**Minutes of the**
**OHIO CRIMINAL SENTENCING COMMISSION**
**And the**
**CRIMINAL SENTENCING ADVISORY COMMITTEE**
**September 24, 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
Paula Brown, Ohio State Bar Association Delegate
Prosecutor Laina Fetherolf
Defense Attorney Kort Gatterdam
Municipal Judge David Gormley
Prosecutor Jason Hilliard
Bob Lane, representing State Public Defender Tim Young
City Prosecutor Joseph Macejko
Mayor Michael O'Brien, City of Warren
Appellate Judge Colleen O'Toole
Jason Pappas, Fraternal Order of Police
Senator Shirley Smith
Municipal Judge Kenneth Spanagel
Representative Joseph Uecker
Steve VanDine, representing Rehabilitation and Corrections Director Terry Collins

**ADVISORY COMMITTEE MEMBERS PRESENT**
Eugene Gallo, Eastern Ohio Correctional Center
Jim Slagle, Attorney General's Office
Gary Yates, Chief Probation Officers' Association

**STAFF PRESENT**
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

**GUESTS PRESENT**
Tori DelMatto, Correctional Institution Inspection Committee
Greg Geisler, Correctional Institution Inspection Committee
Gloria Hampton, Ohio Community Corrections Association
Irene Lyons, Dept. of Rehabilitation and Corrections
Scott Neely, Dept. of Rehabilitation and Corrections
Phil Nunes, Ohio Community Corrections Association
Paul Teasley, Hannah News Network

Municipal Court Judge Jhan Corzine, Vice Chair, called the September 24, 2009, meeting of the Ohio Criminal Sentencing Commission to order

at 10:18 a.m. He welcomed Defense Attorney Kort Gatterdam and City Prosecutor Joseph Macejko as the newest members appointed by the Governor to the Sentencing Commission.

The Commission members reviewed and unanimously approved the minutes from the June meeting.

**DIRECTOR'S REPORT**

Executive Director David Diroll noted that the recent Ohio Supreme Court ruling regarding video lottery terminals and shipping that option to the state ballot is expected to have a $900 million impact on the state budget. This budget gap might foster new impetus for some of Sen. Seitz's ideas in S.B. 22 that are intended to ease prison crowding concerns.

Dir. Diroll reported that Council of State Governments' staff—studying prison crowding issues at the request of the leaders of Ohio's three branches of government—are making the rounds in the State House, DRC, and other offices. He met with the team for a couple hours recently. He noted that, with other states they have focused on earned credit which is the most controversial part of S.B. 22. He doesn't know if that may influence a possible resurrection of the bill.

***COLON* AND "RECKLESS"**

The Commission has been working to clarify the appropriate culpable mental state (*mens rea*) where it is unclear in Ohio's criminal statutes. A subcommittee has been looking at how "reckless" is defined for purposes of the Criminal Code. Currently, an offense that doesn't specify a culpable mental state defaults to "recklessness" unless the statute indicates that it is a "strict liability" offense.

The Revised Code currently defines "recklessly" in §2901.22(C):

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

At the June Commission meeting, the following language suggested by Dir. Diroll was approved by one vote:

> "A person acts recklessly when the person ignores a known risk that his or her conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when the person ignores a known risk that such circumstances are likely to exist."

Since there was no clear consensus on the definition, Dir. Diroll asked the subcommittee to continue efforts to find a suitable definition.

Rather than replace current law, the *Colon* Subcommittee decided to tweak the definition to address the problematic wording of "heedless indifference" and "perversely disregards."

The subcommittee suggested changing "heedless" to "extreme" and "perversely" to "unjustifiably" so that the definition would read:

> "A person acts recklessly when, with extreme indifference to the consequences, he unjustifiably disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with extreme indifference to the consequences, he unjustifiably disregards a known risk that such circumstances are likely to exist."

If this definition is used, said Municipal Court Judge Kenneth Spanagel, it may be necessary to define "unjustifiable".

Some Commission members instead recommended the definition used in the Model Penal Code (MPC), which, in part, states:

> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

Judge Corzine remarked that he prefers the tweaked version to the Model Penal Code version because the latter uses "unjustifiable" to modify the risk whereas the proposed version uses "unjustifiable" to modify the level of disregard toward the risk. He noted that the term "unjustifiable" comes from some certain Law Review articles.

He said that Judge David Gormley had offered an amendment to the proposed version: to change "known risk" to "substantial risk" in the third line, change "certain result" to "particular result", and change "unjustifiably disregards a known risk that such circumstances are likely to exist" to "unjustifiably disregards the likelihood that such circumstances exist."

He reported that Judge Andrew Nastoff had argued against "should have known", noting that the person should be conscious of the risk.

According to law clerk Shawn Welch, "known risk" was already in the statute. He suggested offering two alternative definitions to the General Assembly.

Judge Corzine stressed keeping the definition as close to the current statute as possible.

Judge Spanagel recommended getting Judicial Conference input.

Mr. Welch remarked that the State Public Defender's Office put together a memo stating that 31 states use some form of the Model Penal Code.

Noting that some states don't even use "recklessness" as a mental state, Judge Corzine said he prefers the definition in the U.S. Code.

Representing the State Public Defender's Office, Bob Lane contended that the MPC definition may be the most palatable way to take this effort for clarification to the General Assembly since it has already gone through a testing process.

There is probably a strategic advantage to the defense for using the definition in the Model Penal Code, Judge Corzine admitted, since it states that the defendant "consciously disregards". This would allow a defense that the defendant "didn't know" the risk. The advantage to using "substantial risk", he declared, is that that term is already defined within the Ohio Revised Code. He further explained that "a risk" means the possibility that something might happen whereas "substantial risk" means there is a *strong* possibility that something might happen in contrast to a remote possibility. If it is more likely than not to happen, it is "substantial". He claimed that the current definition in §2901.01 has always been flawed. The original staff notes when §2901.22 passed say that "likely" means less "likely" than "probable". He declares that to be wrong, noting that the dictionary asserts that "likely" and "probable" both mean "more likely than not". He added that English usage sees them the same way but the statute says that they are not the same. In short, he believes that "likely" and "probable" mean the same: that the event has a better chance of happening than not happening.

Courts have especially run into difficulty with these definitions, said Atty. Lane, especially in sex offender cases and in weighing the likelihood of reoffending.

Representing the Ohio Attorney General's Office, Atty. Jim Slagle agreed that the Model Penal Code definition opens the argument for the defense regarding "conscious disregard," yet is better than the current Ohio definition. Ultimately, the issue is whether the definition will be understandable to a jury.

Atty. Lane said it is necessity to keep in mind that this is a criminal standard, not civil. He reiterated that the majority of states have modified the Model Penal Code definition but retained its core. Most of the terms, he insists, remain generally consistent. Most of those states employ all or part of the following definition:

> "Recklessly means, with respect to a result or circumstances described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in this situation. A person who creates such a risk but is unaware of such risk solely by reason of his voluntary intoxication also acts recklessly with respect to such risk."

The proposed definition adds the phrase "extreme indifference to the consequences", said Dir. Diroll. He asked if that was necessary. Noting that "extreme" tends to elevate the level from "heedless", Prosecuting Attorney Jason Hilliard expressed preference for the proposed version if the word "extreme" was removed.

Atty. Slagle suggested replacing "heedless" with "ignored".

Noting that there is a difference between "unjustifiable" and "substantial", Atty. Lane proposed that the definition needs a

qualifier to determine whether the indifference to the danger is small or great.

Judge Gormley agreed with Pros. Hilliard that "extreme" could create problems. He added that there is also a difference between "ignores" and "indifference".

"Heedless" says that the offender evaluated the risk and decided to ignore it, Judge O'Toole argued.

Pros. Hilliard claimed that the phrase "heedless indifference" is redundant.

Judge Corzine contended that "known risk" says you know the risk.

It boils down, said Judge Spanagel, to weighing the level of indifference and level of disregard.

Vice Chair Corzine sought a count on how many members preferred the proposed definition versus the MPC definition, there was still no consensus. Atty. Brown suggested leaving it as is.

Atty. Lane suggested arranging another subcommittee gathering.

Judge Corzine reiterated the need to bounce the final definition off of other interested parties.

The MPC version being discussed is shorter than the original MPC version, said Pros. Hilliard. It might be beneficial to reexamine the full MPC version.

The missing piece, said Phil Nunes of the Ohio Community Corrections Association, is the sentence that references what a "reasonable person" perceives or understands as reckless. He feels that this should be included for the jury's benefit.

Atty. Lane suggested backing up to the original MPC definition and making adjustments from there.

By consensus, the Commission members agreed to table further discussion on the definition of "recklessness" until the subcommittee has another chance to sort through the nuances of the definitional issues.

***COLON* AND CULPABLE MENTAL STATES**

**§2903.02 Murder.** The discussion turned to discerning the mental states for specific statutes, starting with murder.

There is a tendency, said Dir. Diroll, to think of felony murder as "strict liability", but that's not necessarily true. There is a culpable mental state imputed from the underlying offense. To fill the *Colon* void without saying the mental state is "strict liability", he suggested adding the following language to §2903.02(B) and similar statutes: "The culpable mental state for the offense is imputed from the underlying offense of violence."

Some courts, said Atty. Slagle, will apply the mental state of the underlying offense to the mental state of causing the death. He fears that additional language will confuse that. He prefers leaving the statute naked so there would be no default. He noted that there is no mental element for the death but there is a mental element for the underlying offenses.

That makes it easier for the judge, said Judge Corzine. For Title 29 statutes he recommended getting rid of the "reckless" default and to specify that it is strict liability unless a mental state is specified.

He remarked that it is tough trying to figure out if there is an intended *mens rea* in some of the statutes. There are even statutes that don't require a *mens rea* or commission of an underlying offense. He asserted that, with statutes written in the future, the mental culpability needs to be included.

Judge O'Toole feels this would open the door for a subsequent constitutional challenge, allowing someone to claim they didn't know they were committing a crime.

Judge Corzine maintained that the legislature must indicate whether the intent is strict liability or not.

Judge O'Toole moved to eliminate the default *mens rea* then sort through Title 29 and determine what the *mens rea* should be for each statute and formulate a suggestion of how the Legislature might want to indicate for future statutes.

§2901.21(B) states: "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." Dir. Diroll explained that the motion on the table would involve striking the last sentence then going through Title 29 and make sure there's a clear statement of the culpable mental elements for the offenses.

Since 1974, there has been no problem until *Colon*, said Atty. Lane. He recommended analyzing Title 29 to discern where clarification is needed before making a generic motion to strike the default *mens rea*.

It would be hard, Judge Corzine declared, to find many strict liability offenses. He noted that there are lines of case authority in how these statutes are interpreted.

After withdrawing her motion, Judge O'Toole suggested adding a section to each statute stating the intended *mens rea* for that offense.

Judge Corzine noted that *Colon* also brought to the surface that a *mens rea* may be needed for each element of the offense.

**§2903.04 Involuntary Manslaughter.** Dir. Diroll noted that involuntary manslaughter is always committed while committing another crime.

The Commission agreed to recommend wording that a culpable mental element should be imputed from the underlying offenses for §2903.04 Involuntary Manslaughter and §2903.06 Aggravated Vehicular Homicide.

**§2903.06 Aggravated Vehicular Homicide.** After lunch, the discussion turned to aggravated vehicular homicide, which often bootstraps the *mens rea* from underlying traffic offenses. Dir. Diroll noted that most of the Traffic Code offenses are "strict liability"; if you're over the speed limit, it doesn't matter what you were thinking, he noted.

It was recommended that §2903.06(A)(1)(a)(b)and (c) causing a death while driving a vehicle while impaired should be strict liability offenses because the underlying offense carries strict liability.

The recommendation for (A)(2)(b) causing a death while driving a vehicle within a construction zone while recklessly operating the vehicle would impute its *mens rea* from the underlying offense.

It was recommended that (A)(3)(b) causing a death in a construction zone while speeding should be specified as strict liability.

It was recommended that the culpable mental state for (A)(4) causing a death while committing a minor misdemeanor traffic offense should be imputed from the underlying offense unless the offense carries strict liability. However, no commission member could think of a minor misdemeanor traffic offense that doesn't carry strict liability.

Judge Spanagel reported that H.B. 128 is pending which might expand some of the elements of aggravated assault and homicide to various non-licensed offenses and DUS offenses.

**§2903.08 Aggravated Vehicular Assault.** It was recommended that (A)(1)'s causing serious physical harm while impaired is strict liability.

The recommendation for (A)(2)'s causing serious physical harm in a construction zone would clarify that the injury is strict liability unless there is a culpable mental state on the underlying offense.

It was recommended that (A)(3)'s causing serious physical harm in a construction zone while speeding specify strict liability.

**§2903.15 Permitting Child Abuse.** There is no culpable mental state listed, said Dir. Diroll, for allowing serious physical harm or death to a child. But, during the subcommittee discussion of this statute, there was some sentiment among the Commission members for selling the standard of "knowingly".

Judge O'Toole pointed out that this statute is not about the abuser, but about someone who allows the abuse to happen.

Judge Spanagel contended that it is both about the abuser and/or a person who allows it to happen, noting that it is akin to complicity.

Judge O'Toole recommended "reckless" as the standard for the perpetrator but "knowingly" for the passive observer who didn't step in to stop the abuse.

An observer who knows the abusive history or record of the perpetrator deserves to be punished, said Judge Gormley.

Judge Corzine feels the key is "permitting" because it implies complicity. He feels it should be a standard of "recklessness".

A vote of the Commission members resulted in a tie between the use of "knowingly" and "recklessly".

A parent shouldn't have to actually "know" if they suspect they should do something about the action, said Pros. Laina Fetherolf, because they already have an implied duty to protect that child.

Pros. Macejko does not believe the statute is designed to deal with the absentee parent situation. He pointed out that (B) has a built-in affirmative defense. It takes into account that the person did not have the readily available means to prevent the harm or death of the child and the defendant took timely and reasonable steps to summon aid. He noted that complicity means you share the criminal intent. A mother allowing her boyfriend to abuse her child does not necessarily mean she shared the criminal intent.

It was agreed to table this statute and readdress it at a later time.

**§2903.34 Patient Abuse or Neglect.** Dir. Diroll explained that the mental state is specified in a separate definitional section. He suggested moving the definitions and mental elements from §2903.33(B)-(D) to division (F)(a),(b), and (c) of this section. This would not change the *mens rea*. The Commission agreed by acclimation.

**§2903.341 Patient Endangerment.** This statute pertains to (B) people who take care of MR/DD persons and/or (C) people who own, operate, or administer a facility which cares for MR/DD persons. Mr. Welch pointed out that in part (C) there is a second "knowingly", which was already there, to modify both "condone" and "permit".

Judge Corzine noted that both (B) & (C) are M1 offenses. He feels that, for the sake of consistency, the standard should be identical for both.

Noting that (B) refers to someone who deals with a patient on an individual basis while (C) refers to the person who owns or operates the facility but may not have a one-on-one relationship with the patient, Pros. Fetherolf argued that sometimes employees do things without the employer's knowledge. She declared that "knowingly" in (C) does not preclude "recklessly". She contended that (B) addresses your own behavior while (C) addresses your employee's conduct.

With votes of dissent from Attys. Brown and Lane, the Commission chose to add "recklessly" to §2903.341(B) rather than "knowingly", so that the statute would read: "No caretaker should *recklessly* create a substantial risk …."

**§2903.36 Retaliation for Reporting Abuse.** Dir. Diroll noted that this is the whistleblower statute. It is more a policy statement than a crime.

According to Judge Corzine, if case law says if there's no penalty, there's no crime, so there's no *mens rea* to address.

**§2905.01 Kidnapping.** The subcommittee recommended clearly stating that taking someone and holding them for ransom or as shield or hostage or restraining them should be "knowing" conduct.

"The following purposes", said Judge Corzine, should be changed to "the following reasons" so that no one gets confused about whether the statute requires the person to act "purposely".

Atty. Lane urged caution on changing the word "purpose" there is a lot of jurisprudence regarding what "purpose" means. He suggested "motivation" as an alternative.

Ohio, said Dir. Diroll, is one of the few states that use "purposely" as a culpable mental state.

Unanimously, the Commission approved Judge Corzine's motion after it was seconded by Judge Gormley:

> **To change "following purposes" to "following reasons" in §2905.01.**

By acclamation, the Commission approved "knowingly" as the standard for §2905.01(A).

Given the nature of (A)(1)-(5), Judge Corzine believes that the standard for these subsections should be "strict liability" and should not require any separate *mens rea.*

**LEGISLATIVE ISSUES**

**S.B. 22.** Dir. Diroll reported that an article in *Hannah* indicates that Sen. Seitz seems confident that there are enough votes to move S.B. 22 out of the Senate, but the bill has not been scheduled for a vote.

Judge Corzine reported that a *Columbus Dispatch* article quoted the House Speaker Budish as having reservations about S.B. 22.

**Major Rewrite of the Felony Code.** In light of the interest by the Council of State Governments and others, Dir. Diroll asked if the Commission has a desire to begin looking at rewriting the whole felony sentencing structure again or prefers to take a wait and see stance.

Noting that sentencing reform is being discussed nationwide, Mr. Nunes declared the Commission has become more reactive than proactive. He believes that the Commission needs to work together with the Council of State Governments and should get actively involved in reform.

Steve VanDine of the Department of Rehabilitation and Correction said that he would be hesitant in deciding now to take a broader review on studying sentencing reform. Taking such action requires more than a proposal. It requires more money, bringing in experts, conducting studies, and agreement among several constituencies of the criminal justice system. He pointed out that the Council of State Governments hasn't really recommended large changes anywhere that they've done

studies. He agrees that Ohio needs to revamp the State code, but feels that now is not the right time.

Dir. Diroll offered to invite someone from the Council of State Government to a future meeting to discuss their approach.

According to Sen. Shirley Smith, the Council of State Governments is looking at a number of issues, including public safety and budget.

Rep. Joseph Uecker noted that state legislators are already fighting the perception that the state might push more budgetary problems onto the backs of local governments.

When a large overhaul of the felony structure was recommended in the early 90's, said Dir. Diroll, it was an easier sell because the state had a healthier budget. It would be much harder to do that with today's economy.

That which gives us the window of opportunity, said Judge Corzine, also restrains us.

Mr. Nunes noted that California has been ordered to release inmates until their prisons are under 130% capacity. Other states could be forced to do the same.

The 9th circuit court in California, responded Judge Corzine, doesn't really set the tone for the rest of the country.

**S.B. 77.** At the recent hearing on S.B., reported Rep. Uecker, there was testimony heard regarding the use of DNA to exonerate a man who had been wrongly incarcerated for 11 years. The bill would require DNA specimens for offenders 18 years or older accused of felony offenses and storage of those specimens.

Originally, said Judge Corzine, the bill also required audio and video recording of all in-house interrogations for murder and rape. Representatives of the Innocence Project, who pushed for the bill, said they would give up the interrogation provisions if the line-up standards and procedures were improved. He believes that Commission members should take a closer look at this bill.

According to Dir. Diroll the bill has passed the Senate 30 to 1 and is likely to pass in the House.

He reported that the issue of texting while driving is another hot topic in the legislature. With four bills on the subject in the House and two in the Senate, it is likely to pass in some form.

**FUTURE MEETINGS**

Future meetings of the Sentencing Commission were tentatively scheduled for October 15, November 19, and December 17, 2009.

The meeting adjourned at 2:23 p.m.