Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
July 15, 2010

MEMBERS PRESENT
Chief Justice Eric Brown, Supreme Court of Ohio, Chair
Common Pleas Judge Jhan Corzine, Vice-Chair
Victim Representative Chrystal Alexander
Defense Attorney Paula Brown
Cedric Collins, representing Youth Services Interim Director
State Representative Tim DeGeeter
Col. David Dicken, State Highway Patrol Superintendent
Prosecuting Attorney Laina Fetherolf
Defense Attorney Kort Gatterdam
Municipal Judge David Gormley
Public Defender Kathleen Hamm
Prosecuting Attorney Jason Hilliard
Bob Lane, representing State Public Defender Tim Young
Prosecuting Attorney Joseph Macejko
Major Michael O'Brien
Appellate Judge Colleen O'Toole
Sheriff Albert Rodenberg
Steve VanDine, representing Rehabilitation and Correction Director Ernie Moore

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Eastern Ohio Correctional Center
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
Joanna Saul, Correctional Institution Inspection Committee
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Jim Brady, interested citizen
Bill Crawford, Supreme Court of Ohio
Monda DeWeese, SEPTA Correctional Facility
Lusanne Green, Ohio Community Corrections Association
Andre Imbrogno, Counsel, Rehabilitation and Correction
Ken Kocab, Staff Lt., State Highway Patrol
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Michael Rodgers, Ohio Judicial Conference

Karen Romanoff, Professor, the Ohio State University
Dave Schroot, Juvenile Justice Alliance
Matt Stiffler, Legislative Service Commission
Ed Stockhausen, legislative aide to Senator Shirley Smith
Paul Teasley, Hannah News Network

Chief Justice Eric Brown, Chairman, called the July 15, 2010 meeting of the Ohio Criminal Sentencing Commission to order at 10:15 a.m.

Executive Director David Diroll reviewed contents of the meeting packets which included: a Board of Commissioners on Grievances and Discipline article about allowing contributions in lieu of community service work; the latest chart of statutes missing a culpable mental state in light of the *Colon* cases; proposals for the *mens rea* default statute and MPC compromise on the definition of "recklessly".

Regarding the article just mentioned, Dir. Diroll explained that the Board determined that it was not proper for a judge to substitute a contribution to a charitable organization in lieu of community service. Dir. Diroll said the practice raises the specter of wealthier defendants buying their way out of community service, but could be problematical for a range of sanctions, including in patient treatment.

Dir. Diroll welcomed the arrival of Rep. Tim DeGeeter as the Commission's newest legislative member, filling the vacancy created by Rep. Tyrone Yates' appointment to the municipal court bench.

***COLON* ISSUES**

The *Colon* work group has worked for the past year to search the entire Criminal Code for offenses that fail to specify a mental state and to fill the gaps. The result is the chart listing the recommendations of the group and the same recommendations in bill form. In addition, the group reworked the default statute and possible revisions for the definition of "recklessly".

Common Pleas Judge Jhan Corzine suggested voting first on the recommendation packet for the felony statutes then debating the "reckless" and default statute issues.

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, feels that the Sentencing Commission, as a whole, should take a closer look at a few of the statutes.

Because the Commission has already spent many months working on this effort, Dir. Diroll explained that there were no plans to reexamine all of the statutes individually today.

Atty. Murphy expressed concerns about 12 offenses including pandering, obscenity involving a minor, pandering sexually oriented matter involving a minor, aggravated robbery, aggravated burglary, robbery, burglary, etc. He is particularly concerned about the robbery and burglary offenses because they are the most common.

Atty. Murphy was most concerned about the inclusion of "recklessly" in aggravated robbery and robbery (§2911.01(A)(2)&(3) and §2911.02(A)(1)). Since it involves the act of inflicting or intent to inflict serious

physical harm on the victim then "recklessly" seems inappropriate since "inflict" or "intend to inflict" are determinant acts. These, he contended, are "strict liability" acts, like those involving a gun.

Judge Corzine remarked that he had previously taken the same position but *Colon* now says otherwise. He would love to see the General Assembly overrule *Colon*. The Commission's attempt, he said, is to assign mental states based on our understanding of the law.

Dir. Diroll noted that the *Colon* decision was based on a matter of statutory interpretation, not constitutional law, so it could be modified legislatively.

Atty. Murphy continued to insist that "strict liability" is needed for these offenses. Otherwise, he argued, "recklessly" will confuse the jury. He contended that even "knowingly" would be a better option.

Prosecutor Jason Hilliard remarked that he recently had a case that involved serious physical harm "recklessly", not "knowingly".

Atty. Murphy withdrew his recommendation.

Atty. Murphy then contended that the pandering obscenity offenses (§§2907.32, 2907.321, and 2907.322) should be "strict liability" because they involve intentional acts and age is not a defense.

There is a tendency in offenses involving children, Dir. Diroll acknowledged, to go with "strict liability".

Representing the Ohio Justice for Community Corrections, Lynn Grimshaw asked how someone could "recklessly" produce something if he started with clear knowledge of what the subject was and what he was doing.

Pros. Hilliard agreed that these offenses should be "strict liability".

There is a significant difference, Asst. State Public Defender Bob Lane argued, between having the material and publishing it. Att. Lane acknowledged that, if these are intentional acts, they should be committed "knowingly".

Once something is put onto the internet, Judge O'Toole declared, it is "published".

Chief Justice Brown remarked that the difference between "possessing" and "pandering" is the act of publishing or transmitting. For the purpose of analysis, he asked, if the photo is on a person's phone, and the phone gets dropped, causing the photo to accidentally get transmitted, then how would that apply under these statutes?

The courts tend to interpret the law in a light most favorable to the defendant, said Atty. Murphy. "To publish" means a deliberate act is involved so if it is done by mistake or accident, the court is likely to say that there is no *mens rea*.

Law clerk Shawn Welch noticed that in §2907.321, if you violate (A)(5) it is only an F-4 while the other violations under this section are F-

2. This, he said, shows that the General Assembly factored in "possession" as being less punitive than publishing or disseminating.

With the exception of Attys. Hamm, Brown, Lane, and Gatterdam, the Commission members narrowly approved the motion offered by Pros. Hilliard and seconded by Victim Representative Chrystal Alexander, to reopen the discussion of "reckless" in §2907.32(A)(1) and (3).

Insisting that the *mens rea* for these two statutes should remain as "recklessly", Atty. Lane said that "strict liability" means basically no defense for the defendant.

Atty. Murphy argued that he doesn't see that happening.

According to Judge O'Toole, this would dramatically change jury instructions.

Arguing that the same arguments were being repeated, Prosecutor Fetherolf contended that the current proposal offered by the *Colon* Work Group is the best compromise available.

Although Judge Gormley, Victim Representative Alexander, and Atty. Macejko opposed, the Commission members agreed to:

> **Recommend the *mens rea* of "recklessly" for §2907.321 and §2907.322, as agreed by the *Colon* Committee.**

Atty. Murphy accepted the decision of the Commission but noted that he will continue to plead his case on this issue with legislators.

Judge Corzine suggested voting on the chart then turning to the "recklessly" definition.

Pros. Hilliard remarked that his agreement, in previous discussions, on "recklessly" was dependent upon the fact of coming to a consensus on the change to the definition. He feels that to vote on the use of "recklessly" as the *mens rea* in the chart before establishing the definition of "recklessly" would be putting the cart before the horse.

Judge Corzine asked if any of the proposed definitions of "recklessly" are as bad as the current definition.

Preferring the "tweaked" definition, Pros. Hilliard feels that the MPC version is just as bad as the current definition. He offered a motion to discuss the proposed definitions of "recklessly" before voting on the chart.

Pros. Fetherolf agreed that it might be best to discuss the definition in case it's a deal breaker.

There has been general consensus that how "recklessly" is defined in statute today is problematic, said Dir. Diroll. When we sent the survey to judges, prosecutors, and defense attorneys in December, the judges and prosecutors favored the tweaked version while the defense attorneys favored the Model Penal Code (MPC) version. As the Commission and *Colon* Work Group further debated this issue, there was early consensus to send both a tweaked and MPC version to the General Assembly and let it

decide on a final definition. He offered one more "harmonizing" solution as §2901.22(C): "A person acts recklessly when, with indifference to the consequences, the person disregards a known risk that a certain result is likely to occur from the person's conduct and the risk is one that a reasonable person with that knowledge would not disregard."

Atty. Hamm feels it is important to keep some of the modifiers deleted from this proposal.

It is unlikely we will be able to settle on the proposed definition issue today, said Pros. Hilliard, feeling it is important to limit the choice to the two debated options since we have already received input from judges, prosecutors, and defense attorneys on those.

Atty. Welch suggested having both sides give their opinions on both definitions, then voting. Dir. Diroll admitted that he would prefer to send one definition to the legislators, rather than two.

Whichever definition is sent over to the legislators should be based on the consensus of the Commission, said Pros. Hilliard. Although other states chose versions of the MPC definition, Ohio chose not to use any form of the MPC version. The main problems with the current definition are use of the language "heedless indifference" which is redundant and confusing and use of the word "perverse", which also proves to be confusing for the jury. The tweak gets rid of those. He would have preferred just eliminating them but could live with Atty. Lane's compromise solution to substitute "unjustifiable". He feels that the MPC version raises other issues, with "gross deviation" causing the same problem as "perverse".

Atty. Lane argued that the MPC version is a good definition. In fact, he noted, 31 other states use some form of the MPC version.

Judges from the survey, said Atty. Welch, chose the "tweaked" version but also offered suggestions on how to tweak the MPC version. Atty. Kort Gatterdam took those suggestions and incorporated them into a "streamlined" version.

If we kept the "streamlined" version, said Dir. Diroll, we'd have to go back and adjust "knowingly", "negligibly", and "purposely" to parallel.

The main point, said Defense Attorney Kort Gatterdam, is that we are getting close to a civil "negligence" standard if we go with the "tweaked" version.

Judge Corzine suggested replacing "deviation" with "departure". His problem with the tweak version involves something imbedded in the current definition. As law has developed, "likely" has come to mean "more likely than not". It means there is "good reason for the expectation of belief", which is too close to "knowingly". That is why he doesn't like "likely" in the tweak version.

The Commission eventually reached consensus to:

Recommend that the General Assembly adopt the Commission's modified Model Penal Code version of the definition of "recklessly", with "departure" substituted for "deviation".

DEFAULT STATUTE

Under current law, said Dir. Diroll, the default statute says that if no *mens rea* is specified for a crime, then "recklessly" becomes the mental element unless there is indication that "strict liability" was intended by the legislature. He explained that Atty. Jim Slagle offered a reworked default proposal (included in the meeting packets) and argued that the gaps have been filled and the statute controls as it is and there would be no default. Since there was concern that future statutes might be added that do not clearly indicate a *mens rea*, Dir. Diroll revised the proposal to recommend that, for future Title 29 offenses and those outside Title 29, current law continues. For Title 29 offenses, no culpable mental state is required other than what is set forth in statute or an underlying offense is incorporated or a definition that contains a mental element.

Judge Corzine suggested tabling discussion until after lunch.

BINDOVERS AND DETERRENCE: NEW RESEARCH

Karen Romanoff, Professor of Juvenile Delinquency at the Ohio State University, has been studying binding juvenile offenders over to the adult system and whether these juveniles are aware of the possibility of being bound over and the ensuing consequences.

Prof. Romanoff reported that 200,000 juveniles nationally are bound over and tried as adults yearly. The majority, she claimed, are automatically waived to adult court based on the offense committed or the juvenile's age. The youth are defined as adults, under state laws, and given sentences that are punitive rather than rehabilitative. This is contrary to the court's historical purposes of providing rehabilitation and care in the juvenile system.

Bindover laws are meant to deter, but she declared that, when compared to similarly situated juveniles maintained in the juvenile system, youth bound over to the adult system are more likely to recidivate.

If the practice of bindovers is to have a deterrent effect, then it is essential that juveniles are made aware of that they could end up being tried as an adult and serving time in adult facilities. The theory of deterring juvenile crime through the use of bindovers is flawed because qualitative data from phenomenological studies reveal that juveniles rarely even know they can be tried as adults. The qualitative data in this study was based on interviews and the studies indicate that it is time to refine those theories.

Deterrence theory, as applied to the decision to commit criminal activity, said Prof. Romanoff, includes rational choice as part of the decision-making process. Imprisonment is generally based upon the principles of retribution and deterrence. Deterrence as a crime control method is based on the concept that the threat of harsher punishment deters or dissuades the commission of crime. Through free will and rational judgment the individual weighs the risks and rewards and

analyzes the costs and benefits. The expectation is that punishment within the adult system should discourage them from reoffending.

Prof. Romanoff's study involved in-depth interviews with 12 inmates who, as juveniles, had been bound over to adult criminal court. The study sought to understand their knowledge, understandings, and perceptions of their juvenile criminal behavior and trial and sentencing as adults. They were asked to recall their decisions to commit offenses as juveniles and whether anything deterred them. Most could not tell if anything deterred them or why.

In an effort to encourage public policy changes based on evidence-based findings, Prof. Romanoff researched other studies of the effectiveness of juvenile bindovers as deterrence. One, Steiner, studied 22 states and only Maine found strict sentences to be successful deterrents. Fagan found that youth charged and punished as adults were more likely to be arrested for serious crimes more quickly and more often than counterparts who remained in the juvenile courts.

Few phenomenological studies exist on this issue, but those that do reveal that juveniles rarely knew they could be tried as adults. Most believe that if they had known, they may not have committed the crime.

In response to Judge O'Toole's question about how she offset the juvenile's level of understanding based on age, Prof. Romanoff explained that the people interviewed had varying mental capacities. Thus, the larger issue was one of understanding as opposed to age.

To determine if subjects were telling the truth, she looked for accuracy against official records. She noted that they did not have to admit their guilt, but they all accepted culpability. She consistently checked with the subjects to make sure she had interpreted their responses correctly.

83% of the people interviewed had no knowledge of what juvenile bindover was. None understood the concept or consequences of juvenile bindover. In fact, most of them expressed intense frustration, anger, and dismay in response to this question. They didn't think adult sentences applied to them. They all firmly believed that juveniles should be educated about juvenile bindovers and adult sanctions.

Because of a lack of knowledge of bindovers, they did not engage in rational choice regarding juvenile sanctions. 83% considered juvenile crime as normal and 50% considered juvenile time as easy. Half suggested that their youth had led them to impulsive and immature acts. 92% said they would have considered adult sanctions if they had known or understood about them. 50% claimed they would not have committed their crimes. The responses indicate a possible paradigm shift based on sentence severity.

Representing the Eastern Ohio Correctional Center, Eugene Gallo remarked that it doesn't matter what age the offender is, they tend to make impulsive decisions without thinking about the consequences. Most adults in his facility are there because of not thinking through the consequences of their actions and usually because of the influence of friends or drugs or alcohol. He doesn't believe it would make any difference if youth knew they could end up being bound over.

Prof. Romanoff reported that 75% of those interviewed said that sentence length and conditions such as violence affected their intent not to recidivate. 25% revealed that length and conditions of incarceration were overwhelming challenges to desistance.

Lusanne Green, representing Ohio Community Corrections Association, remarked that a lot of empirical studies have been done in Ohio on what works in community corrections versus the prison population. As a result, Ohio is continually working on a restructuring to bring about better results. Generally two-thirds of the people in any state who are released from incarceration will return within 3 years. For Ohio that rate is one-third.

This population of juvenile offenders (bindovers) has the highest rate of recidivism. They claim that the conditions are too difficult for them to overcome.

Participants indicted that length and conditions would act as deterrents as well as family, growth, and maturity. They all believe that education is paramount. Hypothetically, "If you know, you have to think about it."

As a result of her study, Professor Romanoff's recommendations for action include:

- Educational programs to inform juveniles of potential consequences, including the possibility of being bound over to the adult survey;
- Skills and educational programs for the youth;
- A reevaluation of the effectiveness of laws, particularly the use of bindovers;
- Use of a broad-based survey instrument;
- Correlation, empirical, comparison, and further qualitative studies.

It sounds as if we are harboring super criminals, said Judge O'Toole, since they are returning quicker and for more serious offenses.

Pros. Hilliard expressed surprise to hear that no youth are told about the bindover possibility. He admitted, however, that he has never heard a judge tell a juvenile of the possibility of bindover.

Of the offenders interviewed, said Prof. Romanoff, only one was a first time offender. He did not understand the criminality of his behavior, which involved throwing a rock off a highway overpass, striking a car and causing severe injury to the driver. The youth received 14 years. He had no idea that his action could result in such a lengthy penalty.

In the past there was no mandatory bindover, said Mr. Gallo. The judge was trusted to make that determination. When asked how many of the respondents were bound over mandatorily versus discretionarily, Prof. Romanoff admitted that she did not know. She noted, however, that most were serving time for serious F-1 and F-2 offenses.

DEFAULT STATUTE AGAIN

After lunch, discussion returned to the default statute.

After working through the statutes to assign mental states where they were lacking, it had been hoped by some, said Dir. Diroll, that a default statute would not be needed. The Work Group realized, however, that a default might still be needed for offenses outside of Title 29 and those enacted later that might be missing a stated *mens rea*.

John Murphy raised concern about how this would affect minor technical changes made to statutes.

Pros. Fetherolf feels that it will only add confusion to trying to determine when something was enacted.

Dir. Diroll suggested eliminating the future crimes portion of Atty. Slagle's proposal and stating that "For offenses set forth in this title of the Revised Code, no culpable mental state is required other than the mental state set forth in the statute."

With serious concerns about how this would apply to future statutes, Atty. Murphy feels that Atty. Slagle's approach is nice and clear.

According to Atty. Welch, some people had suggested dropping the last sentence of §2901.21(C).

Pros. Hilliard moved to drop the last sentence and approve Atty. Slagle's modified proposal. Pros. Fetherolf seconded the motion.

Defense Attorney Paula Brown is very uncomfortable with having no default statute. This would mean "strict liability" is the default in Title 29. She would prefer no default statute at all as opposed to one with "strict liability".

Only those that are totally naked would be presumed as "strict liability", said Dir. Diroll.

Atty. Lane preferred Dir. Diroll's last clause about definitions.

It all boils down to a value judgment between these two proposals, said Judge Corzine. He pointed out that if the default statute is kept, it also causes some *Colon mens rea* to remain. He favors Atty. Slagle's proposed version with Dir. Diroll's (B) added to address future legislation.

Atty. Paula Brown fears that too many defendants will get unfairly caught under the default of "strict liability." Judge Corzine contended that, overall, there will be fewer defaults to "strict liability" than there would be of additional *Colon* issues if this default statute is not available.

Regarding concern over future statutes, Judge Corzine noted that Title 29 is now three times the size that it was in 1975.

A straw vote of the remaining members in attendance resulted in a preference to accept Atty. Slagle's proposed version which would eliminate the current default statute, offer a new one with "strict liability" as the default mental state and include present and future criminal statutes, with the addition of Dir. Diroll's wording for §2901.21(B).

It was agreed that the Commission should have an official vote on the chart, the "reckless" definition, and the default proposal at the start of the September meeting.

JAIL TIME CREDIT

Attempts to address the problems related to records of jail time credit are a work in progress, said Atty. Lane. The challenge is how to improve communication between the local court and DRC on jail time credit. It is the intention of the Public Defender's Office, he said, that the common pleas court should have continuing jurisdiction because, although some things do not get included on the record, this court has access to the most information. He promised to have more information on this issue at the next meeting.

FUTURE MEETINGS

Future meetings of the Sentencing Commission are tentatively scheduled for September 16, October 21, November 18, and December 16, 2010. The August meeting is cancelled.

The meeting adjourned at 1:40 p.m.