

OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

**Meeting
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
August 15, 2013**

MEMBERS PRESENT

Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Robert DeLamatre, Juvenile Court Judge
Paul Dobson, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Chad McGinty, Capt., representing State Highway Patrol
Superintendent, Col. Paul Pride
Thomas Marcelain, Common Pleas Judge
Aaron Montz, Mayor, City of Tiffin
Albert Rodenberg, Sheriff
Kenneth Spanagel, Municipal Judge
Steve VanDine, representing Rehabilitation and Correction
Director Gary Mohr
Roland Winburn, State Representative

ADVISORY COMMITTEE

Jhan Corzine, Retired Common Pleas Judge
Eugene Gallo, Eastern Ohio Correction Center
David Landefeld, OJACC
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

Monda DeWeese, SEPTA Correctional Facility
Ryan Dolan, Counsel, Rehabilitation and Correction
Marta Mudri, Ohio Judicial Conference
Charlette Osterland, OCCA
Jason Varney, OCCA

The August 15, 2013 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair, Municipal Judge David Gormley at 9:55 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll announced that Retired Common Pleas Judge Jhan Corzine is retiring completely from his many roles in the

judiciary and with the Sentencing Commission. Having served for many years as a Common Pleas judge, then as a visiting judge, as a member and Co-Chair of the Sentencing Commission, and most recently as a member of the Sentencing Commission Advisory Committee, he has testified at the General Assembly on many proposals. Dir. Diroll commended his dedicated service and wished him well in his new service as a volunteer with the VA Hospital.

LEGISLATIVE UPDATE

OVI. Dir. Diroll reported that Sen. Larry Obhof is still interested in introducing the proposed revision of §4911.19 to simplify impaired driving law. A few minor details are being worked out, he added.

An appellate case out of the Eleventh District was brought to the attention of the Commission by Municipal Judge Ken Spanagel for possible consideration at some point. It involves allowing an OVI felony involving the 6th offense in 20 years to max out at 3 years. It is recognized as the *State versus Owen* case, from July 2013.

Dir. Diroll noted that he has received numerous calls regarding whether F-3 OVIs fall within the new category or the old category. The maximum is 3 years in the new category and 5 years in the old category.

According to Judge Spanagel, some call it an unclassified misdemeanor.

Dir. Diroll remarked that the level of the offense is almost the least of their concerns within that statute. He noted that several sentencing options exist, including the specification penalty. The 6th offense in 20 years could be sentenced directly or it could be indicted as a spec, which carries a different penalty for the same conduct. Absurdly, he added, even underage drivers are theoretically eligible for a "6 in 20" penalty, despite its near impossibility.

Indeterminate Sentencing. In the spring, the Commission discussed an indeterminate sentencing proposal designed to help address prison misconduct, Dir. Diroll recalled. This was driven by concerns of DRC. The proposal has not advanced.

Dir. Diroll noted that the meeting packets contained articles addressing U.S. Attorney Holder's decision to change direction in terms of drug enforcement. This echoes some concerns raised by the Commission years ago regarding lower level drug users, he added.

CULPABLE MENTAL STATES

Dir. Diroll remarked that the Sentencing Commission started working on the issue of culpable mental states a couple of years ago after several different opinions emerged from Ohio Supreme Court on point. The defined culpable mental states are purposely, knowingly, recklessly, and negligently (§2901.22). Historically, the exception is when the General Assembly "plainly indicates a purpose" that a statute carry strict criminal liability (§2901.21(B)). In such cases, the act alone constitutes the crime; the prosecutor does not also have to prove the offender's mental capability, he added.

Unfortunately, Ohio's criminal statutes do not always indicate a clear culpable mental state or the intent to impose strict liability. The statutory rule for these situations specifies that "recklessly" is the default *mens rea* when "the section neither specifies culpability nor plainly indicates a purpose to impose strict liability" (§2901.21(B)).

The general rule, Dir. Diroll explained, is that every criminal statute addresses some kind of act that is prohibited and the mental state in which it is carried out. Some statutes involve offenses with actions that in and of themselves indicate strict liability (*e.g.*, speeding), even though the statute doesn't plainly indicate the intent.

In tracing the litigated history of the issue, Dir. Diroll remarked that, in 1981, *State v. Wac* determined that when the statute states the *mens rea* in one clause, but does not mention a mental element in another division of the same statute it "plainly indicates a purpose to impose strict criminal liability" in the latter clause, rather than default to reckless. In 2008, *State v. Colon (Colon I)* turned everything on its head. It underscored the need to make the mental state clear for each crime that isn't meant to carry strict liability. This caused a change in the way prosecutors draft indictments. The case appeared to be retroactive, resulting in lawsuits filed by offenders based on improper convictions and petitioning for release from prison. Eventually, *Colon II* clarified that *Colon I* was prospective only, with few exceptions.

In 2010, Dir. Diroll noted that *State v. Horner* overruled *Colon I*. It stated that an indictment tracking the language of the statute isn't defective for failing to specify a *mens rea* if the statute itself doesn't do so.

In December 2010, *State v. Johnson* held that if the General Assembly expressed a culpable mental state in *any* part of a statute, the statute is effectively complete and there is no need to apply the default rule to remaining clauses. By returning to a law similar to *Wac*, Dir. Diroll noted, this minimizes the cases-by-case debate between strict liability and recklessness, at least in statutes that contain a clear mental elements *somewhere*.

Dir. Diroll pointed out that most of what the Commission had discussed and voted on in its 2011 report was before the *Johnson* case. After *Horner* and *Johnson*, many statutes are presumed complete and the state can indict to the literal language of the Code. He noted, however, that *Johnson* is troubling to those who believe that strict liability should be the exception to the rule, not the default.

Retired Common Pleas Judge Jhan Corzine remarked that he was taught in law school that every offense had to have a *mens rea*, but not that every element of an offense had to have a *mens rea*. He's not sure it is constitutionally required that each element of every offense has to have a *mens rea*.

According to Prosecuting Attorney Paul Dobson, *Johnson* takes the argument back to *Wac*, which made strict liability the default when a *mens rea* was stated in only one clause, but not otherwise made clear. *Colon*, he added, caused more problems than it solved.

Dir. Diroll asked whether the statutes that set the *mens rea* rules should clarify situations in which the mental state is implied, rather than leave it to case-by-case determination

Separately, in addressing the troubling definition of "recklessly", he noted that the Commission had proposed a definition more closely tied to the Model Penal Code (MPC). At least 30 states plus the District of Columbia use some form of the MPC definition. The Commission's proposed definition would read "A person acts recklessly when that person consciously disregards a substantial and unjustifiable risk that a criminal offense will result from the person's conduct. The risk, when considering the purpose of the person's conduct and circumstances known to the person, involves a substantial departure from the standard of conduct that a reasonable person would observe in the actor's situation. A person is reckless with respect to circumstances when the person consciously disregards a substantial and unjustifiable risk that such circumstances are likely to exist."

When we issued our report on criminal culpability in 2011, which included this proposed definition, Dir. Diroll said was encouraged to work with some other groups with an interest in the issue. These included the Texas Public Policy Foundation and the Buckeye Institute. The rewrite that emerged includes the following: "When the language specifies a degree of culpability without specifying the elements of the offense to which that culpability applies, absent clear legislative intent to the contrary, the specified degree of culpability shall apply to all elements of the offense." Dir. Diroll said the goal was to read a stated mental element into naked provisions on each offense, rather than assume the statute is complete as in *Johnson*.

Judge Corzine argued that in theft and drug offenses the amount is a finding, not an element and the *mens rea* would not apply to findings, but *would* apply to elements.

Pros. Dobson argued that *Johnson* is a red line rule.

Judge Corzine raised concern about the third sentence of proposed §2901.22(B) which reads "Except as provided in section 4141.48 or 5111.03 of the revised Code, evidence that a person acted with deliberate ignorance is not sufficient to establish that the person acted knowingly."

Judge Spanagel wondered if this would make deliberate ignorance an affirmative defense.

Judge Corzine did not believe so, but said that it created a fact-based determination as a finder of fact.

Ultimately, Judge Gormley suggested developing a list of the top 10 or 12 offenses needing attention. He cautioned that the changes might otherwise have unforeseen circumstances for other offenses.

Ohio Prosecuting Attorneys' Association Director John Murphy declared that, rather than using a wholesale approach, he recognizes there are a few statutes and offenses that need attention. He agreed that the definition of recklessly needs some serious attention, but he is not keen on the Sentencing Commission's definition.

State Representative Roland Winburn remarked that the history behind a bill and a reminder of the importance of specifying a mental element would be extremely helpful to legislators when bills are considered. He has suggested to LSC that it be a standard consideration for any bill.

Dir. Diroll agreed to identify problem statutes.

Most practitioners agree that an improvement was needed in regards to the definition of recklessly, said Judge Corzine. He feels the Commission should send the voted-on version forward to the legislators as a suggestion.

When he submitted that definition to the legislature before, Dir. Diroll responded, was when he was then directed to the other groups with similar concerns.

Atty. Hamm suggested redistributing the definition voted on by the Sentencing Commission.

Dir. Murphy said that he would take the Diroll memo back to the Prosecutors' Association for further discussion. But he emphasized that the default standard should not drop from "recklessly" to "knowingly."

SENTENCING COMMISSION'S FUTURE

Dir. Diroll explained that the Commission's enabling statutes set forth the membership and duties of the Commission. The first major duty had been to conduct a comprehensive review of the state's sentencing guidelines and submit felony recommendations. The result was S.B. 2, called the "Truth in Sentencing Bill", which involved a major overhaul of the state's sentencing structure. Several legislators were actively involved in the process together with the Commission. Over the years, the Commission has continued to monitor the impact of the new felony laws on local government and appellate courts. Due to term limits, however, there are almost no legislators left who had worked on S.B. 2.

He noted that the Commission was not the first group of choice for the study that led to H.B. 86, which made some other significant changes to the sentencing structure, 15 years later. S.B. 2 concepts were strained by H.B. 86, although the Commission endorsed many of the changes.

The General Assembly deliberated on several major bills in the 1990's and early 2000's that resulted from our work. These included work on misdemeanor sentencing, traffic law, criminal forfeiture statutes, and juvenile offender dispositions. Former Rep. Bob Latta, now a U.S. Congressman, was a key legislator during the time.

In 2007, S.B. 260 proposed having *all* rapes carry the same penalty: 25 to life. The bill passed the Senate with nearly unanimous support. Rep. Latta, who chaired the House Criminal Justice Committee at the time, asked Dir. Diroll to make suggestions on the bill. In response, the Commission recommended a hierarchy of penalties for the variety of rapes, although all would remain F-1s with mandatory prison terms. The final bill passed mostly as the Commission recommended, but it left some bad blood with some senators. One of those legislators twice tried to abolish the Sentencing Commission.

Dir. Diroll reported that several ideas are now floating around among legislators and cabinet members regarding sentencing and the Criminal Code. In addition, he has had conversations with the Director of the Supreme Court about evolving the Sentencing Commission into a broader spectrum of criminal justice issues. Plus, he said that he will step down as director in the near future.

DRC Research Director Steve VanDine reported that DRC Dir. Gary Mohr recently announced that he, Governor Kasich, Speaker Batchelder, and Senate President Faber agreed that a group should study the Revised Code over the next 18 months with an eye specifically toward misdemeanors that have become felonies and a possible adult RECLAIM program. Part of the intent is to offer a broader array of community alternatives for F-4 and F-5 drug offenders. Deputy Director Sarah was assigned as the point person.

According to Juvenile Judge Robert DeLamatre, the juvenile judges would like to see a new review of the laws affecting juveniles. He believes the Sentencing Commission is tailor-made for that task.

According to the Commission's enabling statute, said Judge Marcelain, we have no new mandates. However, those original mandates fit the needs being voiced currently.

Judge Gormley suggested taking a look at the structure of the U.S. Sentencing Commission and see if there may be any useful guidance or options for us.

SEPTA Director Monda DeWeese asked if the Governor's group is planning to departmentalize their project.

They want the review of the Revised Code to be done in 18 months, Mr. VanDine explained, so that the results can be used to help shape the next budget.

Judge Spanagel declared a need to get those legislative leaders more involved in our work. He asserted that we could accomplish the review in 18 months.

Judge Marcelain stressed the need to make an offer that we're available and willing to work on the project.

When the Council of State Governments did their study we were involved, said Dir. Diroll, but not leaders in the project.

Judge Corzine declared that DRC seems to be in the driver's seat on this project.

In response to Judge Gormley's suggestion to consider the strategy of the U.S. Sentencing Commission, Dir. Diroll explained that The U.S. Sentencing Commission and a few states went to a sentencing grid format. Some states also collect data from sentencing courts on every sentence. These moves have resulted in a software sentencing approach. Ohio considered but rejected that approach. He pointed out that the Ohio legislature was historically responsive to work the Commission has

done on things that the General Assembly specifically requested. The legislature is less enthused about other proposals.

Noting current economic issues and financial reasons why sentencing changes are needed, Rep. Winburn acknowledged the financial strain of incarceration. That is the major reason for looking at new options.

Since the Chief Justice is the Chair of the Commission, Judge Spanagel asserted, then as a matter of etiquette, she needs to approach the Governor about the issue.

Dir. Diroll pointed out that the Commission's recommendations on drug offenses that became part of H.B. 86 are a first step along lines now being suggested by Dir. Mohr.

According to Mr. VanDine, some question whether the Commission could do the job in 18 months. The Commission would need to achieve consensus much quicker than in the past.

The Governor, Judge Gormley remarked, wants people who will answer to him and do his bidding. The Commission would need to convince Governor Kasich that he'd have more "buy in" with this group. The length of time it takes to get appointments made says that they don't recognize us as a vital group.

Mr. Gallo contended that the Commission already has representatives from the different groups that will need to have a voice in the Governor's group to review the Revised Code. Since the people are already here, we need to offer our support and volunteer our services to tackle the problem.

Since DRC is already way ahead on the task, Ms. DeWeese asserted that we need to at least express intent and show we are a willing player.

Judge Spanagel agreed with Atty. Hamm that the Commission needs to be an integral part of the project. He suggested getting a copy of any resulting bill from LSC before it gets introduced.

The Commission needs to step forward to remedy the tainted view left of the Commission by a couple of legislators, said Rep. Winburn. He suggested that something new is needed to show the real value of this Commission.

Judge Spanagel suggested that it might worthwhile to offer an annual or biennial report to the General Assembly on what the Commission has accomplished in order to keep the Commission's name and progress fresh in the minds of the legislators.

Dir. Diroll reminded him that the Commission already presents a periodic monitoring report to the General Assembly. Like most reports, it isn't widely read, he surmises.

Judge Marcelain asked if we could reassure them that we could meet the 18 month deadline.

Mr. VanDine noted that all departments will be putting their proposals together for budget consideration 12 months from now.

Representing the Chief Probation Officers' Association, Mr. Yates remarked that, in our argument to participate in this project, we need to make a commitment that we'll do something timely; since some have criticized that we have occasionally taken too long to get a consensus before making a final decision or submitting reports. He understands that a full consensus helps to prevent opposition when a bill works its way through the General Assembly, but when time is a key factor, it may be necessary sometimes to forward something without full consensus.

In regard to the issues to be addressed by the review, Mr. VanDine said that changing some of them back to misdemeanors could save 5,000 prison beds per year. The task won't be easy, however, since the original effort of making them felonies had a lot of political momentum.

If the Senate President and Speaker of the House say we need to change some felonies back to misdemeanors and set up an adult RECLAIM system, said Dir. Diroll, then they want someone to find a way to make it happen. The likelihood of success soars when changes are welcomed by the General Assembly, he added.

After looking at the different sentencing practices within both the juvenile and adult court systems, Mr. Yates expressed doubt that the RECLAIM model can work in an adult system. In the juvenile system, the RECLAIM program offers the judge more flexibility in dispositions.

There is a financial incentive for the prosecutors to keep those offenses at the felony level, Atty. Hamm argued, so that the cost doesn't fall to the county.

Dir. Diroll acknowledged that jail space costs more per diem than prison space, so jails aren't a viable alternative.

Judge Spanagel urged the Commission staff to find out the specific things the legislators want to focus on and use that as a starting point.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for September 19, October 17, November 21, and December 19, 2013.

The meeting adjourned at 2:10 p.m.