OHIO
CRIMINAL SENTENCING COMMISSION
Chief Justice Maureen O'Connor, Chair • Sara Andrews, Director

AGENDA December 14, 2017 10:00 a.m.
Riffe Center, 31st Floor

I. Call to Order & Roll Call of Commission Members, Advisory Committee
Vice-Chair Selvaggio

II. Approval of Minutes from September 21, 2017
Vice-Chair Selvaggio

III. Impact of HB86 and Subsequent Sentencing Legislation on the Incarcerated Population in Ohio
Fredrick Butcher, PhD, Case Western Reserve University
Krystel Tossone, PhD, Case Western Reserve University

IV. Appellate Review
Judge Gallagher

V. Committee Reports & General Updates

a. Juvenile (Paul Dobson)
- The committee received a project proposal from the RFK National Resource Center for Juvenile Justice for a multi-county site review of juvenile probation in Ohio. The committee continues to evaluate the best approach to systemic juvenile probation reform and will hear more from those involved with JDAI at its January 2018 meeting.

- Juvenile Data – the committee will hear from Case Western Reserve University researchers at the January 2018 meeting, as they have completed the evaluation of the impact of HB86 and other enacted sentence reform measures.

- Legislative analysis and/or input – expectations and protocol – for the committee and in general.

b. Sentencing/Criminal Justice (Judge Spanagel)
- Bail Reform – The report and recommendations from the Commission have generated interest in potential legislation and the Supreme Court of Ohio will consider the recommendations in the 2018-2019 rule review period.
- Reagan Tokes Act (HB365, SB201, SB202)
  Testimony on 11-28-17
  Chapter 2929 Recod recommendations – Tim Young
- T-CAP – Judge Zmuda & Marta Mudri, Ohio Judicial Conference
- 2929.15 – Marta Mudri, Ohio Judicial Conference

c. Data (Lisa Hickman, PhD – Research Specialist)
   * The data workgroup will provide content expertise and understanding of the legal landscape in Ohio to ensure that data produced by, and for, the Commission serves to enhance and inform our work. Knowledge about data analyses is not needed (but welcome).

d. Externs (Lisa Hickman, PhD – Research Specialist)
   * Shelby Slaven, Moritz College of Law Master of Study in Law, 2018 & John Glenn College of Public Affairs Master of Public Administration, 2018
   * Hayden Capace, Moritz College of Law Grad 2017 & admitted to the Bar November 2017
   * Shane Farnsworth, Development Director – Morrow County & John Glenn College of Public Affairs, MA Candidate 2018
   * Mike McManaway, Assistant Director – School Employees Retirement System of Ohio & John Glenn College of Public Affairs, MA Candidate 2018

VI. Director's Report
   a. Staffing Update
   b. NASC 2018
   c. JRI 2.0 – Patrick Armstrong and Carl Reynolds

VII. Adjourn

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

2018 Full Commission Meeting Dates

Thursday, March 15, 2018 *Riffe Center – 31st floor*

Thursday, June 21, 2018 Ohio Judicial Center, Room 101

Thursday, September 20, 2018 Ohio Judicial Center, Room 101

Thursday, December 13, 2018 *Riffe Center – 31st floor*

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Operation & Leadership

Committees of diverse membership – including members outside of the Commission and its Advisory Committee – and Ad Hoc Committees meet regularly, while the full Commission meets quarterly. The next full Commission meeting is December 14, 2017. Chief Justice O'Connor chairs the Commission and the Vice-Chair is Judge Nick Selvaggio from the Champaign County Court of Common Pleas.

I. Juvenile Justice – Chair Paul Dobson, Wood County Prosecutor

Juvenile Probation – The committee received a project proposal from the RFK National Resource Center for Juvenile Justice for a multi-county site review of juvenile probation in Ohio. The committee continues to evaluate the best approach to systemic juvenile probation reform and will hear more from those involved with JDAI at its January 2018 meeting.

Juvenile Data – the committee will hear from Case Western Reserve University researchers at the January 2018 meeting, as they have completed the evaluation of the impact of HB86 and other enacted sentence reform measures.

II. Sentencing & Criminal Justice – Chair Judge Spanagel, Parma Municipal Court

Bail Reform – The report and recommendations from the Commission have generated interest in potential legislation and the Supreme Court of Ohio will consider the recommendations in the 2018-2019 rule review period.

For its upcoming work, the committee identified the 2925 Drug Chapter, the 2929 Sentencing Chapter and Appellate Review as priorities from the Recodification Committee's Plan. Additionally, the committee will make recommendations regarding T-CAP, 2929.15 probation violator caps and pending legislation including SB201, SB201 and HB365 – the Reagan Tokes Act.

III. Ohio Justice Reinvestment 2.0 Ad Hoc Committee

The Commission is facilitating Ohio's next phase of criminal justice reform through reengagement in Justice Reinvestment (JRI) with the Council of State Governments (CSG) Justice Center. The Commission sanctioned the Ad Hoc Committee at its September 2017 meeting and the JRI 2.0 kick-off meeting was November 9, 2017.

The focus is on the system's "front end" and will include a comprehensive analysis of available data for crime, arrest, conviction, sentencing, probation, incarceration, behavioral health, post-release control and recidivism. CSG Justice Center staff will examine probation, post-release control, and incarcerated population trends; length of time served in incarceration and on supervision; statutory and administrative policies; and availability of treatment and programs designed to reduce recidivism.

This effort will build on the consensus-driven platform of the Commission and ensure Ohio's commitment to the development of policies, practices and legislative criminal justice reforms that maximize public safety, reduce recidivism and wisely spend tax resources.

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SUBJECT: Ohio Criminal Sentencing Commission review and analysis of ???

DATE:

BILL NUMBER:	TITLE:
SPONSOR(S):	COMMITTEE: STATUS:

SUMMARY OF PROPOSED LEGISLATION:

DESCRIPTION OF PROHIBITED ACT – MENS REA, ACTUS REA:

IS THERE EXISTING STATUTE OR LANGUAGE RELEVANT TO THE ISSUE?	CHANGE IN PENALTY:

GENERAL IMPACT:

VICTIM IMPACT:	LOCAL GOVERNMENT IMPACT:

FISCAL IMPACT:

*The Ohio Criminal Sentencing Commission is comprised of 31 members appointed by the Chief Justice of the Supreme Court of Ohio and the Governor, ORC 181.21. The Commission's mission and vision are to enhance justice and ensure fair sentencing in the State of Ohio. Commission Members represent organizations, associations and agencies with an interest in further advancing sound, well-rounded criminal justice policy. The Commission uses a consensus decision-making process when considering new proposals, advancing recommendations and in conducting its business. Commission Members' opinions on a particular bill may not reflect the position of the organizations, associations or agencies they represent and are not intended to substitute consultation with the respective member organization, association or agency.

RELEVANT SUPREME COURT OF OHIO DECISION(S), IF APPLICABLE:

HISTORICAL RESOURCES, IF AVAILABLE:

NOTES:

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HB365 Interested Party Testimony, House Criminal Justice Committee – November 28, 2017
Presented by – Sara Andrews, Director

Chairman Manning, Vice-Chair Rezabek, Ranking Member Celebrezze and members of the House Criminal Justice Committee, thank you for the opportunity to testify regarding HB365 and share an abbreviated historical perspective of sentencing in our State. In acknowledgment of the tragic circumstances that brought us here, God Bless Reagan Tokes, her family and all of those who knew and loved her.

Borrowing from my friends at the Pennsylvania Commission on Sentencing, today's perspective is important because, "Sentencing is the lynchpin of the criminal justice system. Sentencing influences – and is influenced by – events that happen both earlier and later in the chronological progression of a criminal case. Understanding the relationships between those events is crucial." I've done my best to condense 40 plus years into the confines of legislative-committee-hearing-time.

Ohio's sentencing evolution is consistent with national trends – we are not an outlier. So, you may ask, how did we get here?[i]

1970's

In 1974, Ohio criminal code was significantly rewritten based upon the Model Penal Code. It retained indeterminate sentencing with the judge selecting the minimum term from a range set by statute for each of four felony levels. Ohio's eight prisons held 10,707 inmates on July 1, 1974.

Until the mid-1970s, Ohio's criminal code had few mandatory sentencing statutes. The "tough on crime" era began in the late '70s with the enactment of compulsory sentences for certain drug offenses.

1980's

In the '80s, the General Assembly added mandatory terms for a broader array of crimes. The signature bill of the era—SB199 (1984)—mandated longer terms for high level "aggravated" felons, especially on repeat offenses, and for those having guns while committing felonies. Similar legislation added longer mandatory terms to misdemeanor law, with increased penalties for impaired drivers. The end result was eight new sentencing ranges added to the original four ranges from the 1974 criminal code.[ii]

SB199 enacted the most sweeping mandatory terms in Ohio's modern history, the prison population was expected to hit new heights. That, in part, was the bill's intent. As of July 1, 1983, the prison population had risen to 18,030, which prompted Governor Richard Celeste to create the bipartisan Governor's Committee on Prison Crowding.

In its 1986 report, the Committee stalemated over whether the state should build more prisons to meet the challenge, rewrite the felony sentencing structure, or both. The Committee did make several proposals that were enacted or funded by the General Assembly with bipartisan support. Those included creating earned credit program(s), fostering more use of halfway houses, encouraging the adoption of parole guidelines, expanding community-based correctional facilities (CBCF's) and enacting provisions to govern sentencing reductions if an overcrowding emergency occurs (ORC 2967.19).

Ohio also began a half-billion-dollar prison construction program that significantly expanded the capacity of the system over the next decade. Despite a net gain of over 17,000 beds, as new prisons opened, the number of inmates grew to again exceed capacity.

1990's

Governor Celeste put together a second blue ribbon panel of judges, prosecutors, law enforcement officers, legislators, defense attorneys, and state and local officials. By the time the Governor's Committee on Prison and Jail Crowding reported in March 1990, the prison population had reached 31,268 in space designed for 19,848.

In the '90s, the legislature made felonies out of offenses that were formerly misdemeanors (such as domestic violence, nonsupport and impaired driving) and there were dramatic new mandatory terms for sexual offenders. This was also the time of the "Crack Era". The saying was that officials have addressed 10 of the last one drug epidemics.

Mandatory sentencing bills targeted the worst criminals and even before the mandates, judges were routinely sentencing high percentages of these criminals to prison. This began a subtle shift in prison crowding, moving from prison intake (admitting new prisoners to prison) to length-of-stay in prison. Additionally, during this era, the Parole Board grew more cautious, releasing far fewer offenders at their first parole hearings, also contributing to longer length-of-stay in prison.

The number of prison inmates grew by nearly 400% in the 16 years between 1974 and 1990. The second Crowding Committee decided that systemic change was needed. It recommended that the General Assembly create a sentencing commission to develop comprehensive plans to deal with crowding and a range of other sentencing goals including public safety, consistency, and proportionality (punishment to fit the crime).

Acting on the task force's recommendation, the General Assembly created the Ohio Criminal Sentencing Commission later in 1990 as part of SB258. The Commission was created in response to four concerns: prison population and cost, overly complicated sentencing laws, racial disparity in sentencing, and lack of judicial discretion.

1993

The Commission's charge was to create a comprehensive sentencing structure that was proportionate, mindful of public safety, promoted uniformity across the state retained reasonable judicial discretion, incorporated a full range of criminal sanctions, and matched criminal penalties with available correctional resources.

Accordingly, the Commission's first report, a recommended overhaul of felony sentencing, was completed on July 1, 1993**.** The Commission decided against the grid-style matrix, recommended by sentencing commissions in other states and the federal system, in favor of a determinate system based on judicial discretion and the concept of "truth in sentencing."[iii]

The prison population on November 1, 1993, stood at 40,274. The state had spent $850 million on prison construction between 1982 and 1993, and the annual operating cost of the Department of Rehabilitation and Correction (DRC) was $750 million.[iv]

1996 – Truth in Sentencing

The truth in sentencing scheme in Ohio, known as Senate Bill 2[v] became effective July 1, 1996. The legislation established a type of determinate sentencing structure called a presumptive system, that required minimum sentences with judicial discretion from a range of possible punishments. Many felt that SB2 was probably the most honest truth in sentencing scheme enacted in the country because most other states defined "truth" as 85% of the truth.

These changes grew out of:

- A sense that the public found indeterminate sentencing confusing. In practice pre-SB2, "6 to 25" never meant 25 and often didn't mean 6, since parole eligibility came after about 4 years.
- The knowledge that the inmate's actual time served was not determined by the elected judge in a public forum, but by the Parole Board—an unelected body meeting in private.
- A sense that the Parole Board sometimes acted arbitrarily, as Board decisions varied widely.
- A desire to give greater control over sentences to judges, so that all concerned—court, defendant, victims, and public—know that stated sentences equate more closely to time actually served.
- A desire to foster a broader range of correctional alternatives; and
- A desire to make prison populations more predictable for fairness and budgetary purposes.

1997

Shortly after SB2 was enacted, concerns emerged that the sentence ranges authorized for sexual assaults, particularly rape, were inadequate. SB2 set sentence ranges based on the average terms actually served at the time it was developed. But public attitudes regarding sexual offenders were getting tougher. Beginning with HB180, effective in 1997, the General Assembly responded with various measures, culminating in potentially long, indeterminate sentences for certain high-level sex offenders.

2000

As a disincentive for misbehavior in prison, SB2 had what was called "bad time". The Ohio Parole Board, upon recommendation of the prison's warden, could add bad time to a prisoner's sentence. It could only be imposed for behavior that would be a crime outside prison. The statute allowed the Parole Board to assess bad time in increments of 15 to 90 days per incident, up to a maximum of 50 percent of the offender's stated prison term.

In 2000, Ohio's bad time provision was found unconstitutional for appearing to permit an administrative body (the Parole Board) to augment a judge's definite sentence with additional time in prison for a crime.

Following that decision, proposals were drafted, but not enacted, to make clearer that bad time was part of the prison sentence by instructing judges to impose a basic prison term, then adding a disciplinary term that can include bad time and time for post-release control violations. The proposals generally redefined bad time violations to make clear they cover "serious misconduct" in violation of a prison rule, rather than "crimes".

2006 – 2007

A series of United States Supreme Court decisions[vi] led to two 2006 decisions (*State v. Foster*, 109 Ohio St.3d 1 and *State v. Mathis*, 109 Ohio St.3d 54) by the Supreme Court of Ohio that dramatically changed the guidance given to judges by SB2. Generally, those decisions are credited with a steady rise in prison population.

SB2 retained fairly broad judicial discretion because Judges could choose a sanction from within a statutory range. However, the statute required judges to make certain factual findings before imposing more than the minimum sanction, imposing the maximum sanction, or imposing consecutive sentences.

The Supreme Court of Ohio held that the guidelines in SB2 were merely advisory and that judges have full discretion to impose any sentence falling within a statutory range for an offense and no longer need to make findings or give reasons for imposing any sanction falling within that range.

By 2007, "[T]he Ohio Department of Rehabilitation and Correction reported that the prison population was approaching 49,000; projections made before *Foster* were revised upward by 2,150 beds over the next decade and the dramatic cumulative effect of minor changes in individual sentences were highlighted,"[vii] as well as a surprising increase in female offenders and offenders from rural Ohio counties.

2008 – 2011

While prison crowding increased in the years since 1996, it wasn't until 2008 that the population began to exceed pre-SB2 levels. Ohio's prison population topped 50,000 for the first time in 2008.[viii]

For years, the prison population increased as prison intake grew. However, examination of the growth in Ohio's prison population revealed—even with mandatory sentences and scores of new laws that increased penalties for particular offenses—intake, or admitting new prisoners to prison, was not the primary driver (although a factor). Instead, the increasing prison population was and is largely fueled by increases in inmates' average length-of-stay,[ix] or the same prisoners staying in prison longer.

A decade into the implementation of SB2, prisons were crowed, there was a push toward a broader use of the former indeterminate sentences for high-level felons and there was resounding recognition that the felony sentencing code had become more, not less, complex.

As one commentator succinctly put it, "[E]xceptions often swallow rules and make it difficult to read and apply the basic statutes."[x] Individually, each change seems logical enough, but the complexity and cost increase significantly and generally reflect the heightened sensitivities of an individual interest group, rather than careful public policy analysis. During this same time, in 2008, the Commission proposed a simplification to the Ohio Revised Code – by thousands of words and miles of paper.

Also in 2008, to help address prison crowding and preserve scarce resources, Ohio joined a group of more than 28 states in the Justice Reinvestment Initiative (JRI).[xi] The goal was to develop strategies to improve public safety and control costs for taxpayers by prioritizing prison space for serious and repeat offenders and invest some of the savings in alternatives to incarceration that are effective at reducing recidivism among low-level offenders.

By 2011, Ohio faced record budget deficits and record prison populations. Ohio prisons were holding 50,500 inmates, which is 6.5 times the number held in 1974 and 31 percent over its rated capacity, with about 12,500 more inmates than the prisons were built to hold.[xii]

With the assistance of JRI and many other policy makers, legislative recommendations to manage non-violent offenders in the community were crafted while at the same time bills were enacted to increase penalties for

violent and gun related crimes. The subject of length of stay and remedies to "fix *Foster*" were discussed and drafted, but landed on the cutting room floor when the final package was delivered to the Ohio General Assembly.

The proposals in that final package were enacted in House Bill 86[xiii], effective September 30, 2011 and then later supplemented by revisions made in House Bill 487[xiv] (effective September 10, 2012) and by Senate Bill 337[xv] (effective September 28, 2012). A sampling of the provisions included were:

- Raising felony theft thresholds;
- Elimination of the disparity in criminal penalties between crack and powder cocaine offenses;
- Capping sentence lengths for mid-level felony property and drug offenses;
- Eliminating certain sentence enhancements for drug offenders;
- Creating a "risk reduction" sentencing option that allows certain offenders to shorten their time behind bars if they complete assigned programming;
- Expanding judicial release policies;
- Requiring creation of administrative policies to prioritize intensive residential community correction programs for higher-risk offenders and those who otherwise would be sentenced to prison; and
- Requiring courts to use a validated risk assessment tool at various points in the criminal justice process, including at sentencing.[xvi]

2015 - Present

The fiscal strain of burgeoning prisons and costs are pervasive. Between 1990 and 2010, corrections expenditures grew by 400 percent, with only Medicaid outpacing their growth in state budgets.[xvii] Ohio had the 7th fastest-growing prison population in the nation between 2005 and 2015. While at the same time, the Bureau of Justice statistics reported that Ohio ranked third in the nation for the number of people on probation – 1 in 48 adults on probation.

The state's criminal code has also become increasingly complex and fraught with provisions that are exceedingly difficult to administer. Consider that our quick reference guide for felony sentencing is seven pages long and remarkably isn't inclusive of all detail necessary for application. And, further, one provision alone, 2929.14 Definite Prison Terms, is 13 pages long, 100 paragraphs, nearly 8,000 words and includes 85 'ifs'. (credit Justice Center staff 11-09-17).

The Ohio Criminal Justice Recodification Committee (CJRC) was created by the 130th Ohio General Assembly in 2014 to study the state's existing criminal statutes. The CJRC's charge was to recommend a plan for a simplified criminal code, making efficient use of resources through flexible yet consistent statewide policies.[xviii]

The group began meeting in earnest in 2015 and in June 2017 recommended comprehensive changes to the sentencing code designed with three goals in mind: to prioritize prison for dangerous and violent offenders, to incentivize offenders to target and change their behavior and prepare them for reintegration into society, and to empower judges to exercise their discretion to fairly and proportionately sentence offenders, i.e.) recommending an indeterminate sentencing structure.

As of July 2017, the DRC operates 27 institutions, with a FY2018 budget of $1,823,007,660, and the number of people incarcerated was 50,301. On November 2, 2017, Director Mohr said that the institutional count was

49,860, the lowest since March 2013. He also noted that the number is significantly above the funded prison population level for this fiscal year of 49,104. A current number of those on probation is unavailable, Ohio does not collect statewide probation data, but even without that number we know Ohio has one of the largest probation populations in the nation.

What's next?

Reoccurring themes include prison crowding, the complexity of the laws surrounding sentencing, increased funding for and targeted use of community punishments, responding to drug scourges and the preservation of prison beds for the most violent offenders. The reality is that we are suffering from the cumulative effect of tinkering with sentencing structure on limited data sources and a crime-by-crime basis. Continuing to advance criminal justice policy and legislation on narrow circumstances and data does not contribute to public safety or advance the administration of justice.

HB365 addresses the interest of public safety, the preservation of prison beds for the most violent offenders and the fundamental purposes and principles of sentencing. It also presents us with the opportunity for an efficient, timely and comprehensive review of indeterminate versus determinate sentencing and the future of truth in sentencing while considering ways to simplify the governing statutes and the impact of previous legislative enactments. The expectation is, simply stated, proactive recommendations that change lives AND deliver on the fundamental purposes and principles of sentencing (i.e., protect the public from future crime and punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources).[xix]

The leverage that has emerged for such a review includes a revived Sentencing Commission. In the last two years the Commission has worked to develop the internal capacity to assemble and analyze available data about the inflows and outflows of the criminal justice system and has taken the lead for a re-engagement of JRI. It has also engaged in academic partnerships to advance data informed policy through the evaluation and impact of HB86 and other major sentencing related legislation since 2011 with Case Western Reserve University; is exploring the use of predictive analytics in criminal justice law and policy development with the University of Cincinnati; and is collaborating with The Ohio State University Moritz College of Law and John Glenn College of Public Affairs on several projects.

All of that, aided by recommendations from the Recodification Committee and the desire of this Committee and other members of the General Assembly to implement wise, responsible legislation to protect the public signals this is a pivotal time for criminal justice and sentence reform in Ohio. The Commission stands ready to provide a forum for responsive consideration of HB365 and is well-positioned to do so because its only vested interest in the outcome is a collective will to equalize and preserve justice.

Chair Manning, thank you again for the opportunity to testify today and I'm happy to answer any questions that you and Committee members may have.

[i]Much of the historical information from Diroll, David, Prison Crowding: The Long View with Suggestions, 2011, http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf.
[ii]Rauschenberg, Fritz **Sentencing Reform Proposals in Ohio** *Federal Sentencing Reporter*, Vol. 6 No. 3, Nov. - Dec., 1993; (pp. 166-168)
[iii] Rauschenberg, Fritz **Sentencing Reform Proposals in Ohio** *Federal Sentencing Reporter*, Vol. 6 No. 3, Nov. - Dec., 1993; (pp. 166-168)
[iv] http://www.drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/July%202017%20Fact%20Sheet.pdf?ver=2017-07-17-095457-560
[v]Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7163-7814
[vi] Blakely v. Washington, 111 Wn. App. 851 (2002) *rev'd*, 542 U.S. 296 (2004) and United States v. Booker, 375 F.3d 508 (2004) *aff'd*, 543 U.S. 220 (2005).
[vii] Diroll, David, A Decade of Sentence Reform – 2007, http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf
[viii] Diroll, David, Survey of Judges, Prosecutors, & Defense Attorneys and Code Simplification – 2009 http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/MonitoringRpt2009.pdf
[ix] Diroll, David, Prison Crowding: The Long View with Suggestions, 2011. http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf
[x] Diroll, David. A Decade of Sentencing Reform – 2007 http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf
[xi] JRI is a public-private partnership that includes the U.S. Justice Department's Bureau of Justice Assistance, Pew Charitable Trusts, Council of State Governments Justice Center, Crime and Justice Institute at Community Resources for Justice, Vera Institute of Justice, and other organizations.
[xii] Diroll, David, Prison Crowding: The Long View with Suggestions, 2011. http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf
[xiii]http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_86
[xiv] http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_487
[xv] http://archives.legislature.state.oh.us/bills.cfm?ID=129_SB_337
[xvi] http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment
[xvii]http://gppreview.com/2015/10/13/not-all-bad-on-the-criminal-justice-front-crime-sentencing-and-corrections-reform-gains-momentum-across-the-states/
[xviii] http://ocjrc.legislature.ohio.gov/
[xix] http://codes.ohio.gov/orc/2929.11, Purposes of Felony Sentencing

Office of the Ohio Public Defender

Timothy Young, State Public Defender

Recodification Committee	Reagan Tokes Act

• Maximum sentence is calculated by adding 50% of the longest minimum sentence to the minimum sentence
  ○ Ex. Individual is sentenced to 2-year mandatory firearm specification, 10 years for rape, 10 years for aggravated robbery, and 6 years concurrent for burglary
  ○ Minimum Sentence is 22-years (2+10+10 with 6 years for burglary served concurrent)
  ○ Maximum Sentence is 27 years (22 + 50% of 10)
	• Maximum sentence is calculated multiplying the minimum sentence by 150%
	  ○ Ex. Individual is sentenced to 2-year mandatory firearm specification, 10 years for rape, 10 years for aggravated robbery, and 6 years concurrent for burglary
	  ○ Minimum Sentence is 22-years
	  ○ Maximum Sentence is 30-years 150% x (10 + 10)
	  ▪ 2-year mandatory gun spec is not included in the calculation

• Indefinite sentencing applies to all felonies	• Indefinite sentencing applies to felonies of the first and second degree and some third-degree felonies ○ Bill applies to aggravated vehicular homicide, aggravated vehicular assault, sexual battery, unlawful sexual conduct with a minor, GSI, assisted suicide, and robbery & burglary with two or more priors
• There is a presumption for release at the expiration of the individual's minimum prison term for all felonies exception felonies of the first and second degree	• There is a presumption for release at the expiration of the individual's minimum prison term for all felonies
• Judicial Release is available to all individuals serving non-mandatory offenses. Individuals are eligible after 30 days for sentences under 3 years, after 180 days for sentencings 3-5 years, and after serving 50% of a prison term for sentences over five years	• No changes to current judicial release law
• There will be no parole hearings unless an initial determination is made to extend an individual's sentence. If there is cause, the matter is referred for a hearing within six months before one or more members of the parole board or one or more hearing officer.	• DRC may rebut the presumption of release at a hearing. DRC can extend the sentence for a "reasonable" period of time, and conduct multiple hearings throughout an individual's prison term to rebut the presumption of release

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If the sentence is extended, the individual has a right to a full board hearing to review the extension with the assistance of counsel • Parole board must consider the following factor when deciding to extend a sentence (1) whether the individual committed an infraction of the institution that poses a threat and (2) whether individual completed any institutional programming to address all the individual's risk and needs	• Presumption of release can be rebutted by (1) showing that while the individual was incarcerated they committed an infraction or violation of law that poses a threat and demonstrates that the individual is not rehabilitated (2) the individual was placed in extended restrictive housing at any time within the year preceding the hearing or (3) at the hearing the individual is classified as a DRC security level three, four, five, or a higher security level
• Individuals must be released without supervision upon reaching their maximum sentence	• Individuals must be released upon reaching their maximum sentence
• Post-release control is replaced with parole	• Parole is not available for individuals with indefinite sentences
• Parole supervision can be waived for fourth and fifth degree felonies based on a risk-assessment. Non-reporting parole is available for third degree felonies based on risk-assessment. Parole is not to exceed five years for aggravated murder, murder, rape and felonies of the first degree; three years for felonies of second and third degree; and one year for felonies of the fourth and fifth degree	• All individuals released after serving an indefinite sentence must be on post-release control. Five years for felonies of the first degree, three years for second degree felonies that are not sex offenses, three years for third degree felonies that are not sex offenses
• A violation of parole that is a new felony offense can result in the individual serving the remaining prison time imposed until the maximum prison sentence is reached o Ex. Individual is sentenced to 10-15 years and granted parole. Total, the individual will serve 10-15 years in prison even if a parole violation should occur	• A violation post-release control can result in a nine-month prison sentence and the maximum cumulative prison term for all violations cannot exceed ½ of the minimum prison term o Ex. Individual is sentenced to 10-15 years and placed on post-release control. Total, the individual could serve 10-20 years in prison if a post-release control violations should occur
• Individuals confined for felonies of the fourth and fifth degree can earn credit towards early release for up to 15% of their sentence for completing DRC activities and programs	• All individuals sentenced under indefinite sentencing, except those servicing for a sex offense, can earn a 5-15% reduction of their sentence based on the level of offense as determined by DRC for "exceptional conduct while incarcerated"

Office of the Ohio Public Defender

Timothy Young, State Public Defender

Sentencing Schemes in Ohio

Today, Recod, and Reagan Tokes

First Example – Single Count

1 F-1 with a 10 yr sentence

Present law: Sentence to 10 yrs. Could do up to 15 if D violates PRC after release.

Recod: Sentence would be 10-15. D is parole eligible after 10. If violates parole D could serve any remaining time. Case ends if D serves all 15.

Reagan Tokes: Sentence would be 10 -15 yrs. D could serve another 5 on PRC if violated. The maximum potential time is 20 yrs.

Second example – Multiple Counts

3 F-2s max and stacked with 8 yrs on each

Present law: Sentence is 24 yrs. In addition, if D violates PRC could do up to 12 more so maximum potential time is 36 yrs.

Recod: Sentence is 24 – 28. Parole eligible after 24. If violates parole D could serve 4 more (1/2 of single highest felony sentence). Case ends if D serves all 28.

Reagan Tokes: Sentence would be 24-36. D could serve another 12 if PRC is violated. The maximum potential time is 48 yrs.

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Appellate Sentencing Review 12/14/2017

The problems of appellate review of felony sentencing.

Judge Sean C. Gallagher, Ohio Court of Appeals, 8th District

What is the current standard of review for felony sentencing in Ohio?

In *State v. Marcum*, the Supreme Court of Ohio abandoned the abuse of discretion standard and adopted the clear and convincing standard from the language in R.C. 2953.08. This brought the standard in line with the statue.

If Marcum fixed the standard of review, why is there still a problem?

Marcum was problematic for several reasons. Marcum appears to have revived a provision of the 1997 version of R.C. 2953.08(G) that was excised by the legislature in 2000. Thus, *Marcum* is premised on a statutory principle no longer in the statute.

In the 1997 version of the sentencing review statute, the legislature expressly provided that an appellate court may reverse, only "if the court clearly and convincingly finds," among other alternatives, "that the record does not support the sentence." R.C. 2953.08(G) (1)(a), eff. Jan. 1, 1997; *State v. Phillips*, 8th Dist. Cuyahoga No. 77082, 2000 Ohio App. LEXIS 4773, 6 (Oct. 12, 2000)

While the 1997 version of R.C. 2953.08(G)(1)(a) was in effect, courts reviewed the sentencing factors under R.C. 2929.11 and 2929.12 when determining whether the sentence was unsupported by the record. The legislature, however, removed the language of subdivision (G)(1)(a) starting with the version of R.C. 2953.08 effective October 10, 2000.

Did Marcum provide clarity for the term 'contrary to law'?

No. For over twenty years courts have debated the scope and meaning of this term. For some it means a sentence outside the authorized range. For others it means a sentence that failed to consider a mandatory provision in the law. For others it simply means a court didn't consider a statute or didn't give the required weight the court should have given to a statutory principle or factor.

Paragraph 23 of *Marcum* has left the appellate judges and appellate practitioners hanging.

P23 "We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly

and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence."

Why is paragraph 23 in Marcum problematic?

The problem is appellate practitioners and appellate panels are equating a sentence that is "unsupported by the record" with one that is "contrary to law." This is a problem because if you look closely at 2953.08(G)(2)(a) and (b) you'll see there is no review for individual sentences under 2929.11 or 2929.12 under division (a). That section is for specific sentences like consecutive sentences under 2929.14(C)(4). That means the only way to review a 2929.11 or 2929.12 appeal of a sentence under the current version of R.C. 2953.08 is to assert the statute is somehow "contrary to law."

Why is that a problem?

Because in paragraph 7 of *Marcum* the Supreme Court expressly found that the sentence imposed in the case was not "contrary to law." Marcum's received a single ten-year prison term that was within the statutory range. So how do we review a sentence that is not covered by the express provisions of what is deemed "otherwise contrary to law" under R.C. 2953.08(G)(2)(a)?

Is there an explanation for why Marcum went in this direction?

Marcum appeared to be trying to fill the void of the review of sentences not covered under R.C. 2953.08.

Marcum revived the permissible basis for reversing a sentence if the sentence is unsupported by the record, but it was done without regard to the "contrary to law" framework necessary to harmonizing division (G) with division (A) of R.C. 2953.08. Because *Marcum* determined that the sentence was not contrary to law, but the appellate court could nonetheless review to determine whether the sentence was supported by the record, *Marcum* necessarily imposed a review outside the scope of R.C. 2953.08(A), although the appellate review codified in R.C. 2953.08(G)(2) was adopted. Marcum at ¶ 23.

So how does an appellate court determine if the record does not support the sentencing court's decision?

Marcum tells us we should review these sentences under a deferential standard, but many practitioners and appellate panels are left wondering how to apply that standard? Does it mean appellate courts should re-weigh the trial court's sentencing considerations? Should appellate panels just accept a trial court's rationale if the trial court indicated they considered everything? Should there be a difference in reviewing "the record does not support" sentences between concurrent terms and consecutive terms?

Does this problem extend to the review of consecutive sentences?

Yes. In *State v. Foster*, 109 Ohio St.3d 1, the Ohio Supreme Court severed R.C. 2929.19(B)(2) as unconstitutional. At the time, the section provided that "The court shall impose a sentence and shall make a finding that gives its ***reasons*** for selecting the sentence imposed in any of the following circumstances * * *."

Subsequent to *Foster*, with respect to consecutive sentences, *Oregon v. Ice* declared that the Ohio Supreme Court was wrong, however, *Ice* only dealt with consecutive sentences and division (B) went further, so at least parts of that rule were left undecided.

Didn't HB 86 fix this?

No. In HB 86, effective at the end of 2009, the legislature removed the part of division B that required reasons for certain sentences.

Since the reasons requirement was removed from division B, there is no requirement that the trial courts must give reasons before imposing a sentence. This renders any review of consecutive sentencing beyond whether the R.C. 2929.14(C)(4) findings were made tenuous. Many appellate panels still review to see if the record supports the findings, but without reasons, that analysis is suspect. R.C. 2929.19(B) would have to be amended to include a "reasons" requirement if meaningful review is going to take place.

Thus, a trial court is not required by Crim.R. 32(A)(4) to give reasons supporting its decision to impose consecutive sentences.

See *State v. Bonnell*, 140 Ohio St. 3d 209 *, 2014-Ohio-3177, 16 N.E.3d 659, 2014 Ohio LEXIS 1934, 2014 WL 3628449

Is there a case that offers us an example of why this is a problem?

Yes, see *State v. Beverly*, 2d Dist. Clark No. 2015 CA-71, 2016 Ohio 8078. Beverly received a 50-year sentence while his codefendant's received a 13.5-year sentence. The disparity was based on Beverley's prior record. The appellate panel affirmed in a 2-1 vote with the dissent noting: "Beverly's case as approached by the majority is illustrative of the fact that "appellate review of sentencing is under assault."

What's the answer?

We need a new R.C. 2953.08. The best approach is to get rid of "contrary to law" and replace it with something simpler and definable.

What should be in play?

We should require trial courts to identify the R.C.2929.12 factors the court found relevant or persuasive for the sentence imposed. This should at least be done for consecutive sentences so we have something tangible to review. The R.C. 2929.14(C)(4) "findings" are just legal gibberish.

Should the standard go back to an abuse of discretion?

Yes. R.C. 2929.12 already talks about a trial court's discretion so why deviate from that in R.C. 2953.08? We can have an abuse of discretion standard for all sentencing review, but consecutive sentences, the ones that give everyone the most concern, should be subject to making the trial court justify its deviation from a standard concurrent sentence. We could replace the findings language in 2929.14(C)(4) with a requirement that trial judges identify the factors in R.C. 2929.12 and the overriding principles in R.C. 2929.11 that were relevant or persuasive to the sentence imposed. The review of those sentences wouldn't be perfect, but you'd at least have judges articulating why they were doing what they were doing. You'd also have a means for appellate panels to give some deference, but look and see if the sentence is really justified.

Should concurrent sentences within a range be treated differently from consecutive sentences?

Yes. Standard sentences within the proscribed range could still be appealed, but there should be a presumption of proportionality and consistency since they fall within the range determined by the legislature.

Are we creating a Blakely problem by requiring courts to reference the factors?

No. I see no *Blakely* issues with identifying factors. By requiring judges to identify the factors we are not increasing the maximum sentence for any crime. Consecutive sentencing has always been discretionary. I don't read anything in *Blakely* or *Oregon v. Ice* to disturb that view. *Blakely* has unfortunately become like the "boogie man" in a 5 year olds head at midnight. We need to stop thinking everything is controlled by some distorted interpretation of *Blakely*. Ohio statutes are nothing like the Washington statute at issue in *Blakely*.

PROPOSED R.C. 2953.08 12/14/2017

This version allows for appeal of all sentences and uses an abuse of discretion standard for all sentences. It creates a presumption of proportionality and consistency when the sentence(s) fall within the proscribed range for the offense(s) and where multiple sentences are imposed, those sentences are run concurrent to each other.

Where multiple sentences are imposed consecutive to each other the trial court is required to state the relative factors under R.C. 2929.12 that form the basis of the consecutive sentence. Where consecutive sentences are in play, defense counsel at sentencing shall raise those mitigating factors that support the imposition of concurrent terms, while the prosecutor shall raise those aggravating factors supporting the imposition of consecutive sentences. The trial court shall state the factors the court deemed relevant to the imposition of consecutive sentences. The trial judge may consider and identify any other factors not raised by the parties relevant to a particular sentence.

Appeals by the Defendant

(A) Apart from any other right to appeal as provided by this section, a defendant who is convicted or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant only in the following circumstances:

(1) The trial court abused its discretion in determining that the individual felony sentence comports with the principles and purposes of felony sentencing as set forth in 2929.11 and 2929.12 of the Revised Code. ***(This division allows the defendant to appeal the length of any felony sentence and the review of those sentences is by abuse of discretion).***

(2) The sentence consists of prison terms for two or more felony offenses that are ordered to be served consecutively under division (C)(3) of section 2929.14 of the Revised Code. ***(Makes all consecutive sentences appealable).***

(3) The sentence imposed for an offense is not within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14(A) of the Revised Code. ***(This is intended to do away with the***

"contrary to law" language of current R.C. 2953.08(A)(4) and replace it with something more concrete)

(4) The sentencing judge failed to comply with any mandatory statutory duty with respect to the imposition of sentence. ***(This is the "authorized by law" analogue to "contrary to law")***

Appeals by the Government

(B) 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, only under the following circumstances:

(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 not authorized by any provision of the Revised Code.

(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.

(4) The trial court abused its discretion in determining that the individual felony sentence comports with the principles and purposes of felony sentencing as set forth in 2929.11 and 2929.12 of the Revised Code. ***(This division allows the state to appeal the length of any felony sentence.)***

(5) The sentence consists of two or more sentences ordered to be served concurrently despite the applicability of division (C)(4) of Revised Code Section 2929.14.***(This division allows an appeal for the failure to impose consecutive sentences where the government believes consecutive sentences should have been imposed).***

(C) (1) Sentences imposed upon a defendant, including consecutive sentences, are not subject to review under this section if the sentence is authorized by law, a specific term of years or an agreed range of years for the sentence has been recommended jointly by the defendant and the prosecution in the case,

and is imposed by a sentencing judge. ***(Added consecutive sentences and the phrase "agreed range of years" and makes agreed sentences non-appealable.)***

(2) 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.

* * *

(G) (1) When reviewing a felony sentence, the appellate court shall consider the entire record, including any presentence investigation report if available, the offender's conduct, the trial court's statements, the evidence adduced at trial, and the information presented during the sentencing hearing. An appellate court hearing an appeal under any of these sections shall determine whether the trial court abused its discretion in imposing the sentence.

(2) An appellate court hearing an appeal under division (A)(1) or (B)(4) where the sentence(s) are within the proscribed range for the offense or offenses and the offense(s) are run concurrently shall afford the trial court's sentences with a presumption of proportionality and consistency. This presumption is rebuttable by either the defendant or the government.

(3) An appellate court hearing an appeal under division (A)(3) of this section shall determine whether a sentence imposed on an offender is outside the applicable statutory range for the particular degree of offense. If the sentence imposed is outside the applicable statutory range, the appellate court shall vacate the sentence and remand for a new sentencing hearing solely on the affected counts. ***(New section dealing with appellate reversals for sentences outside the statutory range)***

(a) An appellate court hearing an appeal under division (A)(4) of this section shall determine whether the sentencing judge failed to comply with any mandatory statutory duty when imposing sentence. If the sentencing judge failed to comply with any mandatory sentencing duty, the appellate court may reverse the sentence only if it finds that there is a substantial probability that the sentence imposed would have been different had the sentencing judge complied with the mandatory duty. ***(New section stating that if the court failed to comply with a mandatory duty in sentencing, like post-release control or failing to advise a defendant of a fine, reversal is warranted only if the appellate court finds a***

substantial probability that the sentence would have been different had the court complied.)

(b) An appellate court hearing an appeal under division (A)(2) or (B)(5) of this section shall, examine the factors identified in the record by the trial court and under an abuse of discretion standard determine if the factors support the consecutive sentence imposed. The appellate court shall consider at the minimum, whether the sentence imposed is proportional to the offender's conduct, the harm caused by the offense, the offender's relevant, as it pertains to the charges, criminal history, the risk the offender poses to the public, the offender's likelihood of recidivism and the burden the sentence places on state or local resources.

If the appellate court so determines that the consecutive sentences are excessive or disproportionate, or place or an unnecessary burden on state or local resources and that the goal of punishing the offender and protecting the public from future crime by the offender or others can be achieved by a shorter sentence, or that concurrent terms demean the seriousness of the offender' conduct or are insufficient to punish the offender and a longer sentence is necessary to punish or protect, the appellate court may reverse the consecutive sentence and remand for a de novo sentencing hearing. In such a hearing, the trial court may consider the R.C. 2929.12 factors and R.C. 2929.14(C)(4) anew to determine whether some of the terms are to be served consecutively or concurrently.

R.C. 2929.19(B)((2)(a)

(2) 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) 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; ***if a consecutive sentence or consecutive sentences are imposed, identify the relevant factors under R.C. 2929.12 raised by the defendant or the prosecution or independently identified by the trial judge that were determinate of the sentence imposed.***

2953.08 Recodification comments. 12/14/2017

Judge Sean C. Gallagher, Ohio Court of Appeals, Eighth District.

I have served as an appellate judge for over 15 years. I previously served as a trial judge and was a felony prosecutor for a number of years. I offer what follows based on 35 years of direct experience in the criminal justice system. I will focus solely on the specific language in the current R.C. 2953.08 draft proposal.

General Comments:

Role of appellate courts:

While proportionate and fair sentences are a clear goal, any recodification effort should guard against making appellate courts second-tier sentencing tribunals. This trend is already in play. In virtually every sentencing appeal, defendants now ask appellate panels to reject the trial court's discretion and give greater weight to the mitigating factors rejected by the trial court. This is an unsettling trend because appellate panels lack the interaction with the offender, the victim, and the witnesses, all vital aspects of sentencing. We have to avoid the temptation to create a process where we judicially circumscribe the trial court's sentencing discretion and turn appellate panels into fact-centric, sentencing tribunals. One such example is *State v. Nichter*, 2016 Ohio 7268, 10th District Court of Appeals, released October 11, 2016, where a judicial release determination has been made, appealed and reversed on three separate occasions.

Specific Comments on the Recodification Draft:

2953.08(A)(5):

The undefined term "contrary to law" remains in the draft proposal. This should be a non-starter. This undefined phrase has caused more confusion and inequity in sentencing than any other aspect of SB2. It has needlessly cost taxpayers millions of dollars over the past 20 years in transporting inmates back and forth, preparing transcripts and paying attorney fees for resentencing hearings that, in the end, rarely resulted in any meaningful change. To be fair, the appellate judges have contributed to this problem by not defining the parameters of the phrase. Currently, the phrase undermines any limitations on review by opening up everything to a claim that it is "contrary to law." If retained, the term should be defined as "not

authorized by statute." That will at least require an assigned error to point to that aspect of a statute was violated. If the term is not defined, it will become a catch all and will undermine the limitations outlined in 2953.08(A)(1-4).

2953.08(A)(1-4):

This re-draft makes sense by limiting appeals to defined parameters. The only concern is that when applying 2929.13 it will result in longer sentences. For example, currently the maximum sentence for an F-1 is 11 years. Under this proposal a defendant who receives an 11 year sentence will actually be facing up to 16 and ½ years. This will result in an increase in the prison population.

2953.08(B)(3):

Subsection (B)(3) discusses agreed sentences, but fails to address the most common form of sentencing agreements. Those are where a defense attorney and a prosecutor agree on a range, and the judge imposes a sentence within that agreed range. Will those sentences be considered "agreed" sentences?

2953.08(C):

The requirement to seek leave under (C) is empty when you consider that the second paragraph of Section (D) allows for the claim to be included in the merit brief. It then further complicates the review process by suggesting there will be an initial review to determine if a proportionality issue exists. This will require two reviews: one to assess leave and one to assess the merits. In effect, appellate panels will be doing the appeal just to determine if leave will be granted. I would eliminate this section and select those sentences you really want to be appealed and include them under Section (A).

2953.08(E)(1):

The term "authorized by law" in Section (E)(1) should be defined; if not, it will become problematic, similar to the varying interpretations of "contrary to law." I would suggest taking the definition, in part, from *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. A sentence is "authorized by law" and not appealable within the meaning of R.C. 2953.08 only if it comports with all mandatory sentencing provisions. I

would add that a trial judge exercising discretion within a mandatory provision does not make that discretion appealable.

2953.08(G):

The proposed language does not address how, or under what method, an appellate court will review the proportionality of a sentence. Without clarity we will end up having appellate panels being asked to re-weigh what consideration a trial court gave to any relevant sentencing factors. Ohio supposedly gives trial judges the discretion to weigh sentencing factors. We then erode that discretion by allowing appellate judges to substitute their view of what weight should be given to those same factors in a review process that has no formal structure or methodology. This turns appellate review into nothing more than a "smell test" and appellate panels into second-tier sentencing courts. We should expressly give trial judges the discretion to apply the factors based on the record and not disturb them or reweigh them, and only review them to determine if the record supports the discretion the trial judge exercised. In other words, if the court says the defendant has a prior violent record, but the record shows no prior offenses of violence, only then should the appellate panel find error. This approach is consistent with the proposed language in R.C. 2929.12(C), which states: *"With respect to offenses other than capital offenses, the sentencing court shall set forth the rationale, either on the record or in the sentencing journal entry, or both, for imposing the rendered sentence. It shall be presumed that the sentencing court considered all relevant aggravating and mitigating circumstances applicable regarding the offender, each victim, the crime for which sentence was imposed, and the public interest in determining the appropriate sentence, as long as the rationale the court provides does not indicate that those factors were applied incorrectly."* (Emphasis added.)

2953.08(G)(1):

The language in Section (G)(1) giving appellate panels the authority to increase, reduce, or otherwise modify a sentence is problematic. Appellate judges should not be involved in resentencing offenders from the appellate bench. The defendant is not present, and the victim is not present. How could we ever increase a sentence outside the presence of the offender? Good civics dictates that appellate courts should stick to reviewing records

and determining errors, then returning the case to the appropriate level if there is a problem.

2953.08(G)(2):

The idea under Section (G)(2) that the appellate court entry of judgment will become the sentencing entry is bad civics. Trial courts write sentencing entries, and the Department of Corrections has become proficient in reading them. Appellate courts are not sentencing courts and should not be involved in drafting sentencing orders for trial courts. This language also has the problem of the defendant having no right of allocution if resentenced by the court of appeals.

Recodification Proposal Side by Side Comparison

In line with the discussions up to now, below are some of the current priorities centering around indeterminate sentencing, hard to place populations and drug offenses. The chart is meant to solicit feedback from OCCA as the Ohio Criminal Sentencing Commission works to pass components of the Recodification package.

Drug Offenses

Senate Bill 66 – Eklund (R)	**Senate Bill 201 – Bacon / O'Brien (R), House Bill 365 – Hughes (R), Boggs (D)**	**Recodification Proposal (chaired by Judge Pepple)**	**Senate Bill 202 – Bacon & O'Brien (R)**
Makes changes to **Intervention in Lieu of Conviction (ILC)** allowing relapse to be treated at Judges' discretion as opposed to automatic incarceration RC 2951.041 Modifies eligibility criteria to exclude: prior convictions ***[may want to make sure that felony is specified]*** for "offenses of violence," current presenting F3 – F1 charge of "offenses of violence," "aggravated vehicular assault" nor "aggravated vehicular homicide" OVI nor mandatory prison term(s); "corrupting another with drugs," "illegal manufacturing of drugs" nor "illegal cultivation" nor "administration / distribution of anabolic steroids," F4-F1 traffickers nor F2-F1 possession; "tampering with drugs" that resulted in physical harm Alters verbiage from persons eligibility determination to persons **program** eligibility determination	No provision	Intervention in Lieu proposed changes are discretionary by the court. Once referred or have failed drug tests after enrollment in intensive supervision triggers community treatment provider examination. If successful, criminal charges dismissed. If relapse, court retains discretion to continue treatment, sentence or punishment "…with up to 30 days in jail and continue them on treatment."	No provision
No Provision	For F1 and 2 drug abuse offenses that call for a mandatory term of imprisonment, these bills specify that the mandatory will equate to the longest minimum term available in the new	Makes significant changes to RC chapter 2925 that are not addressed in any introduced legislation. Clearly delineates sellers and those "harming others…from the least culpable (those caught in a cycle of addiction)." "**Fentanyl** has been addressed by broadening definition of heroin to include any mixture of the substances; the entire weight of any compound, mixture, preparation, or substance containing any amount of the drug is weighted for the purposes of this chapter. In addition, collateral sxns. With	No provision

	indeterminate offense ranges RC 2925.01 (LL) to (OO)	no real deterrent effect, such as mandatory driver's license suspensions & mandatory fines were eliminated as counterproductive and unduly harsh." Intensive supervision "…was designed to be pathway for treatment options for those caught in the cycle of addiction…If the person has previously been found guilty of a **serious offense of violence***[1] or a sexually oriented offense, the person is ineligible." Consent based. RC 2951.11 Lowers penalties for Illegal assembly or Possession of Chemicals for Drug Manufacture from F3 to F5. RC 2925.061 Targets more serious manufacturers through RC 2925.06	
No Provision	For those convicted of felony drug trafficking it bars extradition RC 2925.02(C), 2925.03(C), 2925.04(C), 2925.041(C), 2925.05(C) & 2925.11(C)	"…possessing a large amount of drugs creates an irrebutable presumption of trafficking…and is sufficient to charge a person with Aggravated Trafficking or Trafficking…**as a predicate felony for felony murder.**" "**Petty trafficking**, Possession of Drugs, & possession of Marijuana are offenses that are eligible for treatment options." & puts the burden on the prosecution to prove sale / trafficking. RC 2925.03 "**Trafficking in Drugs …**deals with F3 drug amounts and contains no presumption of prison (nor) mandatory minimums."	No provision

[1] **Serious Offenses of Violence** are murder, voluntary & involuntary manslaughter, permitting child abuse, kidnapping, abduction, trafficking in persons, sex offenses, rape, sexual battery, Gross Sexual Imposition, Aggravated Arson, Arson, Terrorism, Inciting to Violence, Aggravated Riot, (formerly) Felonious Assault, Child Endangerment, Aggravated Robbery, Robbery and Domestic Violence

Sentencing

Senate Bill 66 – Eklund (R)	**Senate Bill 201 – Bacon / O'Brien (R), House Bill 365 – Hughes (R), Boggs (D)**	**Recodification Proposal (chaired by Judge Pepple)**	**Senate Bill 202 – Bacon & O'Brien (R)**
Adds rehabilitation to the purposes of sentencing	No provision	3 goals: 1.) "Prioritize prison for dangerous & violent, 2.) incentivize offenders to target & change their behavior & prepare them for reintegration…3.) empower judges to exercise their discretion to fairly & proportionately sentence offenders."	No provision
Presumption for community control for F4/F5s and no mandatory minimum terms only if there are no "offenses of violence" nor "qualifying assault offense." AND if there are no prior felony convictions, the presenting offense is an F4/F5, no prior misdemeanant offenses of violence in the last 24 months and DRC is required to offer community control options within 45 days.		"…those that behave well in prison & actively seek out programming have the potential for presumptive release at the min. sentence, limited earned credit and unsupervised release." Changes appeal process and emphasizes the importance of Pre Sentence Investigations RC 2929.61 and 2951.03 respectively Indefinite sentencing applies to ALL felonies.	
Violations of community control sanctions yield CBCF or jail terms			
Earned Credit made available RC 2929.19 (B)(2)(g)(i) & (v)	Institutes Indefinite Sentencing Scheme for F3 – F1s that is NOT retroactive - provides for mandatory minimums, earned credit and the ability for sentencing judge to choose concurrent or consecutive sentences with maximum sentence held in abeyance based on behavior in institution, DRC determination of continued "threat to society," classification at time of hearing is security level 3-5 or higher. Journal entries by sentencing court required. Concurrent/Consecutive specifications defined by RC	"…if a person is sentenced to a prison term that equals or exceeds the jail term on a misdemeanor, the misdemeanor must run concurrently to the prison term…consecutive jail sentences cannot exceed 18 months." Institutes mandatory minimum ranges. "…institutional rule breaking, violence & lack of progress are grounds to hold an offender beyond the minimum, & to impose stringent supervision" upon release. Provides for the ability for sentencing judge to choose concurrent or consecutive sentences. "Then the court will determine the sentences for the specifications, if any, & decide if the sentences	

		for the specifications should run concurrently or consecutively.	
PRC Violation is a prison term sanction that is limited to 90 days down from current 9 months RC 2967.28 (F)(3)	PRC violations remain at 9 months. Adds that a guilty plea "…new prison term is subject to a max. cumulative prison term for all violations that does not exceed one half of the definite term that is the stated prison term originally imposed upon the offender (as under existing law) or, with respect to an indefinite prison term imposed under the bill one half of the min. term included as part of the indefinite prison term originally imposed under the bill on the offender."		

Sex Offenses

Senate Bill 66 – Eklund (R)	Senate Bill 201 – Bacon / O'Brien (R), House Bill 365 – Hughes (R), Boggs (D)	Recodification Proposal (chaired by Judge Pepple)	Senate Bill 202 – Bacon & O'Brien (R)
No Provision	GPS Monitoring in HB 365 only mirrors SB 202	No Provision	GPS Monitoring of all target offenders (may include sex offenders)
No Provision	Database for law enforcement of all target offenders in HB 365 only mirrors SB 202	No Provision	Database for law enforcement of all target offenders (may include sex offenders)
No Provision	New DRC standards for APA case and workloads in line with criteria as outlined by the APPA in HB 365 only mirrors SB 202	No Provision	New DRC standards for APA case and workloads in line with criteria as outlined by the APPA
No Provision	Requires a residential facility for target offenders in HB 365 only, mirrors SB 202	No Provision	Requires a residential facility for target offenders (may include sex offenders)
No Provision	Sexually Oriented Offenses are not eligible for earned credit. HB 365 only: "The bill clarifies that the law's PRC provisions do not apply with respect to a term of life imprisonment imposed by a court…the Ohio Supreme Court held that the plain language of the current PRC provisions requires the imposition of PRC for all F1s and all felony sex offenses, including rape in circumstances in which a term of life imprisonment is imposed. The bill removes from the PRC law the language that was the basis of the decision."	No Provision	No provision
No Provision	No Provision	Added knowledge of minor victims age except in cases of "aggravated rape of a young child." RC 2907.01	No Provision
No Provision	No Provision	Removed felony enhancements for public indecency RC 2907.09	No Provision
No Provision	No Provision	Made changes to dangerous sexual activity charges around transmission of HIV RC 2907.10	No Provision
No Provision	HB 365 Requires inclusionary and exclusionary zones for all target offenders	No Provision	Mirrors HB 365 Requirements on inclusionary and exclusionary zones for all target offenders
No Provision	No Provision	"…judges were empowered to a limited degree to alter classifications or allow deregistration after a period of time to those who conclusively demonstrated they were no longer a risk to reoffend…prioritize registration for those who	No Provision

		remain a danger to the community and not to dilute the registry with offenders who no longer remain a danger to reoffend." Makes changes to registration technology RC 2950	
No Provision	No Provision	Removes residency restrictions RC 2950	No Provision
No Provision	No Provision	"Sexually Violent Predators - The offender is released under this chapter by the parole board, but the sentencing court retains additional punishments to impose if an offender commits a new crime for the rest of the person's life." RC 2971	No Provision
No Provision	No Provision	"Revocation of Release – person … subject to return to prison if the person commits a new sexually-oriented or violent offense. If the person commits a sexually oriented offense, the sentencing court on the new offense shall reimpose the life sentence in addition to the sentence for the new offense…If the new crime the offender committed was a sexually violent offense, the offender is never again eligible for parole and will not be released…" RC 2971.05	No Provision

MISCELLANEOUS ITEMS OF INTEREST:

"Section 2929.21 Criminal Nonsupport…The sentencing court is encouraged, but not mandated, to consider probation with emphasis on employment for a person found guilty of a violation of this section."

"**Section 2921.34 Escape.** While this section was largely unchanged, it was limited in one regard; breaking supervised release was removed as a form of escape."