



## Sentencing and Criminal Justice Committee Meeting Agenda November 16, 2017

### I. Call to Order, Welcome & Introductions

### II. Old Business

- \* Update on Bail and Pre-Trial Services – status of recommendations with the Supreme Court of Ohio and General Assembly. Risk assessment recommendation and ORAS  
<http://codes.ohio.gov/orc/5120.114v1>.
- \* PRC issue (attachment)

### III. New Business

- \* Update on JRI 2.0 – kick off meeting November 9, 2017  
Overview: <https://csgjusticecenter.org/jr/ohio/publications/justice-reinvestment-in-ohio-overview-2>  
Presentation: <https://csgjusticecenter.org/jr/publications/justice-reinvestment-2-0-in-ohio-launch-presentation/>
- \* T-CAP
- \* Recodification Committee – <http://ocjrc.legislature.ohio.gov/>
  - Spanagel Summary (attachment)
  - Sample Comparison document (attachment)
  - Seitz and 2925 (attachment)
  - Seitz and mens rea (attachment)
  - Appellate review – update and presentation at December meeting
  - Current legislation:  
SB201 (attachment), SB202, HB365  
<https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-HB-365>  
<https://www.legislature.ohio.gov/download?key=7753&format=pdf>  
SB33 (attachment)  
Priority bills from the group
- \* Simplify driving under suspension to three things:
  - Driving under Administrative Suspension
  - Not having a license
  - Driving under court imposed sentence
- \* Legislative Impact Analysis (attachment)
- \* OSU Drug Enforcement and Policy Center (attachment)

### VI. Future work and priorities

### V. Adjourn

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Next meeting: Full Commission – December 14, 2017 at the Riffe Center

Committee Meetings January 18, 2018 10:00a, Room 281



**OHIO**  
CRIMINAL SENTENCING COMMISSION

65 SOUTH FRONT STREET • 5TH FLOOR • COLUMBUS, OHIO 43215-3431 • TELEPHONE: 614.387.9305 • FAX: 614.387.9309

**SUBJECT: Ohio Criminal Sentencing Commission review and analysis of ???**

**DATE:**

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<b>BILL NUMBER:</b>	<b>TITLE:</b>
<b>SPONSOR(S):</b>	<b>COMMITTEE:</b>
	<b>STATUS:</b>

**SUMMARY OF PROPOSED LEGISLATION:**

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**DESCRIPTION OF PROHIBITED ACT - MENS REA, ACTUS REA:**

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**IS THERE EXISTING STATUTE OR LANGUAGE RELEVANT TO THE ISSUE?**

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**CHANGE IN PENALTY:**

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**GENERAL IMPACT:**

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**VICTIM IMPACT:**

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**LOCAL GOVERNMENT IMPACT:**

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**FISCAL IMPACT:**

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**1 SUMMARY AND IMPACT ANALYSIS HB??? 11-03-2017| Ohio Criminal Sentencing Commission**

\*The Ohio Criminal Sentencing Commission is comprised of 31 members appointed by the Chief Justice of the Supreme Court of Ohio and the Governor, ORC 181.21. The Commission’s mission and vision are to enhance justice and ensure fair sentencing in the State of Ohio. Commission Members represent organizations, associations and agencies with an interest in further advancing sound, well-rounded criminal justice policy. The Commission uses a consensus decision-making process when considering new proposals, advancing recommendations and in conducting its business. Commission Members’ opinions on a particular bill may not reflect the position of the organizations, associations or agencies they represent and are not intended to substitute consultation with the respective member organization, association or agency.



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**RELEVANT SUPREME COURT OF OHIO DECISION(S), IF APPLICABLE:**

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**HISTORICAL RESOURCES, IF AVAILABLE:**

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**NOTES:**

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DRAFT

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**2 SUMMARY AND IMPACT ANALYSIS HB??? 11-03-2017| Ohio Criminal Sentencing Commission**

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## **I. EXECUTIVE SUMMARY**

## **II. TABLE OF CONTENTS**

## **III. INTRODUCTION**

## **IV. CURRENT LEGISLATIVE LANDSCAPE**

## **V. ANALYSIS**

This paper compares the areas of similarity and difference between the Recodification Committee proposals and Commission work product. The subject areas include:

- Simplification (add section numbers), Sentence structure, mens rea & strict liability
- Extended Sentence Review
- Sex Offender Registration and Notification
- Possession of Trace Drug Amounts
- Intervention in Lieu of Conviction
- Appellate Review of Sentences
- Record Sealing and Expungement
- Transfer of Juveniles to Adult Court (Bindover)
- Sexting
- Offenses of Violence
- Probation

## **VI. PRIORITIES**

## **VII. CONCLUSIONS AND RECOMMENDATIONS**

## **CHAPTER 2901 – GENERAL PROVISIONS**

R.C. Chapter 2901 deals with a variety of matters applicable to the criminal law in general, including penal provisions found in the Revised Code outside the criminal code, from Title 1 through Title 61. A number of basic criminal law concepts are covered within R.C. Chapter 2901 and remain mostly unchanged since the comprehensive 1974 revision.

An alphabetical glossary of almost all the defined terms within Title 29 is created for the reader's convenience. Language was added to clarify the consequences of a section that "does not apply" to a person or class of persons. Language was also added to clarify that any newly enacted criminal offense must specify if "strict liability" is the degree of mental culpability required for the commission of the offense. Additionally, language was added to address a statute of limitation situation when an accused person is charged in a single indictment or information with multiple crimes arising out of the same occurrence. Finally, R.C. 2901.32 - Guilty of improper solicitation of contributions for missing children is repealed because its conduct should not be criminalized and any concern of fraud or theft can be handled by R.C. Chapter 2913.

Other notable changes include requiring an offense to specify if "strict liability" is the degree of mental culpability required for the commission of that offense and creating a unified section applicable to all of Title 29 for determining the value of stolen or damaged property. Additionally, in accordance with a recent Supreme Court of Ohio decision, the effect of an adjudication of delinquency for juvenile offenders has been constitutionally conformed to preclude juvenile adjudications of delinquency from being used to enhance subsequent violations in adult court.

## **CHAPTER 2903 – HOMICIDE AND ASSAULT**

R.C. Chapter 2903 deals with offenses, other than assaultive sex offenses, where the primary prohibitions involve actual or potential harm to persons. The majority of offenses within this chapter remain mostly unchanged; edits were largely relegated to clarification and reorganization for the sake of readability. However, a few notable changes were made.

"Prior calculation and design" is now a defined term to help courts better distinguish between offenders who plan to kill and those who do not. "Partial affirmative defense" language is added to explain that an offender causing serious physical harm or death while under the influence of sudden passion or rage brought on by the victim's provocation would not be found guilty of Felonious Assault or Murder but instead found guilty of Voluntary Manslaughter or Aggravated Assault, respectively. "Recklessly" mental states are added to many offenses that previously omitted a mental state but were not strict liability crimes. Strict liability is explicitly designated for aggravated vehicular homicide and aggravated vehicular assault where the driver was under the influence of drugs or alcohol.

A few notable sections were either merged or moved for convenience. Felonious assault was merged with Aggravated assault and Aggravated menacing was merged with menacing. Most of the sections relating to protection orders were moved to R.C. Chapter 2932.

## **CHAPTER 2905 – KIDNAPPING AND EXTORTION**

This chapter contains a number of crimes centered on unlawfully transporting another or unlawfully restraining another's liberty. The first three offenses—Kidnapping, Abduction, and Unlawful restraint—have been restructured so that Unlawful restraint is a lesser-included offense of Abduction and Abduction is a lesser-included offense of Kidnapping. Criminal child enticement has been reworked to cure its overbreadth issues by requiring the act of soliciting or luring to be for the purpose of violating specific R.C. Chapter 2905 or 2907 sections. Extortion remains mostly the same except for some language that is removed because it

overlapped with similar prohibitions in Coercion. Likewise, Coercion also remains mostly the same except for some language changed to be consistent with similar language changed elsewhere in Title 29.

#### **CHAPTER 2907 SEX OFFENSES**

With regard to sex offenses, the most important change was ensuring proper culpability through mental states. Therefore, for all offenses other than aggravated rape of a young child, a mens rea was added to the element of age – a person must know that the person was within the prohibited age range, or be reckless in that regard. This mens rea for age was not intended to make the prosecution prove that the person knew the specific age of the person; it is merely intended to require proof that the defendant was reckless in his belief that the person was not in the prohibited age range specified.

In addition, the spousal exception was removed from each section in the chapter. A sexual offense can occur to anyone, even within a marriage.

Finally, with regard to juveniles and ages – changes were made to ensure that criminal violations were appropriately applied to consensual acts between and among juveniles. When children of close age engage in consensual acts, the criminal code must be narrowly tailored to only apply to truly criminal behavior – for example, when there is coercion, either express or inherently due to age differences. When children of similar age engage in consensual activity, criminally charging youths for such behavior is generally not appropriate. Therefore, these changes ensure that the vulnerable are protected, predators are punished, and youthful indiscretions do not carry a lifetime of unwarranted consequences.

#### **CHAPTER 2909 ARSON AND TERRORISM**

The changes to this chapter are mainly to the degree of the offense, rather than substantive changes to the elements of the offense. The guiding principle regarding property crimes is the equivalence between damaging property and stealing property. In both cases, the loss to the owner of the property is the same or similar, and as such, the penalties should be aligned. Therefore, this chapter borrows the theft valuations from Chapter 2913 for most violations of this chapter. In addition, consistent with the definition changes in Chapter 2901, physical harm to property was changed to physical damage to property throughout.

#### **CHAPTER 2911 — ROBBERY, BURGLARY, TRESPASS, AND SAFECRACKING**

The offenses contained in this chapter involve the intersection of theft, violence, and trespass. The crimes of Robbery and Burglary were intended to be a series of greater- and lesser-included offenses, which more severely punish the more dangerous acts. Thus, the revisions to this chapter were predominately guided by proportionality and clarity. With regard to the offenses of Robbery and Burglary, the intention is to ensure that the degree of the offenses corresponded to the degree of harm caused. To that end, all elements regarding physical harm were limited to actually causing physical harm – attempts to cause harm were eliminated from the elements of the offense, to be charged through R.C. 2923.02, the separate attempt statute, rather than as a degree of the substantive offense. These offenses establish clear, bright-line rules regarding the degree of offenses, while essentially retaining the core aspects of the previous version of the offenses. In addition, the offenses were renumbered to remove large numbering gaps and provide greater clarity.

#### **CHAPTER 2913 — THEFT AND FRAUD**

Chapter 2913 consolidates and simplifies all the varying value-based enhancement penalties throughout R.C. Chapter 2913 by creating a general enhancement section, R.C. 2913.90, that applies to most R.C. Chapter 2913 offenses. First and second degree felony enhancement value thresholds are lowered from

many former R.C. Chapter 2913 offenses to allow harsher penalties for offenders that steal or defraud larger amounts of money. Fifth and fourth degree felony enhancement value thresholds are raised from many former R.C. Chapter 2913 offenses to help prevent first-time offenders from being convicted of a felony. However, unlike the majority of former R.C. Chapter 2913 offenses, repeat violators under this chapter will be subject to harsher penalties. Many theft offenses that were automatic felonies regardless of value are removed except in the case of stolen anhydrous ammonia and firearms or dangerous ordinances.

Additionally, all special victim enhancements throughout R.C. Chapter 2913 have been removed.

R.C. 2913.90 contains a general value-based enhancement scheme that is applicable to all value-based R.C. Chapter 2913 offenses. Nearly every value-based offense has a baseline penalty of a third degree misdemeanor, first degree misdemeanor, or fifth degree felony based on the seriousness of the crime and can be escalated up to a first degree felony based on value. Each baseline penalty is contained in the section of the substantive offense and can be enhanced by the general value-based enhancement scheme in R.C. 2913.90. For instance, most value-based offenses have a baseline penalty of a third degree misdemeanor and can be enhanced to a first degree misdemeanor if the measured value is \$500 or more, a fifth degree felony if the measured value is \$2,500 or more, etc. Because each value-based offense uses the same general value-based enhancement scheme in R.C. 2913.90, a value-based offense would be enhanced by value-based enhancements only if the enhancement would result in a higher offense level than is indicated in the section creating the offense. For example, a value-based offense with a third degree misdemeanor baseline penalty is enhanced by value to a first degree misdemeanor at \$500 and a fifth degree felony at \$2,500, but a value-based offense with a first degree misdemeanor baseline penalty would not be enhanced by value at \$500 but would be enhanced by value at \$2,500 to a fifth degree felony.

R.C. 2913.90 also contains a new enhancement based on repeat violations of value-based offenses. If an offender violates a value-based offense and the offender has previously been found guilty or pleaded guilty to two or more violations of any value-based offense within 5 years, the offense will be enhanced by one degree except in the case where a third degree misdemeanor would be enhanced based on repeat violations directly to a first degree misdemeanor. This repeat offender enhancement is in addition to the value-based offenses. In other words, an offender could have an offense enhanced twice: once based on value and another based on his prior record.

#### **CHAPTER 2915 – GAMBLING**

The fundamental thrust of R.C. Chapter 2915 is to prohibit unlicensed or unregulated gambling and assure adherence to regulations on legal gambling. Because almost all sections within this chapter have no substantive changes, these comments will not go section-by-section like the other comments for each chapter. However, a couple changes were made to penalties throughout the chapter for the sake of proportionality. R.C. 2915.09 – Illegally conducting bingo game contains a couple fourth degree felonies that are now changed to fifth degree felonies. Likewise, the fifth degree felony enhancements for prior convictions that were found in R.C. 2915.081(G), 2915.082(F), 2915.091(D), 2915.092(C), and 2915.094(E)(1) have been removed, essentially capping the penalties of those respective sections at a first degree misdemeanor.

#### **CHAPTER 2917 – OFFENSES AGAINST THE PUBLIC PEACE**

R.C. Chapter 2917 deals with crimes whose adverse affects are usually felt by large segments of the public, or which affect an important public interest. Changes to this chapter centered on rewording or eliminating language that ostensibly ran afoul of the Ohio and U.S. Constitutions. For instance, First Amendment concerns arose when overly broad or content-based speech restrictions prohibited a person from making

utterances or gestures that would outrage or offend others in certain situations (e.g., R.C. 2917.11 and 2917.12). Likewise, other language is removed that contained vague language or standards, effectively running afoul of the Fifth and Fourteenth Amendments (e.g., R.C. 2917.11). Additionally, language from different sections that prohibited the same type of conduct is either removed or merged (e.g., R.C. 2917.11 and 2917.13; merging R.C. 2917.31 and 2917.32) and some changes were made to penalties for the sake of proportionality (e.g., R.C. 2917.11, 2917.32, 2917.41).

#### **CHAPTER 2919 – OFFENSES AGAINST THE FAMILY**

The changes to this chapter were primarily designed to enhance readability and clarity. Many of the crimes in this chapter, like endangering children and domestic violence, have multiple ways to commit the offense and a myriad of penalties, depending on the specific act committed. This draft attempts to clearly identify the degrees of offenses, to make determining the appropriate level of offense more straightforward. In addition, several sections in this chapter needed mens reas added to address the culpable mental state. The Committee did not examine or address any of the abortion related provisions in this chapter.

**CHAPTER 2921 OFFENSES AGAINST JUSTICE AND PUBLIC INTEGRITY** primarily deal with actions that hamper and impede investigations and elements of the criminal justice system. As such, these can be some of the most severe crimes in the Revised Code. However, in the previous version of this chapter, many of these crimes had a “one-size-fits-all” approach to punishment, which over-penalized relatively minor conduct with little effect on the criminal justice system, while also failing to sufficiently punish egregious or serious acts which impaired the system. Thus, the changes to this chapter primarily fall into three categories – limiting overbreadth, reducing repetition, and altering the degrees of offenses to reflect the seriousness of the act. These sections focus on acts which actually hamper and impede justice, and mete out punishment accordingly.

#### **CHAPTER 2923 WEAPONS OVERVIEW**

The changes to the weapons portion of this chapter were rarely substantive; the biggest change deals mostly with removing cluttered sections to more appropriate locations. With that goal in mind, all of the licensing provisions dealing with concealed handgun licenses were moved to Chapter 311, the sheriffs code. These sections were inappropriate in the criminal code because they merely regulated the Sheriff in the discharge of the sheriff’s duty to issue the licenses. That is appropriately contained out of Title 29. It must be noted that, when shifting the sections to Ch. 311, no substantive changes were made to the licensing provisions at all. They were simply moved and structured for clarity with no changes.

The criminal provisions contained within the licensing structure were maintained within this chapter, specifically R.C. 2923.124 and .125. The other changes in this section mostly dealt with removing clutter, clarifying mens rea, and ensuring the clarity of the statutes.

#### **CHAPTER 2925 - DRUG OFFENSES**

R.C. Chapter 2925 defines the various prohibitions on possession, use, sale, or furnishing of any drug, intoxicating substance, or drug paraphernalia. With the possible exception of R.C. 2929, R.C. Chapter 2925 has seen the most changes throughout this recodification effort. Every change made to this chapter is with the intent of clearly delineating the most culpable (those in the business of selling drugs and harming others) from the least culpable (those caught in a cycle of addiction). To that end, severe mandatory penalties were retained for aggravated trafficking of large amounts, while expanded treatment paths and supervision were added to assist those with addictions to better themselves.

The former R.C. 2925.03 - Trafficking in Drugs and R.C. 2925.11 - Possession in Drugs sections have been reorganized and moved to the beginning of the chapter because of their prominence when compared to other R.C. Chapter 2925 sections. The first three sections—Aggravated Trafficking in Drugs (“Aggravated Trafficking”), Trafficking in Drugs (“Trafficking”), and Petty Trafficking in Drugs (“Petty Trafficking”)—deal with varying levels of trafficking depending on the amount of drugs in the offense. One key difference in Aggravated Trafficking and Trafficking is that these higher levels of trafficking do not require the prosecution to prove the "sale" or "distribution" element traditionally associated with trafficking offenses; merely possessing a large amount of drugs creates an irrebutable presumption of trafficking because of the large amount of drugs involved and is sufficient to charge a person with Aggravated Trafficking or Trafficking. While mere possession is sufficient for an Aggravated Trafficking and Trafficking charge, language relating to selling or distributing drugs has also been retained in these sections to preempt any proximate cause issues that may arise from using Aggravated Trafficking or Trafficking as a predicate felony for felony murder.

Because Aggravated Trafficking and Trafficking can be charged without the proof of sale, traditional “possession” charges have now been relegated strictly to low-level drug amounts and associated penalties (i.e., misdemeanor and fourth and fifth degree felonies). Marijuana and Hashish have been separated into one unified “Marijuana Possession” section for convenience and readability, effectively making two Possession sections: R.C. 2925.04 – Possession of Drugs and R.C. 2925.041 – Marijuana Possession. Petty Trafficking, Possession of Drugs, and Possession of Marijuana are offenses that are eligible for treatment options.

Offenses with drug amounts now have a minimum required amount that must be detectable: either twenty-five one thousandths of a gram or one fourth of one unit dose, whichever is applicable. Fentanyl has been addressed by broadening the definition of heroin to include any mixture of the substances; the entire weight of any compound, mixture, preparation, or substance containing any amount of the drug is weighted for purposes of this chapter. In addition, collateral sanctions with no real deterrent effect, such as mandatory driver’s license suspensions and mandatory fines, were eliminated as counterproductive and unduly harsh.

The holistic effect of these changes is to make it easier to punish those who are in the business of selling drugs and causing harm, while ensuring that the least culpable have pathways to treatment.

#### **CHAPTER 2927 – MISCELLANEOUS OFFENSES**

Chapter 2927 serves as the repository for offenses which cannot be placed in other chapters of the criminal code. There were not many changes to this chapter. Beyond adding or changing mental states throughout sections in this chapter, only two sections received patent changes. R.C. 2927.01 - Abuse of a corpse is changed to include specific prohibitions against abusing a corpse rather than relying on an undefined standard. R.C. 2927.02, dealing with illegal distribution of cigarettes to children, is changed to a \$1,000 civil penalty for each violation similar to other tobacco-related prohibitions in this section.

#### **CHAPTERS 2929/2951.03/2953.08/2967 – SENTENCING, PAROLE, AND OTHER RELATED SECTIONS**

The comprehensive changes to the sentencing code were designed with three goals in mind: to prioritize prison for dangerous and violent offenders, to incentivize offenders to target and change their behavior and prepare them for reintegration into society, and to empower judges to exercise their discretion to fairly and proportionately sentence offenders. This chapter maintains certainty in sentencing while addressing

proportionality among criminal acts and offenders. As an example, felony sentencing was changed to an indeterminate system, where the sentencing court selects individualized sentences for each offense, and then imposes a maximum sentence of fifty percent of the single longest sentence. Such an individualized, targeted sentencing scheme provides incentives to productively use the offender's time in prison to better the person and prepare for reintegration. To that end, institutional rule breaking, violence, and lack of progress are grounds to hold an offender beyond the minimum, and to impose stringent supervision on the person once released. Conversely, those that behave well in prison and actively seek out programming have the potential for presumptive release at the minimum sentence, limited earned credit, and unsupervised release.

In addition, judges are empowered to exercise their discretion in crafting an appropriate sentence for each offender, considering all relevant factors to arrive at a proportional sentence. The chapter has also returned to traditional words commonly understood within the criminal justice system, such as probation and parole. Mechanical, technical recitations of talismanic words are eliminated in favor of the sentencing court examining the facts and circumstances surrounding the offender and offense. In addition, appeals of sentences are expanded and clarified to work in harmony with the sentencing judge's discretion.

The key principle of this chapter is empowering those who make sentencing decisions, to incarcerate and incapacitate those that mean to do harm and violence while providing positive incentives to others who can use the opportunity to better themselves and become productive members of society. 69

The committee intentionally did not address, and did not substantively change, any sections relating to aggravated murder and murder contained in R.C. 2929.02 through 2929.06.

#### **CHAPTER 2932 – PROTECTION ORDERS**

The intent of the changes to the protection order statutes was done with one overreaching purpose in mind – to better protect victims of violent crimes from their abusers by making the process more straightforward, easy to navigate, and convenient. The biggest problem with the former protection order regime is the complex maze of five different types of protection orders, each with different venues, rules, requirements, and forms. In fact, a protection order issued under one section is limited to only the relief that section provides. Additionally, clerical errors stemming from using the wrong type of protection order form can impede and hamper justice and the safety of the protected person.

This proposal seeks to remedy these issues by creating a single protection order, with two pathways to obtain an order; criminal, and civil. Victims can therefore choose the most efficient and convenient path, such as appearing at a criminal arraignment to receive an order, or filing a petition in a civil court of proper jurisdiction. The proposal also contains mandatory transfer provisions, so if the petition is filed in the wrong court, the petition can be quickly and efficiently transferred to the proper court.

This proposal is also designed to discourage forum shopping by encouraging the petition to be filed in the court with jurisdiction over the underlying dispute, and ensuring that any emergency order necessary to protect the safety of any minor children is target to protect the person until a court with jurisdiction over the children can issue a more permanent order. Ex parte protection orders issued under this chapter are orders of a limited duration that nevertheless are considered full protection orders under this chapter. The specific sections regarding these orders makes clear when a court may issue an ex parte order, and how long the order will remain in effect until the court can have a full hearing on the matter to comport with due process.

Overall, this proposal will protect all victims of violent crime from further abuse and victimization while ensuring the most streamlined, efficient, and effective method possible to provide speedy protection to those in need of a judicial order.

#### **CHAPTER 2942 – SPECIFICATIONS**

Chapter 2942 is a new chapter that is intended to redraft almost all of the specifications as they currently exist into uniform prohibitions containing elements of a crime and sentencing provisions that are the functional equivalent of the former specifications. Prior to this redraft, elements for specifications were found in R.C. Chapter 2941 or sporadically elsewhere, the sentence for the specification was found in R.C. Chapter 2929, and the substantive offense for which the specification attaches merely referenced the specification without providing elements or sentencing provisions.

First, only specifications that added additional mandatory time to sentences were retained as “specifications” in this Chapter. If a former specification only altered the sentence for a substantive offense without adding additional mandatory time to it, the specification was moved directly into the substantive offense as an enhancement penalty. This occurs three times: the Major Drug Offender (“MDO”) specification is incorporated into the applicable R.C. Chapter 2925 sections; the Furtherance of Human Trafficking specification is incorporated into each substantive offense as an additional element that the prosecution can prove to enhance the penalty; the Attempted Rape specifications are merged into R.C. 2907.01 – Aggravated Rape.

Second, the specifications retained as specifications in this chapter are drafted in a manner that makes clear the elements of the specification, defenses, if any, and the penalty associated with the specification. The “general form” of the specification will remain in R.C. 2941.141 to serve as a guide for how the specification should be charged in the indictment.

Third, the specifications were drafted in a manner to require an additional element to be added to the substantive offense to justify the additional sentence. For example, a gun specification is prohibited from being added to a crime that requires proof of an actual firearm to commit the offense, such as carrying a concealed handgun. Because possession of the firearm is punished as an essential element of the substantive offense, the gun spec does not add an additional element to the underlying offense, and therefore the additional sentence is not justified. The Multiple OVI specification was also limited to only apply to third degree felony OVI offenses, to avoid the problem of duplicity and double charging, where the proof for the OVI is the same for, and not in addition, to the proof needed for the substantive offense.

Finally, the repeat violent offender specification is slightly changed for clarity and to alter the sentencing for the specification. The court may add an additional one to ten years for the specification only when the court elects to sentence the offender to the maximum prison term for the underlying offense; if the court does not impose the maximum, the RVO spec authorizes an additional one, two, or three years.

#### **CHAPTER 2950 REGISTRATION OFFENSES**

Due to the complexity of the sex offender registry, the notes for this section will depart from their typical section-by-section breakdown and instead focus on the changes to the registry. The Committee chose to retain the existing structure and specifics of the registry except for the explicit changes summarized herein. The sex offender registry changes were expressly designed to focus only on sex offenses and to maintain the effectiveness of the registry for the worst sex offenders, to protect the public. To that end, although the

registry remains offense-based as a starting point, judges were empowered to a limited degree to alter classifications or allow deregistration after a period of time to those who conclusively demonstrated they were no longer a risk to reoffend. This theme of greater discretion to the judges and prioritizing the most dangerous offenders on the registry is designed to prioritize registration for those who remain a danger to the community and not to dilute the registry with offenders who no longer remain a danger to reoffend. Finally, due to technological advancements, the registry is designed to ease the burdens on Ohio's sheriffs who must maintain the registry and advance the capabilities of the registry into the twenty-first century.

#### **CHAPTER 2971 SEXUALLY VIOLENT PREDATORS**

The changes to this chapter were designed with one goal in mind – refocus this chapter on its core mission – to provide serious sentences and a lifetime of supervision to the worst form of sex offenders – sexually violent predators. Under former law, this Chapter had morphed beyond its intended purpose to encompass a range of sentences for offenses that were not sexually violent. Those lengthy sentences were better addressed in the specific sections (such as aggravated rape's life sentence). Therefore, this Chapter only applies to persons who have been found guilty of the sexually violent predator specification.

In addition, this chapter provides for life sentences and a lifetime of monitoring for all offenders sentenced under this chapter. The release mechanism has been simplified from the former version. Rather than providing for a bifurcated release mechanism between the parole board and the sentencing court, this proposal simplifies the release. The offender is released under this chapter by the parole board, but the sentencing court retains additional punishments to impose if an offender commits a new crime for the rest of the person's life.

October 20, 2017

*Via email*

Dear Representative Manning,

I'm writing regarding SB33 and the Intervention in Lieu of Conviction (ILC) amendment. In 2015, the Commission identified the review of ORC 2951.041(F) Intervention in Lieu of Conviction as a priority issue. Specifically, the Commission sought to ensure the court's discretion to continue this diversion program if the case warrants another chance. The topic was referred to the Sentencing and Criminal Justice Committee and the Committee had lengthy discussions on the topic centered on the need to appreciate a balance between relapse, treatment, criminal behavior and ultimately, enforcement. The Commission approved the revision as noted below:

*(F) If the court grants an offender's request for intervention in lieu of conviction and the offender fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender promptly shall advise the court of this failure, and the court shall hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court determines that the offender has failed to comply with any of those terms and conditions, it **MAY** enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code. If the court sentences the offender to a prison term, the court, after consulting with the department of rehabilitation and correction regarding the availability of services, may order continued court-supervised activity and treatment of the offender during the prison term and, upon consideration of reports received from the department concerning the offender's progress in the program of activity and treatment, may consider judicial release under section 2929.20 of the Revised Code. **IF THE COURT DOES NOT ENTER A FINDING OF GUILTY, THE COURT MAY EXTEND THE TIME PERIOD OF THE INTERVENTION UNDER THIS SECTION, FOR A TOTAL TIME NOT TO EXCEED THE PERIOD OF COMMUNITY CONTROL UNDER 2929.15 AND 2929.25, AND MAY IMPOSE ADDITIONAL CONDITIONS ON THE DEFENDANT.***

The ILC amendment to SB33 reflects the spirit of the Commission's work and is consistent with our recommendation to allow continuation of ILC after a violation. The Commission and its Sentencing and Criminal Justice Committee spent considerable time and effort to thoroughly address concerns with the current statute, we invited diverse practitioners to the conversation and energetically debated the ideas presented. In appreciation of the time well-spent by our members and the members of the General Assembly, we respectfully recommend a favorable vote for SB33. We trust this information will be useful, we appreciate the opportunity to comment and we wholly support the work to benefit to the citizens of the great State of Ohio. Please don't hesitate to contact me by email at [sara.andrews@sc.ohio.gov](mailto:sara.andrews@sc.ohio.gov) or by calling 614-387-9311 if you have any questions or require additional information.

Respectfully,

Sara Andrews, Director

**SB 201 – Reagan Tokes Act – Indefinite Sentencing  
Summary prepared by Ohio Judicial Conference**

Indefinite sentencing for all F1, F2, and current “upper-tier” F3 offenses

- Court must select a MINIMUM term as follows:
  - F1: 3, 4, 5, 6, 7, 8, 9, 10, 11 years
  - F2: 2, 3, 4, 5, 6, 7, 8 years
  - Certain F3: 12, 18, 24, 30, 36, 42, 48, 54, 60 months
- Court must then calculate a maximum term as follows:
  - If only one felony, maximum is 150% of minimum term imposed (example: if court imposes a minimum term of 8 years, maximum term would be 12 years)
  - If more than one felony, and terms to be served consecutively, maximum is 150% of the total of all minimum or definite terms imposed for the consecutive terms (example: if court imposes two consecutive terms, one with a minimum of 10 years, the other with a minimum of 4 years, maximum will be 21 years)
  - If more than one felony, and terms to be served concurrently, maximum is 150% of longest minimum term imposed

At sentencing hearing, must inform offender:

- Rebuttable presumption offender will be released at expiration of minimum term imposed, or on offender’s presumptive early release date, whichever is earlier
- DRC may rebut that presumption if at release hearing, DRC makes specified determinations regarding offender’s conduct while confined, offender’s rehabilitation, offender’s threat to society, offender’s restrictive housing while confined, offender’s security classification
- If DRC so rebuts the presumption of timely/early release, DRC may maintain the offender’s incarceration after the expiration of the minimum term, for the length of time DRC determines to be reasonable
- DRC may make the specified determinations more than one time
- If the offender has not been released prior to expiration of the maximum prison term imposed as part of the sentence, offender must be released at that time

Removes inconsistent language pertaining to post-release control (2929.19 requiring supervision if offender “caused or threatened to cause physical harm” changed to “an offense of violence that is not a felony sex offense” to mirror language in 2967.28(C)).

**2943.032 (line 8895)** Prior to accepting a guilty or no contest plea, the court shall inform the offender that if the court imposes prison and the offender violates the conditions of PRC imposed by the parole board upon completion of the stated prison term, the parole board may impose a residential sanction that includes a new prison term of up to nine months, subject to a maximum cumulative prison term for all violations that does not exceed one-half of the definite prison term imposed, or one-half of the minimum prison term imposed as part of an indefinite sentence originally imposed.

**2953.08 (line 8915)** Allows for appeal as matter of right of a sentence to the longest minimum term allowed.

**2967.271 (line 10071)** When offender is sentenced to a non-life felony indefinite prison term, there is a presumption that the offender will be released on the expiration of the minimum term imposed by the

**SB 201 – Reagan Tokes Act – Indefinite Sentencing**  
**Summary prepared by Ohio Judicial Conference**

court, or on the offender’s presumptive early release date, whichever is earlier. DRC may rebut the presumption if DRC determines at a hearing that one or more of the following applies:

- The offender committed institutional rule infractions that involved compromising the security of the correctional institution or the safety of the staff and/or inmates, or physical harm (or threat of) to the staff/inmates, or committed a violation of law that was not prosecuted, such that there is a demonstration that the offender has not been rehabilitated **AND** the offender’s behavior demonstrates that he/she continues to pose a threat to society
- The offender had been placed in restrictive housing at any time within the year preceding the date of the hearing
- At the time of the hearing, the offender is classified by DRC as a security level 3, 4, 5, or higher

If DRC rebuts the presumption, the offender may remain incarcerated after the expiration of the minimum prison term for an additional period of time determined by DRC, not to exceed the offender’s maximum term. There shall then be a presumption that the offender will be released at the end of the additional term, which again may be rebutted by DRC.

(F)(1) DRC may grant an offender serving an indefinite term a reduction in the minimum prison term imposed by the court, for exceptional conduct while incarcerated, by 5-15% of the minimum term. Not applicable to offenders serving terms for sexually oriented offenses.

**From:** Rep30@ohiohouse.gov [mailto:Rep30@ohiohouse.gov]

**Sent:** Thursday, October 19, 2017 10:02 AM

**To:** 'Kyle.Petty@odrc.state.oh.us' <Kyle.Petty@odrc.state.oh.us>; 'cynthia.mausser@odrc.state.oh.us' <cynthia.mausser@odrc.state.oh.us>

**Cc:** Kirk.Schuring@ohiohouse.gov; Scott.Lundregan@ohiohouse.gov; Sheila.Willamowski@ohiohouse.gov; Nathan.Manning@ohiohouse.gov; Andrews, Sara <Sara.Andrews@sc.ohio.gov>; 'fpepple@auglaizecounty.org' <fpepple@auglaizecounty.org>

**Subject:** Ohio Criminal Justice Recodification Committee Drug Chapter Recommendations

Representative Schuring asked me to look at the information that you forwarded to Representative Schuring's office on October 16. I commend the committee on its comprehensive work. I must say that the "plain language form" is not entirely plain, mainly because it fails to describe how the new proposed laws differ from those currently on the books. We cannot be expected to have all of this memorized. In general, I think the recommendations make a great deal of sense. However, I have a few questions and comments based on my initial speedy review as follows:

1. At pages 262-263 of the "plain language version", I see no reference to the current law that expressly directs fire and emergency medical responders, on request of law enforcement, to divulge to law enforcement the names of the persons to whom naloxone was administered. Frankly, I did not see that anywhere in the plain language version. I hope you are not recommending deleting this provision of current law, as I believe it has the potential to materially assist us in detecting the upstream suppliers of heroin and related drugs;
2. At page 268 of the plain language version, section 2925.061(B), I am concerned with the language that it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance, and that the assembly or possession of a single chemical is sufficient. Way back in my first term in the General Assembly, I went to great lengths to establish that one of principal ingredients of meth is a common chemical used on virtually every farm in Ohio. The way I read this language, it would make criminals out of all Ohio farmers who regularly possess this chemical that may be used in the manufacture of meth. Perhaps this is saved by the language "with the purpose to manufacture a controlled substance", but please clarify;
3. At page 278, section 2925.31, why do we really need a statute on this?
4. How do the proposed penalties in the area of fentanyl and carfentanyl compare to the penalties that are currently prescribed in the version of SB 1 that has passed the Senate and that is pending before us in the House? I believe them to be rather different, and that the Senate language creates harsher penalties involving lesser quantities, but please confirm.
5. I probably missed it, but are we carrying forward the equalization of crack/powder cocaine sentencing as was prescribed by HB 86 in 2011? I hope so.

I look forward to working with you as this process moves forward, and I earnestly hope that the good work of this committee does not go unattended to by the General Assembly.

**From:** Rep30@ohiohouse.gov [mailto:Rep30@ohiohouse.gov]

**Sent:** Friday, September 01, 2017 9:14 AM

**To:** Eklund@ohiosenate.gov; tim.young@opd.ohio.gov; murphyj@ohiopa.org; Andrews, Sara <Sara.Andrews@sc.ohio.gov>; 'fpepple@auglaizecounty.org' <fpepple@auglaizecounty.org>

**Cc:** 'herman.7@osu.edu' <herman.7@osu.edu>

**Subject:** Mens Rea

Please review the enclosed memos analyzing portions of the Recodification Committee's recommendations, which are focused on the mens rea issues in which I have long taken an interest. Professor Herman is recommending closer adherence to the Model Penal Code, a position you may recall I took when we were working on the mens rea bill that passed in 2014. As I recall, the Prosecutors were not for it and hence the compromise language that we now have. I certainly don't want to weaken our mens rea standards as part of any Recodification effort so I invite your close attention to Professor Herman's analysis.



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August 22, 2017

The Honorable William Seitz  
Dinsmore and Shohl  
255 East Fifth Street, Suite 1900  
Cincinnati, OH 45202

Dear Mr. Seitz,

Enclosed are four memoranda relating largely to the culpability provisions of the proposed re-codification of Ohio's criminal code. I strongly believe that these provisions offer too many opportunities for the imposition of strict liability and that they should therefore be amended when the General Assembly considers them. There are other weaknesses as well.

I have practiced Criminal Law and taught it. As an Army JAG officer in the 1950's I was both a prosecutor and a defense lawyer. When I returned to civilian life I began to teach Criminal Law, first at Western Reserve (1959-1961), then at Ohio State (1961-2014). In the mid-1960's I was a member of the committee that produced the first draft of what became Ohio's criminal code of 1974. In 1970 I helped the Ohio Common Pleas Judges Association draft Ohio Jury Instructions - Criminal.

I would be happy to discuss the enclosed memoranda, and others that I am planning to write, with you at your convenience, preferably in Columbus.

Respectfully yours,

Lawrence Herman  
President's Club Professor Emeritus

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#### RECOMMENDATIONS FOR REPRESENTATIVE SEITZ - #4

Proposed Section 2901.07(A)(1)(a), LSC bill, p. 246, lines 7496-7500, authorizes the collection of DNA from anyone who is arrested "for a felony offense." Does the Recodification Committee really want this procedure to apply to any felony? To felony tax evasion? I realize that SCOTUS upheld DNA collection in Maryland v. King, 133 S. Ct. 1958 (2015), but the arrest was for assault and the majority opinion mentioned that the offense was "serious." Does it make sense for the Recodification Committee to regard every felony as "serious"?

Proposed Section 2901.20(B)(1), LSC bill, p. 267, lines 8141-44 has to be re-written!! The proposed section provides, "Every act enacted on or after the effective date of this amendment shall specify if the degree of mental culpability required for commission of the offense is strict liability, which requires no mental state." This makes no sense. It is true that strict liability requires no mental state. That being so, strict liability cannot be referred to as a "degree of mental culpability. It is not a "degree of mental culpability." It is the *absence* of mental culpability.

Proposed Section 2901.21, LSC bill, p. 267, lines 8157-59. In Memorandum #1 I urged the abandonment of Section 2901.21 (A)(2) because it increases strict liability. Now I want to amplify a point that I mentioned earlier but may not have stressed enough: Section 2901.21 (A)(2) conflicts with sections 2901.20, 2901.21(B), and 2901.21(C)(1). These three statutes clearly seek to limit strict liability. All three statutes were enacted in 2015. You were the principal sponsor in the Senate. On December 5, 2014, you issued a press release that contained the following: "In criminal cases where the law does not clearly define how the accused person's lack of criminal intent to commit a crime should play into the ruling, there is a risk that citizens may become guilty of crimes by accident. This is clearly not a just way to conduct criminal proceedings. While most of Ohio's criminal code includes a defined necessary state of mental culpability of the offender, some laws do not. Some courts read these silences as an indication that the General Assembly meant to allow the conviction of individuals without any showing of bad intent, when the reality may be that the omission was due to mere inadvertence on the part of the General Assembly." Your statement leaves no doubt that the 2015 amendments were intended to cabin strict liability and that Section 2901.21 (A)(2) conflicts with these amendments.

In Recommendation #1 I suggested an amendment to Section 2901.21(B): "Delete the word "affirmatively" wherever it appears and substitute the more informative word 'explicitly.'" I now want to suggest another amendment: add the following at the end of division (B): "The fact that one division of a section explicitly specifies a degree of culpability does not by itself explicitly indicate a purpose to impose strict criminal liability for an offense defined in other divisions of the section that do not specify a degree of culpability." This amendment fills a gap and reaches a hidden aspect of avoiding strict liability with which you were concerned. It also disavows the contrary holding in *State v. Horner*, 126 Ohio St. 3d 466, 935 N.E. 2d26 (2010).

## RECOMMENDATION FOR REPRESENTATIVE SEITZ - #1

This document deals mainly with proposed Section 2901.21(A)(2), LSC bill, p. 267, lines 8157-8159. This proposed Section, which already exists in Ohio Rev. Code Section 2901(A)(2), requires as an element of criminality that the defendant have "the requisite degree of culpability for *each element as to which a culpable mental state is specified by the language defining the offense* (emphasis added).

The history of this provision is both interesting and revealing. I was on a drafting committee (called a "technical Committee") formed by the Legislative Service Commission in the middle 1960's to produce the first draft of what eventually became the 1974 Criminal Code. The members of the committee, as well as the personnel of the LSC, were influenced by the American Law Institute's Model Penal Code, a code that was drafted by some of the most respected persons on the academic side of American criminal law. The Model Penal Code was opposed to strict criminal liability and so were we. As a result, we included the following Model Penal Code provision in our draft: "Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense unless a contrary purpose plainly appears." Model Penal Code Section 2.02(4). That this provision is averse to strict criminal liability is obvious.

As time passed, the membership of the Technical Committee changed and so did the personnel of the Legislative Service Commission who were helping the Committee. This is made clear by the minutes of the 61<sup>st</sup> meeting of the Technical Committee, December 22, 1970. At this meeting, Mr. Thomas Swisher of the LSC explained an LSC re-draft of Section 2901.21. The re-draft, which was approved by the new Technical Committee, deleted the Model Penal Code language and substituted what was to become Section 2901.21(A)(2) of Ohio's criminal code. Mr. Swisher twice said that as a result of the re-draft "not every element of every crime has culpability attached to it." Minutes of 61<sup>st</sup> meeting, p.4. What Mr. Swisher did not say is that if an element of a crime does not have some form of culpability attached to it, then as to that element there is strict liability. This means, of course, that Section 2901.21(A)(2), which is in the present criminal code as well as the proposed 2017 recodification, is no longer averse to strict liability.

To demonstrate that Section 2901.21(A)(2) is not averse to strict liability I want to use an example that I have used in the classroom. A statute provides "No person shall knowingly shoot a police officer who is in the execution of his duties." PO is a police officer who is investigating a crime. PO is wearing civilian clothes. PO stops D, but PO does not identify himself as a police officer. PO begins to ask D questions about the crime. D responds by shooting and wounding PO. Under the Model Code provision that I mentioned above, the mental element (knowingly) would attach to all the other elements, and the prosecutor would have to prove beyond a reasonable doubt (1) that D knowingly shot another person, (2) that D knew the other person was a police officer, and (3) that D knew the police officer was executing a police duty. The prosecutor could easily prove element (1) but might have difficulty proving

that D had the knowledge required by elements (2) and (3). However, under Section 2901.21(A)(2) the prosecutor could plausibly argue that "knowingly" attached only to "shoot" because the statute did not "specify" that "knowingly" attached to "police officer" and "who is investigating a crime." As to these elements there would be strict liability.

The real issue here concerns a legislative question of policy: is strict criminal liability wise? If a legislature believes that strict criminal liability is unwise it will either prohibit it altogether or will try to keep it very narrow and keep judges from interpreting statutes to impose strict liability. The Model Penal Code provision serves these goals. Section 2901.21(A)(2) clearly does not.

In addition to what I have said above, I want to point out that Section 2901.21 (A)(2) is inconsistent with Sections 2901.20(A) and 2901.21(B) and (C)(1). Section 2901.20(A) provides "Every act enacted after the effective date of this section that creates a new criminal offense shall specify the degree of mental culpability required for the commission of the offense. A criminal offense for which no degree of mental culpability is specified that is enacted in an act in violation of this division is void." This section, which clearly opposes strict criminal liability, is the antithesis of Section 2901.21(A)(2).

Section 2901.20(B) provides "When the language 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 the person to be guilty of the offense. The fact that one division of a section plainly indicates a purpose to impose strict liability for an offense defined in that division does not by itself indicate a purpose to impose strict criminal liability for an offense defined in other divisions of the section that do not specify a degree of culpability." This section, which clearly restrains strict liability, is opposed to Section 2901.21(A)(2). In the proposed recodification the word "affirmatively" is substituted for "plainly." This does not change the effect of Section 2901.20(B).

Section 2901.21(C)(1) of the present criminal code and of the proposed recodification provides "When language defining an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied neither specifies culpability nor plainly [affirmatively] indicates a purpose to impose strict liability, the element of the offense is established only if a person acts recklessly." This section, which requires the mental element of recklessness, is manifestly opposed to Section 2901.21(A)(2)'s preference for strict liability.

The bottom line is that Section 2901.21(A)(2)'s preference for strict liability is at war with the preference for mens rea in the three statutes discussed above. Something has to give. I strongly recommend that Section 2901.21(A)(2) be completely re-written so that it is in harmony with the preference for mens rea. Model Penal Code Section 2.02(4), discussed above, is an excellent model. However, I would substitute the word "explicitly" for the word "plainly" in Section 2.02(4). If the legislature intends to impose strict liability in any situation it should say so explicitly. Then there will be no doubt and judges will not have to struggle with interpretation.

Although I applaud Section 2901.21(C)(1)'s preference for mens rea, I believe that the Section is poorly drafted. I have practiced criminal law both as a prosecutor and a defense lawyer and I have spent over 50 years teaching criminal law. But I must confess that I do not understand "... language defining an

element of an offense that is related to knowledge or intent. . . .” An element of an offense has to be one of the following: the defendant’s conduct, or a result of the defendant’s conduct, or a mental element, or an attendant circumstance (any other required element). “An element of an offense that is related to knowledge or intent” makes no sense. Nor do I understand “. . . or to which mens rea could fairly be applied. . . .” Some form of mens rea can fairly be applied or attached to any other element. Finally, I do not understand why “. . . the element of the offense is established only if the person acts recklessly” (emphasis added). Suppose the defendant acted purposely or knowingly. Is the element not established?

I believe that the drafters of Section 2901.21(C)(1) were familiar with Model Penal Code Section 2.02(3), that they tried to put it in their own words, and that they failed. They would have been much better off using the text of Section 2.02(3): “Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.” Moreover, the drafters would have been wise also to adopt Model Penal Code Section 2.02(5), “Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element is also established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.”

## RECOMMENDATION FOR REPRESENTATIVE SEITZ -#2

Section 2901.22. As I said in document #1, the committee of which I was a member in the middle and late 1960's was strongly influenced by the Model Penal Code (MPC). As a result, our final draft of the mens rea elements and their definitions closely followed the MPC. The MPC identifies four mental elements: purpose, knowledge, recklessness, and negligence. If purpose is attached to conduct or result of conduct, purpose is defined as "conscious objective." If it is attached to attendant circumstances (any element other than conduct, result of conduct, or mens rea), purpose is defined as awareness, belief, or hope that the circumstance exists. If knowledge is attached to the result of conduct, it is defined as awareness that it is PRACTICALLY CERTAIN that the result will occur. (I will explain later why I have emphasized the words "PRACTICALLY CERTAIN.") If it is attached to nature of conduct or attendant circumstances, knowledge is defined as awareness. It is clear that under the MPC both purpose and knowledge are high levels of subjective culpability. Indeed, if each is attached to attendant circumstances, the definition of each is the same - awareness.

Negligence is at the opposite end of the MPC's culpability spectrum. It is wholly objective in that it uses the standard of the "reasonable person." However, it involves much more culpability than simple negligence in tort law. It is fair to say that MPC negligence is like the gross negligence of tort law. ("... involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.") The MPC does not base criminal liability on the simple negligence that gives rise to tort liability. See Model Penal Code and Commentaries, Part 1, page 243, note 31 (1985).

Between MPC purpose/knowledge, on the one hand, and negligence, on the other hand, is MPC recklessness. It has both a subjective and an objective component. The subjective component requires conscious disregard of a substantial and unjustifiable risk that a material element of the offense exists or will result from the actor's conduct. The objective component resides in requiring that the actor's conscious disregard of risk involve a gross deviation from the standard of conduct that a law-abiding person would observe. The subjective component of recklessness imports a high degree of culpability, although not as high as the culpability of "purpose" or "knowledge." See Model Penal Code and Commentaries, *supra* at 236-237

Recognizing that the MPC was vastly better than Ohio's then-existing treatment of mens rea, see *generally* Criminal Laws and Procedures: An Interim Report, Ohio Legislative Service Commission Staff Research Report No. 82, pages 17-20 (Feb. 1967), the committee of which I was a member (and the LSC staff) accepted the MPC's treatment of mens rea almost word for word. But time passed and the composition of the committee (as well as the LSC staff) changed. The result was that Ohio adopted the MPC's terminology of mens rea (purpose, knowledge, recklessness and negligence) but not the definitions. In my opinion, that was a huge mistake. I now turn my attention to the present committee's draft.

Proposed Section 2901.22(A). Purpose. If purpose is attached to the nature of conduct or the result of conduct, it is defined as "specific intention." LSC bill, p. 269, lines 8203-8208. The definitions section of

the proposed revision does not contain a definition of "specific intention." It is an enormous mistake to use the words "specific intention" without a very precise definition. "Specific intention" suggests the unfortunate dichotomy between "specific intent" and "general intent," a dichotomy that has bedeviled American courts for decades. "The terms 'specific intent' and 'general intent' are the bane of criminal law students and lawyers. This is because the terms are critical to understanding various common law rules of criminal responsibility, yet the concepts are so 'notoriously difficult . . . to define and apply . . . [that] text writers recommend that they be abandoned altogether." Joshua Dressler, *Understanding Criminal Law* 137 (6<sup>th</sup> ed. 2012), quoting from *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969). Why use such an ambiguous definition for "purpose" when the MPC's more informative "conscious objective" is available?

Proposed Section 2901.21(B). Knowledge. If knowledge is attached to conduct or the result of conduct, knowledge is defined as awareness that the conduct "will PROBABLY be of a certain nature" or "will PROBABLY cause a certain result." If it is attached to circumstances, knowledge is defined as awareness "that such circumstances PROBABLY exist." I have emphasized the word "PROBABLY" so you can compare it to the words "PRACTICALLY CERTAIN" in my discussion, above, of the MPC's definition of "knowledge." By using the words "PRACTICALLY CERTAIN," the MPC imports a very high degree of culpability into the word "knowledge," thus placing "knowledge" almost on a par with "purpose." Indeed, the official commentary to the MPC states that the distinction between purpose and knowledge is "narrow." Model Penal Code and Commentaries, *supra* at 233 (1985), and that the "distinction [between the two] is inconsequential for most purposes of liability." *Id.* at 234.

The Recodification Committee's use of "probably" in its definition of "knowledge," instead of "practically certain," has the unfortunate effect of importing a significantly lesser degree of culpability into the word "knowledge," and thus has the additional effects of enlarging the distinction between purpose and knowledge and shrinking the distinction between knowledge and recklessness.

There is another problem with the Recodification Committee's definition of "knowledge." The definition comprises three sentences. In sentence one "knowingly" is attached to the nature of conduct or to the result of conduct. In sentence two "knowingly" is attached to "circumstances" other than the nature or result of conduct. Both sentences contain the words "aware" and "probably" (For example, "A person has knowledge of circumstances when the person is aware that such circumstances probably exist"). Sentence three is drastically different: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a *high probability* of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact" [emphasis added]. Sentence three obviously involves the criminal law problem known as "willful blindness."

It is hard to imagine a case that fits within sentence three's "subjectively believes that that there is a high probability" of the existence of a particular fact that would not also fit within sentence one or two's requirement of awareness of the probability that the same fact exists. After all, a high probability is still a probability. Therefore, given the existence of sentences one and two, there is no need for sentence three. However, sentences one, two, and three are in the present criminal code. Why does that code

include an unnecessary provision? Sentence three, which was added to the code in 2015, is based on Model Penal Code Section 2.02(7), which states, "Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." This is the MPC's solution to the problem of willful blindness. Is this MPC provision unnecessary? The answer is no. Section 2.02(7) is an exception to the Code's definition of "knowingly" in Section 2.02(2)(b). That definition requires actual or subjective awareness that something exists. The exception in 2.02(7) requires only awareness of a high probability that something exists. The difference may be slight, but that does not mean that the exception is unnecessary in the Model Penal Code.

However, Ohio's definition of "knowingly" is quite different from the Model Penal Code's. As noted above, sentences one and two of Ohio's definition requires only awareness of the probability that something exists. Since high probability (sentence three) includes probability (sentences one and two), a sentence-three case can fit within sentences one or two and sentence three is therefore unnecessary. The Commentary to the Model Penal Code, *supra* at 248, note 43, which discusses Model Penal Code 2.02(7) [willful blindness], recognizes that Ohio's use of the word "probable" in the definition of "knowledge," solves the problem of willful blindness: "Ohio has a more expansive definition of 'knowingly' embracing any awareness that something is 'probable.'" This statement confirms that sentence three is unnecessary. Either sentence three should be deleted or the Recodification Committee should rewrite sentences one and two to correspond to the Model Penal Code's definition of "knowingly" so that sentence three can be an exception to sentences one and two. My strong recommendation is the latter. The definition of "knowingly" should describe a high level of culpability, virtually on a par with "purpose." Ohio's current statutory definition of "knowingly," which the Recodification Committee has adopted, describes a diminished level of culpability that is neither close to the culpability of "purpose" nor close to the MPC definition of "knowingly." It is, however, very close in substance to the Model Penal Code's definition of "reckless." And, to drop the other shoe immediately, I note (1) that the Committee has also adopted Ohio's current statutory definitions of "recklessly" and "negligently;" (2) that Ohio's definition of "recklessly" is closer to the MPC definition of "negligently" than it is to the MPC definition of "recklessly;" (3) that Ohio's definition of "negligently" is closer to the tort definition of "simple negligence" than it is to the MPC definition of "negligently;" and (4) that there is a real risk that the disparity between the names of the culpability elements and their definitions will make sentencing decisions much more difficult than need be. I will develop these points in greater detail below.

2901.22(C). Recklessness. As noted at the outset of this memorandum, MPC recklessness has both a subjective and an objective component. The subjective component is conscious disregard of "a substantial and unjustifiable risk that an element of the offense exists or will result from the actor's conduct." At a bare minimum, "conscious disregard" requires that the actor have been aware of the risk. Awareness, of course, is a part of high-level culpability. Also a part of high-level culpability is the phrase "exists or will result." In the MPC definition this phrase is not diminished by words such as "may," "probably," or "likely." The objective component of MPC recklessness is that the actor's

conscious disregard of the substantial risk constitutes a "gross deviation from the standard of conduct that a **law-abiding person** would observe" (emphasis added). This too is part of high-level culpability.

As originally approved in the 1960's by the committee of which I was a member, the definition of "recklessness" was identical to the MPC's. But changes were made when the LSC submitted a proposed code to the legislature in March 1971 and subsequent changes were made in the legislature. The most recent (2015) version of the statutory definition of "recklessness", which the Recodification Committee has adopted, is "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist." There are existing statutory definitions of "risk" and "substantial risk," which the Recodification Committee has adopted. "Risk" means "a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist." LSC bill, p. 193, lines 5870-72. "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." LSC bill, p. 216, lines 6593-96

The words chosen by the Recodification Committee to define "reckless" raise a plethora of issues. "Heedless." My unabridged dictionary defines "heedless" as "careless," "thoughtless," and "unmindful." Random House Dictionary of the English Language, p. 657 (1966). But these words are much more suggestive of "negligence" than they are of "recklessness." The same may be said of both "indifference," which is defined as "lack of interest or concern," *Id.* at 725, and "disregard," which is defined as "pay no attention" and "neglect." *Id.* at 415. Note that unlike the MPC's requirement of *conscious disregard*, which imports awareness and therefore a high level of culpability, the Recodification Committee's version speaks only of *disregard*. The absence of the word "conscious" buttresses my concern that the Committee's language is much closer to "negligence" than it is to "recklessness."

There is an additional problem with the Committee's definition of recklessness. The problem concerns the word "likely." My dictionary's definition of "likely" is "probably." I surfed the internet and discovered that "probably" is the common definition of "likely." "Probably" is used in the Recodification Committee's definition of "knowingly." That the Committee used a different word in the definition of "recklessly" might cause some judge to ignore the common definition of "likely" and to interpret "likely" as less certain than "probably."

The Recodification Committee's definition of "recklessly" is full of problems. All of the problems could be avoided if the Committee adopted a definition that is either identical to the MPC's or very close to it.

2901.22(D). Negligently. As noted above, MPC criminal "negligence" is "gross negligence." What about Ohio? In 1971, when the LSC submitted a draft criminal code to the legislature, the LSC's comment contained the following: "Division (D) is designed to define negligence, for purposes of the criminal law, in terms equivalent to ordinary negligence as applied to the law of torts." Legislative Service

Commission, Proposed Ohio Criminal Code, p. 42. Several years later, however, that comment was replaced with the following: **“Although the definition of “negligence” in the new code is structured similarly to the definition of ordinary negligence used in tort law, it defines a higher degree of negligence than ordinary negligence”** (emphasis added). Page’s Ohio Revised Code Annotated, LSC 1974 Commentary to Section 2901.22). The only degree of negligence higher than ordinary negligence is gross negligence. Which would do a better job of telling judges and juries that criminal negligence in Ohio is “gross negligence,” Ohio’s statute or the MPC? The MPC speaks of “GROSS deviation from the standard of care that a reasonable person would observe in the actor’s situation.” Ohio’s statute speaks of “SUBSTANTIAL lapse from due care.” The MPC speaks of a person who “should be aware of a SUBSTANTIAL AND UNJUSTIFIABLE RISK that the material element EXISTS OR WILL result from his conduct.” Ohio’s statute speaks of “A RISK that the person’s conduct MAY cause a certain result” (emphasis added). It is clear that the MPC conveys the idea of gross negligence better than Ohio does. My recommendation is that the legislature reject the Recodification Committee’s definition of “negligence” and adopt the MPC’s definition or something very close to it.

### RECOMMENDATIONS FOR REPRESENTATIVE SEITZ - #3

1. Proposed section 2901.04, LSC Bill, p. 241, lines 7348 through 7351, states the existing statutory definition of the "strict construction" rule: "(A) Except as otherwise provided in division (C) or (D), R.C. sections defining offenses or penalties shall be strictly construed against the state and liberally construed in favor of the accused." Based on over 50 years of teaching Criminal Law, however, I suggest that the following alternative is more instructive: "Except as otherwise provided in division (C) or (D), any ambiguity in a section of the Revised Code defining offenses or penalties shall be resolved in favor of the accused." This alternative is more instructive because it focuses on the purpose of strict construction – to resolve ambiguities. If there is no ambiguity in a statute, there is no need for invoking strict construction.
2. Proposed section 2901.01, LSC bill, pp. 30-31, lines 929 through 942, defines "affirmative defense" as follows: "An 'affirmative defense' is either of the following: (A) A defense expressly designated as an affirmative defense for which the accused can fairly be required to adduce supporting evidence; (B) A common law defense recognized by the courts of this state that involves an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." I strongly recommend that the following be added at the beginning of the definition: "An "affirmative defense" is a defense that does not negate an element of the offense and is either of the following: . . . "

My concern here is with the defense of alibi. There is a tendency to believe that if the defendant raises alibi, the defendant should have to prove it. I have found this tendency in generations of law students as well as in judges. I was a consultant to the Ohio Common Pleas Judges Association in the drafting of Ohio Jury Instructions – Criminal. Many judges on the drafting committee wanted to instruct the jury that if the defendant raised alibi, the defendant had to prove it by a preponderance of the evidence. I was able to persuade them that their position was unconstitutional under In Re Winship, 397 U.S. 358 (1970), a case that constitutionalized the prosecution's burden of proving every element of the crime beyond a reasonable doubt. In every criminal case an element of the crime is the identity of the perpetrator. The prosecution has to prove that element beyond a reasonable doubt. If the trier of fact has a reasonable doubt that the defendant was the perpetrator, the trier of fact has to find the defendant "not guilty." Thus, if the trier of fact has a reasonable doubt that the defendant was at the scene of the crime at the time of the crime (alibi), the trier of fact has to find the defendant "not guilty." The only burden that the defendant bears is to introduce enough evidence to raise the issue of alibi. Alibi is neither an excuse nor a justification. Rather, alibi is a general denial of any involvement, it negates the element of identity, and the prosecution is therefore constitutionally obligated to disprove alibi beyond a reasonable doubt once the issue has been properly raised.

3. Proposed section 2901.05(D), LSC bill, p. 243, lines 7414 through 7417) states, "As part of its charge to the jury in a criminal case, the court shall read the definitions of 'reasonable doubt' and 'proof beyond a reasonable doubt' contained in RC 2901.01." Proposed section 2901.01, LSC bill, p. 187, lines 5687 through 5693) states, "'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on MORAL EVIDENCE [emphasis added] is open to some possible or imaginary doubt. Proposed section 2901.01, LSC bill, p. 178, lines 5429 through 5431 states, "'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act on it in THE MOST IMPORTANT OF HIS OWN AFFAIRS" [emphasis added].

I have emphasized the words MORAL EVIDENCE because I doubt that anyone of the judges, lawyers, and others reading this document would know what the words mean. I have also emphasized MORAL EVIDENCE because I am certain that no juror would know what the words mean. Instructions to jurors should not contain such words. (A loose definition is "evidence that is based on human observation rather than on scientific demonstration.")

Although the United States Supreme Court upheld an instruction containing the words "moral evidence," it based its decision on the presence of other words in the instruction, and Justice Kennedy, in a concurring opinion criticized the use of "moral evidence" on the ground that it would "baffle" jurors. *Victor v. Nebraska*, 511 U. S. 1, 23 (1994). The words "moral evidence" should be deleted from the proposed instruction. The "loose definition" in the preceding paragraph is preferable.

I have emphasized THE MOST IMPORTANT OF HIS OWN AFFAIRS for a different reason. For many years, I have conducted a small experiment in my Criminal Law class. I have asked all married students to identify themselves and I have then asked them the following question: before you went through the marriage ceremony, were you satisfied beyond a reasonable doubt (whatever those words mean to you) that the marriage would work out? I have never had a student who said that he or she used a BRD standard in deciding whether the marriage would work out. All used some lesser standard in judging the wisdom of this most important action before actually taking the action. To include the emphasized words in a definition of proof beyond a reasonable doubt is to tell jurors that "proof beyond a reasonable doubt" is less weighty than it actually is. *See Victor v. Nebraska, supra* at 24-25 (Justice Ginsburg, concurring). *See also* Judge Jon O. Newman, *Beyond Reasonable Doubt*, 68 N. Y. U. L. Rev. 201, 204 (1994); Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987).

It is clear to me that Ohio's statutory definition of "proof beyond a reasonable doubt" (hereafter PBRD) is flawed and that we need a new definition. One approach to a new definition might include comparing PBRD with the "preponderance of the evidence" standard that is used in civil cases. *See* Federal Judicial Center, *supra* at 28, Instruction 21, which makes that comparison. The problem with this approach is that American law recognizes a third standard of proof and it

comes between preponderance and PBRD. The intervening standard is the "clear and convincing evidence" standard that was mandated by the Supreme Court in *Addington v. Texas*, 441 U. S. 418 (1979), a civil commitment case.

In *Addington*, the jury was asked to determine whether Addington was mentally ill and dangerous to himself or others. Addington argued that the standard of proof was PBRD. However, the trial judge instructed the jury to determine whether, based on clear, unequivocal and convincing evidence Addington (1) was mentally ill and (2) needed hospitalization because he was dangerous to himself or others. The jury found in favor of commitment and Addington appealed. The intermediate appellate court reversed on the ground that the trial judge erred in not using the PBRD standard, and the state appealed. The Texas Supreme Court reversed, holding that the jury should have used the preponderance standard and that Texas law did not recognize a "clear, unequivocal and convincing" standard. Addington then appealed to the United States Supreme Court (SCOTUS).

SCOTUS vacated the decision of the Texas Supreme Court. It held that in civil commitment cases the preponderance standard was inadequate as a matter of due process of law, that a PBRD standard was not required, and that a "clear and convincing evidence" standard (omitting the word "unequivocal") comported with due process of law. The Court's journey through the three standards of proof recognized by American law bears directly on the sort of instruction that a judge should give a jury on the meaning of PBRD.

First, the Court described the PBRD standard as "exacting," *id.* at 422, and "heavy." *id.* at 428. Second, the Court stated that the function of the standard is to protect individual liberty by avoiding erroneous convictions. *id.* at 423, 425. Third, referring to civil commitment cases, the court said, "To meet due process the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." *id.* at 432-33. If that is so, does it not follow that to meet due process in a criminal case the PBRD standard has to inform the factfinder that the proof must be greater than the "clear and convincing evidence" standard applicable to civil commitment cases?

In light of the above analysis, here is a stab at drafting a new instruction on PBRD:

"I have just told you that it is the prosecution's burden to prove every element of the charged offense beyond a reasonable doubt. Now I want to tell you how heavy that burden is. American law recognizes three different standards of proof, each with a different weight, and which standard we use depends on the nature of the case. If the case is an ordinary civil case, say an automobile accident or a breach of contract, the plaintiff, that is the person who brought the case, will have to prove the elements of the case by a preponderance of the evidence. The preponderance standard means 50% plus a little bit more. This is the lightest burden that the law imposes. However, if the case is an extraordinary civil case, the burden will be much heavier. For example, if the state wants to commit a person to a mental institution, it will have to prove, by a standard of clear and convincing evidence, that the person is mentally ill and

dangerous either to himself or to others. Clear and convincing evidence is a much heavier standard than preponderance. However, if the case is a criminal case, the state will have to prove every element of the charged offense beyond a reasonable doubt. "Beyond a reasonable doubt" is a much heavier standard than clear and convincing evidence. Indeed, it is the heaviest standard in American law. That does not mean that you have to be persuaded 100%. After all, the only certain thing in life is death. But it does mean that you have to be very firmly convinced that the prosecution has proved every element of the charged offense. To put it another way, you have to come very close to certainty."

I submit that this instruction is clearly preferable to the Recodification Committee's proposed instruction.