



CRIMINAL SENTENCING COMMISSION

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

**OHIO CRIMINAL SENTENCING COMMISSION– MEETING VIA ZOOM
FULL COMMISSION MEETING NOTES
December 16, 2021**

MEMBERS PRESENT

Nick Selvaggio, Vice-Chair, Common Pleas Court Judge
Lara Baker-Morrish, Municipal Association
Kristin Boggs, State Representative
Brooke Burns-Jackson, Attorney, Juvenile – Office of the Public Defender
Charles Chandler, Peace Officer
Robert Fragale, Domestic Court Judge
Lewis George, Department of Youth Services
Gwen Howe-Gebers, County Prosecutor
Robert Krapenc, Criminal Defense Attorney
Nathan Manning, State Senator
Brian Martin, Ohio Department of Rehabilitation and Correction
Jennifer Muench-McElfresh, Common Pleas Court Judge
Stephen McIntosh, Common Pleas Court Judge
David Painter, County Commissioner
Larry Sims, Sheriff
Bill Seitz, State Representative
Brandon Standley, Chief of Police
Tim Young, Ohio Public Defender

GUESTS PRESENT

Heather Buchanan, Ohio Attorney General
Iris Jin, Ohio Attorney General
Marta Mudri, Ohio Judicial Conference
Dr. Hazem Said, University of Cincinnati
Bryan Smeenk, Supreme Court of Ohio
John VanNorman, Chief Legal Counsel, Supreme Court of Ohio
Dr. Reggie Wilkinson
Gene Zmuda, Appeals Court Judge

STAFF PRESENT

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



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CALL TO ORDER & ROLL CALL OF COMMISSION MEMBERS

Vice-Chair Selvaggio called the meeting to order.

MEETING NOTES APPROVAL

Chief Standley moved to accept meeting minutes from the September 16, 2021 meeting, seconded by Prosecutor Gebers. Judge Fragale had a question about a reference in the minutes, it was determined not to be a typo. The minutes were approved without objection.

INTRODUCTION OF GUESTS AND RECENT REAPPOINTMENTS

Director Sara Andrews introduced Will Davies, the new Criminal Justice Counsel hire in the office of the Commission, and Lewis George, the Interim Director of the Department of Youth Services. Director Andrews also reported that Commission members Brooke Burns-Jackson, Sheriff Larry Sims, and Chip McConville were recently reappointed by Governor DeWine.

UNIFORM SENTENCING ENTRY AND THE OHIO SENTENCING DATA PLATFORM UPDATES

Judge Selvaggio introduced a discussion on the updates of the Ohio Sentencing Data Platform and the Uniform Sentencing Entries. Director Andrews welcomed and introduced guests present at this meeting related to work on the Data Platform, in particular a legal team from the Supreme Court and the Attorney General's office: Bryan Smeenk, John VanNorman, Heather Buchanan, and Iris Jin.

The Commission awarded two additional JAG awards for 2022-23 for the Ohio Sentencing Data Platform project. The early success of the project is encouraging and acceptance by courts has increased the speed of the process. The first grant is to develop and evaluate a public portal to share the data collection. This will happen through conducting a series of focus groups

The second grant is related to recording the offense code structure, specifically creating a standard Ohio Criminal Offense Code application. This information is crucial, without standard format it is not possible to connect and share information across state. This will create a standard, centralized location for the offense code. To accomplish this, the Commission is partnering with the Ohio Judicial Conference and the Legislative Services Commission.

The strategy to roll out the use of the Method of Conviction form, Uniform Sentencing Entry has been deliberate and iterative. The project governance structure was displayed and Director Andrews reviewed the purpose, and membership, and meeting schedule of each group, including: the Implementation Team, the USE Protocol Update Group, Coordinating Team, Project Team, Implementation Team, Data Governance Policy Work Group, Judges Advisory Group, Governance Board. She invited members of the Commission to join any of the groups.

Introduced Hazem, Judge Zmuda and the legal team to discuss the process and decisions regarding the System Architecture.



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Dr. Said gave a brief overview of the progress and what the project intends to accomplish. He spoke of significant momentum, and highlighted a presentation at the Common Pleas Judges Association on December 3 as a turning point and generated a great deal of interest. Dr. Said discussed the approach the project is taking, specifically using a problem-solving framework: learning, designing, developing, piloting, and deploying. He said they are focused on learning first before engaging. At this point, he has engaged one-on-one with approximately 25 percent of judges in 25 percent of counties in Ohio. Judge Selvaggio described that from his point of view, many judges found the system easy to use. However, he noted that the largest concern from judges is how the data will be used, particularly by members of the public. He then introduced Judge Zmuda to discuss his perspective on this issue.

Judge Zmuda discussed two points on this subject: 1) the application is capturing data that exists but has not been captured in this way, and 2) Given this, there needs to be a discussion who the data belongs to once it is in an accessible format. Judge Zmuda introduced counsel from the Supreme Court and Attorney General: John VanNorman, Bryan Smeenk, Iris Jin, and Heather Buchanan. The Data Governance Workgroup sought their advice about how to manage the data considering public records law. This group drafted, and it has been accepted by the Governance Board, a rule of superintendence related to the public access of the data.

John VanNorman gave an overview of public records law in Ohio according to statute. In 2009, Supreme Court adopted rules of superintendence that govern court data, like public records statute. If you have a record that is maintained or kept by the court, that public access is governed by the Rules of Superintendence. One of the first things was to decide if the data access fell under the public records act or the Rules of Superintendence. This was important because exceptions to public access needed to be carved out and it was needed to know how to best do that. In cooperation with the Attorney General's office, it was determined that the data is governed by the rules of superintendence, as the Commission is an affiliated office of the Supreme Court. A basic rule was needed to explain the Ohio Sentencing Data Platform and VanNorman displayed the proposed Rule 38.01. He then explained that the Rule of Superintendence definition of case documents and an addition to the definition to include documents related to the data platform. The expanded definition was also added to the administrative document's exception to public access rules. In Rule 44, it defines data and outlines exceptions. Exclude documents and data obtained from data platform but with further exceptions: 1. Documents available at the source and 2. Up to the discretion of Commission. If this is adopted, the public would not have direct access to all the documents and data from the data platform. Only access to information via public portal at the discretion of the Commission.

Rule has been passed by Governance Board, and now it is being passed through the Supreme Court's rule adoption process, which is like the legislative process. The proposed rule will go to the Commission on the Rules of Superintendence, which then the Commission votes the rule to move to justices, the rule is then published for public comment and brought back to Commission on Rules of Superintendence which then determines if the rule either moves forward or is fine-tuned and then final recommendations are sent back to the justices.



Judge Zmuda discussed the public portal and the judges' access, and that the workgroup continues to discuss the data governance policies. The Data Governance Policy workgroup is creating policy how data is collected, how it will be utilized. He emphasized that this process does not undermine transparency, but it manages it. Judge Zmuda invited anyone at the Commission that would like to participate is welcome. Many of the details of the public portal will be based on the work of the Data Governance Policy workgroup.

Representative Seitz asked if the proposed rules of superintendence includes if information regarding the formation of the database and this project (for example, the focus group information, etc.). The rule of superintendence only applies to the data collected on the data platform, not the development of the entry or the platform. Representative Seitz wanted to clarify that was the case, because of the reference to the "administrative" section of the Rules of Superintendence. John VanNorman specified that the administrative section was necessary due to the structure of how the public record was written. He wanted to make sure it included administrative documents such as documents that are sent to clerk. This proposed rule pertains only to information that is on the platform itself.

John VanNorman expanded that this is not a novel approach. It is a similar approach to the rules that govern the access to the Ohio Courts Network information. Though it is more liberal, because there will be a public portal accessible to public.

Judge Zmuda reminds that individual sentencing entries are still public and accessible within each individual court and judge. It is just the pieces of information that is sent to the platform that is protected by public access.

Judge McElfresh mentioned that the rule is very broad as to Commission's discretion. She asked about the protocol for determining what is available to the public. Judge Zmuda responded that this is the work of the data policy workgroup. He hopes that the group will have a draft in the first quarter.

Judge Selvaggio reiterated that the platform is easy to use. The judges might benefit from a discussion of how the data will be used, though that is difficult to describe if the policy has not been determined yet. Judge Zmuda reiterated that feedback and questions are always welcome, as well as participation in any of the governance groups.

25 YEARS OF SB2: ROUNDTABLE WORKGROUP & LEGISLATIVE EFFORTS

Judge Selvaggio introduced Reggie Wilkinson to discuss the work of the Sentencing Roundtable Workgroup. Director Wilkinson thanked that workgroup for their diligent participation and input on the discussion. He noted in the discussion that "tinkering" with SB 2 over the last 25 years has made the statute not necessarily reflect what was initially intended. He said the group would like to address ways to moderate what are seen as issues with the SB2 scheme such as the Foster decision. Workgroup decided to look at "low hanging fruit"—things the workgroup has consensus on—to move on first, and then move onto the other areas where it may not be clear of the direction. Dr. Wilkinson does have a document that Director Andrews will forward to the Commission following this meeting. The first issue we discussed was simplification of the record sealing statute. All of these issues will need ratification of the Commission in order to move on to legislature. The second issue is the



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addition of *mens rea* elements to offenses to make code more user friendly, as suggested by the Recodification Committee. The final issue is the removal of unconstitutional code sections due to Supreme Court decisions. Wilkinson added that there are additional issues that will be discussed or should potentially be included in the Omnibus bill and the group is hoping the Omnibus bill can be a vehicle to review these items. These include the modernization of the Commission enabling statute, refinement of Appellate review statute, and some fixes to the “Reagan Tokes Act” for the bill to be clearer and to be enacted in a way that is understandable to everyone. Wilkinson discussed several Commission modernization suggestions. As new developments arise, the Commission will be updated for information and ultimately approval.

Judge Selvaggio thanked Director Wilkinson and asked Senator Manning’s perspective. Senator Manning appreciates being part of the group and the discussion. On the Senate side, they are working hard on these issues. He mentioned that he was glad to see Representative Seitz, as he is working on similar issues in the House. Senator Manning thanked the Legislative Service Commission for their help with the omnibus crime bill as the draft is now over 3,000 pages (many of this are amendments). He anticipates discussing the bills in hearings when return in January. That will involve sponsor testimony and then weekly interested party testimony. Some of the workgroup issues are included in the first draft of the bill; of course, all of them may not stay and other things can be added as it is discussed. Currently, the bill includes a simplification of record sealing, from Representative Rodgers’ HB604, and an option for judges to expunge, not just seal. Manning also noted that all unanimous aspects of recodification committee will be included in the bill. It is also anticipated to include aspects of current HB166, a cleanup of SB201 that expands some Reagan Tokes aspects including removing the RTA required early release hearing. Appellate review is not being included now, but Manning is hopeful that there will be a consensus down the road. Most changes currently under consideration in judiciary are penalty enhancements rather than holistic review of sentencing practices – he noted that focusing on enhancements can often make statutes more complicated, and he hopes this effort will provide an opportunity to simplify those measures.

Representative Seitz appreciates the hard work of Senator Manning, Director Wilkinson, and Representative White on this issue. Thinks four things: 1. Simplify Judicial release 2. Eliminate judicial veto over transitional control. 3. Earned credit 8 to 15 percent 4. Better way of counting jail time credit. Seitz noted that HB166 does include Appellate review provisions and he does not see much pushback on that proposal. Senator Manning responded that three of the points that Seitz mentioned are included in the omnibus bill. Jail time credit calculation is not currently included, but Manning is happy to discuss it for inclusion. Senator Manning will reach back out to DRC regarding the calculation of credit.

Brooke Burns-Jackson asked questions about portions of the code that have been found unconstitutional and if they are only applicable to SB2. Specifically, she referenced a statute about juvenile sex offender registration that was found unconstitutional ten years ago but judges are still using that. Senator Manning is not sure if that specific portion is included, but will send Director Andrews the information as to what exactly is included.



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Representative White gave an update about modernization efforts she is working on with Representative Seitz. She has met with governor and others about the bill and many have strong perspectives on membership. There is a desire to balance representation on the Commission. She noted that it would decrease from 31 to 29 members but would include a member from OMHAS and clerk of court, as well as the Attorney General. In turn, there would be a few less positions for judges.

Judge Selvaggio entertained questions or comments to the panel before Brian Martin's comments. Seeing no other comments, Selvaggio raised a concern about proposals for early release and then suggested that the group perhaps be more aggressive at looking at sentencing. He wants to know why we're chipping around the issue. As a body, the Commission should determine if we want to have definite sentencing in Ohio. And if not, then let's go back to indefinite sentencing and create a clear structure. Director Wilkinson discussed the difference in sentence types and the difficulties of post-release control. It is a major undertaking to re-institute parole to everyone in prison. Then there is the issue of applying to everyone sentenced under current law and new law. Judge Selvaggio noted that judges struggle with how much discretion they have in light of aspects like mandatory sentences on specifications and release mechanisms. While a larger discussion of sentencing may not be possible now, he hopes it is something that the Commission will address in the future

Judge Selvaggio then introduced Dr. Brian Martin from Ohio Department of Rehabilitation and Correction for a presentation of sentencing patterns under S B2.

Dr. Martin introduced his presentation by asking if SB 2 has brought about more consistent and predictable sentencing in Ohio. While there are challenges about lack of consistency and uniformity, these discussions and changes should not result on anecdotal evidence or the outlier cases in the media. In order to have a serious discussion about reforms, it should be based on systematically collected data. Martin noted that this analysis is similar to analysis by the US Sentencing Commission following the Booker decision.

There are two main goals of the presentation: 1) how can we think about lack of uniformity: and 2) present information about a change in patterns over last 20 years (or lack thereof). He began with discussion of average terms over ten years by county on a single offense. He then moved to focus on the range of terms handed down by county on one specific offense: aggravated robbery. In both examples, there is a good deal of variability in sentences by county. He then moved discussion of variation in days served by F5 inmates, broken down by county based on population. Martin discussed that it is also important to understand how those trends have changed over time, and specifically the role of the Foster decision. After Foster in 2006, there has been a movement away from terms imposed at the bottom of the range. Prior to Foster, around 45% of sentences were at the lower end of the range. After Foster, this decreased to a low of less than 30% of sentences at the lower end of the range.

DRC also expected Foster would lead to more consecutive terms being imposed. He displayed data showing an increase in the rate of consecutive sentencing terms from around 30% in 2006 to almost 45% in 2011. HB 86 in 2011 seems to stabilize that growth as it reinstated consecutive sentence guiding in 2011. Both the increase



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in use of top of the range terms, and the increased use of consecutive sentences has increased the average aggregate sentences from by almost a year following 2006. Increases in the average term are seen at every felony level – almost a 6 month increase total. While 6 months might not seem like a large number, Brian showed the group how even a 6-month increase can have a massive impact on overall population levels compared to commitment levels at ODRC. Despite a plunge in commitments following 2007, there was not a decrease in population until TCAP began to be implemented in 2017. This is attributable to the increase in length of stay following Foster in 2006. As an illustration, the average of county level F5 days served per 100K population was broken down between 2000-2005 vs 2007-2017; the average number of days for F5 commitments more than doubled in 2007 to 2017, compared to the earlier time period. The standard deviation also doubled, indicated an increase in variability—and therefore a decrease in uniformity—of sentences. Martin hopes that, in addition to illustrating variability and uniformity in sentences, this displays a way to use more systematic data to inform assertions.

Judge Selvaggio thanked Dr. Martin and entertained questions. Sheriff Sims appreciates the work in putting together the data. However, while those numbers reflect lack of uniformity or lack thereof there are often other factors which effect how individual communities respond to issues in their communities. These factors necessarily vary from community to community and county to county and so he is not sure what expectation is for variation. Representative Seitz applauds the effort and has two take aways: situation would be more dire without HB86 and TCAP. He believes this is a compelling argument to making TCAP permanent and required. Dr. Martin agreed with the impact of HB86 and TCAP. Even though population levels have been constrained, it has increased the variability across the counties because not all counties are in TCAP and counties continue to sentence in different ways and lack of uniformity has increased overtime. There are complex countervailing trends.

Prosecutor Gebers suggested that this presentation does not take into consideration why the person got the nine-year sentence instead of the three-year sentence. There needs to be a consideration of all factors that go into sentencing. For this reason, she does not like the use of “lack of uniformity.” She added that and expansion of TCAP would require more funding for local treatment, as her community does not have an inpatient treatment facility to get specifically women the help they deserve.

Dr. Martin agrees that there are severe limitations regarding the data that is available. The purpose is to begin to show how available data could be used in discussions. Director Andrews noted that this demonstrates why the data platform is so important – it will allow us to supplement the data available. Judge Selvaggio noted the difficulty in objectively evaluating subjective reasoning that is contained in sentencing. Judge McIntosh discussed that maybe we are talking about this at the wrong starting point, discussing how people are being sentenced rather than the number of behaviors that require sentencing. Perhaps there needs to be a discussion about decriminalizing offenses rather than further legislating sentencing.

With no further business for the good of the order, the meeting was adjourned. Motion by Sheriff Sims.