that *Johnson* did not even mention the *Colon* and *Horner* cases.

He noted that, for drafting convenience, the General Assembly often puts things in statutes for different purposes at different times, making it tough to insinuate a culpable mental state from another provision in the same statute.

The Commission's proposals were sent to legislators and some members expressed an interest in developing a bill.

He noted that rulings have come down on two other cases that affect our work. The *Rance* case in 1999 made it easy to stack charges against defendants. This raises the issues of "allied offenses of similar import" and double jeopardy. Then *Foster* struck appellate review of consecutive terms, leaving only abuse of discretion reviews which are highly deferential to trial judges. Then came the *Hairston* case in 2008 which found that stacked consecutive sentences are not unconstitutional because the sentence for each individual count was not cruel and unusual punishment. He noted that Justice Lanzinger wrote the opinion on the *Foster* decision and strongly suggested that the General Assembly

look at developing a constitutional approach to constrain consecutive sentencing. She repeated that in the *Hairston* opinion.

**STATE v. JOHNSON and ALLIED OFFENSES**

Law Clerk Shawn Welch explained that another *Johnson* case issued in the last week of December affects the *Rance* decision, mentioned earlier. A major crime may have several minor or sub-crimes merged into it. Under *Rance*, as long as there is a different element to each individual crime, the defendant can be charged and sentenced for each. To commit one crime, you are also committing allied offenses as part of it. The latter *Johnson* case reviewed the history of the "allied offense of similar import" law in §2941.25. It then overruled *the Rance* requirement of an analysis of every individual crime with the elements in the abstract. Looking instead at the conduct of the offense, *Johnson* ruled that if the conduct caused these individual offenses to occur together, then you can only sentence on the major offense.

This breathes new life into the double jeopardy clause, said Dir. Diroll, when it comes to charging decisions.

The *Rance* case had been a horrible decision for the trial bench, declared Judge Corzine.

Noting the Ohio Supreme Court's *Woodfield* decision, Atty. Bob Lane remarked that when there is a guilty verdict, even if the charges are merged, there still is an opportunity to get additional penalties. When there is more than one victim, you're going to get a different animus.

**STATE v. HODGE and CONSECUTIVE SENTENCES**

Returning to *Foster* issues, Director Diroll noted the line of U.S. Supreme Court cases, beginning with *Apprendi* in 2000, that found certain judicial fact-finding to be suspect. Generally, these facts should be presented to a jury. In Ohio, S.B. 2 said that the judge should sentence less than the maximum unless he made certain findings about the offense and/or offender that qualified him for the maximum. S.B. 2 also required certain findings to justify the use of consecutive sentencing.

The findings in S.B. 2 were jurisprudential, said Dir. Diroll. He declared that, to give those types of findings to a jury does not make sense because the jury has no experience beyond the current case in making those type of findings. Nevertheless, the Ohio Supreme Court followed the *Apprendi/Blakely* line of U.S. Supreme Court cases in *Foster*, striking the findings just mentioned. Then, the U.S. Supreme Court found, in *Oregon v. Ice*, that it was okay for the judge to make certain findings before imposing consecutive sentences.

The *State v. Foster* case attacked three provisions of the judicial findings required by S.B. 2, said Dir. Diroll. After *Foster*, trial court judges no longer had to make findings (which were subject to appellate review) in three key areas:

- When imposing more than the minimum prison term on an offender's first commitment to prison;
- When imposing the maximum prison term in the available range;

- When imposing certain consecutive sentences (also eliminating the presumption of concurrence).

All three provisions were designed to directly help contain the prison population. The reduction, then stabilization in the prison population, and the modest increase after the *Foster* decision proved that S.B. 2 was working. The records broken by recent increases in the prison population were records that had been set prior to the implementation of S.B. 2, added Director Diroll.

Both Judge O'Toole and Judge Corzine noted that the consecutive sentence language was reenacted and reinstated after the *Foster* case. But that didn't make it constitutional, contended Dir. Diroll. Judge Corzine added that not every consecutive sentence results in more time as compared to sentencing concurrently.

Additionally, before S.B. 2, Ohio had a presumption of concurrent sentencing. S.B. 2 kept the concurrent sentencing but it was struck by *Foster*, noted Dir. Diroll. Before S.B. 2, there was also a cap on consecutive sentences, he added. S.B. 2 removed that and added the option of appellate review.

In an effort to develop a more streamlined approach, Dir. Diroll asked whether the judge should again be required to make findings before imposing consecutive sentences in situations in which consecutive terms are not mandated. If so, should the findings be subject to appellate review under a more meaningful standard than "abuse of discretion"? If the door is now open on some kind of limitation of consecutive sentencing, how should the Commission approach that?

#### **JAIL TIME CREDIT**

After lunch, Judge Corzine reminded the Commission members that, at the previous meeting, they had made a few amendments to §2929.19 and §2967.191 and voted on the proposal from the State Public Defender's Office regarding jail time credit.

Atty. Lane explained that the addition to §2929.19 makes it clear that the trial court judge at sentencing will be required to calculate jail time credit. The original proposal did not, however, make clear that the judge lists jail time credit but not DRC time. It is the obligation of DRC to credit the offender with time in a DRC facility. The addition to §2967.191 (2) allows the offender to apply after the sentencing hearing to get any necessary corrections made.

DRC Asst. Dir. Janes asked if there was a standardized journal entry. Atty. Lane expressed that that would be a welcome addition.

According to Dir. Mohr, DRC potentially hopes to have electronic booking which will really help at the intake center, especially for short-time inmates.

Without a Supreme Court mandate, it will be hard to get every judge to use a form, Said Judge Corzine.

Atty. Lynn Grimshaw suggested attaching a summary form to the judgment entry.

Atty. Lane remarked that his office spends a lot of time making sure the sentencing entries are *Baker* compliant and that post release control requirements are included. If they could receive an electronic copy of the sentencing entry within days, they can more easily begin the process if an appeal is needed. The *Baker* decision says that it all needs to be on one form or there is confusion over which form to appeal. He favors Judge Corzine's recommendation to have the Supreme Court mandate the use of a specific form.

An additional concern raised by Judge Corzine is that when the offender petitions to get jail time credit credited, he needs to have proof of the time to be credited. Some offenders, he said, attempt to claim credit from separate cases.

The burden, Atty. Lane stressed, is on the offender and defense counsel to provide proof or documentation. That burden cannot be placed on the court. The defense attorney must represent the offender by getting documentation presented at the sentencing hearing.

Atty. Hamm recommended encouraging the judges to call the defense counsel to task on getting this information gathered in time for the sentencing hearing.

#### **CONCURRENT VERSUS CONSECUTIVE SENTENCING**

Returning to consecutive sentencing, Dir. Diroll said that one way to get a handle on it would be to put a cap on it. He noted that there used to be a cap on it, but many people considered it to be too low. That was why, under S.B. 2, the Sentencing Commission had recommended that judges make findings that could be subject to review. Another option would be to allow both concurrent and consecutive sentencing, but default to concurrence.

The Judicial Conference, said Judge Corzine, always seeks more judicial discretion. Anything to decrease that discretion would be regarded unfavorably.

Noting that U.S. guidelines are voluntary, Dir. Diroll asked about judges' reactions to making certain findings voluntary before imposing consecutive sentences.

Judge Corzine would prefer "thou shall consider" rather than "thou shall find" since judges don't like to be told they "have to" send someone to prison or that they "cannot" send someone to prison. He noted that most judges already use the presentence investigation as guidance (a tool not a mandate) to decide the most appropriate community control to impose.

Gene Gallo favored use of the Risk Assessment System to assist in determining the limit of consecutive sentences. He noted that assessments can also assist in weighing the options when discussing a possible plea. The threat of sentences being piled consecutively often helps to get a defendant to settle for a plea.

If the offer is the same as what will be imposed at the end of the trial, asked Judge Corzine, then why take a plea? The defendant may as

well take a chance with a trial. He noted that some judges impose a harsher sentence if the case goes to trial than they would otherwise, but won't admit that. There is never a guarantee that no consecutive sentences will be imposed. He declared that judges just don't want mandates. He prefers the advisory language: "you shall consider". He's not sure about a cap on consecutive sentences. He noted that if the offender seeks a review later, it is often unlikely that it will be reviewed by the original sentencing judge.

The original S.B. 2 proposal also recommended a review of consecutive sentences at some point, said Dir. Diroll. That proposal was opposed by DRC and eventually removed from the bill. It may be worth another look.

Judge Corzine noted that some folks have recommended allowing release after serving 85% of a sentence.

Currently, said Defense Atty. Kurt Gatterdam, there is no early release mechanism, except for judicial release, even if the offender shows sure signs of rehabilitation.

That kind of rehabilitation, said Judge Corzine, occurs mostly with some of the younger offenders who committed their crime on a spree.

Atty. Grimshaw suggested allowing indefinite and/or consecutive sentences for the most serious offenses, with an option to appear before the Parole Board for possible release once the minimum has been served, and even possible "good time". That, he said, would be offering a tool for the prosecutors, defense counsel, and DRC. He believes that the time is ripe to give that another look.

The initial impact of the *Foster* case, said Brian Martin, is being experienced at the lower end of the ranges. The bulk of it does not involve multiple convictions, but single charge cases with a sentence in the middle of the range are the drivers of the current prison crowding situation. He noted that if admissions were at the pre-*Foster* level, the current prison population would be about 5,000 higher.

It is possible to have law requiring judicial findings, Atty. Lane contended. The General Assembly can mandate that judicial determinations be made on the record so that the judge justifies why he gives the stated sentence, then it is open to appellate review. That kind of legislative change could be instituted and a presumption for concurrent sentencing could also be created.

Dir. Diroll remarked that he offered some possible language in his document "*State v. Hodge* and Consecutive Sentencing Findings" in an attempt to bring back some of the S.B. 2 guidance. He admitted that his draft mandates findings and that those findings be specific, which would reign in judicial discretion. At least, he conceded, it offers a place to start. It might also be possible to include the use of risk assessments along with serious of the conduct and likelihood of recidivism. He feels it could give the judge room for interpretation.

According to Defense Attorney Kort Gatterdam, some language needs to be included specific to the offender and offenses.

The standard under S.B. 2, Dir. Diroll noted, was clear and convincing.

Atty. Gatterdam would like to see something to make it more difficult for judges to send F-4s and F-5s to prison.

Instead of telling judge "you can't send this F-4 or F-5 offender to prison", Mr. Gallo recommended giving them an incentive not to send the offender to prison, similar to the DYS Reclaim program. If given an option, particularly of additional resources, he believes that most judges will refrain from sending the offender to prison.

That option, said Dir. Diroll, would likely work best if it is voluntary.

It is that maximum range without having to give reason that is the driving force behind the current prison crowding, Dir. Mohr declared.

According to Judge Corzine, most judges reserve the maximum sentence to allow for post release control and a cushion to cover possible violation of that community control. Perhaps we need to consider a statutory limitation on how much of the sentence can be reserved for violation of community control.

The reduction in the intake numbers shows that the crowding problem is driven by longer sentences, not more people entering the prison, said Dir. Mohr.

Noting the impressive rate of only 36.4% recidivism (within 3 years), Asst. Dir. Jane noted that 20% of the intake numbers are technical probation violators.

As the discussion started to draw to a conclusion, Judge Spanagel suggested compiling a list of things the Commission wants to get accomplished that might be beneficial to the state's budget.

Dir. Diroll noted that the nonsupport programs in DRC have been successful, so there might be a way to expand that option. He agreed to put together a list of things that the Commission could deal with in short order before the budget passes.

In conclusion, Judge Corzine announced that this was his last meeting since he is scheduled to retire in a couple of weeks. He thanked the Commission members for the joy of serving as Vice-Chair.

#### **FUTURE MEETINGS**

Future meetings of the Sentencing Commission are tentatively scheduled for February 17, March 17, April 21, May 19, June 16, July 21, August 18, September 15, October 13, November 17, and December 15, 2011.

The meeting adjourned at 2:18 p.m.