

Third Study Commission Questionnaire

2017

Santiago de Chile

For 2017, the Third Study Commission, which focuses on Criminal Law, decided to continue our study of “The Sentencing of Criminal Offenders.”

In 2016 in Mexico City, we had excellent discussions of the factors judges take into consideration when imposing a sanction on a guilty offender. In addition to general considerations, we discussed sanctions in drug-trafficking cases and child pornography cases.

In 2017, we will discuss appropriate sanctions in some additional fictional cases involving embezzlement, and gun possession. (maybe more to be added)

In addition, we will discuss the role of the victim in a criminal prosecution as well as mandatory sanctions which leave the judge no discretion. Finally, we will discuss “settlement” of criminal prosecutions involving the prosecutor, the criminal, and perhaps the victim.

To aid our discussions, we ask that each country answer to following questions:

- 1) In your country, can a victim participate in the prosecution of a criminal, not as a witness but as a party?
- 2) Can a victim have her own lawyer, and can that lawyer assist the prosecutor?
- 3) If the victim sustained injuries as a result of the crime, can the judge order that the criminal must pay the victim for medical expenses, property damage, emotional distress or lost wages? If the judge can order such restitution, who decided how much? Is it the judge or a jury or a panel of judges?
- 4) Is it obligatory for the judge to award restitution to the victim, even if the case becomes very complicated as a result? Or can the judge decline to award restitution, thus forcing the victim to file a separate lawsuit against the criminal?
- 5) If the victim is awarded restitution, how can the award be enforced? What if the criminal doesn't pay? What if the criminal can't pay?
- 6) Does your country have mandatory sanctions, where the judge has no discretion? What kinds of cases? Are there ways that the litigants can defeat a mandatory sanction?
- 7) In your country, is it possible to settle criminal cases by agreement between the prosecutor and the criminal? Is this common? What role does the judge play? Is settlement of criminal cases a good thing, or not?

Also, we will try to find time to discuss the following fictional cases and explore the possible sanctions which would be applied in the various countries. So please consider what sanction would be applied in your court.

A) Embezzlement

The criminal is a 43 year old woman, married with 4 children, one of whom has cancer. She has a university degree, no mental or drug abuse issues, and no prior criminal activity. She was employed as an office manager; keeping track of financial records, credit card statements etc. with the authority to make business expenditures on a credit card and to write checks. She used the business's credit card to pay for personal items and wrote business checks to herself. In total, she embezzled \$215,265 US dollars.

Does it make any difference if she used the money she took to gamble at a local casino?

Does it make any difference if she used the money she took to pay for medical expenses for her sick child?

What sanction should she receive? Should she have to pay the money back, even if she is poor?

B) Gun Possession

A 37 year old male, married with a small child, has some education but no university degree. He is a truck (lorry) driver. He has a history of abusing prescription pills. He has been previously convicted to drug trafficking, kidnapping, and assaulting his spouse. As a result of these crimes, he is not permitted by the law to purchase or possess a gun.

He gets his wife to buy a gun for him illegally. When the police arrest him and search his home, they find that he has 10 guns.

What would be an appropriate sanction for this criminal?

C) Child Pornography Distribution

A 17 years old boy who goes to college. He has no prior sentences. He comes from a normal family. Both parents are working. Siblings have no records of prior crimes. The boy had a girlfriend who during their relationship sends him a nude picture. The girlfriend is 16 years old at the time when the picture is taken. The boy has kept the picture for no reason in particular. He has not asked for her consent to keep the picture. The boy gets invited by some of his friends to join a facebookgroup. The group exchanges picture of girls. The pictures are all of a pornography character. The boy offers his picture of his ex-girlfriend to the group – yet again without asking for the girls consent. In return he gets 50 similar pictures but of other for him unknown girls. None of these girls have given their consent to the exchange of picture. The boy now has a fine collection of pictures. The other boys in group get more and more sophisticated and now it is not about having must pictures but having

series of picture such a series of girls of different nationality, or girls with all kinds of hair colors etc. The boy lacks a picture of a girl with long hair in his collection why he to the facebookgroup offers five pictures of nude girls in exchange for a nude picture of a girl with long hair. The facebookgroup now has more the hundred user and many of pictures are distributed to other facebookgroups and homepages – here among homepages sited in Russia. It is not possible to delete pictures from the internet any longer. This is the situation when he gets arrested by the police.

D) Distribution of Nude Pictures of An Adult

A man at the age of 45. He has no prior sentences. He has two children with two different women. Both children are under age. One of the children lives at his house. The other child is living with its mother from whom the man is recently divorced. They got divorce because she was unfaithful to him. The divorce had been painful and he lost his job in progress. The mother is now living with a new man and she is sabotaging his access to the child which he normally has every second weekend. She feels that is disturbing for the family that she is trying to make with her new boyfriend. The man has therefore not seen his child in several months. The case has been taken to court but the man is still frustrated and feels that they are getting nowhere. One evening when he is sitting alone at home and he has had too much to drink he is looking over photos from old times on the computer. He finds an old photo that was taken when their relationship was new. At the picture you can see a little bite of the man – he is exposed in a mirror and you can see that he is the one who is taking the picture. In front of the picture is the wife – she is in her nude and she is performing a sexual oriented dance for the man. To get even with the wife for being unfaithful to him and for not letting him see their child he decides in his drunkenness to upload the picture on the internet and send the picture to all the people that know the wife and her new friend. Below the picture he writes that this is a picture of at sloth and a whore and that she will do anything for money. He also writes her phone number and sets some prices for different services that she can provide – all of a sexual nature. The next day when he gets sober he regrets his actions and tries to delete the picture but it has already been seen by more people and the wife has received more phone calls from men who want to buy a service from her but also some hate mails from women in the neighborhood. This is the situation when he gets arrested by the police.

E) Burglary

The accused is a 24 year old healthy, unmarried man, living alone, coming from a poor country and staying illegally in the country. As a member of a gang, he committed 37 burglaries in houses and apartments. They stole money, jewelry and electronic devices equivalent of € 180'000 and caused damages of € 405'000. 4 years ago, he was convicted for burglary and drug trafficking (1 kg marihuana).

What would be an appropriate sanction for this criminal?

Would it make any difference if in some cases the residents of the houses or apartments were at home but didn't notice the burglary?

Would it make any difference if the accused was carrying a loaded gun?