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

**MEMBERS PRESENT**
Common Pleas Judge Jhan Corzine, Vice-Chair
Chrystal Alexander, Victim Representative
OSBA Delegate Paula Brown
Juvenile Judge Robert DeLamatre
Prosecuting Attorney Laina Fetherolf
Defense Attorney Kort Gatterdam
Municipal Judge David Gormley
Public Defender Kathleen Hamm
Ken Kocab, Staff Lt., representing State Highway Patrol Superintendent Col. David Dicken
Bob Lane, representing State Public Defender Tim Young
Jason Pappas, Fraternal Order of Police
Appellate Judge Colleen O'Toole
Municipal Judge Kenneth Spanagel

**ADVISORY COMMITTEE MEMBERS PRESENT**
Lynn Grimshaw, OJACC
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
JoEllen Cline, Legislative Counsel, Supreme Court of Ohio
Tom King, legislative aide to Sen. Smith
John Murphy, Exec. Dir., Ohio Prosecuting Attorneys' Association
Caitlyn Nestleroth, House Minority Caucus
Matt Stiffler, Legislative Service Commission
Phil Teasley, Hannah News Network

Common Pleas Judge Jhan Corzine, Vice-Chair, called the March 18, 2010, meeting of the Ohio Criminal Sentencing Commission to order at 10:20 a.m.

The Commission voted unanimously to approve Appellate Judge Colleen O'Toole's motion, seconded by Defense Attorney Kort Gatterdam, to approve the minutes from the November, 2009, December, 2009, and February, 2010, meetings.

Wood County Public Defender Kathleen Hamm was welcomed as the newest member of the Commission, replacing Yeura Venters, whose term expired.

**DIRECTOR'S REPORT**

Executive Director David Diroll reviewed the meeting packets, which included: a memo from Dir. Diroll titled "Revamping the Commission's Enabling Status"; the latest Legislative Update by Atty. Shawn Welch; supplements to last month's discussion on enforcing restitution orders and driving under suspension; a chart of felony statutes affected by the *Colon* decision; and minutes from the November and December, 2009, meetings and the February, 2010, meeting.

With Atty. Hamm's appointment to the Commission, said Dir. Diroll, we almost have a complete roster once again. He noted that, for a while, there have been challenges to getting a quorum due to several vacancies – as many as 7 at one time. The official core membership, as listed in the enabling act, stands at 31, with an unspecified number on the Advisory Committee. That means that 16 are needed for a quorum.

He reported that the *Colon* Subcommittee continues to meet to address statutes that don't list a culpable mental state.

**LEGISLATIVE UPDATE**

The Ohio House of Representatives has not yet appointed a Chair for the House Criminal Justice Committee, so many bills are in limbo, noted Dir. Diroll.

Law Clerk Shawn Welch reported that the House of Representatives recently passed S.B. 77, which expands DNA testing for all felons.

*The Columbus Dispatch*, he said, had a recent editorial promoting Senator Bill Seitz's S.B. 22, which would increase earned credits for participation in prison programs.

Sen. Grendell and Sen. Teresa Fedor introduced S.B. 235, which would make human trafficking a standalone offense.

Atty. Welch reported that a recent study announced that, nationwide, the number of state prisoners has dropped for the first time since 1972, but federal prison populations have increased.

**ENABLING ACT**

After nearly two decades of the Commission's working on sentencing issues, Dir. Diroll said it may be time to review the Commission's enabling statutes (§§181.21-181.26), particularly since major transitions are on the horizon with the future retirement of the Chairman and Vice Chairman. Dir. Diroll is also unsure if he will still be Executive Director a year or two from now. He feels it is a good time to take stock of the statutes that define the Commission's role.

The statutes include tasks that were very specific and have already been accomplished by the designated deadlines, such as the felony sentence rewrite and rewrite of the Juvenile Code.

Another concern is the size of the Commission's core membership of 31, which sometimes creates problems regarding quorums, especially when there are vacancies, he noted.

As for the Advisory Committee, Dir. Diroll opined that it's good to have an advisory group allowing the Commission to benefit from the expertise of certain professionals, but it might work better if its membership was more *ad hoc*, depending on the topic. The size of the Advisory Committee is less of an issue, he added, but it might be a good time to reevaluate the group's specific makeup.

The size of the Commission becomes a minor issue each time the Commission comes up for review by the Sunset Review Commission or in the General Assembly's budget process, said Dir. Diroll.

The Commission started with 17 voting members, recapped Dir. Diroll. Three municipal and county court judges were added when we worked on misdemeanors and several more members were added when we worked on juvenile law. As vacancies occur due to elections and expiration of terms, there is lag time in getting vacancies filled. This creates a challenge in reaching a quorum during some meetings, he added.

Dir. Diroll suggested amending the language to state that a quorum would constitute "A majority of serving commission members". This would honor the spirit of the quorum language while providing flexibility when there are vacancies.

Judge Spanagel suggested the language "unappointed vacancies" so that the vacant seats don't count against us in the totals for establishing a quorum.

Since the current statute goes into greater detail than necessary regarding the makeup of the staff, Dir. Diroll suggested reducing the specificity of those requirements.

The Juvenile Committee was created in the late 1990's to reexamine juvenile laws that govern delinquency and unruly dispositions. That assignment resulted in the establishment of Title 2152 to address juvenile offenders. The Juvenile Committee is no longer needed as a separate part of the Commission, said Dir. Diroll. It hasn't met for some time. Since all members of the Committee are also on the Commission, and the duties called for were completed by 2003, Dir. Diroll believes that the Committee could be removed from statute.

Dir. Diroll pointed out that the intent is not to purge juvenile topics from the agenda and juvenile representatives would still be part of the membership. The Juvenile Committee and full Commission usually met as a whole anyway.

If the Juvenile Committee is eliminated, said Judge Spanagel, then it should be worded so that we can still call on them when needed. He

suggested language to the effect of "when studying sentencing and dispositional patterns …"

Juvenile Judge Robert DeLamatre remarked that, when the legislature wanted to address and overhaul the juvenile dispositions, they enacted legislation to do so and the purpose has been fulfilled. It could easily be reenacted if necessary.

Although the original membership consisted of only 17 voting members, it was not broad enough to cover the misdemeanor, traffic, and juvenile worlds that the Commission turned to after completing the felony package. The Chief Justice names ten of the members and the Governor names twelve. Four members come from the General Assembly and five more are *ex officio* members. Broad representation makes the Commission work well, but the numbers could be cut for quorum efficiency, Dir. Diroll maintained.

We don't need to drive it from a budget perspective, he said, because it really doesn't cost that much per member since we only cover travel and food costs, not salaries, for each member.

We would be hard pressed to remove any category, Judge Corzine declared, but we might be able to adjust those numbers a little.

Judge O'Toole suggested keeping the core membership and bringing in additional experts or committees as needed.

Dir. Diroll remarked that the state benefits from the expertise of members at a bargain rate. He pointed out to the Sunset Review Committee, which reviews all boards and commissions, that most every sentencing statute used in felony, misdemeanor, and juvenile courts today came out of recommendations of this Commission. The Commission's proposals were largely adopted intact by the General Assembly.

In addition, when S.B. 2 was enacted, the Sentencing Commission was given $2 million to help implement the bill. The Commission returned the money and accomplished the task with existing resources. It is doubtful that many other groups can make that claim.

Judge Corzine encouraged looking ahead, particularly since the state tends to make major revisions to its sentencing structure about every 20 years. We need to leave enough flexibility for that.

Dir. Diroll pointed out that the recent records in the prison population broke records set *before* S.B. 2. S.B. 2 kept the prison population fairly level and predictable for 12 years. The recent increases are due to the removal of aspects of S.B. 2's guidance by the Supreme Court's *Foster* decision. Another factor has been the addition of new felonies.

Representing the Ohio Justice Alliance for Community Corrections, Lynn Grimshaw favored Dir. Diroll's suggestions. He noted that having the Chief Justice as chairman can be awkward, especially when the Commission and Supreme Court decisions are at odds. He suggested that perhaps the Commission's Chair should not be the Chief Justice, but someone appointed by the Chief Justice.

There is some institutional value to having the head of an entity as the chair, said Dir. Diroll. He contended that having the Chief Justice as Chair of the Commission is more valuable than the conflicts that arise. It gives the Commission a significant mantle.

Atty. Slagle asserted that having the Chief Justice as Chair enhances the Commission's credibility with the legislature.

Judge O'Toole concurred with Mr. Grimshaw's concern about conflict.

It was rare to have a Chief Justice testify on a bill, said Dir. Diroll, until Chief Justice Moyer testified on S.B. 2.

Dir. Diroll asked members to give more thought to these issues. He noted that the Advisory Committee works well as an ad hoc committee, since there is no required number of people and it is most cost effective. He feels it is unnecessary to list specific representations for that committee.

Turning to specific provisions, Dir. Diroll suggested amending §181.22(B) to state that "The Commission may invite persons with expertise on adult and juvenile offender sentencing to participate in the meetings of the Commission and its committees." These "experts" should also be included in §181.22(C) regarding expenses. He noted that this will allow flexibility for the Commission to provide lunches and pay travel expenses for experts invited to participate or advise, since this has been a problem in the past.

Dir. Diroll suggested merging all of the duties sections (§§181.23-181.26) into one section, noting that some of the duties were very specific to certain tasks that have been completed, such as the forfeiture, traffic, and juvenile packages.

He mentioned that the Commission's larger staff in the early days conducted extensive studies that enabled the Commission to make detailed fiscal and population projections. We no longer have the budget available to do that, he added, so input from the Advisory Committee becomes even more important.

He added that the Commission's staff will continue to do sentencing plans and project their impact, as well as monitor any changes to the state's sentencing structure and provide periodical reports.

Current law says the Commission should review *all* bills introduced in the General Assembly that provide for new criminal offenses or that change the penalty for any criminal offenses. Dir. Diroll contended that it is not necessary for the Commission to review every bill dealing with criminal offenses, so this portion of the statute could be narrowed while also allowing more flexibility.

Representing the Legislative Service Commission, Matt Stiffler noted that, since not all bills get a second hearing, research is conducted for a bill analysis by the time the bill gets its first hearing but a fiscal note is not completed until the bill gets its second hearing.

Dir. Diroll asked for input on whether any specific duties need to be considered for recommendation to be added to the statute. He noted that

the change coming with Chief Justice Moyer's retirement might mean significant changes to the dynamics of the Commission.

**RESTITUTION & MISDEMEANOR JUDICIAL RELEASE**

**Restitution.** Judge Spanagel reported that he learned from Dir. Diroll that the word "order" was used in the restitution statutes (rather than "judgment" which is used for other financial sanctions) because civil lawyers feared that a restitution "judgment" would be considered *res judicata*, thus limiting the ability of the victim to recover in a civil lawsuit. Relative to that, he added a sentence to the new proposal under §2929.18(D)(3) "The issuing of a certificate under this section shall not be considered for any purpose of *res judicata*." He believes that should be sufficient to deal with the previous concerns.

Dir. Diroll noted that the idea of allowing victims to seek a civil remedy came from the Sentencing Commission's misdemeanor bill.

Judge Spanagel noted that the Civil Law and Procedure Committee and the Court Administration Committees of the Judicial Conference agreed recently to support this and to use the Judicial Conference resources.

In addition, he recently received, from the Judicial Conference, a summary of a new LSC proposal, LSC 128 1606-1 (Victim Rights), proposed by Rep. Raymond Pryor. Among other provisions, it would mandate the court to make the offender pay restitution for economic loss and prohibit imposing community service in lieu of restitution.

Looking over the proposal, Judge Corzine feels there could be some problems with it, but noted that Rep. Pryor is open to discuss adjustments that might be needed.

Judge O'Toole argued that it tends to be taking a restitution order and making it a final judgment for purposes of restitution. It also would create problems with insurance companies who attempt to gain payment for damages.

Judge Corzine recognized that Judge Spanagel's proposal for §2929.18 would simply instruct clerks how to process restitution. It is a good way to clarify things for the clerks of courts.

Judge O'Toole fears it will cause insurance companies to come in and fight the restitution order and enforce it against the policy.

According to Judge Spanagel the LSC draft of LSC 128 1606-1 appears to allow payment to insurance companies.

Judge Corzine argued that, in criminal cases, there is usually a policy exclusion for restitution.

Pointing out that, in the past, legislature has rejected mandating full restitution, Dir. Diroll conceded that it might be a good idea to invite Rep. Pryor to discuss the bill or wait and see what happens once the bill gets introduced.

Regarding Judge Spanagel's proposal under §2929.18(D)(3), Atty. Slagle remarked that the first sentence states that "that person or entity may

enforce said financial sanction by separate civil action". He believes that might imply that a separate civil suit must be filed.

To remedy the problem, Judge Spanagel recommended striking "separate civil action" and inserting "by civil execution of the judgment or order". That would keep it consistent with the language in the statute under 2929.18(D)(1).

**Misdemeanor Judicial Release.** The Sentencing Commission has been asked by the Judicial Conference to develop language for a judicial release provision for misdemeanants, Dir. Diroll reported. At question, is how to adjust a jail sentence after it has been imposed and whether there should be victim notice.

If it is a case of domestic violence then there absolutely MUST be notification to the victim, said Pros. Fetherolf. If notice is to be given, the next question is *who* provides the notice. The jail, she noted, does not have a policy in place to address that.

Dir. Diroll believes there are already ways to adjust the sentence, but clarification would be helpful.

***COLON* ISSUES**

**Default Statute.** After lunch, the discussion turned to the statutory voids brought to light by the *Colon* case. Dir. Diroll reported that Atty. Slagle offered language to amend §2901.21(B) and (C) to create a default statute for felony offenses that do not contain a culpable mental state.

The purpose, said Atty. Slagle, is to make things simpler for judges. He explained this fallback provision uses the existing statute and moves (B) to (C) then offers a new (B) to act as a default statement to address when a culpable mental state is not included.

Judge Corzine likes the idea but worries about future legislators who are likely to ignore this proposal and expect the mental state to be strict liability, without making it clear.

Representing the State Public Defender's Office, Bob Lane noted that Title 29 offenses are not the only ones that might be affected. He insisted that it cannot be assumed that everything in Title 45 should be strict liability. He asserted that it is necessary to continue going through statute by statute to make sure they each list a mental state and to deal with the ambiguities.

Regarding Title 45, Judge Corzine tends to agree with Atty. Slagle's concept. He remarked that he doesn't know of anything in Title 45 that used a default provision to get to recklessness. His concern, however, is about future new statutes that fail to state a mental state.

The burden regarding any new statutes, said Judge O'Toole, needs to be on the people who write those statutes to make sure they include a mental state.

Dir. Diroll argued that you cannot constitutionally bind a future General Assembly, so it cannot be mandated that they include a mental state in all future bills.

**Colon Chart.** Members then discussed some of the specific offense recommendations by the Work Group.

**§2917.11(B) - Disorderly Conduct.** Atty. Welch pointed out that §2917.11 disorderly conduct needs a *mens rea* in (B), which involves certain acts while voluntarily intoxicated. He reported some committee members favor "strict liability", while some favor "recklessly".

John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association, argued that intoxication takes the place of recklessness so it should be a *mens rea* of "strict liability".

Criminal liability in general, said Judge Corzine, requires doing a voluntary act and getting intoxicated is certainly voluntary so "recklessness" would not be applicable.

In other offenses where intoxication is an element of the offense, said Dir. Diroll, they have generally been treated as strict liability, with no additional *mens rea* needed.

In most of those cases, said Atty. Lane, driving is the conduct, and driving while drunk is the danger. With disorderly conduct, the question becomes one of which comes first – intoxification or behavior.

Intoxification affects your mental state, Judge Spanagel noted. He suggested adding "reckless" and "involuntarily detoxification" to (B).

Eventually there was consensus *not* to add "recklessly" to (B).

**§2919.13(B) – Abortion Manslaughter.** This offense involves an attempt to conduct a legal abortion, but the fetus survives, and no measure has been taken to preserve the life of the "aborted" child.

Some subcommittee members favor "knowingly" while others prefer "purposely".

Pros. Fetherolf believes that (A) and (B) should have the same mental state.

Spanagel declared that it involves purposely failing to take measures to preserve the life, not purposely taking the life.

Atty. Lane argued that there is no causation of death in (B).

Since current law does not distinguish whether it is "reckless" or "strict liability", consensus was reached to recommend "purposely" as the *mens rea*.

**§2919.22 – Endangering Children.** The work group recommends that (A) creating substantial risk to a child, should require a mental state of "recklessly" while (C) OVI with a child, should be a strict liability offense. The group tabled (B)(1)-(6) for consideration of statutory definitions or jury instructions.

Judge Corzine noted that "reasonable corporal punishment" is not prohibited under this statute. He argued that (B)(1)-(5) should be "strict liability" since it is behavior that is prohibited, but (B)(6) should have a separate *mens rea* because it refers to allowing a certain action and might not be as easy to control.

Atty. Welch noted that (B)(1) and (5) are F-2s while (B)(2)(3)(4) and (6) are F-3s. Since this section has such a wide range of what might be considered acceptable, Atty. Welch suggested bumping the *mens rea* up to "knowingly".

A consensus was eventually reached that "knowingly" should be the *mens rea* for all of §2919.22(B)(1)-(6).

The subcommittee will continue to wade through the chart of statutes and report on their progress at the next Commission meeting.

**FUTURE MEETINGS**

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

The meeting Adjourned at 2:30 p.m.