

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

**OHIO CRIMINAL SENTENCING COMMISSION & ADVISORY COMMITTEE
FULL COMMISSION MEETING NOTES
December 12, 2019**

MEMBERS PRESENT

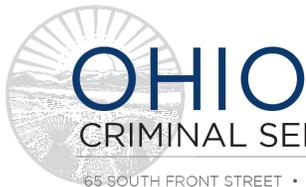
Nick Selvaggio, Vice-Chair, Common Pleas Court Judge
Lara Baker-Morrish, City of Columbus
Kristin Boggs, State Representative
Paula Brown, Attorney – Ohio State Bar Association
Brooke Burns, Attorney, Juvenile – Office of the Public Defender
Charles Chandler, Peace Officer
Robert DeLamtre, Juvenile Court Judge
Robert Fragale, Domestic Court Judge
Sean Gallagher, Appellate Court Judge
Gwen Howe-Gebers, Prosecutor
Kathleen Hamm, Public Defender
Amy Koorn, for Ryan Gies, Director – Ohio Department of Youth Services
Jennifer Muench-McElfresh, Common Pleas Court Judge
Kevin Miller, for Colonel Fambro – Ohio State Highway Patrol
Kyle Petty, for Annette Chambers-Smith, Director – Ohio Department of Rehabilitation and Correction
Elizabeth Poprocki, Victim Representative
William Seitz, State Representative
Larry Sims, Sheriff
Brandon Stanley, Chief of Police
Cecil Thomas, Senator

ADVISORY COMMITTEE MEMBERS PRESENT

Douglas Berman, Professor of Law, OSU
Jim Cole, Juvenile Court Administrator
Doug Green, State Representative – CIIC
Lusanne Green, OCCA
Lois Hochstetler, Ohio Department of Mental Health and Addiction Services
Cynthia Mausser, Ohio Department of Rehabilitation and Correction
Karhlton Moore, Office of Criminal Justice Services
Paul Pfeifer, Ohio Judicial Conference
Keith Spaeth, Common Pleas Court Judge representing OJACC
Carey Williams, CORJUS
Andy Wilson, Office of Governor DeWine
Gene Zmuda, Appeals Court Judge

STAFF PRESENT

Sara Andrews, Director
Nikole Hotchkiss, Research Specialist
Todd Ives, Researcher
Scott Shumaker, Criminal Justice Counsel



OHIO

CRIMINAL SENTENCING COMMISSION

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CALL TO ORDER & ROLL CALL OF COMMISSION MEMBERS, ADVISORY COMMITTEE

Vice-Chair Selvaggio called the meeting to order and called the roll of members and advisory committee.

MEETING NOTES APPROVAL

Judge Selvaggio then referred members to the September 19, 2019 meeting notes, which were approved without objection.

OPEN LETTER TO COMMISSION REGARDING DRUG-INDUCED HOMICIDE PROSECUTIONS

Professor Doug Berman gave the attendees background information on the open letter to the Sentencing Commission co-signed by himself and four other law school professors from around the country. He said that Professor Leo Beletsky spearheaded research into homicide charges in cases that involved an accidental overdose death. Data constraints have led Professor Beletsky to rely on media reports to develop a picture of overdose prosecutions in Ohio and across the country. That research shows Ohio ranks second in drug-induced homicide prosecutions nationwide, and that a majority of those prosecutors involve co-users and family members who provided the drugs rather than “dealers”. Professor Berman also noted that the data around these cases can be spotty, leading to an inability to paint an accurate picture of how the system is handling these cases. Professor Berman said that his Drug Enforcement Policy Center is willing to work toward identifying data gaps and identify strategies to collect information.

Members then heard from Andrea Rainey, a community health worker from Nelsonville, Ohio who read a letter written by Laura Cash. Ms. Cash is a board member of Grief Recovery After a Substance Passing (GRASP) and Harm Reduction Ohio, and a mother of a person who died from accidental overdose. Her letter expressed a belief that initiating homicide charges in cases of accidental overdoses is not an effective use of resources as it does not deter users or dealers and spends resources on punishment that could be better used on prevention and recovery. Dan Cahill also spoke to the group, and told them that he is in recovery after suffering multiple accidental overdoses and that in his experience, fear of being subject to prosecution deters users from calling 911 when someone overdoses.

Gwen Howe-Gebers then directed members to a letter from the Ohio Prosecuting Attorneys Association (OPAA) director Lou Tobin, written in response to the open letter. She highlighted the issues that OPAA sees with the letter – namely that reliance on media reports is a flawed and the fact that prosecuting attorneys are held to a high ethical standard.

Judge Zmuda asked Professor Berman about the timeframe of the data in the open letter particularly in light of changes to Ohio’s Good Samaritan laws around drug possession offenses. Professor Berman said the data was a 10-year window and that researchers are now focused on what, if any, impact the increased prosecution of these cases has had on overdose death rates. He again highlighted the problems with a lack of good data on the subject. Members then discussed the difficulties around collecting this type of data, with Lara Baker-Morrish noting that the Commission should be advocating for widespread collection of standardized data rather than narrow, case specific reporting. Judge Selvaggio highlighted the difficulty of these type of “unintended consequences cases” and stated that the legislature has provided prosecutors with tools to prosecute this conduct which is appropriately guided by the code of ethics for prosecutors and the sentencing discretion of judges.



Paula Brown moved that the Commission look into the data necessary to study the subject of drug-induced homicide charges. Justice Paul Pfeifer expressed concern about the Commission playing a role in what he saw as a biased study. Karhlton Moore offered to have the Office of Criminal Justice Services (OCJS) help Commission staff look into the feasibility of obtaining data on these types of cases. The motion was amended to reflect the Commission staff partnering with OCJS to investigate the feasibility of studying the topic of drug-induced homicides. On a roll-call vote, the motion failed with nine (9) votes in favor, ten (10) votes in opposition, and one (1) abstention.

APPELLATE REVIEW PROPOSAL

Judge Sean Gallagher opened the discussion of appellate review by presenting the facts of the recent Ohio Supreme Court decision in *State v. Gwynne*. He noted that while the case centers directly on appellate review of felony sentencing, the decision by the court is a plurality decision which provides little to no additional guidance to appellate court judges as to how to apply the provisions of R.C. 2953.08.

Judge Gallagher distributed a questionnaire to some of his fellow appellate court judges asking for their input and reaction on the *Gwynne* decision, and he noted the variation in their responses to the decision. Judge Cynthia Westcott-Rice discussed the frustration the appellate court bench has with the number of appeals they receive where no standard is provided for the court to meaningfully review the cases. Judge Gene Zmuda said that with no criteria for holistic review of sentences, courts are left with what amounts to a smell test when it comes to sentencing. He suggested that the legislature must decide how the system should review sentences as a whole and craft a provision that provides for clear and consistent review. He also discussed the still-pending case of *State v. Jones*, an appellate review of felony sentencing case that had been suspended pending the *Gwynne* decision but that now must be set for argument. He further suggested that the Sentencing Commission should give the legislature direction as to how to craft a new statute, and asked members what shape that advice should take.

Representative Bill Seitz discussed issues with the Ohio Criminal Justice Recodification Committee's proposed appellate review statute, and reiterated to Commission members their obligation to provide guidance to the legislature on the subject. He and Judge Gallagher then discussed the subject of sentencing "caps" providing for limits to consecutive sentence time. Justice Paul Pfeifer suggested that the Ohio Judicial Conference (OJC) will be soon be making a recommendation to the legislature on the subject sometime before March 2020. Judge Selvaggio asked that Commission members participating in the OJC discussions be prepared to discuss the OJC proposal at the next meeting of the full Sentencing Commission.

SUBSTITUTE SENATE BILL 3

Scott Shumaker then briefly discussed the recent amendments accepted into Substitute Senate Bill 3, the drug reform legislation pending in the Ohio Senate. A short, written summary of the amendments was also provided to members.

A motion was then made to adjourn the meeting and it was seconded. Accordingly, Vice-Chair Selvaggio adjourned the meeting.