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FULL SENTENCING COMMISSION MEETING MINUTES

July 27, 2023 10:00 a.m.

Ohio Judicial Center, Room 101 or Zoom

MEMBERS PRESENT

Sharon L. Kennedy, Chief Justice, Chair
Nick Selvaggio, Common Pleas Court Judge, Vice-Chair
Amy Ast, Director, Department of Youth Services
Brooke Burns, Ohio Public Defender, Juvenile Department
Beth Cappelli, Judge, Municipal Court
Annette Chambers-Smith, Director, Department of Rehabilitation and Correction
Charles Chandler, Peace Officer
Nicole Condrey, Mayor
Robert DeLamatre, Judge, Juvenile Court
Sean Gallagher, Judge, Appellate Court
Gwen Howe-Gebers, County Prosecutor, Juvenile
Latyna Humphrey, House of Representatives
Kristen Johnson, Judge, Probate and Juvenile Court
Robert Krapenc, Attorney, Criminal Defense
Charles "Chip" McConville, County Prosecutor
Stephen McIntosh, Judge, Common Pleas Court
Jennifer Muench-McElfresh, Judge, Common Pleas Court
Rob Sellers, State Highway Patrol
Darren Shulman, Municipal Prosecutor
Larry Sims, Sheriff
Kenneth Spanagel, Judge, Municipal Court
Brandon Standley, Law Enforcement
Vernon Sykes, Ohio Senate
Helen Wallace, Judge, Juvenile Court

MEMBERS ATTENDING BY ZOOM

Teri LaJeunesse, Victim Representative
Nathan Manning, Ohio Senate
Josh Williams, House of Representatives
Donnie Willis, County Commissioner
Tyrone Yates, Judge, Municipal Court

GUESTS PRESENT

In person:

Director Lori Criss, Ohio Mental Health and Addiction Services
Laura Baker-Morrish, Columbus City Attorney
Dustin Ensinger, Gongwer News
Dr. Hazem Said, University of Cincinnati



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Zoom:

Natasha Ewing

Brendon Embry

STAFF PRESENT

Michael Crofford, Research Specialist

Will Davies, Criminal Justice Counsel

Niki Hotchkiss, Interim Director

Todd Ives, Research Specialist

Alex Jones, Criminal Justice Counsel

CALL TO ORDER AND APPROVAL OF MEETING NOTES

Chief Justice Sharon Kennedy called the meeting to order at 10:00 am. Niki Hotchkiss took roll call, and a quorum was achieved. Niki Hotchkiss submitted a change to the May 18, 2023 meeting notes, indicating that Teri LaJeunesse was present via Zoom. Judge Spanagel moved to approve the May 18, 2023 meeting minutes with the correction. Director Chambers-Smith seconded, and the minutes were approved unanimously.

NEW BUSINESS

Judge Selvaggio moved to approve the travel of Interim Director Niki Hotchkiss for the National Association of Sentencing Commission's annual conference. Judge Cappelli seconded the motion, and it was approved unanimously.

OLD BUSINESS

The Commission discussed the Uniform Sentencing Entry and Ohio Sentencing Data Platform (OSDP) project. Chief Justice Kennedy began by stating that Ohio is not a unified court system, and counties run their courts according to home rule. In 1968, the Supreme Court gained rulemaking ability. There are two sets of rulemaking power, the rules of superintendence and the rules of practice and procedure, which cannot substantively change law.

Niki Hotchkiss presented on the OSDP and the contract with the University of Cincinnati School of Information Technology. The project aims to achieve two goals. First, providing courts with legally up-to-date entry templates that meet the statutory requirements, and second, providing a way to collect sentencing information without the burden of additional reporting. Niki gave an overview of the Commission's statutory obligation to study sentencing structure and recommend changes, stating that data collected through the OSDP is necessary to meet these obligations. The system contains 26 templates currently, and is capable of recording certain defendant information, but that is not required.



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Niki then gave a brief demonstration of the system itself, noting that continued development of the system will continue to refine it and make it more useable for judges.

Senator Sykes asked if the data collected contains public information. Niki responded that the sentencing entries themselves are public records, and the documents are available at the courts. The pieces of information are stored in a database, and it is up to the Commission if reports are produced and how they are made available. Chief Justice Kennedy noted that currently 31 judges are using the system, with one judge being in the “production” environment, as opposed to the “staging” environment. There was a discussion related to how decisions are made regarding what data to collect. Chief Justice Kennedy then asked who owns the uniform sentencing entry. Niki responded that the Commission owns the USE, which has been stated in the original project documents. As the project is conceptualized, the data to be collected comes straight from sentencing entry itself. Because Ohio does not have a uniform case management system from which this information can be collected, the OSDP was formed with this goal in mind.

Chief Justice Kennedy asked if it is possible to bifurcate and develop the uniform sentencing entry without data collection. Niki responded that the Commission used to host a hard copy version of the uniform sentencing entry but moved to solely a web-based application due to ease of use and updating. Secondly, it ensures that only the most recent version of the USE can be used and eliminates the need to download forms when they are updated. Dr. Hazem Said stated that the University of Cincinnati could work with the Supreme Court’s IT department, but there is complexity and technical expertise needed. He added that the home rule nature of Ohio’s courts is why the OSDP is complex. This is why the project has taken a slow, iterative approach to make sure judges are ready to use the system. Hazem noted that part of the reason more judges have not signed on is due to not knowing whether the system will be permanent. The data portion of the project was also developed with an iterative approach, through identifying stakeholders, developing rules, and making sure the system was developed in accordance with the satisfaction of its users.

Commissioner Shulman asked if the system was seamless or if it requires additional work on behalf of the judges. Niki responded that some judges have gotten comfortable with it and are entering the information on the bench and that the system was designed to require no additional reporting burdens. Chief Justice Kennedy asked how many judges are using it on the bench. Niki responded that we do not know for sure, but reports are that using the system has been easy. In some places prosecutors are filling in information in some of the modules and the system allows for customizability to make it user friendly. Commissioner Shulman asked if anyone has worked to come up with recommended sentencing ranges. Chief Justice Kennedy responded that the Commission just reinstated the Criminal Justice Committee to study this. There was a brief discussion on what data exists at various sources, such as OCN, OCJS, and the new probation data repository.

Director Chambers Smith asked if we know why judges are not joining the project, if they have declined. Judge McIntosh stated that he did not participate because he did not want to do two systems at one time, committing to the OSDP when he was uncertain if it would be permanent. If the decision were



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made that the system was going to be permanent, Judge McIntosh stated that he would use it and advocate for fellow judges to follow. Chief Justice Kennedy stated that she has heard some judges say that they will not buy into a system which they do not know what data will be collected. The Chief Justice discussed the difficulty of comparing two judges without a PSI. Judge Cappelli asked if any additional judges have joined since August 2022. Niki responded negatively.

Judge Gallagher read prepared remarks on the Uniform Sentencing Entry and data collection efforts.¹ He also spoke on the complexity of the criminal code and the error rate in advisements and computations on Reagan Tokes cases. He advocated for getting control of the sentencing model. Director Chambers Smith noted the need for sentencing entries that are accurate. The Director noted that data collection should not stall the goal of accurate entries. Brooke Burns noted that over a three-year period they had to work to save the state \$14 million just for kids over jail time credit issues. She stated that data collection is important as is the uniformity of sentencing, for the reasons discussed. Judge Cappelli added that if the complexity of sentencing is that great, we should be discussing that. Chief Justice Kennedy advised taking a step back to decide how to bring uniformity to the sentencing entry. Mayor Condrey stated that the uniform sentencing entry is a product that can be developed to provide aggregate, anonymous data, and that some of the data issues can be mitigated.

Judge Selvaggio added that the Commission should keep in mind the number of new judges that come in from election cycles. There are a combination of factors that should be considered, including the number of new judges that will come onto the bench who are more accustomed to using a computer for sentencing rather than a pen and pencil. Judge Selvaggio talked about the complexity of the criminal code requiring a 50+ page sentencing worksheet, and how that will lead to mistakes. He advocated that in the long term, the USE has value in promoting confidence in the judiciary. He also stated that there could be a benefit in importing indictments from the prosecutor's offices to OCN. Niki responded that the Commission did meet with Matrix, but their information is proprietary. She spoke on the need for data coming up consistently in the Commission's past and that existing sources of information are insufficient. Niki suggested a subcommittee to help guide this matter. Niki also spoke about the Offense Code Portal, which seeks to standardize offense coded.. The Commission staff have found that data can often not be aggregated because of the non-uniform status of offense codes. The Commission has often asked for convictions data and told that it cannot be done. So, the Offense Code Portal is a lynchpin tying this project together.

Judge Spanagel reiterated that the USE is a good idea, and that the concern is data being used against judges. Chief Justice Kennedy summarized that the Commission has agreed upon the viability of the USE, and that it comes down to the next steps. There is an immediate need for the chart on jailtime credit on one simplistic form. Judge Gallagher entertained a motion that we hold the contract in abeyance for nine days, and that a subcommittee should identify anonymous data that can and should be collected. The subcommittee should report back to the group on that. He also suggested the subcommittee evaluate

¹ A copy of these comments were shared with Commission staff and are included, in their entirety, as an addendum to these minutes.

whether the uniform sentencing entry can be used to help the Ohio Department of Rehabilitation and Corrections. Judge Gallagher withdrew this motion, reiterating the Commission's ORC 181 statutory responsibilities and issuing his support for a subcommittee to study data.

Judge Selvaggio suggested voting on the OSDP project in parts, with the first part being whether to continue the relationship with the University of Cincinnati as the developer. Dr. Said asked for a committee to sit and learn what UC has developed, as handing over this project would be complex. Director Chambers-Smith moved for the Interim Director Niki Hotchkiss to engage the University of Cincinnati to explore a modified contract to finish the USE and related templates, with a new contract to be brought back to the Commission for approval at the September meeting. Judge McIntosh seconded the motion. The motion was approved. Judge Selvaggio commented that the technological side of the web-based USE is beneficial because it eliminates unneeded portions of the sentencing entries, based on the nature of the case.

Judge DeLamatre spoke on the data discussions that have been held in the juvenile world. He stated that although they have to file reports with the county commissioners and supreme court, it is impossible to aggregate the data. He stated that judges would be convinced to use the forms if they knew that the data would not be collected by someone else.

Director Chambers-Smith asked if the forms live outside of the University of Cincinnati. Dr. Said stated that although the forms are hosted at UC, this does not have to do with data or data collection. The application could have been hosted at the Supreme Court, but was housed at UC for technical reasons. Dr. Said reiterated that the Commission should sit down with UC to learn the technical design.

Judge Sean Gallagher and Senator Sykes moved to sunset the OSDP Governance Board and establish a new subcommittee examining data consistent with the statutory authority of the Commission pursuant to RC 181. Chief Justice Kennedy seconds. The motion is approved.

Director Criss suggests that the Commission evaluates data governance more generally as well in this subcommittee. Director Criss volunteers to chair the subcommittee and Chief Justice Kennedy volunteers to co-chair with Director Criss. Judge McIntosh, Tim Young, Brooke Burns, Bob Krapenc, and Chip McConville also volunteer to join the subcommittee.

Chief Justice Kennedy moved to go into executive session, as follows:

Under the authority of Ohio Revised Code Sections 121.22(G)(1) I move that the Ohio Criminal Sentencing Commission go into Executive Session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official.

Judge Selvaggio Seconds. The motion is passed at 11:42 am. The Commission returned from executive session at 12:03pm.

Judge Johnson moves to approve a 3% raise for the staff of the Commission. Judge Spanagel seconded. The motion is passed, with Judge McIntosh voting no. Chief Justice Kennedy moved to table the discussion of the salary bands for further information for the September meeting. Judge Johnson



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seconded. The motion is approved. Brooke Burns motions to adjourn. Chandler seconds. Approved. The meeting is adjourned at 12:05pm.



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ADDENDUM: Comments of Judge Sean C. Gallagher to the Commission July 27, 2023:

I have spent over 40 years in our criminal justice system with service as a bailiff, probation officer, felony trial prosecutor, trial judge, and for the past 20 years, as an appellate judge. After rejoining the Commission in October 2019 I was appointed Co-Chair of a workgroup tasked with maintaining and updating USE – the Uniform Sentencing Entry project. The goal of USE was to create a standardized sentencing entry, complete with instructions, detailing every felony sentencing requirement for judges in Ohio.

Will Davies, and his predecessor, Scott Shumaker, did an incredible job of working through the minutia of Title 29, the Criminal Rules, and Supreme Court precedent to compile what is now a comprehensive set of sentencing templates. The initial USE template project later transitioned into what we now refer to as the Ohio Sentencing Data Platform (OSDP) project.

I have not been involved in the data or computerization side of the project, but believe those who participated in that segment, including current Acting Director Nikole Hotchkiss, did so with the best intentions of improving public trust and confidence in the judiciary.

Yet, it is undeniable that there are divergent opinions among members of the judiciary, and others, on the topic of data collection and how the contract with UC to secure data was executed.

During my time on the Commission, I asked what the data end of the project would produce and what it would look like. Of course, the simple answer was “It will be data.” But what form will the data take or look like? What areas or types of data will be created? Will it be a comparison between defendants? Between judges? Between crimes? Or is it a comparison of all those and more?

I never felt participants could give a definitive answer to these questions because, like me, they weren’t certain where the project could or would eventually go.

That uncertainty, along with other events, seemed to fuel distrust of the project, particularly among trial judges. That distrust was so strong that some judges began to equate the USE templates, those forms designed to help them with their current day-to-day sentencing entries, as a threat to their judicial independence and declined to use them.

Let me be clear. I believe data compilation is a good idea and something we should strive to achieve. In fact, R.C. 181.25 (and other related statutes) mandates that this body study our criminal justice system and report biannually to the legislature.

But first, we must define what “data” entails. Different people and groups have attached various meanings to that term. It has now taken on a life of its own. Data means completely different things to different people.

Simply put, the data project needs a time out for reassessment. That doesn’t mean we end the relationship with UC, or close out the contract entirely, but before we move forward on spending \$2 million, we need to revisit the contract terms and have a better understanding of specifically what data

will be created, how it will be managed, and how it will be made available to members of the criminal justice system and the public at large. Some of this was discussed in Sara Andrews July 2022 memo, but it really should be decided in advance and agreed to by all the stakeholders before proceeding. Two big areas of concern are the anonymity declaration that many are unaware of, and the algorithmic sentencing claims of the program.

In the end, data should be instructive and not be a weaponized tool to simply attack opponents.

In addition to reevaluating the data project, we must move to fix Ohio's bloated sentencing model. Even with a algorithmic program I question if we can garner usable and reliable data on the rationale for a particular sentence from the existing model. No numeric matrix exists for all the considerations a trial judge goes through in reaching a sentencing decision. A judge explaining their reasoning by way of a worded summary in a journal entry will not seamlessly translate into a data model.

The USE outline is now 50 pages long, and when printed with the entries and instructions, it reaches to nearly 200 pages. Some have criticized the USE program for this astronomical length, but I believe it should be praised for exposing the absurd sentencing process we've created over the past 25 years that undermines the confidence of all participants in the system and creates near impossible hurdles for our Common Pleas Court judges.

R.C. 181.25 also mandates we study the cost of sentencing appeals on the counties around the state. Prior to SB2 in 1996, there was no statutory right of appeal for any sentence in Ohio, yet today, virtually every sentence is appealable at incredible costs to local entities and the State government.

As a first line intermediate appellate court judge I can tell you that the sentencing process has our trial judges under siege. They struggle with overcomplicated statutory and procedural requirements along with a miriad of inconsistent standards on how they should approach these tasks. If the judges are struggling to understand the process, then certainly the defendants are lost as well. We need to act.

This USE document should serve as a wake-up call that reform is needed.