

Legislative & Judicial Brief

A Message from Sara Andrews, Director



As promised, here are the notable Supreme Court of Ohio cases that closed out 2016 with notations of applicable Revised Code sections, subsequent action of the Commission and recommendation for future action. In case you missed it, our [December issue](#) highlighted the year end legislative activity. As always, please remember to regularly check our [website](#) for helpful and we hope, valuable information.

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

-Sara Andrews



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Supreme Court of Ohio Case Summaries 2016



State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624

Summary: Sex offender registration and notification mandates for Tier 2 sex offenders do not amount to cruel and unusual punishment. Requirements of SORN are punitive, not remedial, in nature.

Revised Code Sections: RC Chapter 2950

Subsequent Actions: The Sentencing Commission sent suggested revisions to the SORN law to the Ohio Criminal Recodification Committee for inclusion in its recommendations.

Recommendation: Monitor the Recodification Committee draft. Should the draft not include the Commission's recommendations present the recommendations to the General Assembly for introduction.

State v. Earley, 145 Ohio St.3d 281, 2015-Ohio-4615

Summary: A trial court may impose separate sentences on a defendant convicted of aggravated vehicular assault and operating a vehicle under the influence (OVI) when the OVI is the underlying conduct that led to the vehicular assault.

Revised Code Sections: R.C. 2903.08

Subsequent Actions: None

Recommendation: None

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995

Summary: Three factors determine whether multiple offenses "were offenses of similar import" as defined in R.C. 2941.25: conduct, animus, and import. If the defendant's conduct is composed of offenses involving separate victims or if the resulting harm is separate and identifiable, then two or more offenses of dissimilar import exist. A defendant can be convicted of multiple offenses if the conduct involves offenses of dissimilar import, or the offenses were committed separately, or the offenses were committed with separate animus.

Revised Code Sections: R.C. 2941.25

Subsequent Actions: None

Recommendation: None

State v. Barry, 145 Ohio St.3d 354, 2015-Ohio-5449

Summary: Disavows the "unmistakable crime" doctrine. The state cannot infer the defendant knew that concealing evidence was an "unmistakable crime", but rather it must prove that the defendant knew a criminal investigation was ongoing or likely to follow.

Revised Code Sections: R.C. 2921.12

Subsequent Actions: None

Recommendation: None

State v. Leak, 145 Ohio St.3d 165, 2016-Ohio-154

Summary: The arrest of an occupant of a legally parked car does not, by itself, justify automatic impoundment of that car; and a warrantless inventory search of the car violated the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution.

Revised Code Sections: Ohio Constitution, Art. I, Sec. 14; Fourth Amendment

Subsequent Actions: None

Recommendation: No action by the Commission should be taken.

State v. Polus, 145 Ohio St.3d 266, 2016-Ohio-655

Summary: A criminal sentence for a felony and a misdemeanor must be served at the same time, except for in a certain situations specified in state law. The decision settles a conflict among Ohio appellate courts where some have found that R.C. 2929.41(B)(1) provides judges the discretion to run felony and misdemeanor sentences consecutively.

Revised Code Sections: R.C. 2929.41(B)(1)

Subsequent Actions: The Commission has contracted with Case Western Reserve University (CWRU) to study the impact of H.B. 86 and its progeny. Concurrent and consecutive sentencing patterns and practices should be included in that review. Concurrent and consecutive sentences should also be a part of the Criminal Recodification Committee's work.

Recommendation: Ensure CWRU analysis reviews consecutive and concurrent sentences.

Supreme Court of Ohio Case Summaries 2016 – continued

State v. J.M., Slip Opinion No. 2016-Ohio-2803

Summary: A fourth-degree-misdemeanor conviction under R.C. 4503.11(A) for failing to register a motor vehicle counts as a conviction when determining eligible-offender status under R.C. 2953.31(A).

Revised Code Sections: R.C. 2953.31

Subsequent Actions: The Commission has released its report on suggested non-substantive changes to sealing and expungement statutes. The Commission through its Ad Hoc committee will continue to explore substantive changes to the statutes.

Recommendation: Finalize recommendations for substantive changes to sealing and expungement statutes.

In re Von, 146 Ohio St.3d 448, 2016-Ohio-3020

Summary: Registration-termination procedure in R.C. 2950.15 does not apply to sex offenders who committed their offenses prior to January 1, 2008.

Revised Code Sections: R.C. 2950.15

Subsequent Actions: The Sentencing Commission sent suggested revisions to the SORN law to the Ohio Criminal Recodification Committee for inclusion in its recommendations.

Recommendation: Monitor the Recodification Committee draft. Should the draft not include the Commission's recommendations present the recommendations to the General Assembly for introduction.

In re D.S., 146 Ohio St.3d 182, 2016-Ohio-1027

Summary: When a delinquent child disputes that he or she was at least 14 years old at the time the offenses were committed and age cannot be established from the undisputed allegations in the complaint, the juvenile court must make a determination of age eligibility before or during the sex-offender classification hearing and prior to subjecting the child offender to registration and notification requirements under R.C. 2152.82 through 2152.86 and Chapter 2950. Conducting a sex-offender-classification hearing under R.C. 2152.83 upon a delinquent child's release from a secure facility does not violate the prohibition against double jeopardy. The imposition of juvenile-offender-registrant status under R.C. 2152.82 or 2152.83(B) with corresponding registration and notification requirements that continue beyond the offender's reaching age 18 or 21 does not violate the offender's due-process rights.

Revised Code Sections: R.C. 2152.82, R.C. 2152.83(B)

Subsequent Actions: Justice Kennedy has requested the Commission review juvenile sentencing structure. The Commission did not make any recommendations for changes to juvenile SORN laws as a part of its overall recommendations on SORN revisions.

Recommendation: The Juvenile Justice committee should make this a part of its review of overall sentencing structure.

State v. Klembus, 146 Ohio St.3d 84, 2016-Ohio-1092

Summary: Raising the felony level and imposing an additional mandatory prison term on offenders convicted of operating a motor vehicle while under the influence (OVI) five or more times within the previous 20 years does not violate the Equal Protection Clause of the U.S. or Ohio constitutions.

Revised Code Sections: R.C. 4511.19(G)(1)(d) and 2941.1413

Subsequent Actions: None

Recommendation: None

State v. Sergeant, Slip Opinion No. 2016-Ohio-2696

Summary: A trial court judge is not required to make a separate consecutive-sentence finding if presented with a jointly recommended sentence that contains consecutive sentences.

Revised Code Sections: R.C. 2929.14(C)(4); R.C. 2953.08(D)(1)

Subsequent Actions: None

Recommendation: None

State v. Barker, Slip Opinion No. 2016-Ohio-2708

Summary: In the context of interrogating juveniles in police custody, R.C. 2933.81(B) violates the due process rights of juveniles and is unconstitutional. The law cannot change the constitutional rule that the prosecutor must prove the juvenile knowingly, intelligently and voluntary waived his rights and that the juvenile's statements were voluntary.

Revised Code Sections: R.C. 2933.81(B)

Subsequent Actions: None

Recommendation: None

State v. Thompson, 147 Ohio St.3d 29, 2016-Ohio-2769

Summary: A trial court's determination of a motion for jail-time credit pursuant to R.C. 2929.19(B)(2)(g)(iii) constitutes a special proceeding and affects a substantial right. Because the motion for jail time credit is a special proceeding and affects a substantial right, the denial of a motion for jail-time credit pursuant to R.C. 2929.19(B)(2)(g)(iii) is a final, appealable order.

Revised Code Sections: R.C. 2929.19(B)(2)(g)(iii)

Subsequent Actions: Although not directly related, the Commission has approved changes to the jail time credit statutes regarding juveniles. In addition, the Commission approved changes to the appellate review process.

Recommendation: Working with interested parties, revisit the Commission's recommendations on the appellate review process for possible introduction in the 132nd General Assembly. Continue pursuit of changes to juvenile jail time credit.

Supreme Court of Ohio Case Summaries 2016 – continued

State v. Heinz, 146 Ohio St.3d 374, 2016-Ohio-2814

Summary: The prosecuting attorney has the authority to prosecute all complaints, suits, and controversies in which the state is a party, including community control violation hearings. Revocation of community control is an exercise of criminal sentencing and that the court may extend the offender's community control or impose more restrictive conditions or a prison term. Community control violation hearings are formal, adversarial proceedings that follow the rules of criminal procedure, afford the offender the right to an attorney, and allow the victim of the crime to be present.

Revised Code Sections: R.C. 309.08

Subsequent Actions: None

Recommendation: None

State v. Aalim, Slip Opinion No. 2016-Ohio-8278

Summary: Mandatory transfer of juveniles to the common pleas courts violates juveniles' right to due process; however, discretionary transfers of juveniles older than 14 years are constitutional and satisfy due process.

Revised Code Sections: R.C. 2152.11 and RC 2152.12

Subsequent Actions: The Commission has approved changes to bindover, including the elimination of all mandatory bindovers.

Recommendation: Present the Commission's proposed statutory language to the General Assembly in January 2017 for introduction.

In re A.G., Slip Opinion No. 2016-Ohio-3306

Summary: Juveniles are entitled to the same constitutional double jeopardy protections as adults, and juvenile courts must conduct the same double-jeopardy analysis in delinquency proceedings as other courts apply in adult criminal proceedings.

Revised Code Sections: R.C. 2941.25

Subsequent Actions: None

Recommendation: None

State v. Mole, Slip Opinion No. 2016-Ohio-5124

Summary: R.C. 2907.03(A)(13), which makes it a felony for a peace officer to have sex with a minor more than two years younger than the officer, violates equal protection clause and is unconstitutional.

Revised Code Sections: R.C. 2907.03(A)(13)

Subsequent Actions: None

Recommendation: Provide to Criminal Justice & Sentencing committee for review.

State v. Jones, Slip Opinion No. 2016-Ohio-5105

Summary: In regards to the right to speedy trial and preindictment delay the Sixth Amendment does not require the government act within a particular period of time to investigate and charge someone of a crime, but statutes of limitations do provide an ultimate time limit. However, even if the state brings an indictment within the statute of limitations, if unjustifiable delay in bringing the indictment causes actual harm to the accused's right to a fair trial, the due process clauses of the Ohio and U.S Constitutions provide additional protection

Revised Code Sections: Sixth Amendment (Right to speedy trial)

Subsequent Actions: None

Recommendation: None

State v. Hand, Slip Opinion No. 2016-Ohio-5504

Summary: Use of a prior juvenile adjudication to enhance the sentence of an adult offender violates the state and federal constitutions.

Revised Code Sections: R.C. 2901.08(A)

Subsequent Actions: None

Recommendation: Provide to Juvenile Justice committee to determine if any statutory changes are necessary.

State v. Thomas, Slip Opinion No. 2016-Ohio-5567

Summary: An offender should be sentenced under the law in effect at the time he was convicted not when the crime occurred. The majority decision noted that R.C. 1.58(B) allows an offender to be sentenced under a more lenient statute if one is passed before the sentence is imposed and R.C. 1.52(A) states that when two statutes conflict and cannot be reconciled, the later-passed law prevails. The Court then analyzed two sections of uncodified law, one in S.B. 2 (1996) and one in H.B. 86 (2011). The S.B. 2 language limited the impact of the sentencing changes in that bill to offenders sentenced after its effective date. The language in H.B. 86 allows its provisions to impact sentences if those sentences would be lessened under the bill (alà R.C. 1.58). Because H.B. 86 was passed later than S.B. 2, the Court found that the sentence under H.B. 86 should be imposed on the defendant.

Revised Code Sections: R.C. 1.58 (B); R.C. 1.52(A)

Subsequent Actions: None

Recommendation: Provide to Criminal Justice & Sentencing committee for review.

Supreme Court of Ohio Case Summaries 2016 – continued

State v. Gonzales, Slip Opinion No. 2016-Ohio-8319

Summary: Prosecutors must prove that the actual weight of cocaine, excluding any filler materials, meets statutory levels when prosecuting cocaine-possession cases.

Revised Code Sections: R.C. 2925.11(C)(4)

Subsequent Actions: The Recodification committee has proposed changes to R.C. Chapter 2925.

Recommendation: Provide to Criminal Justice & Sentencing committee for review.

State v. Moore, Slip Opinion No. 2016-Ohio-8288

Summary: Imposition of sentences of life imprisonment without parole and a term-of-years prison sentence that exceeds offender's life expectancy on juvenile nonhomicide offenders is unconstitutional.

Revised Code Sections: Eighth Amendment

Subsequent Action: None

Recommendation: Present the Commission's recommendations on juvenile extended sentences for reintroduction in the next General Assembly.

State v. Walker, Slip Opinion No. 2016-Ohio-8295

Summary: The elements for purpose and prior calculation and design are distinct and the state must prove both to support a conviction of aggravated murder.

Revised Code Sections: R.C. 2903.01

Subsequent Action: None

Recommendation: None

State v. Shalash, Slip Opinion No. 2016-Ohio-8358

Summary: "Controlled substance analogs," were not specifically included in Title 29; however, the Court found that other provisions of the Revised Code incorporated synthetic drugs into Title 29. R.C. 3719.013 states that controlled substance analogs "shall" be treated as a controlled substance for purposes of "any provision of the Revised Code".

Revised Code Sections: R.C. Chapter 2925 and 3719

Subsequent Action: None

Recommendation: None

State v. Noling, Slip Opinion No. 2016-Ohio-8252

Summary: R.C. 2953.73(E)(1), which denies appeals of right from rejections of applications for DNA testing in cases in which the death penalty is imposed, is unconstitutional.

Revised Code Sections: R.C. 2953.73

Subsequent Action: None

Recommendation: Provide to Criminal Justice & Sentencing committee for review.

State v. Martin, Slip Opinion No. 2016-Ohio-7196

Summary: In interpreting R.C. 2907.323 the Court found that to convict a person for possession of images of nude minors without violating the First Amendment, the images must depict nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals." On the other hand, to convict a person of creating the child nudity materials, the lewd or graphic element does not apply.

Revised Code Sections: R.C. 2907.323

Subsequent Action: None

Recommendation: None

In re D.S., Slip Opinion No. 2016-Ohio-7369

Summary: A juvenile must be credited with time served in a case where the trial court incorrectly determined that he had been returned to juvenile court on a "new charge". After an initial transfer to adult court, a plea agreement returned the juvenile to juvenile court for sentencing. But at the sentencing hearing, the juvenile court judge refused to give the juvenile credit for time served in the detention center and county jail. The Court found that R.C. 2152.18(B) clearly states that confinement credit must be credited if the confinement stems from an original complaint and is sufficiently linked to the adjudication of the charges upon which the juvenile court orders commitment.

Revised Code Sections: R.C. 2152.18(B)

Subsequent Action: The Commission has approved language regarding clarifying the juvenile confinement credit statute.

Recommendation: Continue to pursue Commission recommendations.

Supreme Court of Ohio Case Summaries 2016 – continued

In re R.A.H., Slip Opinion No. 2016-Ohio-7592

Summary: Juveniles are entitled to the same constitutional double-jeopardy protections as adults, therefore, a new disposition hearing was ordered for a Cleveland juvenile found delinquent for rape.

Revised Code Sections: R.C. 2941.25

Subsequent Action: None

Recommendation: None

State v. Williams, Slip Opinion No. 2016-Ohio-7658

Summary: Once a trial court determines an offender is guilty of allied offenses of similar import, Ohio law requires the sentences to be merged and allows the prosecutor to choose the offense for sentencing. If a trial court then imposes separate sentences, the sentence is void and can be challenged at any time.

Revised Code Sections: R.C. 2941.25

Subsequent Action: None

Recommendation: None

State v. Kona, Slip Opinion No. 2016-Ohio-7796

Summary: If a pretrial diversion program requires a noncitizen to admit guilt, a trial court must warn the accused that he or she could be deported. When a noncitizen enters a plea before a judge, state law requires the judge to warn the defendant of the potential immigration status consequences.

Revised Code Sections: R.C. 2941.25

Subsequent Action: None

Recommendation: None

State ex rel. Cincinnati Enquirer v. Ohio Dept. of Public Safety, Slip Opinion No. 2016-Ohio-7987.

Summary: Law enforcement dash-cam recordings are public records that cannot be shielded in their entirety, but portions considered "investigatory work product" can be withheld. A case-by-case review is necessary to determine how much of a recording must be disclosed.

Revised Code Sections: R.C. 149.43

Subsequent Action: None

Recommendation: None

State v. V.M.D., Slip Opinion No. 2016-Ohio-8090

Summary: Attempted robbery is a crime of violence and that someone convicted of it is ineligible to have the record of conviction sealed under R.C. 2953.36.

Revised Code Sections: R.C. 2953.36

Subsequent Action: None

Recommendation: None

State v. Jackson, Slip Opinion No. 2016-Ohio-8127

Summary: A community control revocation hearing is a sentencing hearing as contemplated in R.C. 2929.19(A) and Crim.R. 32 and, therefore, trial courts must allow offenders to speak on their own behalf during the hearing.

Revised Code Sections: R.C. 2929.19

Subsequent Action: None

Recommendation: None

Other Court News that may be of interest:

Amendments to the Rules of Practice:

http://courtnewsohio.gov/happening/2016/ruleAmendRulesPractice_121916.asp#.WGv_PIMrJhE

Changes to the Code of Judicial Conduct:

http://www.courtnewsohio.gov/bench/2016/ruleAmendJudConduct_121916.asp#.WGv-SFMrJhE

Board of Professional Conduct advisory opinions:

http://courtnewsohio.gov/happening/2016/BPCAdvOpin16-9-12_122016.asp#.WGv-9IMrJhE

Amended Rules on Court Appointed Lawyers:

http://courtnewsohio.gov/happening/2016/ruleAmendSuperintendence_122916.asp#.WGv-b1MrJhE

Working Committees of the Commission

Ohio Criminal Sentencing Commission Members

CHAIR

Maureen O'Connor, *Chief Justice*

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Nick Selvaggio, *Common Pleas Court Judge*

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Sylvia Sieve Hendon, *Appellate Court Judge*

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Derek DeVine, *County Prosecutor*

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Tim Young, *State Public Defender*

Gary Mohr, *Director, Department of Rehabilitation and Correction*

Chrystal Pounds-Alexander,
Victim Representative

Paula Brown,
Ohio State Bar Association

Ronald Burkitt, *Juvenile Police Officer*

Frederick Benton, Jr., *Defense Attorney*

Kathleen Hamm, *Public Defender*

Law enforcement – vacant

County Commissioner – vacant

*the Commission is assisted by its Advisory Committee, for a complete list contact sara.andrews@sc.ohio.gov

Sentencing & Criminal Justice Committee priorities include the study of criminal penalties and sentencing statutes and patterns in Ohio, recommending statutory change and reviewing national developments and trends on matters of sentencing. The committee is also poised to respond and make recommendations regarding more broad areas including probation, risk assessment, release programs, specialized dockets, community corrections and building, as well as improving, relationships and coordinating the work of the Commission with other justice partners – both state and federal.

Juvenile Justice Committee priorities include the review of criminal penalties and sentencing statutes and patterns in Ohio and recommending strategies to combat juvenile delinquency and recidivism.

Data Collection and Sharing Committee primary goals are to develop, coordinate and identify ways to collect and promote methods for sharing appropriate data and information with justice system partners.

Each committee consists of a chair, a vice chair and individual members. The committee chairs are Commission Members or an Advisory Committee member. Committee membership may include individuals outside of the Sentencing Commission and its Advisory Committee that have a vested interest in the Commission's work.

All committees generally meet the third Thursday of each month. For a full list of members, work to date and future meeting information, please visit <http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp> or email Sara Andrews at sara.andrews@sc.ohio.gov.

2017 Full Commission Meeting Dates

Thursday, **March 16, 2017**

Thursday, **June 15, 2017**

Thursday, **September 21, 2017**

Thursday, **December 14, 2017*** (*not the third Thursday)

All meetings are held beginning at 10:00 a.m. at the Thomas J. Moyer Ohio Judicial Center, 65 South Front Street, Columbus, Ohio 43215.

Working committees meet between Full Commission meeting dates.

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