Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
June 17, 2010

MEMBERS PRESENT
Common Pleas Judge Jhan Corzine, Vice-Chair
Victim Representative Chrystal Alexander
Defense Attorney Paula Brown
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
Police Chief Philip Messer
Mayor Michael O'Brien
Appellate Judge Colleen O'Toole
County Commissioner Bob Proud
Sheriff Albert Rodenberg
Senator Shirley Smith
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Ernie Moore
State Public Defender Tim Young

ADVISORY COMMITTEE MEMBERS PRESENST
Eugene Gallo, Eastern Ohio Correctional Center
Jim Slagle, Attorney General's Office

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Shawn Welch, Law Clerk

GUESTS PRESENT
Lawrence Baker, Citizens United for the Rehabilitation of Errants
Jim Brady, interested citizen
Marshall Clement, Council on State Governments
JoEllen Cline, legislative counsel, Supreme Court of Ohio
John Coady, legislative intern, House Republican Caucus
Cedric Collins, Dept. of Youth Services
Monda DeWeese, SEPTA Correctional Facility
Butch Hunyadi, Rehabilitation and Correction
Andre Imbrogno, Counsel, Rehabilitation and Correction
Tom King, legislative aide to Senator Shirley Smith

Bob Lane, State Public Defender's Office
Tekla Lewin, Citizens United for the Rehabilitation of Errants
Scott Neeley, Rehabilitation and Correction
Phil Nunes, OJACC
Mark Pelka, Council on State Governments
Lloyd Pierre Louis, Counsel, House Majority Caucus
Ed Rhine, Rehabilitation and Correction
Emily Tucker, legislative aide to Rep. Tim DeGeeter

Common Pleas Judge Jhan Corzine, Vice-Chair, called the June 17, 2010, meeting of the Criminal Sentencing Commission to order at 10:10 a.m.

Mansfield Police Chief Phil Messer was welcomed as a new member.

Executive Director David Diroll reviewed contents of the meeting packets which included: a summary of the "Justice Reinvestment Initiative in Ohio" report by the Council on State Governments; a memo regarding jail time credit Issues; an outline of a proposed *Mens Rea* Default and Model Penal Code compromise on defining "reckessly"; a modified MPC definition proposal; a chart of the felony statutes requiring culpable mental state in light of the *Colon* cases; the latest judicial update; the latest legislative update, and minutes from the April meeting.

Bob Lane, representing the State Public Defender's Office suggested that the *Colon* issues should be placed at the beginning of the agenda for the July meeting.

SEXUAL OFFENDER REGISTRATION AND NOTIFICATION (SORN) DECISION

Dir. Diroll noted that a recent Ohio Supreme Court decision (*Bodyke*) found the retroactive application of the Adam Walsh Act (AWA) unconstitutional. Since a judicial decision was made to determine an offender's placement in the hierarchy of registration, notice, and updates, *Bodyke* states that separation-of-powers prevents the AWA from overriding the judge's decision.

This ruling, said Sentencing Commission law clerk Shawn Welch, points out that provisions in §2950.31 and §2950.032 violate separation of powers because it allows the Attorney General to reclassify sex offenders who were judicially classified prior to January 2008. He noted that the ramifications of this decision are not yet clear so it is hopeful that some clarification will be offered.

Representing the State Attorney General's Office, Jim Slagle pointed out that this ruling only addresses the reclassification issue. It has no affect on anyone sentenced as a sex offender since January 2008.

PRISON COMMITMENT TRENDS

DRC Research Director Steve VanDine offered several prison commitment trends based on DRC's 2009 Commitment Report. Between CY 2004 and CY 2009, total commitments have been about the same but there has been an 8% shift away from F-5 sentences to other felony levels. This has resulted in a reduction of almost 1,900 F-5 offenders. Most seem to have shifted to the F-3 level, which shows an increase of slightly more

than 6%, and F-2 offenses have risen by 1% or 2%. Other felony levels have remained relatively stable.

Over the 10 year period from 1999 to 2009, there was an 11% drop, from 53.50% to 44.54%, in African-American commitments, which appears to have been affected by changes in drug offenses. Most of the decrease has been replaced by whites, with a 1% increase in Hispanics. Black commitments were at their highest level in 1994, with 57.60%.

He attributes the decrease in the African American proportion of commitments to increased diversions in the larger cities, especially for those with drug problems.

During the past decade there has also been a drop of 5% in drug offenders. 4% of that decrease was between 2005 and 2009. More specifically, for drug possession offenders, there has been a decrease of 8% since 1999 and 5% between 2005 and 2009. In contrast, there was an increase from 7.8% to 11.34% for trafficking offenders during that decade. 27% of prison intake now consists of drug offenders.

There have interesting changes in two other crimes of interest. In CY04 non-support commitments peaked at 790, or 2.80% of admissions. This decreased in CY09 to 2.40%, or 601 admissions. The commitment numbers for escape peaked in CY06 with 641 or 2.23% of the commitments. This rate dropped in CY09 to 365, or 1.45% of total commitments, due, in part, to a revision in the supervision portion of the escape provision.

Mr. VanDine noted that the number of commitments has decreased each year since 2006. He believes that increased community funding for certain kinds of programs has been a large contributing factor to that decrease. The shift upward in certain felony levels, he believes, is due to changes in sentencing laws.

Commitments for FY10 are expected to be about 24,000, reflecting a 5,000 drop in commitments since 2007.

Although there has been a drop in the prison population, the *Foster* decision in Feb. 2006, said Mr. VanDine, has had the largest effect on the current prison population. By lengthening sentences, it has caused an average increase of 2 months for F-4 offenders, 4 months for F-3 offenders, and a 6 month average in increase for F-1 and F-2 offenders.

Mayor Michael O'Brien remarked that he doesn't see it as reflecting a drop in the number of crimes being committed but a drop in arrests.

There is a hypothesis, said Judge Corzine, that the crime rate is down because offenders are locked up.

Butch Hunyadi, from DRC, remarked that there has been a sharp reduction in the jail population as well.

JUSTICE REINVESTMENT - COUNCIL ON STATE GOVERNMENTS

Judge Corzine welcomed Mark Pelka and Marshall Clement from the Council on State Governments Justice Center. Mr. Clement is the Justice Reinvestment Project Direct and Mr. Pelka is a Policy Analyst.

Mr. Marshall commended Mr. Vandine for having one of the best research staffs in corrections in the country.

He explained that the Council on State Governments Justice Center is a nonprofit membership association of state police makers, representing all three branches of government. They were invited by Governor Strickland, Ohio legislative leaders, and Chief Justice Moyer to work on the current project.

He pointed out that they are in the early stages. They spent the past six months working on the analysis portion of the project, gathering data and examining it. They have not yet proposed policy options.

They are anxious to gain input from the Sentencing Commission, noting that it has the best expertise.

They have been working with 13 states to date, focusing on trends found in the correctional and justice systems.

With the Ohio project, they have looked at a wide range of data and gained input from wide range of stakeholders including treatment providers, judges, law enforcement, prosecutors, defense bar, victims, and community correction agencies. The goal is to develop and present a comprehensive analysis of the state's criminal justice system and develop a framework of policy options that together can increase public safety and reduce/avert taxpayer spending.

Current trends in the Ohio justice system reveal an 11% decrease in arrests but a 30% increase in charges filed within common pleas courts.

They hope to meet with law enforcement officials to find out more about the decrease in arrests. Some people attribute it to reductions in law enforcement funds and personnel. The increase in court filings could mean either an increase in the number of defendants or the number of charges or counts per defendant.

Mr. VanDine said the increase is in the number of individual cases.

A big driver of Ohio's prison growth, said Mr. Marshall, has been the 42% increase in admissions for **new** offenses and the 38% increase in the felony probation population, with 17% of those being revoked back to prison for violations.

When Judge Corzine asked how Ohio's data collection compared with other states, Mr. Clement responded that, on prison data, it is excellent. However, data on probation is more difficult to collect because there is no statewide database of probationers, their felony levels, length of supervision, revocation rates, or termination rates. There appear to be no statewide standards within the probation system, so it is difficult to determine the impact by geography, felony level, court practices, or success rates for individual probation agencies.

Eugene Gallo, representing the Eastern Ohio Correctional Center, declared that most state-funded programs already have a data base through which they report, but county-funded programs are more likely to lack adequate data bases for reporting.

The decrease in arrests versus increase in filings, Atty. Welch, argued, might be related to charging decisions by prosecutors.

Phil Nunes, representing the Ohio Justice Alliance for Community Corrections, questioned the large increase of 166% from 2000 to 2008 in parole revocations.

Mr. Clement explained that the relative number of people involved is very small in comparison to the overall prison population but the overall percentage of increase appears to be quite large.

Post release control (PRC) under S.B. 2 didn't really kick in, said Mr. VanDine, until about 2000, so there were few people who would have been available for parole revocation during the early years of that period. By 2008 there were many more people being released PRC, which would also increase the possibility of more violations and revocations.

The number of arrests, said Mr. Clement, includes both misdemeanor and felony offenses.

Although the prison population has gradually decreased from the years of 2000 to 2005, there has been a steady increase of 15% in the prison population from 2006 to 2009. Along with this increase in the prison population, there has also been a 21% increase in prison costs.

An analysis of Ohio prison admissions reveals that F-4 and F-5 offenses constitute 56% of the crimes committed and offenders convicted. 68% of those are property and drug offenders and 71% of those have had one or more prior convictions. 28% have had no prior conviction.

Defense attorney Kort Gatterdam asked if that meant prior conviction or prior commission to prison, noting that some offenders might have had a prior felony conviction without being committed to a prison term.

Echoing that premise, Prosecutor Laina Fetherolf pointed out that many counties attempt community sanctions first before sending a person to prison, so the first admission to prison does not necessarily mean that person's first conviction.

Mr. Clement continued by noting that those felony property or drug offenders have an average prison term of 9 months, at an average annual cost of $120,507,528.

There is a serious lack of data on how many go directly to felony probation or jail, he added.

Mr. Hunyadi said that more booking data will be available in December.

Public Defender Kathleen Hamm expressed concern about the gaps in the data on how many offenders go to felony probation or jail.

A more direct way to get data reported, said Dir. Diroll, would be to have the court do it by rule.

The biggest missing piece, said Mr. Clement, is a count of people on felony probation and the lack of statewide standards on how the probation departments should be run. This lack of state standards using

evidence-based practices prevents a viable measurement of the system's effectiveness. The numbers available are based on an estimate provided by a U.S. Department of Justice survey. It lists 57,214 felony probationers and 152,900 misdemeanor probationers.

Policy Analyst Mark Pelka remarked that it is difficult to find a solution when there are no data available statewide regarding the success or failure of treatment programs and probation departments. When an offender returns to the prison system, the question becomes whether the offender failed on his part or the treatment provider or probation department failed on their part.

47 counties use DRC-operated probation services, covering 15,000 probationers, while 41 counties have their own probation departments, controlling 42,000 offenders.

Mr. Clement noted that, in addition to DRC's quality research department, Ohio also has easy access to some of the foremost national experts on community correction research and what works, particularly at the University of Cincinnati.

In looking at new felony convictions, the team found that CBCFs were successful in reducing recidivism for high risk offenders, but not for low and moderate risk offenders.

Halfway houses were found to produce a 14% reduction in recidivism among high risk offenders, but an increase in recidivism for low risk offenders, again demonstrating the importance of targeting offenders for these programs.

He noted that a 6 month prison stay is considered by some offenders to be easier to handle than 3 years on supervision/probation.

In comparing the various probation programs, there appears to be a wide range of levels in training for practitioners and the strategies used for supervision case plans. Mr. Clement stressed a need for consistency, which can be achieved with standardized policies.

According to Mr. Hunyadi, state funding tends to entice better reporting by facilities and programs.

The risk level of the offender should play an important role in determining who receives post release control, Mr. Clement insisted, but there currently is little relation between risk level and those who receive mandatory PRC. He noted that F-1s are least likely to return in 3 years. 26% of the low risk offenders are likely to return in 3 years, yet 53% of them are released under supervision. The majority of F-4 and F-5 felons are released from prison with no supervision.

When Mr. Gallo asked about the instrument used to determine the risk level, Mr. VanDine responded that the offender's risk level instrument focuses only on factors in the offender's likelihood to reoffend, not the risk of level of offense causing readmission.

Mr. Clement continued by declaring that a large number of low risk offenders are serving less than one year in prison, which is a costly use of prison space. He said DRC's community correction and diversion

program infrastructure could be better used if managed with cohesive statewide guiding principles promoting evidence-based practices.

He noted that a survey was recently conducted with common pleas judges, who claimed that they are not getting risk assessment data. The judges were asked whether they place an offender in a certain sanction for the purpose of getting treatment. Two-thirds said that they do. Since CBCFs are more likely to have treatment available, most offenders tend to get sent in that direction. He feels that more would get directed to halfway houses, which have a greater success rate, if more programs were available there. Full results of the survey will be revealed soon.

He reiterated that judges need access to risk assessment data so that they can sanction offenders to suitable programs. They also need to know that these programs are managed with cohesive statewide guiding principles promoting evidence-based principles.

Attorney Slagle remarked that we tend to use a progressive discipline mindset in dealing with F-4s and F-5s. That results in sending these offenders to halfway houses for probation violations rather than an initial commitment for treatment.

Mr. Nunes expressed concern about unintended consequences, warning that there is a cost benefit analysis beyond recidivism that often gets overlooked. There are other factors that play into a judge's decision besides cost. Judicial discretion is the wild card in the process. He's more interested in seeing what policy changes will be recommended.

In addition to this assessment of the criminal justice system, said Mr. Clement, a further system-wide analysis is assessing available behavioral health systems and services. He reported that, in late July, another work group will further review the findings and address policy options, public safety, and holding offenders accountable.

Mr. Nunes stressed the need to have county commissioners represented since they control some of the local funding.

Since criminal sentencing is offense-based more than evidence-based, Dir. Diroll asked how the proposals would address retribution and efforts to make the punishment fit the crime for low risk offenders.

We must determine first, said Mr. Clement, if we are imposing a sentence to provide punishment or to reduce crime.

It is important to remember, said Mr. Gallo, that the judge determines whether to focus on punishment or treatment for the offender.

Mr. Nunes expressed concern about how judicial discretion issues, and particularly judicial release decisions, factor in with this data.

Mr. Pelka remarked that the next report will include veto rates of early release by judges.

Judge Colleen O'Toole feels that a judge's budget should be tied to his use of judicial discretion.

JAIL TIME CREDIT

After lunch, Dir. Diroll directed the discussion toward jail time credit issues. He reported that the State Public Defender requested a change in the Superintendence Rules, which kicked over to Criminal Rules Committee, which then passed it to the Sentencing Commission.

Dir. Diroll noted that the Equal Protection Clause has been interpreted to say that anyone incarcerated in jail while awaiting trial, sentencing, or transfer to prison should be given credit for this time against any prison term subsequently imposed for the crime. This proves difficult when the offender's prison term is short. The State Public Defender's office asks whether the Rules of Superintendence should be amended to make sure jail time credit is properly applied. Without the credit clearly indicated in the sentencing entry, DRC does not feel it has authority to include the credit. Superintendence rule makers have argued that the issue should be addressed by Criminal Rule 32(C). Dir. Diroll said a key question is whether this should be done by rule or by statute. The Criminal Rules Committee referred the matter to the Sentencing Commission, since a statutory remedy might be the best approach, he added.

Judge Corzine notes that §2967.191 requires DRC to reduce a stated prison term by the total number of days the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted. There is appellate authority defining what "confinement" means. CBCFs and jails qualify, but halfway houses do not because they allow the offender to come and go. He feels that most facilities just don't calculate the credit correctly.

State Public Defender Tim Young remarked that his office has one staff person who works solely on jail time credit issues. He declared that sheriffs tend to get the numbers wrong because they don't have access to records of other facilities. Only the court has authority to access all records. He asserted that many offenders don't know they qualify for certain jail time credit until it is too late.

According to Atty. Lane, not all days that warrant jail time credit are on record. A motion can be filed to get the corrections made, but it involves a lot of time to get all of the information together.

It takes a lot of time because it involves reconstructing history, said Atty. Slagle. He contended that it makes sense to get the issue resolved at the time of sentencing, when the information is more accessible. He suggested amending the statute.

Butch Hunyadi reported that there are about 350 jails in the state which house about 700,000 people per year. About 90 of those are full-service jails. Some of the others are temporary holding facilities. The 90 full-service jails are probably the only ones that have electronic means for reporting a person's confinement time.

According to Judge O'Toole there is considerable discussion in the Appellate Courts about what constitutes confinement.

Usually, said Atty. Slagle, the difficult cases are those involving offenders who have been through community control sanctions with multiple periods of incarceration over the life of the case.

In Clermont County, the clerk's office keeps record of any local time served, said Sheriff Albert Rodenberg, and sends that information along with the commitment papers to DRC

The burden of setting up a centralized clearing house should probably fall on the court, said Judge Corzine, since it will have to deal with errors that occur. As such, it should probably be ordered by statute and handled at the time of sentencing.

Atty. Young asserted that there currently is no single statewide entity responsible for compiling all of this information.

Ultimately, the Ohio Courts Network might be right for tracking the information, said Mr. Hunyadi, but not all courts are on the system.

Atty. Young offered to draft some language to amend §2929.19 and present it at the next meeting.

Atty. Slagle asserted that it should be easier to track the information at sentencing than it is during the prison term.

Atty. Hamm declared that prosecutors should have the numbers calculated and related information ready at the time of sentencing.

Mr. Nunes said most placements in halfway houses are as a condition of probation, not part of a sentence.

***COLON* AND CULPABLE MENTAL STATES**

Lingering Issues. At the last *Colon* Work Group gathering, a few loose ends were resolved, said Dir. Diroll. Words like "purpose" and "knowledge" are used throughout the Revised Code without always meaning "purposely", "knowingly", etc. However, they still have meaning as elements of proof. The *Colon* Work Group decided that the report should list those without recommending changes.

The "default" statute, said Dir. Diroll, still needs attention, said Dir. Diroll, as well as determining what to do about offenses that don't clarify the culpable mental state. Consensus is also needed on the definition of "recklessly".

Voyeurism. Atty. Welch explained that, after another check of the statutes, there are some consistency issues. Voyeurism (§2907.08) involves acting with purpose of sexually arousing/gratifying. (A) through (D) includes a mental state of "knowingly" for both the trespass and the surreptitious act. Because "purpose" of sexual gratification is not a defined *mens rea*, and watching is a "knowing" act, the work group, for the sake of consistency, recommended inserting "knowingly" as the culpable mental state for the watching aspect.

Judge Corzine argued that the language should not specify or state "knowingly" for trespass because it then bootstraps "trespass" into it. The trespass, he contended, provides the *mens rea*, and you just ask for the particulars.

Default Statute Proposal. Assuming we identify culpable mental states to fill all the voids in Title 29, some type of default statute is still needed to cover other statutes that do not clearly specify *mens rea* outside the Criminal Code or are enacted later in Title 29. Without a default statute, these may be construed as strict liability offenses.

A few months ago, Atty. Jim Slagle had proposed a solution stating "For offenses in Title 29, no culpable mental state is required other than the culpable mental state indicated in the statute."

This would involve amending §2901.21(B), said Dir. Diroll, to include language stating that "For offenses set forth in Title 29 on and after the effective date of this amendment and for offenses elsewhere in the Revised Code ...", you have the current default to "recklessness" absent an indication of strict liability. Carrying over current law but saying at the end that "For offenses set forth in this title of the Criminal Code enacted before the effective date of the amendment, no culpable mental state is required other than the mental state set forth in the statute, an underlying offense incorporated into the offense, or a definition that specifies a culpable mental state."

Atty. Young questioned whether this is needed. He recommends leaving the current default statute alone and making the *mens rea* clear in the remaining statutes. He argued that "strict liability" is the exception, not the rule.

We will draw attention to the need to avoid default and/or clearly label strict liability offenses in the report to the General Assembly, said Dir. Diroll, in hopes they will make future statutes clearer.

Atty. Slagle urged a simple solution, again proposing that §2901.21(B) add: "No culpable mental state is required other than the culpable mental states set forth in this statute or set forth in an underlying offense or definition referred to within this statute".

Contending that this becomes a default to "strict liability", Atty. Lane asked if any other state has something similar.

Atty. Slagle declared that the defense bar is more nervous than necessary. He argued that, in every statute when an effort was made to clarify the *mens rea*, we increased the mental state and never decreased it, yet defense remains unsatisfied.

Since we filled the voids in Title 29, Dir. Diroll asserted, the issue really shouldn't come up that much.

Atty. Slagle feels that keeping the current default statute would indicate an ongoing lack of clarity.

FUTURE MEETINGS

Meetings of the Ohio Criminal Sentencing Commission are tentatively set for July 17, September 16, October 21, November 18, and December 16, 2010. There is no meeting scheduled for August.

The meeting adjourned at 2:35 p.m.