



## OHIO CRIMINAL SENTENCING COMMISSION

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### Sentencing and Criminal Justice Committee

May 17, 2018

#### Agenda

- I. **Call to Order & Approval of Meeting Notes of February 21, 2018 meeting**
- II. **Discussions of ongoing projects**
  - A. **JRI 2.0 Update**

*The committee will discuss questions raised by CSG representatives to better inform the efforts of JRI 2.0.*
  - B. **Chapter 2925 review**

*The committee will discuss the status of drug chapter redraft project, including JRI questions regarding the drug chapter.*
  - C. **Recodification Project**

*Ms. Mudri and Scott will discuss efforts to move forward portions of the Recodification Committee's work.*
  - D. **Appellate Review**

*The committee will discuss directions for appellate review efforts and whether to adopt a strategy of total redrafting or to attempt amendments to current statute.*
- III. **Legislative Updates**
  - A. **Reagan Tokes Bills**

*Update on the status of the bills and discussion of potential impact.*
  - B. **SB 66**

*The committee will discuss potential amendments to SB66 involving record sealing and prosecutorial diversion programs.*
  - C. **TCAP/2929.15**
  - E. **HB439/SB274**

*Update on status of bail reform legislation*
  - D. **Other recently introduced legislation**
- IV. **Criminal Sentencing Commission staffing update**
- V. **Adjourn**

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#### Upcoming Meetings

Ohio Criminal Sentencing Commission	June 21, 2018 Ohio Judicial Center, Room 101
Sentencing and Criminal Justice Committee	July 19 <sup>th</sup> , 2018 Ohio Judicial Center, Room 281

Current ORC:	Recodification Proposal:
<p align="center"><b>2925.01 Definitions</b></p>	<p>Recodification Proposal moves all definitions to 2901.01</p>
<p align="center"><b>2925.02 Corrupting Another with Drugs</b></p>	<p><b>Moved to 2925.05</b></p> <ul style="list-style-type: none"> <li>• Removes school and safety zone enhancements.</li> <li>• Removes enhancement for providing drugs to a pregnant woman.</li> <li>• MDO spec removed, replaced with mandatory term enhancement in F1 range.</li> </ul>
<p align="center"><b>2925.03 Trafficking in Drugs</b></p>	<p>Recod Created 3 classifications - Generally raised threshold amounts at each felony level.</p>
	<p><b>2925.01 Aggravated Trafficking: F1 and F2 offenses.</b></p> <ul style="list-style-type: none"> <li>• Mandatory prison terms.</li> <li>• Possession sufficient to prove trafficking.</li> <li>• Retains MDO for cocaine, opiates, and CSA as a mandatory 10 or 11 year term.</li> <li>• Amounts on attached chart.</li> </ul>
	<p><b>2925.02 Trafficking In Drugs: F3 offenses.</b></p> <ul style="list-style-type: none"> <li>• No mandatory or presumptive prison sentences.</li> <li>• Partial affirmative defense that lowers F3 Trafficking to F4 Possession if offender proves personal use.</li> <li>• Unless rebutted, possession is sufficient to prove trafficking.</li> <li>• Amounts on attached chart.</li> </ul>
	<p><b>2925.03 Petty Trafficking: F4 and F5 offenses.</b></p> <ul style="list-style-type: none"> <li>• Requires sale or offer to sell.</li> <li>• Amounts on attached chart</li> </ul>
<p align="center"><b>2925.04 Illegal Manufacture of Drugs - Illegal Cultivation of MJ - Methamphetamine offenses</b></p>	<p><b>Moved to 2925.06</b></p> <ul style="list-style-type: none"> <li>• F3 w/mandatory sentence for all drugs except MJ.</li> <li>• If it involves the sale or possession &gt;100x bulk amount of Sch I or II substance an F1 w/mandatory sentence (MJ excluded)</li> <li>• Adds requirement of engagement in a "substantial" part of the production of drugs.</li> </ul>

	<ul style="list-style-type: none"> <li>• Prohibits conviction for both Illegal Manufacture and Illegal possession of chemicals for manufacture for the same substances.</li> <li>• Penalties capped at F4 for Illegal Cultivation of MJ. Mirrors lowered penalties for MJ possession detailed in chart below.</li> </ul>
<p><b>2925.05</b>  <b>Funding, Aggravated Funding of Drug or MJ Trafficking</b></p>	<p><b>Moved to 2925.07.</b> Amounts for offense based on Recod F4 possession amounts (except MJ <math>\geq</math> 200g)</p> <ul style="list-style-type: none"> <li>• Funding Sch I or II is an F3</li> <li>• Funding Trafficking in <math>\geq</math>100x Bulk Sch I or II is an F1 w/mandatory prison term</li> <li>• Funding Sch III, IV, or V is an F4</li> <li>• Funding Trafficking in MJ is an F4</li> </ul>
<p><b>2925.06</b>  <b>Illegal Administration or Distribution of Anabolic Steroids.</b></p>	<p><b>Moved to 2925.08.</b> Removed mandatory DL suspension and mandatory fines.</p>
<p><b>2925.07</b>  <b>[Repealed]</b></p>	<p><b>Now Funding of Drug or MJ Trafficking as above.</b></p>
<p><b>2925.09</b>  <b>Unapproved Drugs - Danger Drug Offenses Involving Livestock</b></p>	<p>Added mens rea element "Knowingly" to section (A)</p>
<p><b>2925.11</b>  <b>Possession of Controlled Substances</b></p>	<p><b>Moved to 2925.04 and titled "Unlawful Possession of Drugs."</b> F4 and F5 possession offenses.</p> <ul style="list-style-type: none"> <li>• No presumption for prison or mandatory terms.</li> <li>• Requires a minimum .025g of a controlled substance or analogue for an F5.</li> <li>• Amounts on attached chart.</li> </ul>
	<p><b>2925.041 Possession of Marijuana -</b>  <math>\geq</math>.025g - &lt;200g = MM  <math>\geq</math>.200g - &lt;400g = M4  <math>\geq</math>400g - &lt;1kg = F5  <math>\geq</math>1kg - &lt;5kg = F4  <b>Possession of Hashish</b>  <math>\geq</math>.025g - &lt;10g = MM  <math>\geq</math>10g - &lt;20g = M4</p>

	<p>≥20g - &lt;50g = F5  ≥50g - &lt;250g = F4</p>
<p><b>2925.12  Possessing Drug Abuse  Instruments</b></p>	<p>Section repealed. Merged with 2925.14 and 2925.141 into Recod 2925.14</p>
<p><b>Permitting Drug Abuse</b></p>	<p>Removal of driver's license suspension, otherwise unchanged</p>
<p><b>Illegal Use or Possession of  Drug Paraphernalia</b></p>	<p>Incorporates 2925.12 and 2925.141 with existing 2925.14. Mandatory driver's license suspensions removed. Otherwise unchanged</p>
<p><b>Illegal Use or Possession of MJ  Drug Paraphernalia</b></p>	<p>Merged with 2925.12 and 2925.14 into Recod 2925.14</p>
<p><b>2925.22  Deception to Obtain a  Dangerous Drug</b></p>	<ul style="list-style-type: none"> <li>• Possession of blank Rx pad is an M1.</li> <li>• Procurement of an Rx, administration or dispensing a dangerous drug still an F5</li> <li>• Felony enhancement for previous drug abuse offense conviction removed.</li> <li>• Felony enhancements for F1, F2, and F3 amounts retained but amounts changed to reflect Recod 2925.01, 2925.02, and 2925.03</li> </ul>
<p><b>2925.23  Illegal Processing of Drug  Documents</b></p>	<p>Removed mandatory fines. No other changes</p>
<p><b>2925.31  Abusing Harmful Intoxicants</b></p>	<p>Removed F5 enhancement for prior offense.</p>
<p><b>2925.32  Trafficking in Harmful  Intoxicants - Improperly  Dispensing or Distributing  Nitrous Oxide</b></p>	<p>Removed age threshold and merged (A)(1) and (A)(2)  Added mental state "knowingly" to (B)(3)</p>
<p><b>2925.33  Possessing Nitrous Oxide in  Motor Vehicle</b></p>	<p>Added mental state "knowingly"</p>

<p><b>2925.36</b>  <b>Illegal Dispensing of Drug Samples</b></p>	<p>Removed mandatory license suspension  Changed MDO specification to a mandatory 10 or 11 year sentence for what constituted MDO amounts.</p>
<p><b>2925.37</b>  <b>Counterfeit Controlled Substance Offenses</b></p>	<p>Added mental state "knowingly" to sections (C) and (D)  Removed section (E)</p>
<p><b>2925.51</b>  <b>Evidence in Drug Offense Cases</b></p>	<p>Reworded for readability</p>
<p><b>2925.56</b>  <b>Unlawful Sale of Pseudoephedrine or Ephedrine Product</b></p>	<p>Merged with affirmative defense to this section in 2925.58.  Added mental state "knowingly" to (C) and (D)</p>
<p><b>2925.57</b>  <b>Illegal Pseudoephedrine or Ephedrine Product Transaction Scan</b></p>	<p>Added mental state "knowingly" to (C)(1), (2), (3), and (4)</p>
<p><b>2925.58</b>  <b>Unlawful Sale of Pseudoephedrine or Ephedrine Product to Minor - Affirmative Defense</b></p>	<p>Merged with 2925.56 as above</p>

Excerpted from Recod Committee Notes:

**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 section—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.**

**Sec. 2925.01. Aggravated Trafficking in Drugs.** Aggravated Trafficking deals with first and second degree felony drug amounts and provides mandatory minimum prison terms within the range of those felony degrees. Aggravated Trafficking also retains the "major drug offender" designation for the offenders with the highest level of drug amounts, but it has been reworked to apply only to cocaine, opiates, and controlled substance analogs and acts as a blanket mandatory prison term of 10 or 11 years. The felony drug amounts and associated penalties for this section are listed in the chart on the following page:

<b>DRUG</b>	<b>AMOUNT</b>	<b>LEVEL</b>
<b>Schedule I or II</b>	$\geq 50 \rightarrow < 100$ x bulk	F-2 (mandatory within the range)
	$\geq 100$ x bulk	F-1 (mandatory within the range)
<b>Marijuana</b>	$\geq 40$ kg	F-2 (mandatory within the range)
<b>Cocaine: Powder or Crack</b>	$\geq 50$ g $\rightarrow$ $< 100$ g	F-2 (mandatory within the range)
	$\geq 100$ g $\rightarrow$ $< 250$ g	F-1 (mandatory within the range)
	$\geq 250$ g	F-1 (MDO – 10 or 11 year mandatory)
<b>LSD: Solid</b>	$\geq 500$ UD $\rightarrow$ $< 5000$ UD	F-2 (mandatory within the range)
	$\geq 5000$ UD	F-1 (mandatory within the range)
<b>LSD: Liquid</b>	$\geq 50$ g $\rightarrow$ $< 500$ g	F-2 (mandatory within the range)
	$\geq 500$ g	F-1 (mandatory within the range)
<b>Heroin/Fentanyl</b>	$\geq 30$ g $\rightarrow$ $< 50$ g; $\geq 300$ UD $\rightarrow$ $< 500$ UD	F-2 (mandatory within the range)
	$\geq 50$ g $\rightarrow$ $< 100$ g; $\geq 500$ UD $\rightarrow$ $< 1000$ UD	F-1 (mandatory within the range)
	$\geq 100$ g; $\geq 1000$ UD	F-1 (MDO – 10 or 11 year mandatory)
<b>Hashish</b>	$\geq 2$ kg	F-2 (mandatory within the range)
<b>Controlled Substance Analog</b>	$\geq 30$ g $\rightarrow$ $< 40$ g	F-2 (mandatory within the range)
	$\geq 40$ g $\rightarrow$ $< 50$ g	F-1 (mandatory within the range)
	$\geq 50$ g	F-1 (MDO – 10 or 11 year mandatory minimum)

**Sec. 2925.02. Trafficking in Drugs.** Trafficking deals with third degree felony drug amounts and contains no presumptions of prison or mandatory minimum prison terms. While possession of a third degree felony amount of drugs is still sufficient for a Trafficking charge, Trafficking provides a partial affirmative defense that lowers third degree felony Trafficking to fourth degree felony Possession if an offender proves that the drug involved was solely for personal use. Additionally, if an offender establishes this partial affirmative defense, the offender

becomes eligible to apply for intensive supervision under R.C. 2951.11(A)(1). The felony drug amounts are listed and associated penalties in the chart below:

<b>DRUG</b>	<b>AMOUNT</b>	<b>LEVEL</b>
<b>Schedule I or II</b>	$\geq 5$ x bulk $\rightarrow$ $< 50$ x bulk	F-3
<b>Schedule III, IV, or V</b>	$\geq 50$ x bulk	F-3
<b>Marijuana</b>	$\geq 5$ kg $\rightarrow$ $< 40$ kg	F-3
<b>Cocaine: Powder or Crack</b>	$\geq 27$ g $\rightarrow$ $< 50$ g	F-3
<b>LSD: Solid</b>	$\geq 200$ UD $\rightarrow$ $< 500$ UD	F-3
<b>LSD: Liquid</b>	$\geq 20$ g $\rightarrow$ $< 50$ g	F-3
<b>Heroin/Fentanyl</b>	$\geq 10$ g $\rightarrow$ $< 30$ g; $\geq 100$ UD $\rightarrow$ $< 300$ UD	F-3
<b>Hashish</b>	$\geq 200$ g $\rightarrow$ $< 2$ kg	F-3
<b>Controlled Substance Analog</b>	$\geq 20$ g $\rightarrow$ $< 30$ g	F-3

**Sec. 2925.03. Petty Trafficking in Drugs.** Petty trafficking in Drugs deals with low-level fourth and fifth degree felony drug amounts and, like R.C. 2925.02, *supra*, contains no presumptions of prison or mandatory minimum prison terms. Unlike R.C. 2925.01 and 2925.02 where sale or distribution is not required to be proven, *supra*, Petty Trafficking in Drugs is not afforded the same irrefutable trafficking presumption with low-level drug amounts without proving actual sale, offer to sell, or distribution. Additionally, persons charged with violation of this offense may apply for intensive supervision under R.C. 2951.11. The felony drug amounts and associated penalties for this section are listed in the chart below:

<b>DRUG</b>	<b>AMOUNT</b>	<b>LEVEL</b>
<b>Schedule I or II0</b>	$\geq 0.025\text{g} \rightarrow < \text{bulk}$	F-5
	$\geq x \text{ bulk} \rightarrow < 5 x \text{ bulk}$	F-4
<b>Schedule III, IV, or V</b>	$\geq 0.025\text{g} \rightarrow < \text{bulk}$	F-5
	$\geq \text{bulk} \rightarrow < 50 x \text{ bulk}$	F-4
<b>Marijuana</b>	Gift $\leq 20\text{g}$	Minor Misdemeanor
	$\geq 0.025\text{g} \rightarrow < 1 \text{ kg}$	F-5
	$\geq 1 \text{ kg} \rightarrow < 5 \text{ kg}$	F-4
<b>Cocaine: Powder or Crack</b>	$\geq 0.025\text{g} \rightarrow < 10 \text{ g}$	F-5
	$\geq 10 \text{ g} \rightarrow < 27 \text{ g}$	F-4
<b>LSD: Solid</b>	$\geq 0.25 \text{ UD} \rightarrow < 50 \text{ UD}$	F-5
	$\geq 50 \text{ UD} \rightarrow < 200 \text{ UD}$	F-4
<b>LSD: Liquid</b>	$\geq 0.025\text{g} \rightarrow < 5 \text{ g}$	F-5
	$\geq 5 \text{ g} \rightarrow < 20 \text{ g}$	F-4
<b>Heroin/Fentanyl</b>	$\geq 0.025\text{g} \rightarrow < 1 \text{ g}; \geq 0.25 \text{ UD} \rightarrow < 10 \text{ UD}$	F-5
	$\geq 1 \text{ g} \rightarrow < 10 \text{ g}; \geq 10 \text{ UD} \rightarrow < 100 \text{ UD}$	F-4
<b>Hashish</b>	$\geq 0.025\text{g} \rightarrow < 50 \text{ g}$	F-5
	$\geq 50 \text{ g} \rightarrow < 200 \text{ g}$	F-4
<b>Controlled Substance Analog</b>	$\geq 0.025\text{g} \rightarrow < 10\text{g}$	F-5
	$\geq 10 \text{ g} \rightarrow < 20 \text{ g}$	F-4

**Sec. 2925.04. Unlawful Possession of Drugs.** Unlawful Possession of Drugs deals with low-level fourth and fifth degree felony drug amounts except marijuana or hashish. Like R.C. 2925.02 and 2925.03, *supra*, this section contains no presumptions of prison or mandatory minimum prison terms. Similar to R.C. 2925.03, *supra*, a person charged with a violation of this section may apply for intensive supervision under R.C. 2951.11. The drug amounts and associated penalties for this section are listed in the chart below:

<b>DRUG</b>	<b>AMOUNT</b>	<b>LEVEL</b>
<b>Schedule I or II</b>	$\geq 0.025\text{g} \rightarrow < \text{bulk}$	F-5
	$\geq x \text{ bulk} \rightarrow < 5 x \text{ bulk}$	F-4
<b>Schedule III, IV, or V</b>	$\geq 0.025\text{g} \rightarrow < 5 x \text{ bulk}$	F-5
	$\geq 5 x \text{ bulk} \rightarrow < 50 x \text{ bulk}$	F-4
<b>Cocaine: Powder or Crack</b>	$\geq 0.025\text{g} \rightarrow < 10 \text{ g}$	F-5
	$\geq 10 \text{ g} \rightarrow < 27 \text{ g}$	F-4
<b>LSD: Solid</b>	$\geq 0.25 \text{ UD} \rightarrow < 50 \text{ UD}$	F-5
	$\geq 50 \text{ UD} \rightarrow < 200 \text{ UD}$	F-4
<b>LSD: Liquid</b>	$\geq 0.025\text{g} \rightarrow < 5 \text{ g}$	F-5
	$\geq 5 \text{ g} \rightarrow < 20 \text{ g}$	F-4
<b>Heroin/Fentanyl</b>	$\geq 0.025\text{g} \rightarrow < 1 \text{ g}; \geq 0.25 \text{ UD} \rightarrow < 10 \text{ UD}$	F-5
	$\geq 1 \text{ g} \rightarrow < 10 \text{ g}; \geq 10 \text{ UD} \rightarrow < 100 \text{ UD}$	F-4
<b>Controlled Substance Analog</b>	$\geq 0.025\text{g} \rightarrow < 10\text{g}$	F-5
	$\geq 10 \text{ g} \rightarrow < 20 \text{ g}$	F-4

**Sec. 2925.041. Marijuana Possession.** Marijuana Possession deals with low-level amounts of marijuana and hashish (i.e., fourth and fifth degree felonies and various misdemeanors). Like R.C. 2925.02, 2925.03, and 2925.04, this section contains no presumptions of prison or mandatory minimum prison terms. Like R.C. 2925.03 and 2925.04, a person charged with a violation of this section may apply for intensive supervision R.C. 2925.11. The marijuana and hashish amounts and associated penalties for this section are listed in the chart below:

<b>DRUG</b>	<b>AMOUNT</b>	<b>LEVEL</b>
<b>Marijuana</b>	$\geq 0.025\text{g} \rightarrow < 200 \text{ g}$	Minor Misdemeanor
	$200 \text{ g} < 400 \text{ g}$	M-4
	$400 \text{ g} < 1 \text{ kg}$	F-5
	$1 \text{ kg} < 5 \text{ kg}$	F-4
<b>Hashish</b>	$\geq 0.025\text{g} \rightarrow < 10 \text{ g}$	Minor Misdemeanor
	$10 \text{ g} < 20 \text{ g}$	M-4
	$20 \text{ g} < 50 \text{ g}$	F-5
	$50 \text{ g} < 250 \text{ g}$	F-4

**Sec. 2925.05. Corrupting another with drugs.** Along with removing the school and safety zone enhancements within this section, the enhancement for furnishing a drug to a pregnant woman has been removed. Reference to the "major drug offender" specification has been removed from this section and replaced with a functionally equivalent mandatory prison term enhancement within the range of prison terms prescribed for a first degree felony.

**Sec. 2925.06. Illegal manufacture of drugs - illegal cultivation of marijuana - methamphetamine offenses.** This former section prohibited a person from knowingly cultivating marijuana or manufacturing or engaging in any part of the production of a controlled substance. The word "substantial" is added to qualify the phrase "part of the production" so that a person is prohibited from knowingly . . . "engag[ing] in any substantial part of the production of a controlled substance." This section's prohibition should target people that are actually manufacturing drugs rather than targeting inchoate conduct or conduct that is already covered by a separate section like possession of chemicals for manufacture of drugs under R.C. 2925.061.

Additionally, language is added to preclude a person from being found guilty of both this section and R.C. 2925.061, which deals with possessing chemicals used to manufacture drugs, if the chemicals used to illegally manufacture drugs are the same chemicals that would give rise to a charge under R.C. 2925.061. Currently, trial courts do not merge R.C. 2925.04 and 2925.041 as allied offenses because the defendant's actions will often constitute separate conduct. For instance, defendants will often purchase chemicals with an intent to manufacture drugs on day 1 (violation of R.C. 2925.061), but the defendant will wait until day 2 to manufacture the drugs using the chemicals bought on day 1 (violation of R.C. 2925.06). If R.C. 2925.041 is understood as essentially criminalizing the inchoate conduct leading to a potential violation of R.C. 2925.04, then R.C. 2925.041 can arguably be characterized as criminalizing an "attempt" to violate R.C. 2925.04. R.C. 2923.02 punishes any "attempt" to violate a section and essentially states that no person can be convicted of an attempt to commit an offense if that person is also convicted of committing the completed offense. The same policy should cover a person convicted under R.C. 2925.04 if the same chemicals that were used to manufacture illegal drugs would also support a conviction under R.C. 2925.041.

The penalties associated with illegal cultivation of marijuana have been capped at a fourth degree felony. Likewise, drug amounts associated with illegal cultivation of marijuana are changed to mirror the new marijuana possession amounts in R.C. 2925.041, *supra*. For instance, this former section made illegal cultivation of marijuana a fourth misdemeanor if the amount involved exceeded 100 grams but was less than 200 grams because a fourth degree misdemeanor marijuana possession also involved those same amounts. The changes to this section make illegal cultivation of marijuana a fourth degree misdemeanor if the amount exceeded 200 grams but is less than 400 grams because a fourth degree misdemeanor marijuana possession now involves those same amounts.

Finally, mandatory prison terms are removed throughout this section except for the mandatory prison term of 10 or 11 years that was previously an MDO specification.

**Sec. 2925.061. Illegal assembly or possession of chemicals for manufacture of drugs.** Lowered the penalty from a third degree felony to a fifth degree felony and removed all mandatory prison terms and enhancements for prior offenses.

**Sec. 2925.07. Funding, aggravated funding of drug or marijuana trafficking.** This section essentially prohibits a person from providing money to another so that the other person can obtain a certain amount of a controlled substance. The former section made funding drugs a crime when the amount of drugs being funded were at least a fourth degree felony amount of drugs under the former possession of controlled substances section. The drug amounts in the penalty section are changed to match the new fourth degree felony drug amounts in both R.C. 2925.04 and 2925.041. For instance, this former section made funding of cocaine a crime when the amount being funded was at least 5 grams of cocaine because 5 grams of cocaine under the former possession of controlled substances section was a fourth degree felony. Likewise, the changes to this section make funding of cocaine a crime when the amount being funded is at least 10 grams of cocaine because 10 grams of cocaine under the new possession of controlled substances section, R.C. 2925.04, is a fourth degree felony.

Additionally, the penalties have been changed because they are grossly disproportionate to other similar sections' penalties in this chapter. For instance, under this former section, it was a first degree felony for funding what would otherwise be an third degree felony possession amount of schedule I or II drugs. As a result, aggravated funding of drugs (schedule I or II) is changed from a first degree felony to a third degree felony, funding of drugs (schedule III, IV or V) is changed from a second degree felony to a fourth degree felony, and funding of marijuana trafficking is changed from a third degree felony to a fourth degree felony.

Finally, all mandatory fines and mandatory prison terms have been removed, except for the mandatory prison term of 10 or 11 years that was previously an MDO specification.

**Sec. 2925.08. Illegal administration or distribution of anabolic steroids.** Notwithstanding removing mandatory license suspensions and fines, there are no substantive changes to this section.

**Sec. 2925.09. Unapproved drugs - dangerous drug offenses involving livestock.** The mental state "knowingly" was added to the prohibition under division (A).

**Sec. 2925.10. Fines.** Most of this section's language was taken from former R.C. 2925.03, allowing it to apply to a broader range of sections in R.C. Chapter 2925. This section details exactly how a court clerk shall distribute fine moneys to different agencies responsible for or involved in making the arrest of, and in prosecuting, the offender. In the case of law enforcement agencies, a court clerk can distribute money only if the law enforcement agency

adopted a written internal control policy to address the use of fine moneys to pay to subsidize the agency's efforts pertaining to drug offenses.

**Sec. 2925.11. Driving License Suspensions.** This section centralizes all of the former mandatory driver's or commercial driver's license suspensions so that this one section applies to the entire chapter. However, this section changes license suspensions so that they discretionary rather than mandatory. Furthermore, a court can suspend a driver's license only if the violation occurred while the offender was operating a motor vehicle or motorcycle when the violation occurred or offender was using a motor vehicle or motorcycle to facilitate the violation.

This section also establishes that the court can suspend a license up to a maximum period of five years. Changes were also made to allow an offender to petition the court to terminate the license suspension after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender was released from prison, whichever is later. Additionally, a person may also file a petition for limited driving privileges. Furthermore, an offender who received a mandatory license suspension prior to the effective date of this new section may also file a petition to terminate his or her suspension unless the offender was found guilty of violating R.C. 4511.19 or similar law.

**[Former] Sec. 2925.12. Possessing drug abuse instruments.** This former section was repealed and merged with R.C. 2925.14 and former 2925.141 into R.C. 2925.14.

**Sec. 2925.13. Permitting drug abuse.** Notwithstanding the removal of mandatory license suspensions, there are no substantive changes to this section.

**Sec. 2925.14. Illegal use or possession of drug paraphernalia.** For the sake of convenience and simplicity, this section has incorporated two very similarly worded and similarly themed sections: R.C. 2925.12, Possessing drug abuse instruments, and 2925.141, Illegal use or possession of marijuana drug paraphernalia. Notwithstanding the removal of mandatory license suspensions, all three sections have not been substantively changed.

**[Former] Sec. 2925.141. Illegal use or possession of marijuana drug paraphernalia.** This former section was repealed and merged with R.C. 2925.14 and former R.C. 2925.12 into R.C. 2925.14.

**Sec. 2925.22. Deception to obtain a dangerous drug.** This section prohibits a person, through deception, from knowingly procuring a prescription for a dangerous drug or possessing an uncompleted preprinted prescription blank used for writing a prescription for a dangerous drug. The former penalty section made a violation of this section a fifth degree felony and enhanced to a fourth degree felony if the offender was previously found guilty of a drug abuse offense. The changes to the penalty section now lower the penalty from a fifth degree felony to a first degree misdemeanor if the offender merely possessed a blank prescription pad used for writing prescriptions for dangerous drugs. Also, the felony enhancement if the offender was

previously found guilty of a drug abuse offense is removed. However, deception to obtain a dangerous drug is still a fifth degree felony if the offender procured the administration of, a prescription for, or the dispensing of, a dangerous drug. Likewise, enhancements are retained for a violation of this section involving first, second, and third degree felony scheduled drug amounts, but the enhancement felony amounts are changed to reflect the changed drug amounts in R.C. 2925.01, 2925.02, and 2925.03, *supra*.

**Sec. 2925.23. Illegal processing of drug documents.** Notwithstanding the removal of mandatory fines, there are no substantive changes to this section.

**Sec. 2925.24. Tampering with drugs.** There are no substantive changes to this section.

**Sec. 2925.31. Abusing harmful intoxicants.** Former R.C. 2925.31 makes abusing harmful intoxicants a first degree misdemeanor and enhanced to a fifth degree felony if the offender has previously been convicted of a drug abuse offense. The fifth degree felony enhancement has been removed.

**Sec. 2925.32. Trafficking in harmful intoxicants – improperly dispensing or distributing nitrous oxide.** This former section essentially prohibited a person from knowingly dispensing or distributing a harmful intoxicant to a person eighteen years old or over under division (A)(1) and to persons under eighteen years old under division (A)(2) for the purpose of abusing the harmful intoxicant. Because the prohibitions in division (A)(1) and (A)(2) contain the same prohibition except for arbitrary age threshold, division (A)(1) and (A)(2) have been merged to prohibit knowingly dispensing or distributing a harmful intoxicant to any person. Additionally, the mental state “knowingly” is added to division (B)(3).

**Sec. 2925.33. Possessing nitrous oxide in motor vehicle.** The mental state “knowingly” was added to division (A).

**Sec. 2925.34. Restriction against sale of or offer for sale of a pure caffeine product; misdemeanor.** There are no substantive changes to this section.

**Sec. 2925.36. Illegal dispensing of drug samples.** Notwithstanding the removal of all mandatory license suspensions and changing the MDO specification to a mandatory prison term of 10 or 11 years, there are no substantive changes to this section.

**Sec. 2925.37. Counterfeit controlled substance offenses.** The mental state “knowingly” was added to division (C) and (D). Additionally, former division (E) is removed because the committee believes it should not be a crime for a person to represent a counterfeit controlled substance as a controlled substance by describing the physical or psychological effects of a controlled substance.

**Sec. 2925.38. Notice of conviction of professionally licensed person sent to regulatory or licensing board or agency.** There are no substantive changes to this section.

**Sec. 2925.42. Criminal forfeiture of property relating to felony drug abuse offense.** There are no substantive changes to this section.

**Sec. 2925.50. Conviction of acquittal under federal drug abuse control laws bar to state prosecution.** There are no substantive changes to this section.

**Sec. 2925.51. Evidence in drug offense cases.** This section is reworded and reorganized for better readability but no substantive changes have been made.

**Sec. 2925.511. Reimbursement for costs of positive drug tests.** There are no substantive changes to this section.

**Sec. 2925.52. Motion for destruction of chemicals for methamphetamine production.** There are no substantive changes to this section.

**Sec. 2925.55. Unlawful purchase of pseudoephedrine or ephedrine product.** There are no substantive changes to this section.

**Sec. 2925.56. Unlawful sale of pseudoephedrine or ephedrine.** A smaller section, R.C. 2925.58, is merged into this section because the entirety of R.C. 2925.58 was dedicated to an affirmative defense specifically for this section. Additionally, the mental state “knowingly” is added to division (C) and (D).

**Sec. 2925.57. Illegal pseudoephedrine or ephedrine product transaction scan.** The mental state “knowingly” to division (C)(1), (2), (3), and (4).

**Sec. 2925.61. Lawful administration of naloxone.** There are no substantive changes to this section.

**Sec. 2951.11 Intensive Supervision.** This section is grouped with the drug chapter because it was designed to be the pathway to treatment options for those caught in the cycle of addiction. This model was heavily based on Hawaii’s HOPE model and is based on a swift, certain, and fair model. Offenders supervised under this section will have frequent, random drug tests. If they fail, they will swiftly and certainly be sent to jail for a brief period to punish their behavior to help equate drug use with punishment. This is designed to divert those persons who, with proper judicial oversight, can stop using drugs from those that need more intensive help, covered in intervention in lieu, below.

An offender is eligible for intensive supervision if the offender committed a drug possession offense or a fourth or fifth degree felony when drug or alcohol use was a factor leading to the criminal offense. If the person has previously been found guilty of a serious offense of violence or a sexually oriented offense, the person is ineligible. If the person committed a drug possession offense or the person has not previously been granted intensive supervision before on a non-possession fourth or fifth degree felony, the person is automatically

eligible upon request. If the person previously has been granted intensive supervision for a non-possession offense, the judge has discretion on whether to allow the person into intensive supervision. A decision granting or denying eligibility for intensive supervision is a final, appealable order.

If a person is charged with a third degree felony offense or higher resulting from the act which gave rise to an offense that is eligible for intensive supervision, the person is only eligible if the third degree felony is severed or otherwise disposed of prior to intensive supervision.

At its core, intensive supervision is consent based. In order to be accepted into the program, the offender must plead guilty to the charge and consent to each of the conditions specified in division (C)(2), including consenting to possible incarceration for a failed drug test. If the person does not consent, the person is not eligible; if, after consenting, the person withdraws consent, the guilty plea will be accepted and the person will be sentenced.

A person supervised under this section shall be supervised for two to four years, unless successfully released early. The person is subject to frequent and random drug testing. If the person resides in a different county than where the crime occurred, division (D)(2) governs transfer of supervision.

If an offender violates supervision, the court's next action is determined by the nature of the violation. If the violation is for substantial noncompliance – for example, committing a new felony or OVI, absconding, or repeated minor violations – the court can revoke supervision. If the violation is for a new offense, absconding, or withdrawing consent, the court may proceed directly to sentencing. If the violation is repeated minor violations, the court shall have the person screened for intervention, as discussed below.

For a minor violation – for example, skipping an appointment, arriving late, or a positive drug test – the court may not revoke supervision, but instead shall sentence the person to a term of local incarceration, not to exceed thirty days per incident and ninety days in the aggregate.

If the person successfully completes intervention, the charges will be dismissed with prejudice and may be immediately sealed. The person may also be released early, after one year, if the person has an exemplary record under supervision.

### **Sec. 2951.12 Intervention in Lieu (Drugs)**

Stage Two of the two step drug-treatment process is the more intensive intervention in lieu. An offender may apply directly for intervention in lieu, or may be referred to this section due to repeated failed drug tests under intensive supervision. A person who applies for intervention may be granted or denied intervention, at the court's discretion.

Once a court grants intervention or the person is referred intervention due to failed drug tests under intensive supervision, the person is examined by a community treatment provider. If

the person is amenable to treatment, they shall be put on a treatment plan. Successful completion of the treatment plan constitutes dismissal of the charges. If a person violates the treatment plan, the court has discretion whether to revoke the plan and sentence the person, or punish the person with up to thirty days in jail and continue them on treatment.

# JRI 2.0 Questions

## Sentencing Questions

- Is split sentencing allowable, i.e., having confinement followed by probation? How is it achieved (or is it spelled out in statute in a way we don't recognize)? How does it operate along with PRC (or parole)? Is that confinement typically in local jails or DRC facilities?
  - In general per your experience, how often is jail used as a sentencing option for those with felony/common pleas convictions?
- Is there any appetite for true simplification, a fresh start from hyper-legislated instructions? For example, there are many ways that statutes compel or encourage a more severe result when identified factors are met. Sections 2929.13, 2929.14 and 2929.15 are exceedingly complex just by themselves. An ORC search for the term "mandatory prison" yields 76 results.  
<http://codes.ohio.gov/orc/Search/%2522mandatory+prison%2522>.
  - If there were such interest, would people still be satisfied with the rubric of listing aggravating and mitigating factors in statute, with no real obligation to identify the salient factors in sentencing? It appears that this approach is ratified by Recodification: "The court does not have to recite each element in division (A), nor does the court have to refer back to any specific factor in division (A) at all. The court merely must explain, on the record in whatever form the court wishes, the factual reasons for imposing a sentence."

## Recodification Questions

Is there consensus about the changes to:

- **Merger of offenses, 2941.25**
  - Presumption that offender may be sentenced for each offense for which they were found guilty. Offenses merge if ALL the following are true: "(1) The offenses were committed by conduct so connected by time and place as to constitute a single event. (2) The offenses were committed with the same intent. (3) The offenses involved the same victim. (4) The offenses caused the same type of harm.
  - When offenses merge, the prosecutor elects which charge the court should sentence on.
- **Transitional Control (2967.26)**
  - Recod eliminates the judicial veto for transitional control of an offender serving less than two years
- **Protective Orders, new chapter 2932.**
  - Simplification effort intended to better protect victims. One type of order available through criminal or civil means. Includes mandatory transfer provisions and encouragement to file in court where underlying dispute is being decided.
  - Does this revision improve upon the guidance to law enforcement in 2935.032 (Requirement for written policy and procedure for responding to domestic violence incidents or protection order violations)?

- **Specifications, new chapter 2942**
  - Simplified location and statement of specifications, with drafting to emphasize the additional element necessary for the specification.
  - RVO specification slightly altered.
  - MDO, Furtherance of Human Trafficking, and Attempted Rape specifications moved to respective sections as they alter sentence without addition additional mandatory term.
- **Drug Offenses generally, chapter 2925**
  - Sec. 2925.11. Driving License Suspensions
  - Sec. 2951.11 Intensive Supervision
  - Sec. 2951.12 Intervention in Lieu (Drugs)
  - Separate handout re: drug chapter
- **Presumptive Parole**
  - Recod moved to indefinite sentencing structure with presumptive parole for convictions that aren't life sentences or F1 or F2 serious violent felonies.
  - Proposal allows non-completion of a program to block presumptive release on parole, while Regan Tokes is a cleaner version (though not labelled parole). Why was the former approach chosen in Recod?
- **How "max outs" are addressed** by Recod, if at all?
  - Courts allowed to add remainder of parolee's sentence to a sentence for a new felony conviction while on parole.
  - DRC may extend parole up to 5 years from date of release.



## Sentencing and Criminal Justice Committee Meeting Agenda February 21, 2018

### CALL TO ORDER & APPROVAL OF JANUARY 18, 2018 MEETING NOTES

Judge Spanagel called the meeting to order and introduced Scott Shumaker as the new Criminal Justice Counsel for the Commission. The notes from the January 18, 2018 were unanimously approved.

### UPDATES FOR THE GOOD OF THE ORDER

#### \* T-CAP & 2929.15

DRC advised that the grant application was re-opened for the grant period of May 1, 2018 – June 30, 2019, expenditure period May 1, 2018 – June 30, 2020. It is the final opportunity for counties to participate in the FY2018-2019 budget cycle.

#### \* Reagan Tokes Act - SB201, SB202, HB365

An amended bill is expected soon.

#### \* SB66

Marta Mudri from the Ohio Judicial Conference (OJC) discussed the expansion of expungement/sealing requirements and additional amendments to the bill. Discussion included:

- 1) use of a halfway house as a local confinement sanction for a community control violation
- 2) a conforming amendment removing references to 1-year duration of community control.
- 3) the removal of rehabilitation as a purpose of sentencing and an insertion of rehabilitation of the offender as one of the factors for a judge to consider in sentencing
- 4) the changes in penalties for failure to withhold or remit taxes. The F5 is reduced to an unclassified misdemeanor for a first offense. Taxation authorities were having trouble getting prosecutors to present those charges to a grand jury on a first offense.
- 5) OSHP having jurisdiction over the Corrections Center of Northwest Ohio.

Members noted there had been discussion of including an amendment to remove the judicial veto option for transitional control, but the amendment is not part of the bill.

Judge Spanagel, Tim Young and others then discussed expungement of local police records/investigations. Tim indicated that most courts are willing to deal with those expungements under miscellaneous case numbers as they were never formally indicted or charged.

Marta indicated SB66 has a 4th hearing coming up and it is expected to pass the Senate.

#### \* HB439

Sara Andrews noted there was an interested party meeting and comments were asked to be submitted last week. Cost for implementation of the data collection provisions is a concern for most all that were in attendance. Representative Dever's office is hopeful to move the bill quickly through the House and it's expected that a companion bill may be introduced in the Senate by Senator McColley.



## **MARSY'S LAW IMPLEMENTATION**

Marta Mudri discussed OJC's document about impact to the courts and Lara Baker-Morrish is working on information about impact for prosecutors. There is an interested party group drafting proposed implementing legislation and there will be future meetings to work on it.

## **CHAPTER 2925 REVIEW, DISCUSSION AND TIMELINE**

Judge Spanagel expressed his view that the Recodification Committee's recommendations are not likely be implemented as a full package/one legislative bill. He proposed the committee revisit the recommendations and the previous work of the Commission on drug chapter topics with the goal to put forward a feasible effort at recodification of 2925. Tim Young said 2925 is the easiest section to pull from the Recod Committee's report as a standalone bill. There was discussion of HB455 going in the opposite direction towards mandatory prison terms for all trafficking.

Members then discussed possession and trafficking offenses with Tim Young reflecting that the recommendations from Recod basically brought down all possession levels by 1 felony degree and had trafficking as presumptive with possession over certain amounts. He also opined that OPD would want ILC greatly expanded and available multiple times. Members also discussed current marijuana legalization efforts. Professor Berman suggested that Michigan may legalize marijuana this year. He also noted that the numerous court challenges to Ohio's Medical Marijuana statute could spark a legislative legalization effort not unlike that passed in Vermont.

Judge Selvaggio posed a question to the Committee- 1) Does the Commission want to work within the parameters set by General Assembly legislation, or does the Commission want to lead in the policies it suggests? He thought how the committee felt about that question should dictate what approach it takes on 2925. He also felt that a discussion over trace amounts of drugs should lead the conversation. After considerable discussion, the consensus of members was we should be a leader in the discussion and move forward in making recommendations on the drug chapter.

Judge Spanagel suggested the following items for consideration by this committee and Commission:

- 1) Low level drug offense changes
- 2) Definition of trafficking/combination with possession
- 3) How to deal with trace amount cases
- 4) The expungement provisions in SB 66
- 5) Changes in ILC

Hayden Capace, JD briefly discussed the Neighborhood Safety and Drug Treatment and Rehabilitation amendment and will provide a report/analysis to the full Commission at the March 15, 2018 meeting.

Judge Spanagel also discussed Judge Gallagher's work on appellate sentencing and proposed a small working group coordinate with Judge Gallagher and the OJC.

## **ADJOURN**

With no further business, the meeting was adjourned.