

**Minutes of the  
OHIO CRIMINAL SENTENCING COMMISSION  
And the  
CRIMINAL SENTENCING ADVISORY COMMITTEE  
October 15, 2009**

**MEMBERS PRESENT**

Common Pleas Judge Jhan Corzine, Vice-Chair  
Chrystal Alexander, Victim Representative  
Major John Born, representing State highway Patrol Superintendent  
Col. Richard Collins  
Collins, Cedric, representing Youth Services Director Tom Stickrath  
Juvenile Court Judge Robert DeLamatre  
Defense Attorney Kort Gatterdam  
Municipal Judge Fritz Hany  
Prosecutor Jason Hilliard  
Kravitz, Janet, representing OSBA representative Paula Brown  
City Prosecutor Joseph Macejko  
Major Michael O'Brien, City of Warren  
Appellate Judge Colleen O'Toole  
Municipal Judge Kenneth Spanagel  
Representative Joseph Uecker  
Steve VanDine, representing Rehabilitation and Correction  
Director Terry Collins  
State Public Defender Tim Young

**ADVISORY COMMITTEE MEMBERS PRESENT**

Eugene Gallo, Eastern Ohio Correctional Center  
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections  
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  
Monda DeWeese, SEPTA Correctional Facility  
Adam Garn, Supreme Court of Ohio extern  
Beau Hill, Ohio Community Corrections Association  
Phil Nunes, Ohio Community Corrections Association  
Andrew Stevenson, Ohio Association of Criminal Defense Lawyers  
Matt Stiffler, Legislative Service Commission  
Jennifer Turnes, Ohio Community Corrections Association  
Lisa Valentine, Legislative Aide to Rep. Hoffman

Jason Varney, Ohio Community Corrections Association

Common pleas court Judge Jhan Corzine, Vice Chair, called the October 15, 2009, meeting of the Ohio Criminal Sentencing Commission to order at 10:11 a.m.

The Commission reviewed and unanimously approved the motion offered by victim representative Chrystal Alexander and seconded by Prosecuting Attorney Jay Macejko to approve the minutes from the September meeting.

He welcomed Janet Kravitz, who was filling in for Paula Brown as the OSBA representative.

**DIRECTOR'S REPORT**

Executive Director David Diroll reviewed the contents of the meeting packet, which included: a list of House and Senate bills that are currently before the House Criminal Justice Committee; a summary of "sexting" and "texting" bills being considered by legislators; an outline of law clerk Shawn Welch's related PowerPoint presentation; a list of states that use some versions of the Model Penal Code definition of "recklessness" provided by the State Public Defender's office; a list of statutes that may have *mens rea* issues as a result of the *Colon* cases; the latest Judicial Update; a pan by James Austin on "Reducing America's Correctional Populations"; and the minutes from the September meeting.

Dir. Diroll reported that representatives from the Council of State Governments were unable to join us for this meeting but should be able to join us for an upcoming meeting to discuss their approach to prison crowding issues.

**BILLS PENDING BEFORE THE HOUSE CRIMINAL JUSTICE COMMITTEE**

State Representative Tyrone Yates, as Chairman of the House Criminal Justice Committee, asked the Sentencing Commission to look at various bills that are now before the legislators.

**H.B. 11.** This bill would further narrow where a sex offender can live, by expanding the 1,000 foot rule to include recreation centers, playgrounds, and other places where it is reasonable to expect children to frequent or linger.

Former prosecutor Lynn Grimshaw, representing the Ohio Justice Alliance for Community Corrections asked about the definitions used for a recreation center, playground, and "places where you expect children to frequent or linger". Without a more explicit definition, this could include a grocery store, residences, and the like.

Judge Corzine agreed that the bill is quite broad and could create problems. He added that the bill doesn't differentiate among types of sex offenders.

Former prosecutor Jim Slagle, representing the Ohio Attorney General's Office, remarked that, since the vast majority of sex offenders are

relatives or acquaintances of the victim, not strangers, this legislation is unlikely to provide additional protection for children.

A child is more likely to get struck by lightning twice than to be abducted by a stranger who is a sex offender quipped State Public Defender Tim Young.

The bill needs to clarify its application to juvenile offenders, said juvenile Judge Robert DeLematre. It could split families as they are forced to relocate in an effort to comply with the residential requirements. It would also force homeschooling if juvenile sex offenders are not permitted to attend school.

Atty. Slagle intoned that having the Sentencing Commission weigh in on these bills would give legislators some cover to enact laws that make sense rather than just what is popular.

Another concern, said Atty. Grimshaw, pertains to offenders who were charged years ago with no mandate to register, but now face that mandate under the Adam Walsh Act.

The Commission's focus, said Judge Corzine, should be to caution legislators about the consequences of some of the details in the bills and perhaps offer drafting suggestions.

Representing the Ohio Community Corrections Association, Phil Nunes emphasized a need to insert science into the Commission's response. One significant point would be to explain that research shows the 1,000 foot rule does not make anyone safer. The Commission also needs to help legislators recognize the systemic impact of the bills. He claimed that homeless shelters will have to kick out many offenders, since that is where many sexual offenders now live.

Dir. Diroll acknowledged that the 1,000 foot rule gives a false sense of safety and is not as effective in protecting the public as most people would hope. It also creates numerous enforcement issues, to which sheriffs have testified. He noted that it is imperative to deal with the practical concerns on both sides and seek a compromise solution. He would recommend that the legislators conduct or support a systematic study of the effectiveness of SORN laws. There might be some other options that would more directly address the concerns.

Judge Spanagel suggested asking the legislators to step back and allow the Commission to look at this issue and craft something more workable.

If we take a broad based look at SORN, said Defender Young, then we need to include comments on systemic issues, including the barriers it creates which prevent many offenders from being able to comply. He insisted that if we don't speak up, then it is a failure on our part.

Ms. Alexander opposes the bill, even as a victim advocate and someone who has had to help register sex offenders.

According to Mr. Nunes, the Buckeye State Sheriff's Association has said they've had to become advocates for sex offenders because they can't even keep up with monitoring and registering all of them.

**H.B. 13.** This bill would prohibit Tier III sex offenders from being on school premises, said Judge Corzine, even to pick up their own child.

Atty. Slagle asked if there is an exemption allowed for someone who has a legitimate cause.

By making all SORN issues into criminal offenses, Appellate Judge Colleen O'Toole, questioned whether the bill raises constitutional issues, such as right to counsel, and the impact on finances (jail, court costs, etc.).

Dir. Diroll noted that the Ohio Supreme Court continues to rule that SORN Laws are civil remedies, not criminal punishment. As the Adam Walsh Act now conditions SORN on the level of offense, it becomes harder to argue that the penalties are civil rather than criminal.

It weakens the argument, echoed Judge Corzine, that the classification system is civil when you penalize people based on their classification.

Exemptions would have to be added to this bill for 18 year olds still attending high school, as well as guardians and care-givers, said Defender Young.

**H.B. 29.** This bill elevating sexual abuse of a corpse to the F-3 level. Judge Corzine noted that this would make it a more severe penalty than some sexual offenses against a live victim.

In summarizing the concerns of the Commission members regarding these three bills (H.B. 11, H.B. 13, and H.B. 29), Judge Corzine emphasized systemic issues with SORN laws and treatment of sex offenders which must be taken into consideration by the legislators, as well as the laws' effects on communities and individuals. He cautions against making it an F-5 for a rapist to pick up his own kid at a day care center. There are possible unintended consequences for some of these bills and some technical drafting issues.

In presenting these concerns to the legislators, Warren Mayor Michael O'Brien emphasized the need to stress the practical nature of those concerns and the potential consequences.

**H.B. 55 and H.B. 70.** H.B. 55 kicks up the penalty for committing cruelty to animals to M-1 for the second offense and mandates supervision for repeat offenders. If the defendant is a juvenile, an assessment is required. The court may require the parent or guardian of the juvenile to pay for the assessment and any subsequent counseling. H.B. 70 increases the penalty to F-5 for cruelty to animals, when the act is committed by a custodian or caretaker of the animal.

Because of costs, Judge O'Toole suggested allowing the judge discretion regarding having the parent pay for assessment of the child offender.

Atty. Young asked about the definition of "cruel" within this statute, noting that it appears we may be protecting an animal to a greater degree than we do human victims. Is cruel equal to basic assault?

Atty. Slagle suggested that the Sentencing Commission may want to recommend keeping these at misdemeanor levels, not felony.

According to city Pros. Jay Macejko, H.B 70 stems from a case involving someone who owned a kennel where 22 dogs were found starved to death. The discovery was particularly shocking considering that the owner had a reputation for training military and police dogs. The bill is intended to focus on custodians and kennel owners who are repeat offenders. These people are trusted care givers for animals and when the offense involves continued cruelty with repeat offenses, a misdemeanor penalty just doesn't seem to be enough.

Atty. Grimshaw fears that increasing it to the felony level could open the door to charging every person who mistreats an animal with a felony, thereby causing undue increases in the prison population.

It might be best, said Dir. Diroll, to narrow the focus of the bill, perhaps by adding the description "knowingly and systematically starving an animal" or something more specific rather than the broad description of "cruelty".

Judge O'Toole recommended limiting it to someone who boards or trains animals for compensation. Another option might be to prohibit anyone convicted of the offense from being permitted to continue taking care of or boarding animals for compensation.

Rather than kicking the penalty up to a felony, Judge Spanagel suggested charging the defendant for each separate animal involved.

**H.B. 78.** Would expands use of mandatory interlock devices to first time OVI offenders who are granted limited driving privileges while under a license suspension.

Declaring the bill is not necessary, Judge Spanagel pointed out that this option is already available to the judge. It does not need to be mandated. Besides, he noted, most first OVI offenders do not reoffend.

Arguing that the OVI changes constantly and is already eight pages long, Judge Hany requested giving it a rest for awhile. Guardian interlock is very effective, he said, particularly for multiple offenders and judges have the option now to use if for first offenders.

Judge Corzine acknowledged that judges won't like the bill due to the mandatory and cost issues.

**H.B. 99 and S.B. 77.** These are companion bills requiring the collection and preservation of DNA specimens from any person over the age of 18 who is arrested for certain felonies.

The amended Senate version, said Judge Corzine, narrows the requirement to offenses of homicide and rape. He reported that there had also been extensive discussion regarding the procedure used for conducting lineups. In fact, representatives of the Ohio Innocence Project offered to give up recording interrogations if improved procedures for lineups were adopted.

The bill, said Atty. Young, would mandate the collection of DNA along with fingerprints from everyone arrested. The ACLU has gone on record in opposition to this action, citing concerns about DNA results being

used for medical purposes. He noted that, with the proper restrictions imposed, it should serve solely for identification purposes. The bill would also require that there be availability of DNA testing post-conviction for people who maintain their innocence.

He acknowledged that the bill establishes procedures for conducting "live lineups" or "photo lineups". This is in response to lineups that have resulted in mistaken identifications of offenders.

As a member of the House Criminal Justice Committee, Representative Joseph Uecker reported that the biggest objections pertain to costs for testing and storage and how long DNA samples should be stored.

Among departments that use DNA, there is a huge body of evidence attesting to its success, said Atty. Young.

**H.B. 112.** This bill would authorize the court to require the use of a global positioning system device when a protection order is imposed.

Commission members decided to pass on discussing this bill since it does not pertain to sentencing.

**H.B. 128.** This bill would create a new Class 8 driver's license supervision level for certain traffic offenses.

This bill, said Judge Spanagel, relates to the traffic offenses of assured clear distance and running stop signs where the action results in serious physical harm or death, which would subsequently result in an increased penalty. This bill is the result of a tragedy that occurred in one legislator's district. "Serious physical harm", he said, is a broad term that could envelop more traffic offenses than intended and "death" in these cases is already covered by vehicular and negligent homicide. The bill is unnecessary, he contended.

Judge Corzine warned against criminalizing all negligent conduct.

According to Judge Spanagel, the bill would be criminalizing the result, not the conduct.

**H.B. 154.** This bill would elevate the base penalty of fleeing or eluding a law enforcement officer from M-1 to F-5 when committed by a person who is operating a motor vehicle. When committed by a person on foot, the offense would be an M-2. If committed after the commission of a felony, it would be F-4 or if serious physical harm is caused or a substantial risk of serious physical harm it would be F-3.

Judge Spanagel raised the issue of a person driving and cannot pull over immediately when an officer uses a siren or flashing lights to signal him to do so. Sometimes, he said, there might be a quarter mile distance before there is a safe spot to pull over. Under this bill, would this be regarded as "fleeing or eluding" because the driver didn't pull over right away?

The greatest concern, said Atty. Slagle, is that the bill would make every disobeying case a felony, which could cause a significant increase in the prison population.

Dir. Diroll noted that a consecutive offense is treated like escape. He asked if the felony side should be limited to whether there's serious risk of harm. He also mentioned the problem in current law with the mandatory license suspension for the least serious charge.

Judge Spanagel remarked that this bill would not have prevented the death that generated the bill.

**H.B. 180.** This bill addresses aggravated menacing and assault when committed in a courthouse, increasing the penalty to the F-5 level.

If a person cannot show proper respect for the court, said Pros. Macejko, then he feels that an act of aggravated menacing or assault in the courthouse should result in a higher penalty.

Judge Corzine suggested leaving threats—the aggravated menacing portion—as misdemeanors.

Atty. Gatterdam sees menacing as an everyday occurrence at the courthouse.

Judge Spanagel suggested leaving aggravated menacing as M-1 unless the offender has prior assaultive behaviors.

It is quite doubtful, said Mr. Grimshaw, that increasing this to the felony level will affect anyone's behavior.

**H.B. 182.** This bill specifies that the judge cannot choose from the bottom end of the sentencing range for the F-1 conviction of felonious assault or endangering children when the victim was less than age 5. It also mandates choosing a term within the maximum portion of the sentencing range for F-2 offenses and extending beyond the maximum of the range for F-3 convictions, noted Dir. Diroll.

The mandatory would be chosen from the range of 5 to 10 years for felonious assault, endangering child, voluntary manslaughter, involuntary manslaughter, or reckless homicide when the victim is under the age of 5 years old, said Dir. Diroll. The mandatory prison term must be served consecutively to and prior to any prison term imposed for the underlying offense.

According to Atty. Young this is an unclassified felony which comes as the result of a Montgomery County shaken baby case. The offender was convicted of an F-2 and sentenced to the maximum of 8 years of prison. Someone didn't think the 8 years was enough. Instead of creating a new unclassified felony, he said the case should be treated like an F-1 because of the age of the victim.

After seeing numerous cases over the years where victims endure unbelievable irreparable harm that affects them severely for the rest of their lives, Judge Corzine admitted that sometimes 8 years of prison might not seem like enough. Given the nature of the harm to the victim regardless of the age, there are some cases of felonious assault where the penalty should be available for at least up to 15 years. It should probably be handled as specifications added on to the offense.

The problem, said Atty. Young, is the idea of creating an unclassified felony as the solution. There should be another way to go with this.

Whether an element, finding, or specification, it would have to be proven beyond a reasonable doubt to increase the penalty. Judge Corzine contended that it should be based on the harm rather than the class of the victim. He suggested creating a spec and setting a penalty for it.

**H.B. 191.** This bill would expand the definition of "street racing" to require the forfeiture of a vehicle involved in the offense, and increase the penalties for repeat offenders. It would also create the offense of street racing manslaughter, a felony of the second degree.

If the action causes death there is a mandatory prison term for aggravated vehicular homicide, said Judge Spanagel, plus the use of nitrous oxide will result in a first degree misdemeanor.

According to Pros. Hilliard, nitrous oxide is already illegal to use in a vehicle. It is an equivalent violation.

This bill, Atty. Gatterdam noted, grew out of a case where a lady died when two street racers caused her to lose control. One driver died and the other was tried and acquitted since his vehicle didn't touch hers.

Other than expanding the definition of "street racing" and offering a provision for forfeiture of the vehicles, Atty. Young declared that this is another bill that really isn't needed.

**H.B. 225.** This bill would eliminate the requirement for conducting a presentence investigation (PSI) before sentencing an offender to a community control sanction.

Gary Yates, representing the Chief Probation Officers' Association reported that these PSIs are extremely helpful to probation officers.

The impetus for this, said Judge Corzine, came from Cuyahoga County. He feels it is a waste of resources to do a PSI in each felony case when the judge imposes a community sanction.

According to CBCF operator Eugene Gallo, if a PSI is required for each case, it is likely to result in abbreviated PSIs instead of thorough ones. He agrees that it would result in a waste of resources.

Noting that the PSI is helpful in many cases when determining appropriate community sanctions, Judge Corzine asserted that there are also cases where everyone (prosecution and defense counsel), agrees on the best sanction for the defendant without a need for the PSI. In that case, it would be a waste of resources.

Mr. Nunes argued that the PSI is valuable in the move toward risk/needs type of sentencing. It could result in a loss of consistency and aggregate data collection regarding sentencing patterns.

Judge Corzine insisted that ordering a PSI should be left to the judge's discretion.

PSIs have been extremely valuable to community correction practitioners rather than relying on the word of the offender, Mr. Nunes declared. As a nonprofit agency, he is unable to get the PSI on his own, so he counts on getting it through the court.

According to DRC Research Director Steve VanDine, it is rumored that some judges skip the PSI requirement anyway.

When prosecutors and defense counsel work things out without a PSI, said Atty. Gatterdam, it may not be necessary to halt the process for a PSI since it could delay things another 3 to 4 weeks.

Mr. VanDine reported that there is a new Risk and Needs Unified Assessment that every county will be using soon which may be more informative than PSIs. It is a series of four different instruments being designed by the University of Cincinnati.

Noting that some assessment tools hurt the outcome measurements for CBCFs, Mr. Nunes fears that the Risk and Needs Unified Assessment could have some unintended consequences.

Judge Corzine suggesting establishing a requirement in the Rules that the prosecutor and defense counsel should agree that a PSI is needed.

An amendment to the Criminal Rules would also be needed, said Judge Spanagel.

It has become problematic in some jurisdictions where the court is routinely neglecting to get PSIs, said Atty. Slagle. He pointed out that the information in the PSI is not always to help determine whether or not to send the offender to prison. It is also quite useful to help determine the type of supervision needed for the offender.

According to Judge Corzine, underlying alcohol or drug problems are not always revealed in PSIs.

Atty. Gatterdam noted that Franklin County courts do a short form version of the PSI.

According to Judge Hany, some counties face a cost of \$800 per PSI, which could be a major factor in guiding the judge's discretion.

**H.B. 233.** This bill would create the Criminal Justice Reform Committee. Dir. Diroll explained that this new panel would examine cases of wrongful imprisonment to identify issues that need to be addressed within the criminal justice system.

Judge Spanagel feels it is just a "feel good" response to recent cases that have been in the public spotlight as a result of DNA tests which proved certain people were wrongly convicted.

The goal, said Dir. Diroll, would be to identify systemic problems.

Any effort to address the problems is good, Atty. Young insisted.

Mr. VanDine believes it would be simpler to let the Court of Claims work with the Attorney General's Office to address the concerns.

Mr. Gallo feels that the duties of the proposed group could be addressed by the Sentencing Commission.

Since being acquitted is not the same as proving innocence, Judge O'Toole asked if the group's purpose would be to refer the case to a hearing to prove the individual's innocence.

Judge Spanagel sees the group's purpose as seeking out where there are problems within the criminal justice system.

Judge Corzine believes that the recommendations in S.B. 77 are likely to help alleviate a lot of the problems with people being wrongly convicted.

Law clerk Shawn Welch noted that the bill does not say where the group would be housed.

With today's state budget, said Dir. Diroll, it would almost have to be part of an entity that already exists.

If it includes misdemeanor cases, Judge Corzine warned that there would be no end to the list of cases.

Atty. Young pointed out that the bill says it must be a case that has gone through the Common Pleas Court, which would exclude misdemeanors.

Atty. Slagle does not see this as a concern of the Sentencing Commission and suggested leaving it alone.

**H.B. 235.** This bill, said Defender Young, is an attempt to return discretion to judges by getting rid of the mandatory bindovers for certain alleged juvenile delinquents to the adult system for criminal prosecution. The overriding purpose of the bill is to reduce the mandatory bindover range and the mandatory spec time, and return the authority of judicial release to the discretion of the juvenile court. He reported that the State Public Defender's Office supports the bill.

This bill also gets to issues raised by the Collin report on DYS, said Mr. Nunes. It is a hybrid of those concerns and best practices used by other states. He suggested inviting DYS Dir. Tom Stickrath to speak about it at the November meeting.

According to Judge DeLeMatre, there has been controversy about it among juvenile judges.

This issue was tabled for further discussion at a future meeting.

**H.B. 242.** This bill would set up an internet database on offenders who commit crimes against someone less than 18 years of age.

According to Mr. VanDine, the mechanics of putting together an information system that would meet the requirements of this bill would require a police officer to enter data immediately and courts to back track to enter data. It would be extremely expensive to do.

Atty. Young contended that Ohio needs to create a centralized database of all convictions with agency access to portions of that data. This bill would merely create pieces of the needed larger database. He feels that concentrating only on a small factor is a waste of time and money.

It would be necessary to exempt juvenile offenders until they're over 18 years of age, said Judge O'Toole.

Pros. Hilliard pointed out that even if the offender's record is expunged, his name would still be on this list.

Judge Spanagel mentioned that the new court data network would contain this information for court purposes. It is not available to the public, however.

**H.B. 243.** This bill would increase the penalty for non-aggravated murder from 15 years to life to 20 years to life when the victim is under age 13.

Atty. Slagle noted that few, if any, offenders convicted of murder get released in 15 years, regardless of the age of the victim.

It is unlikely that an extra 5 years will serve any deterrent effect, said Mr. VanDine.

Atty. Young agreed that the bill would have little impact.

**Am. Sub. S.B. 58.** This bill affects the collection of blood, urine, tissue, or other bodily substances.

This is a procedural evidentiary issue, said Judge Spanagel, not a sentencing issue.

Judge Corzine cited possible implications under this bill if a divorced parent attempts to get a DNA swab from a child to determine paternity and similar unintended consequences.

There was general consensus that the legislators should consider unintended consequences of this bill.

#### **COLON AND RECKLESS CONDUCT**

Over several months, the *Colon* Subcommittee has been reworking the current statutory definition of "recklessness". Some members prefer a "tweaked" version that retains most of the current definition, but replaces words such as "heedless indifference" and "perverse disregard" that confuse jurors. Others prefer different approach taken by the Model Penal Code version. Dir. Diroll remarked that the subcommittee will reconvene in yet another effort to finalize the definition.

Representing the Ohio Association of Criminal Defense Lawyers, Andrew Stevenson reported that the OACDL is in favor of using the full version of the Model Penal Code definition.

The OACDL contends that there must be a clear separation or distinction between "negligence" and "recklessly". Because "recklessly" is the minimum culpable default standard in the Code, removal of the adverbs

would turn "reckless" into "negligence" and eliminate the criminal mental culpability that is required.

The OACDL also contends that the alleged offender should be aware of the possible consequences that could result from knowing the risk of his action. His thought process needs to be recognized. It is important to get into the mental component of what the alleged offender was thinking.

The OACDL is concerned about the potential criminalization of common behavior. The second sentence of the Model Penal Code provides a safeguard for common behavior that is done by a lot of people that is not intended to be criminal but, under some circumstances, could be accused of being criminal. If that sentence is omitted, you risk the potential of common behavior becoming criminalized.

Atty. Stevenson concluded by stressing that the Model Penal Code has the strongest chance of surviving litigation. When the definition of "reasonable doubt" was changed twenty years ago, it led to a wealth of potential litigation. He fears that the same could happen if the Sentencing Commission changes the Model Penal Code definition.

The actual definition might not be as critical as anticipated, said Dir. Diroll. He believes that the bigger issue is whether the default to recklessness should be retained and whether various statutes currently calling for "reckless" conduct might better require "knowing" conduct.

#### **FUTURE MEETINGS**

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for November 19 and December 17, 2009.

The meeting adjourned at 2:35 p.m.