ATTACHMENTS

- September 19, 2019 Agenda
- RC 2953.08 proposed revision "draft"
- Drug Chapter Workshop: Consensus Topics
- Juvenile Probation Study
- Pretrial Practices Survey
- SB 201 Implementation Issues
- Legislative & Judicial Brief

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CRIMINAL SENTENCING COMMISSION

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AGENDA
September 19, 2019 10:00 a.m.

I. Call to order, roll call & approval of meeting notes from March 21, 2019
   Vice-Chair Selvaggio

II. Appellate review – discussion and possible vote

III. Legislative preview for Criminal Justice
   — Senator Eklund, Representative Seitz, Senator Thomas & Representative Boggs

IV. Reagan Tokes Law – Implementation Updates and Roundtable Discussion
   — Presentation from DRC Bureau of Sentence Computation and Legal Services

V. Uniform sentencing entry Ad Hoc Committee

VI. General Updates – written report provided
   — Juvenile Probation Study
   — Drug Chapter Workgroup
   — Pretrial Services Survey

VII. Adjourn

2019 Full Commission Meeting Dates

Thursday, December 12, 2019 *Riffe Center – 31st floor*

Additional information is available on the Commission website
http://www.supremecourt.ohio.gov/Boards/Sentencing/

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APPELLATE REVIEW OF FELONY SENTENCING PROPOSAL

R.C. § 2953.08

In 1996 Senate Bill 2 introduced a process for appellate review of felony sentencing codified in O.R.C. §2953.08. The section was intended to provide for review of sentences that fell outside the guidelines set forth in S.B. 2, but the *Foster* decision and subsequent case law have led to conflicting interpretations of the section and inconsistent application of its provisions. In their efforts to provide meaningful review of felony sentencing Appellate courts have struggled with the definition of the term "contrary to law" as used in the statute leading to substantial conflicts and several cases currently pending before the Ohio Supreme Court. The need for reform of R.C. § 2953.08 has long been a subject of Commission discussions and this draft represents the culmination of those efforts.

Sentencing Commission members and staff have worked in conjunction with Judge Sean Gallagher of the 8th District Court of Appeals as well as the Ohio Judicial Conference to move forward a revision to §2953.08. This proposal opens up appeal of nearly all sentences, adopting an abuse of discretion standard for review, a presumption of proportionality for concurrent sentences, and in doing so does away with the problematic phrase "contrary to law." It also requires that sentencing courts identify relevant factors from §2929.12 that were determinate of the imposition of a consecutive sentence, in order to provide a meaningful record for an Appellate Court to review. The proposal also expands the State's ability to appeal a sentence, subject to the same abuse of discretion standard and presumptions of fairness, and excludes appeals for jointly recommended or agreed sentences.

Provisions regarding the State's right to appeal, specifically proposed (B)(4) [see lines 33-36 of attached draft] have proven a sticking point to in discussion particularly for representatives of the Ohio Public Defender, and pending Ohio Supreme Court cases such as *State v. Gwynne*, 2017-1506 and *State v. Jones*, 2018-0444 cause representatives from the Prosecuting Attorney's Association to adopt a "wait-and-see" approach to issues of Appellate review. Members of the Sentencing and Criminal Justice Committee voted to advance the draft proposal for consideration of the full commission and to allow both the OPD and OPAA the opportunity to discuss their position on the point of contention in the draft.

These proposed changes to §2953.08 will provide a straightforward, uniform standard of review for sentencing throughout the state, allowing an opportunity for meaningful review of sentences while preserving the trial court's discretion as well as jointly-recommended sentences.

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TO: Drug Chapter Workgroup Members

FROM: Sara Andrews, Director

DATE: September 9, 2019

RE: Drug Chapter Workgroup Conclusion

At the December 2018 Sentencing Commission meeting Members heard details on a number of proposals to reform Ohio's drug sentencing laws and practices. In an effort to further evaluate and harmonize the various ideas, this workgroup was formed to bring together stakeholders and interested parties from throughout the criminal justice system, with an eye toward identifying priorities necessary for meaningful reform and developing consensus recommendations to advance those priorities. After frank and honest discussions at its initial meeting, the workgroup developed consensus on a number of reform goals:

1. Diminishing or eliminating the stigma of a felony conviction
2. Reducing the use of, demand for, and trafficking of illegal drugs
3. Developing a structure that includes accountability, flexibility, and simplicity
4. Using or revising the civil commitment process to provide treatment access without criminal justice system involvement
5. Appropriately addressing relapse
6. Addressing threshold amounts and defining "low level possession" offenses

Workgroup participants further debated these consensus topics as well as recently introduced legislation such as House Bill 1 and Senate Bill 3 at a series of meetings in 2019. Those conversations have proved invaluable to the work of the Commission and helped to inform the discussions around potential legislation in both testimony and interested party meetings. The Commission is tremendously grateful for your time and contributions in this work. However, recognizing the fluid nature of these topics and that much of our discussion is already included in pending legislation we've opted to discontinue meetings of the workgroup.

Please find below a synopsis of consensus topics, including current status.

Diminishing or Eliminating the Stigma of a Felony Conviction

Recognizing quickly that the subject of defelonization of possession offenses was not likely to generate a consensus opinion, and that myriad felony charges often accompany drug possession when an individual suffers from a substance abuse disorder, the workgroup focused much of its time and effort on examining ways to reduce the collateral consequences of a felony conviction. These discussions were framed around 1) expanding treatment options for charged individuals and 2) expanding their ability to have a record of conviction sealed, expunged, or their rights otherwise restored.

Expanding Treatment Options

Members were supportive of expansion of drug court programs, an idea also included in the Governor's budget request passed in HB166. They also supported expansion of the concurrent jurisdiction of municipal and common pleas courts to operate drug courts. These discussions were shared with the legislature and contributed to an amendment of the jurisdictional provisions of SB3 to allow for such concurrent jurisdictions.

Having heard the Chief Justice's proposals for expansion of Intervention in Lieu of Conviction (ILC) at the December Commission meeting, members discussed that expansion as proposed in HB1, and were strongly supportive the presumption ILC be granted and of requirements that judges make findings on the record when denying ILC. Judge Selvaggio presented a draft of a statutory simplification of ILC provisions and members endorse drafting changes that make the provisions of the criminal code clearer and easier to digest. Commission staff will look to harmonize that simplification draft with the provisions of HB1 and discuss that simplification as the legislature further considers the bill.

The treatment of probationers with substance abuse disorders was also discussed in relation to probation violator caps in R.C. §2929.15 and the definition of "technical violation." Practitioners felt frustrated by an inability to direct probationers into long term treatment when the offender is aware they can only serve an additional 90 or 180 days for a probation violation under current law. Offenders often ask that the judge sentence them to a term in local jail rather than engage in treatment. Furthermore, offenders who abscond from community control entirely were benefitting from the lack of clarity on what constitutes a "technical violation". These discussions have informed interested party meetings and an amendment to SB3 for the proposed definition of technical violation. Articulated or repeated refusal to participate in the terms of community control is excluded from consideration as a "technical violation," subjecting violators who have abandoned the goals of their community control sanction to their suspended prison sentence.

Expanding Rights Restoration

The subject of simplifying and expanding access to record sealing procedures, expungement, and Certificates of Qualification of Employment (CQE's) was also at the forefront of workgroup discussions. As HB1, SB3, SB160 and similar legislation proceeds through the legislative process, the ideas discussed by the workgroup will inform their consideration.

Record Sealing

The proposals put forth by the Chief Justice in December 2018 were discussed at length by the workgroup and formed the basis of HB1. Members strongly support the reduction in the waiting period to seal low level offenses from three years to one year and expanding the number of such low-level convictions that can be sealed. Provisions in SB3 allow for immediate sealing of a drug conviction upon completion of a drug treatment program or ILC were also favorably discussed, as were its provisions treating prior convictions for low level possession offenses as misdemeanors for sealing purposes, as this would allow individuals with multiple possession offenses a greater ability to see their convictions sealed. HB1 also increases the ability for individuals with a conviction for a felony of the third degree to have their record sealed, a concept supported in workgroup discussions.

While these pending bills do not revise or simplify the sealing statutes for clarity and ease of administration, Commission staff will continue to advocate for legislation to address that desired reform.

Expungement

SB160 was introduced in June 2019 and establishes one of the consensus reforms discussed by the workgroup – providing a method to expunge convictions after a substantial waiting period with no new criminal offenses. Members discussed and supported similar timelines at the April 2019 meeting, and that discussion will inform consideration of the provisions of SB160 moving forward.

Certificates of Qualification of Employment

The process for obtaining a CQE, particularly for misdemeanor offenses, as well as the wide variance in filing and application fees was another topic that workgroup members felt should be addressed. As employers struggle to find workforce candidates, there is a high value in an individual being able to obtain a CQE from both the employer's and the job seeker's perspective. Commission staff have reached out to other interested parties from the business community and will work to draft language making it easier and less costly to obtain a CQE.

Expand Civil Commitment Process to Provide Treatment Access

Recognizing the need to provide a path to treatment that eschews the criminal justice system entirely, the workgroup also focused on potential expansion and reform of the civil commitment process. This would allow families, loved ones, or even law enforcement to request an involuntary commitment to a treatment facility for someone suffering from a substance abuse disorder. Current statutes require the posting of a bond of half the expected cost of treatment – a financial barrier that often too difficult to overcome, necessitating criminal charges and placement through probation, ILC, or a diversion program.

SB3 introduced several provisions aimed at addressing this issue, including allowing evidence of revivals by an opioid antagonist to be considered by the probate judge and allowing proof of insurance to serve as the cost of treatment bond. These provisions were discussed by the group and concerns that the process should not be limited to opioid disorders and that proof of insurance still created a two-tiered system were relayed to the bill sponsors. Amendments to SB3 address these concerns, including that the provisions are not limited to a specific type of substance abuse disorder and that evidence of intention to pay for part of drug treatment would suffice for the bond requirement. Commission staff will continue to work with interested parties to move these recommended changes to the civil commitment process forward.

Members also noted the need for more treatment facilities and placement options for individuals, whether placed there through civil or criminal proceedings. To that end the possibility of expanding use of Community Alternative Sentencing Centers was discussed. While no legislation has been introduced as of yet, Commission staff will continue to monitor these provisions and advocate for greater access to treatment facilities throughout Ohio.

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TO: Sentencing Commission Members & Advisory Committee

FROM: Sara Andrews, Director

DATE: September 19, 2019

RE: Juvenile Probation Study by Case Western Reserve University

For several years, much of the work of the Sentencing Commission's Juvenile Justice Committee has focused on developing a better understanding of probation practices and outcomes in Ohio. As you have heard so often about the adult system – we need to tell the story of what happens when youth leave court after being placed on probation. Plenty of information exists about youth sentenced to a Department of Youth Services (DYS) facility, but our lack of statewide data on juvenile probation makes it difficult to assess what is working and to make recommendations to improve the system.

To that end, researchers at Case Western Reserve University (CWRU) presented to the Committee and discussed cost and feasibility to study juvenile probation practices in Ohio . Notably, researchers at CWRU have conducted evaluations of the Behavioral Health/Juvenile Justice Initiative (BHJJ) for over a decade, and have established relationships with many of the juvenile courts throughout the state. CWRU proposed a study of courts in four counties – Montgomery, Lucas, Ashtabula, and Marion –reporting the youth placed on probation, the programming offered them, and rate of recidivism. The study hopes to provide insight regarding the risk level and needs of youth on probation the probation process n those jurisdictions, and to evaluate the availability and dearth of criminal justice data in those (juvenile) courts. While the researchers initially identified the four counties as a cross section of urban and rural counties, members of the Committee suggested including additional courts within counties not currently participating in the Juvenile Detention Alternatives Initiative (JDAI) could provide a more complete picture of the juvenile justice system in Ohio. Thus, CWRU suggested including juvenile courts in either Hamilton or Lorain County, Clark County, and Richland County in the study.

We are pleased to inform you that this summer DYS agreed to fully fund the study and CWRU researchers are already contacting participating courts. They expect to collect data from those courts in September 2019, with an eye toward a completed study in late summer 2020. We've agreed to assist them in identifying a graduate student in central Ohio to help with data collection. We'll remain in contact with the CWRU researchers and provide updates to the Committee and Commission on the study as it progresses. Attached is a copy of the study as well as the responses from CWRU to the questions posed by the Committee after its initial review of the proposal.

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TO: Commission Members, Advisory Committee & Those Interested

FROM: Sara Andrews, Director

RE: Sentencing Commission Survey of Pretrial Practices – UPDATE

DATE: September 19, 2019

As you know, earlier this summer we embarked upon a groundbreaking statewide survey of local pretrial practices. We are now analyzing the results with assistance from a team of interns, representing several universities, assigned to the project.

The Commission coordinated the survey effort with staff from the Supreme Court of Ohio, the Ohio Association of Pretrial Services Agencies, the Ohio Chief Probation Officers Association, and the Ohio Association for Court Administration, among others. The survey team reached out to 127 municipal courts and 87 common pleas courts, completing 183 interviews with a few remaining interviews to be conducted. With the vibrant survey process nearly completed, the researchers and interns at the Commission are currently compiling results to produce a report for presentation and sharing in the late fall of 2019.

In addition to conducting the remaining interviews, the team of interns is currently transcribing audio recordings of the open-ended portion of the survey interviews and coding them to extract key themes and subjects for qualitative analysis. Researchers in the office are also aggregating survey responses on questions such as program size, caseload, age, data collection, and scope. The subsequent quantitative analysis will capture the intricate picture of the near-200 pre-trial programs surveyed in Ohio.

This ambitious survey supplements the prior work of the Commission on bail practices and pretrial services in a meaningful and credible way to better understand pretrial processes in Ohio. The robust information from the survey, for the first time, will give practitioners, policy makers and others first-hand, fresh and powerful aggregate information about the current status of pretrial services in our state.

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TO: Senator O'Brien , Representative Boggs
Senator Manning, Representative Carfagna

FROM: Sara Andrews, Director

DATE: May 17, 2019

RE: Reagan Tokes Law – Indefinite Sentencing implementation

As sponsors of SB133 and HB215, I'm writing to follow up on conversations we've had regarding the implementation of Senate Bill 201 "The Reagan Tokes Law". As you may know, Sentencing Commission staff are providing education and training for criminal justice practitioners throughout the state on the provisions of the law. These presentations are generating meaningful feedback from stakeholders and provide us an opportunity to examine the operational impact of the law.

Thus, we've attempted to synthesize this feedback into the attached working document that was discussed at the Sentencing and Criminal Justice Committee on May 16, 2019. The listed discussion points reflect areas of the law that are identified as difficult to administer or are unclear in application for the imposition of indefinite sentences and sentence computation. As you know, felony sentencing in Ohio is a complex, intricate process, and ensuring clear, comprehendible sentences is of the utmost import for the administration of justice and promoting confidence in the system.

We hope to further discuss these topics with you and that legislation will be drafted to clarify the provisions of the law. We look forward to working with you and if you have any questions or need additional information, please let us know.

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REAGAN TOKES LAW

SB201 IMPLEMENTATION

- **DEFINITIONS OF TERMINOLOGY** – SB201 introduces several terms that would benefit from clear and concise definition, and existing defined terms could also benefit from additional clarification in light of the new indefinite sentencing provisions. Definitions of the following terms would ease practitioner implementation of the new sentencing structure and aiding understanding of the interplay of specifications, definite terms, and indefinite minimum and maximum terms. The work of the Criminal Justice Recodification committee, upon which portions of SB201 were based, could provide some clarity with regard to definitional terms.
    - **Most serious felony** – not currently defined – should be objective and not subjective decisions to avoid disparate impact
    - **Minimum term**
    - **Maximum term**
    - **Stated Prison Term** – clarify definition vs prison term – include "stated minimum" and "stated maximum"
    - **Exceptional conduct or adjustment to incarceration**

- **FIX TO SENTENCING FORMULAS** – Remove "or definite term" from consecutive sentence formula in RC 2929.144(B)(2) and place it in concurrent sentencing formula in RC 2929.144(B)(3) to solve consecutive sentence issues(below)

- **ORDER OF SERVICE OF SENTENCE ISSUES** – Existing 2929.14(C)(9) addresses how definite terms previously or subsequently imposed interact with indefinite terms – however, this provision needs to be expanded to allow practitioners to properly advise defendants of the impact of their sentences. Areas that need to be addressed include:
    - **Concurrent sentences w/in same case** – Potential for a longer definite term to be run concurrent to an indefinite term, no guidance from statute as to what happens to the potential maximum term.
    - **Concurrent sentences between multiple files** – A defendant could have sufficient jail time credit to cause expiration of a minimum term on one file but a maximum term that exceeds the minimum and maximum on another file. What then becomes of the maximum term?
    - **Consecutive sentences between multiple files** – Can ODRC extend incarceration of one indefinite sentence before a defendant would begin serving a consecutive indefinite minimum term?

- **Consecutive indefinite sentences and life sentences** – Similarly, can ODRC extend incarceration beyond the minimum term before the defendant begins serving the mandatory portion of a life sentence?
- **Contemporaneous sentencing of multiple files** – two issues
  - 2929.14 says previous or subsequent – not contemporaneous sentencing.
  - Depending on answers above, can a judge structure the order of indefinite sentences at the sentencing hearing?

- **EARNED REDUCTION OF MINIMUM PRISON TERM (ERMPT)** – Incentivizing good behavior in prison is a laudable goal, but several concerns have arisen amongst stakeholders with regard to ERMPT hearings.
  - **Is the defendant entitled to counsel** – unlike judicial release, this process is started administratively by DRC – In some counties full time public defenders may be available to represent these defendants but many jurisdictions may lack the resources to provide counsel.
  - **Are mandatory sentences eligible** – generally mandatory sentences include a provision exempting them from reduction by RC 2967 – As with sexually oriented offenses, a provision specifically excluding mandatory sentences would be beneficial (as would a definition of "mandatory sentence")
  - **Subpoenaing of DRC staff to testify** – Clarification of what "information" the sentencing court is to consider at an ERMPT, particularly from prosecutor and victim. Can prosecutor subpoena DRC staff to testify at these hearings?
  - **Concerns about timeframe** – some courts worried that 90 days is not sufficient time to schedule a hearing, have defendant transported, review information, etc.
    - **Feasibility of conducting hearings via videoconference**?
    - **Must a court schedule a hearing**? What if they wish to agree to the reduction?
  - **Appellate review of denial of ERMPT** – Is a denial by the sentencing court of a reduction subject to review under 2953.08? Can DRC appeal that decision, or just the defendant?
  - **Still eligible for earned credit** – These defendants are still eligible for some form of earned credit – does that count towards a presumed early release date?
  - **Removal of judicial veto** – Should the release decision be purely administrative and determined by DRC – judges have expressed concern about the lack of meaningful discretion in reviewing ERMPT.

- **JUDICIAL RELEASE ISSUES** – can a defendant still apply for judicial release after the expiration of the minimum term? Does the judge then have authority to return them to prison if they violate community control?

- **EXTENDING INCARCERATION BEYOND MINIMUM TERM** – is this administrative decision subject to appellate review? A provisions providing for appellate review could be inserted into 2953.08.
  - **Is defendant entitled to counsel at the hearing**?

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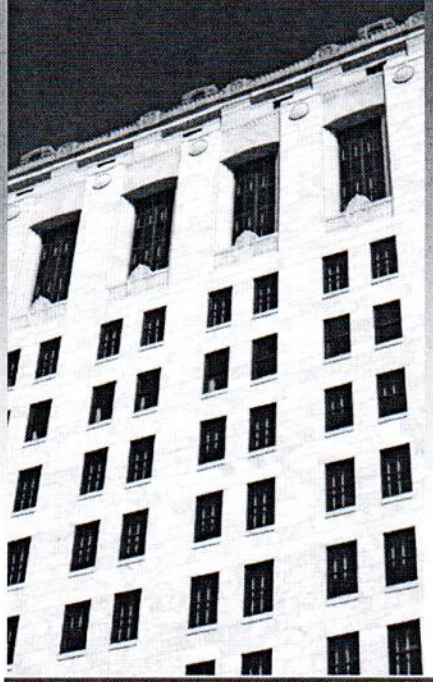

Legislative & Judicial Brief

A Message from Sara Andrews, Director

The Legislative & Judicial Brief is designed to share information and spark conversation. The Commission strives to move ideas to solutions that advance public safety, realize fairness in sentencing, preserve judicial discretion, provide a meaningful array of sentencing options and distinguish the most efficient and effective use of correctional resources.

-Sara Andrews

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