



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
September 27, 2018

MEMBERS PRESENT

Nick Selvaggio, Vice-Chair, Common Pleas Court Judge
Chrystal Alexander, Victim Representative
Lara Baker-Morrish, City of Columbus Solicitor General
Kristin Boggs, State Representative
Paul Brown, OSBA
Brooke Burns, Attorney, Juvenile – Office of the Public Defender
Charles Chandler, Peace Officer
Carl DiFranco, Municipal Court Judge
Gary Dumm, Municipal Court Judge
Gwen Howe-Gebers, County Prosecutor
Kathleen Hamm, Public Defender
Stuart Hudson, Department of Rehabilitation and Correction
Thomas Marcelain, Common Pleas Court Judge
Stephen McIntosh, Common Pleas Court Judge
Kevin Miller, Ohio State Highway Patrol
David Painter, County Commissioner
Harvey Reed, Department of Youth Services
Brandon Stanley, Chief of Police
Kenneth Spanagel, Municipal Court Judge
Cecil Thomas, State Senator
Tim Young, State Public Defender

ADVISORY COMMITTEE MEMBERS PRESENT

Jill Beeler, State Public Defender
Douglas Berman, Professor of Law, OSU
Jim Cole, Juvenile Court Administrator
Paul Dobson, County Prosecutor
Jim Lawrence, OCCA
David Magura, Ohio Chief Probation Officer's Association
Cynthia Mausser, Department of Rehabilitation and Correction
Paul Pfeifer, Ohio Judicial Conference
Keith Spaeth, Common Pleas Court Judge representing OJACC
Carey Williams, CORJUS

STAFF PRESENT

Lisa Hickman, PhD – Research Specialist
Todd Ives, Researcher
Scott Shumaker, Criminal Justice Counsel
Sara Andrews, Director

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

The September 27, 2018 meeting of the Ohio Criminal Sentencing Commission and its Advisory Committee was called to order by Vice-Chair Selvaggio and he called the roll of members and advisory committee.

APPROVAL OF MINUTES FROM June 21, 2018

The minutes of the June 21, 2018 meeting of the full Commission were unanimously approved.

STEPPING UP – OVERVIEW AND UPDATE

Justice Stratton discussed the presentation (meeting materials on the Commission website) and work of the Initiative.

“The national Stepping Up initiative is a collaboration between the National Association of Counties (NACo), the Council of State Governments (CSG) Justice Center, and the American Psychiatric Foundation (APF) to help advance counties' efforts to reduce the number of adults with mental and co-occurring substance use disorders in jails. The initiative engages a diverse group of organizations with expertise on these issues, including those representing sheriffs, jail administrators, judges, community corrections professionals, treatment providers, people with mental illnesses and their families, mental health and substance use program directors, and other stakeholders”.¹

ISSUE 1 – TO REDUCE PENALTIES FOR CRIMES OF OBTAINING, POSSESSING, AND USING ILLEGAL DRUGS

Commission Criminal Justice Scott Shumaker provided an overview of the amendment and potential implementation. He relayed the four main points of Issue 1 and noted that Ohio trafficking statute doesn't have possession with intent, while 48 other states do. He also discussed intent v application of the provisions in Issue 1, specifically the interpretation of the use of the word “conviction” in the exclusionary section – also, noting that Issue 1 specifies drug laws as of January 1, 2018 – undoes SB1, effectively freezing law(s) in time.

Members discussed that no other state has done this type of criminal justice reform in a state constitution.

Senator Eklund voiced his opposition in no uncertain terms – and suggested that without concerted, thoughtful widespread small seed campaign by groups like Commission to oppose Issue 1, the end result may be toddling down the road. The amendment is misleading and sounds good to people – and, there needs to be an effort made to inform voters.

Senator Thomas asked for clarification of the Commission's role? Director Andrews noted that in 2002, when a similar ballot initiative was posed, that although the Commission supported the general ideas, they opposed the provisions being placed in the Constitution.

Justice Stratton opined that there must be commitment to do it (criminal justice reform) right if the effort is made to defeat Issue 1.

Senator Thomas suggested that the legislature is reluctant to make changes and pursue criminal justice reform – ie. Recodification committee and no result after two years of work. He said that the legislative process doesn't

¹ <https://commissioners.franklincountyohio.gov/stepping-up>

contribute to making change. Things really haven't changed since the 70's – except now the prison population has swelled, primarily because there isn't the political will of legislature to fix unintended consequences.

Vice-Chair Selvaggio reminded Members of the statutory obligation of the Commission per ORC 181.23-25 and its role as detailed in §181.25 (A)4 –Study criminal sentencing structures in this state, other states, and the federal government, recommend necessary changes to the sentencing structure of the state, and determine the costs and effects of any proposed changes in the sentencing structure of the state. He further stated that discussion and a position by Commission (on Issue 1) is appropriate – it is our charge and suggested that debate about policy is important – but, now is not the right time. Vice-Chair Selvaggio urged the group to consider a narrower question – is changing state drug law via the Constitution appropriate?

Lara Baker-Morrish stated that a constitutional amendment v legislative change is problematic because the only way to change the provisions is another constitutional amendment.

Professor Berman said that the Commission should speak to the constitutional provision v legislation concern, but hadn't done so last year when Marsy's Law was on the ballot. He noted that it is difficult to separate process from substance. He suggested the approach the Commission should take is to support tackling the provisions of Issue 1, but do it better, providing a more constructive way to achieve the goals – noting that the time frame is limited.

Tim Young argued that the Commission process seems inconsistent and echoed most of Professor Berman's points. He said he is deeply troubled about taking action – especially since the Commission didn't when Marsy's Law was on the ballot last year. He went on to say that he believes the Commission's role is not to make recommendations on constitutional issues. He also asked about the Committee process and the fact that the topic was raised in both Commission committees but a motion to oppose Issue 1 failed in both, so how can the Commission take a vote on what appears to be an improper question. Clarification was provided about the committee conversation and the fact the committee members felt they did not have enough information at the time to advance a vote for opposition. Further, the Commission has the discretion to consider and act independently from its committees. Mr. Young concluded by cautioning the group to not react to heat being turned up, the committees work and didn't make a recommendation – lastly, to step back – outside of the heat of this moment – and, consider the substantive role of this group.

Representative Boggs expressed her support and agreement with the position of Senator Thomas – the legislature abdicated duty to react and move issues forward – at the end of the day the legislature does not act. Observation or statement from this group is needed to state the legislature hasn't taken steps necessary. She said that the method and statements should be carefully crafted – sensitive to the political nature – and, our group is nonpartisan and independent.

Lt. Chandler noted his experience in drug enforcement and investigating deaths from overdose. He said this amendment will make fentanyl investigations more difficult for. He said talking about people and death due to fentanyl is not partisan.

Vice-Chair Selvaggio said Mr. Young's points well-taken – but that Marsy's Law was victim rights centered and not sentencing specific. He went on to say that when the committees met they didn't make recommendation

or abstained their respective associations had not yet taken positions. Vice-Chair Selvaggio went on to say that, if in fact we – appointed because we are leaders within disciplines – contribute to discussions and it is time for us to lead – vote today on a position and recommendation to legislature – not commercial campaign. The Commission as a body hasn't led in matters of importance, it is time for us to step up.

Chief Standley expressed that his organization and the Buckeye State Sheriffs Association entirely oppose Issue 1. He said at the local level – law enforcement and judiciary are speaking at every local meeting that will allow it. It is a tough decision for Commission – but, look at individual addict – what is best – families and friends give up – law enforcement and/or unbiased judge can offer help. Low dose traffickers are doing it every day because they know the law. Separating addict and trafficker is not accomplished by Issue 1.

Judge Dumm then made a motion for the Commission to go on record – opposing Issue 1 on basis it of it being a constitutional amendment. The motion was seconded by Senator Eklund.

Discussion following the motion included:

Senator Thomas said that there were 700,000 signatures to get something done and the Commission role should be to come up with solutions that make sense instead of support or oppose Issue 1. He said he support efforts of this group to do research and make recommendations, not take a position on Issue 1.

Commissioner Painter suggested the group consider a higher perspective – for and by the people – asking if the Commission is prepared to come out for / against the issue – but, that we need to lead – path forward is to recommend changes to legislature.

Tim Young said that Marsy's Law did impact sentencing and the Commission didn't take action then because of the substance – he asked the group to be honest and not frame the opposition behind constitutional objection. He also said that fentanyl is an opiate – bulk weight v dosage – single gram is 5-10,000 daily doses – he can't find a single case that hasn't been charged as trafficking.

Judge McIntosh expressed his concerns about presentation as only as a drug issue. Other crimes are impacted and the will of the people to put on ballot sounds good, but outcome is not. The other aspects are being overlooked and there are serious consequences – as a drug court judge – strong concerns.

Jillian Boone said that the Commission should take comprehensive look at the elements – all felonies impacted – it is much more than a drug crime reduction. The role of the Commission is to educate the public v indoctrinate. The Commission is a neutral unbiased credible resource that people trust.

Senator Thomas reminded members that a number of states done similar and discouraged taking a position, to instead make recommendations.

Judge Spanagel noted that the signatures for the ballot were funded by groups outside of Ohio. He also noted that the propoganda was misleading and the details of the amendment were often not discussed.

Vice-Chair Selvaggio clarified the motion and took a roll call vote of Commission members. The motion carried, 15-6, 9 not present. Roll call vote record attached.

Vice-Chair Selvaggio then took a roll call vote of the Advisory Committee. The motion carried 8-2, 9 not present. Roll call vote record attached.

APPELLATE REVIEW

Judge Gallagher and Scott Shumaker updated members on the work of the committee. Mr. Young noted that the work product has not yet been voted on by the Sentencing and Criminal Justice Committee. Jill Beeler also noted that she serves on the working group and that while they have a good working draft, there are additional changes that should be considered before voting. Namely, she has three objections: 1. expanding states ability to have appeal of right; 2. section G(1) – trial court and mandatory findings – last sentence was added.... – it only applies to the sentencing entry; 3. Section A – new language – harmless error standard on top of abuse of discretion standard – why is this language needed?

Vice Chair Selvaggio noted that section A eliminates types of appealable sentences and he suggests the draft be revised to just say all can be appealed. He also noted that he has some concern about Judges making findings – concerned about the difference between making findings v reasons. A finding is statutory, while reasons support statutory findings.

Vice-Chair Selvaggio also said he doesn't support the language for the ability of a person to appeal of Judicial Release. Ms. Beeler offered clarification that the language is included because the state has right to appeal – a limited right to appeal and if there is a hearing on the matter and denied, there is a right. Judge Gallagher also mentioned a reservation about Judicial Release is because the defendant can refile if denied.

Judge McIntosh said, in his opinion, there is a lot of information and issues that need to be vetted before the Commission considers a vote. He recommended the subject be referred back to the sentencing and criminal justice committee for discussion and recommendation.

Judge Spanagel agreed and said the appellate subcommittee will work on draft to present to the Sentencing and Criminal Justice Committee. The group will discuss it at the November meeting and hope to bring it back to the full Commission in the near future.

In the interest of time, Paul Dobson moved to forgo the remainder of the agenda and asked Director Andrews to submit a written report to the Members on the topics listed. Judge DiFranco seconded the motion and the motion carried unanimously. Paul Dobson then moved to adjourn the meeting, seconded by Judge Spanagel and with no objection, the meeting was adjourned by Vice-Chair Selvaggio.

Attachments/Meeting Materials:

Roll Call Vote Record

Written Update – remaining agenda items

Commission Member Roll Call Vote – Issue 1 – September 27, 2018

<u>Motion: To oppose Issue 1 on the basis of it being a constitutional amendment.</u>		<u>For</u>	<u>Against</u>	<u>Not Present</u>
Nick Selvaggio, Vice – Chair	Judge, Common Pleas Court	x		
Chrystal Alexander	Victim Representative	x		
Lara Baker-Morrish	Municipal Association	x		
Kristin Boggs	House of Representatives		x	
Paula Brown	Ohio State Bar Association		x	
Brooke Burns	Attorney, Juvenile – Office of Public Defender		x	
Charles Chandler	Peace Officer	x		
Robert DeLamatre	Judge, Juvenile Court			x
Carl DiFranco	Judge, Municipal Court	x		
Gary Dumm	Judge, Municipal Court	x		
John Eklund	Ohio Senate	x		
Robert Fragale	Judge, Family Court			x
Gwen Howe-Gebers	County Prosecutor - Juvenile	x		
Scott Gwin	Judge Appellate Court			x
Kathleen Hamm	Attorney, Criminal Defense		x	
Stuart Hudson	Director, DRC	x		
Terri Jamison	Judge, Juvenile Court			x
Thomas Marcelain	Judge, Common Pleas Court			x

Commission Member Roll Call Vote – Issue 1 – September 27, 2018



OHIO
CRIMINAL SENTENCING COMMISSION

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

<u>Motion: To oppose Issue 1 on the basis of it being a constitutional amendment.</u>		<u>For</u>	<u>Against</u>	<u>Not Present</u>
Charles "Chip" McConville	County Prosecutor			X
Stephen McIntosh	Judge, Common Pleas Court	X		
Kevin Miller, Staff Lieutenant **Designee for Paul Pride	State Highway Patrol	X		
Aaron Montz	Mayor			X
David Painter	County Commissioner	X		
Bill Seitz	House of Representatives			X
Brandon Standley	Law Enforcement	X		
Kenneth Spanagel	Judge, Municipal Court	X		
Harvey Reed	Director, DYS	X		
Larry Sims	Sheriff			X
Cecil Thomas	Ohio Senate		X	
Timothy Young	State Public Defender		X	
	TOTALS	15	6	9
	15-6 Motion carries			

Advisory Committee Roll Call Vote – Issue 1 – September 27, 2018

<u>Motion: To oppose Issue 1 on the basis of it being a constitutional amendment.</u>		<u>For</u>	<u>Against</u>	<u>Not Present</u>
Jill Beeler	State Public Defender’s Office		x	
Douglas Berman	Professor of Law, OSU			x
Jim Cole	Juvenile Court Administrator	x		
Lori Criss	The Ohio Council			x
Paul Dobson	County Prosecutor	x		
Steve Gray	Chief Legal Counsel, DRC			x
Mark Hurst	Director, OMHAS	x		
Jim Lawrence	OCCA		x	
John Leutz	County Commissioners			x
David Magura	Chief Probation Officer Assoc.	x		
Brian Martin	Research, DRC			x
Cynthia Mausser	DRC	x		
Jason McGowan	Chief Probation Officer Assoc.			x
Michele Miller	Warden, DRC			x
Karhlton Moore	Executive Director, OCJS			x
Executive Director Paul Pfeifer	Ohio Judicial Conference			x
David Picken	Attorney General’s Office	x		
Judge Keith Spaeth	OJACC	x		
Cary Williams	CORJUS	x		
	TOTALS	8	2	9

TO: Commission Members and Advisory Committee

FROM: Sara Andrews, Director

DATE: September 27, 2018

RE: General Updates & Justice Reinvestment – Agenda Items from September 27, 2018 Meeting

— **Recodification**

Commission staff has continued work in partnership with the Ohio Judicial Conference (OJC) to move forward portions of the Recodification Committee recommendations. We have parsed many of the recommendations into two proposed bills, one specific to the drafting conventions to improve readability and those in which a mens rea element was added. The second bill contains changes deemed non-controversial aimed at nonviolent and property related crimes. Both bills are currently being drafted by LSC, and Commission and OJC staff will work with the legislature to identify potential sponsors in the upcoming general assembly.

— **Juvenile Committee**

The Committee recently voted to seek funding for a proposed study of juvenile sentencing practices in Ohio. A small workgroup was formed to look for revenue streams to cover the cost of the study, estimated to be approximately \$60,000. The Committee will also hear about the effect of School Safety Initiatives on juvenile justice issues at its next meeting.

— **FY2020-2021 Budget preparation**

We are approaching the next biennium budget cycle and as such, in preliminary conversations with the Administrative Director and Fiscal staff of the Supreme Court of Ohio, it is recommended that the enabling statutes of the Commission be clarified, modernized and that the budget request and appropriation for the Commission be independent from the Supreme Court of Ohio.

— **Justice Reinvestment**

The Commission sanctioned the Ad Hoc Committee last fall and intends to have proposals prepared the end of this year (2018). The work continues to evolve and is currently focused on four key areas: 1) addiction and behavioral health services; 2) working with law enforcement to reduce violent crime; 3) sentencing review; 4) Ohio's capacity for meaningful data analysis. The next (and, last) meeting of the Ad Hoc Committee is scheduled for November 8, 2018.

— **Bail and Pretrial Services**

Last year, we asked the Commission on the Rules of Practice and Procedure to consider our Bail and Pretrial Services Report and Recommendations that impacted Crim. R. 46. Accordingly, the Commission on the Rules of Practice and Procedure has proposed a number of changes to the Rules of Evidence and the Rules of Criminal Procedure, including Rule 46(B). The revisions suggest that bond should be set based on the least restrictive conditions that, in the court's judgment, will reasonably ensure the defendant's appearance in court, the

protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process. In Crim. R. 46, the Commission also proposed adding an additional item for the court to consider in setting bond – a risk assessment tool.

Earlier this year, the Commission staff applied for a grant in partnership with the Office of Criminal Justice Services regarding data collection for bail and pretrial services with five courts – Parma Municipal, Fairborn Municipal and Common Pleas Courts in Franklin, Lucas and Tuscarawas counties. We recently received notice that we received the grant – the summary description is as follows:

Under the Special Emphasis project, OCJS will collaborate with the Ohio Criminal Sentencing Commission, an Affiliated Office of the Supreme Court of Ohio, to move Ohio municipal and common pleas courts toward better and more comprehensive data collection on bail and pretrial services. OCJS and the Criminal Sentencing Commission will carry out the following activities:

- 1) Assess the quality of local court data and examine the extent to which these records can support analysis of bail and pretrial services;
- 2) Make recommendations regarding data collection based on local needs and the standards identified as most critical in assessing outcome and performance measures for the bail and pretrial services field, and their related court functions; and
- 3) To work with identified courts on early implementation of these recommendations.

Updates are available on the Commission website
<http://www.supremecourt.ohio.gov/Boards/Sentencing/>

2018 Full Commission Meeting Dates
Thursday, December 13, 2018 Riffe Center – 31st floor