

# **OHIO CRIMINAL SENTENCING COMMISSION**

65 South Front Street · Fifth Floor · Columbus · 43215 · Telephone: (614) 387-9305 · Fax: (614) 387-9309

Chief Justice Maureen O'Connor  
Chair

Sara Andrews  
Director

AGENDA April 23, 2015  
Moyer Judicial Center, Room 281

**9:30a            Call to Order & Roll Call of Commission Members, Advisory Committee  
                    Vice-Chair Marcelain**

**9:40a            Approval of Minutes from March 19, 2015  
                    Vice-Chair Marcelain**

**9:45a            Welcome and remarks from Chief Justice O'Connor**

**10:15a           Appellate Review & Recommendation – \*Action Item, Vote  
                    Jo Ellen Cline will give an overview  
                    Discussion & vote led by Vice-Chair Marcelain**

**Review Commission priorities, identify time lines & subcommittees  
Sara Andrews**

**12:00p           Food for Thought – Lunch provided for those who reserved one**

**12:30p           Priorities discussion continued, if necessary & Director's Report  
                    Sara Andrews  
                    -Quarterly Report & Updates**

**Member Updates – All**  
*Brief* (3 min) update for the good of the order from Members so inclined

**Adjourn**

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## Priorities for the Commission as voted March 19, 2015 meeting

### General:

1. Clarify what is the precise role and function of the Criminal Sentencing Commission
2. Consider death penalty task force recommendations
- ~~3. Need to find an easier, cheaper, and more efficient way to make court hearing transcripts available to the parties involved in a case.~~
4. Increase options for non-violent drug offenders to be placed in community based programs – **Category created for recommendations specific to non-violent drug offenders.**
5. Appellate Review
- ~~6. Prosecutor and defense counsel access to presentence investigations, recommendations and the ORAS score.~~
- ~~7. Consider reducing the length of probation terms for low level felons. Consider the length of probation term close to the length of an actual sentence.~~
8. Review how probation violations for fines and restitution are dealt with, consider decriminalizing nonpayment of fines and costs.
9. Remove Halfway Houses from ORC 1.05 D (2). The only place in the ORC that defines Halfway Houses as sentencing serving facilities is ORC 1.05. The reference to the halfway houses in this section should be deleted, as it is in conflict with the other multiple definitions.

## Data Collection, reports and informational resources:

### 10. Data Driven Oversight of sentencing & corrections reform:

- ~~a. Require greater accountability from state agencies, and provide ongoing data driven oversight of sentencing and corrections reform~~
- b. Sentencing Commission as clearing house for proposed criminal justice legislation
- ~~c. Provide better behavioral health data among Criminal Justice partners~~

### 11. Marijuana penalty review and data collection

### ~~12. Review application/prosecution of ORC 2923.32 engaging in pattern of corrupt activity – is it being overextended?~~

### 13. Review Transitional Control Program to determine if there are any policy or law changes needed to increase participation by inmates in the Transitional Control Program.

## Sentencing and Recodification:

### Penalties:

- 14. Consider making it mandatory for individuals with mental health issues to be placed in community based programs, especially if they committed low level and non-violent offenses. How do we provide services for individuals with drug dependencies? **Moved to non-violent offender category.**
- 15. Non-Violent Offenders - Ensure fairness and certainty in sentencing; Require supervision for offenders leaving prison; Focus corrections resources on high-risk offenders; High rates of incarceration, growing correctional populations, and over-extended judicial caseloads; Offenders on parole or probation being sent back to prison for breaking rules of their release, not for committing new crimes. **Moved to non-violent offender category.**
- 16. Drug penalties – possession v. trafficking – restructure controlled substance offenses - **Moved to non-violent offender category.**

17. Drug penalties – mandatory sentences \*note: 2011 monitoring report recommendations, October 2013 meeting discussion; November 2013 meeting discussion and memo ‘prison crowding’ dated 11-18-13:

*“Drug Penalty Sentencing Guidance: During the so-called “War on Drugs” era (mid-‘80s to mid-‘90s), we saw significant violence associated with the drug trade. S.B. 2 was enacted at the tail end of that era. Reflecting the times, the bill retained mandatory sentences already in place, although it gave the judge discretion to set the actual terms. It also created sentencing rules for drug offenses that are more punitive than that for other offenses at the same felony levels.*

*§2929.13 generally creates a rebuttable presumption in favor of prison for F-1s and F-2s (div. (D), no particular guidance on F-3s (div. (C)), and guidance against a prison term for many F-4s and F-5s (div. (B)). Drug offenses differ. Former law often pushed offenders away from div. (B) toward prison and into mandatory penalties at lower levels than non-drug offenses.*

*At the Commission’s suggestion, H.B. 86 partially equalized the guidance by offense degree for many F-4 and F-5 drug offenses and removed many of the mandatories that existed at the F-3 level for drugs. The sky didn’t fall. However, the Code still treats drug and non-drug differently in these categories:*

*Mandatory Instead of Presumption in Favor: Almost every F-1 & F-2 drug offense.  
Presumption in Favor instead of Neutrality under Div. (C): Most F-3 drug offenses.*

*Drug offenders routinely constitute anywhere from a fifth to a third of prison intake in Ohio, so any additional equalization of drug and non-drug penalties could be significant. Remember: eliminating the distinctions between drug and non-drug cases would not entail reducing the degree or penalty range of any drug offense. The same prison terms would still be available, albeit not necessarily mandated.*

*Should any of these offenses shift to a higher degree of felony?*

*If not, should the guidance be the same for these drug offenses as for non-drug offenses at the same felony levels?”*

18. Trace Cocaine Levels - time to address the misdemeanor-like "dumbing down" of our felony drug offenses \*note – 2011 sentencing commission recommendation:

*"The two most commonly abused street drugs in Ohio are marijuana and cocaine. Many low level marijuana offenders fall into misdemeanor categories and don't come to prison. But even the most microscopic amount of cocaine can be prosecuted as a felony.*

*Some courts already fudge on the topic, discouraging felony charges in trace amount cases, but most don't. One thought is to set a misdemeanor penalty or limit the F-5 felony sanctions for very small amounts of cocaine. Admittedly, it's a hot-button issue. But it would ease prison crowding and partially address statistical racial imbalance (more blacks than whites come to prison for both crack and powder cocaine in Ohio). We can't be naïve to the likelihood that the offender possessed a larger amount and was nabbed late in the possession cycle. But our penalties are based on the amount found. The "gateway" drug argument—which may or may not be valid (tobacco and alcohol being more likely gateway drugs)—must be discussed. If misdemeanor penalties were considered, we can't ignore that felony courts have a broader range of drug treatment options available. And we must be vigilant not to exacerbate local jail crowding in the process.*

*Alternately, surveys show there is a measure of public support for treating low-level drug violations as health concerns rather than as crimes. That, too, is controversial, but, perhaps, worthy of consideration."*

19. Revise or eliminate the sections in the O.R.C. that provide for an operator's license suspension as a sentence for drug convictions.
20. Address felonization of misdemeanors and increasing lengths of sentence for existing felonies since adoption of new criminal sentencing code (SB2) in 1996.

## **Sentencing and Recodification:**

### **Simplification:**

21. OVI law review & simplification
- ~~22. ORC 2911.02(A)2 and 3 robbery: The definition of "force" and inclusion of the language "fleeing immediately after" allows a simple shoplifting into a robbery by aggressive apprehension techniques.~~
- ~~23. ORC 2903.11 felonious assault, felony 2 and ORC 2903.12(A) aggravated assault F4: problem typically arises in mutual combat (or clearly provoked but maybe not self defense) that results in the "loser of fight" with "serious physical harm"(usually facial injuries from punch). The "loser" becomes the "victim" and the "winner" becomes the defendant with felonious assault charges.~~

~~There is no self defense for mutual combat and one cannot consent to an assault in Ohio. Even if mitigating circumstances, the original charge is a F2, so often reluctant to reduce to F4 due to perception F2 down to F4. Also a close reading of aggravated assault requires “deadly force” so arguably the punch that causes serious physical harm (broken nose) even if provoked by the victim as described in ORC 2903.12 would not neatly fall into the reduced charge unless “deadly force” is used.~~

24. ORC 2951.041(F) Intervention in lieu of conviction – allow the courts discretion to continue this diversion program if the case warrants another chance. The statute seems to say otherwise.
25. Clarify sentences for ORC 2907.02 Rape....especially under ORC 2907.02(A)1(b)....section ORC 2907.02(B) and/or perhaps sentencing commission can work on a chart as we have with other statutes (ie drugs and DUI).
26. Consider revision to ORC 2950.04 and 2950.99 Failure to Register due to inequities that can result with the “strict liability” standard applied **and include review of all residency requirements.**

## Juvenile Justice:

~~27. Review juvenile representation procedure/practice, especially for kids who can't afford an attorney. Better management process for the time a public defender spends with a child, avoid meeting with these kids for brief periods of time right before a hearing and ensure that private space is available for public defenders to meet with kids.~~

~~28. Clarify jurisdiction of the juvenile court.~~

29. Juvenile extended sentence review

~~30. Further reform juvenile sentencing to enhance a behavioral health treatment approach and data collection on behavioral health needs~~

31. Reduce use of mandatory shackling

32. Eliminate or limit mandatory bind-over by giving judges the discretion to determine when a child should be transferred to adult court.

33. Eliminate or limit mandatory sentences in the juvenile justice system.

34. Address Juvenile Court Costs

35. ~~Remove~~ **Amended to Review and combine with #37** the mandatory minimum firearm 1-5 year specifications and replace them with discretionary specifications.

36. Clarify Juvenile Confinement Credit

37. Review and revise RECLAIM public safety beds i.e.) firearm specifications

## Recommendations from the floor:

~~1. Consider attorney representation for juvenile offenders.~~

2. Review offenses mandating limited or no driving privileges.

3. Review expungement eligibility, filing times and general collateral consequences – consider an automatic removal of non-violent offenses after a period of time, ie. 25 years

## **DRC handout at the meeting: Ideas for Sentencing Commission consideration:**

1. Find a way to restore ORC presumption and appellate language from before the Foster decision.
2. Review DRC's Probation Improvement and Incentive Grant Program and the SMART program as a way to move toward a RECLAIM structure for all non-violent F3's, F4's and F5's.
3. Review all offenses made felonies or modified for much more extensive use over the past 25 years and review all felonies that have been upgraded to higher levels to see if lower penalties are more appropriate. **Combine with approved recommendation #20 and include review of penalties that have been reduced.**
4. Consider mandating Transitional Control exit for all Definite Sentence inmates; this would include a new penalty for those who fail to cooperate while on TC status. **Combine with approved recommendation #13.**
5. Change the sentencing statutes so that commitments are to DRC, with DRC allowed to sort those committed to DRC among appropriate alternatives, ranging from intensive community supervision/ monitoring, CTC's, CBCF & HWH, and prisons of different sorts.

One of these that could easily be estimated would be # 4, with a bed savings of about 750 at present levels on persons committed to prison. Number 1 could also be estimated, with a reduction of up to 6,000 achievable over a decade. The other three proposals are potentially very fundamental shifts in the CJ structure, and change in impact could be at least 5,000 with moderate changes in the code.

Regarding #3, the chart comparing commitments in 1993 and currently, rising from a few hundred to over 4000, has been circulated before. Not circulated is a recent observation as to how many offenses have been shifted to the felony 3 level, from 5.5 % in 1993 (pre-SB 2 equivalent) to about 30 % in most recent commitment years. We intend to explore in more detail on how this shift took place.



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## **Recommended Priorities for the Commission as voted March 19, 2015 meeting**

The recommendations of the membership of the Ohio Criminal Sentencing Commission and its Advisory Committee are prioritized by time frame and subject matter.

1. Time frame categories:
  - a. Immediate: Three months or less
  - b. Short Term: Three to six months
  - c. Long Term: Six months to one year
  - d. Extended: More than one (1) year
2. Subject matter committees:
  - a. Criminal Justice
  - b. Sentencing
  - c. Data Collection/sharing
  - d. Juvenile Justice
  - e. Executive:

It is recommended that each committee consist of a chair, a vice chair and individual members. The chair of each committee, the Vice Chair of the Commission and the Director will comprise the Executive Committee. The Chair of the Commission serves as an ex officio member.

The committee chairs will be a Commission Member or an Advisory Committee member and staffed by the Criminal Sentencing Commission. Committee membership may include individuals outside of the Sentencing Commission Members and its Advisory Committee that have a vested interest in the Commission's work.

It is proposed that the Sentencing Commission and its Advisory Committee adjust the monthly meeting schedule to accommodate the work of the committees. At the monthly meetings the Committee Chair or the Chair's designee will report on the committee's progress.

The May 2015 meeting of the Sentencing Commission and its Advisory Committee will be cancelled to allow the committees to meet. The next meeting of the Sentencing Commission and its Advisory Committee will be June 18, 2015 and thereafter a quarterly in-person meeting. In the meantime, the committees will meet as needed – in person or by conference call.

## **Immediate priorities – three months or less:**

### **Criminal Justice Committee:**

1. Clarify what is the precise role and function of the Criminal Sentencing Commission.
2. Consider death penalty task force recommendations.
3. Appellate Review – recommendations for vote April 23, 2015 meeting.
4. Remove Halfway Houses from ORC 1.05 D (2). The only place in the ORC that defines Halfway Houses as sentencing serving facilities is ORC 1.05. The reference to the halfway houses in this section should be deleted, as it is in conflict with the other multiple definitions.

### **Sentencing Committee: none**

### **Data Collection/Sharing Committee:**

1. Marijuana penalty review and data collection (info collected).
2. Address felonization of misdemeanors and increasing lengths of sentence for existing felonies since adoption of new criminal sentencing code (SB2) in 1996. Review all offenses made felonies or modified for much more extensive use over the past 25 years and review all felonies that have been upgraded to higher levels to see if lower penalties are more appropriate. Review any felonies reduced in the same period.
3. Clarify sentences for ORC 2907.02 Rape....especially under ORC 2907.02(A)1(b)....section ORC 2907.02(B) and/or perhaps sentencing commission can work on a \*chart as we have with other statutes (ie drugs and DUI).
4. Consider revision to ORC 2950.04 and 2950.99 Failure to Register due to inequities that can result with the “strict liability” standard applied and include review of all residency requirements.
5. Review offenses mandating limited or no driving privileges.

### **Juvenile Justice Committee: none**

## **Short Term priorities 3 – 6 months**

### **Criminal Justice Committee:**

1. Review expungement eligibility, filing times and general collateral consequences – consider an automatic removal of non-violent offenses after a period of time, ie. 25 years. Also consider internet accessibility and status of records.

### **Sentencing Committee:**

1. OVI law review & simplification.
2. ORC 2951.041(F) Intervention in lieu of conviction – allow the courts discretion to continue this diversion program if the case warrants another chance. The statute seems to say otherwise.
3. Find a way to restore ORC presumption and appellate language from before the Foster decision.

### **Data Collection/Sharing Committee: none**

### **Juvenile Justice Committee:**

1. Juvenile extended sentence review.
2. Eliminate or limit mandatory bind-over by giving judges the discretion to determine when a child should be transferred to adult court.
3. Eliminate or limit mandatory sentences in the juvenile justice system. Review the mandatory minimum firearm 1-5 year specifications and replace them with discretionary specifications.
4. Address Juvenile Court Costs.
5. Clarify Juvenile Confinement Credit.

## **Long Term Priorities 6 – 12 months:**

### **Criminal Justice Committee:**

1. Review how probation violations for fines and restitution are dealt with, consider decriminalizing nonpayment of fines and costs.

2. Review Transitional Control Program to determine if there are any policy or law changes needed to increase participation by inmates in the Transitional Control Program. Consider mandating Transitional Control exit for all Definite Sentence inmates; this would include a new penalty for those who fail to cooperate while on TC status.

#### **Sentencing Committee:**

1. Increase options for non-violent drug offenders to be placed in community based programs
  - a. Consider making it mandatory for individuals with mental health issues to be placed in community based programs, especially if they committed low level and non-violent offenses. How do we provide services for individuals with drug dependencies?
  - b. Ensure fairness and certainty in sentencing; Require supervision for offenders leaving prison; Focus corrections resources on high-risk offenders; High rates of incarceration, growing correctional populations, and over-extended judicial caseloads; Offenders on parole or probation being sent back to prison for breaking rules of their release, not for committing new crimes.
  - c. Drug penalties – possession v. trafficking – restructure controlled substance offenses.
2. Drug penalties – mandatory sentences \*note: 2011 monitoring report recommendations, October 2013 meeting discussion; November 2013 meeting discussion and memo ‘prison crowding’ dated 11-18-13.
3. Trace Cocaine Levels - time to address the misdemeanor-like "dumbing down" of our felony drug offenses \*note – 2011 sentencing commission recommendation.
4. Revise or eliminate the sections in the O.R.C. that provide for an operator’s license suspension as a sentence for drug convictions.

#### **Data Collection/Sharing Committee: none**

#### **Juvenile Justice Committee:**

1. Reduce use of mandatory shackling.

## **Extended Priorities – More than 12 months:**

### **Criminal Justice Committee:**

1. Review DRC's Probation Improvement and Incentive Grant Program and the SMART program as a way to move toward a RECLAIM structure for all non-violent F3's, F4's and F5's.
2. Change the sentencing statutes so that commitments are to DRC, with DRC allowed to sort those committed to DRC among appropriate alternatives, ranging from intensive community supervision/ monitoring, CTC's, CBCF & HWH, and prisons of different sorts.

**Sentencing Committee: none**

**Data Collection/Sharing Committee: none**

**Juvenile Justice Committee: none**

## §2953.08. Grounds for Appeal of Criminal Sentence

(A) **Scope** Any appeal of the sentencing aspects of a felony case ~~involving a court's failure to consider and apply under~~ Chapter 2929. of the Revised Code and related statutes shall be brought under this section. However, nothing in this section precludes an appeal based on ~~due process or other~~ constitutional considerations.

The appellant's ~~merit brief~~ shall precisely delineate how the sentence falls within the limited grounds for appeal specified in this section, including any specific errors by the trial court under ~~division (D)~~ of this section, as shown in the sentencing transcript or judgment entry that forms the basis for the appeal. An error by the trial court that does not ~~adversely~~ prejudice the appellant is not sufficient to sustain an appeal.

~~(A)~~(B) **Defendant's Appeal of Right** In addition to any other right to appeal and except as provided in division ~~(D)~~(E) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right ~~the~~ a sentence imposed upon a ~~the~~ defendant on ~~the~~ ground that the sentence is contrary to law as defined in this section. ~~any either of the following grounds:~~

~~(1) The sentence is contrary to law, as defined in this section. The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:~~

~~(a) The sentence was imposed for only one offense.~~

~~(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.~~

~~(2) The sentence included an additional prison term of more than five years for a repeat violent offender under division (B)(2) of section 2929.14 of the Revised Code that was not mandated by law.~~

~~The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.~~

~~(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the~~

~~Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.~~

~~(4) The sentence is contrary to law.~~

~~(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.~~

~~(B)(C) State's Appeal of Right~~ In addition to any other right to appeal and except as provided in division ~~(D)(E)~~ of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division ~~(B)(3)~~ of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds: the state may appeal as a matter of right a sentence imposed upon a defendant for a felony that is contrary to law, as defined in this section.

~~(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.~~

~~(2) The sentence is contrary to law.~~

~~(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.~~

#### (D) Contrary to Law Defined; Application

(1) As used in this section, a sentence is "contrary to law" if the ~~trial~~ appellate court clearly and convincingly finds that the trial court failed to consider and apply the following provisions, based on the record at sentencing:

(a) The purposes and principles of sentencing under section 2929.11 of the Revised Code;

(b) ~~The Any~~ relevant ~~seriousness and recidivism~~ factors under section 2929.12 of the Revised Code;

(c) The relevant guidance by degree of offense under section 2929.13 of the Revised Code;

(d) The relevant guidance and limits on the length of prison terms under section 2929.14 of the Revised Code.

In addition, a sentence is contrary to law if the court imposed a sentence ~~plainly~~ not authorized by statute ~~for the offense~~.

(2) An appeal, in which an assigned error challenges any sentence as contrary to law appeal shall specify the precise aspects of the statute or statutes that the trial court failed to consider or otherwise violated in imposing the sentence.

If the basis for the appeal is division (D)(1)(b) or (e) of this section, the appellant shall an appeal may only be taken if the appellant shows either of the following:

(a) The sentencing court failed to state reference the factors under section 2929.12 of the Revised Code that were present and persuasive used in selecting the term and to include those factors in the record on appeal; or

(b) The appellant can demonstrate by clear and convincing evidence that the sentencing court stated those factors and included them on the record, but the record does not are not otherwise supported by the record that the stated factors were present. On appeal, the sentencing court's reference to one or more of the section 2929.12 factors is prima facie evidence that the court considered all of the factors under that section and that the sentence imposed is not contrary to law for consistency and proportionality under 2929.11 and 2929.12 of the Revised Code.

~~(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.~~

~~(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.~~

~~(D)~~(E) **Agreed-Sentence Exceptions.** ~~(4)~~ Notwithstanding any other provision of the Revised Code, a sentence imposed upon a defendant is not subject to review under this section if:

(1) the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge; or

(2) ~~A the sentence is imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section. Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.~~

~~(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.~~



~~(E)(F)~~ **Timing** ~~A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an~~ An appeal of a sentence under this section shall be filed to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is ~~pursuant to division (B)(3) of this section~~ is based on an allegedly improper grant of judicial release, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

~~(F)(G)~~ **Record on Appeal** On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

- (1) The trial record in the case in which the sentence was imposed; Any presentence report excluding the recommendation of the writer, if any, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.
- (2) The trial record in the case in which the sentence was imposed; Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;
- (3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed; Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code;
- (4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code. Any psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed;
- (5) Any presentence investigation report requested by either party, excluding the recommendation of the writer, if any. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and

does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

~~(G)~~(H) **Appellate Court Duties**

(1) **Remand for Findings** If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 and divisions (B)(2)(a) and (b) of section 2929.19 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under ~~division (A), (B), or (C)~~ of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) **Standard of Review; Remand** The court hearing an appeal under ~~division (A), (B), or (C)~~ of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

~~The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing.~~ The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may ~~take any action authorized by this division~~ vacate the sentence and remand the matter to the sentencing court for resentencing, on any portion of the sentence in which error is found, if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) [this reference should be to (C)~~(3)~~(4)] of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

~~(H)~~(I) **Appeal to Supreme Court** A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

## §2929.19. Felony Sentencing Hearing

(A) **Required Hearing** The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

### (B) Scope

(1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code.

(2) **Imposing a Prison Term** Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) **Stated Prison Term & Factors** Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term. In imposing a prison term, the court shall state reference, in open court on the record, the seriousness and recidivism factors under section 2929.12 of the Revised Code that were present and persuasive in selecting the term. On appeal, the statement is prima facie evidence that the court considered all of the factors under that section and that the sentence is not contrary to law for consistency and proportionality under 2953.08 of the Revised Code.

(b) **Sentencing Entry Details** In addition to any other information, include in the sentencing entry all of the following:

(i) ~~the~~ The name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms;

(ii) The section 2929.12 factors that were present and persuasive under division (a) of this section;

(iii) ~~if~~ If sentences are imposed for multiple counts, whether the sentences are to be served concurrently or consecutively, and the findings supporting consecutive sentences, if imposed;

(iv) ~~the~~ The name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. If a court imposes a sentence including a prison term of a type described in division (B)(2)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of this section and failed to notify the offender pursuant to division (B)(2)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(2)(c) of this section. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of this section and failed to notify the offender pursuant to division (B)(2)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(e) of this section that the parole board may impose a prison term as described in division (B)(2)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of section 2967.28 of the Revised Code, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in section 341.26 , 753.33 , or 5120.63 of the Revised Code, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(g)

(i) Determine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code. The court's calculation shall not include the number of days, if any, that the offender previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

(ii) In making a determination under division (B)(2)(h)(i) of this section, the court shall consider the arguments of the parties and conduct a hearing if one is requested.

(iii) The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(h)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(h)(i) of this section, and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. Sections 2931.15 and 2953.21 of the Revised Code do not apply to a motion made under this section.

(iv) An inaccurate determination under division (B)(2)(h)(i) of this section is not grounds for setting aside the offender's conviction or sentence and does not otherwise render the sentence void or voidable.

(3) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of section 2950.03 of the Revised Code if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under section 2971.03 of the Revised Code for a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418 , 2941.1419 , or 2941.1420 of the Revised Code.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(3)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (E) of section 2929.14 of the Revised Code, the court shall impose sentence on the offender as described in that division.

(4) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

(5) Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(6) If the sentencing court sentences the offender to a sanction of confinement pursuant to section 2929.14 or 2929.16 of the Revised Code that is to be served in a local detention facility, as defined in section 2929.36 of the Revised Code, and if the local detention facility is covered by a policy adopted pursuant to section 307.93 , 341.14 , 341.19 , 341.21 , 341.23 , 753.02 , 753.04 , 753.16 , 2301.56 , or 2947.19 of the Revised Code and section 2929.37 of the Revised Code, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to section 2929.37 of the Revised Code for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(6)(a)(i) of this section and does not pay the bill by the times specified in section 2929.37 of the Revised Code, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(6)(a)(ii) of this section.

(7) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any information required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose additional sanctions as specified in sections 2929.15 , 2929.16 , 2929.17 , and 2929.18 of the Revised Code. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of section 2929.13 of the Revised Code.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose an additional prison term as specified in section 2929.14 of the Revised Code. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (I)(1) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 of the Revised Code or an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

# OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor  
Chair

Sara Andrews  
Director

## Ohio Criminal Sentencing Commission Meeting April 23, 2015 1<sup>st</sup> Quarter Director's Report

- I. Establish day to day office operation**
  - A. Day to day
    - Collaboration – OJC, retired judges, supreme court resources
    - Library – record retention, archiving, research
    - Public Information – website, OG TV, publications, logo-branding
    - Resources – informational subscriptions – legal, political
    - Internship request
- II. Refresh membership – identify missing elements, confirm interest, fill vacancies**
  - A. Roster
    - common pleas judges appointed
    - replaced Judge Gormley
    - juvenile judicial appointments outstanding
    - senate appointments complete 02-23-15
    - house appointments complete
    - OSBA, law enforcement and municipal prosecutor pending at Governor's office
    - advisory committee additions
  - B. Distribution lists
    - email communication – members, advisory, interested
- III. Rejuvenate meeting decorum**
  - A. Timeliness
  - B. Roberts rules
  - C. Meeting formalities – sign in, name tents
  - D. minutes, audio
  - E. online availability of materials



**IV. Deliver tangible product(s)**

- A. Roster
- B. Quick reference guides
- C. Trend reports – marijuana, prison beds, interstate compact
- D. Appellate review
- E. On line resources

**V. Increase visibility & Gain creditability – members and external, site visits, meetings, testimony, branding**

- A. Task Force on Community-Police Relations
- B. OJC - Legislative Committee, Criminal Law & Procedure Committee, Municipal Court & DRC meeting, OJC Retired Judges CLE
- C. Recodification group collaboration
- D. Site visits – Ross, Pickaway, Champaign, Delaware, Fayette
- E. Attorney General – OHLEG steering/advisory, BCI&I crime and trends
- F. Ohio Justice Alliance Community Corrections (OJACC) – membership, collaboration
- G. Interstate Compact Adult Offender Supervision (ICAOS) – Ohio Commissioner
- H. American Correctional Association – probation and parole committee
- I. Association of Paroling Authorities International (APAI) – workshops in May 2015
- J. National Association of Sentencing Commissions
- K. Ongoing legislative meetings

**Next Quarter Goals:**

- I. Continue to enhance those of 1<sup>st</sup> quarter
- II. Develop committee structure, adjust meeting frequency, formalize agenda to reflect action items
- III. Draft staffing plan, request for reorganization
- IV. Develop contacts/relationships with other state commissions
- V. Draft next monitoring report & subsequent trend report