Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
November 19, 2009

MEMBERS PRESENT
Common Pleas Judge Jhan Corzine, Vice-Chair
Chrystal Alexander, Victim Representative
Paula Brown, Ohio State Bar Association Delegate
Juvenile Judge Robert DeLamatre
Prosecutor Laina Fetherolf
Defense Attorney Kort Gatterdam
Municipal Judge David Gormley
Bob Lane, representing State Public Defender Tim Young
City Prosecutor Joseph Macejko
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
Representative Tyrone Yates
Steve VanDine, representing Rehabilitation and Correction Director Terry Collins

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Eastern Ohio Correctional Center
Lynn Grimshaw, OJACA
Jim Slagle, Attorney General's Office
Gary Yates, Chief Probation Officers' Association

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

GUESTS PRESENT

Jim Brady, interested citizen
Brad DeCamp, Department of Alcohol and Drug Addiction Services
Tori DelMatto, Correctional Institution Inspection Committee
Monda DeWeese, SEPTA Correctional Facility
Phil Nunes, Ohio Community Corrections Association
Ed Stockhausen, legislative aide for Senator Smith

Common Pleas Court Judge Jhan Corzine, Vice-Chair, called the November 19, 2009, meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m.

DIRECTOR'S REPORT

Executive Director Emeritus David Diroll reviewed contents of the meeting packets which included: a summary of the *Colon* Work Group report; a copy of his letter sent in response to Rep. Tyrone Yates' request for comments on pending legislation before the House Criminal Justice Committee; a summary of pending "sexting" and "texting" bills; an LSC Summary of a bill proposed by Rep. Huffman regarding juvenile sex offenders; a letter from the Department of Rehabilitation and Correction addressing concerns about post-release control; the latest Judicial and Legislative Updates; and minutes from the October meeting.

He reported that he has invited representatives from the Council on State Governments to speak about their audit of Ohio's criminal justice system with a focus on the prison population. They are unable to come until sometime after the New Year.

Director Tom Stickrath from DYS will likely be at the December meeting to discuss current bills related to juvenile issues, he reported.

Law Clerk Shawn Welch added that the bill proposed by Rep. Huffman, not yet introduced, would address juvenile sexual offender reporting and notification (SORN) issues. He noted that the proposed bill might be affected by four cases recently argued in the Ohio Supreme Court regarding S.B. 10 and the federal Adam Walsh Act.

***BARNES* AND POST-RELEASE CONTROL**

Dir. Diroll turned attention to three consolidated Ohio Supreme Court cases dealing with post release control (PRC) issues. Statute explains that, at sentencing, the judge has an obligation to tell the offender that he faces mandatory or discretionary PRC upon release from prison and to specify the amount of time. That includes: a mandatory PRC period of 5 years for F-1 and F-2 offenders, violent F-3 offenders, and felony sex offenders; and potential PRC supervision of up to 3 years for all other felons. A recent article in the *Columbus Dispatch* claimed that slip-ups on including this information at the time of sentencing could result in freeing 14,000 or more inmates from PRC supervision.

According to Dir. Diroll, by enacting §2929.191 in 2006, the Legislature attempted to address the problem by allowing sentencing entries that did not properly meet the requirements of §2967.28 and §2929.19 to be corrected by resentencing the defendant before release from prison. Once the inmate was released, however, the entry could not be corrected. The Ohio Supreme Court has upheld this remedy.

DRC Research Director Steve VanDine reported that, of the first sample of 79 cases that the APA staff looked at, 74 did not meet the standards set by the Supreme Court, which meant that 90% would be dropped from supervision. After approximately 400 more cases were reviewed, the percentage was still 90% that would be released from supervision. Ultimately, it appears that 8-10,000 parolees could be released from PRC supervision.

A second legislative attempt to fix the problem, said Dir. Diroll, is §2929.14(F)(1), which automatically places any offender classified for mandatory PRC by statute, to receive the mandatory supervision, irrespective of what the judge actually said at sentencing. Again, the Ohio Supreme Court upheld the change, stating, "The failure of a court to include a PRC requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of PRC that is required the offender under §2967.28(B)."

Representing the Attorney General's Office, Atty. Jim Slagle remarked that the Ohio Supreme Court said nothing in that division provides that the Executive branch may impose PRC if the sentencing court has not ordered it.

Dir. Diroll agreed that the Justices did not overrule the section but intimated that judges need to make it clear that the offenders will have PRC supervision upon release.

It is the failure to include a clear statement of a time certain ("3 years" or "5 years"), said Mr. VanDine, that is invalidating the PRC.

According to Atty. Slagle, the Supreme Court is expressing frustration with sentencing judges because the issue has been decided and ruled on numerous times and they still are getting it wrong.

Dir. Diroll asked whether there was anything the Commission could do to help correct the problem.

It is probably not a matter for the Commission at this point, Judge Corzine remarked, since the Ohio Supreme Court has basically said "Judge, you did it wrong. Now do it right." The judges just need to be more specific in their sentencing entries.

It is sometimes hard to tell from the statutes, said Judge Corzine, whether some post release control terms are optional or mandatory, which further complicates matters.

DRC is trying to help the courts, said Mr. VanDine, by checking which cases need reviews and making the necessary modifications. He admitted, however, that it could still affect some people in the future. If they're on post release control now and DRC finds that the journal entry is wrong, they release them from supervision.

RECKLESSNESS

Dir. Diroll explained that problems with the current definition of "recklessly" in §2901.22 have slowed the work of the group studying gaps in culpable mental states of various crimes, which grew out of the Ohio Supreme Court's *Colon* decisions. The Commission earlier decided to suggest ways to fill gaps in the statutes to the General Assembly.

If a statute does not clearly indicate strict liability and doesn't contain a culpable mental state, then it defaults to "recklessly," noted Dir. Diroll. The current definition of "recklessness" raises flags with its archaic language, since it calls for "heedless

indifference" and "perverse disregard". The *Colon* Work Group has not agreed on a suitable definition.

The Work Group identified two options: tweak the current definition by modifying the obsolete language; or switch to the Model Penal Code (MPC) definition. Over 30 states use variations of the MPC definition, but the General Assembly, which adopted many other aspects of the MPC in 1972, chose a different definition of "recklessly". The State Public Defender's Office would like Ohio to adopt the MPC definition.

Here are the choices, in detail:

Option A involves an altered version of the current definition:

> §2901.22 (C) "A person acts recklessly when, with indifference to the consequences, he unjustifiably disregards a known risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with indifference to the consequences, the person unjustifiable disregards a known risk that such circumstances are likely to exist."

Option B offers a modified version of the Model Penal Code definition:

> "A person acts recklessly with respect to a material element of an offense when that person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from that person's conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to that person, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. A person who creates such a risk solely by reason of involuntary intoxication also acts recklessly with respect to such risk."

Option A, said Atty. Welch, changes "perversely disregards" to "unjustifiably disregards" because the subcommittee agreed that "perversely" has unintended sexual connotations that can confuse jurors.

The Commission staff, said Dir. Diroll, will survey judges, defense attorneys, and prosecutors to see which of the two definitions they feel is most workable.

Judge Corzine reported that this issue is already on the agenda of the Common Pleas Judges' Association meeting next week.

Atty. Welch noted that the definitions reflect a proposal by Atty. Bob Lane, from the State Public Defender's Office, to make the definitions gender-neutral by substituting the word "actor" for "he".

Atty. Lane explained that he recommended use of the word "actor" because it is already used in numerous statutes to discern "actor" from "reasonable person".

Atty. Slagle remarked that he prefers the use of "he" or she" or "defendant".

Judge Corzine argued that most legislation uses "person".

Prosecutor Laina Fetherolf suggested changing "the actor" to "that person".

Atty. Slagle would also like to change "gross deviation".

Judge Corzine recommended letting the practitioners being surveyed offer their opinions before tweaking the language any further. He added that most other states kept that language from the Model Penal Code.

Representing the Fraternal Order of Police, Jason Pappas said that simplicity is the biggest concern for law enforcement which causes him to lean toward the Option A version of the definition.

SIMPLIFICATION

Dir. Diroll reported that he finally got a draft back from LSC on the Commission's proposals to simplify the Revised Code by removing certain redundant and unneeded phrases. There is interest from practitioners in the proposal, he added. The problem is that it would change the basic drafting conventions used by LSC, so the proposals may have to be presented formally to the entire Legislative Service Commission.

Dir. Diroll said he would pursue the matter in 2010.

DNA: S.B. 77

Judge Corzine reported that, on December 1, he plans to attend an "interested party" meeting to discuss S.B. 77 which deals with DNA testing of criminal suspects and improvement of eyewitness identification procedures. Sponsors of the bill are hoping to move the bill along quickly.

PRISON CROWDING: S.B. 22

Mr. VanDine reported that parts of S.B. 22 could be incorporated into the pending budget proposal, including some items suggested by the Sentencing Commission.

According to Phil Nunes, representing the Ohio Association of Community Corrections, the *Columbus Dispatch* reported that parts of S.B. 2 were folded into H.B. 318 and a substitute version is out with a vote planned in December.

SEXTING/TEXTING

Among the bills pending before the House Criminal Justice Committee is one dealing with "sexting," the act of transferring nude or sexually explicit photographs by mobile phone. The key bills addressing the issue are H.B. 132 and S.B. 103. Atty. Welch explained that since the act is mostly being committed by teens, many states are treating it under their child pornography statutes. The result is trapping teens under the SORN law (registration as sex offenders) and other felony sanctions. One study claims that 20% of today's teens report having sent sexually suggestive images or messages via cell phone. 33% of teen boys claim to have received messages containing nude or semi-nude images, originally meant to be private, from other teens. Under current

law the possible charge would be possession of child pornography, which means that everyone involved could face the same charge whether they took the photograph, received it, or forwarded it.

Prosecutor Laina Fetherolf remarked that teens are so active with the cell phones, including sending pictures and text messages, that they tend to think of "sexting" as a joke and don't realize they are creating a permanent record.

According to an article in the Columbus (Georgia) *Ledger-Enquirer*, one 17-year-old female claims that "Everybody knows somebody who either sent or has seen those kinds of pictures. The boys do it for the shock value or because they think it's fun, and girls are trying to … impress their boyfriends …"

The use of mobile technology has increased to such a degree, said Judge Coleen O'Toole, that 20 hours worth of video is uploaded to YouTube per minute. Add that to the fact that teens are much more open about sexual issues, it is not surprising that the two would eventually merge.

Eugene Gallo, representing the East Ohio Correctional Center, suggested making the person who pays for the phone responsible instead of criminalizing the act of teens.

Representing Ohio Justice Alliance for Community Corrections, former prosecutor Lynn Grimshaw noted that, with the internet, anything that gets sent out into cyberspace is out there forever for the whole world to discover. It tends to be a status offense since the issue involves the action of teens. He suggests decriminalizing it for teens.

There are several acts being charged as "sexting", said Atty. Welch. One is the act of the teen sender taking a sexually oriented photo of him/her and sending it to another teen. Another is the passive act of receiving the photo. A possible third act might involve the receiver of that photo sending it to others. He pointed out that some teens are being charged with child pornography for each of these actions.

The key difference, said Juvenile Judge Robert DeLamatre, is between knowing participation by the person who takes the initial picture and sending it to an intended recipient and the act of sending it beyond that point without approval. He argued that, regardless of whether the act is done by video or phone, the implication is the same since videos can now be done by phone.

The proposed statute, said Atty. Welch, specifies the use of any "telecommunication device".

Regardless of the device used, Atty. Grimshaw contended that if the ex-boyfriend, out of spite, sends the received picture(s) on to others, the act should be regarded as more serious.

Atty. Welch pointed out that the two bills address only acts of "sexting" by minors, not adults. Current felony law governing nudity-oriented matter would remain for adults.

Current law addresses it as illegal use of a minor in sexually oriented material, said Atty. Slagle. He stressed the need to start with what

current law says. The act of taking a photograph involving nudity of a minor is an F-2 offense. If someone sends it to another person, the person who receives it can be charged with the act of possessing the photo, an F-5. He agrees that these consequences are overly harsh for teens, so the challenge is to determine how to adjust the consequences. If a new offense is created to focus on the act by a teenager, then existing law must be adjusted to continue to accommodate the offense if committed by adults. He recommended changing "no person" to "no adult".

The question, Judge O'Toole argued, is whether it is regarded as sexually deviant behavior.

Like the law of defamation, Dir. Diroll, said that the "republication" could be treated more harshly.

Atty. Slagle emphasized that the teenage boyfriend must be discouraged from sending his girlfriend's picture out to others.

Under these bills, said Atty. Lane, every recipient would be subject, or at least vulnerable, to receiving child porn under §2907.322(A)(5). When current law was written, any person receiving pornography had to take an active step to possess it, since it was mostly only available through printed matter or videos that had to be purchased. With today's technology, however, a message or photo can get onto your phone or computer before you even turn it on, he argued. It can make the recipient vulnerable without his knowledge.

Dir. Diroll pointed out that with today's telecommunication devices, a person possesses a message sent to them even if it's unopened.

Judge Corzine suggested amending §2907.323 so that it only applies to an adult defendant. Under §2907.324, the act of sending out the nude photo could be an M-3 or M-4 offense if the person being photographed consents to the act, and an M-1 offense if the person being photographed does not consent.

Pros. Fetherolf expressed concern about making a law involving what someone does with their own body. She declared that it is not her job to parent someone else's child. The parents, she insisted, need to be taking care of this.

Mr. Nunes asked how far we plan to go in criminalizing human behavior. Comparing the act of "sexting" to the act of "mooning" in the 1960's and 1970's, he declared that the judicial system cannot put a scarlet letter on all juveniles who act foolishly.

Acknowledging that it is an unruliness status offense, Judge DeLamatre remarked that the bigger problem is that it puts pictures out for predators to see. He is more concerned if sexual activity is depicted.

Judge Corzine agreed that it might be necessary to find that distinction between sexual conduct and sexual activity in these cases. Given that the legislators are under pressure to find an adequate response to public concerns, the challenge is finding a balance between getting juveniles to recognize the consequences of actions and how to determine the appropriate consequences without destroying the juveniles' future over a moment of foolishness.

Sometimes, said Pros. Fetherolf, the public doesn't realize what the consequence could be of what they're asking.

It is particularly tricky, said Atty. Slagle, since it involves technology that didn't exist a few years ago.

There are pressures on both sides of the aisle, said Representative Tyrone Yates, and it is not possible to respond to every public concern. As Chairman of the House Criminal Justice Committee, he has decided to hold a few bills until adequate research can be conducted on the issues. The primary goal with these two particular bills, he said, is to pass a bill that has a consequence but will not result in mandated sex offender registration for the juvenile defendant.

Atty. Welch opined that the bill might be the best way to prevent mandatory sex offender registration for the juvenile offender. It is important for juveniles to see that there are repercussions. As the result of the social stigma, one girl committed suicide after her photo went public without her knowledge.

Judge O'Toole suggested making the first commission of the offense a status offense (unruly act) and Judge Spanagel suggested kicking the third offense up to the felony level.

Noting the emphasis placed on receiving these photos, Sen. Shirley Smith argued that a young girl who allows these pictures to be taken of her body, whether by herself or someone else, has to take some ownership in the act.

Division (B) would address that, said Judge Spanagel. If the girl has created the picture and sent it, she could be charged with an M-1.

Judge Corzine would like the state of mind required to be "knowingly" for the act of receiving the photos. It needs to apply to "knowing" what is in the transmission.

Simple reception of the picture should be taken out of the bill, Atty. Lane insisted, since the recipient has little or no control over that. If received and forwarded, however, that involves an additional act and should carry a consequence.

If the recipient asked for the photo, said Judge O'Toole, then it becomes a matter of soliciting.

Due to the rapid progression in technology, it might be best, said Judge Spanagel, not to limit it to a telecommunication device. Everyone quickly agreed.

After lunch, City Prosecutor Joseph Macejko suggested a standard of "recklessly" for everything except possession, which should be "knowingly possess". He also suggested changing "telecommunication device" to "by any means".

Atty. Slagle prefers to eliminate "recklessly" and making all of it "knowingly". Noting that the degree does not make a lot difference in

juvenile court, he suggested making possession an M-4 since disseminating the photos is the worst of the offenses.

Judge DeLamatre noted that if the offense is made a status offense, then it smoothes the road to eventually allowing expungement.

Judge O'Toole asked how this would affect things if the teen merely wants the picture for themselves for their own computer.

It goes back to whether there should be culpability on the part of the person whom the picture is of, said Judge Spanagel.

Judge Corzine recommended striking "receives" and "possess" from §2907.322(B).

Because it is too easy to innocently receive something, Atty. Lane recommends deleting "receive" from both parts and eliminating the reception exception, since there is no act involved to receive it.

If a person requests a copy of the picture, said Judge O'Toole, then there's an act involved.

Dir. Diroll summarized the **Consensus** as: 1) To remove juveniles from current law of "distribution of nudity related matter" under §2907.323(B); 2) Not to limit the offense to telecommunication devices; 3) Use the culpable mental state of "knowingly"; 4) Consider deleting "receiving"; and 5) Change "exchange" to "transfer or disseminate" and make it an M-1 offense.

Judge O'Toole suggested M-3 or M-4 for the first offense, noting that the person who sends it needs to accept some responsibility.

Judge Corzine asked Rep. Yates if it is helpful for the Commission to recommend specific language or just list concerns and recommendations.

Specificity is most helpful, said Rep. Yates, but you don't necessarily have to be too specific – just get us in the ball park.

Pros. Fetherolf pointed out that, from a practical standpoint, her county can't afford to send everything such as cell phones off to BCI&I if it comes down to means of proving recent of these photos.

Atty. Welch reported that Montgomery County has a sexting diversion program with a class for juvenile offenders to attend.

Judge Corzine agreed with Rep. Yates that the key concern is to make sure that the final statute prevents "sexting" from being an offense that requires registration as a sex offender.

Dir. Diroll asked if the level of offense should elevate if the act is repeated by the defendant.

The first offense will hit an act of diversion, said Judge DeLamatre. A second and third act may need further assessment because it begins to demonstrate some action of deviance.

Acknowledging that the effort here is to recognize the action of "sexting" as a status offense, Judge O'Toole remarked that, overall, she doesn't feel that sending a naked picture of oneself to a boyfriend should be regarded as a felony with lifetime criminal consequences. The intent is to prevent exploitation and defiant behavior in sexually explicit material.

The Criminal Justice Committee, said Rep. Yates, wants to send the message that "sexting" is a behavior that is inappropriate.

This remedy, said Judge Corzine, basically defines it so that it is not an offense that warrants lifetime sex offender registration.

Atty. Lane cautioned that Ohio cannot say we are immunizing any offense from future federal guidelines regarding sex offenders (H.B. 180, Adam Walsh Act).

It is not criminal for an adult to send a sexually explicit picture of themselves to a boyfriend or girlfriend, said Judge O'Toole, so why should it be considered inappropriate for a juvenile? By the very nature of labeling this as a status offense means that it is allowed for adults, but not for juveniles.

We have status offenses, said Judge DeLamatre, because of developmental disadvantages and levels of maturity. Since juveniles have a tendency not to think of the long term consequences of their actions, certain acts by juveniles are recognized as crimes because they are injurious to the juvenile's health, safety or morals.

To prevent it from being labeled as a sex offense, Judge O'Toole recommended placing it under the "unruly" statute instead of the sex offense statute.

The "unruly" statutes are more generic, said Dir. Diroll. It could be confusing to add something this specific. The real issue, he said, is determining what the penalty level should be. It might be best to specify that the conduct is "unruly" conduct on the first offense and then let it kick into the misdemeanor level for a subsequent offense.

Atty. Lane agreed with Judge O'Toole that it is a behavior that should not result in a label of juvenile delinquency.

An underlying basis for this bill, said Rep. Yates, is that schools currently have no basis for prohibiting this behavior.

In that case, said Judge O'Toole, the code of conduct needs to be dealt with within the school district.

TEXTING WHILE DRIVING

The seven "texting" bills boil down to five main issues, said staff Atty. Welch. These include:

1) Should this be a primary of secondary offense?
2) What is the appropriate penalty level and fine?
3) What activities should be prohibited: Texting? Browsing? Talking? Hands-free devices?
4) Does "typing" include dialing? and

5) Should adults and minors be held to different standards?

Some municipalities have ordinances requiring "full time and attention" to driving, said Judge Spanagel. This addresses actions such texting, reading, eating food, or anything else that distracts the driver. He wonders if there should be a state full time and attention law.

An officer generally does not have probable cause to stop a driver, said Judge Corzine, unless there is something in the driving that causes them to question the driver's capabilities. The driver usually gets pulled over first for something else, such as swerving.

Judge DeLamatre noted that "full time and attention" covers all forms of distraction.

Judge Spanagel suggested establishing a "full time and attention" statute with a subsection to include certain specifics such "texting".

A consensus was quickly reached that "texting while driving" warrants some kind of legislation.

Judge Spanagel suggested narrowing it down to audio communication versus non-audio communication, juvenile versus adult, and hands free versus non hands free telecommunication.

Atty. Lane warned that he sees some serious Fourth Amendment issues emerging. He noted that there is evidence that talking on a cell phone or texting while driving is comparable to driving drunk.

The overall focus, Judge DeLamatre remarked, is public safety.

Dir. Diroll pointed out that legislation addressing this issue is coming on either the state or federal level.

Since juveniles are less experienced drivers and overly confident, Judge Corzine wondered if there should be different standards for adults and juveniles.

If it is a secondary offense, then Judge Spanagel suggested that the standards should be the same for adults and juveniles.

Because adults have more driving expense, Judge Corzine wondered if the level of penalty should be different for adult and juveniles.

Defense Attorney Paula Brown pointed out that juveniles can text better and faster. Some can do it blindly.

There are other traffic offenses that have different penalties for juvenile drivers, said Dir. Diroll, because juveniles are still in a probationary period. The juvenile drivers are not charged with a higher level of offense, but face suspension for fewer violations, he added.

Asking how an officer can tell if the driver is texting or dialing, Pros. Fetherolf contended there will be problems of proof.

Judge Spanagel asked if these actions will warrant points. Since it involves operation, he assumes that they probably will. That would most

likely apply to both juveniles and adults. Because the action deals with operation of the motor vehicle, he declared that it should be placed under Chapter 4511 which deals with "operation", rather than Chapter 4507, which deals with "licensing".

The theory, said Atty. Slagle, is that "texting while driving" needs to be prohibited just like speeding is, because of the danger it presents to other people on the road.

Given the speed of developments in technology, Judge O'Toole pointed out that we're going to be technologically outdated if we try to be too specific in defining the forms of communication under this statute.

Sooner or later, said Judge Corzine, we will probably end up with legislation for strict liability on some behaviors.

According to the National Transportation Board, a driver is 30% times more likely to have an accident while texting, said Rep. Yates, so he believes that making it an M-4 offense would be appropriate.

It would probably do more good to assign points to the offense than anything, said Pros. Fetherolf, since people hate the consequences of getting points.

If "texting while driving" is made an M-4, then the right to a jury trial falls into play, said Judge Corzine, which he believes will result in a lot of plea bargaining.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for December 17, 2009, January 21, February 18, March 18, April 22, May 20, June 17, and July 15, 2010.

The meeting adjourned at 2:30 p.m.