Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
September 16, 2010

MEMBERS PRESENT
Chief Justice Eric Brown, Supreme Court of Ohio, Chair
Common Pleas Judge Jhan Corzine, Vice-Chair
Victim Representative Chrystal Alexander
Defense Attorney Paula Brown
Juvenile Judge Robert DeLamatre
Prosecuting Attorney Laina Fetherolf
Defense Attorney, Kort Gatterdam
Municipal Judge David Gormley
Public Defender Kathleen Hamm
Prosecuting Attorney Jason Hilliard
Staff Lt. Kenneth Kocab, representing State Highway Patrol Superintendent, Col. David Dicken
Bob Lane, representing State Public Defender Tim Young
Prosecuting Attorney Joseph Macejko
Mayor Michael O'Brien
Appellate Judge Colleen O'Toole
County Commissioner Bob Proud
Jason Pappas, Fraternal Order of Police
Sheriff Albert Rodenberg
Senator Shirley Smith
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Ernie Moore

ADVISORY COMMITTEE MEMBERS PRESENT
Lynn Grimshaw, Ohio Justice Alliance for Community Corrections
Jim Slagle, Attorney General's Office
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Caitlynn Nestleroth, OSU extern
Cynthia Ward, Administrative Assistant
Shawn Welch, Law Clerk

GUESTS PRESENT
Jim Brady, interested citizen
JoEllen Cline, Legislative Counsel, Supreme Court of Ohio
Alex Coelho, Legislative Aide to Rep. William Coley
Bill Crawford, Supreme Court of Ohio

Monda DeWeese, SEPTA Correctional Facility
Andre Imbrogno, Counsel, Rehabilitation and Correction
Adam Jackson, Detective, Correctional Institution Inspection Committee
Jenna Mann, Legislative Aide to Sen. Joseph Uecker
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Matt Stiffler, Legislative Service Commission
Ed Stockhausen, Legislative Aide to Senator Shirley Smith

Chief Justice Eric Brown, Chairman, called the September 16, 2010 meeting of the Ohio Criminal Sentencing Commission to order at 9:20 a.m.

Irrespective of the Supreme Court's recent decision in *Horner* to limit the *Colon* decision, Chief Justice Brown said that he feels the Commission's work on the *Colon* issues and culpable mental states is still vital and extremely timely. In fact, he asserted, it may be even more important now than before. He feels that, ultimately, the final result will be appreciated by judges and jurors, as well as prosecutors and defense counsel.

DIRECTOR'S REPORT

Executive Director David Diroll reviewed contents of the meeting packets which included: memos on "A Case for Limited Adult RECLAIM" by Dir. Diroll and "*Colon*, *Horner* & the Default Statute" by Law Clerk Shawn Welch; a proposal from the State Public Defender's Office on "Proposed Confinement Credit Reform Amendments"; the Commission's proposed Chart of Culpable Mental States to Fill Statutory Voids in Light of the Colon Cases; the latest Legislative Update; and minutes from the June and July meetings.

Charitable Contributions in Lieu of Community Service. Dir. Diroll reminded members that, in July, the Commission briefly discussed a recent ruling by the Board of Commissioners on Grievances and Discipline which rejected the practice of courts transferring community service work into cash contributions. The practical application is tricky because it logically goes beyond community service to drug treatment and other sanctions where the ability to pay for a sanction increases the likelihood it will be used, said Dir. Diroll.

At the Judicial Conference several municipal court judges noted that there are many occasions when offenders would prefer to make a contribution rather than having to serve time in another sanction, said municipal court Judge Jhan Corzine. Dir. Diroll added that the Board was concerned with the appearance of buying justice. Some agencies, however, would prefer receiving a financial contribution rather than having to find work for the person to accomplish for their agency. Various language options are being considered that the Judicial Conference hopes to include in a bill soon.

Council on State Governments. The Council on State Governments has recommended improving the Ohio Criminal Justice System by making better use of risk assessment instruments and developing a better reporting system and statewide standards for probation. To date, they have not proposed any significant changes to the basic sentencing structure, noted Dir. Diroll.

***COLON, HORNER,* & THE DEFAULT STATUTE**

Dir. Diroll agreed with Chief Justice Brown that, despite the Supreme Court's recent reversal of *Colon*, there remain numerous statutes that do not clearly state a *mens rea*, which engenders confusion. Therefore, it remains useful to continue the Commission's current work in hopes of reducing confusion in trial courts and appeals.

In a memo titled "*Colon*, *Horner* & The Default Statute", Law Clerk Shawn Welch outlined the progression of decisions that directed the Commission's current course of action.

The original *State v. Colon* decision in 2008 held that when an indictment fails to charge the mental state element of a crime, the error is structural error and the defendant's failure to raise that defect in the trial court does not waive appellate review of the error.

Clarification came later in *Colon II*, said Atty. Welch, that the *Colon I* decision was prospective only and the court would not use structural error analysis unless there were several other errors.

More recently, *State v. Horner*, which overruled *Colon*, states that an indictment that charges the offense by tracking the language of the criminal statute is not defective for failure to identify the mental state when the statute itself fails to specify a mental state.

Since dozens of statutes with mental state gaps had been identified by the *Colon* Committee, the Sentencing Commission has worked to clarify the code in light of *Colon*'s indictment requirement.

Prosecutors had assumed they could indict on the language of the statute, said Dir. Diroll, until *Colon* changed that. *Horner* returns to form.

The issue, said Judge Corzine, was whether a specific element of the offense needed a *mens rea*. Did *every* element need a specific *mens rea?*

That, said Atty. Welch, goes to the heart of the analysis from the pre-*Colon*, *State v. Wac* and *State v. Maxwell* cases, to determine the mental state where none is specified. It also reinforces the possible need for a change to the current default statute.

The *Colon* Subcommittee's work resulted in a proposed new definition of "recklessly" in §2901.22(C), a list of statutes that are deficient under *Colon*, and possible changes to the mental state default statute, §2901.21(B).

Since *Horner* goes to the heart of the indictment, Atty. Welch asked if judges or defense attorneys will be more inclined to apply "strict liability" or "recklessly" as the default mental state.

According to Judge Corzine, *State v. O'Brien* allows a missing *mens rea* to be amended into the indictment.

Public Defender Kathleen Hamm declared that a jury instruction will still be needed to address whatever may be missing in the indictment.

Representing the State Attorney General's Office, Atty. Jim Slagle, contended that prosecutors need to know what the elements of the offense are, even if the offender pleads guilty. The *Horner* case, he said, holds that "an indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state …" Even by using the statutory language for the indictment, it is still necessary to know the elements of the offense.

This emphasizes the need for us to go forward with our work on the *mens rea* issues and recommendations, said Atty. Hamm.

Prosecutor Jason Hilliard agreed that we need to go forward with the whole package: chart, default statute, and "recklessly" definition.

The Commission members unanimously approved the motion offered by Judge O'Toole, seconded by victim representative Chrystal Alexander:

> **To proceed to submit the Commission's recommendations to the General Assembly that will address *Colon*-deficient statutes, a new definition of "recklessly," and a revised default statute.**

The Commission members next gave unanimous approval to another motion offered by Judge O'Toole, and seconded by Asst. State Public Defender Bob Lane:

> **To approve the "Colon Chart" (*Colon* Committee recommendations) of statutes that lacked mental states and the recommendations for those mental states.**

At this point, Pros. Hilliard asserted that a good default statute must be part of the package.

Dir. Diroll reintroduced Atty. Slagle's default statute proposal which would allow for statutes outside of Title 29 or future statutes to use the current default to "recklessly" if "strict liability" is not indicated. He noted that the Model Penal Code has a default to "recklessly".

The *Colon* Subcommittee, said Atty. Lane, looked at the Model Penal Code, the U.S. Code, and Codes of other states. There is no uniformity. Some states don't even have a default statute. Now that *Colon* has been reversed, he wondered if the current default statute suffices.

Atty. Slagle feels there are still many questions about it.

Because of areas of uncertainty, Judge Corzine agreed that there's still a need for a better default statute.

Without a new default statute, Pros. Hilliard feels that this issue about mental elements will return in 10 to 20 years.

Atty. Slagle explained that, with his proposal, what you see is what you get. If there's no mental element stated in a Title 29 offense, then there is no mental element required for that clause.

Atty. Hamm expressed serious concern about the legislature adopting the default statute without the chart of *mens reae*. She fears that it would cause a lot of offenses to be read as "strict liability."

The Commission could ask that adoption of the default statute be contingent upon adoption of the chart of *mens rea* recommendations, said Atty. Slagle and Dir. Diroll.

Although votes of opposition were cast by Attys. Lane, Hamm, and Gatterdam, the Commission approved Pros. Hilliard's motion, seconded by City Prosecutor Jay Macejko:

> **To recommend adoption of Atty. Slagle's default statute proposal, with amendments suggested earlier by Dir. Diroll:**
>
> **§2901.21 Requirements for Criminal Liability**
> **(A) Except as provided in division (B) and (C) of this section, a person is not guilty of an offense unless both of the following apply:**
> **(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;**
> **(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.**
> **(B) For offenses set forth in this title, no culpable mental state is required other than the culpable mental states set forth in the statute, an underlying offense incorporated into the offense, or a definition that specifies a culpable mental state.**
> **(C) ~~When~~ For offenses not set forth in this title, 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.**

Judge Corzine and Atty. Slagle asked Dir. Diroll to make it clear to the legislators that §2901.21 is contingent upon adoption of the Commission's chart of *mens rea* recommendations.

Legislators hope to get S.B. 22 out during the lame duck session, said Judge Spanagel. He remarked that the default statute and reckless definition might fit into S.B. 22. Dir. Diroll had doubts, especially with the contingency proposal just approved.

If anything were to be included in S.B. 22, said Judge Corzine, it should only be the "reckless" definition, because that would be the least controversial.

JAIL TIME CREDIT

Since S.B.2 was enacted in 1996 and the sentencing structure switched from indeterminate to determinate sentencing, the importance of ensuring that felony offenders are awarded credit for each day of confinement took on new meaning, at least for those being confined.

Current law, however, leaves some confusion as to which entity, the court or ODRC, is ultimately responsible for ensuring that inmates are given the correct amount of credit.

Atty. Bob Lane offered a proposal from the Office of the State Public Defender to correct this problem. Though most of what is in the document is current law, the purpose behind the proposal, he said, is to clarify where the responsibility lies to keep records and to provide the proper credit of time served for the inmate.

The proposed amendments to §2929.19 and §2967.191 are an attempt to ensure that that the issue of confinement is addressed at the offender's sentencing hearing and that credit is transmitted to the Bureau of Sentence Computation at DRC. The amendments would also allow the inmate to pursue a correction to the amount of credit and authorize the trial court to address motions for post-sentencing confinement credit, if warranted. By addressing the issue at sentencing, it is hoped that trial courts will see a reduction in the number of meritless jail-time credit motions filed later.

According to Atty. Lane, inmates often have spent more time awaiting trial than they are given credit for and, under this proposal, some of the burden would fall to the defense bar to assure that documentation is available to get this credit into the sentencing entry.

Judge O'Toole wondered why *habeas corpus* wouldn't be the tool.

Sometimes it might be, Atty. Lane responded. The issue usually comes back to what is on the record. Proper documentation is needed because some records never quite get into the computation.

Judges are in the best position, said Judge Corzine, to determine what does or does not constitute incarceration and what should count as jail time credit. One question might be whether it should go into the judgment entry or a separate entry. He noted that Rule 32 is silent about jail time credit, so he wondered if a rule might be needed to remedy the situation.

The reason for not amending Rule 32, responded Atty. Lane, was to avoid another series of litigations. The intention was to assure that failure to put jail time credit in the sentencing entry would not make it void.

Defense Attorney Kort Gatterdam liked the proposal to §2967.191, arguing that the defendant should have the right to file for jail time credit at any time if he can prove that he has earned it.

The biggest concern for Atty. Hamm is that this will fall onto the defense counsel's shoulders. Most errors occur when the offender has been in and out on probation violations. She fears that defense counsel will be given the burden of digging up all kinds of documentation.

Judge Corzine remarked that he is not going to merely take the word of a public defender because they don't understand all of the rules and what counts as incarceration and what doesn't. The judge knows that.

Atty. Lane pointed out that it is a basic duty of the defense counsel to protect the rights of his client, including the assurance that he gets full credit for time served.

Although the proposed amendment to §2967.191 would allow the inmate to file for a correction of jail time credit at a later date, said Ohio Justice Alliance for Community Corrections representative Lynn Grimshaw, the longer an inmate waits, the more difficult it will be to gather the necessary documentation.

Inclusion of the phrase "special proceeding" as defined in §2505.02(B) makes it an appealable order, said Judge Corzine.

Requiring a certified copy provides a date/time stamp, said Judge Spanagel, which might be beneficial.

It is easier, said Atty. Lane, to get the documentation without requiring that. He doesn't feel that certification is necessary.

Atty. Slagle added that it is easier to transfer electronically if not certified.

According to Judge Corzine there is computer software available that greatly simplifies the calculation of jail time credit, even for multiple offenses.

The first line of §2967.191, said Judge Spanagel, should say "determination or redetermination" in order to cover a filing by the inmate after he is sentenced and incarcerated.

Pros. Slagle argued that there should be some kind of time limit on §2967.191.

Since the inmate has the burden to prove, there is no benefit in waiting to begin the process, said Atty. Lane.

Representing the Ohio Chief Probation Officers' Association, Gary Yates declared that his office receives motions every week for someone's jail time credit to be reviewed.

Most jails have good records of when someone was in jail, said Atty. Slagle, but not *why* they were in jail or if any time was being served concurrently. All of that needs to be addressed at the time of sentencing, when everyone is at the table.

Some offenders file a *pro se* motion, said Atty. Hamm. She contended that there are often continuing errors because some offenders serve a lengthy time before getting an attorney on board.

Judge O'Toole argued for making it *pro forma* and expediting things as quickly and well as possible. It is easy to gather the necessary documents, she asserted, when the case is open since the judge can get the orders, but it is much more difficult to gather those documents post-conviction.

If a *pro se* inmate files multiple motions without any new evidence, it is understandable, said Atty. Gatterdam, if the court rejects the

motion. If documentation is presented, however, every effort should be made to correct the error quickly, particularly since it ultimately saves money for the entire judicial and correctional system.

Judge O'Toole suggested designating someone to gather the necessary documentation.

Recognizing the extensive task of gathering documentation, Atty. Hamm favored having the common pleas court assign someone for that task.

Noting that he hasn't had that much trouble getting documentation pulled together, Atty. Macejko suggested surveying how many other courts run into this problem.

Representing the Ohio Community Corrections Association, Phil Nunes noted that the problem is primarily procedural. He suggested that, prior to sentencing, the defendant should present a petition for jail time credit at the hearing and the final entry could be the investigative portion of the credit. That would put the onus back on the offender at sentencing to sign a petition requesting credit, which would then invoke defense counsel to process the paperwork. He pointed out that the offender always knows how much time he has served. He also feels that a remedy for this problem should be included in S.B. 22 since it relates to savings for the criminal justice system.

The offender still needs a chance, Senator Shirley Smith insisted, for a second bite at the credit if he is unable to get all the information together in time or didn't know

Everybody benefits, both time wise and financially, said Judge O'Toole, by having the right numbers, so there should be some way to get this to work better.

This really should be handled at sentencing, Judge Corzine argued. If all the necessary documentation cannot be gathered in time, then continue the sentencing hearing. He feels that another separate hearing on getting additional credit should not be necessary years later unless something is circumscribed.

Juvenile court Judge Robert DeLamatre doesn't feel a sentencing hearing should be held up for that. He favors the proposal that this would become a final appealable issue.

It all comes down, said Mr. Grimshaw, to the prosecutor and defense bar being prepared.

For F-1 and F-2 offenders, said Judge Corzine, there would be about two weeks for the defense counsel to get this information together before the sentencing hearing because it usually takes that long to get the victim's impact statement.

Judge Corzine recognized a general consensus among the Commission members regarding 2929.19(B)(3)(c). Some tweaking might be needed, however, regarding post-conviction motions. The more jail time credit information required at the sentencing hearings, the harder it should be to get a motion for another hearing at a much later date.

The biggest challenge in filing a post-conviction motion for jail time credit, said Atty. Lane, is obtaining the documentation. An inmate should not have to hire counsel to get the credit to which he entitled, but the difficulty in getting documents varies from county to county.

Judge Corzine agreed to get suggestions to Atty. Lane before the next meeting, for possible tweaks to the proposal.

At this point, Dir. Diroll introduced Caitlynn Nestleroth as the newest addition to the Sentencing Commission staff. She is an extern from the Ohio State University College of Law and is researching information on how the sentencing of drug offenses differs from state to state.

"RECLAIM" FOR THE ADULT SYSTEM

After lunch, the Commission's attention turned to discussing a "RECLAIM Ohio" approach for the adult criminal justice system.

In an attempt to find a possible market based solution to prison crowding, Sen. Bill Seitz had asked DRC's "Bed Budgeting" Committee (on which Dir. Diroll serves) to consider something similar to the juvenile system's RECLAIM model. Dir. Diroll said we must be mindful of whether the system appears to be driven more by economics than justice. That said, judges obviously prefer to keep full discretion to send appropriate offenders to prison, but the current pattern is becoming very expensive.

With RECLAIM money, said Judge Corzine, counties are assigned a proportion of state juvenile beds to be used for incarcerating delinquents. For beds not used, that money returns to the county to be used in other ways by the county's juvenile justice system.

DRC Research Director Steve VanDine described it as a "charge-back" system.

The RECLAIM model was developed based on a rehabilitative focus, said Judge Robert DeLamatre, not for population control purposes. The aim was to keep and treat the offender locally. He noted that a lot of funding is being cut which is causing some counties great difficulty in keeping the local programs going.

Atty. Hamm had heard that, in the juvenile RECLAIM program, a lot of the funding is based on felony convictions, so some counties tend to charge a juvenile with a felony instead of a misdemeanor just so that the county can get the RECLAIM money.

Under the proposal being considered, said Judge Corzine, if a RECLAIM model were to be used in the adult system, it would only apply to F-4 and F-5 felons and each county would be allocated a certain number of beds. If the county used fewer beds than allocated, it would receive a "refund" of the RECLAIM money to then use for local community corrections. If, however, the county would exceed its allocation, the county would be charged an amount per bed in excess of those allocated beds. He claimed that, if an offender enters the court with a worse record and greater potential for harm to the public than an offender from the same county who is currently occupying a RECLAIM bed, the

judge can release the one using the bed and replace him with the worst offender. This is only for F-4s and F-5s, he stressed.

As a member of the State Oversight Committee for RECLAIM since 1994, County Commissioner Bob Proud pointed out that this is a funded nonmandate. No county is mandated to participate. He was originally very skeptical of the Juvenile RECLAIM model but is now a fan. He claimed that, by encouraging the county to keep more juveniles in local treatment programs it has drastically reduced recidivism. It has also saved the county money by allowing some facilities to be shut down when they were no longer needed.

The State predicts an $8 billion deficit next year. A recent article in the *Columbus Dispatch* said that if *every* state employee were laid off, it would only save $4 billion. With that in mind, Dir. Diroll drafted a tentative proposal.

Dir. Diroll, however, pointed out that the juvenile system has advantages that don't exist in the adult system in terms of being able to use that type of model. Juvenile judges have a lot of control over the detention facilities and quasi-administrative control over the local system. That level of control is not available to a common pleas judge at the adult level.

Within that context, said Dir. Diroll, it would be a challenge to figure out how to give community corrections people more flexibility while keeping judicial discretion. He does not feel that a broad-based RECLAIM model can work in the adult system. He suggested applying the RECLAIM model to qualified F-4 and F-5s. DRC would return marginal costs of incarcerating them at the state level to counties if they keep the offender locally. The money would be used to pay for the sanction and, if done for many offenders, to encourage counties to develop more community corrections options. To truly save money, he said, it would be necessary to divert enough people to go beyond marginal costs (about $12 per day) to the average costs including construction. It would be necessary to save enough to close prisons or wings to gain the $30+ per day savings.

Mr. VanDine remarked that the Ohio Supreme Court's 2006 decision on the *Foster* case is driving the prison population at the moment, due to longer sentences. Overall, *Foster* is causing a 4 month longer sentence per inmate than those imposed before *Foster.* He asserted that the prison population would currently be 46-47,000 if *Foster* had not gone into effect. That is 4-5,000 less than the current population. The *Foster* decision is still increasing the average sentence.

In analyzing the feasibility of establishing a RECLAIM model for the adult system, Mr. VanDine noted that 10-12,000 F-4 and F-5 offenders enter the prison system each year. The current prison population is at 133-134% of capacity. Since F-4 and F-5 offenders don't stay very long, if none of them entered the prison system, the prison population would still be at 113% of capacity. It is going to take more than diverting F-4 and F-5 offenders to significantly reduce the prison population as needed. He would love to keep all F-4 and F-5 offenders out of DRC, but even that wouldn't be enough to solve the problem.

FUTURE MEETINGS

Dir. Diroll announced that the Sentencing Commission will conduct its next meeting at the Pickaway Correction Institution when it visits there on October 21st.

The Commission, he acknowledged, should look at some options that would affect the prison population in greater numbers, including revisiting the results of *Foster* in some way. Since *Foster* liberated the psychology of sentencing by allowing an extra month or two, we need to look at the psychological impact behind Foster in hopes of finding a way to level it off a bit.

Sen. Smith invited the Sentencing Commission to also look at S.B. 291. This bill would allow the possible expungement of a person's record after demonstrating 5 years of no further criminal offenses post release. The option would not be available to F-1, F-2 or violent offenders.

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for October 21, November 18, and December 16.

The meeting adjourned at 1:15 p.m.