

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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SENTENCING

WHERE DO WE GO FROM HERE?

On September 16, 2021 Reginald Wilkinson, EdD [facilitated a Roundtable Discussion among Commission Members recognizing the 25-year anniversary of the enactment of SB2*](#), known as Truth in Sentencing in Ohio.

As a result, a workgroup was established to refine the discussion topics and develop recommendations to achieve clarity and reduce [the complexity of felony sentencing](#) consistent with the Commission's Vision: To enhance justice and its Mission: To ensure fair sentencing in the state of Ohio.

Have suggestions? Contact Sara Andrews by email: sara.andrews@sc.ohio.gov.

*SB2: Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7163-7814

LEGISLATION IMPACTING SENTENCING & SIGNED BY THE GOVERNOR

SB36 CRIME VICTIMS (MANNING, HUFFMAN)

The bill was introduced on February 2, 2021. The bill includes two additional types of victims who may receive an award of reparations, and it modifies the information that the Attorney General must include in the finding of fact and decision when making an award of reparations to increase transparency. It was signed by the Governor on December 1, 2021 and becomes effective 90 days from then.

LEGISLATION IMPACTING SENTENCING & RECENTLY INTRODUCED

HB439 PSYCHIATRIC DETERIORATION (GALONSKI, HILLYER)

The bill was introduced on September 29, 2021 and makes changes to the law regarding involuntary treatment for mentally ill persons subject to a court order. Specifically, the bill makes it possible for someone to be involuntarily committed before becoming a danger to self or others, if there is psychiatric deterioration that would make someone a danger to self or others if it continues. The bill had a third hearing in the House Civil Justice Committee on January 18, 2022.

HB459 SEX OFFENDERS (CUTRONA, LaRE)

The bill was introduced on October 19, 2021. The bill prohibits offenders of child-oriented offenses or of sex offenses where the victim was younger than 18 from being employers, employees, or independent contractors, or volunteers in any capacity affording extensive contact with minor children. The bill provides that law enforcement must alert a prosecuting authority to known violations of the prohibition and the prosecuting authority can seek injunctive relief.

HB475 INCREASED PENALTIES (FRAZIER, PLUMMER)

The bill was introduced on November 1, 2021. It increases penalties for assault if the victim is a hospital police officer or a special police officer: an F4 for assault, F3 for aggravated assault, and F1 for felonious assault. If the act causes serious physical harm, the felony levels are the same and a prison term is mandatory. The bill also provides hospital police officers the same level of immunity as other peace officers and designates gaming agents with the Casino Control Commission as peace officers.

HB500 MANDATORY JUVENILE BINDER (LAMPTON, STEWART)

The bill was introduced on December 2, 2021. The bill eliminates mandatory bindovers and reverse bindovers and modifies discretionary bindovers of an alleged juvenile offender from a juvenile court to an adult criminal court. The bill also eliminates the mandatory SYO (Serious Youthful Offender) designation.

HB511 PAROLE BOARD HEARINGS (HUMPHREY, STEWART)

The bill was introduced on December 14, 2021. The bill requires electronic recordings to be made of all parole board hearings, excluding certain personal identifying information, and makes those electronic recordings public records.

SUPREME COURT OF OHIO COURT DECISIONS

[*State v. Jones*, Slip Opinion No. 2021-OHIO-3311](#), decided September 23, 2021. The Court found that the First District Court of Appeals erroneously dismissed an aggravated murder conviction on the basis that there was insufficient evidence to prove the element of prior calculation and design. The Court found that the proper standard in reviewing the evidence of conviction was whether, viewed in the light most favorable to the state, a reasonable fact finder could conclude that the defendant acted with prior calculation and design. The Court stated that prior calculation and design may be found where there is evidence for the jury to conclude that the defendant had the time and opportunity to plan a homicide, and the evidence presented “shows a scheme designed to implement the calculated decision to kill.” The Court cited its previous holdings in *State v. Taylor*, 78 Ohio St.3d 15, 19, 676 N.E.2d 82 (1997) and *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, among others, in reviewing the record and finding that it supported the jury’s finding of guilt on aggravated murder committed with prior calculation and design. However, the court of appeals had also found evidentiary issues during the trial, on the aggravated murder charge as well as separate murder and felony murder charges and had remanded the case for a new trial on those charges. The Court held that their reversal of the dismissal of the aggravated murder charge meant that it could also be retried in the trial court.

[*State v. Glenn*, Slip Opinion No. 2021-OHIO-3369](#), decided September 28, 2021. The defendant, who is awaiting trial for a sex offense, wishes to present an alibi defense at trial, and filed a notice of their alibi along which contained both locations and a number of witnesses who would testify to their presence. The state requested that the trial court compel disclosure of witness statements or summaries thereof, and a hearing was held to resolve the discovery dispute. The trial court ordered defense counsel to turn over written summaries of the statements as reciprocal discovery under Crim.R. 16. An appeal of the discovery order was dismissed by the appellate court, finding that there was not a final, appealable order which would grant them jurisdiction over the appeal. The Court affirmed this dismissal, reviewing both R.C. 2505.02’s jurisdictional provisions as well as its own case law, and holding that the specific order in question in this case would have an adequate remedy through direct appeal of a conviction and sentence.

[*State v. Foreman*, Slip Opinion No. 2021-OHIO-3409](#), decided September 30, 2021. Upon giving birth, the defendant’s child was found to have cocaine in their system, as well as in umbilical cord tissue. The defendant admitted cocaine use two weeks prior to the child’s birth to an investigator, and she was charged and convicted of cocaine possession. She challenged her conviction alleging that the essential element of venue could not be established as the state could not prove she possessed the controlled substance in the jurisdiction. The conviction was affirmed by the court of appeal. The Supreme Court overturned the conviction, holding that once a controlled substance is taken into a person’s system in a way that can be “assimilated” into their system, they no longer have the requisite control over that substance to establish possession under R.C. 2925.01(K). Evidence of controlled substance metabolites in a defendant’s system, therefore, were not sufficient to establish the element of possession of a controlled substance. The Court went on to find that the state failed to prove the element of venue, as there was insufficient evidence that the drugs were possessed in the county where the crime was charged. A positive drug test, in and of itself, was insufficient circumstantial evidence to prove the crime of controlled substance possession, absent sufficient corroborating evidence to support the claim the drug was possessed in the jurisdiction, was not sufficient to prove venue.

[*State v. Toles*, Slip Opinion No. 2021-OHIO-3531](#), decided October 4, 2021. The Court reiterated its holding in *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, that R.C. 2953.08 does not allow and appellate court to review the record to determine if the sentence imposed is supported by R.C. 2929.11 and R.C. 2929.12. Toles sought review of a specific R.C. 2929.12 factor that the trial court considered which Toles argues was not supported by the evidence. The Court affirmed dismissal of the appeal citing their opinion in *Jones*.

[*State v. Lawson*, Slip Opinion No. 2021-OHIO-3566](#), decided October 7, 2021. Defendant was convicted of aggravated murder with capital specifications and sentenced to death. On direct appeal of the case, the Court upheld imposition of the death penalty. The Court examined the aggravating and mitigating circumstances as well as the appropriateness and proportionality of the four capital counts. The defendant entered a guilty plea to numerous counts and capital specifications, and defense counsel never raised the issue of defendant’s competence to stand trial. The Court examined this issue and the record regarding defense counsel’s objection to a competency evaluation and held that there were not sufficient issues on the record for the trial court to, sua sponte, order the evaluation. The Court directly addressed the issue of the defendant’s disclosure that they were prescribed psychiatric medications and found that the trial court conducted an adequate inquiry into those medications effect on the defendant. All other issues alleged in the appeal were also rejected.

[*State ex rel. Slaughter v. Foley*, Slip Opinion No. 2021-OHIO-4049](#), decided November 17, 2021. The defendant sought a writ of habeas corpus alleging that the trial court erred in imposing their sentences for robbery and homicide offense in 1993. The court of appeals found that these errors made the sentence voidable, not void, and under the Court’s recent jurisprudence the needed to have been addressed on direct appeal, and denied the request for the writ. The Court upheld the dismissal based on their void-versus-voidable holding in *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784.

SUPREME COURT OF OHIO COURT DECISIONS *continued*

[*State ex rel. Roberts v. Hatheway, Slip Opinion No. 2021-OHIO-4097*](#), decided November 23, 2021. Defendant filed a motion challenging their trial courts subject matter jurisdiction over their criminal case. No action was taking on the motion for 10 months, and the defendant filed the writ asking the appeals court to order a decision. Shortly after the motion was filed, the trial court issued an order dismissing the defendant's motion. The Court upheld the dismissal of the requests for writs as moot, and further noting that the defendant had relief available through direct appeal on the issues.

[*State ex rel. Ogle v. Hocking County Common Pleas Court, Slip Opinion No. 2021-OHIO-4453*](#), decided December 21, 2021. Ogle was convicted at trial of assaulting a police officer in 2011. Placing the defendant on house arrest pending sentencing, the trial court issued a no contact order which included contact with lawyers. The defendant filed a notice that they wished to appear pro se at trial but indicated at the sentencing hearing that they were not waiving their right to counsel. After discussions with the defendant, the trial court sentenced the defendant without counsel present. The conviction was affirmed on appeal, and almost a decade later Ogle challenged the conviction through a request for writs of prohibition and mandamus, arguing that the trial court lacked jurisdiction to sentence them without a waiver of their right to counsel. The Court held that, under *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), that Ogle had a colorable claim that a denial of their right to counsel rendered the sentence in their case void, and therefore the appellate court's granting of a motion to dismiss the complaints was in error. The case was remanded to the court of appeals for further hearing. Ogle's request to have opposing counsel disqualified based on an alleged conflict of interest was found to have been properly denied.

[*State v. Hubbard, Slip Opinion No. 2021-OHIO-3710*](#), decided October 12, 2021. The defendant plead guilty to murder prior to the effective date of Sierah's Law and was sentenced after the effective date. They were notified by the court of their obligations to enroll in the Violent Offender Database following their release from prison. Hubbard appealed these enrolment duties, arguing that their retroactive application to a crime that occurred before their effective date violated the Retroactivity Clause as set forth in Article II, Section 28 of the Ohio Constitution. On direct appeal, the Twelfth District held that the new law did not violate the retroactivity clause. The Court upheld that decision, citing the two part test set forth in [*State v. Williams, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108*](#), which turns on whether there is specific statutory retroactivity imposed, and on the nature of the statute as either substantive (affecting the rights of the defendant in some way) or remedial ("those affecting only the remedy provided"). The Court compared the duties imposed under Sierah's law and found them to be less onerous than those with regard to sex offender registration laws, and held that duties required by Violent Offender Database enrollment were not punitive in nature.

[*State v. Jarvis, Slip Opinion No. 2021-OHIO-3712*](#), decided October 12, 2021. Jarvis was sentenced after the effective date of Sierah's law and ordered to enroll in the violent offender database, but the crime for which they were convicted occurred before the effective date. They alleged this violated the Ohio Constitution's prohibition on retroactive punishment. The Fifth District Court of Appeals agreed with Jarvis and found the law to be unconstitutional, in conflict with the Twelfth District Court of Appeals decision in *State v. Hubbard*. The Court reversed the Fifth District, citing its decision in *Hubbard* above, and holding that Sierah's law is not punitive in nature and is no more onerous than that previously upheld sex offender registration laws which included retroactive application.

CASES DECIDED ON THE BASIS OF HUBBARD AND JARVIS:

[*State v. Pilkington, Slip Opinion No. 2021-OHIO-4119*](#), decided November 24, 2021. Certified conflict on the constitutionality of the Violent Offender Database as applied retroactively. Judgement of the Court of Appeals reversed on the basis of *State v. Hubbard*, 2021-Ohio-3710 and *State v. Jarvis*, 2021-Ohio-3712.

[*State v. Lamb, Slip Opinion No. 2021-OHIO-4120*](#), decided November 24, 2021. Jurisdictional appeal challenging the constitutionality of the Violent Offender Database as applied retroactively. Appeal dismissed as improvidently accepted.

[*State v. Baber, Slip Opinion No. 2021-OHIO-4121*](#), decided November 24, 2021. Jurisdictional appeal challenging the constitutionality of the Violent Offender Database as applied retroactively. Appeal dismissed as improvidently accepted.

[*State ex rel. Suwalski v. Peeler, Slip Opinion No. 2021-OHIO-4061*](#), decided November 18, 2021. The defendant, Ewing, sought to have their right to own a firearm restored following a misdemeanor domestic violence conviction which was granted by a Common Pleas Court trial judge. The victim (Suwalski), the defendant's former spouse, filed a writ of prohibition with the court of appeals under Art. I §10a of the Ohio Constitution, also known as "Marsy's Law." The court of appeals granted the writ holding that the trial court lacked the authority to relieve a firearm disability under federal law. The Court upheld the granting of the writ, holding that the victim had rights related to the issue, that the victim had sufficiently asserted those rights at the trial court level, and that *res judicata* did not bar the claim from being appealed. The Court also found the trial court's grant of relief was not authorized by law, and as no other remedy was available to the victim, the grant of an extraordinary writ was warranted.

SUPREME COURT OF OHIO COURT DECISIONS continued

[State v. Harrison, Slip Opinion No. 2021-OHIO-4465](#), decided December 22, 2021. The defendant challenged the arrest warrant in their case alleging that the lack of a judge or magistrate signature on the warrant rendered the warrant invalid under Criminal Rule 4, and also argued that the good faith exception should not apply in such circumstances. The Court held that Crim.R. 4 does not specifically require a signature on the arrest warrant and found on review of the record that the issuing judge properly held a hearing and found probable cause to issue the warrant, noting so in the complaint attached to the warrant. As such, the Court held that the arrest warrant was valid and complied with Crim.R. 4 and the Fourth Amendment, and therefore there was no need to examine the issue of whether an officer can, in good faith, rely on an invalid warrant.

[Dubose v. McGuffey, Slip Opinion No. 2022-OHIO-8](#), decided January 4, 2022. Dubose was one of two defendants charged with aggravated robbery and murder, and upon arrest and arraignment had a bail amount of \$750,000 imposed for each of the two offenses. After several hearings to have the amount reduced, Dubose filed a writ of habeas corpus in the court of appeals claiming the bail amount was excessive. The First District held that the \$1.5 million (total) bail amount imposed was excessive and effectively a denial of bail, and that the trial court failed to take all requirements of Crim.R. 46(C) into account. The court of appeals reduced the amount to \$500,000 with additional conditions. The state appealed, arguing that the court of appeals erred by reviewing the issue of bail de novo when it should have applied an abuse of discretion standard, and separately erred by failing to properly take the statements by the victim's family into account. The Court, in a per curiam decision, rejected the state's first argument, citing its previous holding in *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132 for the proposition that "in an original habeas action, a court of appeals may receive new evidence and independently weigh the evidence to make its own bail determination." The Court also rejected the state's argument that the appeals court did not properly account for the public safety concerns raised by the victim's family. It noted that recent revisions to Crim.R. 46 make it clear that financial conditions of bail are to be based on risk of non-appearance, the seriousness of the offense, and the defendant's prior criminal history. The Court held that public safety concerns can be, and were, considered regarding non-financial conditions of bail, but not with regard to the monetary bail imposed. Finally, the Court reviewed the issue of whether the original \$1,500,000 amount was excessive bail and found on review of the record that the bail set at the trial court level was indeed excessive. The judgement of the appeals court was affirmed.

THE UNIFORM SENTENCING ENTRY

The Ohio Criminal Sentencing Commission—in partnership with the University of Cincinnati School of Information Technology—is continuing its work developing a statewide criminal sentencing database, [the Ohio Sentencing Data Platform \(OSDP\)](#). Started in 2020, the project has expanded much more rapidly than anticipated; currently more than 25 courts and 60 judges are engaged with the platform.

The OSDP is designed to tell the story of sentencing in Ohio. The story begins when judges integrate the Uniform Sentencing Entry and Method of Conviction forms into their existing court processes. For more information, please contact Sara Andrews, sara.andrews@sc.ohio.gov.

OTHER COURT NEWS**TECHNOLOGY GRANTS**

The Supreme Court of Ohio is inviting local courts to apply for grants to upgrade technology. You can find more information here:

https://www.courtnewsOhio.gov/happening/2022/techGrantsApplication_11022.asp#.YeXdrP7MI2w.

PUBLIC COMMENT

The Supreme Court of Ohio is accepting public comment until February 21, 2022 on [proposed amendments](#) for the annual update to the Rules of Practice and Procedure. This is the second public comment period for the proposed changes to civil, criminal, evidence, juvenile, and traffic rules. Several of the proposals intend to modernize courts and maximize the use of technology.

As noted in [Court News Ohio](#), these proposals largely arise from the [recent report of the Supreme Court's Improving Court Operations Using Remote Technology \(iCOURT\) Task Force](#), which was charged with studying and proposing best practices in using technology for court operations.

Next Meeting of the Full Commission
(Location TBA)
Thursday March 17, 2022 10:00 a.m.

2022 Full Commission Meeting Dates (Location TBA)
Thursday June 16, 2022
Thursday September 15, 2022
Thursday December 15, 2022

*Working committees meet between Full Commission meeting dates.



Special Thanks to contributor:

Marta Mudri, Esq., Legislative Counsel, Ohio Judicial Conference

Questions, Comments, Suggestions? Contact:

sara.andrews@sc.ohio.gov

Contact Us:

Ohio Criminal Sentencing Commission
65 South Front Street
Columbus, Ohio 43215-3431

www.supremecourt.ohio.gov/Boards/Sentencing

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