

A DECADE OF SENTENCING REFORM

A Sentencing Commission Staff Report

By David J. Diroll

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OHIO CRIMINAL SENTENCING COMMISSION

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INTRODUCTION

Ohio Revised Code §§181.21 to 181.26 instructs the Ohio Criminal Sentencing Commission to study the criminal laws of the state, to develop and propose comprehensive sentencing plans to the General Assembly, to help implement the plans, and to monitor the impact of any of the Commission’s proposals that are enacted.

Every two years, the Commission reports on the impact of the sentencing reforms that grow out of the Commission’s recommendations. These reports typically have a statistical focus. While this document presents some data, it has a different emphasis.

A decade has passed since the first Commission plan became law—S.B. 2 dealing with adult felons. Overall, the Commission has worked with the General Assembly on five major bills and five companion acts based on our recommendations. The legislature also has made numerous topical amendments to other bills at the suggestion of the Commission. These bills cover several hundred sections of the Revised Code in a sweeping range of sentencing fields: felonies, misdemeanors, traffic, juveniles, and the forfeiture of assets linked to wrongdoing.

The time seems right for a recap of this decade of sentencing reform. This report looks at each major topic and the related Commission-based legislation. It then turns to what has happened since the key bills passed and discusses issues that warrant more attention.

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EXECUTIVE SUMMARY

Felony Sentencing

- The General Assembly enacted the Commission’s felony sentencing proposals in S.B. 2 of the 121st G.A. (Greenwood), effective 7.1.96. Changes included:
 - Truth-in-sentencing under which the prison term imposed in open court reflects the time actually served;
 - Compressing 12 sentencing schemes into 5 felony levels;
 - Statutory guidance for judges based on offense level, criminal history, victim impact, and other factors, subject to new appellate review;
 - Enacting a broad continuum of “community control” sanctions (with funding) for less threatening felons and for supervising those released from prison;
 - Broader rights allowing victims to provide input at each stage.

- **Key changes since S.B. 2:**
 - Most criminal legislation since S.B. 2 has followed that bill’s template. But significant departures occurred regarding serious sex offenders, where sentencing has become indeterminate.
 - In *State v. Foster*, the Ohio Supreme Court struck down statutory guidance that affected minimum, maximum, and consecutive sentences. DRC revised its population projections upward by 2,000 beds over the next 10 years in light of the decision.
 - Other trends include more mandatory prison terms and elevating more misdemeanors to felony level.

- **Key topics to address:**
 - **Complexity.** The sentencing code has become remarkably complex, adding untold hours to the workloads of judges and other practitioners. It should be simplified to make it easier for practitioners and citizens to understand and apply.
 - **Indeterminate Sentencing.** Rather than tinker with the sentencing structure on a crime-by-crime basis, there should be a systematic review of indeterminate versus determinate sentencing and of the meaning of “truth-in-sentencing.”
 - **Sex Offenders.** In light of S.B. 260’s changes to rape law, other felony sexual assaults should be reviewed for consistency, rather than amended bill-by-bill. Child pornography statutes also warrant review, and there should be an effort to make sense of SORN Law.
 - **Sentencing Guidance and Consistency.** A decision must be made about language found unconstitutional in *Foster*. The need for consistency also should be assessed, particularly in regard to RVO, MDO, and consecutive sentencing changes and offense merger issues.
 - **Prison Population.** At nearly 49,000 inmates, Ohio’s prisons are nearly at the record levels set before S.B. 2. DRC estimates that Ohio will have nearly 70,000 inmates by 2016. Many believe that a new prison crowding study is warranted. Its goal should be to make sure there is adequate prison space for the most menacing offenders. The need for new construction and for reducing the number of low-level felons admitted to prisons should be studied.

- **Murder Penalty Issues.** Penalties for aggravated murder and murder should be reviewed in light of recent rape penalties changes and in view of patterns in other states regarding “life” sentences.

Juvenile Offenders

- The Commission’s juvenile sentencing reforms were enacted as S.B. 179 (Latta), effective 1.1.02. Changes included:
 - Dividing the juvenile code into two chapters, with one dealing exclusively with offenders (delinquents & traffic) and the other covering unruly children (truants & runaways) and abused, neglected, and dependent children.
 - Making public safety a key consideration in dealing with juvenile offenders, along with the traditional purposes of rehabilitation and addressing the child’s needs.
 - Creating a new blended sentencing option for serious youthful offenders (SYO) that allows juvenile courts to impose combined juvenile/adult sentences on certain delinquents. The adult term may be invoked only for serious misconduct.
 - Lowering the minimum age for commitment to DYS facilities from 12 to 10 for certain serious offenders.
 - Tightening the application of firearm penalties (gun specs).
 - Modernizing “unruly child” law to focus on truants and runaways.
 - Authorizing juvenile courts to create traffic bureaus.
- **Since S.B. 179:**
 - As of October 2006, no person younger than 12 had received a blended sentence. No 10 year old and only two 11 year olds had been committed to DYS, both for rape.
 - According to DYS, for the first four years under S.B. 179:
 - 137 youth received SYO sentences statewide, but only four had their adult sentences invoked;
 - DYS received juveniles with a total of 130 gun specs in the five years before S.B. 179 took effect. The number jumped to 292 in the first four years under S.B. 179.
 - According to a Cuyahoga County Prosecutor’s Office survey, with 84 counties reporting:
 - At least 291 SYO cases have been *filed* (the DYS numbers above reflect *adjudicated* SYOs) with 4 populous counties not reporting.
 - Only 10 of these cases involved jury trials.
 - The adult sentence has been invoked in 15 cases.
 - Only seven counties have not filed an SYO charge.
 - RECLAIM Ohio gave counties an economic incentive to deal with young offenders locally. As a result, the DYS population has decreased nearly 50% since RECLAIM began, from 2,795 in 1995 to 1,463 in 2005.
 - Since a slight increase during the first year of S.B. 179 (2002), the declines have continued, albeit at a slower rate.
- **Key topics to address:**
 - **SYO Simplification.** The Cuyahoga study and earlier research by a magistrate in Delaware county indicate a need for improving SYO procedures to make them more workable.

- **Extended Juvenile Jurisdiction.** Some argue for extending juvenile jurisdiction over certain offenders until age 23 or 25.
- **Competency.** As the stakes get higher, there is a need to develop competency procedures that are specific to juveniles.
- **Adult Penalties in Juvenile Court.** Increases in adult penalties ripple through the juvenile system. There should be a comprehensive review of this impact and legislative intent.

Misdemeanor Sentencing

- Many of the Commission’s misdemeanor sentencing proposals were enacted by H.B. 490 (Latta), effective 1.1.04, including:
 - Bringing direct sentencing to an organized continuum of sanctions to misdemeanor law;
 - Increasing the top fine for minor misdemeanors to \$150;
 - Expanding restitution opportunities for victims;
 - Making greater use of community service and new monitoring technologies;
 - Requiring each mayor’s court to register and report case data.
- **Key topics to address:**
 - **Jail Crowding.** Jails are the most expensive sentencing option available. Impaired driving penalties, preferred arrests in domestic violence cases, guidance in favor of community sanctions for low-level felons, pre-trial detention of accused felons, and a growing number of local sanctions violators have taxed local jail capacities. A systematic review is needed.
 - **Fines and Costs.** Counties and municipalities should weigh whether there is a more equitable formula for distributing fine and costs revenue.

Traffic Law

- The Commission’s proposals for rewriting the traffic laws were enacted in S.B. 123 (Oelslager), effective 1.1.04. Changes included:
 - Consolidating traffic offender provisions in a new chapter, standardizing license suspension law, and merging penalties with substantive offenses;
 - Making it easier for deserving drivers to stay valid through flexible payment plans and allowing driving privileges during suspensions for legitimate medical, educational, and treatment purposes;
 - Making it harder to lose a license through speeding alone, while increasing penalties for underage alcohol offenses, hit-skip cases, and for fleeing or eluding law enforcement;
 - Expanding the use of restricted license plates and immobilizing technologies;
 - Eliminating forfeitures of innocent parties’ vehicles, but beefing up the law on wrongfully entrusting a vehicle to an unlicensed, uninsured, suspended, or impaired person.
- The Commission’s suggestions for rewriting the vehicular homicide and assault laws were enacted in S.B. 107 (Latta), effective 3.23.00. Key changes included:
 - Increasing the penalty for impaired aggravated vehicular homicide;
 - Creating a new vehicular manslaughter offense;
 - Removing minor misdemeanor traffic offenses from involuntary manslaughter law.

- **Since S.B. 123 and S.B. 107:**
 - H.B. 52 (Hughes), effective 6.1.04, increased penalties for construction zone vehicular homicides and related offenses;
 - H.B. 163 (Oelslager), effective 9.23.04, dramatically changed the felony OVI law to mandate prison terms for a sixth OVI within 20 years, to increase penalties for refusing to submit to a test when the offender has a prior OVI within 20 years, and to require courts to keep records for longer periods;
 - S.B. 8 (Austria), which just took effect, added presumptive impairment levels for certain street drugs.

- **Key topics to address:**
 - **Mayor's Courts.** The inability of mayor's courts to use the payment plans or extensions authorized by S.B. 123 to help drivers pay license reinstatement fees;
 - **Nuts and Bolts.** Numerous mechanical issues that could make the traffic law operate more efficiently.

Asset Forfeiture Reforms

- The Commission's forfeiture plan was enacted by H.B. 241 (Latta), effective 7.1.07. Changes include:
 - Greatly streamlining and simplifying forfeiture law;
 - Laying out simpler rules for what is forfeitable;
 - Protecting individual interests by: formalizing a hardship release process; requiring the amount forfeited to be proportionate to the misconduct; speeding the process for vehicles and personal, business, and governmental records; and allowing a pre-seizure review for real estate;
 - Protecting the public interest by: affording more tools to protect forfeitable property; making a crime of transferring, hiding, or diminishing the value of forfeitable property; giving the State or political subdivision the right to a jury trial in civil forfeiture cases; and authorizing criminal forfeitures in Medicaid fraud cases;
 - Prioritizing a victim's right to receive restitution or a civil recovery from forfeited assets;
 - Retaining the basic formulas for distributing forfeited assets.

- **Topics for further study:**
 - **Wild Animals.** Currently, any vehicle or boat used to unlawfully take and transport wild animals can be seized summarily as contraband. It may make sense to treat them and expensive equipment—such as large fish nets—as “instrumentalities” under H.B. 241.
 - **Trademarks.** Similarly, perhaps forfeitable equipment used to produce goods in violation of the trademark laws should fall under the “instrumentality” rules of H.B. 241.

FELONY SENTENCING

The Reforms: S.B. 2 and Its Progeny

The Commission crafted a package of felony sentence reforms and submitted it to the General Assembly in 1993. The proposals were designed to enhance public safety, to help manage the prison population, and to simplify the sentencing laws.

The 121st General Assembly adopted the Commission's recommendations in Senate Bill 2, sponsored by Senator Tim Greenwood, and in its companion, Senate Bill 269, sponsored by Senator Bruce Johnson. Both took effect on July 1, 1996. (In this report, "S.B. 2" includes S.B. 269.)

S.B. 2 changed hundreds of provisions of the state's criminal code and reworked the way in which judges sentence convicted felons. It made these key changes:

- **Truth-in-Sentencing.** Before S.B. 2, convicted felons were sentenced under a hybrid system of indeterminate and determinate sentences. Indeterminate sentences (*e.g.*, "6 to 25 years") gave discretion to the Ohio Parole Board to release felons relatively early from prison or to hold them for long periods. Control over the *actual* length of a prison term fell to administrators rather than to the sentencing judge. Determinate sentences—available mostly for lower level felons—required release after a fixed term was served. There was no possibility of post-release supervision for these flat time sentences. In both cases, offenders received "good time" reductions to shorten their "minimum" prison terms by about 30%.

Under S.B. 2, all felons (other than murderers and those sentenced under pre-existing law) became subject to definite sentences, selected by the judge from a set range of prison terms. If a prison term is warranted, the judge imposes a sentence in open court and that sentence is the time actually served, unless the judge agrees to a modification. A supervision period could be imposed on any felon who leaves prison (see the Broader Continuum of Sanctions below). Good time was eliminated as were traditional parole releases for all non-life sentences.

- **Guidance by Offense Level & Appellate Review.** Before S.B. 2, there were four classes of felonies, but 12 different sentencing rules to govern them. S.B. 2 simplified this by placing all felonies (other than murders) into five categories.

A judge imposing a sentence on a felon is guided by a presumption in favor of prison for higher level offenders, including first degree felons (F-1s) and second degree felons (F-2s). Conversely, the judge must review a list of factors to determine if prison is necessary for lower level felons in the fourth (F-4) and fifth degrees (F-5). For example, when sentencing for F-4s and F-5s, the judge must make one of several specified findings (*e.g.*, the offender caused physical harm to a person or the crime was committed for hire). If the judge does not make at least one such finding, the guidance suggests a community-based sanction. S.B. 2 also guided judges toward the minimum prison sentence when the felon had no prior prison stay and suggested reserving maximum terms for the worst criminals.

To help make this work, S.B. 2 enacted a new kind of appellate review. Judges going against the guidance had to put their reasons on the record, subject to scrutiny by appellate courts.

- **Broad Continuum of Sanctions.** S.B. 2 enacted a wider range of “community control” sanctions for felons who are less threatening to the public. The bill standardized eligibility for community sanctions. Increased funding for these tools accompanied the bill.

Unless a mandatory prison term is called for, the judge can tailor a sentence from numerous residential, non-residential, and financial sanctions. A judge may opt to place the offender in a local jail, halfway house, or community based correctional facility (CBCF). The judge may decide against a residential facility, but instead make the offender subject to electronic monitoring, house arrest, intensive probation, or other non-residential sanctions. The court may impose financial sanctions against the offender, including restitution, a fine, and pay-for-stay in jail reimbursement. The judge may impose the sanctions in any reasonable combination.

Also, as noted earlier, S.B. 2 authorized supervision after prison for more offenders. The Adult Parole Authority decides on the level of “post-release control” (PRC) and assigns parole officers to monitor offenders once released from prison. The period of supervision ranges up to five years, depending on the offense.

- **Expanded Victims’ Rights.** S.B. 2 consolidated earlier legislation and filled gaps to allow for victims to have input at each stage of the criminal process. Moreover, it required courts to consider the impact of the offense on the victim in every case.

- **Refinements.** Under its statutory duty to monitor any of its plans that becomes law, the Commission suggested refinements that were enacted in S.B. 107 of the 123rd G.A. (2000) and H.B. 327 of the 124th G.A. (2002), both sponsored by Bob Latta. The Commission also fostered changes to the appellate review process as part of H.B. 331 (2000), sponsored by Rep. Dean DePiero.

Changes Since S.B. 2 & Topics for Further Study

While most of S.B. 2 remains intact, several important changes to felony sentencing law have occurred since the bill took effect in 1996.

Complexity and Structure. The felony sentencing code has become remarkably complex since S.B. 2's enactment. Exceptions often swallow rules and make it difficult to read and apply the basic statutes. The overlay of felony impaired driving is one intricate example. The S.B. 2 template is no longer used for certain serious sexual offenses and in a few other circumstances.

This adds untold hours to the workloads of judges, prosecutors, defense attorneys, and probation and parole officials and workers. Moreover, it has become extremely difficult for offenders, victims, and the media to understand criminal sentences.

Topics for Further Study:

- **Simplification.** While the exceptions each have their logic, the time has come to streamline and simplify the sentencing code (Ch. 2929 and related provisions) so that it is again relatively easy for practitioners and citizens to understand. The Sentencing Commission is well-suited to undertake the rewrite. If a penalty-neutral review makes sense to members of the General Assembly, the Commission would work with the Legislative Service Commission and others to make the Code more readable.
- **Indeterminate v. Determinate Sentences.** The Ohio Prosecuting Attorneys Association (OPAA) suggests a broader use of indeterminate sentences for other high level felons. Historically, the Sentencing Commission favored determinate terms for all but a few offenders. Indeterminate sentences recently became the norm in child rape cases. Rather than tinker with the sentencing structure on a crime-by-crime basis, the issue deserves comprehensive discussion by the Commission, which, in turn, should provide guidance to the General Assembly.
- **DRC Suggestions.** The Department of Rehabilitation and Correction has an "omnibus bill" that suggests changes that would

move away from S.B. 2's truth-in-sentencing model. In light of the Department's concerns and the reemergence of indefinite sentences, it is time to reassess what makes a sentence honest and how programs such as judicial release, transitional control, intensive program prisons, and the like should work. Also, mechanical questions have been raised about each of these options. Each program should be reexamined and refined.

Sexual Offenses. Since S.B. 2, the General Assembly has created or modified penalties for numerous crimes. While most of these penalties fit within the S.B. 2 framework, the most significant departure came regarding sexual offenses.

Indeterminate Sentences. As noted earlier, S.B. 2's truth-in-sentencing was manifested in "flat" (determinate) sentences for all felonies except murder. The change came about because Ohioans had lost confidence in the indeterminate sentences that then prevailed for serious offenses, largely because the system was fraught with fictions.

Before S.B. 2, if a court wanted to assure that a rapist served, say, four years in prison, the judge would have sentenced the offender to "6 to 25" years. The 25 was hyperbole, given parole release practices at the time. Even the "minimum" of six years wasn't always served. Each inmate was eligible for a decrease for good behavior. This "good time" reduction was supposed to be earned, but it was given so liberally that it appeared to be earned by breathing. These credits lopped about a third off the minimum term.

As noted earlier, S.B. 2 shifted the authority to determine the actual time an offender serves from the Parole Board—an unelected body meeting in private—to the elected judge who imposes sentences in open court. Under S.B. 2, if a judge wanted a rapist to serve eight years in prison, the judge imposed eight years. That was it. The Parole Board no longer had authority over the sentence and good time and other administrative adjustments were repealed. The defendant, the victim, and the public all knew that the offender was going to prison for eight years.

While this system continues to work for the vast majority of felonies, there were concerns that the sentence ranges authorized for sexual assaults, particularly rape, were inadequate. S.B. 2 set the ranges based on the average terms actually served at the time it was developed. But public attitudes regarding sexual offenders were getting tougher.

Beginning with H.B. 180, sponsored by Representative Jeff Jacobson (effective in 1997), the General Assembly responded. Various measures, culminating in the current Sexual Predator Law, authorize potentially

long, indeterminate sentences for certain high level sex offenders. Rapists deemed likely to commit future sexual assaults could get a term of, say, 2 years to life. Those who prey on victims under age 13 are subject to 10 years to life and even life without parole. (When created by S.B. 2, life without parole only applied as an alternative in death penalty cases.)

Indeterminate sentences might be justified for serious sexual offenders for at least two reasons: these crimes are viewed as the worst offenses short of murder; and sex offenders do not “age out” of their crime-committing years as readily as burglars, robbers, and other serious criminals. Thus, there may be a need for the longer term monitoring and intervention therapies available with indefinite terms. Indeterminate sentences also lessen the need for a separate civil commitment structure. In short, while most Commission members believe that honest, flat sentences are appropriate for most crimes, the exception carved for serious sexual assaults makes some sense.

S.B. 260 and Rape Penalties. Because sexual assaults are such personal and intrusive crimes, violators consistently receive longer prison terms (and more restrictions on their freedoms once released) than offenders who commit other assaults, including those that are life-threatening. Yet current penalties sometimes seem inadequate.

Late in 2005, several members of the Ohio House of Representatives, Buckeye State Sheriffs Association, DRC, and others asked the Sentencing Commission to look dispassionately at the jumble of sex offense statutes.

In the spring of 2006, a well-publicized Columbus case raised questions about the adequacy of penalties for serious sexual offenses, particularly those committed against young victims. The General Assembly’s reaction was swift. The House and Senate joined forces to finalize H.B. 95 (sponsored by Rep. Bill Seitz), expanding the measure to include mandatory prison terms for sexual battery and certain sexual impositions when the victim is under 13. The Senate worked on S.B. 260 (Sen. Steve Austria) which built on the indeterminate sentences of the Sexual Predator Law. The Senate-passed version of S.B. 260 would have increased the penalty for most rapes to 25 years to life. The legislature recessed before the House acted on the bill.

The Sentencing Commission recognized that there are gaps in the sentencing structure for serious sexual assaults. It understood the sentiments underlying H.B. 95 and S.B. 260, particularly when the victims are prepubescent children. However, the Commission and others believed that H.B. 95 and S.B. 260 had unintended consequences.

H.B. 95 mandated a prison term from the F-2 range for sexual conduct with a victim under age 13. The change was designed to fill a perceived gap in the law by guaranteeing prison terms for persons charged with sexual battery involving young victims. But, because of its specific language, the measure could have penalized conduct as an F-2 that would otherwise be punished more severely as an F-1, since sexual conduct with a person under age 13 is also statutory rape.

S.B. 260's initial "one size fits all" approach could have lessened the flexibility to deal with the wide array of conduct covered by the rape statute and with the differences between offenders. It could also have meant that more cases go to trial because the stakes would be so high; more vulnerable victims could be forced to testify; costs could increase dramatically for courts and corrections; and—ironically—there could be more acquittals or pleas to reduced charges.

After raising these issues, Commission members felt a duty to submit a plan covering not just rape, but sexual battery, unlawful sexual conduct with a minor, and gross sexual imposition. Among other things, the proposal took a more nuanced approach to rape sentencing.

Senator Austria offered an alternate version of S.B. 260 that contained many elements of the Commission's rape proposal and attempted to correct the inadvertent undermining of the statutory rape law by H.B. 95. The bill focused its toughest penalties on people who rape children. The House approved the substitute bill and the Governor signed it into law at the end of 2006.

Sexual Offender Registration and Notification (SORN). Driven in part by Federal initiatives, the General Assembly also adopted complex Sexual Offender Registration and Notification statutes shortly after S.B. 2 took effect. The key bills were H.B. 180 in 1997 and S.B. 5 in 2003, both sponsored by Jeff Jacobson. SORN Law imposes additional restrictions on persons convicted of certain offenses with a sexual motivation.

Ohio's SORN Law is lengthy, complex, and, in part, controversial. It allows citizens to know whether and where sex offenders reside in their communities. However, in addition to finding it difficult to implement, many sheriffs are critical of the expectations raised by the act. It notifies citizens and registers sexual offenders, but there are no restrictions as to where sex offenders actually reside. Separate residency limitations keep sex offenders 1,000 feet from schools, yet they may live next door to their victims. Recognizing this, some municipalities have banned sex offenders from their towns, pushing more offenders into concentrated settings in neighboring locales.

Last fall, Congress rewrote the Federal SORN requirements in the Adam Walsh Act. A work group led by the Attorney General's Office and the Office of Criminal Justice Services studied the Federal changes and has prepared a report to the General Assembly on implementing the changes in Ohio. A legislative work group was created by S.B. 260 to further study these issues.

Sex Offender Topics for Further Study:

- **Other Sexual Assaults.** S.B. 260 focused on rape of children under age 13. Issues in other felony sexual assault statutes were not addressed. Proportionate and researched-based penalties should be set for them.
- **Enhancements.** The sentencing enhancements for repeat violent offenders, other prior offenses, position of trust violations, impairment, and the like should be made logically consistent in the sexual assault laws.
- **Child Pornography.** The complex statutes governing child pornography merit review.
- **Judicial Input.** There is no post-sentencing judicial input for indeterminately-sentenced sex offenders, belying the judicial control aspects of truth-in-sentencing.
- **SORN.** SORN Law remains confusing and largely unrelated to other sex offender sanctions.

State v. Foster and Prison Population Trends. A series of United States Supreme Court decisions culminated in two 2006 decisions by the Ohio Supreme Court that dramatically changed the guidance given to judges by S.B. 2. While the changes were applauded by prosecutors and judges and flew under the radar screens of most citizens, they could have an impact on sentencing policy and on the costs of operating the Ohio prison system for years to come.

Sentence Guidance Under S.B. 2. As noted, S.B. 2 relied heavily on guiding judges toward certain sentences. It said the purpose of sentencing is to punish offenders and to protect the public. It instructed judges to consider sentencing consistency and other important goals.

More tangibly, S.B. 2 laid out lists of factors indicating whether the criminal act is more serious or less serious. It also laid out factors that indicate recidivism is more or less likely. All of these factors must be balanced by sentencing judges.

In addition, judges were told to presume that a prison term is appropriate for F-1s and F-2s. Conversely, unless certain factors were

present, courts were to look toward community sanctions instead of prison for those who commit many F-4s and F-5s.

Once a judge decided that a prison term was appropriate, S.B. 2 then told them to reserve the maximum term in the statutory range for the worst forms of the offense and the worst offenders. If a felon had not previously served a prison term, the judge was to consider imposing the shortest term from the range.

The court could depart from each of these principles, provided that the judge gave reasons for doing so. The judge's stated rationale was subject to appeal by the state or the defendant.

Foster Rewrites the Guidance. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the United States Supreme Court found state statutes unconstitutional because they required judges to make sentencing-related findings after a conviction. The statutes violated the defendant's Sixth Amendment right to have a jury determine the critical facts unless the facts are admitted by the defendant. The vote was 5-4 in each case.

In *United States v. Booker*, 543 U.S. 220 (2005), the U.S. Supreme Court was asked to apply the same logic to the Federal Sentencing Guidelines. The same 5-4 majority found the Guidelines deficient on Sixth Amendment grounds. But a funny thing happened on the road to a remedy. One judge switched sides and a new 5-4 majority found that the Guidelines could be made constitutional if they are voluntary rather than mandatory. That is, the Federal Guidelines were saved by *permitting* rather than *mandating* judicial fact-finding. One irony is that Mr. Apprendi and Mr. Blakely would have lost if the *Booker* remedy were applied to the state statutes that they successfully challenged.

Juries weren't mentioned much in the *Booker* remedy. Perhaps that is because the dissenters in *Apprendi*, *Blakely*, and substantive *Booker* wrote the remedy, providing four of the five votes needed.

Such was the confused state of Federal constitutional law when the Ohio Supreme Court heard *State v. Foster*, 109 Ohio St. 3d 1 (2006), and related cases in which defendants challenged certain findings mandated by S.B. 2 as unconstitutional under the *Apprendi* line of cases.

Early in 2006, the Ohio Supreme Court elected not to split hairs about which facts are appropriate for judges and juries. The court used *Booker* to arrive at a simple solution: Everything within the broad sentencing

ranges became available to judges. The guidance in S.B. 2 that directs judges within the ranges is unconstitutional.

To accomplish this, the Court then struck language that required particular findings before using certain parts of those ranges. In a companion case, *State v. Mathis*, 109 Ohio St. 3d 54 (2006), the Court significantly altered appellate review of criminal sentences. Defendants no longer have an appeal of right for sentences imposed by judges who did not follow the statutory guidance.

Where Things Stand Legally. After *Foster* and *Mathis*:

- Judges have broader discretion within the felony ranges to impose a definite sentence. That is:
 - Judges are no longer encouraged to use minimum sentences for persons who haven't previously been to prison;
 - Judges are no longer encouraged to reserve maximum sentences for the worst offenses and offenders;
 - Judges no longer need to give reasons why a particular sentence was imposed.
- Judges also have broader discretion to impose consecutive sentences. That is:
 - Judges are no longer guided to give concurrent sentences unless circumstances argue that consecutive sentences are more appropriate;
 - Defendants no longer have the right to appeal a judge's decision to impose consecutive sentences.
- As before, judges may give the maximum sentence for so-called "major drug offenders" (MDOs) and "repeat violent offenders" (RVOs) if the charge has been specified in the indictment.
 - The judge may impose the additional 1 to 10 year sentence on each specification without an additional factual finding.

Foster did not eviscerate S.B. 2's guidance. Judges still must:

- Follow the purposes and principles of sentencing (§2929.11);
- Weigh seriousness and recidivism factors (§2929.12), although the standard of appellate review for determining whether a judge properly followed these provisions is uncertain;
- Engage in fact-finding that goes to the decision of whether to imprison or not (as opposed to where the appropriate term falls in the sentence range), including:
 - The presumption of prison for F-1s & F-2s;

- The presumption against judicial release for F-1s & F-2s (although the judge need not give reasons for the downward departures); and
- The guidance against prison for certain F-4s & F-5s under (§2929.13 (although it is unclear whether the judge *must* give reasons since *Mathis* failed to mention these offenses).
- Follow the guidance on not sending a drug offender to prison that violates community control solely by testing positive for illicit drug use unless he or she has first failed in some type of treatment.

Where Things Stand for the Prison System. The Commission's 2005 Monitoring Report contained a great deal of data demonstrating that S.B. 2 generally was meeting its goals. The findings included:

- After decades of steady growth, the state's prison population had leveled off since S.B. 2. Crime rates also declined, on balance.
- Those going to prison are a tougher crowd than before, with S.B. 2 steering more violent and repeat felons to prison while fostering community sanctions for less menacing offenders.
- There was greater consistency in sentencing patterns across the state and across felony offense levels under S.B. 2.
- The racial makeup of Ohio's prison population generally tracked the racial makeup of those arrested for crimes. Since S.B. 2 became law, the share of total prison intake represented by African-American offenders has slowly, but consistently, declined.

After *Foster*, it seems logical to assume that there will be new pressures on Ohio's prison population. Judges no longer have to justify giving a prison sentence beyond the minimum on a first commitment to prison, giving the maximum sentence, or stacking consecutive terms. Judges who felt constrained by these aspects of S.B. 2 have been liberated.

Certainly many judges will impose sentences that are similar to those given before *Foster*. Judges will continue to follow the other principles in S.B. 2 and their own appropriate patterns of justice. Still, *Foster* takes away benchmarks for new judges to develop similar patterns.

Foster stands to compound other pressures on the prison system. The Department of Rehabilitation and Correction (DRC) reports:

- Ohio's prison population is approaching 49,000;
- Projections made before *Foster* were revised upward by 2,150 beds over the next decade in light of the Court's decision. Even minor changes in individual sentences have a dramatic cumulative effect;

- H.B. 95 (repeat violent offenders and certain sex offenders) and S.B. 260 (rape against younger victims) will add about 1,000 inmates over the next decade and about 2,500 over 30 years;
- The population will push toward 70,000 inmates by July 2016, far surpassing the system's design capacity;
- Prison construction will not solve the problem, according to Director Terry Collins.

While still dwarfed by male inmates, the female population is growing at a faster rate—unrelated to *Foster*—according to a report prepared by James Austin of the JFA Institute in conjunction with DRC:

- There were 3,554 women behind prison bars on October 2, 2006;
- DRC anticipates 5,214 female inmates by mid-2016;
- The trend is due to more women committing felonies and to longer prison terms;
- Perhaps surprisingly, the increases come largely from rural and suburban counties, rather than the urban centers.

Separately, the specter of Federal court hegemony over state prison systems—largely dormant since the '80s—is again present in some states. This could result in forcing new construction, inmate releases, or other prison management changes.

Foster and Prison Population Topics for Further Study:

- **Foster and Sentencing Guidance.** The favorable reaction to *Foster* by trial judges gives us the strong sense that there should be minimal intrusion on the court's sentencing prerogatives. Yet issues arise, including:
 - **Unconstitutional Provisions.** The offending provisions struck by *Foster* still appear in the Revised Code, leading to confusion among those trying to understand the sentencing statutes. Some would remove the wording to lessen misunderstanding; some would review the language to see if any of it should be kept as purely voluntary guidance without requiring formal findings.
 - **Consistency.** A common criticism of the law pre-S.B. 2 was that sentencing was inconsistent from court to court. While almost no one favors strict uniformity, *Foster* effectively broadened judges' sentencing ranges, raising new concerns about consistency. For instance, RVOs and MDOs now face a sweeping 3 to 20 year range.

Also, long before S.B. 2, Ohio law suggested giving

concurrent terms unless there is a good reason for consecutive sentences. Pre-S.B. 2 law also placed caps on the length of consecutive sentences. S.B. 2 removed the caps, giving judges greater latitude, but also required that certain findings be made to justify consecutive terms. *Foster* eliminated those findings

With less S.B. 2 guidance after *Foster*, there is concern that the absence of consecutive sentencing guidance could lead to erratic sentencing. Solutions such as voluntary guidelines or more felony levels with narrower sentence ranges could be considered to foster consistency.

- **Merging Offenses.** While most offenders sentenced to consecutive terms deserve them, the issue gets trickier when the *same* conduct leads to multiple charges and multiple prison terms. Murders also are aggravated assaults; rapes also involve kidnapping or abduction. Some observers feel that the criminal statutes dealing with merging crimes that punish the same conduct should be revisited, without allowing “free crimes.”
- **Miscellany.** *Foster* raises some more mundane issues as well, including how the same factor can be unconstitutional in an RVO specification, but constitutional when considered on the underlying charge.

Separately, Justice Alito’s dissent in the U.S. Supreme Court’s recent decision in *Cunningham v. California* (2007) may have kept alive the distinction between “facts of the offense” and “factors of the offender” dichotomy that the Sentencing Commission unsuccessfully argued before *Foster*.

- **Prison Population Issues.** *Foster* will likely spawn a net increase in the number of prison inmates. But many other factors drive the prison population, predicted to increase by more than 20,000 over the next decade. While there is little doubt that prison is an appropriate place for violent and predatory criminals, the majority of offenders sent to prison do not fall into those categories.

- **The Basic Goal.** The state must assure adequate prison space for the worst criminals. The Sentencing Commission could study pressures on the prison population as was done by the Governor’s Committee on Prison Crowding in the late 1980s. Ideally, Governor Ted Strickland’s administration would participate in these efforts, together with legislative leadership, to assure a bipartisan approach and to help set funding priorities. Areas of concern include:

- **Drug Offenders.** While relatively few drug possessors

are imprisoned on their first offense, many chronic users work their way to prison for repeat offenses and violations of local sanctions or conditions imposed on them when they leave prison.

- **Mentally Ill & Retarded Offenders.** A number of mentally ill and mentally retarded persons end up in prisons and jails. The emergence of mental health courts and similar concepts help form may be steps toward comprehensive solutions.
- **Aged Offenders.** Other than certain sex offenses and crimes of passion, persons over age 50 commit relatively few crimes. Other states have questioned the level of scrutiny required for aging offenders and weighed the extent of the public's interest in punishment, retribution, and protection against the costs of geriatric care.
- **Mandatory Sentences.** See below.
- **Enhanced Misdemeanors.** See below.

Mandatory Sentences. While generally following the S.B. 2 template, the General Assembly has called for mandatory prison terms for a wider array of crimes in each General Assembly.

In 1996, prison terms were mandated for aggravated murder, murder, rape, attempted forcible child rape, repeat F-1s and F-2s, other repeat violent offenders (RVOs), certain high level drug offenses, certain racketeering activities, felony vehicular homicides involving alcohol/drug impairment, and felonies committed with firearms.

Since 1996, the General Assembly has added mandatory prison terms for several offenses. §2929.13(F) lists most of them: sexually violent predators; repeat gross sexual imposition or sexual battery when the victim is under age 13; felony drunken or drugged driving; additional vehicular homicides and assaults; certain assaults against a peace officer; and felonies committed while wearing body armor, as part of gang activity, or for certain crimes committed in a school zone. Ironically, the prison system itself contributed when it pushed for mandatory terms for employees conveying prohibited items into a prison.

Issues for Further Study:

- While deciding which offenses must carry a prison or jail term is certainly a legislative prerogative, one could argue that the current list is both over- and under-inclusive. The question is whether it reflects current public policy priorities.

Felonizing Misdemeanors. The distinction between felonies and misdemeanors has long been blurry. To help assure adequate prison space for serious offenders, S.B. 2 drew a sharper line between felony and misdemeanor theft offenses. The bill kept repeat petty thefts (under \$500) at the misdemeanor level. It removed enhancements for certain drug offenses.

The changes were not meant to trivialize chronic theft or drug abuse or the legitimate concerns of merchants and other citizens. Rather they were designed to free several hundred prison beds occupied by enhanced misdemeanants on the assumption that jail space could be used for chronic misdemeanants. Coincidentally, other pressures have made jail crowding a significant problem for many counties.

In recent years, there again has been a move to enhance several misdemeanors to the felony level. Individually, each change seems logical enough, but the costs are increasing. According to DRC, the prisons now receive several thousand inmates each year that would not have been eligible for prison terms 10 to 15 years ago. Arguably, some of the offenders were under-sentenced in the past, such as chronic impaired drivers and repeat domestic assaults. But others may reflect the heightened sensitivities of an individual interest group, rather than significant public policy analysis.

Issues for Further Study:

- The pool of enhanced misdemeanants is a hodgepodge today. Some offenses belong on the list (including some not enhanced under current law), others may not. The impact of felony penalties for chronic misdemeanants should be analyzed as part of any review of prison and jail crowding.

Murder Penalties. Historically, penalties for intentionally taking a life have been higher than those for crimes in which the victim survives. In 2006, S.B. 260 increased the penalties for rape and attempted rape to the point where they exceed the terms available for some murders. This builds on earlier legislation that authorized life without parole for certain rapes, a penalty only otherwise available for capital punishment-eligible aggravated murder cases.

Issues for Further Study:

- Murder penalty debates are emotionally charged, making it hard to get to other issues involving the great mass of criminal offenses.

Nevertheless, in the interest of proportionality among offenses, the penalties for aggravated murder and murder should be reviewed in light of the increased rape penalties in S.B. 260.

Similarly, the parole eligibility dates for various life sentences should be reviewed for proportionality and in light of approaches taken in other states.

JUVENILE OFFENDER SENTENCING

The Reforms: S.B. 179 and Its Progeny

The Sentencing Commission presented a juvenile plan to the legislature in July 1999. The 123rd General Assembly approved many of the proposals as S.B. 179, effective January 1, 2002. Sponsored by Senator Bob Latta, S.B. 179's reforms included:

- **Broader Purposes.** The bill created a new chapter in the Revised Code (Ch. 2152) to deal with juvenile delinquents and traffic offenders separately from abused, neglected, dependent, and unruly children. The latter group continued to fall under Ch. 2151, the historic juvenile code. The new chapter seeks to foster public safety as well as rehabilitation and addressing the needs of problem children.
- **Blended Sentencing for Serious Youthful Offenders.** The bill's key reform was to create a new option for juvenile court judges to deal with juveniles defined as "serious youthful offenders" (SYOs). For youth accused of very serious felonies, the court's historic options were to transfer the case to adult court ("bindover") or to keep the case, realizing that the offender would be free at age 21 or sooner.

The blended sentencing option for SYOs allows the juvenile court to retain jurisdiction and to impose *both* a juvenile disposition and an adult sentence. The juvenile term would be served and, if successful, would negate the need for invoking the adult sentence. If the juvenile continues to commit serious offenses, however, the juvenile court may invoke the adult term.

Since SYOs face adult-like sanctions, the bill gave youth an unwaivable right to counsel, the opportunity to raise the issue of competency, the right to jury trial, speedy trial, indictment, and other adult rights.

- **Firearm Specifications.** The bill made gun and gang specs mandatory for all but mere possession of a firearm.
- **Minimum Age for DYS Commitment.** The bill dropped the minimum age at which an offender can be committed to DYS from 12 years to 10 years, but only for serious offenses.
- **Traffic Bureaus.** Each juvenile court may establish a violations bureau to deal with certain low-level traffic offenses without a formal court hearing.
- **Unruly Children.** The bill streamlined the definition of “unruly” children (truants, runaways, etc.) to exclude obsolete and redundant provisions.
- **Refinements.** In signing S.B. 179, Governor Bob Taft issued an executive order that required DYS to find private placements for any 10 and 11 year olds it receives. In addition, S.B. 179 was fine-tuned by H.B. 393 of the 124th G.A. in 2002, sponsored by Rep. Bob Latta.

What Is Happening Under S.B. 179?

There have been a handful of studies on the impact of S.B. 179. The data presented in this section come from an October 2006 report prepared by DYS researcher Bruce Sowards for the Governor’s Council on Juvenile Justice, from data gathered last fall by Carmen Naso, Chief of the Juvenile Division of the Cuyahoga County’s Prosecutor’s Office, and from other sources.

Younger Offenders. S.B. 179 reduced the minimum commitment age to DYS from 12 to 10 for some offenders. Commission members felt that the flexibility to use DYS was needed in those rare situations in which other local options were inadequate.

- As of October, 2006, no 10 year olds and only two 11 year olds have been committed to DYS. One was four days short of his 12th birthday. Both were committed for rape. Both have been paroled, but one was recommitted for a parole violation.

Perhaps the most controversial aspect of S.B. 179 was a provision that allows blended sentences for offenders as young as 10. To be a serious youthful offender (SYO) at age 10 or 11, the youth has to commit aggravated murder, murder, or a violent F-1 when certain enhancing factors are present. While these details were lost in the tumult over the

age issue, the Commission assumed that very few 10 and 11 year olds would receive SYO sentences. The blended sentence option was needed as a safeguard for very serious offenders who are too young for bindover to the adult courts.

- As of October 2006, no person younger than 12 had received a blended sentence.

Blended Sentences. Looking back at the first four years after S.B. 179 authorized blended sentences (2002-2005), DYS reports that:

- 137 youth received SYO sentences, 25 (18.2%) for sex offenses;
- Adult sentences were invoked for 4 of the 137 to date;
- Of Ohio's 88 counties, 32 had at least one SYO;
- Of the 137 SYO commitments, 50 (36.5%) were from Summit and Cuyahoga Counties;
- By race, 44.5% of the SYOs were white, 48.9% African-American, and 6.6% were classified as "other." The percentages are similar to the breakdown of felony commitments to DYS as a whole, both before and after the enactment of the law. All of the African-American SYO commitments came from 10 counties.

Interestingly, the total numbers differ in an ongoing survey being conducted by the Cuyahoga County prosecutor's office. (In part, the discrepancies probably reflect the difference between the number of SYO cases filed and the number that resulted in actual blended sentence commitments to DYS, as well as the extra year covered by the Cuyahoga data.) Here are the findings to date:

- With 84 of the 88 counties reporting, there were 291 SYO cases. Three of the four non-reporting counties are populous (Hamilton, Lucas, and Mahoning), so the number understates the total;
- While there was anxiety that S.B. 179 would make jury trials common in juvenile court, only 10 of these cases involved juries;
- The adult sentence was invoked in 15 cases;
- Only 7 counties have not filed an SYO charge;
- Some respondents prefer to use bindover for serious cases. Some have been deterred from blended sentences by the adult safeguards and related practicalities (the right to bond, a jury trial, and a speedy trial; a dearth of places to hold hearings; *etc.*). Some prosecutors complain that, after all the work, the judge can still opt for a traditional juvenile disposition rather than a blended sentence.

The latter points are similar to comments reported by Delaware County Juvenile Court Magistrate David Hejmanowski in his 2004 report, which were included in the Commission's 2005 Monitoring Report.

Firearm Specs. In an effort to raise the stakes for using a firearm in the commission of felony delinquent acts, S.B. 179 clarified the application of the gun specifications in juvenile cases. According to DYS:

- DYS received juveniles with a total of 130 gun specs in the five years before S.B. 179 took effect (an average of 20.5 per year). The number jumped to 292 in the first four years under S.B. 179 (an average of 62.8 per year).
- 33 of Ohio's 88 counties sent a youth to DYS on a firearm spec from 1995-2004. A total of 422 gun specs were imposed.
- 76% of the firearm specs were imposed in five urban counties: Cuyahoga (23%), Franklin (17%), Hamilton (14%), Mahoning (11%), and Montgomery (11%). As a result, the vast majority were imposed on African-American (81.3%). The percentage was about the same before and after S.B. 179.

DYS Population. DYS's RECLAIM Ohio program gave counties an economic incentive to deal with young offenders locally. It provided a concomitant fiscal disincentive to sending youth to DYS facilities. As a result, the total DYS population has decreased significantly since RECLAIM began in 1995. According to DYS, felony admissions were 2,795 in 1995, but only 1,463 in 2005, a decrease of 47.7%.

There was concern that S.B. 179 would offset the reductions under RECLAIM. However, other than an up tick during the first year of S.B. 179 (2002), the declines have continued, albeit at a slower rate.

Juvenile Sentencing Topics for Further Study:

- **Competency.** Adult standards for when an alleged offender is competent to stand trial work in principle for juveniles, but juveniles have developmental and maturity issues that are largely irrelevant to adult offenders. As the stakes get higher for juvenile offenders, there is a need to develop a competency statute that is specific to juveniles, particularly in light of the decreased DYS admission age in S.B. 179 coupled with the potential adult sentence for SYOs sentenced in juvenile court. The type of facility or program needed to deal with juveniles found incompetent must be a critical component.

The Sentencing Commission crafted a juvenile competency standard several years ago, with input from the Department of

Mental Health and others. A tight budget put the proposal on hold. Justice Evelyn Stratton put together a work group to advance the issue. A report is expected soon.

- **SYO Simplification.** Both the Naso and Hejmanowski studies of blended sentencing indicate a need for improving SYO procedures to make them more workable. In the Sentencing Commission's debates leading to the proposals that became S.B. 179, the Commission settled on a vague standard that would allow each jurisdiction to tailor a procedure that fits its needs. The time may be right to more clearly instruct juvenile courts in SYO procedures.
- **Extended Juvenile Jurisdiction.** In the report underlying S.B. 179, the Sentencing Commission not only recommended blended sentencing, it also suggested extended juvenile jurisdiction (EJJ) for certain offenders. The first draft of S.B. 179 would have authorized EJJ until age 23 or 25, depending on the offense and the offender. After initial support, the Department of Youth Services came to oppose the plan in the General Assembly, particularly as budgets tightened.

Some practitioners contend that EJJ makes sense for the juvenile system, perhaps making SYO a more widely used tool. Some advocates favor more time under the rehabilitative and focused juvenile system to improve offenders and reduce recidivism. Arguably, reduced costs in the adult system could partially defray increased costs to the DYS system, especially if EJJs were supervised in the community, rather than incarcerated, from age 21 to age 25.

- **Adult Penalties in Juvenile Court.** Generally, the Criminal Code sets the parameters of misconduct in juvenile delinquency cases. Sometimes juvenile penalties are significantly different from those available for adults, making the consequences of bindover to adult court or blended sentences very dramatic. It may be time to review how adult penalty changes should apply to juvenile offenders.

ADULT MISDEMEANOR SENTENCING

The Reforms: H.B. 490

The Commission first submitted a plan for sentencing misdemeanants and for redistributing revenue from fines and costs in 1998. The 124th General Assembly enacted much of the plan as H.B. 490, effective January 1, 2004. The fine revenue recommendations were not included.

Sponsored by Representative Bob Latta, H.B. 490:

- Brought direct sentencing to an organized continuum of sanctions to misdemeanor law;
- Increased the maximum fine for the most common offenses (minor misdemeanors) from \$100 to \$150, producing greater revenue;
- Expanded restitution opportunities for victims;
- Encouraged greater use of community service and new monitoring technologies;
- Required mayor's court registration and reporting.
- **Refinements.** Tweaking restitution law occurred in 2002 as part of H.B. 52 of the 125th G.A., sponsored by Rep. Jim Hughes. That bill made clear that restitution does not apply in minor misdemeanor cases and in traffic cases that do not require a court appearance. H.B. 52 also clarified that restitution is not available for "non-economic" losses such as pain and suffering, loss of consortium, mental anguish, punitive damages, and other intangible losses. These limitations also apply in felony and juvenile cases. In addition, H.B. 52 made clear that restitution is an *option* for the court, not a mandate.

Misdemeanor Topics for Further Study:

- **Jail Crowding.** Increases in jail terms for impaired drivers, the preferred arrest policy in domestic violence situations, the longer detention of pre-trial felons, the growing number of community sanction violators, and the guidance in favor of community sanctions for low-level felons under S.B. 2 have combined to put pressure on local jail populations. Since jails are, bed-for-bed, the most expensive sentencing option, the time has come to take a long look at the problems with an eye toward lasting solutions.
- **Unclassified Misdemeanors.** The Revised Code contains a number of regulatory offenses that are not classified as M-1s, M-2s, M-3s, M-4s, or minor misdemeanors. Some are not classified because the fines and jail terms do not fit within a tidy category. While not a pressing issue, unclassified misdemeanors should be classified so that sentencing rules and sanctions are clear.
- **Fines and Costs.** Ohio's complex system for assessing and collecting fines and costs differs from jurisdiction to jurisdiction. The system is sometimes played to the advantage of municipalities at the expense of counties. Several years ago, the Sentencing Commission laid some groundwork on these issues.

Recognizing there will be local winners and losers, counties and municipalities should decide whether there should be a more equitable formula to govern distribution of revenue from these economic penalties.

- **Mayor’s Courts.** Mayor’s courts handle thousands of traffic cases statewide in a given year. They tend to be “profitable” cases in which a guilty plea is likely and trials are rare. Setting aside the contentious debate about the future of mayor’s courts, there are more prosaic issues that should be addressed, including the inability to use the payment plans or extensions authorized by S.B. 123 to help drivers pay license reinstatement fees.
- **Mechanical Issues.** Relatively few technical issues have been raised since the enactment of H.B. 490 and H.B. 52. However, in exempting minor misdemeanors and minor traffic cases from restitution, H.B. 52 provides that the basic purposes and principles of sentencing do not apply in these cases. That seems to eliminate the need to consult basic principles (such as proportionality and fairness) in sentencing MMs and in setting payment schedules for Rule 13 cases. Several other statutory issues linger, including how recent changes to public indecency law (S.B. 245) affect penalties when the victim is a minor.

TRAFFIC REFORMS

The Reforms: S.B. 123

The Sentencing Commission’s traffic proposals first reached the General Assembly at the end of 1998. After scores of hearings over two sessions, the 124th General Assembly enacted S.B. 123 in 2002. The bill took effect January 1, 2004. Sponsored by Sen. Scott Oelslager, S.B. 123:

- Consolidated traffic offender provisions in new Chapter 4510, standardized license suspension law, and merged penalties with substantive offenses;
- Made it easier for deserving drivers to stay valid through flexible payment plans, particularly for impaired driving and insurance-related offenses, and allowed driving privileges during suspensions for legitimate medical, treatment, and educational purposes;
- Made it harder to lose a license through speeding alone, but toughened penalties for underage alcohol offenses, hit-skip cases, and for fleeing or eluding law enforcement;
- Expanded the use of restricted license plates and immobilizing technologies;
- Created a new physical control offense to cover persons who are intoxicated in the driver’s seat but not operating the vehicle.
- Eliminated seizures and forfeitures of innocent parties’ vehicles, but beefed up the law on wrongfully entrusting a vehicle to an unlicensed, uninsured, suspended, or impaired person.

- **Refinements.** The traffic package was modified by the 125th G.A. in H.B. 52 (Rep. Jim Hughes) and H.B. 163 (Rep. Scott Oelslager), effective June 1 and September 23, 2004, respectively. H.B. 52 focused on vehicular homicides in construction zones and related offenses. H.B. 163 dramatically changed the felony OVI law to mandate prison terms for a sixth OVI within 20 years, to increase penalties for refusing to submit to a test when the offender has a prior OVI within 20 years, to require courts to keep records for longer periods, and to refine other provisions.

The Reforms: S.B. 107

The Commission's suggestions for rewriting the vehicular homicide and assault laws were enacted in S.B. 107 (Latta), effective March 23, 2000. That bill increased the penalty for impaired aggravated vehicular homicide and made it easier to prove, created a new vehicular manslaughter offense, removed minor misdemeanor traffic offenses from involuntary manslaughter law, and made other changes.

Key Changes Since S.B. 123 and S.B. 107

Since then, there have been relatively few changes regarding traffic offenses in general. However, bills last session affect two key areas:

- S.B. 8 (Austria) set presumptive levels for proving impaired driving based on operating under the influence of marijuana, powder and crack cocaine, amphetamines, methamphetamines, heroin, LSD, phencyclidine (PHP), and their metabolites. The bill does not set presumptive levels for commonly abused drugs such as morphine, codeine, synthetic opiates such as Demerol and Methadone, Ecstasy, Valium, Xanax, or rohypnol. In fact, it contains an exception for prescription drugs that are taken as directed.
- H.B. 461 (Wolpert) increased the mandatory prison term for OVI-related vehicular homicide to at least 10 years when the offender has committed three or more prior OVIs or related offenses. Mandatory license suspension periods also increased.

Traffic Topics for Further Study:

- **Drugged Driving.** While no immediate action is recommended, S.B. 8 should be monitored with an eye toward making it work fairly and effectively in reducing impaired driving.
- **Nuts and Bolts Issues.** The Commission continues to monitor S.B. 123 and compiled a list of traffic-related issues that judges and

other practitioners would like to address. The staff drafted language on each of these.

ASSET FORFEITURE REFORMS

The Reforms: H.B. 241

Asset forfeiture is one of criminal law's touchiest topics. Forfeitures can stymie economic misdeeds by making offenders surrender their criminal tools and ill-gotten gains. But forfeiture is an intrusive tool. It encourages law enforcement to reach beyond traditional penalties into an offender's wallet, car, and, perhaps, home.

§181.25(B) called for the Commission to make proposals to improve the state's complex statutes governing the forfeiture of property used in misconduct. The Commission worked to reform Ohio's asset forfeiture laws in a way that's mindful of the interests of both government and the individual. It focused on the Byzantine forfeiture statutes governing drugs, rackets, gangs, Medicaid fraud, and contraband.

The Commission submitted its forfeiture plan in 2003. Concerns were addressed, and House Bill 241 was introduced by Rep. Bob Latta in the 126th G.A. Both houses approved the bill in December 2006.

H.B. 241 should make Ohio's asset forfeiture law easier to understand, more consistent, and fairer. The bill takes effect July 1, 2007. It:

- Greatly streamlines forfeiture law into a new Revised Code chapter;
- Makes the purposes of forfeiture law clear;
- Simplifies forfeiture statutes by more clearly defining terms and providing simpler rules for what is forfeitable;
- Protects individual interests by:
 - Formalizing a hardship release process;
 - Providing guidance on the link between property and alleged misconduct;
 - Requiring the amount forfeited to be proportionate to the misconduct;
 - Laying out a quicker process for vehicles and personal, business, and governmental records;
 - Setting up a pre-seizure review for real estate; and
 - Otherwise safeguarding the rights of innocent parties such as true owners, lien and security holders, law-abiding spouses, and business associates;
- Protects the public interest by:

- Affording more tools to protect forfeitable property;
- Creating a new crime of transferring, hiding, or diminishing the value of property subject to forfeiture;
- Making the burden of proof “a preponderance” of the evidence in civil forfeiture cases rather than “clear and convincing evidence” used in some statutes;
- Clearly giving the State or political subdivision the right to a jury trial in civil forfeiture cases; and
- Authorizing criminal forfeitures in Medicaid fraud cases;
- Protects victims’ interests by prioritizing the victim’s right to receive restitution or a civil recovery from forfeited assets;
- Retains the basic formulas for distributing forfeited assets: amounts from forfeited contraband, proceeds, and instrumentalities would go largely to law enforcement agencies. As now, amounts from other property room “forfeitures” would go largely to the appropriate general fund.

Forfeiture Topics for Further Study: Since the ink is barely dry on H.B. 241, no major issues have arisen. However, there are two forfeiture areas not addressed by H.B. 241 or S.B. 123 (traffic offenses):

- **Wild Animals.** Current law requires forfeiture in cases involving the unlawful taking of animals (§1531.20). It contemplates a prompt, summary forfeiture. If you shoot the pheasant out of season, you forfeit the gun, bullets, and pheasant. Since the stakes typically are small and the need for prompt action great, summary forfeiture makes sense for the animals taken and items of limited value used in the taking.
 However, §1531.20 also allows seizing any vehicle or boat used to unlawfully take and transport animals. Given the value of the property potentially seized, an argument could be made that these forfeitures should be treated as mobile instrumentalities under H.B. 241 and that expensive equipment—such as large fish nets—should follow the new “instrumentality” rules.
- **Trademarks.** Currently, goods produced in violation of a trademark, and the tools and equipment used to produce them, may be forfeited under §2913.34(D). Summary forfeiture of the goods produced makes sense. However, one could argue that the equipment used to produce the forfeitable goods should fall under the “instrumentality” rules of H.B. 241.