

**Minutes of the
CRIMINAL SENTENCING COMMISSION
And
CRIMINAL SENTENCING ADVISORY COMMITTEE
July 17, 2008**

MEMBERS PRESENT

Common Pleas Court Judge Reginald Routson, Vice-Chair
Paula Brown, OSBA Representative
Common Pleas Court Judge W. Jhan Corzine
Municipal Court Judge Fritz Hany
Bob Lane, representing State Public Defender Timothy Young
Mayor Michael O'Brien, City of Warren
Municipal Court Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins

ADVISORY COMMITTEE MEMBERS PRESENT

Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
John Madigan, Senior Attorney, City of Toledo

STAFF PRESENT

David Diroll, Executive director
Cynthia Ward, Administrative Assistant
Shawn Welch, Legal Intern

GUESTS PRESENT

Chrystal Alexander, Office of Criminal Justice Services
Lisa Bagdonas, Senate Republican Caucus
Noah Blundo, the Hannah Report
Monda DeWeese, SEPTA Correctional Facility
Lusanne Greene, Ohio Justice Alliance for Community Corrections
Jim Guy, Rehabilitation and Correction
Erin Rosen, Attorney General's Office

Common Pleas Court Judge Reginald Routson, Vice-Chair, called the July 17, 2008 meeting of the Ohio Criminal Sentencing Commission to order at 9:50 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reviewed the contents of the meeting packet which included: Sentencing Commission intern Shawn Welch's revised report on *State v. Colon* and *Statutory Mens Rea*; a draft of the Commission's S.B. 2 sentencing survey; the most recent misdemeanor simplification draft; a Summary of SORN guidelines; a report on

juvenile application of SORN; reports on the Council of State Governments' (CSG) approach to Kansas and Texas Prison population tensions; and a legislative update.

He offered an apology from Prof. Doug Berman who was unexpectedly detained in New Jersey and would be unable to attend the meeting.

COURT COSTS REPORT

Dir. Diroll reported that the Joint Committee to Study Court Costs and Filing Fees released its report July 14. The Committee found definitional confusion with court costs and fees in the Revised Code and urged the General Assembly to implement standard definitions to avoid future confusion. The report offers 11 recommendations designed to streamline the process for determining, collecting, and monitoring court costs and filing fees.

He noted that when the Sentencing Commission studied court costs and offered some recommendations, it discussed writing off certain debts as uncollectible. This report makes the same recommendation, as well as allowing suspension of court costs.

Warren Mayor Michael O'Brien remarked that the courts in his city offer a payment plan for paying court costs and fines. For some offenders it is a satisfactory solution. For others, it is problematic. Sometimes the court can collect the third payment but then can't collect the fourth. His court offers to suspend a 30 to 60 day jail sentence if the fine is paid. If the fine and court costs don't get paid and the offender is put in jail, it ends up costing the county more.

Municipal Court Judge Kenneth Spanagel remarked that the mandatory jail sentence for OVI adds significantly to jail crowding but there is no way around it. Some counties are in desperate need of new jails, the counties cannot handle the extra cost.

Years ago, said Dir. Diroll, the Sentencing Commission recommended that funds collected should go to those who incur the costs.

Municipal Court Judge Fritz Hany remarked that it only seems fair that some of the funds should be given back to the funding authority.

In Warren, said Mayor O'Brien, there are several townships that share the same court system but most of them pay nothing toward the costs of that court system.

The number of legislators on the committee that did the report far outweighed the number of judges on the committee, Dir. Diroll noted. The report is available on the Supreme Court website

According to Judge Spanagel there is now a commission to study how to reform county government.

MISDEMEANOR SIMPLIFICATION

Judge Spanagel reported that he distributed a copy of the Commission's misdemeanor simplification draft to municipal court judges at their recent conference. He has not yet received much feedback, noting

that many of the judges took it home to study. He said many judges wondered why we didn't simplify the Revised Code like this sooner.

SORN LAW UPDATE

Dir. Diroll reported that final guidelines are now available for implementing the federal Adam Walsh Act and SORN law applications.

One issue with applying SORN in Ohio has involved juvenile offenders. According to the new guidelines, the sex offender registration requirements will apply to juvenile offenders who are adjudicated delinquent of a sex offense "comparable to or more serious than" the federal aggravated sexual abuse statute, 18 USC §2241. This will result in a Tier III registration classification.

PRISON CROWDING

Evaluations of prison crowding have been done in several states by Council of State Governments (CSG), said Dir. Diroll. The meeting packets included two briefs that summarize work on state prison populations in Kansas and Texas. The evaluations included spending, public safety, reentry, community sanctions, and prison populations. The goal has been to determine how data-driven strategy can assist in managing corrections spending, increase public safety, and redirect some of the savings toward efforts that will improve conditions in the neighborhoods to which most people released from prison return. The same group is expected to do a similar study in Ohio.

Dir. Diroll noted that, in comparison, an inmate in Ohio can now get one day credit per program participated in. As a result of the CSG recommendations, Kansas has expanded its earned credit concept and Texas has expanded its treatment and diversion programs.

Eugene Gallo, Executive Director of the Eastern Ohio Correctional Center was impressed that these studies targeted neighborhoods where the majority of the prison population was coming from.

DRC Research Director Steve VanDine reported that the Urban Institute did a similar study about 5 years ago focusing on the neighborhoods where most crimes are committed. They were surprised that they didn't find the same results in Ohio as in other states, such as Illinois and Maryland. The study found Ohio crime tended to be more spread out throughout the state.

Dir. Diroll noted a recent article in *Atlantic* that noted a discouraging trend. It seems that, after the elimination of large housing projects, crime patterns tended to follow Section 8 housing into other parts of the city.

Still, said Mr. VanDine, the break up of pockets has helped decrease the crime rate.

LEGISLATIVE & JUDICIAL UPDATES

Intern Shawn Welch provided new legislative and judicial updates includes some U.S. Supreme Court cases in which Commission members expressed an interest.

SENTENCING SURVEY

Last month, Commission members suggested surveying practitioners on S.B. 2. Dir. Diroll presented a draft survey designed with judges, prosecutors, and defense attorneys in mind.

Representing the State Public Defender's Office, Atty. Bob Lane observed that the list of who we intend to survey tends to lean toward the prosecutorial side. He feels that more of a balance is needed. He suggested including advocacy groups.

Dir. Diroll said his intent was to collect data separately from prosecutors, defense attorneys, and judges, making the relative numbers less important. Nevertheless, he said he would use county public defenders and of the Ohio Association of Criminal Defense Lawyers' board to give defense attorneys adequate representation.

Mr. Gallo suggested including some common questions to which everyone could comfortably respond.

Mr. VanDine exclaimed that he was quite impressed with the survey draft, noting that it is much more thorough than what he envisioned last month.

Judge Corzine likes the instrument as designed, but suggested offering more space for suggestions.

DRC Counsel Jim Guy suggested recrafting certain questions to offer the option of both determinate and indeterminate sentencing. The respondent, he noted, might favor determinate sentencing for most cases with a few exceptions.

Judge Spanagel felt that a question on sentencing purposes should include rehabilitation. He suggested offering the survey online.

Dir. Diroll noted that online surveys tend to dissuade people that don't go online. A combination of online and mailed surveys might yield better results.

In light of probation crowding, Mr. Gallo suggested asking for input on local sanctions.

Judge Spanagel suggested asking court jurisdictions what community control programs are successful in their areas.

Some of the questions would even be good to ask the general public, suggested Atty. Guy.

If the general public is to be included, Mr. VanDine recommends using a survey through the University of Cincinnati or a similar entity.

If we decide to survey the public, Mayor O'Brien suggested also asking how much they would be willing to spend on improving the criminal justice system.

Acknowledging that as a favorite subject of newspapers, Judge Corzine pointed out that such public surveys tend to show informational gaps.

Representing the Ohio Justice Alliance for Community Corrections, Lusanne Green suggested letting CSG seek the public opinion.

Dir. Diroll noted that the CSG survey will be a different instrument, since the group isn't as expert in Ohio law

As a few members suggested offering additional choices, Dir. Diroll reminded them that it is imperative to keep in mind that the length of a survey can affect the number of responses received. Most responses are likely to come in paper form and we are likely to get more responses with multiple choice questions than with open-ended questions. He emphasized the necessity to get the right mix.

Atty. Lane suggested giving respondents an option between a long or short survey.

If given a choice, most people, Ms. Green contended, will take the lazy way out.

In reference to a question regarding whether drug penalties should be increased or decreased, Dir. Diroll said that this provides the opportunity for judges and practitioners to vent their opinions on the value of treatment in lieu as an option.

Treatment in lieu, said Judge Spanagel, may save DRC from extra crowding but transfers those crowding issues to county facilities.

Dir. Diroll remarked that OVI seems to have its own world and many judges wish that felony OVI didn't exist.

It can certainly result in a lot of 60-day minimums in municipal court, said Judge Routson.

Judge Hany pointed out that a lot of federal transportation money is triggered by compliance with OVI law. He encouraged a question about whether such cases should remain in municipal and county courts.

COLON CASE

After lunch, attention turned to statutes affected by the *mens rea* issue raised by the *State v Colon* case. Dir. Diroll reported that the Ohio Supreme Court has not acted on the motion to reconsider *Colon*.

As discussed at the last meeting, there are many statutes that do not clarify what the culpable mental state is.

The default statute, Dir. Diroll noted, says the *mens rea* is "recklessness" if the legislature didn't clearly indicate that the offense is strict liability. But that rule isn't universally honored, and might cause problems if it were, he opined. He said the appropriate mental state will be difficult to sort this out for some offenses. It may also be necessary to examine how "reckless" is defined.

Because of this, some prosecutors are charging at a higher standard where they have to prove "knowingly", which is easier for jurors to understand. He added if the standard defaults to "reckless" for some

misdemeanors, it will compete with the mental state for felonies. Vehicular homicide is one example. It is not just be a matter of filling in the blanks, he speculated.

Judge Hany remarked that it won't be necessary to deal with traffic offenses.

Based on the current state of the law, Judge Corzine doesn't see how you can get around this if you don't list a mental state for every offense. He feels it will be necessary to state "strict liability" in many statutes.

The General Assembly could meet the spirit of *Colon*, said Dir. Diroll, if it says it is "strict liability" unless something else is specified.

Another issue, said Dir. Diroll, is to determine how many elements need a culpable mental state.

Judge Corzine believes that, as a result of *Colon*, a lot of people may be entitled to release from prison on *habeus corpus*. He doesn't see any way around the motion to reconsider.

Hopefully, said Dir. Diroll, we will know more about the status of *Colon* before our next meeting. In the meantime, he suggested sorting through the offenses affected by *Colon* and designating which ones need a specific mental state listed. It will particularly be necessary, he noted, to hammer out the multiple tiered offenses.

The offense of kidnapping will be the challenging, said Judge Spanagel, because it includes circumstances that involve different mental states. As long as you can prove there was force, a threat, or deception, it tends to be a standard of strict liability.

There is a *mens rea* in deception, Judge Corzine declared, but not force or threat.

The definition of deception is in §2913.01, said Dir. Diroll, which lists a mental state of "knowingly" but is not in the kidnapping chapter.

Shawn Welch said all the lesser offenses related to kidnapping use "knowingly" as the mental state.

Judges Spanagel and Hany remarked that offenses involving seasonal or permit issues, such as watercraft, etc. should be strict liability.

The Commission agreed to peruse the statutes affected by the *mens rea* issue resulting from the *Colon* case and make recommendations regarding the mental states that need to be clarified.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for September 18, October 16, November 20, and December 18, 2008.

The meeting adjourned at 1:50 p.m.

