Minutes of the
CRIMINAL SENTENCING COMMISSION
And the
CRIMINAL SENTENCING ADVISORY COMMITTEE
November 20, 2008

MEMBERS PRESENT
Chief Justice Thomas Moyer, Chair
Major John Born, representing State Highway Patrol Superintendent
Colonel Richard Collins
Paula Brown, Ohio State Bar Association Delegate
Common Pleas Judge Jhan Corzine
State Representing Stephen Dyer
Atty. Bob Lane, representing State Public Defender Timothy Young
Common Pleas Judge Andrew Nastoff
Appellate Judge Colleen O'Toole
Dave Schroot, representing Youth Services Director Tom Stickrath
Municipal Judge Kenneth Spanagel
Prosecuting Attorney, Jim Slagle
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins

ADVISORY COMMITTEE MEMBERS PRESENT
Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
John Madigan, Senior Attorney, City of Toledo
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
Andrea Clark, Legal Extern
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

GUESTS PRESENT
Amanda Blust, legislative aide to Speaker Jon Husted
Jim Brady, concerned citizen
JoEllen Cline, Supreme Court of Ohio
Bill Crawford, Supreme Court of Ohio
Lynne Crow, legislative aide to Senator Tim Grendell
Monda DeWeese, SEPTA Correctional Facility
Ryan Fahle, Supreme Court of Ohio
Lusanne Green, Ohio Justice Alliance for Community Corrections
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Erin Rosen, Attorney General's Office
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News

Chief Justice Thomas Moyer, Chair, called the November 20, 2008, meeting of the Criminal Sentencing Commission to order at 10:00 a.m. We welcomed the Commission's newest member, State Representative Stephen Dyer.

STREAMLINING CHAPTER 2929

The Sentencing Commission sent a report to the General Assembly last spring, said Director David Diroll, suggesting ways that the Ohio Revised Code could be streamlined. Some basic drafting changes could cut about half a million words, roughly the size of *War and Peace* from the Code without changing any meaning. The Speaker of the House's Office asked the Legislative Service Commission to begin working through the recommendations.

The report gave examples using the felony sentencing statutes (§2929.11-2929.20). Dir. Diroll returns today with the rest of the basic sentencing statutes. As before, the intent is to say the same things in fewer words. However, there are a few areas where clarification (beyond simplification) might make sense.

"Full" Years for Murder. Dir. Diroll directed the Commission's attention to the aggravated murder and murder penalty language.

Common Pleas Judge Andrew Nastoff noticed that §2929.03(A)(1)(c) and (d) say that the offender must serve life in prison with parole eligibility after serving twenty-five or thirty "full" years, but (b) did not include the word "full". He asked if there was a reason for that omission or if it was merely an oversight.

When the death penalty was reenacted back in the early 1980's, Dir. Diroll answered, there were several administrative reductions available. S.B.2 eliminated most of those, including "good time". So, under pre-S.B. 2 law, an offender convicted of murder could get a "life" sentence, which usually meant a minimum of 15 years minus good time. He would generally have his first Parole Board hearing after serving about 11 years of that sentence. "Full years" was inserted to assure that such reductions weren't available for aggravated murder.

Representing the State Public Defender's Office, Attorney Bob Lane agreed that, prior to S.B. 2, a sentence of 15 full to Life, or 20 full to Life, or 30 full to Life meant that good time could not be applied.

Judge Nastoff moved to add "full" to §2929.03(A)(1)(b) for the sake of consistency. Appellate Court Judge Colleen O'Toole seconded the motion.

Dir. Diroll said he would rewrite the statute accordingly. He then asked Matt Stiffler, representing the Legislative Service Commission, to check why "full" was included in (c) and (d) but not the others provisions of the statute.

Chief Justice Moyer suggested adding a condition to the motion that it be based upon advice received from LSC regarding whether any substantive consequences might apply.

Judge Nastoff agreed to amend the previous motion accordingly and Judge Corzine seconded that amendment.

The Commission unanimously approved the amended motion:

> **To add "full years" to §2929.03(A)(1)(b) for the sake of consistency, unless the Legislative Service Commission advises that the amendment will have a substantive impact.**

Forfeiting Retirement Benefits. §2929.192 provides that, on conviction of certain felonies, the court must forfeit certain retirement benefits. The retirement system or plan must comply with the order "on application". There was some confusion as to what this meant.

According to Common Pleas Judge W. Jhan Corzine it refers to when the offender applies for his retirement.

Pros. Slagle wondered if a loophole is left open if the person does not apply for his retirement.

Eventually there was a consensus to leave the language as is.

Certain Peace Officer Convictions. §2929.43 tells the court to advise the peace officer of certain things but requires the court to first determine whether the defendant is truly a peace officer.

It seems absurd, said Dir. Diroll, to ask every felony defendant if he or she is a peace officer when it seems that the judge would already have that information. That aside, he feels the section could be streamlined by striking "if the court determines" from statute and rewording the language to state "before accepting the plea from a peace officer, the judge must advise him of certain things". If the determination is a formal legal requirement, however, then it should be left in.

If this statute includes security guards, said Municipal Court Judge Kenneth Spanagel, it might explain why this is included. He suggested that "advisement" might be more appropriate language than "advice".

Judge Corzine agreed that "advisement" is more appropriate.

> **By acclamation, the Commission recommended using "advisement" instead of "advice" in §2929.43.**

Prosecuting Attorney Jim Slagle wondered what the implications would be if the peace officer pleads guilty and the court does not give the advice. He wondered if it would really make a difference.

The last sentence of (B)(1) refers to "other procedures required under the Rules of Criminal Procedure". Dir. Diroll asked what this means and if it was really needed. It is obvious that the Rules of Criminal Procedure would apply and this phrase is not included in other statutes, so why here? He noted that (E) tends to handle this in a simpler way.

The rules might apply to a plea in this situation, said Judge Corzine, when they might not apply elsewhere.

Judge Nastoff remarked that he didn't know it was there.

As an aside, Chief Justice Moyer suggested that the draft avoid using possessives ("'s") when the noun is not an individual. For example, "the clerk's" clearly refers to a person, while "the court's" does not.

By acclamation, the Commission suggested limiting possessives throughout the draft to persons.

Sentence Election. Dir. Diroll noted that §2929.61 provides that offenders who were charged with F-3 or F-4 offenses committed on or after January 1, 1974, and before July 1, 1983, were to be prosecuted under the law as it existed at the time the offense was committed. Offenders convicted or sentenced on or after July 1, 1983, for an F-3 or F-4 offense that was committed on or after January 1, 1974, but before July 1, 1983, were given a one-time option to choose to be sentenced under either the law in effect at the time of the offense (indeterminate sentencing) or the law in effect at the time of sentencing (determinate sentencing). If the offender chose to be sentenced under the "old law" indeterminate sentencing structure, or opted to make no choice, he could not later ask to have his sentence converted to a definite sentence.

Dir. Diroll asked whether the provision should be repealed since the all covered cases should have been sentenced by now.

Atty. Lane and Judge Nastoff noted that there are still a few cases 20 years old or more that are being heard and have not yet reached the sentencing stage. Since the statute of limitations has not been reached for these cases, the section should remain in the Revised Code.

Convictions and Guilty Pleas. Dir. Diroll observed that numerous sentencing statutes refer to persons who "plead guilty to or are convicted of" the offense. §2929.02(A) is the first example in Ch. 2929. The Commission agreed that there are times when it makes sense to include both phrases but on most cases it only proves cumbersome. At the time of sentencing the offender's guilt has already been determined. Thus, Dir. Diroll wrote around the phrase in the recommended language, here and elsewhere in the chapter.

Life Sentencing Phrasing. In setting murder penalties, §2929.02(B)(2) provides that, where there is a sexual motivation or sexually violent predator, the penalty appears as an "indefinite term of thirty years to life". In light of the earlier discussion, Dir. Diroll asked if the language should be standardized as "30 years to life" or "30 full years to life." The issue was not resolved.

Parallel Phrasing. Pros. Slagle noticed that the introductory language in §2929.02(A) and (B) differed slightly, with (A) stating "A person being sentenced for …" and (B) beginning "A person who commits …". This resurrected the debate on whether to keep the language "if convicted or plead guilty to …"

In the effort toward simplification, Judge Corzine suggested the language "sentencing for this offense is as follows …"

When Judge O'Toole contended that the court cannot sentence until there's a conviction, Dir. Diroll asked for clarification on what point in the process the offender is convicted.

According to Judge Nastoff, it becomes official when the jury comes down with a verdict or at the point of being entered in the court records.

> **All Commission agreed by acclamation that §2929.02(A) and (B) should begin with the same phrase, along the lines of, "Sentencing for this offense is as follows …"**

Aggravated Murder; Prior Convictions. §2929.022(A)(1) addresses the situation where the defendant elects not to have the prior conviction specification determined at the sentencing hearing. The last clause, said Dir. Diroll, seems superfluous.

> **The Commission agreed by acclamation to suggest removing the phrase "as in any other criminal case in which a person is charged with aggravated murder and specifications" from §2929.022(A)(1).**

Misdemeanor Community Control Generally. §2929.25 allows direct sentencing as well as suspended sentencing. (C)(2) addresses penalties for violations of community control sanctions. The last sentence allows the court to reduce any additional time for violation by the amount of time already served successfully. Dir. Diroll asked if this sentence was necessary since the general rule under (D) appears to suffice.

Atty. Lane asked how an offender can violate community control if he has not been assigned to it to begin with.

Representing the Ohio Chief Probation Officers' Association, Gary Yates added that conditions of community control cannot be written up if the offender hasn't been assigned to community control.

Atty. Paula Brown seconded Atty. Lane's motion to retain the last sentence stricken in §2929.25(C)(2), but the motion was narrowly defeated.

Restitution. §2929.28(A)(1) covers misdemeanor restitution. Dir. Diroll added language that parrots the felony statute, allowing restitution to be paid to "another agency designated by the court". This, he said, would allow the court to use a collection agency to assist with collecting restitution from the offender, as is now done for court costs and fines.

Per earlier discussions, the word "evidentiary" was stricken from the reference to a hearing in the third paragraph under §2929.28(A)(1) because it implies that the Rules of Evidence apply at sentencing, which is not accurate. Parallel felony and juvenile provisions get by just fine without this sentence, said Dir. Diroll.

The Commission discussed whether the entire paragraph should be eliminated.

We are the only ones worried about this, said Judge O'Toole, because nobody does evidentiary hearings anyway.

If this language were removed, said Chief Justice Moyer, the judge would have discretion to decide what happens at the hearing and whether is needed

> **Consensus was reached to recommend removing "evidentiary" from §2929.28(A)(1), making misdemeanor restitution law more closely parallel felony and juvenile statutes.**

Victim's Civil Remedies. §2929.28(G) provides that court costs cannot be waived without statutory authority to do so. At the previous meeting, the Commission discussed and favored giving the court discretion to waive uncollectible court costs imposed at any time on the defendant.

Since the Commission agreed not to make any substantive changes to the simplification proposal, Judges Spanagel and O'Toole suggested recommending the change to the Ohio Judicial Conference.

Although Pros. Slagle and Judge Nastoff dissented, the Commission approved the motion by Judge Spanagel, seconded by Judge O'Toole:

> **The Ohio Criminal Sentencing Commission supports giving the court discretion to waive uncollectible court costs imposed at any time on the defendant.**

Vote on the Package. The Commission then unanimously approved Judge Corzine's motion, seconded by Judge Nastoff:

> **To forward the Sentencing Commission's recommendations for simplifying the rest of Ch. 2929 to the General Assembly.**

Dir. Diroll agreed to make the final adjustments and send it forth.

LAW, TECHNOCORRECTIONS, AND NEUROSCIENCE

After lunch, Dir. Director noted that it can be challenging for courts to keep up with medical and scientific technologies and their applications in the court system. Sentencing Commission extern Andrea Clark had attended a symposium on the use of technology in corrections and the courts at the University of Akron. Dir. Diroll asked her to update the Commission on emerging technologies.

According to Ms. Clark, the term "technocorrections" was coined by Tony Fabelo, Director of the Texas Criminal Justice Policy Council, in May, 2000. It refers to a convergence of technological developments and the forces of law and order.

There are three areas where technology is already or shall soon be used within the field of corrections: electronic tracking and location systems; pharmacological treatments; and genetic and neurobiological risk assessments. Electronic tracking and location systems are commonly used via tracking bracelets in lieu of incarceration. Pharmacological treatments such as Depo-Provera are used for sex offenders and Topamax for seizure disorders and alcoholics. The newer area of neurobiological

risk assessments has recently opened many new opportunities for neuroscience and the law to intersect.

Ms. Clark remarked that attention should be given to where two or more of these areas intersect, such as new innovations like an electronic tracking bracelet with sensors that can analyze the wearer's sweat for evidence that they have been using alcohol. Of greater concern might be genetic or neurological testing getting developed to the point of accurately predicting a propensity for violence and using pharmaceutical or neurosurgical interventions to control that propensity. Some of these developments, she noted, are already having an impact in court cases and criminal law.

Ms. Clark explained that she had recently attended a Neuroscience, Law and Government Symposium held at the University of Akron School of Law. The keynote speaker, Professor Hank Greely of Stanford Law School, identified five areas where neuroscience and the law are likely to intersect: prediction, mind reading, treatment, enhancement, responsibility and consciousness. As neuroscientists study the brain and development of Alzheimer's disease and attempt to find a way to predict who is most likely to develop that disease, it raises the question of being able to predict one's propensity toward schizophrenia or psychopathy as well. If brain scans can offer this information, should that information be shared with juries as an element toward recidivism in criminal cases?

This information is already being sought by lawyers and government intelligence services in an effort to find a foolproof deception detector, or "lie detector." The danger zone might soon become one of protecting oneself from allowing their own thoughts, opinions, and biases to testify against them. This might eventually apply to jurists as well as defendants and witnesses in a court.

The new technology of deep brain stimulation (DBS) is proving successful in treating patients with Parkinson's disease and other tremor and movement disorders. It also has shown to be successful in some cases of clinical depression and aggressive outbursts associated with mental retardation. This use in controlling violent impulses has some wondering about its possible application with criminal populations.

Another area where two areas of technocorrections intersect is with neuroscience and pharmaceuticals. Drugs are now being used for cognitive enhancement. Some are used by adolescents with ADD and ADHD to allow better focus and concentration. Attempts are being made to reduce or reverse the effects of age related memory loss. Another consideration might be to allow witnesses to take those drugs before testifying in a court of law.

Psychologists, philosophers and cognitive neuroscientists are currently looking to find the areas of the brain where moral decision making takes place. Some of these scientists are working to prove that humans have no free will and cannot be responsible for their aberrant or anti-social behavior. If this is true, then the retributive rationale for punishment loses its validity, and the criminal justice system needs to look to deterrence, incapacitation or other rationales to justify imposing punishment for criminal acts.

Ms. Clarke related two cases involving the issue of personal responsibility for criminal acts based on how the defendant's brains were working when their crimes were committed and afterwards. When Mr. Weinstein was accused of killing his wife, he had an arachnoid cyst in his brain which was found to seriously affect his behavior. Once the cyst was removed, his behavior returned to normal. This case raised the issue of whether there should be different standards for judging criminal responsibility for a person whose defect in rationality is caused by a physical impairment in brain function and one who can demonstrate no such physical defect. In the second case, Ms. Sharma was accused of lacing her fiancé's food with arsenic, from which he died. She submitted to a form of "brain mapping" by undergoing a "Brain Electrical Oscillation Profiling" (BEOS) test. This test does not require the person to respond to any questions, but attempts to detect electrical activity in the brain as stimulus is presented – in this case statements relevant to the commission of the crime. This test purports to identify areas of the brain where memory is stored and accessed. Based on the BEOS deception detection she was convicted of murder and sentenced to life in prison. This case raises serious constitutional rights and civil liberties issues since she was convicted based on information collected from her brain without her voluntary responses.

Since every criminal takes away with him something that records his involvement with the crime – his brain – neuroscientists claim that brain scanning technologies look directly at brain function as the brain accesses those stored memories, thus linking the perpetrator with his crime. The two major techniques used for this deception detection are "brain fingerprinting" and "brain mapping". Although these techniques have been used in a few cases, there are very few peer reviewed studies and the technology is not yet fully accepted within the neuroscientific community.

Ms. Clark remarked that many experts in psychology and neuroscience are concerned that BEOS has been used to win criminal convictions before being validated by any independent studies and reporting in respected scientific journals. She explained that there is much more interest in the neuroscientific community in deception detection based in functional magnetic resonance imaging or fMRI, than in the EEG based systems. Since 1992, there have been over twenty thousand published studies based in fMRI research. There are about 28 published research studies from eleven different groups that have applied fMRI to deception detection.

She explained that there is a difference between fMRI and MRI imaging. An MRI provides a static picture of the anatomical structure of the brain in three dimensions at a given moment in time. On the other hand, fMRI imaging looks at brain activity, not at other bodily functions. It displays the metabolic function of the brain over time and is used to identify the areas of the brain involved in certain mental activities.

The process shows changes in blood oxygen demand as certain parts of the brain are activated. Since mankind is hard wired to tell the truth, lying requires more effort from the brain and activates certain regions of the brain to demand greater oxygenation.

While the technology seems promising, there are some severe limitations and caveats that need to be placed on neuroscience-based deception detection. Further studies are needed, including some on the effect of medication, illegal drugs, and alcohol on the test results. Studies are also needed on actors, poker payers, sociopaths, psychopaths or pathological liars to see if their brains respond differently.

As these areas of technology and neuroscience progress, said Ms. Clark, it is inevitable that their impact will be felt in numerous ways in courts and corrections. The areas to watch the most closely will be in truth/lie detection, evidentiary issues of admissibility, bias detection, sentencing decisions, insanity defense, effects of neuroscientific evidence on jurors, and constitutional issues including Fifth Amendment privilege against self incrimination and Fourth Amendment protections regarding search and seizure.

She pointed out the importance of approaching the use of this technology's application within the courtrooms with caution. There have been examples in the past where the use of "scientific method" for getting at the truth or of controlling undesirable behavior achieved questionable results. Some of those included trial by torture, trial by ordeal, eugenics, phrenology, and frontal lobotomies. So, how will jurors respond to neuroimaging testimony in insanity defense cases?

Ms. Clark concluded with a quote made over 80 years ago by Justice Brandeis, dissenting in *Olmstead v. United States*:

> "In the application of the Constitution, our contemplation cannot be only of what has been, but what may be. The progress of science in furnishing government with means of espionage is not likely to stop with wire tapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose a jury the most intimate occurrences of the home. Advances in psychic and unrelated sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. That places the liberty of every man in the hands of every petty officer."

It is nice to know that this technology is out there, said Judge Corzine, but there had better be a lot more studies done before adopting it in the courts.

Some tests, said Mr. Gallo, once proven effective and reliable, have achieved great results and validity in the courts.

Ms. Clarke pointed out that there have been 28 studies of fMRi conducted since 2006, with more to come.

It might be worthwhile to study other new scientific methods being introduced into the courts as well, said Dir. Diroll.

Many convictions used to be based on blood type, said Judge Spanagel, but DNA can now prove that someone convicted on blood type alone is often not the guilty party.

It makes the judge's task more difficult to discern which information is most reliable, said Atty. Brown.

THE FUTURE OF SENTENCING GUIDELINES IN OHIO

The *Foster* case resulted in a loss of S.B. 2 guidance to reserve prison for the worst offenders and steering those who hadn't been to prison before toward minimum sentences. As a result, said Dir. Diroll, the average prison time served is now subtly increasing. Even the increase of one month can make a significant difference given the large number of inmates received by the state. The removal of some aspects of appellate review and the cap on consecutive sentences contributes to the upward prison population trend, he added.

The Commission's recent survey revealed that judges and prosecutors feel that some form of guidance is useful beyond merely providing a range of sentences or nonprison options, Dir. Diroll noted. Most respondents feel that the recidivism factors are satisfactory. Guidance regarding a prison term for certain offenders was generally accepted but the defense respondents favored guidance against prison for certain offenders. The substantial majority of judges and prosecutors prefer voluntary guidelines.

Judge Corzine declared that the Commission needs to focus on the areas that have the most consensus among all three groups.

The respondents agree, Dir. Diroll reported, on a need for *some* guidance. The lean tends to be toward guidance for prison for F-1 and F-2 offenses and against prison for low level nonviolent F-4 and F-5 offenses.

According to Judge O'Toole, most judges don't see how *Foster* is affecting the prison population.

Judge Corzine insisted that the legislators need to be concerned with the increase in prison population since they control the purse strings.

Often an offender is sentenced to prison because the judge would like to put him in a community corrections program, said Mr. Gallo, but there is no community corrections program available for him, so he goes to prison instead. He feels the solutions are available in the community but the resources are needed to keep them available. In the juvenile system, he noted, the funding resource follows the offender (RECLAIM Ohio) wherever he is sent (community program).

The real issue is cost versus effectiveness, said Judge O'Toole. She urged the use of a risk management tool.

Community options are always cheaper than institutional options, declared Mr. Gallo.

Mr. VanDine pointed out that the juvenile RECLAIM program is not applicable to F-1 and F-2 offenders. He noted that DYS's population is lower, not because of RECLAIM Ohio but because juvenile crime is now much lower.

Dir. Diroll reminded the Commission that we are coming into a very tough budget cycle which will play heavily with decisions being made by the General Assembly.

Pointing out that there are really only two choices, local community resources or state prison, Mr. Gallo remarked that local CBCFs handle extreme caseloads. Lorain County, he noted, processed 4,965 criminal cases through a 72 bed facility last year between Lorain and Medina County. His six-county region only processed 2,115 cases through a 104 bed facility but they are full. SEPTA Center processed 4,114 cases through a 64 bed facility.

Judge O'Toole suggested tracking resources by courtroom.

Some of that information should be available when the court system study is done, said Mr. VanDine.

Pros. Slagle argued that the survey data should not govern what policy ought to be, although it helps to reveal where resistance will be encountered.

National research, said Mr. Gallo, declares that Ohio is locking up too many offenders.

According to Mr. VanDine, Ohio is at the average incarceration rate nationally. It is imperative, he added, to recognize that that data includes those on 5 year probation. He wondered how other states have dealt with the *Booker, Apprendi*, *etc*. fallout.

Judge Corzine suggested starting with the easy stuff first, meaning the areas with the most consensus.

Since we now have new leadership in the Ohio legislature, Judge Spanagel suggested finding out what their biggest criminal justice concerns are.

Judge O'Toole suggested inviting the legislative leadership or judiciary chairs to speak to the Commission on what criminal justice issues they want to focus on and what their concerns are.

COLON CASES

On April 9, 2008, the Supreme Court of Ohio released the first *State v. Colon* decision, which held that the failure to include the applicable mental state in a criminal indictment may be a "structural" error that could be raised for the first time on appeal. As the Sentencing Commission has discussed the repercussions of the case, it became clear that the criminal code contained numerous mental state omissions that would not be cured even if *Colon* were overturned.

Commission members suggested removing the default to recklessness under §2901.21(B). Dir. Diroll noted that this removal does not create an automatic default to strict liability. He wondered if it should.

Atty. Madigan believes that it should.

We want to avoid the confusion that now exists, said Pros. Slagle.

Judge Corzine favors removal of (B).

Atty. Brown insisted that the default to strict liability must remain.

It would only compound the problem, said Atty. Brown, to assume that a statute that displays no obvious *mens rea* would then default to strict liability. She feels it is necessary to examine the statutes and insert the appropriate *mens rea* where needed.

Isn't strict liability the same as no *mens rea*, asked Judge O'Toole. If so, then she insisted that there is no need to stipulate strict liability.

It would be helpful to know what the controlling law is on some of these stipulations, said Judge Corzine.

Judge Corzine stressed that it will also be necessary to look at some of the statutes where there is reckless use of the words "knowing" and "knowledge".

Redefining "Reckless". §2901.22(C) defines reckless to include stilted language that sometimes puzzles juries, according to Dir. Diroll. Words such as "heedless" disregard and "perversely" ignoring a risk can be given more emotional weight than is intended. He prepared a stripped-down definition, focusing on ignoring a risk.

Judge Corzine pointed out that "ignores" imposes a higher standard than "perversely disregards".

Atty. Madigan favored the use of "ignores" but recommended removing "knows".

"Ignores", agreed Judge Corzine, implies that the defendant is aware of the risk.

Dir. Diroll agreed to tinker with the wording. He asked why the definitions of culpable mental states define the term, then repeat the definition regarding the circumstances of the offense.

Judge Corzine and Atty. Lane feel that the reference to circumstances should remain within the definitions because, in some cases, it can make a significant difference. A person shooting a gun into the air during a celebration is quite different from a person shooting a gun toward a house. Or a person shooting a gun toward a garage differs from a gun being shot toward a house. It is more likely that a person might be in the house at the time, than in the garage.

Judge O'Toole prefers that language "blatantly disregards" rather than "ignores".

Another attempt at the language for §2929.22(C) might be "A person acts recklessly when the person is aware the conduct is likely to cause a certain result and ignores the known risk", said Dir. Diroll.

List of Statutes with Mens Rea Issues. The Commission turned to the list of statutes with *mens rea* issues that was distilled by legal intern Shawn Welch.

§§2903.02 murder and 2903.04 involuntary manslaughter currently have a standard of strict liability with a *mens rea* from intent to commit the predicate felony. At first the general opinion was these should remain as is, with the *mens rea* defaulting to the underlying offense. No consensus was reached.

Dir. Diroll said that the Commission will work in committees at next month's meeting.

FUTURE MEETINGS

Future meetings of the Sentencing Commission are tentatively scheduled for January 22, February 19, March 19, April 16, May 21, June 18, and July 23, 2009.

The meeting adjourned at 3:05 p.m.