



CRIMINAL SENTENCING COMMISSION

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TO: Ohio General Assembly

FROM: Ohio Criminal Sentencing Commission

DATE: February 15, 2024

RE: Adult Unconstitutional Ohio Revised Code Sections

[R.C. 181.25\(A\)\(4\)](#) directs the Ohio Criminal Sentencing Commission (the Commission) to study the existing sentencing structure of the state and recommend necessary changes. Consistent with the Commission’s statutory mandate, this memorandum is notification to the General Assembly that legislative action may be necessary, as the Supreme Court of Ohio has held the following criminal code sections unconstitutional in whole or in part. While the commission does not offer specific corrections or fixes, the legislature will need to evaluate the purpose of these code sections and decide whether they need to be repealed, modified or rewritten in some way.

2901.08(A)

R.C. 2901.08(A) allows a court to use an adjudication of delinquency or juvenile traffic offender as a conviction when considering appropriate charges or sentence of the person now that they have attained adulthood. The Supreme Court found that it was unconstitutional to use that juvenile record against an adult.

The Supreme Court in [State v Hand, 149 Ohio St.3d 94, 2016-Ohio-5504](#) found that R.C. 2901.08(A) violates the Due Process Clauses of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution because it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult. A juvenile adjudication cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum.

2907.03(A)(13)

R.C. 2907.03 is the offense of Sexual Battery. For the offense of Sexual Battery, only subsection (13) is unconstitutional. Subsection (13) applies strict liability to police officers regardless of the relationship with the victim. This is an instance where the legislature must decide whether the underlying principles of holding a police officer strictly liable necessitates a rewrite of this statute, a repeal of the statute or some other resolution.

The Supreme Court in [State v. Mole, 149 Ohio St.3d 215, 2016-Ohio-5124](#) found that R.C. 2907.03 is generally a valid scheme insofar as it imposes strict liability for sexual conduct on various classes of offenders who exploit their victims through established authoritarian relationships. But subdivision (A)(13) irrationally imposes that same strict liability on peace officers even when there is no occupation-based relationship between the officer and the victim. The Court concluded that R.C. 2907.03(A)(13) is an

arbitrarily disparate treatment of peace officers that violates equal protection under the Ohio Constitution and the United States Constitution.

2953.73(E)(1)/2953.72(A)(8)

The sentence at issue is found in R.C. 2953.73(E)(1) and states, “If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the offender may seek leave of the supreme court to appeal the rejection to the supreme court * * *.” By severing the phrase “seek leave of the supreme court to,” the court removed the offending discretionary-review process. The statute then permissibly reads, “If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the offender may appeal the rejection to the supreme court.”

With regards to 2953.72(A)(8) by severing the text that reads “seek leave of the supreme court to” and “to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals,” the section is left with the direction that “the offender may appeal the rejection.”

The Supreme Court’s solution was to sever the offending language to make the statutes constitutional. Until the legislature makes a decision and adopts or changes the severance that the Supreme Court decided, then the language remains in the Ohio Revised Code.

The Supreme Court in [State v. Noling, 149 Ohio St.3d 321, 2016-Ohio-8252](#) found that R.C. 2953.73(E)(1), which denies appeals of right from rejections of applications for DNA testing in cases in which the death penalty is imposed, is unconstitutional. The court held that unconstitutional portions of R.C. 2953.73 are severed. After severance, R.C. 2953.73 entitles capital offenders to appeals of right to the Supreme Court. Further the Court held that the same analysis applies equally to 2953.72(A)(8).

2950.031 and 2950.032

R.C. 2950.031 allowed the Ohio Attorney General to reclassify registered sex offenders into the new Tier classification system. R.C. 2950.032 required the same reclassification, except for incarcerated sex offenders. The Supreme Court held that the legislature could not give the executive branch a function that is for the judicial branch. Judges had already made the findings and ordered registrations, so the executive could not be given the authority to undo that decision and reclassify.

The Supreme Court in [State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424](#). found that R.C. 2950.031 and 2950.032 violate separation of powers by requiring executive branch to reclassify sex offenders already classified by court order. Only appellate courts are constitutionally permitted to review or modify court judgments. The Executive branch may not reopen final judgments.

For further information or inquiry please contact Melissa A. Knopp, Esq., Director of the Ohio Criminal Sentencing Commission, at Melissa.Knopp@sc.ohio.gov or (614) 378-9311.