Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
February 18, 2010

MEMBERS PRESENT
Common Pleas Judge Jhan Corzine, Vice-Chair
Chrystal Alexander, Victim Representative
Defense Attorney Kort Gatterdam
Municipal Judge David Gormley
Jason Hilliard, Prosecuting Attorney
Ken Kocab, Staff Lt., representing State Highway Patrol Superintendent Col. David Dicken
Bob Lane, representing State Public Defender Tim Young
Mayor Michael O'Brien, City of Warren
Sheriff Albert Rodenberg, Clermont County Sheriff
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Ernie Moore

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
JoEllen Cline, Legislative Counsel, Supreme Court of Ohio
Cedric Collins, legislative liaison, Youth Services
Marion Harris, State Representative
Arthur Hill, President Elect, OCCA
Tom King, legislative aide to Sen. Smith
Peggy Lehner, State Representative
Irene Lyons, legislative liaison, Rehabilitation and Correction
Scott Neeley, Rehabilitation and Correction
Caitlyn Nestleroth, House Minority Caucus
Nancy Neylon, Ohio Domestic Violence Network
Phil Nunes, Ohio Community Corrections Association
Kelsey Woolard, legislative aide to Rep. Harris

Common Pleas Judge Jhan Corzine, Vice-Chair, called the February 18, 2010, meeting of the Ohio Criminal Sentencing Commission to order at 10:10 a.m.

Judge Corzine welcomed Sheriff Albert Rodenberg as the newest member of the Ohio Criminal Sentencing Commission. He replaces Sheriff Dave Westrick, whose term expired.

DIRECTOR'S REPORT

Executive Director David Diroll announced that the Commission is losing a member since State Representative Tyrone Yates was recently appointed to fill a vacant bench on the Hamilton County Municipal Court. Since Rep. Yates was also chair of the House Criminal Justice Committee, his absence will be a great loss.

Another loss, said Dir. Diroll, is that of Jim Guy, who representative DRC on many occasions as legal counsel. He died in December.

Dir. Diroll reported that he and law clerk Shawn Welch, met with Rep. Ron Maag about his "sexting" bill, H.B. 132. They shared some of the concerns that had been raised by Commission members at recent meetings. Rep. Maag is receptive.

Dir. Diroll testified before the Joint Commission on Sunset Review, which periodically reviews all boards and commissions. Most of the group's questions centered on a discussion of prison crowding and S.B. 22 issues.

LEGISLATIVE UPDATE

Atty. Welch reported that the U.S. Senate Judiciary Committee voted to create a blue ribbon committee to study the criminal justice system over an 18 month time timeline. It is included in a bill sponsored by Senator Jim Webb from Virginia.

The first statewide report on human trafficking, said Atty. Welch, was recently released by the Ohio Trafficking and Persons Study Commission. This study ranked Toledo as having the fourth highest rate of "human trafficking" in the U.S. The report criticized Ohio for not having a stand alone human trafficking statute.

The National Survey of Youth in Custody released a report on victimization rates in detention centers. Ohio is below the national average but still has an overall abuse rate of about 11.7%.

The Department of Transportation recently prohibited interstate trucks and bus drivers from sending text messages while driving. Anyone violating this rule can face a fine of up to $2,750.

Dir. Diroll reported that the Council on State Governments is still collecting data and has remarked that Ohio does not have a lot of obvious targets for easy solutions to its prison crowding problems. He hopes to eventually have them present and discussion their findings and proposals to the Sentencing Commission.

DUS AND RESTITUTION CONCERNS

Municipal Court Judge Kenneth Spanagel raised concerns about §4510.11, driving under suspension (DUS). In an effort to reduce the workload of public defenders, the budget bill passed last summer inadvertently created a problem with DUS. It created two tiers of penalties for a DUS. Under the second tier, if the driver is convicted of DUS for child support or licensed forfeiture (either failure to appear or failure to pay a fine in a traffic or criminal case), it is an unclassified misdemeanor with $1,000 fine, no jail, and $500 community service. If no jail time is involved, no public defender is needed.

The problem, he noted, is that the change failed to differentiate the offense from other DUS offenses. Under §1.58, the judge is required to give the defendant the benefit of the doubt in any sentencing. If the defendant has only one suspension, there is no problem, but most tend to have more than one, he noted. According to statute, that means the judge must default to minor misdemeanor sentencing. Judge Spanagel does not think that was the intention of the bill.

To correct the problem, he proposes separating the offense into two DUS crimes, one of which would be the current M-1, and the other would be the unclassified misdemeanor for license forfeitures and/or child nonsupport. The charging decision would be left to the law enforcement officer, who could cite either or both. The penalty would then directly relate back to the specific crime and not "default" to a minor misdemeanor across the board. He added that efforts are being made to get this remedy added to an existing bill.

Another concern raised by Judge Spanagel relates to §2929.18(D) and §2929.28(D) regarding restitution. Generally, restitution is collected as a civil judgment by the court through its probation department, since the amount is generally relatively small. When the amount is larger, it is usually in connection with a felony. Unfortunately, there is no criminal collection procedure specified in the Criminal Code.

Judge Spanagel believes that the simplest way to remedy the problem would be to allow the criminal division to issue a certificate of judgment, in the same manner and form as the certificate of judgment issued in a civil action. This, he declared, would enable a financial sanction judgment to be established as a civil case, which would than enable the victim or other entity to collect the matter in the same manner as any other civil judgment. After all, he noted, the civil side already knows how to deal with the issue.

DOMESTIC VIOLENCE – H.B. 429

Representative Marion Harris reported that she and Rep. Peggy Lehner became interested in the issue of domestic violence and the enforcement of temporary restraining orders when the *Columbus Dispatch* did a series on the subject. They were appalled at the inconsistency of how domestic violence is handled by the criminal justice system. Urged by the need for better protection of victims and consistent treatment of abusers, they jointly introduced H.B. 429.

Rep. Lehner pointed out that their aim is not to burden the system, but to find a way to achieve more consistency and make the system more

workable. At this time, they are seeking input from numerous sources, including the Sentencing Commission.

The proposed legislation would:

- Require an arrest when a protection order has been violated;
- Establish judicial review hearings for those convicted of domestic violence;
- Require a person convicted of domestic violence to enroll in a batterer intervention program;
- Create local domestic violence fatality review boards;
- Set up a tracking system to collect the number of civil and criminal protection orders issues in each county;
- Allow the court to impose a jail term of up to one year for a first time domestic violence offender; and
- Allow the court to extend the term of a protection order until the end of probation for a domestic violence offender.

Victim Representative Chrystal Alexander asked if they thought consistency could be legislated.

No, responded Rep. Harris, but it can certainly be encouraged. Acknowledging that domestic violence incorporates a wide range of issues, she stressed the concern that a protection order is supposed to protect. If violated, the consequences should be swift. She noted that a judge in Mansfield does follow-up reviews of domestic violence offenders on a regular basis. She recognizes the challenges in a system where a victim may repeatedly recant when urged to testify.

Judge Corzine said the first thing that must be understood is that this is a crime unlike any other. It is difficult to get a conviction when the victim refuses to press charges. It is easier when you have a willing victim.

Rep. Harris had been told that a victim's testimony is not necessary to prosecute a case of domestic violence. She wondered how the crime of domestic violence got separated out from assault.

With a peace officer's testimony, Judge Corzine explained, a case of domestic violence can be charged but someone still has to be able to explain how the bruise got there. It is not uncommon for a victim to give one statement at the time of the defendant's arrest and a different story at trial. The victim obviously lied at one time or the other, yet the State must prove the abuse beyond a reasonable doubt to the jury.

Representing the Ohio Justice Alliance for Community Corrections, Lynn Grimshaw said it is imperative to discern who claims the protection order has been violated, because there sometimes are problems as to whom to arrest. He noted that if the responding officers don't make an arrest, they have to write a report explaining why. Sometimes it is easier to make the arrest, yet it is difficult to get the necessary evidence. There are no simple solutions to this dilemma.

Representing the Attorney General's Office, Atty. Jim Slagle echoed previous sentiments that, in the majority of cases, the victim often doesn't cooperate with the prosecution. He personally is not a fan of mandatory arrest. The challenge is where to find the middle ground.

According to Prosecuting Attorney Jason Hilliard, 90% of domestic violence cases have victims who recant or otherwise are uncooperative. To get around a witness that you know is going to tell a different story than told at the time of arrest, his county uses Evidence Rule 614. This allows the court to call a witness as the court's witness, which, in turn, allows the prosecutor to impeach the witness if he/she lies on the stand. Regardless of the difficulty, they still prosecute these cases. He has found that if that particular case is not prosecuted the offender is soon likely to victimize someone else.

Regarding the proposed bill, he favors the recommendation of judicial review hearings and treatment for those convicted of domestic violence. He also favors extending protection orders until the end of the probation period.

In response to questions about the proposal for local domestic violence fatality review boards, Rep. Harris explained that part of the goal is to collect more data on domestic abuse cases and find any areas where the judicial system failed to properly address the problem. Some counties, she noted, are already doing this.

Judge Corzine explained that a civil protection order (CPO), which often has a wider range, can be imposed in a civil case. A temporary protection order (TPO) is imposed in a criminal case and stays in place through the life of the criminal case.

Atty. Slagle declared that violating a protection order is a felony. It could also be prosecuted as contempt, said Judge Corzine.

In response to a concern of the Buckeye State Sheriffs Association relayed by Dir. Diroll, Nancy Neylon, representing the Ohio Domestic Violence Network, declared that all protection orders are supposed to go on LEADS.

Citing a case where a protection order violation was charged over a petty incident, Municipal Judge David Gormley feels some gradation is needed on when to use mandatory arrests.

The cases that involve obvious physical damage, such as broken bones, are easier to prosecute, said Judge Corzine. The vast majority, however, involve pushes, shoves, slaps, etc. that are not so obvious.

Dir. Diroll declared that if there are serious injuries, other assault charges, with higher penalties, can be filed.

Atty. Slagle pointed out that with domestic violence there's also an issue of pressure and control.

With domestic violence cases, said Judge Spanagel, there are people with whom we are angry and there are bad people. Anger goes away, but badness doesn't. He favors the "preferred" arrest policy. He believes that judicial release hearings are a good idea but should be optional because there is often an issue of availability. He also believes that treatment should be optional due to a lack of resources in some areas. A review board in each county is too many, he declared. Some form of tracking system, he said, might be workable, but some of the current

clearinghouses or LEADS might suffice. Otherwise funding becomes an issue. Most judges, he said, remain flexible on the amount of jail time to impose. He also believes that the decision should remain optional regarding whether to extend the term of a protection order to the end of an offender's probation. He noted that a civil protection order has a 5-year maximum (as does probation). Any temporary protection order, he said, should be deleted from LEADS when it expires.

As a former prosecutor, Sheriff Rodenberg emphasized the need to allow some wiggle room and discretion for the officer in the field. He noted that some jails are becoming "felony only" jails and don't have space for misdemeanants. With this in mind, law enforcement cannot arrest every person who violates a protection order. The court and the public, he said, have to trust the responding officer to do the right thing.

According to Ms. Neylon, when H.B. 335 passed in 1994, it required law enforcement agencies to work in conjunction with local agencies to develop policies on a coordinated response to domestic violence.

The purpose of preferred arrest, said Judge Spanagel, is to diffuse the situation and a temporary protection order arrest policy is intended to keep the situation from getting out of hand. Either way, the officers must be allowed discretion in handling the situation.

A champion is needed for domestic issues like Justice Stratton is for mental health, said Phil Nunes, representing the Ohio Community Corrections Association. He stressed the need for more research and specialized training, noting that the key is law enforcement intervention.

Rep. Harris agreed that more research is needed on the outcomes of existing programs.

Atty. Welch asked whether the bill addresses situations when the perpetrator is a juvenile or the victim is a juvenile, noting that those situations add many additional challenges to the problem.

Rep. Harris responded that there is another bill in the works addressing some juvenile domestic violence issues.

Steve VanDine, Research Director for the Department of Rehabilitation and Correction, praised the representatives for including in the proposal a focus on the need for research. He noted that DRC used to get a couple of domestic violence offenders per year, but now gets about 800 annually. There are currently 4,000 felony offenders in DRC whose crimes didn't even exist 15 years ago. He encouraged finding solutions other than prison.

Recognizing that that the issue of domestic violence is quite complex, Rep. Lehner said they are very open to suggestions.

H.B. 130 – JUDICIAL RELEASE

Director Diroll turned attention to §2929.20(C)(1), (2), and (3) which sets the time table for judicial release from prison. Judicial release, he noted, used to be called "shock probation" prior to S.B. 2. Also prior to S.B. 2, there were certain offenses that were "non-

probationable," such as those carrying mandatory prison terms. S.B. 2 changed that. If given a mandatory prison term, say under a gun spec, and the underlying offense carries a term that is not mandatory, once the mandatory term was served, the offender is eligible for judicial release on the nonmandatory term. A person serving a 5 year sentence with a 3-year gun spec would be eligible for judicial release after serving the mandatory 3-year period. The Commission intended the person to be eligible based on the remaining two year sentence, not based on the timing for filing on a five year sentence.

Dir. Diroll continued. Eligibility in the statute now says that if you have a stated prison term of a certain amount of time, you become eligible to petition for release based on that "stated" prison term. The problem is that the definition of stated prison term includes both the mandatory and nonmandatory periods. Taken literally, a person with a 3-year mandatory gun spec and a 2-year nonmandatory term for the underlying offense would have to serve the entire 5 years before applying for judicial release. That was not the intent.

Separately, the statute inadvertently prevents a person from being able to file for meaningful judicial release if serving a 5-year sentence, since he or she can only apply after serving five years.

H.B. 130, which took effect April, 2009, was supposed to clean up the discrepancy regarding five year terms, but repeated it, noted Dir. Diroll. S.B. 22 contains another attempt to fix the problem, but that bill is still hanging in the balance. In addition, attempts have been made to offer eligibility after serving 4 years on a 5-year flat-time prison term, as was the law for a time before H.B. 130.

Judge Corzine would prefer to return to the Commission's original intent, before H.B. 130.

Dir. Diroll suggested that we should explain to the legislators that there were some mistakes made in the way the statute was drafted and state that it should reflect what the law was and what the intent was before those changes, along with the recommended adjustment.

Defense Attorney Kort Gatterdam noted that a person sentenced to 2 years is eligible to apply for judicial release after 6 months but a person serving 5 years has to wait 4 years (and possibly 5 years) before applying. He wonders why the person with a 5-year sentence has to wait 4 years and suggesting giving the judge discretion about allowing the offender to apply between 2 and 5 years.

Dir. Diroll said that would be a policy change. He raised the issue merely to get back to the S.B. 2 intent. Another policy issue is that the definition for stated sentence includes jail time credit. For judicial release, however, eligibility time doesn't begin to run until the person enters a prison. So those denied bail have to wait longer to apply for release than those who received bail for the same offense. Correcting that would also be a substantive change, he noted.

Since this involves a technical correction, Judge Spanagel suggested that it should be fairly easy to get it included in another bill.

RESTITUTION

After lunch, the discussion returned to restitution under §2929.18. Judge Corzine noted that the provisions of §2929.18 are odd because, unlike other financial sanctions, the statute doesn't make restitution a judgment, instead calling it an enforceable "order".

According to Dir. Diroll, the statute does not call restitution a "judgment" because civil trial lawyers feared the order would be *res judicata* in civil actions.

Judge Spanagel said the underlying problem is logistical since the criminal division of the court does not have a procedure in place for issuing documents for collection of a restitution judgment.

Judge Spanagel suggested adding that "a certificate of transfer of judgment for restitution shall not constitute a prior adjudication to preclude other civil litigation." He was open to other language.

RECKLESSNESS AND *COLON*

"Recklessly." Over the months, the committee working on filling gaps regarding mental states for felony statutes has bogged down on what the default term "recklessly" means. To break the impasse, the staff sent a survey to 691 judges, prosecutors, and defense attorneys for opinions on various definitions under consideration.

While the total response rate was about 50%, a significantly lower percentage of defense attorneys (28.6%) replied than either the judges or prosecutors.

The options offered included the current definition in §2901.11(C), a "tweak" version of current law without "heedless" indifference and "perversely" disregarding the known risk, and the Model Penal Code (MPC) definition emphasizing "conscious disregard" of a "substantial and unjustifiable risk" and "gross deviation" from standard conduct.

No group favored the current definition, reported Dir. Diroll.

Dir. Diroll explained that the survey provides a snapshot revealing there is strong sentiment for a change. The tweaked version appears to be the clear favorite among prosecutors and judges while defense favors the Model Penal Code version.

Judge Corzine asserted that common pleas judges strongly favor the tweaked version. He added that legislators may favor the MPC version because they are prone to lean toward any model code. He feels the tweak and MPC are both better than current law. Since there is no clear consensus, he suggested giving both the tweak and MPC versions to the legislators with the results of the survey, noting that either would be better than current law.

By consensus, the Commission agreed to:

> **Present the tweaked version of current law and the Model Penal Code definition of "recklessly" to the General Assembly as part**

of a package with recommendations for filling gaps in culpable mental states pursuant to the *Colon* decisions.

Statutes Missing Culpable Mental States. Attention returned to statutes with voids regarding their mental state in light of the *Colon* cases. Atty. Welch explained the focus of the *Colon* Work Group in its effort to assign culpable mental states to these statutes.

- The Work Group believes there should be general language that clarifies that the *mens rea* needed in certain situations comes from the underlying offense (e.g., felony murder). It would make clear that these are not strict liability (no mental culpability) offenses, despite the absence of a stated *mens rea*;
- There also is a sense in the Work Group that we should make clear that there is no need for additional instructions to jurors on *mens rea* if the statute doesn't indicate a culpable mental state for an offense or element of the offense.

Atty. Slagle pointed out that the underlying offense has its own mental element.

One proposal, said Judge Corzine, would be to specify that "there is strict liability for this offense except as to the *mens rea* required for the underlying offense". This presents a problem because any reference to strict liability gets a jury confused about whether it applies to any other element of the crime. The problem with *Colon*, he said, is that it forces any examination of every element of the statute as to whether it has a *mens rea*. This arose, he claims, because courts have ignored what the statute generally says about strict liability.

Without the default statute, Atty. Slagle argued, you don't have to go through that analysis. He suggested rereading the *Colon* decision.

Dir. Diroll remarked that the syllabus of the court on *Colon 1* states that "when an indictment fails to charge a *mens rea* element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment".

In the "Rules for Reporting Decisions", said Atty. Lane, it states that "Laws in the syllabus and in the text, if there is a discrepancy, the syllabus rules".

The felony murder statute does not provide a *mens rea* element, since it is bootstrapped from the underlying felony that led to the death, noted Dir. Diroll. The question, he added, is how should this be stated in light of *Colon*?

After considerable discussion over whether to trudge through statute by statute or solve the problem through a default statute, there was general consensus to first take the statute by statute approach and assign a specific culpable mental state to those needing it and possibly summing up the rest with a default statute.

If the current default statute is eliminated, Atty. Welch asked what happens when legislators fail to include *mens rea* in new statutes.

That's often a conscious decision said Dir. Diroll.

Focus turned to statutes that don't clearly mention a culpable mental state.

§2903.15 – Permitting Child Abuse. The offense involves permitting child abuse that results in a death, not actually committing the abuse, which is covered elsewhere. The Work Group recommended adding a mental state of "knowingly".

Noting situations where a mother suspects something may be happening but doesn't know for sure, Judge Spanagel feels that a higher standard than "recklessly" is needed, but not necessarily a standard as high as "knowingly".

Because this is an F-1 offense with a penalty of 10 years, Atty. Lane argued that it needs the higher *mens rea* of "knowingly".

Dir. Diroll added that reckless conduct is seldom punished as an F-1.Typically the conduct is knowing or purposeful.

§2903.34 – Patient Abuse or Neglect. The definitions at the beginning of the chapter (RC §2903.33) on abuse, gross neglect, and neglect include mental elements. The Work Group suggested moving those definitions to this statute, particularly since they aren't relevant to other offenses in the chapter.

§2903.341 – Patient Endangerment. The Sentencing Commission previously voted to add "recklessly" to (B) and "knowingly" to (C).

§2905.01 – Kidnapping. Because restraint with a purpose implies more than reckless conduct, the Work Group recommended clarifying that the action must be done "knowingly". It was also agreed that subsections (A)(1)-(5) are strict liability.

§2905.22 – Extortionate Credit & Usury. This statute involves conduct that is more than reckless action. The Commission agreed that the person "knowingly" possesses the documents, knowing the contents.

§2907.02 – Rape. (A)(1)(b) involves statutory rape, which is strict liability as to the age of the victim. (A)(1)(c) involves a victim whose consent is impaired, the mental state should be "knowingly".

Judge Corzine argued that instead of "knowingly", (A)(1)(c) should say "has actual knowledge of or has reasonable cause to believe".

Atty. Lane cautioned against deletion of the second sentence in §2907.02(A)(1)(c). He favored keeping both sentences. He also prefers "has actual knowledge".

Concern was raised by Judge Corzine about (A)(1)(a), claiming that it should state "For the purpose of purposely preventing resistance".

Atty. Lane argued out that it needs to amount to "purposely preventing" versus "attempting".

Judge Corzine recommended changing §2907.02(A)(1)(a) to "to purposely prevent resistance, the offender substantially impairs the other person's judgment …"

Atty. Lane recommended "to purposely prevent resistance, the offender purposely and substantially impairs the other person's judgment…".

§2907.03 Sexual Battery. This statute does not state a mens rea for engaging in sexual conduct and for acts by various custodians (A)(5)-(12). It was agreed that the mental state should be "knowingly". Since (A)(5)-(12) are status situations, no separate mental element needs to be shown.

Atty. Lane cautioned that there could be some rare circumstances where the person in authority may be unaware of the age of the victim. He also pointed out that the statute says that person may be a person of authority, but not necessarily a person in authority over that person.

FUTURE MEETINGS

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

The meeting adjourned at 2:30 p.m.