New Judges Orientation: Part II

Common Pleas Track

May 13-15, 2025
Thomas J. Moyer
Ohio Judicial Center,
Columbus

The Supreme Court *of* Ohio
Judicial College

THE SUPREME COURT *of* OHIO
JUDICIAL COLLEGE

New Judges Orientation: Part II – Common Pleas Track
May 13-15, 2025
Thomas J. Moyer Ohio Judicial Center Columbus, Ohio

AGENDA

TUESDAY, MAY 13, 2025

1:00 **Q & A - What's Buggin' Me – as to Trial Protocol and Trial Skills**
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*
Hon. Stephen L. McIntosh, *Franklin County Court of Common Pleas, General Division*
Hon. Matthew L. Reger, *Wood County Common Court of Common Pleas, General Division*
Hon. Cynthia Westcott Rice, *Trumbull County Court of Common Pleas, General Division*

1:15 **Trial Protocol**
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*
Hon. Stephen L. McIntosh, *Franklin County Court of Common Pleas, General Division*
Hon. Matthew L. Reger, *Wood County Court of Common Pleas, General Division*
Hon. Cynthia Westcott Rice, *Trumbull County Court of Common Pleas, General Division*

2:30 Break

2:45 **Trial Skills Workshop**
Hon Sherrie M. Miday, *Cuyahoga County Court of Common Pleas, General Division*
Hon. Donald E. Oda II, *Warren County Court of Common Pleas, General Division* (TBD)
Hon. Nick A. Selvaggio, *Champaign County Court of Common Pleas, General Division*

4:30 Common Pleas Track Adjourns

WEDNESDAY, MAY 14, 2025

8:45 **Q&A - What's Buggin' Me – as to Pleas and Sentencing**
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*
Hon. Stephen L. McIntosh, *Franklin County Court of Common Pleas, General Division*
Hon. Matthew L. Reger, *Wood County Court of Common Pleas, General Division*
Hon. Cynthia Westcott Rice, *Trumbull County Court of Common Pleas, General Division*
Hon. Nick Selvaggio, *Champaign County Court of Common Pleas, General Division*

9:00 **Pleas, including Judicial Participation in Plea Negotiations**
Hon. Nick Selvaggio, *Champaign County Court of Common Pleas, General Division*

10:15 Break

10:30 **Bulletproof Your Convictions**
Hon. Cynthia Westcott Rice, *Trumbull County Court of Common Pleas, General Division*

12:00 Lunch

12:45 After Plea, Before Sentencing
Hon. Stephen L. McIntosh, *Franklin County Court of Common Pleas, General Division*

2:00 Break

2:15 Sentencing and Post-Sentencing Issues
Hon. Matthew L. Reger, *Wood County Court of Common Pleas, General Division*

4:00 Common Pleas Track Adjourns

THURSDAY, MAY 15, 2025

8:45 Q&A - What's Buggin' Me – as to Civil Law and Procedure
Hon. D. Chris Cook, *Lorain County Court of Common Pleas, General Division*
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*

9:00 Civil Law and Procedure
Hon. D. Chris Cook, *Lorain County Court of Common Pleas, General Division*
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*

10:30 Break

10:45 Civil Law and Procedure, continued
Hon. D. Chris Cook, *Lorain County Court of Common Pleas, General Division*
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*

12:15 Lunch **(45-minute lunch)**

1:00 Civil Law and Procedure, continued
Hon. D. Chris Cook, *Lorain County Court of Common Pleas, General Division*
Hon. Joy Malek Oldfield, *Summit County Court of Common Pleas, General Division*

3:00 Program Concludes

FACULTY BIOGRAPHIES

D. CHRIS COOK was elected to the Lorain County Court of Common Pleas – General Division, on November 8, 2016, assumed the office on December 24, 2016, and was reelected to full, six-year terms on November 6, 2018, and November 4, 2024. On January 1, 2023, he was elected to serve as Presiding Judge of the Ten-Judge Lorain County Common Pleas Court. Judge Cook also oversees the felony non-support docket and runs a county-wide driver's license reinstatement program.

Prior to becoming a judge, Judge Cook's primary practice involved litigation, specifically in the area of Attorney Discipline, Consumer Sales Practices Act, and the defense of automobile dealerships. He has tried numerous civil and criminal cases to juries throughout the State of Ohio, in both state and federal courts, including multi-million dollar class action matters and death penalty cases. Judge Cook has been admitted pro hac vice in California, Illinois, and Maryland. He has prosecuted or defended approximately 100 appeals.

Judge Cook Chaired the Supreme Court of Ohio's Board of Professional Conduct in 2023 and 2024, and has been a member of the Board since 2018. He is a member of the Ohio Supreme Court's Judicial Curriculum Committee; and a member of the Ohio Supreme Court's Committee on Grievances Against Supreme Court Justices. He is a former member of the Board of Governors of the Ohio State Bar Association; past President of the Lorain County Bar Association; a former member of the Certified Ethics and Grievance Committee (2002-2012); former Chairman of the Lorain County Bar Association's New Lawyer's Admissions Committee; former Chairman of the Lorain County Bar Association's Unauthorized Practice of Law Committee; and former Supreme Court Certified Bar Counsel to the Lorain County Bar Association (2006 – 2016). Judge Cook also served as an Assistant Lorain County Prosecutor in both the civil and major felony division for five years; served as Magistrate for the Lorain Municipal Court (2005 – 2016); and Prosecuting Attorney for Sheffield Village, Ohio (2004 – 2016). Prior to taking the bench, Judge Cook was a member of the law firm Cook & Nicol, LLC, in Lorain, Ohio, and was named an Ohio "Super Lawyer" for 2017 by Thomson Reuters.

JOY MALEK OLDFIELD graduated from the University of Akron school of law after obtaining a Bachelors degree in Sociology from John Carroll University Before entering public service, she was recognized throughout the State of Ohio as a Plaintiff's trial attorney. Judge Oldfield started her legal career with Scanlon & Gearinger Co., LPA, and then as a partner at Hill Hardman Oldfield, LLC, where she practiced in the area of complex civil litigation and appeals. A persuasive and effective trial lawyer, she represented clients in state and federal courts throughout Ohio, as well as before the Supreme Court of Ohio and the Supreme Court of the United States. The individuals whose causes she undertook suffered age, gender and race discrimination, sustained serious personal injury, and/or unfortunately lost loved ones due to professional or other negligence. The hallmark of Judge Oldfield's practice as a lawyer was her work ethic, sharp courtroom skills and compassion for humanity.

Drawn to helping people in a larger way, she left a successful career as a private attorney to serve as a Magistrate for Judge Elinore Marsh Stormer in the Summit County Common Pleas Court. As a Magistrate, Oldfield presided over bench and jury trials for civil cases.

In 2011, Judge Oldfield was elected to the Akron Municipal Court, serving until 2016. There, in addition to her duties as a trial court judge, the other judges elected her as the Administrative/Presiding Judge from 2014-2016. And, in keeping with the philosophy of treatment in lieu of incarceration, she revamped and presided over the Akron Municipal Drug Court from 2013-2016.

Judge Oldfield joined the General Division of the Summit County Common Pleas Court in November 2016, and her colleagues immediately selected her as Presiding Judge of the Turning Point Program (the Felony Drug Court).

The hallmark of Judge Oldfield's judicial service has been her tireless work to impact and educate individuals on the disease of addiction and the beauty of recovery. Through her years on the bench, Judge Oldfield spearheaded various initiatives to try and meet all needs – physical, mental, social, emotional, spiritual – for those suffering from the disease of addiction.

Her innovations in this field have been widely recognized. Judge Oldfield founded Faith in Recovery – designed to provide interested participants a spiritual connection along their recovery journey; and, Y-STRONG, designed to provide participants with access to area YMCA facilities for physical wellness. Also under her leadership, the Turning Point Program obtained Summit County's first specialized docket therapy dog, "Tank." With Tank's help, participants can relax, reduce their level of stress and feel more comfortable in the Court setting.

In addition, Judge Oldfield works to educate others – locally, state-wide and on the national level. Two national entities, Substance Abuse and Mental Health Services Administration (SAMHSA) and the Bureau of Justice Assistance (BJA) invited Judge Oldfield to present in a national expert panel to develop guidance for provicers. She also presented "Trauma in Specialty Court Settings" for SAMHSA's National Center for Trauma-Informed Care and Alternatives to Restraint and Seclusion and GAINS Center for Behavioral Health and Justice Transformation. The session was part of a five-part series and provided information on how treatment courts can provide a trauma-informed approach to support recovery. Since then, SAMHSA's GAINS Center continues to partner with Judge Oldfield as a leader and expert in the field of recovery.

In 2019, the University of Akron School of Law hired Judge Oldfield to teach Pretrial Advocacy to second and third year law students. Judge Oldfield continues to teach that course today, designed to instruct students on the skills, standards and ethics required for civil litigation.
A Summit County resident, Judge Oldfield has three daughters.

STEPHEN McINTOSH is a 1983 graduate of the Ohio State University Moritz College of Law. While attending the College of Law, he was President of the Black Law Students Association (BLSA) He received the Judge Joseph Harter Trial Advocacy Award upon graduation. His team won best brief at the Frederick Douglas Moot Court Regional Competition.

In 1984 Judge McIntosh began employment with the Columbus City Attorney's Office as an assistant city prosecutor. In 1986, he was appointed Deputy Director of the UCC Div. for Secretary of State Sherrod Brown. In January of 1990, he was hired as an associate with Crabbe, Brown, Jones, Potts and Schmidt, (now Amundsen Davis LLC). Columbus City Attorney Janet E. Jackson appointed Judge McIntosh Chief Prosecutor for her Prosecutor's Division February of 1997, a position he held until January of 2007 when he assumed the bench.

Judge McIntosh serves as the Presiding Judge of the Common Pleas Court and previously served as the Administrative Judge of the Court of Common Pleas General Division. He serves as judge of the court's recovery court docket, TIES. (Treatment is Essential to Success).

Judge McIntosh is a past president of the Columbus Bar Association. He is a member of the John Mercer Langston Bar Association. He is also a member of the Ohio State Bar Association where he served on the Board of Governors and currently serves on the Council of Delegates. He currently serves on the House of Delegates for the American Bar Association.

Judge McIntosh currently serves as chair of the Supreme Court of Ohio Judicial College Board of Trustees. He serves on the OLAP Board where he is a past chair. He previously served as chair of the Supreme Court Task Force to Examine Improvements to the Ohio Grand Jury System and co-chair of the Joint Task Force to Study the Administration of Ohio's Death Penalty. He previously chaired the CLE Commission. He served on the Supreme Court Advisory Committee on Dispute Resolution and the Supreme Court Advisory Committee on Interpreter Services. He currently serves on the Ohio Sentencing Commission.

He has been recognized by Columbus Monthly Magazine and Who's Who Among African Americans in Central Ohio. In 2023 he was recognized by the OSBA with the Chief Justice Thomas Moyer Award for Judicial Excellence. He received the John Mercer Langston Bar Association Legacy Award and received the David L. White Award from Capital University.

SHERRIE MIDAY is a judge in the Court of Common Pleas in Cuyahoga County. As a Common Pleas judge, she is responsible for both felony criminal cases and general civil cases. She was first elected on November 8, 2016.

Judge Miday received her undergraduate degree from John Carroll University in 1998 and her J.D. from the Case Western Reserve University School of Law in 2001. Prior to taking the bench, Judge Miday practiced law with the firm of Manley Deas Kochalski, LLC, specializing in foreclosure litigation and creditor's rights law. She previously served as a staff attorney to the Honorable Ann Mannen and as a dedicated domestic violence assistant prosecutor for the City of Cleveland.

In 2020, Judge Miday was appointed to preside of the Cuyahoga County High-Risk Domestic Violence Court. The High-Risk Domestic Violence Court is a specialty docket of the Common Pleas Court, with a mission to reduce the risk of violence and homicide in high-risk cases of intimate-partner violence. Judge Miday leads a specially trained, multi-disciplinary team of justice system professionals who work collaboratively to improve victim safety by providing resources for victims and intense monitoring and behavioral interventions for offenders.

Judge Miday serves as the Chairperson of the Cuyahoga County Domestic Violence Taskforce and is the co-editor of the Baldwin's Ohio Handbook Series: Ohio Domestic Violence Law 2018-2019, 2019-2020, 2020-2021 and 2021-2022 Editions.

DONALD E. ODA II graduated from Ohio State University in 1991 with a degree in journalism. Upon graduation from Chase College of Law in 1995, he was admitted to the bar and maintained a general law practice in Warren County. Judge Oda was elected to the County Court in 2004 and was elected to the Common Pleas Court in 2012. His wife, Linda Oda, is the County Recorder. They live in Clearcreek Township with their two children.

Judge Oda is a member of Springboro Baptist Church and serves on the Board of Directors for Safe Haven Farms, a community for adults with Autism in Southwest Ohio.

MATTHEW REGER is a Wood County Common Pleas judge in Bowling Green Ohio. He has been on the bench since 2017. Prior to that he was the Bowling Green municipal prosecutor for 20 years. He graduated from Michigan State University in 1990 and the University of Toledo College of Law in 1993. He began his career as a staff attorney for Judge Charles Kurfess in 1993, serving until 1996.

In 2006 he took a year away from the Bowling Green prosecutor's office to live and work in the former Soviet Republic of Georgia. Serving with the American Bar Association's Rule of Law Initiative, Judge Reger trained Georgian attorneys and prosecutors in the adversarial system. He also worked with the US Embassy and the Georgian Parliament in the creation of a criminal procedure code that protected basic rights.

Following his return to the United States, in addition to his duties as Bowling Green Prosecutor, he also founded a nonprofit that provided free legal services through his church. Since 2008 he has served as an adjunct professor with Bowling Green State University, teaching several different law related classes.

Judge Reger lives with his wife Heidi and his two children, Elizabeth and Noah, in Bowling Green.

NICK A. SELVAGGIO is serving his third term as the elected Judge of the Champaign County Common Pleas Court, General Division, initially taking office in January 2013.

Judge Selvaggio is the President-Elect of the Ohio Common Pleas Judges Association, is a member of the Ohio Jury Instruction Committee and is actively involved in the Criminal Law and Practice Committee and the Court Administration Committee for the Ohio Judicial Conference. Judge Selvaggio served as Vice Chairman of the Ohio Sentencing Commission from 2015 – 2025 and on the Ohio Supreme Court's Task Force on Conviction Integrity and Postconviction Review. In September 2015, the Ohio State Bar Association's Judicial Administration and Legal Reform Committee awarded Judge Selvaggio's Court with the "Innovative Court Programs and Practices Award" for its success in Managing Jail Population and Overages.

From 1997 – 2012, Judge Selvaggio served four terms as the elected Champaign County Prosecutor. Judge Selvaggio received special recognition for his work as a prosecutor, including the Assistant Prosecutor Outstanding Achievement Award (1994), Ohio Prosecuting Attorney of the Year (2003) and the Leadership Award (2009) from the Ohio Prosecuting Attorneys Association. He also received a Certificate of Recognition from the Supreme Court of Ohio and the Champion of Justice Award from the Ohio Association of Criminal Defense Lawyers (2010) for his work in the development of New Criminal Rule 16, which governs how prosecutors and defense lawyers exchange information about their criminal cases.

Judge Selvaggio graduated from Miami University in 1988 with a B.A. in public administration and received his law degree from Cleveland-Marshall College of Law in 1991.

CYNTHIA WESTCOTT RICE was elected to the Trumbull County Court of Common Pleas in November 2022. On December 12, 2022, she was sworn in for the remainder of the term of Retired Judge Peter Kontos.

Judge Rice was elected to the Eleventh District Court of Appeals in November 2002. The court reviews decisions of the trial courts in Ashtabula, Geauga, Lake, Portage, and Trumbull Counties. Judge Rice has also been appointed to serve as a visiting judge on the Supreme Court of Ohio. She was elected Chief Judge of the Ohio Courts of Appeals Judges' Association for 2021.

Judge Rice has been on the Ohio Judicial Conference Executive Committee from 2011 to the present. She has served as the co-chair of the Criminal Law and Procedure Committee since 2011.

Judge Rice was employed as an Assistant Trumbull County Prosecutor from 1991 to 1999. First, she served as Chief Counsel for the Drug Prosecution Unit. Eventually, Judge Rice was

appointed First Assistant Prosecutor in the Criminal Division of the Trumbull County Prosecutor's Office.

While serving as First Assistant Prosecutor, Judge Rice was appointed Chief Counsel for the Mahoning Valley Law Enforcement Task Force, Vertical Prosecution Unit. She was responsible for setting up this unit, which was designed to provide multi-jurisdictional prosecution of major drug law violations and in-house counsel for the task force. She coordinated efforts among the Mahoning and Trumbull County Prosecutor's Offices and the United States Attorney's Office. She was appointed Special Assistant United States Attorney from 1997 to 1999.

From 1999 to 2002, Judge Rice was an Assistant United States Attorney in the United States Attorney's Office, Department of Justice, in Youngstown, Ohio. As a member of the General Crimes Division, she prosecuted major felonies, including firearm and drug law violations, bank robberies, cyberstalking and interstate stalking cases.

Judge Rice is a member of the Ohio State Bar Association and the Trumbull County Bar Association, in which she served as its president from 1996 to 1997. She was a member of its Executive Committee for four years and a member of its Grievance Committee for three years. Judge Rice received her B.S. degree from Purdue University Krannert School of Management and her J.D. degree from the University of Akron School of Law. She has been admitted to the Michigan Bar and to the Ohio Bar.

Trial Protocol

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

Hon. Stephen L. McIntosh
Franklin County Common Pleas Court

Hon. Matthew L. Reger
Wood County Common Pleas Court

Hon. Cynthia Westcott Rice
Trumbull County Common Pleas Court

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Trial Skills Workshop

Hon. Sherrie M. Miday
Cuyahoga County Common Pleas Court

Hon. Donald E. Oda II
Warren County Common Pleas Court

Hon. Nick A. Selvaggio
Champaign County Common Pleas Court

Ohio Judicial College
Trial Skills Workshop

Trial Skills Problems:

PROBLEM #1 – PRE-TRIAL CONFERENCES (GROUND RULES)

TOPIC SUMMARY: Participants will learn to use the pre-trial conference as a forum for communicating to the lawyers the judge's ground rules for conducting a trial.

POINTS TO COVER:

1. Procedure rules regarding pretrial conferences
2. Orders setting pretrial conferences
3. The utility of pretrial conferences and case management
4. Conducting the pretrial conference
5. The ground rules
6. Communicating the ground rules to counsel.

MATERIALS:

PROBLEM 1 HYPOTHETICAL 1A

Judicial Assistant: Judge, I need some guidance from you regarding a couple of cases that are on our next jury trial docket.

Judge: OK, which cases do you want to discuss?

Judicial Assistant: Well, the first one is Morris vs. Case Transportation, Inc. It's a rear end collision, with a claim of soft tissue injury. The plaintiff's lawyer is that real nice lady lawyer, Sally Schaeffer, and the defendant is represented by Thompson E. Lewis, VI, the managing partner over at Bigg, Biggar & Biggast, PA. The attorneys don't want to have a pretrial, which you ordered without any input from the lawyers. The pretrial is scheduled for this Friday, and both the lawyers say they are really busy, and would just as soon skip it. They tell me they've tried to settle, but to no avail. They don't believe anything will be resolved at the pretrial, and they could sure put their valuable time to better use. I told them I'd run it by you.

Judge: Anything else?

Judicial Assistant: Yes, they would also like to know, if you are having a pretrial, whether they need to show up personally. They each would like to send an associate from their respective firms. As an alternative, could they appear by telephone?

Judge: Is that all?

Judicial Assistant: Well, the other case is Mickle vs. Menendez Grocery. It's a slip and fall. The plaintiff is claiming a herniated disc. This case was on your predecessor's trial docket, about 20 months ago, but no action was taken, so it was continued. The lawyers tell me nothing has changed since the last pretrial, and they'd like to forgo the conference next week and just show up the morning of trial.

Judge: Anything else?

Judicial Assistant: Yes, the case will be over the Supreme Court time guidelines on the current trial date.

LEADER: **(PASS THE GAVEL)**

Review:

- Purpose and utility of pretrial conferences.
- Judicial preferences regarding pretrial conferences (necessity, attendance by trial counsel telephone hearings).
- Judicial philosophy regarding mandatory mediation.

- See Civil Rule 16
- Rules of Superintendence—Time Guidelines
- Pre-trial orders
- Local Court Rules

PROBLEM 1 HYPOTHETICAL 1B

Prosecutor: Your honor, the next case on your pretrial docket is State v. Manson. It's a petit theft, and the defendant has a rather lengthy prior record. The victim is requesting restitution, as soon as possible. The prosecution is asking for 60 days jail time, followed by 3 years probation, with restitution and all costs to be paid within 90 days.

Defense Counsel: Judge, my client couldn't possibly accept any plea agreement which involves jail time. We don't quarrel with probation and full restitution and costs, but no jail.

Prosecutor: Judge, we have an open and shut case. There are three eyewitnesses, and we have a confession!

Defense Counsel: Your honor, my client cannot afford to go to jail at this time. If disposition requires incarceration, we demand a jury trial. I'll be filing a motion to suppress this alleged confession, and various motions in limine. It will take quite some time to get all these matters heard. Judge, I assure you we will have a very active and lengthy defense. Since we assumed the prosecution would be reasonable, we haven't done too much. Speedy trial runs next week, but there is no way we can be ready for trial as scheduled. Judge, we were sandbagged by the prosecution. The defendant requests a continuance, and asks that it be charged to the prosecution for speedy trial purposes.

Judge: Is the defendant present?

Defense Counsel: I believe he may have just started a new job today. For the record, I will waive his presence.

LEADER (PASS THE GAVEL)

Review:

- Where is the pre-trial held?
- What matters should be covered during a pretrial conference in a criminal case?
- To what extent does the judge wish to get involved in trying to resolve the case by pleas?
- Should the role of the judge be passive and merely accept or reject a tendered plea agreement, or should the judge get actively involved in plea negotiations, and make his or her own plea offer to the defendant?

- Any problems with undercutting the prosecutor's offer?
- Presence of the defendant required, unless waived in writing.
- Should the judge discuss possible sentences?
- Potential number of witnesses.
- Speedy trial issues.

PROBLEM 1 HYPOTHETICAL 1C

Defense Attorney: Your honor, I have never had the privilege of appearing in your court. Is there anything I should be aware of regarding your procedural personal preferences?

LEADER (PASS THE GAVEL)

Review:

- Need to seek permission to approach witnesses for review of exhibits?
- Permissible to travel from behind podium during voir dire?
- Speaking objections?
- Use of first names?
- Stand or sit when jury enters or leaves courtroom?
- Requests of offers re stipulations before the jury?
- Other . . .?
- Means of communicating personal procedural preferences:
    - Standard orders
    - Review orally during pretrial conference
    - Handouts
    - Bulletin board postings
    - Bar magazines, newsletters, and other such publications
    - Internet home page
    - Other

PROBLEM #2—OPENING REMARKS

TOPIC SUMMARY: Participants will be able to qualify, select and manage a jury.

It is essential to the proper performance of their duties that jurors be informed of their responsibilities before the trial begins. Most counties have a film, video or slide presentation which provides a general orientation for persons summoned for jury service. However, each judge has the responsibility of explaining to the prospective jurors summoned to the courtroom what will be required of them during the jury selection and what will be required if selected as jurors.

POINTS TO COVER:

1. How prospective jurors are seated in the courtroom.

2. Practical concerns of jurors
    a. breaks
    b. smokers
    c. physical problems (example – hard of hearing, diabetes)
    d. small children
    e. length of trial
    f. hours normally worked (example – 8:00 am. –5:00p.m., 10:00 a.m. – 6:00 p.m.)

3. Introductions of courtroom personnel

4. Introduction of lawyers, defendant, parties

5. Identification of case set for trial

6. Explanation of voir dire process

7. Explanations of jury selection

8. Americans With Disabilities Act

9. What to do when attorneys:
    a. Ask jurors questions previously asked by judge or another counsel
    b. Ask questions which require jurors to commit to a verdict
    c. Argue the case or ask questions which are in substance arguments of the case.

10. Limitation of time allowed attorneys for voir dire.

11. Collective questions vs. individual questions.
12. Jurors who wish to be excused.
13. Discussion of method or methods of jury selection.
14. Number of peremptory challenges.
15. Basis for a challenge for cause.
16. Presence of a criminal defendant during jury selection.
17. Discriminatory use of peremptory challenges.
18. One Day/One Trial.

MATERIALS:

PROBLEM 2 HYPOTHETICAL 2A

Bailiff Smith To Judge: "Judge, how many jurors do you want brought to court for your OVI trial?

Leader: **[Hands gavel to student judge.]**
(Criminal Rule 24)

Lawyer Smith: "Judge, may we approach the bench? Judge, I've never tried a case before you. How do you select a jury? Do you allow back striking?"

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Jones: (*If jury selection is done at bench)*
"Judge, my client, Sam Sleuth, has a right to be present during jury selection. Can he come up here to the bench with us?"

Or "Judge, my client, Sam Sleuth, trusts me to select this jury. Can he go outside and have a cigarette while we select this jury?"

(If jury selection is done while jury is out of courtroom)
"Judge, I object to selecting this jury without being able to look at the prospective jurors. I can't remember them with them out of the courtroom and us in the courtroom. Besides, it violates my client's constitutional right to confrontation."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 2 HYPOTHETICAL 2B

Lawyer Smith: "Your honor, you limited my time on voir dire to 30 minutes. I didn't have time to ask all my questions. You're prohibiting me from effectively representing my client. I need at least thirty more minutes, and I'm asking for that much additional time."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 2 HYPOTHETICAL 2C

Leader: Assume jury selection has begun. Challenges for cause have been dealt with and no jurors have been struck for cause. Continue with the selection allowing attorney Smith and Jones to exercise peremptory challenges." (Hands gavel to student judge).

The following dialogue should occur some time during the jury selection.

Defense Lawyer Smith: "Your Honor, I object. The last juror struck by Lawyer Jones was black. My client's black. That violated Batson.**"**

Leader: **[Hands gavel to student judge for a ruling.]** (Make sure judge makes the proper inquiry).

Prosecution Jones: "Your Honor, I've already accepted two blacks. Besides, I didn't strike that juror because he's black. That juror was sleeping during voir dire; he wasn't paying attention, and I don't think he'll listen to the evidence."

Leader: Makes sure judge evaluates the reasons given by Prosecutor Jones to determine if they are race neutral; also, whether they are supported in the record.

If the judge sustains the objections, talk about what judge should do. Simply disallow the strike? Dismiss the entire jury and start again? If judge overrules objection, talk about what would have happened had it been sustained.

Continue with jury selection.

Defense Lawyer Smith: "Your Honor, I object, the prosecutor has jury struck a woman (or another woman) juror. My client's a woman. That violates Batson."

Prosecutor Jones: "Your Honor, Batson applied only to bias of race, not gender."

Leader: **[Hands gavel to student judge for a ruling.]**

Discussion should center around whether cases apply only to blacks and whether they are applicable to other groups such as Hispanics and women.

Conclude jury selection

PROBLEM #3 – MOTIONS IN LIMINE

TOPIC SUMMARY: A Motion in Limine (at threshold) provides a helpful advance in ruling on admissibility; it can prohibit (preclude the calling of a witness, reference to prejudicial matters), or it can be conditional (meeting criteria prior to admission, laying foundation).

Grounds and purposes of the Motion include:
Identification of matter or documents.
Prejudicial (unfair) effect if allowed.

POINTS TO COVER: 1. Purpose of Motion in Limine is to prevent the introduction of improper evidence, the mere mention of which would be prejudicial.

2. Trial courts should not allow Motions in Limine to be used as unwritten and unnoticed Motions for Partial Summary Judgment or Motions to Dismiss. *Id.*

3. Must a Motion in Limine be in writing or can it be oral?

4. Does a judge have to rule on a Motion in Limine prior to trial?

5. When should a Motion in Limine be heard by the judge and where should the jury be, if selected?

6. Is the granting of a Motion in Limine irrevocable or can the judge change his/her ruling during the course of the trial depending on the evidence?

7. What responsibility does the judge have in informing the witnesses about the Motion?

8. What do you do when the Motion is granted and then violated by the opposing counsel?

MATERIALS:

PROBLEM 3 HYPOTHETICAL 3A

Lawyer Smith: "Judge, I have five Motions in Limine which I would like to make before we begin opening argument. I haven't had time to put the motions in writing, but they're short."

Lawyer Jones: "Objection, your Honor, the motions need to be in writing. I can't be expected to keep track of six oral motions. Besides, he hasn't given me any notice of these motions."

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Jones: **"**Judge, I object for another reason. This isn't the proper time to hear a Motion in Limine."

PROBLEM 3 HYPOTHETICAL 3B

Defense Lawyer Smith: "Your Honor, now that the jury is selected, but before we start this trial, I would like to make an oral Motion in Limine. I believe the defendant's confession was made after many hours of questioning and coercion by the police and after he had repeatedly asked for a lawyer; therefore, I believe it should be excluded."

Prosecutor Jones: "I object, your Honor, this is not timely. Mr. Smith should have filed a Motion to Suppress and had this matter resolved in a hearing prior to trial."

Leader: **[Hands gavel to student judge for a ruling.]**

(After the ruling, inform student judge that a written motion to suppress was timely filed, but contained only boiler plate language without specific facts. Ask for a new ruling.)

Review:

- Is a hearing required?
- Who goes first?
- Who has BOP/burden of going forward?
- Is a motion to suppress proper for a non-constitutional issue?

PROBLEM 3 HYPOTHETICAL 3C

Defense Lawyer Smith: "Your Honor, I make a Motion in Limine to prohibit evidence regarding our my client's prior OVI conviction. It's not relevant to this case, and I have reason to believe the Prosecutor will try to elicit this testimony from one of his witnesses."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume student judge grants the oral Motion in Limine. The trial is in progress, and the defendant has testified. Discuss what convictions are admissible. Also, what of remoteness in time?)

Prosecutor Jones: "Judge, the defendant has just lied on the stand. He told this jury he has never been in trouble with the law before in his life. Judge, he has a prior conviction for OVI. The jury has a right to know he's lying. I should be able to introduce evidence of that prior OVI. conviction."

Defense Lawyer Smith: "I object, your Honor, you granted my Motion in Limine about this very issue. All evidence of my client's prior OVI. conviction was excluded from this trial."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:

- Should you make evidentiary rulings before trial generally?

PROBLEM #4—WITNESS SEQUESTRATION

TOPIC SUMMARY: This problem considers and explains whether and when witnesses must or should be excused from the courtroom during trial proceedings.

POINTS TO COVER:

1. Is it discretionary with the court?

2. When in the course of the trial is it proper (before voir dire? Before opening statements? Before testimony?)

3. Are there certain witnesses who do not have to be excluded? (Victims? Mothers of small children who are also witnesses? Case detectives? Experts?)

4. What does the judge say to the witnesses when rule is invoked?

5. What to do when rule is violated.

PROBLEM 4 HYPOTHETICAL 4A

Defense Lawyer Smith: "Before we start the trial, your Honor, I would like to request that separation of witnesses be invoked and that all witnesses on both sides be excluded from the courtroom until they are called to testify. Since I have never practiced before you would your Honor indicate what you will tell potential witnesses and what, if anything, you will require of counsel regarding sequestration of witnesses?"

Prosecutor Jones: "I object, your Honor, we haven't started the testimony. We're just starting voir dire. The victim's family, who are also witnesses, want to be in the courtroom during voir dire and opening statements. They shouldn't have to leave the courtroom until the evidentiary part of the trial. And even then, the victim or her representative can be present for the trial. Doesn't the constitution say so?"

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor Jones: "I have no objection to witnesses being excluded, your Honor, but I would like to have the investigating officer remain in the courtroom and sit with me at counsel table so that we can confer during the trial."

Lawyer Smith: "I object, your Honor, the prosecution has no right to that. All witnesses should leave the courtroom until they're called.

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 4 HYPOTHETICAL 4B

Lawyer Smith: "Your Honor, I have just discovered that one of the prosecutor's witnesses who was supposed to have been excluded, walked into the courtroom and has been sitting here during the testimony of the other prosecution witness. Of course, I asked the bailiff to exclude her as soon as I knew she was in the courtroom. However, under the circumstances, I must move for a mistrial."

Prosecutor Jones: "Your Honor, I oppose the mistrial. It is true one of my witnesses was in the courtroom for part of the testimony this morning. I did not realize it until I turned around and saw her in the back of the courtroom. She was not here yesterday at the beginning of the trial when you excluded the witnesses. There was not willful disobedience on my part or the witness' part. I don't think a mistrial is either appropriate or necessary."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #5—SCOPE OF DIRECT AND CROSS EXAMINATIONS

TOPIC SUMMARY: Participants will be able to control, when necessary, the scope of direct and cross-examination.

POINTS TO COVER:

1. When to limit direct or cross examination.

2. When to limit redirect or recross.

3. How to handle lawyers who are disrespectful to witnesses.

4. How to handle gender bias or racial bias as it relates to witnesses.

MATERIALS:

PROBLEM 5 HYPOTHETICAL 5A

(Assume direct and cross have taken place)

Prosecutor Jones: "Mr. Witness, in what county did the assault occur?"

Lawyer Smith: "Objection, that question is outside the scope of cross examination. He had Mr. Witness on the stand on direct for two hours; he certainly could have asked the question."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume judge sustains objection)

Prosecutor Jones: "Judge, this is just a technical point. It may be outside the scope of cross, but I have to prove the crime occurred in New Rome. This is an essential element of my case. If you don't let me ask the question you will in essence be directing a verdict."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume direct, cross, redirect, attorneys are seated, witness has left the stand)

Prosecutor Jones: ***(Jumps up excitedly)*** "Judge, I've got to ask two more questions. I forgot to prove venue. I would like to recall Mr. Witness for that purpose."

Lawyer Smith: "Objection, your Honor, he has already called this witness and the witness has left the courtroom."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 5 HYPOTHETICAL 5B

Prosecutor: "Mr. Witness, I know I asked this question earlier, but after that lengthy cross examination by Lawyer Smith, the jury has probably forgotten what you said in response to my direct examination, so let me ask you once more. . . .

Lawyer Smith: "Objection."

Leader: Discuss need to limit repetitive questions/attorney trying to get the "last word".

PROBLEM 5 HYPOTHETICAL 5C

(Assume direct, cross and redirect have occurred)

Lawyer Smith: "Your Honor, I know at the beginning of the trial, you said you were only going to allow direct, cross and redirect of witnesses, but I have some more questions for this witness. I would like to recross."

Leader: **[Hands gavel to student judge for a ruling.]**

OR

Lawyer Smith: "Judge, I know you said you were only going to allow direct, cross and redirect of witnesses; however, the prosecution went into new matters in redirect. I should now be allow to recross."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:

- The judge has the authority to set limitations on direct, cross, redirect, etc., but the judge's rule or order must be set forth in advance.

PROBLEM #6—COMMON OBJECTIONS

TOPIC SUMMARY: Participants will be able to respond appropriately to common objections made by counsel.

Assume trial is in progress. The trial is based on information charging Driving Under the Influence of Alcoholic Beverages. The purpose of this exercise is NOT to review the evidence code, but to help the judge respond effectively and appropriately to objections.

POINTS TO COVER:

1. How to handle objections when attorney states no grounds for the objection.

2. How to handle objections when attorney states wrong grounds for the objection.

3. How to handle objections when attorney states no grounds, but grounds are obvious.

4. Should the judge require attorneys to stand when making objections.

5. How to handle attorneys who argue objections before the jury.

6. How to handle a proffer of evidence.

7. When does the judge ask questions?

8. How to handle attorneys who object only to delay the trial.

MATERIALS:

PROBLEM 6 HYPOTHETICAL 6A

Prosecutor Jones: "Dr. Do Little, what were the results of the Breathalyzer test you conducted on Mr. Bud Wieser?"

Lawyer Smith: "Objection, your Honor!"

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should center on the fact that no grounds were given for the objection. Is the judge's response any different if the grounds are obvious?)

Judge: "Lawyer Smith, state the ground for your objection."

Lawyer Smith: "Judge, I object because it's prejudicial and improper."

Leader: **[Hands gavel to student judge for a ruling.]**

Discussion should center on fact that wrong grounds were given. Should the judge overrule the objection because the grounds were incorrect? Should the judge sustain the objection if he/she believes objection should be sustained on other grounds? Should judge sustain the objection and state grounds for his/her sustaining the objection?)

Lawyer Smith: "I object, your Honor, the proper predicate has not been laid by the prosecutor."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume judge sustains this objection.

Prosecutor Jones: "Ask to approach the bench."

"Judge, I think I've laid the proper predicate. What's wrong? Lawyer Smith ought to have to state what's wrong with the predicate."

Lawyer Smith: "Judge, I shouldn't have to help him try his case."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include the following: Should the judge make Lawyer Smith be more specific or simply sustain the objection if proper predicate has not been laid?)

Assume the judge has sustained the improper predicate objection three times. Each time Prosecutor Jones has gone back and tried again to lay the proper predicate with his witness Dr. Do Little.

Prosecutor Jones: Ask to approach the bench.

"I just don't know what else to do to get this in, Judge. I've tried. If you don't let it in, I'll lose my case. What's wrong with the predicate?"

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should included the following: Does it make a difference if the case is a OVI manslaughter rather than a common OVI?)

PROBLEM 6 HYPOTHETICAL 6B

Police Officer is on the stand. Direct examination has taken place. Lawyer Smith is cross examining the witness.

Lawyer Smith: "Mr. Police Officer, I show you a photograph, marked Defense Exhibit I. Do you recognize it?"

Police Officer: "Yes, it's a photograph of the Defendant's car as it looked when I arrived at the scene on the night of the accident."

Lawyer Smith: "Judge, I offer into evidence Defense Exhibit I."

Prosecutor Jones: In front of jury.

"Objection! Lawyer Smith knows better than that. He's trying to introduce evidence in my case. He can't do that and he knows it. He's trying to put one over on you."

Leader: **[Hands gavel to student judge for a ruling.]**

(*Discussion should include the fact that the attorney argued the objection in front of the jury as well as the attempt to offer evidence at the wrong time.)*

Assume judge sustains the objection.

Lawyer Smith: Ask to approach the bench.

"Judge, I'm just going to have to recall this witness in my case if you don't let the photograph in. There's no question that it will be admissible.

Mr. Police Officer is a busy man; there's no need to make him come back."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 6 HYPOTHETICAL 6D

Defense Attorney: "Mr. Witness, isn't it true that you have been arrested in the past?"

Plaintiff's Attorney: "Objection, Your Honor, improper impeachment."

Leader: **[Hands gavel to student judge for a ruling.]**

Defense Attorney: "Mr. Witness, have you ever been convicted of a felony?"

Witness: "No."

Defense Attorney: "Isn't it true you have a prior conviction for grand theft?"

Plaintiff's Attorney: "Objection, counsel must have certified copies of any purported prior convictions in court before he can even ask the question, improper impeachment, move to strike, move to reprimand counsel before the jury, move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #7—WITNESS PROBLEMS

TOPIC SUMMARY: Participants will be able to identify and deal with selected witness problems.

POINTS TO COVER:

1. Should the judge control the questioning of witnesses, and if so, how?

2. How and when should a judge protect a witness from harassment?

3. What role does a judge play in determining the competency of witnesses?

4. Does the judge have the duty to aid the discovery of the truth by controlling the questioning of witnesses?

5. When should a guardian ad litem be appointed for a victim? For a witness? What about interpreters?

MATERIALS:

PROBLEM 7 HYPOTHETICAL 7A

Prosecutor Jones: **"**The State calls Jimmy Juvenile. I'm asking that Jimmy take the stand but that the clerk not swear him in at this time."

(Jimmy Juvenile takes the stand.)

"Jimmy, how old are you?"

Jimmy: "I'm six years old."

Prosecutor Jones: "Where do you go to school?"

Jimmy: "I go to Seneca School. I'm in the first grade."

Prosecutor Jones: "Do you know the difference between right and wrong?"

Jimmy: Silence.

Prosecutor Jones: "I'll ask you another question. Is it wrong to tell a lie or O.K. to tell a lie?"

Jimmy: "Wrong."

Prosecutor Jones: "What happens if you tell a lie?"

Jimmy: "My Mother hits me."

Prosecutor Jones: "You Honor, I ask that the clerk swear the witness."

Clerk: (Administers the oath.)
"Do you swear or affirm that the evidence you will give will be the truth, the whole truth and nothing but the truth?"

Jimmy: Silence.

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include when the determination of a child witness' competency to testify should be made. [Prior to trial? Outside presence of jury?] Discussion should also include whether the traditional oath has to be given and whether judge has to state on the record that he/she finds the witness competent to testify—if he/she allows him to testify.)

Assume Judge determines Jimmy is competent to testify.

Lawyer Smith: "I object to Jimmy testifying, your Honor. We don't know what he might say. After all, he's only six years old. I think we should hear his testimony first, outside the presence of the jury, and then determine whether this six year old child is competent to testify."

Prosecutor Jones: "Your Honor, the scope of the examination has nothing to do with competency; the witness is either competent of not. I shouldn't have to reveal his testimony in advance."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume Jimmy has been found competent to testify and is about to be called to the stand.

Prosecutor Jones: "Judge, we have a small child size chair which we have brought to the courtroom. We would like Jimmy to sit in that chair, NOT the normal witness chair."

Lawyer Smith: "Objection, if he is competent to testify, he ought to have to sit in the witness chair."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should included similar such requests which could be made. Can the guardian hold the child in her lap while he testifies? Can he take a teddy bear to the stand with him?)

Assume Jimmy is testifying.

Prosecutor Jones: "Your Honor, I object to the length of the questioning on cross by Lawyer Smith. Jimmy has been on the stand for forty-five minutes. He has asked the same question in ten different ways. Enough is enough. Direct only lasted fifteen minutes."

Lawyer Smith: "Judge, I'm asking the same question ten different ways because I keep getting different answers. This witness is the most important witness. I've got a right to cross examine him properly. If you limit my cross examination, you will keep me from effectively representing my client and I will be forced to ask for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include whether the student judge's ruling would change if the case being tried was capital sexual battery rather than a misdemeanor child abuse.)

PROBLEM 7 HYPOTHETICAL 7B

(Assume the prosecution witness, after testifying favorably for the state on direct examination, testifies as follows on cross.)

Lawyer Smith: "Mr. Witness, was the person you say you saw driving the car wearing a hat as you testified on direct or no hat as you testified to on deposition? Which statement is correct?

Witness: "I have answered all the questions I'm going to answer. All I want to do is get out of this court. Judge, I'm not answering any more questions. That lawyer is trying to make me look stupid. I'm leaving."

Witness rises from witness chair and starts to leave the courtroom.

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include what to do with the jury during this exchange.)

Change the facts, same players.

Lawyer Smith: "Mr. Witness, did you see my client behind the wheel of the car?"

Witness: "Well, I was a ways away, it was dark, it's been a long time; I've been thinking about this. . . ."

Lawyer Smith: *(Angrily interrupts witness)* "Judge, will you instruct the witness to answer the question? I requires a simple 'yes' or 'no'."

Prosecutor Jones: "I object, your Honor, the witness is trying to answer the question."

Leader: **[Hands gavel to student judge for a ruling.]**

(Questioning by Lawyer Smith continues.)

Lawyer Smith: (Raised voice, obviously angry.)
"Mr. Witness, did you see the defendant behind the wheel of the car? Just answer the question and be quick about it this time."

Prosecutor Jones: "Judge, I object, he's badgering the witness."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 7 HYPOTHETICAL 7C

(Female witness is on the stand. Lawyer Smith is cross examining her.)

Lawyer Smith: "Susan, we've previously heard from Mr. Carney and Mr. Pearce as witnesses in this case. I know this is difficult for you because the scene was bloody, and I'm not going to make you identify any of the photographs of the domestic violence victim, the men already did that; but, please tell us what you saw. –Oh, the Judge has Kleenex on the bench if you need some."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:
Is there anything wrong here? Should the judge step in? How protective should the judge be, if at all?

PROBLEM 7 HYPOTHETICAL 7D

Assume case being tried is a gross sexual imposition.

Lawyer Smith: "Come on Ms. Easy, isn't it true you slept with my client at least ten times before you decided to claim he molested you?"

Prosecutor Jones: "Objection, your Honor, he's harassing the witness."

Lawyer Smith: "Come on Judge, are you going to limit my cross just because Ms. Easy keeps crying?"

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Smith: ***(continues)*** In fact, Ms. Easy, haven't you slept with my client's best friend and his best friend and his best friend? In fact, don't you sleep around with whoever you can find that's willing?"

Prosecutor Jones: Does not object.

Leader: **[Hands gavel to student judge.] Judge, do you step in?**

PROBLEM 7 HYPOTHETICAL 7E

Lawyer Smith: "The Defense calls Mr. Harry Hispanic. State your name please."

Witness: "Harry Hispanic."

Lawyer Smith: "Mr. Hispanic, will you please tell this jury what you observed on the night of the accident when you arrived at the scene."

Witness: "Huh—I don't understand, my English is not real good. Would you repeat the question?"

Leader: **[Hands gavel to student judge.] Judge, what do you do if anything?**

(Discussion should center around whether the judge should step in and order an interpreter or leave it to the discretion of Lawyer Smith who called the witness. Discussion should include when determination should be made about the need for an interpreter for witnesses—pre-trial if possible. Also include need to swear the interpreter and have interpreter state his/her name for the record.)

PROBLEM 7 HYPOTHETICAL 7F

Assume witness on the stand has been involved in serious accident and has suffered some brain damage making him mentally deficient but still competent to testify.

Lawyer Smith calls Mr. Witness to stand.

Lawyer Smith: "Mr. Witness, I know it's hard for you to remember the accident, but I'm going to ask you some questions and just answer the best you can. You remember when the red car came across the center line and struck your car, don't you."

Witness: "Yes."

Prosecutor Jones: "Objection, your Honor, Lawyer Smith is leading the witness. Lawyer Smith might as well be testifying."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 7 HYPOTHETICAL 7G

Assume the case being tried is a spouse battery. State calls the Victim to the stand to testify.

Prosecutor Jones: "The State calls Vicky Victim. Ms. Victim, state your name and tell the jury how you are related to the defendant."

Witness: "Vicky Victim; the defendant is my fiancé. We're going to get married."

Prosecutor Jones: "Ms. Victim, please tell this jury what happened on the night in question."

Witness: "I really don't remember exactly, a lot was going on; there was a party, you know. I just don't remember exactly."

Prosecutor Jones: "Ms. Victim, were you struck on the mouth?"

Witness: "Well, yes, somehow my two front teeth got knocked out."

Prosecutor Jones: "Who knocked out your two front teeth, Ms. Victim?"

Witness: "Well, I really didn't see, you know, lots was going on—I don't know."

Prosecutor Jones: Asks to approach the bench.
"Judge, it's obvious this witness is not testifying truthfully; she's probably scared. I'd like you to order her to answer my question."

Lawyer Smith: "I object, judge."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #8—MOTIONS FREQUENTLY MADE AT TRIAL

TOPIC SUMMARY: Participants will explore the criteria and factors in determining whether to grant or deny motions made during trial.

POINTS TO COVER:

CRIMINAL

1. Motion to exclude Evidence based on failure to provide complete witness list.

2. Motion for Judgment of Acquittal.

3. Motion for Mistrial.

4. Motion to Disqualify Judge.

5. Motion to Amend the Information.

CIVIL

1. Motion for Voluntary or Involuntary Dismissal.

2. Motion for Directed Verdict.

3. Motion to Conform Pleadings to the Evidence.

4. Motion to Disqualify Judge.

MATERIALS:

PROBLEM 8 HYPOTHETICAL 8A

Prosecutor Jones: "The State calls Wanda Witness."

Lawyer Smith: "Objection, your Honor, this witness was never furnished to the defense in discovery."

Prosecutor Jones: "I know, Judge, I didn't find out about this witness until yesterday when another witness gave me her name. As soon as I found out, I told Lawyer Smith. I gave him the name this morning. I don't know what else I can do."

Lawyer Smith: "Judge, if this witness testifies, I'm going to be greatly prejudiced."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 8 HYPOTHETICAL 8B

(Assume State has presented its evidence but not yet rested.)

Prosecutor Jones: "Your Honor, I move to amend the complaint as follows: the date in the complaint states December 30th but the evidence has shown the crime actually occurred in the early morning hours of December 31st. The information should read December 31st."""

Lawyer Smith: "Objection! He can't amend the complaint now. The jury's been sworn."

Prosecutor Jones: "The Defendant isn't prejudiced. He's known what the witnesses were going to testify to all along. I just noticed the complaint had the wrong date."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should also include motions to amend the information immediately prior to trial; amendments which might prejudice the Defendant such as changing the name of the victim. What options does a judge have? Deny the motion? Grant a continuance? Bill of Particulars? Alibi Defense? Indictment vs. Information? Civil Complaint?)

PROBLEM 8 HYPOTHETICAL 8C

(Assume criminal case, Defendant is charged with OVI)

Prosecutor Jones: "Mr. Police Officer, do you see the defendant in the courtroom and if so, would you point him out."

Police Officer: "He's over there, dressed in that plaid shirt and jeans. That's the same shirt he had on the night I arrested him for this OVI and the same shirt he had on the last time I arrested him for OVI."

Lawyer Smith: "Objection, your Honor. I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include what factors a judge should weigh in deciding whether to grant a mistrial.)

Change Facts

Lawyer Smith: "Mr. Bud Wiser, did you perform poorly on the road side sobriety test?"

Witness: "Heck no, that police officer lied. He's lied before. You know, he beat me up and he's being sued for beating up two other guys. I saw it in the newspaper."

Prosecutor Jones: "Objection, your Honor, I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include possible double jeopardy problems.)

PROBLEM 8 HYPOTHETICAL 8D

(Assume you are in the second day of a two-day jury trial in which the Defendant is charged with Theft.)

Lawyer Smith: "Your Honor, before the jury is brought in I would like to make Motion to Disqualify you. This is an oral motion because I just found out about this and haven't had time to prepare a written motion. I've been told that you and Prosecutor Jones are friends and go to the Ohio State football games together every week-end. In fact, you went to Ann Arbor together last Saturday for the OSU-Michigan game. My client does not believe he can receive a fair trial in front of you."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should center on fact the motion is not in writing, there is no certificate of counsel it is made in good faith, no accompanying affidavits, and not timely.)

Assume judge denies motion. The next day, Lawyer Smith files a written motion with certificate of good faith and two accompanying affidavits. Also, assume Judges does not go to OSU football games with Prosecutor Jones and did not go to Ann Arbor last Saturday with him.

Leader: What do you do now, Judge?

PROBLEM #9—MISCELLANEOUS ISSUES RELATING TO DEMONSTRATIVE EVIDENCE, JURY VIEWS, NOTE TAKING, AND JUROR QUESTIONS

TOPIC SUMMARY: Participants will discuss the proper procedures for handling physical and demonstrative evidence at trial, ruling on requests for jury views, and for responding to juror requests to ask questions and take notes.

POINTS TO COVER:

1. Use of demonstrative evidence in opening and closing arguments by lawyers.

2. Showing to jury or allowing jury to see evidence before admission.

3. Marking evidence for identification.

4. Jury views.

5. Jury questioning/note taking.

MATERIALS:

PROBLEM 9 HYPOTHETICAL 9A

(Assume opening statements are in progress.)

Prosecutor Jones: "As you can see, members of the Jury, from this photograph of the scene the ground was very grassy."

Defense Lawyer Smith: "I object. That photo is not in evidence. This is improper."

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor Jones: "As you can see, members of the jury, from this sketch of the scene. . ."

Defense Lawyer Smith: "Same objection."

Prosecutor Jones: "But I could just as easily have drawn it while I spoke, it's admissible."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 9 HYPOTHETICAL 9B

Prosecutor Jones: "I ask that the clerk mark these photographs for identification."

Defense Lawyer Smith: "Your honor, while counsel was having those marked he held them so that they were clearly visible to the jury. I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 9 HYPOTHETICAL 9C

The Defense counsel is cross examining the arresting officer in OVI case.

Defense Attorney: "Isn't it true there are a lot of pot holes where you asked the defendant to perform the field sobriety exercise?"

Witness: "No. It was nice and level."

Defense Attorney: "Your Honor, I move for a jury view so the jury can see all the pot holes for themselves."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discuss jury views, how and when they should be considered.)

PROBLEM 9 HYPOTHETICAL 9D

Assume Defendant did not testify and the defense counsel is giving closing argument and identity is the disputed issue.

Defense Attorney: "Jim (the defendant), stand up, come up here with me and let's demonstrate something for this jury."

Prosecutor: "Your Honor, I object. The defendant didn't testify."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discuss what you would allow, e.g., height, weight, defendant speaking to show accent or lack of accent, tattoos, gloves.)

If this happens during the defense's case and the defense counsel asks the defendant to demonstrate, does the defense lose final closing argument?

PROBLEM 9 HYPOTHETICAL 9E

Assume the plaintiff has finished her testimony.

Juror #1: *Raises hand.* "Judge, can I ask this witness a question?"

Leader: **[Hands gavel to student judge for a ruling.]**

Now assume defendant in criminal case has finished testifying.

Juror #1: "Judge, I want to ask the defendant if he/she has a criminal record."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume the defense counsel has finished redirect of his client and turns and says to the judge. "I now offer my client to the jury for any questions they may have." What do you do?

Juror #2: Judge, can I take notes?

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #10—MAINTAINING PROFESSIONALISM

TOPIC SUMMARY: Participants will be able to recognize attorney's improper behavior during trial and consider alternatives available to the judge.

POINTS TO COVER: 1. Options for discipline of attorneys and clients; fines, probation, jail, donations to charity, threats.

2. Use of contempt, serious ramifications of use of contempt—establish standard early.

3. Consider discipline without jeopardizing a client's rights.

MATERIALS:

PROBLEM 10 HYPOTHETICAL 10A

(A Civil Case)

(Assume Plaintiff's Lawyer is experienced.)

Plaintiff's Lawyer Jones: "Mr. Police Officer, did you charge the defendant?"

Defense Lawyer Smith: I object, irrelevant and so prejudicial as to require a mistrial. I request counsel be held in contempt.

Leader: **[Hands gavel to student judge for a ruling.]** Then, "Any different ruling if liability is not a close question?"

PROBLEM 10 HYPOTHETICAL 10B

Leader: "You have requested all jury instructions to be on your desk by 9:00 a.m. the following morning to review. Tomorrow arrives.

(Hands gavel to student). "Ask for the jury instruction."

Plaintiff's Lawyer Jones: "Here are the Plaintiff's, your Honor."

Defense Lawyer Smith: "I don't have mine, judge. My secretary messed up and forgot to do them."

Plaintiff's Lawyer Jones: "That's not fair. I move for sanction."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 10 HYPOTHETICAL 10C

(Assume last day of long, heated jury trial and in front of the jury the following exchange takes place.)

Defense Lawyer Smith: "I object."

Leader: "Sustained."

Plaintiff's Lawyer Jones: (In front of the jury) "Judge, you are wrong and you are denying my client the right to a fair trial." (emphatic)

Leader: "How do you handle this?"

PROBLEM 10 HYPOTHETICAL 10D

Leader: Hands gavel to student and directs student to ask counsel for any last motions before trial begins.

Defense Lawyer Smith: "I need a continuance. I know you already denied my first motion for continuance this morning, but I am not ready. If you make me go to trial I'll be ineffective."

Leader: **"What will you do?"**

PROBLEM 10 HYPOTHETICAL 10E

Leader: This occurs at pretrial.

Defense Lawyer Smith: Judge, I need to continue this trial because I have a case specially set in federal court on the same day.

Leader: You check with federal court which indicates case was continued a month ago. **[Pass gavel.]**

PROBLEM 10 HYPOTHETICAL 10F

Judge: State v. Larry Later
"This case is set for Jury Trial this morning!—Where is Mr. Later? Where is his attorney, Lawyer Smith?

Prosecuting Attorney: "I don't know, judge. I haven't seen either one."

Leader: **[Pass gavel.]**

Ten minutes passes

Prosecuting Attorney: "Judge, Mr. Later is in the courtroom now."

Leader: **[Pass gavel.]**

Defense Lawyer Smith: "Judge, wait. I told Mr. Later to meet me out in the lobby. It's my fault he wasn't in the courtroom when you called the case earlier this morning. If you take someone into custody, it ought to be me. It's my fault he's late."

Leader: Pass gavel.

*(Discuss if **capias** is issued.)*

PROBLEM #11—CLOSING ARGUMENTS

TOPIC SUMMARY: Participants will be able to recognize and rule correctly on improper closing arguments.

POINTS TO COVER:

1. Improper comments by attorneys in closing arguments.
2. Repetitive argument.
3. Limits on time of argument.
4. Comments outside scope of evidence.

MATERIALS:

PROBLEM 11 HYPOTHETICAL 11A

(Assume you are in the middle of closing arguments in a criminal case.)

Prosecutor Jones: "As a prosecuting attorney, I can tell you I have no interest in prosecuting an innocent person. If I did not truly believe the defendant to be guilty, I would not have filed these charges."

Defense Lawyer Smith: "I object and move for a mistrial."

Leader: **[Hands gavel to student for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11B

(Assume the lawyer arguing has one minute to go.)

Plaintiff's Lawyer Jones: "I know that the minute I sit down I will remember something I forgot to tell you. . . so to be on the safe side, I'd better go over the whole argument again."

Leader: **"What do you do?"**

PROBLEM 11 HYPOTHETICAL 11C

Prosecutor: "Members of the jury, I submit the defendant's testimony is unworthy of belief. He's a chronic, pathological liar."

Defense: "I object and move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHERTICAL 11D

Defense Attorney: "This is a clear case of self defense. Imagine you were faced with a 240 pound maniac rushing at you. Wouldn't you have pulled a gun to protect yourself?"

Prosecutor: Objection and move for a mistrial.

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11E

Leader assume prosecutor states during closing argument:

Prosecutor: "We have an obligation to make you feel just a bit of what Mary, the victim, felt, because otherwise it's easy to forget that."

Defense Attorney: "Your Honor, now that the State has concluded its closing argument, I object to the improper comment regarding jury feeling what the victim felt and move for mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11f

Leader: "You heard that the victim was high on cocaine. How can he possibly identify his attacker?"

Prosecutor: "Objection—there is no evidence that the victim was high on cocaine or anything else."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11G

Prosecutor Jones: "Your Honor, I hate to interrupt opposing counsel during his closing argument, but we each agreed to a 20 minutes time limit. I stuck to the 20 minutes, but now Defense Lawyer has gone on and on for nearly 35 minutes."

Defense Lawyer Smith: "I have a lot to say, Your Honor. This is an important case. Besides, you cannot limit my client's right to be heard."

Leader: --Discuss time limits.
--When can they be imposed?
--What is a "fair" amount of time?
--How does a judge control time limits?

PROBLEM 11 HYPOTHETICAL 11H

Prosecutor Jones: "This obscenity case is very important to our community and its citizens. Law abiding citizens do not want this smut in their neighborhoods. I urge you, by your verdict, to send a strong message to smut dealers—no more in our community."

Defense

Lawyer Smith: "Objection!"

Leader: Discuss emotionally improper arguments.
If there is no objection, when/should trial court intervene so as to preserve the fairness of the proceeding?

PROBLEM 11 HYPOTHETICAL 11I

(Criminal Case—Marijuana possession—during closing argument Prosecutor states:)

Prosecutor: "I don't know why the Defense counsel objected to the I.D. technician telling you about the fingerprint results. Maybe he will tell you, unless he has something up his sleeve along with the perjured testimony and planted evidence."

Defense Attorney: "Objection, move for mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor cont.: "If you believe the detective is a perjurer, likes to point the finger at innocent people and would look you straight in the eye and lie, raise your hand now, and I will sit down. God forbid you should believe a police officer whose testimony went "uncontradicted" by these Defendants.

Defense Attorney: "Object, move for mistrial."

PROBLEM 11 HYOPTHETICAL 11J

Defense Lawyer Smith: "Your Honor, my client waives his initial closing argument. I shall save my closing remarks for rebuttal after the prosecutor gets finished."

Prosecutor Jones: "Your Honor, the State of Ohio waives its closing argument, as well."

Defense Lawyer Smith: "In that event, Judge, I shall make my rebuttal argument now."

Prosecutor Jones: "Wait a minute Judge, there was no defense argument and there was no prosecution argument, so what' to rebut?"

Leader: *Both sides have waived argument.*

Suppose the Prosecutor had said more such as, "Since the jury carefully heard the evidence that proves Defendant guilty, I shall waive argument also." Has argument to jury, albeit short, been made?

Suppose attorney tells jury he will only take five (5) minutes now and reserve remainder for rebuttal and Defense attorney objects. Permissible?

PROBLEM 11 HYPOTHETICAL 11K

Criminal Case (Judges Improper comments)

Leader: Pass gavel to student before reading this Hypothetical). (Student is to assume he/she is Judge in scenario).

Assume Defense Counsel referring to specific testimony, argues that witnesses lied. "They are liars."

Judge: "That's just improper for you to call him a liar. There's no evidence that anybody is a liar. I had to talk to you a couple of times. It's not up to you to call anyone a liar in this court, do you understand?"

Defense Counsel: "Your Honor, may counsel approach the bench? Your Honor, you have unreasonably criticized me in presence of jury at least 3 times—during opening and now during closing argument and your castigation of counsel has impaired the fairness of the trial for defendant, I move for a mistrial."

Does student judge grant or deny? What, if possible, is appropriate?

PROBLEM #12—JURY INSTRUCTIONS

TOPIC SUMMARY: Participants will be able to decide what jury instructions should be given to the jury.

POINTS TO COVER:

1. "Ohio Jury Instructions" are suggested.

2. Don't stop thinking just because there are standard instructions.

3. Sometimes law changes and standard instructions do not.

4. Methods by which instructions can go to the jury: written, recorded, verbal.

MATERIALS:

PROBLEM 12 HYPOTHETICAL 12A

Defense Lawyer Smith: "Your Honor, the defense requests that you give a special instruction on identity since that is the issue in this case." (hands instruction to student).

Prosecutor Jones: "I object. Not in the standard instructions."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 12 HYPOTHETICAL 12B

Prosecutor Jones: "Your Honor, the defendant is charged with Public Indecency. As I'm sure you are aware, the jury instructions do not define 'private parts'. Accordingly, we are requesting that you included in your instruction to the jury the following language defining 'private parts': 'private parts are defined as genitalia.'"

Defense Attorney Smith: "I object. The Supreme Court saw fit not to define the term 'private parts'. That instruction the Supreme Court wrote is the one they want given. It should not be modified at all."

(What if the prosecutor asks for "breasts" to be included in "private parts"?)

PROBLEM 12 HYPOTHETICAL 12C

Defense Attorney Smith: "This is a Disorderly Conduct Charge. The State claims the Defendant was disorderly because she refused to leave when the rest of the crowd left and refused to stop yelling at officers. My client has a Constitutional right to yell at officers, unless the words are fighting words. I propose this special jury instruction."(Hands instruction to student.)

Prosecutor Jones: "I object to Defendant's proposed instruction, it improperly places the Court in the position of commenting on the evidence. Further, the cases cited by Defense Counsel are distinguishable."

Leader: "What will you consider in ruling on this requested instruction?" *(Chaplinsy v. New Hampshire and State v. Hoffman)*

PROBLEM 12 HYPOTHETICAL 12D

Plaintiff's Lawyer Jones: "Judge, I hand you a charge that has been submitted to the Supreme Court for approval by the Civil Jury Instruction Committee. It's just better than the standard instruction in the book."

Defense Lawyer Smith: "It is not <u>in</u> the book. It is <u>not</u> the law."

Leader: "What should be taken into consideration in making a ruling?"

PROBLEM 12 HYPOTHETICAL 12E

Defense Lawyer Smith: **"**I request the jury instructions be tape recorded as the court reads them, and sent to the jury room with a tape player for use during deliberations."

Prosecutor Jones: "I object. If the jury has a question about the instructions and plays the tape, they may only play a portion of the instruction and receive an incomplete statement of the law."

Leader: **[Hands gavel to student for ruling.]**

PROBLEM #13—JURY DELIBERATION

TOPIC SUMMARY: The participants will be able to respond to problems that arise during jury deliberations.

POINTS TO COVER:

1. Questions and notes from the jury.

2. Questions to the bailiff from jurors.

3. Presence of defendant during these events.

4. Sending evidence back to jury room; guns, drugs, etc.

5. Deadlocked jury, now what?

6. Warning lawyers to check evidence before it goes back with jury.

7. When to order mistrial; how much time should pass when jury is deliberating.

9. Excusing the alternate juror.

10. Care and feeding of jury.

MATERIALS:

PROBLEM 13 HYPOTHETICAL 13A

(Assume jury is in deliberation)

Bailiff: "Your Honor, the jury gave me this note." Your Honor, we would like:

1. To hear all the testimony about the accident again.
2. For you to send back the two depositions given by the doctors.
3. To smoke.
4. A calculator.
5. A dictionary.
6. For you to explain what the "greater weight of the evidence means."
7. The video tape that is in evidence.

Leader: **What do you do? In what order and why?** *(Assume the bailiff has told the jury the judge never allows this.)*

PROBLEM 13 HYPOTHETICAL 13B

Bailiff: "Judge, they've asked to have the guns, ammo and drugs back with them. Any problem?"

Prosecutor Jones: "I object. Too dangerous."

Defense Lawyer Smith: "It's all evidence, they have a right to see it all."

Leader: **[Hands gavel to student judge for a ruling.]**
(What if the Bailiff offers to stay in the deliberation room with the material?)

PROBLEM 13 HYPOTHETICAL 13C

Leader: Assume a note is sent from a deliberating jury. The note reads. . ." . . .I need to speak with you in private, your Honor. Signed Mr. Lamberth."

(Hands gavel to student judge for ruling)

PROBLEM 13 HYPOTHETICAL 13D

(Assume the jury has been discharged and sent home.)

Bailiff: "Judge, some of the marijuana that was admitted into evidence and sent to the jury room for deliberation is missing. What do you want me to do?"

PROBLEM 13 HYPOTHETICAL 13E

Leader: "You notice that the jury has come back from deliberation and you see that a photo marked for identification but never admitted, has been sent back with them. No one has notice or objected. What do you do?"
[Hands gavel to student judge for ruling.]

Leader: *(Same situation except counsel notices and makes the following motion.)*

Defense Lawyer Smith: "I move for a mistrial. Evidence improperly before the jury."

Leader: **[Hands gavel to student judge for a ruling.]** *(How can these situations be avoided?)*

PROBLEMS 13 HYPOTHETICAL 13F

Prosecutor Jones: "Your Honor, the jury has been deliberating for over 3 hours. The case only took 2 hours to try. Could you please ask them if there's some additional information they need?"

Defense Attorney Smith: "I object."

Leader: **[Hands gavel to student judge for a ruling.]**
(Do you interrupt the jury?
Do you order dinner if it's after 7:00 p.m.?)

PROBLEM 13 HYPOTHETICAL 13G

(Two hours later)

Bailiff: "The jury is in the Courtroom. Sir, they have a question."

Foreperson: "Your Honor, it is 8:00 p.m., we have been at it for over five hours now. We are exhausted, and can't decide tonight. Can we go home for the night, and start again in the morning?"

Prosecutor Jones: "No problem for the State."

Defense Attorney Smith: "I object, I want them tired and angry. That helps the defense."

Leader: **[Hands gavel to student judge for a ruling.]**
(What if it is 5:00 p.m. and a single parent juror has to pick up a child from day care? How can this be avoided?)

PROBLEM 13 HYPOTHETICAL 13H

Leader: The jury has sent a note wanting to know what happens when they can't reach a unanimous decision—they're split 6-2.
[Hands gavel to student judge for a ruling.]

What happens when the judge forgets to excuse an alternate juror? Is there a situation when a judge would allow less than a unanimous verdict? Would you allow a case to go to the jury with 5 jurors and no alternates—in what situations?

--Discuss propriety of Judge inquiring how jury is split.
--What if it was a civil case, split 6-2?

PROBLEM #14—RECEIVING VERDICTS AND CONCLUDING TRIALS

TOPIC SUMMARY: The participants will be able to receive a jury verdict and close the trial proceedings.

POINTS TO COVER:

1. Verdict form proper—what to look for.
2. What to say when jury re-enters courtroom.
3. Who takes verdict from whom?
4. Polling the jury.
5. Verdict on one count but not on others.
6. How and when to discharge the jury.
7. Continued bond after criminal verdict.
8. What to say to defendant's lawyer—criminal.
9. Safety of jurors—verdict late at night.
10. Adjudicate right there—criminal.
11. Who does judgment—civil.

MATERIALS:

PROBLEM 14 HYPOTHETICAL 14A

Bailiff: "Your Honor, they have a verdict."

Leader: "What do you do first?" (cover how to bring them in, where they stand, etc.)

Lawyer: "We would like the jury polled, please."

Leader: "Must you? How is it done? Who does it?"

Juror: (While being polled). "No, that's not what I wanted to do."

Leader: "Now what do you do?"

PROBLEM 14 HYPOTHETICAL 14B

Bailiff: "The jury is in the courtroom, your Honor."

Leader: "Have you reached a verdict?"

Foreperson: "Your Honor, we are deadlocked on one count but have verdict on the other."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 14 HYPOTHETICAL 14C

The Clerk: "We find the defendant guilty."

Leader: "What do you say to the jury?" *(appreciation and rules of privacy)*

"To the criminal defendant?" *(bond)*

"To the lawyers?" *(who prepares judgment in civil case)*

(Assume the jury has been discharged but several jurors have chosen to remain in the courtroom)

"Do you continue with sentencing?"

PROBLEM 14 HYPOTHETICAL 14D

Plaintiff's Lawyer Jones: "Permission to speak to the panel after discharge."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 14 HYPOTHETICAL 14E

Defense Attorney: "Judge, the verdict and your instructions asked the jury to reduce all future economic damages to their present money value. The verdict awards $3,000.00 for future medical and lost wages and then "reduces" that amount to $9,000.00. This is a fatal inconsistency in the verdict, and I suggest a mistrial is in order."

Plaintiff's Counsel: "Judge, can't we fix this?"

Leader: **[Hands gavel to student judge for a ruling.]**

What if it is a criminal verdict and it is incomplete? (Not signed, all boxes not checked—such as firearms, value, etc.)

Discuss use of interrogatories and verdict forms.

PROBLEM 14 HYPOTHETICAL 14F

(Assume the jury has just returned a $15,000.00 verdict.)

Plaintiff's Lawyer Jones: "Your Honor, we anticipated that we might win, so we have a judgment prepared for you to sign for the full amount plus interest at 10%."

Leader: "Do you sign?"

PROBLEM 14 HYPOTHETICAL 14G

Judicial Assistant: "Judge, a juror from last week's trial is here and wishes to speak with you about the verdict."

Leader: **[Hands gavel to student judge for a ruling.]**

Pleas, including Judicial Participation in Plea Negotiations

Hon. Nick A. Selvaggio
Champaign County Common Pleas Court

Pleas & Plea Negotiation

New Judge Orientation – May 12-15, 2025

NICK A. SELVAGGIO
JUDGE, CHAMPAIGN COUNTY COMMON PLEAS COURT

Objective(s) to taking a plea?

Philosophical Answer:

(Fill-in the blank)

Objective Answer:

Will it survive appeal?

FUNDAMENTAL ELEMENTS

Was it Knowingly made?

Was it Intelligently made?

Was it Voluntarily made?

Conducting the Plea

Tip: Use a Worksheet

Why use a worksheet?

Obviously – you don't forget Crim.R. 11 requirements!

Routine Order to Questioning
- Provides predictability to Defense Attorneys to prepare the client

Establishes a reputation with the Court of Appeals
- Thoroughness

Helps perfect your skills
- If you only use in High Profile Case, you're more likely to make a mistake

How are you taking the plea?
Remote Participation

Crim. R. 43

Requires:
- Notice
- Defendant can see and hear and see proceeding
- Defendant can speak, be seen and heard by Court and all parties
- Court explains on the record how Defendant and counsel shall have private communication.

Defense Counsel shall be permitted to appear with Defendant at remote location upon request.
Waiver of physical appearance – can be in writing or orally on the record for any stage of the proceedings
BONUS – Bench Card - A Judicial Guide to Conducting Remote Hearings
www.supremecourt.ohio.gov / Courts / Services to Courts / Bench Cards & Toolkits

Crim.R. 43

(B) DISRUPTIVE DEFENDANT

- Hearing / Trial cannot reasonably be conducted with the defendant's continued physical presence;
- May proceed in the defendant's absence or by remote presence.
- Preserve constitutional rights of the defendant by communication of the courtroom proceedings to the defendant

BONUS: OJI CR 403.03 –

- Removal of Disruptive Defendant from Courtroom (*State v. McCollum*, 2023-Ohio-69, 8th Dist.)
- Return of Disruptive Defendant to Courtroom (*State v. Cook*, 2023-Ohio-2157, 12th Dist.)

BONUS – Look to OJI 403.01
Trial Defendant absent during trial

- *State v. Harris*, 2023-Ohio-3271, ¶35-37 (2nd Dist.) – Application of Crim.R. 43(A) / Plain error analysis
- A defendant's absence is voluntary if it is a product of his own free choice and unrestrained will.
- When a defendant refuses to leave his or her cell to attend a court proceeding, the defendant is considered voluntarily absent.
- **NOTE: There is a significant distinction between pre-trial and mid-trial absence of the Defendant.**

Victim Notification / Objection

R.C. 2930.09 – Victim Invoked Rights and Is Absent

- Court shall ask whether Victim was notified, the attempts to notify, whether conferred
- Prosecutor shall inform the Court of the Victim's position if known to the Prosecutor
- Victim right to be present and to be heard at negotiated plea;
- Victim to objection to the terms of the plea agreement on record in open court – Crim.R.11(F)
- Non-presence at negotiated plea, Prosecutor has to verify notice, discussions, any objections
- Applies to Bond, Community Control Violations or Community Control Modifications

R.C. 2930.06 – Victim Invoked Rights & Negotiated Plea

- Prosecutor, upon victim request, must confer with Victim
- Before amendment of indictment or agreeing to negotiated plea
- Court shall ask whether prosecutor conferred and if not, note on record why not
- Court shall not accept plea or impose sentence if reasonable efforts not made to confer
- Validity of plea entered by defendant not impacted by prosecutor or court failure to comply

Starting the Plea Colloquy

Do you place
the Defendant under oath?

Tip: Begin with Defendant's Background

- ❑ U.S. Citizen
- ❑ Under influence of alcohol or illegal substance
- ❑ Taken any prescribed medication today
  - ❑ Are you taking the prescribed medications pursuant to the prescription?
  - ❑ Does your prescribed medication interfere with ability to make rational choices?
  - ❑ Does your prescribed medication prevent you from understanding what your attorney or the court told you?
  - ❑ Does your prescribed medication affect your ability to fully and adequately assist your attorney?
- ❑ Defense Counsel, have you seen any indication that the Defendant's prescribed medications were affecting his/her reasoning ability or judgment?
- ❑ Defense Counsel, do you believe the Defendant has sufficient present ability to consult with you to a reasonable degree of rational understanding and factual understanding of the proceedings against the Defendant?

Foreign Citizen Advisement

- Prior to accepting Defendant's plea of guilty or no contest, the Court personally addressed the Defendant and advised the following pursuant to Ohio Revised Code Section 2943.031:
- **If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty or no contest may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.**

Prescription: Meds and Competency

- Just because a Defendant is taking prescription medication for mental illness, it does not follow that the trial court must order a competency hearing before accepting a guilty plea.
- *State v. Montgomery*, 2016-Ohio-5487, ¶54-56 (capital case)
  - The defendant must have a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and [have] 'a rational as well as factual understanding of the proceedings against him.'"
  - And it is a matter of statutory and decisional law that "[t]he fact that a defendant is taking antidepressant medication or prescribed psychotropic drugs does not negate his competence to stand trial." *(citations omitted).*

Prescription: Meds and Competency Cont'd - two more cases

- *State v. Lawson*, 2021-Ohio-3566, ¶58-63 (capital case)
- See also, *State v. Johnson*, 2024-Ohio-6048, (2nd Dist.)
- ¶11: "Factors courts should consider when determining a defendant's competence include:
  1) doubts expressed by counsel as to the defendant's competence;
  2) evidence of irrational behavior;
  3) the defendant's demeanor at trial; and
  4) prior medical opinion relating to competence to stand trial."
- Absent sufficient indicia of incompetency, a trial court need not hold a competency hearing. *(citations omitted*)."
- ¶15: "[A] suicide attempt, when it is not coupled with any other evidence of incompetence, does not warrant the conclusion that a defendant did not knowingly and voluntarily enter a guilty plea."

Prescription: Meds and Competency *Johnson,* cont'd

State v. Johnson, 2024-Ohio-6048, (2nd Dist.) continued:

¶16: Jail would not allow certain medications. Def taking his prescribed medications as instructed, however.

¶18: Expressed anxiety based on amount of prison time he was facing for the offenses not reflective of incompetency but rather understood penalty severity.

¶18: The Supreme Court of Ohio "has made clear that '[i]ncompetency must not be equated with mere mental or emotional instability or even with outright insanity.'" *(citations omitted).*

¶18: '[A] defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.'

Bonus Tip – Three Slashes

Ask during different parts of plea colloquy:

1) Is there anything that I have covered that you didn't understand?
2) Is there anything that I have covered that you would like me to rephrase or repeat?
3) Is there anything that you would like to talk to your attorney about before we continue?

Tip: Look for trouble

Look for Trouble - Why Ask?

- ❑ Defense Counsel, have you reviewed the discovery packet containing police reports / prosecution materials?
- ❑ Talked with attorney about your case
- ❑ Did you review your discovery packet containing police reports and prosecution materials with your attorney?
- ❑ Have you had sufficient time to speak with your attorney about the case?
- ❑ Attorney done everything you've asked?
- ❑ Anything you want attorney to do that attorney has not?
- ❑ Do you believe have received enough information about this case to make decisions on whether your plea of guilty / ADMISSION TO THE MERITS is a knowing, intelligent and voluntary decision?
- ❑ Do you have confidence in attorney?

See, *State v. Harris*, 2023-Ohio-3271, ¶18-19 (2nd Dist.) – regarding atty-client conflicts

Look for Trouble - Why Ask? – *Cont'd*

- ❑ Does the State of Ohio believe that it has fully complied with Rules of Criminal Procedure regarding discovery?
- ❑ Does Defense Counsel agree?
- ❑ Do you understand that your lawyer and the State of Ohio believe that you have been given all of the information that you are entitled to so that you may make a knowing, intelligent and voluntary decision as to entering a plea of guilt / Admission to the Merits?
- ❑ Understand what doing
- ❑ Doing this of own free will
- ❑ Do you understand the nature of the charges against you?
- ❑ Do you understand the maximum penalties involved; Including Specs/PRC judicial sanction

Look for **Trouble** - Why Ask? – *Cont'd*

- ❑ Any threats against you to make you enter a plea / ADMISSION TO THE MERITS
- ❑ Any promises made to you or any promises to recommend something on your behalf to get you to enter the plea of guilt / ADMISSION TO THE MERITS except what you have heard in court
- ❑ Does the State of Ohio believe it has sufficient information to prove the Defendant guilty?
- ❑ Do you understand that the State of Ohio believes that they can prove you guilty?
- ❑ Do you have any defense to the charge / any reason you should not be found guilty?

What kind of Plea is involved?

- Guilty
- No Contest
- *Alford*
- Intervention in Lieu of Conviction

Guilty Plea and No Contest Plea

Guilty Plea v. No Contest Plea

Guilty Plea – Crim.R. 11(B)(1)
- Complete Admission of Guilt – Crim.R. 11(B)(1)

No Contest Plea – Crim.R. 11(B)(2)
- No Admission of Guilt
- Admission of the truth of the facts alleged in the Indictment/Information
- Plea shall not be used against the defendant in any Civil/Criminal proceeding

BONUS TIP: Additional question to ask: Do you understand that you should expect that based upon your plea of no contest the Court will make a finding of guilty as to every count that you enter a plea to?

State v. Hogan, 2011-Ohio-5811, ¶13 (2nd Dist)

Upon Receipt of Felony Plea of No Contest

State v. Mayfield, 2004-Ohio-3440, ¶7 (Lundberg Stratton, concurring):

- ❑ A trial court must find a defendant guilty of the charged offense if the indictment alleges sufficient facts to state a felony offense.
- ❑ Defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense.
- ❑ If Defendant denies the facts to which s/he pled no contest, Prosecutor should object, ask the Court to reject the no contest plea and proceed to trial.

Felony Plea of No Contest

State v. Burchfield, 2025-Ohio-867, ¶17 (5th Dist.)

- (contains list of supporting case authority for the following proposition):
- Felony Plea of No Contest forecloses Defendant's right to challenge truth of facts in subsequent appeal of sentence

Contrast: Misdemeanor Plea of No Contest

City of Girard v. Giordano, 2018-Ohio-5024:

- ¶13 - R.C. 2937.07 sets forth the procedure for taking a no-contest plea in a misdemeanor case:
- A plea to a misdemeanor offense of 'no contest' constitutes an admission of the truth of the facts alleged in the complaint and that
- The judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense.
- No explanation of circumstances is required for a plea of no contest to a minor misdemeanor.
- ¶19 - "explanation of circumstances" requirement does not exist in felony cases

Contrast: Misdemeanor Plea of No Contest Cont'd

Giordano, continued:

- ¶15 – "Stipulation" that judge may find guilty or non guilt from explanation of circumstances no longer provided in R.C. 2937.07.
- ¶15 - R.C. 2937.07 was not superseded by Crim.R. 11 and therefore, a no contest plea may not be the basis for a finding of guilty without an explanation of circumstances.
- ¶18 – "The explanation-of-circumstances requirement does, however, provide a degree of protection for the defendant. In essence, it allows a judge to find a defendant not guilty or refuse to accept his plea when the uncontested facts do not rise to the level of a criminal violation."

Example: Why Enter No Contest Plea? Preserves Right to Appeal Suppression Issue

State v. Engle, 74 Ohio St.3d 525, 528-529 (1996) (Resnick, concurring):

- Plea of no contest does not preclude appellate review of the merits of the suppression motion.
- Since suppression is dispositive of the action (i.e., it eliminates all possible defenses), judicial economy is served by allowing the defendant to plead and then to appeal the evidentiary ruling rather than completing the trial.

Contrast: Desire to Enter No Contest Plea to Preserve Right to Appeal Liminal Ruling

State v. Engle, 74 Ohio St.3d 525, 529 (1996) (Resnick, concurring):

- "A motion in limine is tentative and precautionary in nature, reflecting the court's anticipatory treatment of an evidentiary issue at trial.
- In deciding such motions, the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial.
- Finality does not attach when the motion is granted. Judicial economy could not be served by an appeal of such a ruling after a plea of no contest.
- By entering a plea of no contest in such a case, the defendant voluntarily waives the right to appeal the ruling on the [liminal] motion.

Guilty Plea AND No Contest Plea

- **Can an unrepresented defendant enter a felony G / NC plea?**
- Yes.
- Court must first re-advise of right to be represented by retained / appointed counsel and defendant must waive the right on the record and in writing. Crim.R. 11(C) and Crim.R. 44(A) and (C).

  See ***NJO I Manual***, pages 15-16 for general inquiry.
- Denial of right to self-represent when properly invoked is "per se reversible error". *State v. Dean*, 127 Ohio St.3d 140, 151 (2010) (citing *State v. Reed*, 74 Ohio St.3d 534, 535 (1996)).

Guilty Plea AND No Contest Plea

- **Can a judge refuse to accept a felony G / NC plea?**
  - ✓ Yes.
- Crim.R. 11(C)(2).
- Why would a judge refuse to accept a felony G / NC plea?

Guilty Plea AND No Contest Plea

What must a judge look for when accepting a felony G / NC plea?

- Defendant is voluntarily entering the plea
- Defendant understands nature of the charges / max penalty
- If applicable, understands eligibility for community control

Crim.R. 11(C)(2)(a).

Guilty Plea AND No Contest Plea

What must a judge look for when accepting a felony G / NC plea?

- Defendant understands the effect of the plea
- Defendant understands upon acceptance of plea, Court may proceed with sentence

Crim.R. 11(C)(2)(b).

Guilty Plea AND No Contest Plea

What must a judge look for when accepting a felony G / NC plea?

- Defendant understands waiver of constitutional rights

- ❑ Right to jury trial / MERITS HEARING
- ❑ Right to confront witnesses against you (a.k.a. "Right to face those who accuse you & cross examine them")
- ❑ Right to have compulsory process for obtaining witnesses in your favor (a.k.a. "Right to make witnesses attend and testify in your favor pursuant to subpoena")
- ❑ Right to make the State prove your guilt beyond a reasonable doubt / BY A PREPONDERANCE OF THE EVIDENCE before being found guilty
- ❑ Right that if you went to trial / MERITS HEARING, you cannot be compelled to testify against yourself (a.k.a. "Right to remain silent")

Crim.R. 11(C)(2)(c) – Strict Compliance Required

Alford **Plea**

ALFORD **PLEA - BASICS**

State v. Williams, 1993 Ohio App. LEXIS 2013, 1993 WL 102632 (2nd Dist.):

What is it?

- A plea of guilty from a defendant that maintains his innocence

Why enter?

- A defendant who believes himself innocent
- Rationally concludes
- Evidence so incriminating
- Significant chance that a jury would find him guilty of the offense
- Runs the risk of greater punishment than if he accepted offer with guilty plea

ALFORD PLEA: OBLIGATION OF TRIAL JUDGE

State v. Williams, 1993 Ohio App. LEXIS 2013, 1993 WL 102632 (2nd Dist.):

- Obligation of judge is different in an *Alford* plea setting from taking guilty plea
  - Judge must ascertain that defendant has made a rational calculation that it is in his/her best interest to accept the plea bargain offered by the prosecutor

How does a judge meet that obligation?

- Judge must find there is a strong factual basis for the plea in order to conclude that the accused was making an intelligent and voluntary guilty plea. *State v. Hughes*, 2021-Ohio-111, ¶13 (4th Dist.) (*citations omitted*)
- Evidence must be clear and unequivocal that choice was made with full understanding of risks of conviction and a desire to avoid them. *State v. Mapes*, 2010-Ohio-4042, ¶12 (2nd Dist.) (*citation omitted*)

ALFORD PLEA - BASICS

State v. Alvelo, 2017-Ohio-742, ¶24, 25 (8th Dist.):

- Requires Defendant actually state his innocence on the record (i.e., Defendant must assert or maintain his actual innocence while at the same time protesting his/her innocence).

NEW:

- When sentencing an *Alford* Defendant, court may not consider whether offender showed genuine remorse for the offense. *R.C. 2929.12(G); H.B. 234 (GA 135),* eff. April 9, 2025

ALFORD PLEA: OBLIGATION OF TRIAL JUDGE

State v. Williams, 1993 Ohio App. LEXIS 2013, 1993 WL 102632 (2nd Dist.) (citing *State v. Piacella*, 27 Ohio St.2d 92, 96 (1971)) :

- Guidelines for accepting a voluntary and intelligent *Alford* plea in Ohio:
- The record affirmatively discloses that:
  1. a guilty plea was not the result of coercion, deception or intimidation;
  2. counsel was present at the time of the plea;
  3. counsel's advice was competent in light of the circumstances surrounding the plea;
  4. the plea was made with the understanding of the nature of the charges; and,
  5. the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both.

How does a judge meet the *Alford* inquiry standard? Part One of Two0. -+2

- Inquire of the defendant concerning his reasons for deciding to plead guilty notwithstanding his protestations of innocence;
  - Is Defendant motivated by desire to seek lesser penalty or does Defendant fear consequences of jury trial, or both?
- Make inquiry concerning the State's evidence
- Evaluate factual basis
- Determine that the likelihood of the defendant's being convicted of offenses of equal or greater magnitude than the offenses to which he is pleading guilty
- Warrants an intelligent decision to plead guilty.
- Consider introduction of evidence – *State v. Satterwhite*, 2021-Ohio-2878 (12th Dist.) (*i.e.*, exhibit of Defendant interview, testimony of Detective, Prosecutor's statement of anticipated evidence read into the record)

How does a judge meet the *Alford* inquiry standard? Part Two of Two

- A bill of particulars or statement from defense counsel verifying a factual basis exists can form a sufficient factual basis. *State v. Hughes*, 2021-Ohio-111, ¶15
- Elicit from Defendant any reason or reasons, in relation to the evidence against him, why Defendant believed he would be convicted should he go to trial, his claims of innocence notwithstanding.
  - Attorney told him "I would lose" is insufficient to demonstrate the full and subjective understanding of his risks of conviction that an *Alford* plea requires. *State v. Mapes*, 2010-Ohio-4042, ¶63 (2nd Dist.)
- Consider what, if anything, Defendant's counsel did to investigate the strength of the State's case and whether he interviewed the victim or other State's witnesses and whether the *Alford* plea was in the Defendant's best interests.

Alford Plea – Actual Findings by the Judge

With regard to the *Alford* plea, the Court finds:

- Defendant maintains his innocence while entering this negotiated plea of guilty.
- Defendant rationally concluded that the evidence against him is so incriminating that there is a significant chance that a jury would find him guilty of the offense with which he is charged and would therefore run the risk of greater punishment than if he accepted a plea offer which required an official plea of guilty.
- There is a strong factual basis for the plea in order for the Court to conclude that the Defendant was making an intelligent and voluntary guilty plea.
- The evidence is clear and unequivocal the Defendant's choice to enter the *Alford* plea was made with full understanding of the risks of conviction and the desire to avoid them.

Alford Plea – Findings by the Judge *Cont'd*

- The *Alford* plea was not the result of coercion, deception, or intimidation.
- Defense Counsel's advice was competent in light of the circumstances surrounding the plea.
- The *Alford* plea was made with an understanding of the nature of the charges and was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial or both.
- The Court therefore accepts the Defendant's *Alford* plea and finds the Defendant **GUILTY** of each offense to which Defendant has entered this plea. The *Alford* plea and guilty plea shall be filed.

What if Defendant protests innocence after entering a *traditional* guilty plea?

- Is Defendant seeking to withdraw guilty plea?
  - If no, traditional guilty plea remains.
  - If yes, proceed to the legal analysis for withdrawing a guilty plea.
- Is Defendant making "I'm innocent" statements during his/her allocution at sentencing?
  - If there was no reason to question Defendant's guilty pleas at the time they were made and Defendant never sought to withdraw his guilty pleas prior to sentencing, the trial court has no duty to inquire into Defendant's reasons for pleading guilty or the facts underlying his guilty pleas in order to accept or "keep" his guilty pleas. *State v. Alvelo*, 2017-Ohio-742, ¶27 (8th Dist.) (*citations omitted*).

Intervention in Lieu of Conviction (ILC) Plea

ILC – R.C. 2951.041 - Basics

Why? drug/alcohol usage, mental illness, intellectual disability was factor that led to criminal act
When? Prior to entry of guilty plea
Hearing? Mandatory if drug/alcohol is alleged by Defendant as factor leading to act
Protocol?

- Order Assessment to determine Defendant eligibility and Recommendation of Intervention Plan
- R.C. 2951.041 sets forth statutory requirements to be eligible for ILC
- ILC is statutorily presumptive unless court finds specific reasons in a written entry to reject
- Accept Waiver of Speedy Trial and Plea of Guilty

ILC – R.C. 2951.041 – Basics Cont'd

Length of ILC Program? Must be for at least one year, not to exceed five years.

Program Requirements? Abstain from using, participate in treatment, urine screens and other terms

If successful? Court dismisses case, not an adjudication of guilt, not a criminal conviction or disability

Basis to Reject ILC?

R.C. 2951.041:
(B)(6) Intervention in lieu of conviction would demean the seriousness of the offense
- Ex. Occurrence of physical injury or property damage during the commission of the drug use

(B)(6) Intervention would not substantially reduce likelihood of any future criminal activity
- Ex. Defendant's criminal record – multiple OVIs, multiple drug convictions, multiple rehab stints

(B)(9) The offender is not willing to comply with all terms and conditions imposed by court
- Ex. Violations of bond demonstrate ongoing usage, unwillingness or failure to attend treatment

Violations during ILC term

Treat as if community control violation (Due process / Counsel / Plea)

- Can return Defendant to ILC supervision
- Can return Defendant to ILC supervision and add new conditions
- Can terminate ILC and enter finding of guilt – Sentence anew.

Additional Items for the Plea Basket

- **Registration Requirements**
- **Presumptive Release**
- **Earned Reduction Minimum Prison Term**
- **Post-Release Control Supervision**
- **Right to Appeal Sentence Imposed "Contrary to Law"**

Registration Requirements

- Sex Offender Advisements
- Arson Offender Advisements
- Violent Offender Advisements

SEXUAL OFFENDER / CHILD-OFFENDER REGISTRATION

- Carries residential, employment and education registration and verification requirements as well as prohibitions against the Defendant living within 1,000 feet of any school premises or preschool or child day care center premises and a community notification process by which members of the public would be made aware by the registering sheriff of the Defendant's status as a sex offender
- Court will determine Tier status prior to sentencing
  - ✓ Tier I – 15 years with in-person verification annually. R.C. 2950.01(E) / 2950.07
  - ✓ Tier II – 25 years with in-person verification every 180 days. R.C. 2950.01(F) / 2950.07
  - ✓ Tier III – lifetime with in-person verification every 90 days. R.C. 2950.01(G) / 2950.07

ARSON OFFENDER REGISTRATION

- Court will determine length of registration prior to sentencing
- Lifetime Registration with in-person verification annually within ten (10) calendar days of the anniversary of the initial registration. R.C. 2909.16(D)(1)- (2)
- The Court can receive a request from the Prosecutor and investigating law enforcement agency to consider limiting the arson offender's registration period to not less than ten (10) years. Therefore, no limitation on the Defendant's registration is imposed by the Court. R.C. 2909.16(D)(2)(b)

VIOLENT OFFENDER REGISTRATION – R.C. 2903.41 – R.C. 2903.44

Court will determine prior to sentencing

- Convicted of Agg Murder, Murder, Voluntary Manslaughter, Kidnapping or F2 Abduction
- Rebuttable presumption that a VO shall be required to enroll in the VO database and have VO database duties with respect to that offense for 10 after initial enrollment. R.C. 2903.42(A)(1)
- Defendant has right to file a motion to rebut presumption, of the procedure & criteria for rebutting the presumption & of the effect of a rebuttal and the post-rebuttal hearing procedures and possible outcome. R.C. 2903.42(A)(2)(a), (A)(3), (A)(4), (C)

VIOLENT OFFENDER REGISTRATION – R.C. 2903.41 – R.C. 2903.44, con't.

Court will determine prior to sentencing

- Time for enrollment – R.C. 2903.43(A)(1)
  - ✓ If received no jail or prison – w/in 10 days after sentencing.
  - ✓ If received jail or prison – w/in 10 days after release
- 10 yr enrollment period can be extended upon motion of prosecutor if offender has violated a term or condition of a sanction imposed under offender's sentence or has been convicted of or pleaded guilty to another felony or any misd. offense of violence during the enrollment period. R.C. 2903.43(D)(2)

Presumptive Release

Presumptive Release

- Applies only to Indefinite Sentences (F1 / F2) – (R.C. 2967.271(B))
- Rebuttable presumption that Defendant released upon minimum term expiration
- ODRC can rebut presumption based on factors (R.C. 2967.271(C))
- ODRC can rebut presumption more than one time (R.C. 2967.271(D))
- Once Defendant reaches maximum term, Defendant must be released

Earned Reduction of Minimum Prison Term

Earned Reduction of Minimum Prison Term

- Applies only to Indefinite Sentences (F1 / F2) – (R.C. 2967.271(F))
- 5 – 15% Reduction for Exceptional Conduct or Adjustment to Incarceration
- Rebuttable Presumption Created
- ODRC notifies Court and Court sets hearing with Defendant present
- Court has 60 days to decide whether to grant or rebut presumption based on factors
- Not eligible for ERMPT:
  - Mandatory imprisonment sentences
  - Felony sex offense sentences

Post-Release Control Supervision

Post-Release Control Supervision R.C. 2967.28

Applies only to offenders released from imprisonment

(B)(1) Felony Sex Offense - **MANDATORY – 5 years**

(B)(2) First degree felony that is not a felony sex offense - **MANDATORY – up to 5 years, not less than 2 years**

(B)(3) Second degree felony that is not a felony sex offense - **MANDATORY – up to 3 years, not less than 18 months**

(B)(4) Third degree offense of violence that is not a felony sex offense - **MANDATORY – up to 3 years, not less than 1 year**

(C) Any remaining felony not included above – **DISCRETION OF PAROLE BOARD – up to 2 years**

Post-Release Control Advisements

Advise of Penalties For Violations of PRC Supervision:

- Increase duration of PRC up to maximum duration or impose more restrictive sanction. *R.C. 2967.28(F)(3)*
- Parole Board can impose PRC sanction including prison term not to exceed nine months, with maximum cumulative prison term not to exceed one-half of definite prison term or one-half of minimum prison term on an indefinite sentence. *R.C. 2967.28(F)(3)*
- If commit new felony while on PRC, face penalty for new felony and sentencing court can impose an additional consecutive maximum prison term of the greater of 12 months or the period remaining on PRC at time of sentencing. *R.C. 2929.141(A)(1)*

Right to Appeal Sentence

Why Advise Appellate Rights?

Defendant can appeal as a matter of right:

- Where the sentence is contrary to law. *R.C. 2953.08(A)(4)*

Prosecutor can appeal as a matter of right:

- A non-prison sentence on a presumption of prison offense. *R.C. 2953.08(B)(1)*
- Where the sentence is contrary to law. *R.C. 2953.08(B)(2)*

Sentence NOT subject to appellate review:

- A sentence imposed upon a Defendant where the sentence is authorized by law, has been recommended jointly by the Defendant and the Prosecution in the case, and is imposed by a sentencing judge. *R.C. 2953.08(D)(1)*

Plea Negotiations

Reasons not to get involved – *Byrd* case

Reasons not to get involved? See, *State v. Byrd*, 63 Ohio St.2d 288, 292 (1980):

- High potential for coercion.
- Defendant may be led to believe that judge considers him guilty of the crime without a chance of proving otherwise.
- Defendant may infer that he will not be given a fair opportunity to present his case.
- Judge participating in plea bargaining brings to bear the full force and majesty of office and power to impose substantial sentence in excess of plea offer
- Defendant is easily influenced to accept what appears the more preferable choice and is subjected to subtle but powerful influence

Reasons not to get involved – American Bar Association

Reasons not to get involved? *Byrd* at 293 (1980) (citing, *Section 3.3(a) American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty*):

Valid reasons for keeping the trial judge out of the plea discussions, including:

1. Creates the impression he would not receive a fair trial before this judge;
2. Makes it difficult to objectively to determine voluntariness of the plea;
3. Promising certain sentence is inconsistent with the theory behind use of PSI;
4. Risk of not going along with the disposition apparently desired by the judge may seem so great that he will be induced to plead guilty even if innocent.

Reasons not to get involved – Nick Reasons

Reasons not to get involved?

- Judge doesn't know everything about case until sentencing – review of police report, offender criminal record, existence of co-defendants, receipt of Victim Impact Statement, *Brady* material
- Defendant may commit post-plea acts that impact sentencing recommendation
- Interferes with prosecutorial role – judges had no hand in circumstances bringing charge, why should we have hand in resolving charge without knowledge of the same circumstances
- on record / off record?

Reasons not to get involved – Nick Reasons

Reasons not to get involved? *continued*

- Too many variables involved to suggest judicial bias:
  - Retained vs. Appointed Counsel OR Out-of-County vs. In-County
  - Overcharging and imposing judicial will on "young prosecutor" – shouldn't jury set standard
  - How many offers previously made – coercion
  - May expose assumption of Trial Tax
  - Judicial approval of hard-line bargaining practices (time deadline, restriction on pretrial motion, etc.)

Bottom Line for NOT getting involved

State v. Byrd, 63 Ohio St.2d 288, 293-294 (1980):

Although **strongly discouraged** by the Ohio Supreme Court, a trial judge's participation in plea negotiations does not render a defendant's plea invalid per se under the Ohio and United States Constitutions

Plea Colloquy for Judge who does NOT get involved

- Lawyers talk to each other about the case – Judge not involved in the discussions
- Lawyers make suggestions or recommendations about sentence – Judge seek to follow the law
- Do you understand that the Court is not required to follow the sentencing recommendation of the Prosecutor, your attorney or yourself
- Do you understand that even though the pre-sentence investigation report is recommended by the Prosecutor, your attorney or yourself, the Court is not required to order a pre-sentence investigation report

Judge DOES get involved

Reasons to get involved?

- Judge can objectively discuss application of law to particular conduct involved (ex. “burglary” when nothing is stolen)
- Judge can explain interests of the court in handling common criminal fact patterns
- With a basic understanding of the particular fact pattern, the Judge can highlight which of the purposes and principles of sentencing are important to the court

Judge DOES get involved – Cont'd

Why get involved?

- Sometimes, the defendant is so bull-headed that the only person s/he will listen to is the judge
- Judge trusts the lawyers on the case not to throw the Judge under the bus
- May help a party where one side is "performance deficient"
- May help establish consistency amongst prosecutor offers between the "young vs. old" prosecutors

This Judge got too involved – *Byrd* case

State v. Byrd, 63 Ohio St.2d 288, 293-294 (1980) – trial judge's active efforts to secure plea rendered Defendant's plea involuntarily:

- Must carefully scrutinize to determine if the judge's intervention affected the voluntariness of the defendant's guilty plea.
- Ordinarily, if the judge's active conduct could lead a defendant to believe he cannot get a fair trial because the judge thinks that a trial is a futile exercise or that the judge would be biased against him at trial, the plea should be held to be involuntary and void under the *Fifth Amendment* and *Section 10, Article I of the Ohio Constitution*.

Judge got too involved – *Byrd* Cont'd

What did the *Byrd* judge do? *Byrd* at ¶294 (capital case)

- Judge initiated discussion, no D lawyer present.
- Judge convened Lt. Coney, Byrd mother, sister and family friend, and conveyed own remarks.
- The judge negotiated for plea and then recommended that the appellant take the plea.
- Appeared as if the judge had joined forces with the prosecution in deciding that appellant was guilty.
- Discussed the problems involved in having a jury trial.
- Intense pressure in these meetings, designed to make him realize that guilty plea was his best course.

Judge got too involved – *Byrd* Cont'd

Two other factors:

- Defendant's methadone addiction could easily have amplified the coercive effect
- Never had the opportunity to consult with an attorney regarding the judge's remarks.

Post-*Byrd* Decisions

State v. Harrison, 2020-Ohio-4154 (2nd Dist)

¶22: When the trial court promises a certain sentence at a plea hearing, that promise "becomes an inducement to enter a plea, and unless that sentence is given, the plea is not voluntary."

¶23: a trial court generally does not improperly participate in plea negotiations as to sentencing when it does not promise a particular sentence or otherwise encourage the defendant to enter a plea in order to receive a more lenient sentence.

State v. Riggans, 2010-Ohio-1254 (3rd Dist)

¶9: the trial court's involvement in the plea negotiations was limited to providing the State and the defendant with a range of sentence it would impose— "it would not sentence the Defendant over seven years"

Post-*Byrd* Decisions

State v. Jackson, 2023-Ohio-2480 (7th Dist)

¶22: No indication the trial court's statement about Appellant's federal sentence rendered involuntary his decision to take the plea offer negotiated by defense counsel in his two state cases.

¶18: Court did mention it would impose the state sentence consecutively to a pre-existing federal sentence after a trial (in the absence of the state's recommendation under the negotiated plea).

Trial court did not indicate a position on the length or concurrency of the state sentences if the case were taken to trial, which has been upheld in other cases.

Post-*Byrd* Decisions

State v. Jabbar, 2013-Ohio-1655 (8th Dist)

¶28: discussion of the evidence to be presented at trial should be left to the prosecutor and defense counsel, and that it is the defense counsel's role — not the judge's — to explain the evidence to a defendant, give his opinion of the strength of the state's case and the likelihood of conviction, and to tell the defendant that it would be better to plead than to go to trial.

¶34: no prohibition against a trial judge discussing the different penalties associated with the plea as opposed to the penalties if convicted of all the counts of the indictment.

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Bulletproof Your Convictions

Hon. Cynthia Westcott Rice
Trumbull Common Pleas Court

BULLETPROOF YOUR CONVICTIONS

How to Think Like an Appellate Judge

Judge Cynthia Rice, Trumbull County Common Pleas

Think Like an Appellate Judge

- Know the standard of review for the issue
- Make sure the record provides support to meet the standard of review

Abuse of Discretion

"unreasonable, arbitrary or unconscionable" *State v. Beasley*, 152 Ohio St.3d 470

"review is deferential and does not permit an appellate court to simply substitute its judgment for…trial court's." *State v Darmond*, 135 Ohio St.3d 343

"A decision is unreasonable if there is no sound reasoning process that would support the decision." *State v. Clinton*, 153 Ohio St.3d 343

Arbitrary is defined as a decision made "without consideration of or regard for facts or circumstances." *Black's Law Dictionary* 125 (10th Ed. 2014)

Issues Reviewed Under Abuse of Discretion Standard of Review

- Appointed Counsel
- Motion for Continuance
- Admission or Exclusion of Evidence
- Hearsay unless Confrontation Clause Implicated then De Novo
- Expert Witness Testimony
- Limitation on Cross Examination
- Scope of Redirect Testimony
- Voir Dire
- Juror Misconduct
- Motion for Mistrial
- Motion for New Trial

Defense Motion for Mistrial

- Standard of Review?
- Curative Instruction?
- Make sure the appellate court knows what "actually" happened
- Voir Dire the jury- Make a record

Making the Record

The trial court did not abuse its discretion in dismissing an action with prejudice where the record reflected the trial court's final pretrial orders that warned that failure to attend the trial would result in dismissal of the action, and plaintiff and her counsel left the courtroom during the second day of the jury trial, failed to appear thereafter, and failed to request a continuance.

Saunders v. Greater Dayton Regional Transit Authority, 2023-Ohio-1514

Questions of Fact

- Reviewed for abuse of discretion
- Trial court is afforded more deference because the trial judge, having heard the evidence and observed the demeanor of the witness, may be in a better position to make findings of fact than appellate judge who only have the written transcripts to review

Presentence Motion to Withdraw Guilty Plea

- Should be freely and liberally granted
  St. v. Xie, 62 Ohio St.3d 521 (1992)
- However, No absolute right to withdraw a plea prior to sentencing and will be reviewed under an abuse of discretion

Post-Sentence Motion to Withdraw Guilty Plea

- May be granted only "to correct a manifest injustice"
- Defendant bears the burden of establishing the existence of manifest injustice
- Reviewed under an abuse of discretion standard
- Res judicata generally bars a defendant from raising claims in a Crim.R. 32.1 post-sentencing motion to withdraw a guilty plea that he raised or could have raised on direct appeal

Post-Sentence Motion to Withdraw Hearing Mandatory

- Whether State would be prejudiced
- Accused represented by highly competent counsel
- Whether accused given a full CrimR 11 hearing
- Whether a full hearing was held on the motion
- Whether the trial court gave accused's motion full and fair consideration
- Whether the motion was made within a reasonable time
- Whether the motion outlined specific reasons for the withdrawal
- Whether the accused understood the nature of crime and possible penalties
- Whether the accused was not guilty or had a complete defense to the crime

CRIM. R. 14 MOTIONS TO SEVER DEFENDANTS

- Abuse of Discretion
- Court "shall" order State to provide any statements/confessions for inspection
- *BRUTON* issues Bruton v. U.S., 391 U.S. 123
- Confession of Codefendant, who did not take the stand, that implicated Defendant violated Defendant's Right of Confrontation
- Cautionary instruction is not an adequate substitute for severance

CRIM. R. 8
PREJUDICIAL JOINDER OF OFFENSES

Issues of Joinder and Severance is generally reviewed under Abuse of Discretion (Law favors joinder)

But wait! Whether charges were misjoined in contravention of Crim.R. 8 is an issue of law that is reviewed de novo

RELIEF FROM PREJUDICIAL JOINDER

- Defendant must show
- 1) Rights were prejudiced
- 2) At time of motion, court had sufficient information to weigh law favoring joinder and defendant's right to a fair trial
- 3) Given the information provided to the court, it abused its discretion in refusing to separate the charges for trial

JOINDER ALLOWED

- Offenses of same or similar character
- Other Acts Evidence Test
- Evidence of each offense is simple and direct- regardless of the admissibility under Evid. R. 404(B)

Findings or the Record?

A defendant can challenge consecutive sentences on appeal based on two issues:

1. Consecutive sentences are contrary to law because the court failed to make the necessary findings required by R.C. 2929.14(C)(4), or
2. The record does not support the findings made under R.C. 2929.14(C)(4)

State v. Hawley, 2020-Ohio-1270

Sealing Record

A trial court errs in denying a motion to seal a record of a dismissed indictment and misdemeanor conviction, where no findings were made on the record, as required by R.C. 2953.52(B)(2)

State v. Fasnaugh, 2023-Ohio-3539

De Novo Review

- A complete and independent power of review as to all questions of law
- The reviewing court does not need to give any deference to the decision of the lower court
- Typically, appropriate when determining issues of law because the lower court judges are not necessarily in a better position to determine questions of law than appellate courts are and thus their decisions need not influence the interpretations of the appellate court

Issues Reviewed De Novo

Ineffective Assistance of Counsel

- Defendant must show his counsel's performance was deficient AND
- The deficient performance prejudiced the defense so as to deprive the defendant of a fair trial
  - *Strickland v. Washington*, 466 U.S. 668, 687
  - *State v. Froman*, Ohio St.3d 435

Statutory Interpretation

- Question of law
- If statutory language is unambiguous, it is applied as written
- If statute is ambiguous then the court will engage in further consideration and interpretation

Evid.R. 404(B)

Other acts evidence admission is a question of law

Barred as evidence to show propensity but allowed to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

"The nonpropensity purpose for which the evidence is offered must go to a 'material' issue that is actually in dispute between the parties."

Huddleston v. United States, 485 U.S. 681

Trial court must weigh the proffered evidence under Evid.R. 403 whether probative value outweighs its prejudicial effect

Mixed Standard of Review
Motions to Suppress

- Mixed question of law and fact
- Appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence
  State v. Hawkins, 2019-Ohio-4210

"But the appellate court must decide the legal questions independently, without deference to the trial court's decision."
State v. Burnside, 100 Ohio St.3d 152

Speedy Trial

Speedy trial provisions are mandatory- A person not brought to trial within the relevant time constraints shall be discharged
Tolling events outlined in R.C. 2945.72

- Unavailability of defendant
- Period of time a defendant is incompetent to stand trial
- Delay due to lack of defense counsel
- Delay occasioned by the neglect or improper act of the accused
- Any period of delay necessitated by reason of a plea, motion, proceeding or action made or instituted by the accused
- Delay due to removal or change of venue
- Continuance granted on accused own motion
- Any reasonable continuance granted other than on the accused own motion

Criminal Rule 11
Voluntary Plea

A plea in a criminal case must be made knowingly, intelligently, and voluntarily

- Dual standard of review
- Non-constitutional issues "substantial compliance"
- Constitutional issues "strict compliance" and failure to strictly comply with Crim.R.11(C)(2)(c) renders the defendant's plea invalid
- Requires the defendant to demonstrate prejudice which requires a showing that the plea would have not been entered if he had known

Manifest Weight

- When reviewing a claim challenging the manifest weight of the evidence, the appellate court in reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed, and a new trial ordered.

  State v. Thompkins, 78 Ohio St.3d 380

  - "Appellate court sits as the "13th Juror" and disagrees with the factfinder's resolution of the conflicting testimony." *State v Martin*, 20 Ohio App. 3d 172
  - Unanimous Appellate Panel

Cumulative Error

A conviction must be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute case for reversal.

State v. Clinton, 153 Ohio St.3d 422

Prosecutorial Misconduct

The question is "whether the prosecutor's comments so infect the trial with unfairness as to make the resulting conviction a denial of due process."

State v. Froman, 162 Ohio St.3d 435

Pre-indictment Delay

"Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay."

State v. Jones, 148 Ohio St.3d 167

Actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant as relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense

Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

- There was an error
- The error was plain or obvious
- But for the error, the outcome of the proceedings would have been otherwise, and that reversal must be necessary to correct a manifest miscarriage of justice.

State v. Buttery, 162 Ohio St.3d 10

Harmless Error

- Whether the defendant was prejudiced by the error
- Whether the error was harmless beyond a reasonable doubt
- Whether, after the prejudicial error is excised, the remaining evidence establishes the defendant's guilt beyond a reasonable doubt.

State v. Ford, 158 Ohio St.3d 139

Civil Standards of Review

Abuse of Discretion

- Discovery
- Evidence
- Motion to Strike
- Amendment of Pleadings
- Intervention
- Discovery Sanctions
- Class Certification must be exercised within framework of Civ.R. 23
- Jury Instructions
- Civ.R. 60(B)
- Stay of Proceedings
- *Howard* Charge

De Novo Review

- Summary Judgment
- Directed Verdict
- Civ.R. 12(B)(6) Dismissal
- JNOV
- Civ.R. 12(C) Judgment on the Pleadings
- Statutory Construction
- Political-Subdivision Immunity

Summary Judgment

A trial court's ruling on a motion for summary judgment is reviewed de novo and the appellate court uses the same standard that the trial court should have used, under Civ.R. 56, without deference to the trial court, to determine whether, as a matter of law, no genuine issues of fact exist for trial.

Budz v. Somerfield, 2023-Ohio-155

The determination of credibility is beyond the province of a summary judgment proceeding.

Matter of Adoption of M.L.K., 2023-Ohio-3184

Dismissal Pursuant to Civ. R. 12(B)(6)

The trial court erred in dismissing Plaintiff's Complaint sua sponte without providing prior notice of its intention to dismiss and an opportunity to respond.

Live Joyfully, L.L.C. v. PNC Bank, N.A., 2023-Ohio-3275

Declaratory Judgment

- Dismissals of declaratory-judgment actions is not justiciable
- Caveat-
  - "Once a trial court determines that a matter is appropriate for declaratory judgment, its holding regarding questions of law are reviewed de novo…"

    Arnott v. Arnott, 132 Ohio St.3d 401 (2012)

Arbitration Award

A decision to confirm, modify, vacate, or correct and arbitration award is a mixed standard of review.

Appellate Courts must accept finding of fact that are not clearly erroneous

Questions of Law are de novo

Waiver
Mixed Question of Law and Fact

Party seeking waiver must demonstrate

1) that the party knew of its right to assert an argument or defense AND

2)The totality of the circumstances establish that a party acted inconsistently with that right

- Factual finding of trial court reviewed only for clear error
- Legal question whether conduct amounts to waiver of an argument is de novo

Invited Error

"A party will not be permitted to take advantage of an error which he himself invited or induced."

Hal Artz Lincoln-Mercury v Ford Motor Co., 28 Ohio St.3d 20 (1986)

Plain Error

"In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances, where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself."

Goldfuss v. Davidson, 70 Ohio St. 3d 116 (1997)

Harmless Error

- "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."
- The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Civ.R. 61

Administrative Appeal

- An appellate court reviews a common pleas court's decision under an abuse of discretion standard of review in determining whether reliable, probative, and substantial evidence supports the administrative order.

  Gyugo v. Franklin Cty. Bd. Of Dev. Disabilities, 151 Ohio St.3d 1 (2017)

  BUT

  Appellate Court exercises plenary review over questions of law, including questions of statutory interpretations…

  Pons v. State Med. Bd., 66 Ohio St.3d 619 (1993)

After Plea, Before Sentencing

Hon. Stephen L. McIntosh
Franklin County Common Pleas Court

Criminal Rule 32.1

A motion to withdraw a plea of guilty of no contest maybe made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of the conviction and permit the defendant to withdraw his or her plea

(1) Prejudice to the State
(2) Counsel's representation
(3) Adequacy of Criminal Rule 11
(4) Extent of Plea withdrawal hearing
(5) Full andFair consideration of the motion
(6) Timing
(7) Reason for the motion

(8) The Defendant's understanding of the nature of the charges and potential sentences

(9) Whether the Defendant is not guilty or has a complete defense to the charge

No one factor is conclusive

State v Xie, 62 Ohio St. 3d 521(1992)

Post Sentence

Defendant has the burden of establishing the existence of manifest injustice.

A fundamental flaw in the proceedings which results in a miscarriage of justice or inconsistent with the demands of due process

Defendant pleads guilty to burglary F2 and felonious assault F2. PSI is ordered. Prior to sentencing defendant moves to withdraw his plea asserting that his prior counsel had assured him he would receive no prison time. Prior counsel threaten to withdraw if he did not enter the plea, failed to advise him of any defenses and presented the offer only 10 to 15 minutes before he pled. Also, his answers to the rule 11 colloquy were not truthful and he asserted his innocence.

State v Warren, 2024-Ohio-1072 (6th District)

Pleads guilty to amended charge of GSI. Prior to sentencing he retains new counsel and moves to withdraw his plea. Defendant professed his innocence, said that his counsel pressured him to enter the plea, was unaware of the full implications of the plea and had a defense to the charge.

State v Kutnyak, 2012-Ohio-3410 (6th District)

Defendant completes a written plea agreement outlining the rights he is waiving and the consequences of his plea. The Defendant pleads guilty and immediately after the sentence is imposed request to withdraw his plea. On appeal the record does not reflect that the trial judge informed the defendant of the maximum sentence which could be imposed.

State v Harris, 2021-Ohio-1431 (2nd District)

Disqualification Common Pleas Judge

ORC 2701.03

…allegedly is interested in a proceeding…allegedly is related to or has a bias or prejudice for or against a party …or otherwise disqualified

counsel may file an application of disqualification with the supreme court

Burden falls on the affiant to submit sufficient evidence

that would support disqualification

Bias or prejudice implies hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigant or his attorney

Defendant is charged with aggravated robbery, felonious assault and kidnapping. The victims are the wife and daughter of a sitting Hamilton County Judge.

Who should recuse?

Only judges close to the judge whose family is the victim?

Only Judges who indicate cannot be fair and impartial?

All Judges?

In Re Nadel 47 Ohio St. 3d 604 (1989)

Judge prosecuted defendant who is now seeking post conviction relief. Petition alleged judge as prosecuting attorney acted inappropriately at trial and may be a witness in the post conviction proceedings.

In re Disqualification of Ward 77 Ohio ST. 3d 1233

- Day of trial summary judgment granted for Plaintiff
- Reversed remanded
- Rescheduled trial defendant request recusal. Recusal denied trial continued so affidavit could be filed
- Plaintiff filed for sanctions arguing motion for recusal and continuance frivolous as filed to delay trial. Sanctions granted.
- Third trial judge shared his opinion regarding evidence. Granted directed verdict after opening.

Although adverse rulings generally do not require the disqualification of a judge, "'a judge could be disqualified if his or her adverse rulings were accompanied by words or conduct that call into question the manner in which the proceedings are being conducted.'"

Judicial remarks….do not support a bias or partiality challenge. They ***may*** do so if they reveal an opinion that derives from an extrajudicial source; and they ***will*** do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

At sentencing calling defendant's parents gang members and relying on information outside the record

Motion for new trial pending and judge states prior to any decision that the defendant deserves a new trial.

Judge's family member posted on a family account opinions about a pending case and defense counsel on the case.

Judge John V. Corrigan frequently shared the following advice with his judicial colleagues: When the case becomes about the judge rather than the facts of the case and the law, it is time for the judge to step aside.

MARSY'S lAW

R.C. 2390, Ohio Constitution Art.1 Sec. 10a(D)

…establishes procedures for criminal justice entities to ensure victims rights are protected …

…completion of the offender's sentence of disposition.

Receive information about the status of the case

Be present at all public hearings

Tell the Court their opinion in public proceedings and any other hearing involving victim's rights

Object to unreasonable delays

The Court must inquire of the prosecutor and make a record regarding:

1. Victim or their representative is present
2. Whether victim or representative requested notice
3. Whether prosecutor conferred with the victim and their representative

Right to be heard

Post-arrest release

Community Control Revocation hearing

Any proceedings to terminate or modify the terms of community control if it would affect defendant's contact with or the safety of the victim, restitution or incarceration status

"R.C. 2929.19 grants broad discretion to the trial court to consider any information relevant to the imposition of a sentence."'

Pretrial Release Detention

When determining the amount of bail, the court shall consider public safety, including the seriousness of the offense, and a person's criminal record, the likelihood a person will return to court, and any other factor the general assembly may prescribe.

Ohio Constitution Art I section 9

R.C. **2937.222** Hearing on denial of bail to certain alleged offenders; appeal

- Aggravated murder (not a capital case)
- Murder
- Felony First or Second Degree
- Agg Vehicular Homicide
- Menacing by stalking as a felony
- Felony OVI

Clear and Convincing Evidence

(1) Proof is evident, or presumption great committed the offense

(2) Poses a substantial risk of serious physical harm to any person or to the community

(3) No release conditions will reasonably assure safety of that person and the community

Sentencing and Post-Sentencing Issues

Hon. Matthew L. Reger
Wood County Common Pleas Court

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A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right

Nancy Gertner

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A SHORT HISTORY OF AMERICAN SENTENCING: TOO LITTLE LAW, TOO MUCH LAW, OR JUST RIGHT

JUDGE NANCY GERTNER*

For the centennial of this renowned *Journal*, I have been asked to tell the history of American sentencing—concisely, to be sure. The history of sentencing in the United States can be recounted from a number of perspectives. First, there is an institutional story—the story of the division of labor between all of the sentencing players. Sentencing is, after all, a *system*; sentencing institutions work in relation to, and not independent of, one another. Players in the sentencing system include the traditional ones: judges, lawyers—both prosecutors and defense—as well as the Congress, the public, sometimes the jury, and most recently, administrative agencies. Second, and as a corollary of that division of labor, sentencing can be examined through the different sources of its rules and standards, which can be common law rules crafted by judges, statutes drafted by legislatures, regulations promulgated by agencies, or standards articulated by academic experts, like penologists, sociologists, political scientists—the kind of scholars who write in this estimable *Journal*.

Third, sentencing can be viewed through the lens of the changing substantive law, reflecting the shifting winds of penal theory, from rehabilitation, retribution, and deterrence, to incapacitation, and various permutations of each. Different theories of sentencing, in turn, confer power on different sentencing players. For example, rehabilitation theories necessarily enhanced the role of judges and parole officers, the purported experts in individualized punishment aimed at "curing" deviant behavior. Retributive theories did the same for Congress and the public, not to mention radio "shock jocks" and 24/7 cable television pundits. If the most important question was the culpability of the offender—what punishment this crime deserved—everyone was suddenly an expert, or so it seemed.

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Finally, the political entity in whose name the punishment is imposed is critical: most law enforcement is the province of the state. A national federal sentencing system, owing to what some have called the "federalization" of crime,[1] has far different pressures—few financial pressures (the federal government prints money, after all), and many more political pressures—than a state one, and necessarily produces a different sentencing regime.

This Article will range over the various stages of American sentencing over time, focusing mostly on federal sentencing, and having these issues in mind—division of labor, source of sentencing standards, substantive law, and federal-state divisions and their shifting permutations.

I. COLONIAL JURIES AND SENTENCING

In colonial times, and particularly in the period before American independence, juries were de facto sentencers with substantial power.[2] Many crimes were capital offenses.[3] The result was binary—guilty and death, or not guilty and freedom. There were few scalable punishments, or punishments involving a term of years.[4] This is so because penitentiaries were not common until the end of the eighteenth century.[5] Jurors plainly understood the impact of a guilty verdict on the defendant because of the relative simplicity of the criminal law and its penalty structure, and often because of the process by which they were selected. They were picked from the rolls of white men with property. Indeed, steps were sometimes taken to secure better qualified people to serve on juries. Juries were hardly representative in the sense that we understand today.[6] The substantive criminal law was the province of the states, and was, for the most part, state

[1] *See* Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1039-40 (2006).

[2] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-76 (1994) (reviewing early jury trials); Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999).

[3] Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832-33 (1968).

[4] While Langbein describes this development in terms of the English jury system, his observations apply with special force to the colonial jury. *See* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 64 (2003).

[5] SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 27-30 (1973).

[6] Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 432 (1996).

common law, often deriving from cases with which the jurors were familiar.[7]

Like the modern jury, colonial jurors were authorized to give a general verdict without explanation, but unlike the modern jury, the colonial jury was explicitly permitted to find both the facts and the law.[8] If capital punishment were inappropriate, they would simply decline to find guilt, or find the defendant guilty of a lesser crime in order to avoid the penalty of death.[9] No one disparaged this as "jury nullification." Ignoring the law to effect a more lenient outcome was well within the jury's role.[10] In fact, several colonies explicitly provided for jury sentencing.[11]

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[7] Lance Cassack & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors about Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL'Y 411, 439-40 (2007) (citing J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986)).

[8] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). As Professor Amar noted:

> [I]t was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact. So said a unanimous Supreme Court in one of its earliest cases (decided before *Callender*) [*Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)] in language that resonates with the writings of some of the most eminent American lawyers of the age—Jefferson, Adams, and Wilson, to mention just three. Indeed, Chase himself went out of his way to concede that juries were judges of law as well as of fact. Perhaps, however, this concession had to do with the pecularities of sedition law and its somewhat unusual procedures—driven, it will be recalled, by the struggle between judge and jury.

Id. at 1193; *see, e.g.*, R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 303 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury . . . ."); *see also* David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 609 (2000) (arguing that colonial juries had the right to decide the law as outlined by the Court); *cf.* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (distinguishing between civil and criminal juries, and dismissing *Brailsford* as anomalous). *But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 131 (1998) (suggesting that the historical record is not clear).

[9] RUBIN, *supra* note 5, at 31.

[10] Blackstone called the jury practice of convicting of a lesser charge to mitigate against the death penalty as "pious perjury." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239; *see also* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON ENGLISH CRIMINAL TRIAL JURY, 1200-1800 295 (1985); LANGBEIN, *supra* note 4, at 234-35.

[11] There is some disagreement as to how widespread jury sentencing was in non-capital cases at the time of the Constitution's ratification. *Compare* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 (1999) ("Jury sentencing in noncapital cases was a colonial innovation."), *with* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) ("American juries at the time of the adoption of the Bill of Rights played a minor role in

Thus, in the colonial division of labor, juries had a preeminent role.[12] There was no need for a priori punishment standards or rules, because there was, for the most part, a single punishment. Penal philosophy, at least as a formal matter, was retributive. There was little national federal law, even after independence. Most criminal law derived from the common law and in time, statutes from state legislatures—law with which jurors were familiar.[13]

II. THE ERA OF INDETERMINATE SENTENCING

The turn of the nineteenth century brought scalable punishments—penitentiaries and, in time, reformatories—and thus, a more complex set of sentencing outcomes.[14] The jury could no longer link conviction to a particular sentence even if it had the power to sentence or decide questions of law—and it did not. Now, they were explicitly instructed to find only the facts; judges determined the applicable law. Federal substantive criminal law began to evolve, although most criminal prosecutions were still state-based. And the jury changed: it was more diverse as barriers to serving as jurors were lifted for minorities and women, as were property restrictions.[15] With more and more access to education, a professional class of judges and lawyers evolved, and with it, the power of the jury declined, including the power to affect the sentence.[16]

Over time, a different division of labor evolved as between judges and juries: juries decided liability; judges sentenced. Selection procedures sought to insure that the jury would be selected in direct proportion to what they did *not know* about the issues, or the parties.[17] And that was not too

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sentencing."). Lanni reports that "as recently as three decades ago more than one-quarter of U.S. states provided for jury sentencing in noncapital cases." Lanni, *supra*, at 1790.

[12] Nancy J. King emphasizes judicial power even in the colonial period through the practice called "benefit of clergy," which derived from seventeenth-century English law. "Clergy was a judicial pardon of sorts," which rested entirely with the judge after conviction. Nancy J. King, "*The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 938, 948 (2003).

[13] On the absence of federal criminal law, see Sarah Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41 (1996). On the fact that jurors were familiar with the law, see Judith L. Ritter, *Your Lips are Moving . . . but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 188-189 (2004).

[14] NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4-5 (1974); *see also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003).

[15] Alschuler & Deiss, *supra* note 2, at 915-916 (1994).

[16] Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 380.

[17] *See generally* NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES (2009).

difficult in an urbanizing, diverse country.[18] Juries became more and more passive, deferring to the professional judge.[19]

This was especially true by the early twentieth century, when the dominant penal philosophy was rehabilitation and an indeterminate sentencing regime took hold.[20] In indeterminate sentencing, the judge's role was essentially therapeutic, much like a physician's. Crime was a "moral disease,"[21] whose cure was delegated to experts in the criminal justice field, one of whom was the judge. Different standards of proof and of evidence evolved between the trial stage and the sentencing stage, reflecting the very different roles of judges and juries.[22] The trial stage was the stage law students studied. It was the stage of constitutional rights, formal evidentiary rules, and proof beyond a reasonable doubt. At the sentencing stage, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system: a fair preponderance of the evidence. The rationale was straightforward: it made no more sense to limit the kind of information that a judge should get at sentencing to exercise his or her "clinical" role than to limit the information available to a medical doctor in determining a diagnosis.[23]

Unlike other common law countries, appellate review of sentences was extremely limited in American courts.[24] In the federal system, the "doctrine of non-reviewability" prevailed until 1987, when the Federal Sentencing

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[18] With urbanization, the juries lost their "proximity to persons and events of the cases brought before them" and "lost their capacity to inform themselves." LANGBEIN, *supra* note 4, at 64. Akhil Amar describes the "present day jury" as "only a shadow of its former self." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 97 (1998).

[19] LANGBEIN, *supra* note 4, at 64.

[20] *See* Honorable Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571 (2005) (describing the evolution of federal sentencing).

[21] *See* Elizabeth T. Lear, *Is Conviction Irrelevant*?, 40 UCLA L. REV. 1179, 1187 (1993).

[22] Gertner, *supra* note 20, at 571.

[23] *Williams v. New York*, 337 U.S. 241 (1949), exemplified this approach. A jury convicted Williams of first-degree murder and recommended life imprisonment. The judge disagreed and sentenced the defendant to death. While Williams had no criminal record, the judge, relying on the pre-sentence report that contained information inadmissible at trial, concluded that the defendant had committed a string of uncharged burglaries, that he had a "morbid sexuality," and that he was a "menace to society." *Id.* at 244. "Retribution is no longer the dominant objective of the criminal law," the Court declared. *Id.* at 248. Rather, "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* Any restrictions upon a trial judge's ability to obtain pertinent information "would undermine modern penological procedural policies." *Id.* at 249-50.

[24] *See* Comment, *Appellate Modification of Excessive Sentence*, 46 IOWA L. REV. 159, 159-60 (1960) ("The federal and majority state rule which precludes appellate modification of seemingly excessive sentences within statutory limits seems to be a vestige of the early common law doctrine denying any judicial review as of right in criminal cases.").

Guidelines became effective.[25] Likewise, only a few states had appellate review of sentencing, and even then it was used "sparingly."[26] A trial judge's authority to sentence was virtually unquestioned.

Consistent with this view of judges as the sentencing experts, Congress took a back seat, prescribing a broad range of punishments for each offense, and intervening only occasionally to increase the maximum penalty for specific crimes in response to public demand. Judges had substantial discretion to sentence, so long as it was within the statutory range. In effect, the breadth of the sentencing range left to the courts the task of "distinguishing between more or less serious crimes within the same category."[27] While prosecutors had discretion to bring the charges, which, given the broad definitions of crimes, was not insubstantial, and defense lawyers could argue for creative "therapeutic" solutions, the judge had the final word. And even the judge's sentence did not fully determine the length of time a defendant would serve. Parole was available depending upon the defendant's conduct while incarcerated.

To sum up, judges and parole authorities had the most power relative to the other sentencing players. They were the acknowledged sentencing experts. There were few a priori rules or standards. Each case was resolved on its own merits; to the extent there were standards, they evolved from the day-to-day experience of sentencing individuals. There was little or no appellate review of sentencing. And the substantive law of sentencing was shaped by rehabilitation, a penal philosophy that necessarily reinforced the judge's role and limited Congress's and the public's. After all, neither was in a position to second guess the judge concerning what would rehabilitate an individual defendant. Finally, although federal criminal power was growing, most criminal law was state originated.

As I have written elsewhere,[28] there were problems with indeterminate sentencing, problems that sowed the seeds of the next institutional shakeup. In fact, judges had no training in how to exercise their considerable discretion. Whatever the criminological literature, judges did not know about it. Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation—such as on the pages of

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[25] Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L .REV. 1441, 1444 (1997).

[26] *Id.*

[27] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 23 (1998).

[28] *See* Gertner, *Sentencing Reform*, *supra* note 20; *see also* Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007).

this *Journal*—it was not reflected in judicial training.[29] "It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without *Gray's Anatomy*."[30]

In the absence of any review, judges had little incentive to generate standards for sentencing which might be applied in future cases; few judges bothered to write sentencing opinions at all. Other efforts aimed at guiding judicial discretion, or even enhancing judicial decisionmaking, like sentencing councils, mimicking the clinical rounds of physicians, or sentencing information systems, were rejected.

Disparity was inevitable, although nowhere near as much as pre-Guidelines scholarship suggested.[31] Marvin Frankel described this period as "the unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[32] There was no common law of sentencing to create precedents to constrain discretion as exists in torts or contract. Without appellate review, no common law of sentencing could evolve. Constitutional review of sentencing decisions was limited; Eighth Amendment or due process review was rarely invoked, and even more rarely successful.[33] Furthermore, Congress had tried—and failed—to rationalize the criminal code, as the American Law Institute's Model Penal Code had done with respect to state substantive criminal law.[34] The Model Penal Code simplified state law, recommending a limited number of broad categories based on seriousness (felonies in the first, second, and third degrees) and mens rea. While the Model Penal Code also reflected the prevailing views of indeterminate sentencing—the categories are still relatively broad and judicial sentencing discretion is explicitly acknowledged—it did frame that discretion to some degree by systematizing offenses and listing sentencing factors a judge may consider. So long as the federal substantive law was chaotic, with overlapping categories and muddled distinctions among offenses, federal sentencing was bound to seem lawless. [35]

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[29] Stith and Cabranes note that "law faculties had long regarded sentencing as a 'soft' sub-specialty of criminal law, populated primarily by aficionados of psychiatry, sociology, social work, and other such branches of the 'social' sciences." STITH & CABRANES, *supra* note 27, at 26.

[30] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 528.

[31] STITH & CABRANES, *supra* note 27, at 111.

[32] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972).

[33] Reitz, *supra* note 25, at 1443.

[34] Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 179 (2003).

[35] Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 202 (1997).

III. GUIDELINE MOVEMENT

In response to widespread calls to reform the indeterminate system, a number of states implemented sentencing guidelines. The sentencing guideline approach introduced a new institutional player, an administrative agency—the sentencing commission—charged with generating sentencing standards.[36] The role of the commission, its powers vis-à-vis the other sentencing players, and its animating penal philosophy varied from state to state.

In 1984, the federal government entered into the act with a version of sentencing reform that by the end of the decade would be widely criticized. Congress passed the Sentencing Reform Act of 1984 (SRA), creating the United States Sentencing Commission and abolishing parole.[37] The Commission was supposed to do what Congress had been wholly unable to do, namely, to rationalize sentencing free of political influence, separate from the ever popular "crime du jour." At the same time, the dominant penal philosophy changed. The public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing,[38] instead championing a philosophy known as "limited" retribution.[39] With that change, the locus of sentencing expertise moved from the judges and parole authorities to the Commission, Congress, and, to a degree, the public. Retribution made sentencing more accessible to the public and, ironically, to Congress. What the crime and the criminal deserved could be the subject of debate with the late night talk show host, or in time, the blogosphere.[40]

To be sure, the institutional implications of the SRA were not immediately apparent. To some reformers, it was not clear whether the Guidelines would become a mandatory or an advisory system, or, put

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[36] *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 9 NW. U. L. REV. 1441 (1997).

[37] 18 U.S.C. § 3551--3673 (2006); 28 U.S.C. § 991--998 (2006).

[38] *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). Martinson's 1974 work was then recanted in his later work, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) (noting that "new evidence" leads him to reject his prior conclusion).

[39] *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (2004) ("This approach places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate.").

[40] *See generally*, Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 254 (1996).

otherwise, whether they would *supplement* or *supplant* the judges.[41] Where the system would land on the continuum from advisory to mandatory would have a substantial impact on the institutional division of labor.

Some who believed that the SRA would herald a truly advisory system pointed to such things as the fact that the Guidelines authorized a judge to depart from its confines whenever he or she concluded there was a factor "of a kind, or to a degree, not adequately taken into consideration" by the Commission.[42] To others, the Guideline regime was unquestionably mandatory, underscoring the fact that the Guidelines were meant to determine sentencing outcomes in the vast majority of cases, and judges' power to depart was intended to be exercised sparingly.[43]

As a result of various factors, many of which continue to shape the debate over sentencing today, the more onerous and mandatory vision of the system quickly took hold.[44] Meanwhile, Congress, rather than taking a back seat to its newly created expert Commission, followed the passage of the SRA with a success of even more punitive mandatory minimum statutes and "three strikes and you're out" type sentencing enhancements. While cause and effect may not be clear, the following trends paralleled the Guideline movement.

A. POPULIST PUNITIVENESS

Crime became the fodder of political campaigns;[45] "lenient" judges were parodied on the evening news and the bourgeoning 24/7 cable outlets. But the popular rage went beyond judges who were supposedly "soft on crime." Efforts to restrict or even eliminate judicial discretion in sentencing paralleled efforts to strip judges of authority in a number of other areas. In 1981 and 1982 alone, more than two dozen bills stripping or altering federal courts' jurisdiction were introduced in the Ninety-Seventh Congress.[46] And the anti-judge, significantly anti-*federal* judge language was vituperative.[47]

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[41] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 530.

[42] 18 U.S.C. § 3553(b)(1) (Supp. 2004).

[43] Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 267 (2009).

[44] For further discussion of the factors shaping sentencing, see generally Gertner, *From Omnipotence to Impotence*, *supra* note 28; Gertner, *supra* note 43.

[45] Sara S. Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49-51 (1997).

[46] This discussion draws on Christopher LeConey, *Rhetorical Branding of Judges as Outlaws: Recasting the SRA of 1984 as Symptom of the Reagan-Era Anti-Judiciary Zeitgeist* (on file with author); *see also* Max Baucus & Kenneth Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts and Congress*, 27 VILL. L. REV. 988 (1982); *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority*

B. MANDATORY MINIMUMS

Congress, propelled by this atmosphere, passed a succession of mandatory minimum statutes, statutes that were wholly inconsistent with the SRA's approach and surely with deference to the new "expert" Commission. Indeed, over time Congress directly intervened in Guideline determinations, ordering the Commission to increase this or that guideline.[48] Congress's role grew as the criminal law became more and more federalized, now accounting for the prosecution of more and more local gun and drug offenses, the kind of street crime that had traditionally been the state's bailiwick.[49]

C. THE COMPOSITION OF THE COMMISSION AND ITS GUIDELINES

The composition of the Commission and the guidelines it drafted exacerbated these trends. While the Commission was supposed to be made up of sentencing experts,[50] the first Commission was not. Indeed, no one on the first Commission had experience in the day-to-day experience of sentencing offenders.[51] It was, as many described it, political from the

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to Regulate the Jurisdiction of Federal Courts, 95 HARV. L. REV. 17, 18 n.3 (1981) (identifying bills introduced in the Ninety-Seventh Congress to strip the federal courts of jurisdiction to hear various constitutional claims against state or local officials).

[47] *See* LeConey, *supra* note 46. LeConey cites to Senator Jesse Helms of North Carolina as stating that:

> Mr. President, unrestricted power has always been the mortal enemy of the rule of law. In our day, we have learned that this is as true in the case of judges as it has been in the case of tyrannical kings and communist dictators. . . . Federal judges have abdicated their role as upholders of the rule of law and become instead tyrants who substitute their own personal views for law. . . . Congress fortunately has authority to correct judicial abuses . . . I urge my colleagues to consider the available congressional remedies and move expeditiously to put them into law . . . . [t]he survival of the rule of law is at stake.

Id. at 1 (citing 128 CONG. REC. 32733-734 (1982) (statement of Sen. Helms)).

[48] Frank O. Bowman III, *Pour Encourager Les Autres*, 1 OHIO ST. J. CRIM. L. 373, 435-436 (2004). *See generally* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

[49] *See* James A. Strazzella & William W. Taylor III, *Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws*, 14 CRIM. JUST. 4 (1999); AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 15, 27 (1998).

[50] FRANKEL, *supra* note 32, at 119-20 (explaining that the commission had called for only "people of stature, competence, devotion, and eloquence," in particular, "[l]awyers, judges, penologists . . , criminologists . . , sociologists . . , psychologists, business people, artists, and . . . former or present prison inmates").

[51] STITH & CABRANES, *supra* note 27, at 49.

start[52] and decidedly pro-prosecution.[53] Without the patina of real sentencing expertise on the Commission, much less real independence, Congress had no problem regularly intervening in the Commission's decisionmaking and regularly ignoring it.[54]

Additionally, the Commission made a number of problematic decisions in its initial drafting that had important institutional consequences. The Guidelines were complex and numerical. In an effort to minimize judicial discretion, they were keyed to the "objective" facts of the offense and the offender, such as the quantity of drugs or the amount of loss on the one hand and criminal record on the other. It rejected mens rea, the traditional basis for moral culpability, or other factors that judges had taken into account in the pre-Guidelines era.[55]

And the Guidelines were severe, far more punitive than federal sentencing had ever been. While the Commission claimed to base the new Guidelines on existing practice, its data were limited and its analysis skewed. Moreover, it simply took existing sentencing lengths and then increased them. Notably, it chose to use Congress's mandatory minimum sentences as the base levels for the Guidelines, in effect requiring sentences even above the levels that Congress had set.[56] Indeed, the Guidelines resulted in a marked increase in the percentage of all defendants sentenced to prison rather than probation, and for markedly longer terms of imprisonment.[57] The severity of the Guidelines necessarily increased the

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[52] SENTENCING MATTERS 63 (Norval Morris & Michael Tonry eds., 1996) ("Most proponents of guidelines have seen its one-step-removed-from-politics character as a great strength. . . . The U.S. Commission, by contrast, made no effort to insulate its policies from law-and-order politics and short-term emotions.").

[53] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763-64 (2005) (describing the extent to which the United States Sentencing Commission was "stacked" in favor of prosecution interests from its inception and throughout its history).

[54] *See id.* at 765-69.

[55] *See* Gerald E. Lynch, *The Federal Guidelines as a Not-So-Model Code*, 10 FED. SENT'G REP., July-Aug. 1997, at 25; Jack B. Weinstein & Fred Bernstein, *The Denigrating of* Mens Rea *in Drug Sentencing*, 7 FED. SENT'G REP., Nov.-Dec. 1994, at 121.

[56] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 3 (2000) (indicating that the Commission departed from existing sentencing practice to increase drug sentences because of Congressional directives); *id.* at ch. 1, pt. A, § 4(g) (2000) (indicating that the provisions of the Anti Drug Abuse Act of 1986—setting up drug mandatory minimum sentences—trumped the SRA's requirement that the Commission consider the impact on prison populations); *id.* § 2D1.1 cmt. background (2000) (describing the relationship between the drug base offense levels in the guidelines and the 1986 statute).

[57] *See* U.S. SENTENCING COMM'N, *supra* note 39, at 46 ("Average prison time for federal offenders more than doubled after implementation of the Guidelines."); *see also id.* at 43 (examining the drop in federal sentences to probation); ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994 (1995) (discussing numbers of federal inmates), *available at* http://bjs.ojp.usdoj.gov/.

power of the prosecutor who could now credibly threaten substantial sentences to extract guilty pleas.

The Commission chose to implement a "real offense" system, which allowed a judge to consider additional facts about the criminal conduct of the defendant, beyond the offense of conviction, and under the usual sentencing standard, a fair preponderance of the evidence.[58] Moreover, the requirement to consider uncharged conduct that was part of the "real offense" led to the requirement that a judge consider even "acquitted conduct."[59] While a judge, pre-Guidelines, had the discretion to consider uncharged conduct or acquitted conduct, post-Guidelines, it was mandatory, and that conduct came to have specific determinate consequences—an increase in one's sentencing score and a concomitant increase in one's sentence.[60] And "real offense" sentencing also enhanced the prosecutor's power to determine what to charge and what to leave in reserve for sentencing, under a lesser burden of proof and few evidentiary standards.

And these decisions, effectively out of whole cloth, not correlated with the purposes of sentencing on the one hand, or empirical data, on the other, had an impact on judges.[61] Kate Stith and Jose Cabranes said it best:

> [T]he Guidelines are simply a compilation of administrative *diktats*. A set of unexplained directives may warrant unquestioning obedience if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but this is not a common occurrence in human affairs—at least not in democratic societies. . . . The Commission's reluctance to explain itself to the public thus leaves us with a set of rules promulgated and enforced *ipse dixit*—because the Commission says so. In the absence of some reasoned explanation for a particular rule, it is difficult to understand, much less defend, the rule. Unless there is reason to believe that the Commission has some unusual capacity to discover important or eternal truths, its argument from authority leaves the Guidelines with little or no independent validity or legitimacy.[62]

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[58] *See* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 418-19 (1993).

[59] Hofer & Allenbaugh, *supra* note 48, at 21 (noting that members of the Commission could not articulate a philosophy of sentencing to explain the Guidelines' priorities). While there is no Guideline provision explicitly requiring the consideration of acquitted conduct, it is part and parcel of "real offense" and the courts have concluded there is no justification for not considering it. In fact, all efforts to amend the Guidelines to exclude consideration of acquitted conduct have failed. *See* 57 Fed. Reg. 62,832 (Dec. 31, 1992); 58 Fed. Reg. 67,522 (Dec. 21, 1993); *see also* Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct*, 75 N.C. L. REV. 153 (1996).

[60] Gertner, *supra* note 2, at 434.

[61] STITH & CABRANES, *supra* note 27, at 59-66.

[62] Kate Stith & José Cabranes, *Judging under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1271-72 (1997).

D. THE FEDERAL JUDICIARY

This quality of the Guidelines—administrative diktats—then had an influence on the courts charged with applying them. As I have written elsewhere,[63] federal judges at both the trial and appellate levels could have played a critical role in mitigating the harsh effects of this Guideline system. They could have created a robust law of departures, or they could have critically evaluated them in formal opinions. Instead, the federal judiciary, which had overwhelmingly opposed the Guidelines, suddenly became wholly "passive" in their sentencing decisionmaking.[64] They enforced the Guidelines with a rigor required by neither the SRA nor the Guidelines.[65] This response was due in part to a continuation of conditions that existed prior to the promulgation of the Guidelines, the flaws of the indeterminate era. Judges *still* lacked training on how to sentence, and many did not have backgrounds in criminal justice. As a result, many judges—especially those who arrived on the bench after the Guidelines were promulgated—had no perspective independent of the Guidelines and no critical context within which to judge the Guideline outcomes. To them, the Guidelines seemed to define the fair sentencing outcome; it was the only one they knew. In part, judges mechanically followed the Guidelines because of how the federal guidelines were crafted and sold to them—what I have described as a civil code ideology of sentencing reform created by the SRA and the Guidelines.[66] They believed that experts promulgated the comprehensive Guidelines, that they were based on empirical data, and that any gaps in their coverage were best filled by the expert Commission, rather than by the common law rulemaking of the federal bench.[67] They believed

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[63] *See generally* Gertner, *From Omnipotence to Impotence*, *supra* note 28.

[64] Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 93-94 (1999).

[65] *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1720-21& n.199 (1992).

[66] Gertner, *From Omnipotence to Impotence*, *supra* note 28. John Merryman's description of civil code judges resonated under the SRA:

> The judge becomes a kind of expert clerk. . . . His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.

Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 534 (quoting JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 36 (2d. ed. 1985)).

[67] *See* United States v. Wilson (*Wilson I*), 350 F. Supp. 2d 910, 915, 920 (D. Utah 2005) (noting that the Guidelines are entitled to "heavy weight" because of these assumptions); United States v. Wilson (*Wilson II*), 355 F. Supp. 2d 1269 (D. Utah 2005); United States v.

this—and many still do—even though these assumptions were flawed, as recent Supreme Court case law has suggested.[68] The Guidelines' Introduction acknowledges that they are not comprehensive but rather have gaps intended to be filled in by judges' power to depart.[69] Nor have they been drafted by sentencing experts, at least not the kind of experts envisioned by the SRA. Nor are they based on data or keyed to the purposes of sentencing.

In any event, even though the Guidelines were in fact enforced as if they were mandatory, that was not sufficient for some members of Congress. In 2003, Congress passed the PROTECT Act.[70] The Act sought to eliminate virtually all departures from the Guidelines by creating a reporting mechanism for the judges who were not "compliant."

The result was a division of labor that gave extraordinary power to prosecutors who could effectively determine sentences, either by what they charged in the first instance or what they held in reserve for the sentencing "real offense" determination. It also gave power to Congress, which could also determine sentencing outcomes through mandatory minimum sentences or its edicts to the Commission. The power of judges to sentence was substantially diminished; parole had been abolished since the implementation of the Guidelines. Congress and the Commission became the exclusive source of sentencing rules. While the SRA was supposed to implement all of the purposes of sentencing, retribution was in fact the dominant philosophy. And with a growing federal criminal code, the federalization of crime, there were few external constraints on Congress. Unlike in the states, the federal correctional budget was a fraction of the total budget.[71]

IV. *UNITED STATES V. BOOKER*: REENTER THE JURY

The implementation of the SRA sowed the seeds of a major constitutional challenge to the Guidelines. Under the still broad definition of crimes—the chaotic federal criminal code remained unchanged—the jury only found facts necessary to delineate the outer limits of punishments,

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Jaber, 362 F. Supp. 2d 365, 370-76 (D. Mass. 2005) (criticizing *Wilson II*); *see also* Gertner, *From Omnipotence to Impotence*, *supra* note 28, 534-35.

[68] Spears v. United States, 129 S. Ct. 840 (2009); United States v. Kimbrough, 552 U.S. 85 (2007).

[69] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1, introductory cmt. 4(b) (2010); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt.5.

[70] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[71] Frank O. Bowman, *Beyond Bandaids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 172 n.131 (2005).

facts that would trigger the application of the still broad statutory sentencing ranges. Then at the sentencing stage, the judge was obliged to make additional findings of fact in order to determine exactly where the offender fit in the sentencing grid. What was becoming more and more clear was that the judge was now nothing more than another fact finder, rather than a sentencing expert exercising any sentencing judgment, adding any kind of expertise. His or her job was to find facts with determinate numerical consequences under the Guidelines, a job which began to look more and more like the jury's.

In 2005, the United States Supreme Court handed down *United States v. Booker*,[72] which held that the Guidelines were unconstitutional because of their impact on the jury. The Court found that the Guidelines violated the Sixth Amendment precisely because they obligated judges to find facts with the determinate consequences of increasing a defendant's sentence beyond the range required by a jury's verdict or a guilty plea.[73] Suddenly, the jury was important in the sentencing division of labor, although as I have described, the jury of the twenty-first century looked nothing like the powerful colonial jury. This constitutional defect, according to the Court, required severance of the provisions of the SRA that made the Guidelines mandatory.[74] The Court deemed the Guidelines to be "advisory," such that judges were to "consider" Guideline ranges but were permitted to tailor sentences in light of other statutory concerns.[75]

In effect, making the Guidelines advisory restored judicial power or more specifically, judicial *expertise* to the sentencing calculus:

> When [sentencing was] indeterminate and juries determined guilt or innocence, judges exercised "therapeutic judgment" within the broad limits set by the Congress. What the jury did was different from what the judge did. As the Guidelines became mandatory, what the judge did and the jury began to look alike, finding facts with mandatory consequences. In effect, *Booker* announced that in order to avoid the constitutional consequences of the mandatory regime, the courts had to exercise judgment again. The Guidelines had to be advisory . . . .[76]

In particular, a sentencing judge was instructed to follow the SRA's directive to weigh a number of factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant."[77] The sentencing court was also advised to consider the purposes of sentencing listed in the Act, which include not only the

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[72] United States v. Booker, 543 U.S. 220 (2005).

[73] *Id.* at 237.

[74] *Id.* at 259.

[75] *Id.* at 266, 270.

[76] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 536.

[77] *Booker*, 543 U.S. at 250.

retributive goals concerning the seriousness of the offense, but also the prevention of recidivism, the deterrence of future criminality, and the rehabilitation of the offender.[78]

At first, not much happened. The trends that predated the decision continued afterwards. Even after the Supreme Court declared mandatory application of the Guidelines to be unconstitutional, many judges continued to believe in the ideology of the Guidelines and urged continued deference. Many judges seemed to be uncomfortable exercising the discretion they now had. Many continued to use the numbers in the Guideline framework as a point of reference, illustrating the phenomenon known to cognitive researchers as anchoring.[79]

But in a series of four cases after *Booker*, the Court made it quite clear that it meant what it had said. In *Gall v. United States*,[80] the Court held that a judge could consider factors, such as offender and offense characteristics, regardless of whether they were allowable under the Guidelines. With *Kimbrough v. United States*[81] and *Spears v. United States*,[82] the Court indicated that a trial judge could even reject advisory Guidelines based solely on policy considerations, such as a conclusion that the applicable Guideline did not properly reflect national sentencing data and empirical research. And in *Nelson v. United States*, in a per curiam decision, the Court reversed a within-Guideline sentence, holding that "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."[83]

It is too early to say concretely what *Booker* and its progeny will do to the sentencing division of labor. It is clear that *Booker* has enhanced the position of the judge, whose sentencing expertise has been formally acknowledged again, at the cost of diminishing the position of the Sentencing Commission. *Booker* stripped the Guidelines of the force of law, transforming the Commission into a more traditional administrative agency, now subject to review akin to that required by the Administrative Procedure Act.[84] Congress's role, to a degree, is unchanged, so long as it

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[78] *Id.* at 264.

[79] Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 15 YALE L.J. POCKET PART 137, 137 (2006), http://www.yalelawjournal.org/images/pdfs/50.pdf.

[80] 552 U.S. 38 (2007).

[81] 552 U.S. 85 (2007).

[82] 129 S. Ct. 840 (2009).

[83] 129 S. Ct. 890, 891 (2009) (per curiam).

[84] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005); *cf.* Administrative Procedure Act of 1946 § 10, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 701--706 (2006)) (describing the scope of judicial review of administrative decisions).

continues to legislate mandatory minimum statutes, although its influence on the Commission no longer translates into a direct influence on sentencing. The prosecutor's role is somewhat diminished to the extent that his or her charging decisions are no longer effectively outcome determinative. But given the remaining arsenal of federal offenses with mandatory minimum sentences, or enhanced penalties, that reduction is hardly substantial. And the role of the jury, whose diminished position was the initial concern of the Court in *Booker*, has effectively not changed.

While retribution remains an important purpose of sentencing, the other purposes of the SRA—including rehabilitation—have new importance in the federal sentencing scheme, making sentencing outcomes more complex and, I would argue, far more fair. Federal judges have an opportunity to participate in fashioning new sentencing standards, alongside the Sentencing Commission and Congress, although it is not at all clear how much they will use their power.

One might argue that *Booker* should bring new experts to the sentencing system. It invites scholars, judges, lawyers, and legislatures to participate in a multilayered discussion about federal sentencing, a discussion that had been largely squelched in an era of Guideline diktats. In fact, it invites just the kind of discussion that this *Journal* has encouraged for the past one hundred years.

Sentencing Review Project
An interactive educational program for New Judges Orientation II

Enclosed is material for analysis of two cases that participants will engage in through the sentencing section of New Judges Orientation II. In this part of the education participants will review two different cases and then discuss sentencing options based upon information provided.

One case involves an offender named **James** who has been charged with multiple offenses based upon three different incidents involving three different victims. For this sentencing review you will have for your review the following material:

1. A Presentence Investigation Report (PSI)
2. Recommendation from probation officer
3. Sentencing factors worksheet
4. Ohio Risk Assessment System report
5. Handwritten statements from offender about incidents

During the sentencing review participants will first discuss their initial thoughts on sentencing, their own process for preparing for sentencing, and what questions are left unanswered by the PSI. Some of the discussion points will be what other people the judge would want to hear from, what other resources the judge would want to access in sentencing, and how does the process the judge engaged in for the simulation compares with what the judge has done with other sentencings.

After discussion on this aspect of the sentencing process the participants will be presented with a video of a sentencing colloquy from the attorneys on the case and their perspective on the sentencing. The participants will then be given an opportunity to discuss where they are in their sentencing conclusions. Following this discussion another video will be shown of a reenactment of a victim representative and the offender speaking about sentencing. Following this presentation participants will discuss how they would sentence. Each participant will fill out a form indicating what sentencing they would impose on each count at each phase.

In the other scenario with an offender named **Michael** the participants will go through a similar process except they will not have a PSI to refer to. All participants will know ahead of time is the offense (Corrupting Another with Drugs – F3) and the basic facts. After discussion of initial thoughts participants will see a video of arguments from counsel. That will be followed by discussions and thoughts on sentencing. Finally, participants will be presented with a video of statements from the victim and offender. Participants will then discuss their final conclusion on sentencing.

The purpose of this presentation is for judges to consider the process each engages in for sentencing. It is also an opportunity to consider the sentencing factors, how other judges interpret those factors and to learn best practices in reaching a sentence.

ADULT PROBATION DEPARTMENT

DEFENDANT:

ADDRESS: c/o Wood County Justice Center

DOCKET NO

LKA:

AGE: 26

DATE OF BIRTH:

OFFENSE & ORC SEC. NO.:
Ct. 3 – Abduction, ORC 2905.02(A)(2)(C), F3
Ct. 7 – Felonious Assault, ORC 2903.11(A)(1)(D)(1)(a), F2
Ct. 10 – Obstructing Official Business, ORC 2921.31(A)(B), M2
Ct. 11 – Attempted Rape, ORC 2923.02 and 2907.02(A)(2)(B), F2

EDUCATION: Some College

MARITAL STATUS: Single

CHILDREN: Zero (0)

PENALTY:
Ct. 3 – 6, 9, 12, 18, 24, 30, or 36 months ODRC;
Maximum fine of $10,000.00
Ct. 7 – 2 to 8 years ODRC;
Maximum fine of $15,000.00
Ct. 10 – 90 days Local Jail
Maximum fine of $750.00
Ct. 11 – 2 to 8 years ODRC;
Maximum fine of $15,000.00
Register as a Tier III Sex Offender

PLEA: Guilty

VERDICT: Guilty

DETAINERS OR CHARGES PENDING:
None identified

CUSTODY STATUS: $100,000 no 10% to be applied

CODEFENDANTS (Disposition or status of case):
Not applicable

SENTENCING JUDGE **INVESTIGATING PROBATION OFFICER**

OFFENSE:

Official Version:

The following official version of the **INSTANT OFFENSE** was compiled using reports from the Bowling Green Police Department. It should be noted, the **INSTANT OFFENSE** involved three different female victims. Each victim made separate reports in regards to the defendant.

The initial report was reported as follows:

On December 4, 2017, Ashley reported to the Bowling Green Police Department with her grandfather to file a report. Patrolman met with Ms. who explained she came to Bowling Green on November 29, 2017, to visit her boyfriend. James the defendant in this criminal matter, at North Enterprise Street. Ms. stated she has been coming to Bowling Green to see the defendant, and the visits had become "strange." According to Ms. the defendant had been threatening to commit suicide more often, and Ms. had driven to Bowling Green in order to check on the defendant after he made the threats of suicide.

On November 29, at 10:00 p.m., the defendant asked Ms. for the password to her phone, and she refused to provide the defendant with the password. The defendant took Ms. phone and locked himself in the bathroom with her rose gold colored Apple iPhone 7 plus. Ms. decided to leave the residence, so she grabbed her belongings and went outside. The defendant came out of the bathroom and told Ms. "I'm going to kill you and then kill myself." The defendant grabbed Ms. by the backpack she was wearing, and pulled her back into the house. Ms. asked the defendant to let her leave several times and the defendant would not allow her to leave. Ms. told the defendant she wanted to go home, and the defendant responded with "No. That sucks, you can't." The defendant blocked the front door, to prevent Ms. from leaving. Ms. told Patrolman the defendant would shove her backwards when she tried to leave, and grabbed her by the throat at one point and choked her.

At some point, the defendant took fifteen to twenty Aleve capsules, and told Ms. he was going to kill himself. The defendant continued to ask Ms. for her phone password, which she refused to provide him. Ms. told the defendant she was going to call the police, and the defendant threw her phone against the wall and broke it. By that time, the incident had been going on for three hours, and Ms. attempted to get to her car. The defendant had sugar ready, and threatened to pour the sugar in Ms. vehicles gas tank. The defendant told Ms. if she did not spend the night with him, he would put her entire sexual history online for everyone to see, including nude photos of her, and then kill himself.

Official Version – continued

At 5:00 a.m., Ms. woke up to the defendant attempting to have sex with her. Ms. told the defendant no, and stopped him. The defendant wanted Ms. to take him to the Falcon Health Center. She told him she would not and attempted to run to her vehicle. The defendant ran after Ms. and poured sugar into her vehicles gas tank. The defendant jumped into her vehicle's back seat and jumped around, but Ms. did not know what the defendant was doing. Ms. found an opportunity to speed away, and the defendant reached into her vehicle and broke her tum signal lever. Ms. believed the defendant would attempt suicide, and went to the Circle K in downtown Bowling Green, and called the police.

Once home, Ms. found twenty-two holes stabbed in the seats of her vehicle. Ms. began receiving phone calls from friends, who told her, the defendant contacted them stating, he was planning to post nude photos of Ms. on the internet. Ms. indicated she had blocked the defendant's phone number, but was receiving calls from the defendant from various other phone numbers. Ms. received a call from the defendant, from a number located out of Beavercreek, Ohio, and the defendant told her, "I hope it was worth it, stay tuned." Ms. showed Patrolman her broken, $700.00, Apple iPhone, along with a bruise on the inside of her right bicep. Ms. stated, she attempted to get her phone from the defendant, and he threw her against his bed frame, and it knocked the wind out of her. Ms. provided an estimate to repair the damages to her vehicle from Chevrolet, which totaled $2,010.39.

The second report was reported as follows:

On January 20, Patrolman with the Bowling Green Police Department, was dispatched to South Church Street, Bowling Green, Ohio, to respond to a female looking for help after being strangled by her boyfriend at South Church Street. Patrolman and Sergeant arrived and entered South Church Street and observed R crying, and observed a large, severe bruise around her neck. Ms. was observed wearing only socks on her feet, despite the temperature being 10 degrees without the wind chill factored in. Ms. agreed to be transported to the Wood County Hospital with the Bowling Green Fire Department. Prior to being transported to the hospital, Ms. was asked if she resided at South Church Street, or if she had children with the subject, which she indicated no to both questions.

Official Version – continued

Dispatch advised Patrolman , they had the male subject on the phone. He was identified as James , the defendant in this criminal matter, and he claimed to be a passenger in a car on his way to Fremont, Ohio. The defendant told dispatch he would return to Bowling Green, "later" and would call to give the police his side of the story. Patrolman pointed out to Sergeant , there were no footprints exiting South Church Street, other than the footprints that led to South Church Street, from Ms. . Patrolman Crites requested dispatch tell the defendant to exit the residence to speak with the officers. The defendant continued to tell dispatch he was on his way to Fremont, and continued to deny being in the residence. Ms. advised officers she could track the defendant's cell phone, and showed officers, the defendant's phone was located at the residence of South Church Street.

The defendant continued to disconnect from dispatch, and would call back, or answer when dispatch contacted him. The defendant refused to allow the "driver" to speak with dispatch, and stated the driver would drop the defendant off in ten minutes to speak with officers. The "driver" refused to identify himself, and did not say what kind of car was being driven. Patrolman reported back to the Bowling Green Police Department to complete paperwork charging the defendant with Felonious Assault.

Once at the Bowling Green Police Department, the defendant called and wanted to speak with Patrolman The defendant continued to claim he was in a vehicle, but, Patrolman noted, he could not hear any road sounds in the background. The defendant continued to ask Patrolman if he could come up later to talk. Patrolman explained, a Judge was responding to the Police Department to review charges, and may allow officers to enter his residence. The defendant stated he would speak with officers, still on scene, through the upstairs window. Sergeant spoke with the defendant through the window, before he came outside and was taken into custody.

The defendant was transported to the Wood County Justice Center, by Patrolman Crites. The defendant stated Ms. had caused all injuries to herself. The defendant told Patrolman , Ms. had attacked him with a bottle, and pulled his hair.

Officer with the Bowling Green Police Department, reported to the Wood County Hospital Emergency Room, to speak with Ms. . Ms. told Officer she had been in a relationship with the defendant since November 7, and indicated she moved in with the defendant. Ms. stated she maintains her own residence as well at West Wooster Street, Apartment

Official Version – continued

Ms. told Officer she and the defendant got into an argument, and she told the defendant, she no longer wanted to be in a relationship with him. The defendant took Ms. purse, and refused to give it back to her. Ms. told the defendant she was going to call the police, at which time, the defendant took her phone from her. Ms. attempted to get her phone from the defendant, and fell to the ground during the struggle. The defendant straddled Ms. pinned her to the ground, and grabbed her around the neck with both hands, and began to strangle her. Ms. stated, the defendant also stepped on the front of her neck. Ms. attempted to leave the residence, but the defendant blocked the door and did not allow her to leave. The defendant offered to help Ms. clean the blood off her neck, so she went toward the bathroom, which was near the back door. Ms. went out the back door, in her socks, and the defendant followed her and tackled her to the ground. Ms. was able to get awav from the defendant. and made it to the neighbor's door at South Church Street. Ms. told Officer her neck hurt and the neck brace given to her by the Wood County Hospital Emergency Department helped with the pain. Ms. additionally stated her throat was sore and she was having difficulty swallowing. Lastly, stated, her voice was "raspier" than normal.

The third report was reported as follows:

On August 2, 2019, Officer spoke with ., at the Bowling Green Police Department. Ms had disclosed to Bowling Green State University, she had been sexually assaulted by James the defendant in this criminal matter, on March 2, , at the defendant's residence, South Church Street, Bowling Green, Ohio. Ms. told Officer she was with two friends, Chayce and Aliciana, and they went to the defendant's residence to hang out. Ms. stated, she had not met the defendant prior to this incident.

Ms. explained, the group were all sitting around, listening to music, when Aliciana went to the defendant's bedroom. Ms. stated, Aliciana went into the defendant's bedroom, so Aliciana and the defendant could have sex. According to Ms. , the defendant was in the bathroom at the time, and instead, a friend of the defendant's went into the room after Aliciana. Ms. stated the defendant was upset about that when he exited the bathroom. Ms. indicated, the defendant propositioned her to do sexual acts with Ms. to "get back" at Aliciana. Ms. told the defendant she was not interested, and she did not want to do anything sexually with the defendant. Ms. told the defendant, he needed to go in and stop the defendant's friend, and the defendant was not interested in stopping his friend. Ms. attempted to go into the room to stop the defendant's friend, and the defendant threw Ms. back on to the couch. According to Ms. the defendant threw her on the couch three times. Ms. continued to tell the defendant she was not interested, and continued to tell him, she did not want to do anything sexually with the defendant.

Official Version – continued

Ms. . explained to Officer , the defendant grabbed her by the throat, and began to strangle her. The defendant threatened to harm Ms. . if she did not "sit down and shut up." Ms. stated, the defendant strangled her with one hand, and after he threatened her, she stopped fighting and complied. Ms. admitted she was afraid of the defendant, and had seen what the defendant had done to Aliciana in the past. Ms. additionally stated, her fear of retaliation, was the reason she did not come forward until she saw the defendant was incarcerated.

Ms. continued, stating the defendant forced her to give him oral sex, and he digitally penetrated her. Ms. could not remember if the defendant ejaculated. Ms. additionally stated, the defendant performed oral sex on her. Ms. had several bruises from the defendant as a result of the incident, and stated Aliciana and Chayce, had seen the marks. Ms. stated she had bruises on her upper thigh, upper arms, wrists, and neck. Ms. explained, she received the bruises due to lying flat on her back, while the defendant pinned her down. Ms. stated, the bruises on her upper thigh was a result of the defendant holding her down in that area while he was performing oral sex on her. Ms. stated the bruises on her arms, were a result of the defendant holding her down, after she attempted to get away from him.

According to Ms. . Aliciana and Chayce, attempted to get her to report the defendant, but Ms. was fearful of him. Ms. . stated since the incident she has had nightmares, and anxiety issues, which she is medicated for.

James was charged in a twelve count indictment with Ct. 1: Rape, a felony of the first degree, Ct. 2: Felonious Assault, a felony of the second degree, Ct. 3: Abduction, a felony of the third degree, Ct. 4: Disrupting Public Service, a felony of the fourth degree, Ct. 5: Criminal Damaging or Endangering, a misdemeanor of the second degree, Ct. 6: Criminal Damaging or Endangering, a misdemeanor of the second degree, Ct. 7: Felonious Assault, a felony of the second degree, Ct. 8: Abduction, a felony of the third degree, Ct. 9: Disrupting Public Service, a felony of the fourth degree, Ct. 10: Obstructing Official Business, a misdemeanor of the second degree, Ct. 11: Rape, a felony of the second degree, and Ct. 12: Felonious Assault, a felony of the second degree. He appeared before the Court on September 11, 2020, and entered pleas of guilty to Ct. 3: **Abduction,** a violation of the Ohio Revised Code Section 2905.02(A)(2)(C), a felony of the third degree, Ct. 7: **Felonious Assault,** a violation of the Ohio Revised Code Section 2903.11(A)(1)(D)(1)(a), a felony of the second degree, Ct. 10: **Obstructing Official Business,** a violation of the Ohio Revised Code Section 2921.31(A)(B), a misdemeanor of the second degree, and Count 11: **Attempted Rape,** a violation of the Ohio Revised Code Section 2923.02 and 2907.02(A)(2)(B), a felony of the second degree. The court accepted his pleas and adjudged the defendant guilty. The court ordered the preparation of a presentence investigation report and scheduled sentencing for **October 23, at 3:30 p.m.**

Defendant's Version:

The defendant provided a lengthy version of the **INSTANT OFFENSE.** It is attached for review.

During the presentence interview, the defendant discussed the **INSTANT OFFENSE.** The defendant first spoke about the incident regarding Rachel, . The defendant stated he woke up on the date of the **INSTANT OFFENSE** and was watching videos on YouTube regarding "Alpha Male Strategies." The defendant described the Alpha Male Strategies videos as meant to help African-American men to follow goals and aspirations. According to the defendant, the individual who is in the Alpha Male Strategies videos is very promiscuous. The defendant described some of the videos as misogynistic, but stated he was not listening to the videos for those reasons. Additionally, the defendant explained the Alpha Male Strategies videos taught men they were either submissive or strong.

Ms. did not like the defendant watching the Alpha Male Strategies videos, and the defendant was aware of that. The defendant stated, initially, he was trying to watch the videos quietly so Ms. did not know he was watching them. As the videos continued, the defendant did not try to conceal his watching of the videos. Once Ms. knew the defendant was watching the Alpha Male Strategies videos, she wanted to leave the house. When Ms. tried to leave, the defendant stopped her from leaving.

The defendant and Ms. first got into a verbal argument, which elevated to a physical altercation. The defendant stated he was afraid Ms. was ending the relationship, and became angry, which is why he tried to stop her from leaving. While restraining Ms. the defendant began strangling her. According to the defendant, he did not intentionally strangle her, but was instead trying to restrain her from leaving. Additionally, the defendant stated he was strangling Ms. for approximately thirty to forty-five seconds, and the defendant stated his grip was "really strong."

When Ms. got out of the house, away from the defendant, the defendant stated he was "freaked out." The defendant stated he was shocked about what had just happened, and scared of what would happen to him. The defendant described the situation as his home being surrounded by police officers, and the defendant stated he was afraid of dealing with the police. The defendant stated, he "knows about this County and its history" and was afraid of what his experience with the police would be. The defendant stated he wanted to take himself to the police station instead of speaking to the police at his home. The defendant stated, he chose to not come out of the house for some time due to him being overwhelmed, and feeling irrational and impulsive.

The defendant next spoke about the incident involving A: The defendant stated, he and A: were in a relationship at the time. The defendant was hanging out with other females, and A: was not comfortable with that. The defendant stated, A: was going through his cell phone, and he asked to go through her phone, which she did not allow. The defendant stated he became angry, and the fight became physical.

Defendant's Version – continued

During the fight, the defendant stated he put A in a "choke hold" for two seconds, to calm her down. The defendant stated he did not intend to harm A by doing this, but was trying to stop her from assaulting him. The defendant stated the fight was physical on both sides, and anything he did was defensive. The defendant became angry due to A wanting to leave the situation, and tried to put sugar in the gas tank of A vehicle. Additionally, the defendant stated, when A was trying to leave, he reached into the vehicle and broker her turn signal.

When discussing the situation with A , the defendant stated he "was hoping the wheels would fall off" of A car while she was driving. The defendant stated it "didn't work as planned" and the car was not disabled. When asked about the holes stabbed throughout A car, the defendant denied doing that. The defendant stated, A did not like her car and wanted to get a new car. The defendant stated he believed A stabbed the holes in the car upholstery herself in order to get herself a new car through the insurance agency.

Lastly, the defendant discussed the incident involving P According to the defendant, he thought the girls had come over to his home for casual sex. When the girls first arrived, the defendant stated, they were having "sexual conversations" and all of them were drinking. Additionally, the defendant stated he was fingering P friend, Aliciana's vagina, and had his arm around P at the time, and she did not seem upset. The defendant's roommate, Josh, came into the room, and he and Aliciana left and went upstairs to have sex, leaving the defendant alone with P .

The defendant stated he and P began kissing and was helping her remove her pants. The defendant began performing oral sex on P The defendant stated when he completed oral sex on P she began giving him oral sex. While P was giving the defendant oral sex, she stated she wanted to leave, and the defendant stated it stopped at that time. According to the defendant, he did not get verbal consent from P but stated he "thought she wanted to" based on her actions. The defendant stated, he thought individuals could consent based on their actions, and did not think he needed verbal consent.

The defendant stated while giving P oral sex, he was holding her down. The defendant stated he is not a submissive person, and he was taking control of the situation by holding P down. The defendant stated he was holding P down by the legs, and was holding her down by the neck. The defendant reiterated, he was attempting to dominate his sexual partner, P

The defendant reflected on the **INSTANT OFFENSE** as a whole. The defendant stated he feels shame, and "something stronger than remorse" in regards to his actions. The defendant stated he does not consciously engage in criminal conduct. The defendant related much of his problems with women to the troubled relationship he has with his mother. The defendant stated he struggles with issues of abandonment and let that influence his relationships.

Victim's Version:

Victim Impact Statements were sent to [redacted]. They have not been received as of the writing of this report.

PRIOR RECORD:

Juvenile: No Record Located.

Adult Traffic: No Record Located.

License Status: Expired.

Adult Criminal:

Ct. 1- Possession of Marijuana F[redacted]
Ct. 2- Use/Possess with Intent to Use Drug

Disposition: Ct. 1 & Ct. 2- Dismissed.

Disorderly Conduct

Disposition: Ordered to pay fine and court costs.

Ct. 1- Abduction
Ct. 2- Disrupting Public Services
Ct. 3- Criminal Damaging
Ct. 4- Criminal Damaging

Disposition: Merged with 2019-CR-0428.

Ct. 1- Abduction
Ct. 2- Assault

Disposition: Merged with 2019-CR-0428.

Ct. 1- Felonious Assault
Ct. 2- Abduction
Ct. 3- Disrupting Pubic Services
Ct. 4- Obstructing Official Business

Disposition: Merged with 2019-CR-0428.

Adult Criminal – continued

Ct. 3- Abduction
Ct. 7- Felonious Assault
Ct. 10- Obstructing Official Business
Ct. 11- Attempted Rape

Disposition: **INSTANT OFFENSE.** Cts. 1, 2, 4, 5, 6, 8, 9, and 12 to be dismissed at Sentencing. Sentencing scheduled for **October 23, at 3:30 p.m.**

Telephone Harassment

Disposition: Dismissed.

FAMILY STATUS:

The defendant was born in New Jersey, on September , to James and Rosalin The defendant was raised by his grandmother, until he was seven years old. The defendant described his grandmother as his "saving grace." According to the defendant, he would tell his grandmother about what would be happening to him, and she would protect him. The defendant's grandmother passed away when the defendant was eleven years old.

At seven years old, the defendant moved back in with his mother in New Jersey. The defendant's mother, was an avid drug user during this time. According to the defendant, his mother would abuse crack/cocaine, alcohol, and various other substances. Additionally, the defendant stated, his mother would have individuals at the home at all hours using drugs. When others were at the home, the defendant described being locked in his room, in order to separate him from the drug use. The defendant's mother maintains residence in New Jersey, and continues to abuse substances. The defendant stated he still communicates with his mother, but described the communications as negative. According to the defendant, his relationship with his mother has caused many of the problems he is presented with. The defendant described growing up in New Jersey with his mother as "horrible." The defendant described rampant substance abuse, violence, weapons, and gang activity in his neighborhood.

The defendant's father, James , never lived with the defendant during his childhood. The defendant would visit his father frequently. The defendant's father lived with a friend, Ronnie, who also had boy at the house who was thirteen or fourteen years old. The defendant stated, when he was seven years old, the boy sexually abused him. The defendant stated he would tell him they were playing, but the defendant knew what they were doing was not right. The defendant stopped going to his father's house at that time due to the abuse.

Family Status – continued

The defendant's father passed away while the defendant was incarcerated at the Wood County Justice Center. The defendant reported his father was an alcoholic and died from cirrhosis of the liver. According to the defendant, he has been unable to deal with his grief while incarcerated and stated he has "compartmentalized" his grief at this time.

Additionally, the defendant stated his mother and uncles were physically abusive toward him. When the defendant was thirteen years old, the Department of Child Protection and Permanency, removed the defendant from his mother's home, and he was placed in a foster home. The defendant moved to New Jersey, to live with a foster family until he was fourteen years old.

At fourteen years old, the defendant moved back to New Jersey to live with his mother. According to the defendant, the living situation was no better, but his mother had stopped drinking alcohol. The defendant remained living with his mother until he left for college in the fall of 2013.

MARITAL HISTORY:

The defendant has never been married and has never fathered any children.

EDUCATION:

The defendant graduated from High School, New Jersey, on 2013 (verified). The defendant stated, in his first two years of high school, he did not do well due to not having a "solid foundation" supporting his learning. After the first two years, the defendant started doing better in school and was on the honor roll. Additionally, the defendant stated he took advanced placement classes in his last two years of high school. The defendant was not involved in any clubs or athletics in high school.

Following high school, the defendant enrolled at University, North Carolina (verified). The defendant enrolled in August of 2013, and was studying Zoology. According to the defendant, he did well at University and transferred when he decided he wanted to study a different major. Records received from University indicated the defendant had a cumulative G.P.A. of 2.07 when he left the university. Additionally, the defendant was suspended from the university in June of 2015, for the 2015 to 2016 school year. The defendant was suspended following a Title IX investigation alleging violence against a female student.

The defendant enrolled in Community College in Pennsylvania, in 2014 (not verified). The defendant stated, he completed one semester of courses at Community College and majored in Biology and Chemistry.

Education – continued

The defendant enrolled in Bowling Green State University, Bowling Green, Ohio, in the fall of (verified). The defendant was studying Biochemistry and Math and indicated he did well at Bowling Green State University. According to the defendant, he was interested in working in drug design and development and research. The defendant was one semester away from graduation when he was expelled from the university. Records received from Bowling Green State University indicated the defendant had a cumulative G.P.A. of 2.16, and was expelled from the university on September 11, 2020, for conduct reasons.

HEALTH:

Physical:

The defendant stands six feet tall and weighs approximately two hundred and eighty two pounds. He has black hair and brown eyes. The defendant denied any identifying marks or tattoos. The defendant described his health as "poor." According to the defendant, his health has steadily declined since his admittance to the Wood County Justice Center. The defendant stated he has high blood pressure, skin problems, and problems with his mouth and teeth due to his wisdom teeth coming in. The defendant denied being placed on any medication addressing any of his health concerns. The defendant stated he is able to get pain medication as needed, but stated he is not able to get enough and therefore is often in pain. The defendant is not under the care of a primary care physician at this time.

Mental and Emotional:

The defendant described his mental health as "horrible." As a child, the defendant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). The defendant stated he believes he has Bi-Polar Disorder, but he has not been diagnosed as such. The defendant currently takes Effexor, Inderal, and Remeron for mental health concerns. The defendant described his emotions as a "roller coaster" and stated he often wakes up feeling very depressed. Additionally, the defendant stated his mental health makes him very uncomfortable.

The defendant denied any current thoughts of suicide. According to the defendant, he occasionally has thoughts of suicide, but stated it is nothing he would act upon. The defendant stated, the thoughts of suicide arise when he cannot get his mind to slow down, and his thoughts are out of control. The defendant denied any past attempts of suicide.

The defendant previously received mental health treatment at the Bowling Green State University Counseling Center (not verified), and Harbor Behavioral Health (not verified). The defendant stated he also saw , twice a month for counseling (not verified).

SUBSTANCE USE HISTORY:

The defendant was fifteen years old when he first drank alcohol. The defendant stated he would drink alcohol with his friends when it was available, but denied a pattern of alcohol use. When the defendant enrolled in college, he began drinking alcohol every weekend. According to the defendant, he would consume "everything" stating he would drink wine, liquor, and beer, when consuming alcohol. The defendant learned he could not drink much alcohol and maintain his grades in school, so his drinking slowed down. The defendant last consumed alcohol on April 2, , the day he was arrested.

At seventeen years old, the defendant first smoked marijuana. The defendant would smoke marijuana three to four times a week, but would sometimes smoke marijuana daily. The defendant noticed his marijuana habit became a financial burden, and his use decreased to two to three times a month. The defendant last smoked marijuana on April 2, the day he was arrested.

The defendant experimented with other substances. At nineteen years old, the defendant tried cocaine. The defendant snorted cocaine three times and last used cocaine in 2018. According to the defendant, he did not like cocaine. At twenty years old, the defendant experimented with MDMA by ingesting "Molly." The defendant only ingested MDMA the one time and did not form a pattern of use. Additionally, at twenty-two years old, the defendant tried mushrooms. The defendant stated he used mushrooms "a few times" in college.

The defendant denied any past participation in substance use treatment. Due to the defendant's incarceration, a urinalysis was not completed.

EMPLOYMENT:

Due to the defendant's incarceration, he is currently unemployed. The following is a list of his previous employment.

2016 to 2019 **Bowling Green State University** Bowling Green, Ohio

The defendant was employed in the Finance & Economics Department as a computer technician, and the Chemistry department in the Novel Optogenic Improvement section (verification pending). The defendant stated he left the university following his arrest on the **INSTANT OFFENSE.**

2018 to 2018 **Kroger Pharmacy** Bowling Green, Ohio

The defendant was employed as a Pharmacy Technician earning $8.50 an hour (verification pending). The defendant stated he was not able to maintain his employment due to lack of transportation for training.

Employment – continued

2014 to 2015 **Rutgers University** New Brunswick, New Jersey

The defendant was involved in summer programs through Rutgers University (verification pending). The defendant stated the programs were temporary.

MILITARY:

The defendant is not a member of the United States Armed Forces.

FINANCIAL:

The defendant has been incarcerated since April 2, 2019. He reported having no outstanding bills or debts during his incarceration.

****RECOMMENDATION**:**

The most serious offense in this case is a felony of the second degree, and a prison term is presumed. Therefore, this writer will examine seriousness and recidivism factors as they relate to this case. Two factors are present increasing the seriousness of this offense. The victims suffered severe physical and psychological harm as a result of the offense, and the offenders relationship with the victims facilitated the offense. No factors are present indicating a decrease in seriousness. One factor is present suggesting an increase in recidivism. The offender has a history of criminal convictions. In contrast, one factor is present indicating a decrease in recidivism. The offender was not previously adjudicated a delinquent child.

According to the Ohio Risk Assessment System (ORAS), the defendant is a "high" risk to recidivate.

The defendant before the Court is charged with **Abduction, Felonious Assault, Obstructing Official Business, and Attempted Rape.** The case before the Court is very troubling. The defendant victimized and assaulted three young women. Even more concerning to this writer, the defendant strangled all three of the victims. The Honorable Alan Pendleton, Tenth Judicial District Judge in Anoka, Minnesota and Gael B. Strack, JD, CEO, and Co-Founder of the Family Justice Alliance in San Diego, California, wrote, "Strangulation is one of the most terrorizing and lethal forms of violence used by men against their female intimate partners. The act of strangulation symbolizes an abuser's power and control over the victim, most of whom are female." The defendant watched videos teaching him to be the "alpha male" and the "dominate" partner. He wanted to have power over these women, and he was going to get that power any way he could. In the same article, the Honorable Alan Pendleton, and Gael Strack wrote, "Experts across the medical profession now agree that manual or ligature strangulation is "lethal force" and is one of the best predictors of a future homicide in domestic violence cases." Each of the victims in this case were in imminent danger to lose their life during the **INSTANT OFFENSE.** The defendant demonstrated a pattern of behavior, and a pattern of abuse toward his victims. The defendant is a danger to society. This writer would conclude, the defendant does not overcome the presumption of a prison term, and would not be an amenable candidate for Community Control.

Therefore, it is respectfully recommended as to Count 3, the defendant serve a term of thirty-six months in the Ohio Department of Rehabilitation and Correction, as to Count 7, the defendant serve a term of eight (8) years in the Ohio Department of Rehabilitation and Correction, as to Count 10, the defendant serve a term of 90 days in the Wood County Justice Center, and as to Count 11, the defendant serve a term of eight (8) years in the Ohio Department of Rehabilitation and Correction. It is additionally recommended sentences for Count 3, Count 7, and Count 11 run consecutively for an aggregate term of nineteen (19) years in the Ohio Department of Rehabilitation and Correction and Count 10 run concurrent to the sentences for Count 3, Count 7, and Count 11. It is the opinion of this writer, consecutive sentences are necessary due to two or more of the multiple offense committed as a single course of conduct and harm so great or unusual a single term does not adequately reflect the seriousness of the conduct. Should the Court choose an alternative sanction, special conditions are attached for review.

SENTENCING FACTORS

Felonies of the Fourth (4th) and Fifth (5th) Degree:

Ohio Revised Code Section 2929.13(B)(1):
Except as provided in division (B) (2), (E) (F) or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

_____ (a) In committing the offense, the offender caused physical harm to a person.

_____ (b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

_____ (c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

_____ (d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

_____ (e) The offender committed the offense for hire or as part of an organized criminal activity.

_____ (f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

_____ (g) The offender at the time of the offense was serving, or the offender previously served, a prison term.

_____ (h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

_____ (i) The offender committed the offense while in possession of a firearm.

SENTENCING FACTORS

Seriousness Factors (Increased Seriousness):

Ohio Revised Code Section 2929.12(B):
The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is *more serious* than conduct normally constituting the offense:

____ (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

XXX (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

____ (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

____ (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

____ (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

XXX (6) The offender's relationship with the victim facilitated the offense.

____ (7) The offender committed the offense for hire or as a part of an organized criminal activity.

____ (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

____ (9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

SENTENCING FACTORS

Seriousness Factors (Decreased Seriousness):

Ohio Revised Code Section 2929.12 (C):
The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is *less serious* that conduct normally constituting the offense:

_____ (1) The victim inducted or facilitated the offense.

_____ (2) In committing the offense, the offender acted under strong provocation.

_____ (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

_____ (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

SENTENCING FACTORS

Recidivism Factors (Likely to Commit):

Ohio Revised Code Section 2929.12(D):
The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is *likely to commit* future crimes:

____ (1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 (2929.14.1) of the Revised Code.

XXX (2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151 of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152 of the Revised Code, or the offender has a history of criminal convictions.

____ (3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151 of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152 of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

____ (4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

____ (5) The offender shows no genuine remorse for the offense.

SENTENCING FACTORS

Recidivism Factors (Not Likely to Commit):

Ohio Revised Code Section 2929.12(E):
The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is ***not likely to commit*** future crimes:

XXX (1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

____ (2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

____ (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

____ (4) The offense was committed under circumstances not likely to recur.

____ (5) The offender shows genuine remorse for the offense.

Military Factor:

Ohio Revised Code Section 2929.12(F):
The sentencing court shall consider the offender's military service record and whether the following applies:

____ The offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

PRINT

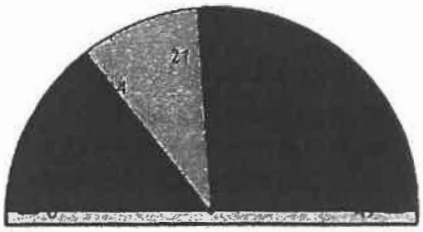
ORAS Summary Report

Name: James **DOB:**
Alias:
DRC #:
Staff Completed: **Date:**
Last Assessment Type: **Last Assessment Date:**

Overall Impression:

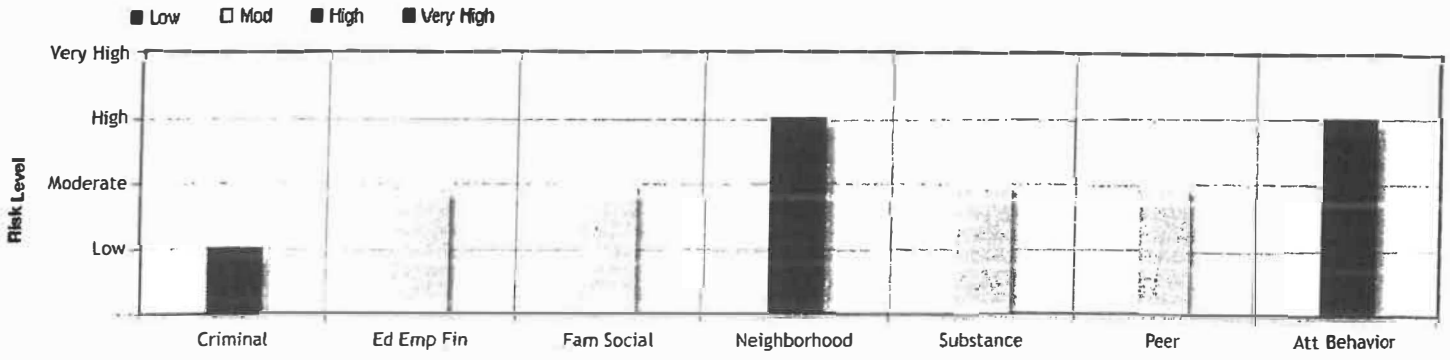
Assessment: Community Supervision
Final Risk Level: High

Level of Risk



27

Treatment Priorities



Defendant written Statement: Incident #1

24 September 20

Re: Statement of Participation
Rough draft #2

January 20, ,-

My ex-girlfriend A. and I, Woke up in the morning and made mimosas. Also, we Smoked marijuana before the incident occured. While lying in bed, I began to watch a video on youtube by a youtuber named, "AMS-AlphaMale Strategies". AMS makes videos to help empower African-American American men and give advice on how to achieve your goals. I was very aware that Article didnt like some of the rhetoric he chose to use but I [illegible] anyway. This choice was very [illegible] her feelings and I should have left the room instead of [illegible] While watching the video she asked me to watch it in another room and I said no. Lately our relationship had been going through many stressors, so me saying no and disregarding her feelings pushed her over the edge and she said she didn't want

to be together anymore. She started to gather her belongings and out of fear of not wanting her to leave, I took her things and asked her not to leave and to stay and talk. I'm very ashamed at my actions of restraining her liberty because of my fear. This is no excuse and I now know if someone wants to leave you need to let them go. After taking her things she got irate and violent. Instead of letting her leave or walking away from the situation I impulsively grabbed her by the neck and pinned her to the ground. In no way are those actions ever acceptable. I should have never put my hands on her neck and I regret the fact that I did that. I'm extremely ashamed of physically hurting someone that cared so much to me. At no time is violence ever acceptable, especially when someone is trying to leave. I now know that it is never okay to use anger and physically violence out of fear to control another individual in a staying in a relationship. This has made me take the step of making an intellectual commitment to my emotional responses.

Strangling an individual can not only cause physical harm but also psychological harm. Which is why I should never do that to another person again. My actions have made me feel horrible and ashamed. Walking away is always the best choice, never to choice restraining a persons liberty. By no means neccessary is it ever okay to pinn someone down on the ground while grabbing them by the neck. My behavior during the incident is absolutely appauling and inexcusable.

30 September 20

Defendant Statement : Incident #2

Statement of Participation

A

On or about NOV. 27. 2017, my ex-girlfriend A came to my off-Campus to visit. During her visit, We began to argue over issues concerning infidelity. I asked her to unlock her phone so I could confirm my suspicion of her being un-faithful. She denied open the phone, so I grabbed her phone and threw it at the Wall. The next morning while we were conversing, she ultimately confessed her infidelity, which made me irate and I attempted to pour sugar in her gas tank and broke her window-wiper control. My actions in the instant offense deeply disappoint me as instead of leaving the relationship and being the mature adult, I acted in a childish manner overall leading me to be incarcerated. It is never okay to destroy someones property in anger. Also, it is never okay to use anger to try to control anothers actions. My actions in this offense are completely inexcusable. Also I should have never restrained her liberty by grabbing her cell phone. This action was unlawful and un-acceptable

30 September 20

Defendant Statement: Incident 3

Statement of Participation

P

I now know that it is important to get verbal consent before engaging in any sexual contact with an individu
Also, it is important to be cognizant of how another person may perceive your actions. Next time, I will make sure to get not only verbal consent, but also written consent.

When Alicia, Chayce, and paige came over, I thoug they were coming over for casual sex. It is now apparent, that A and C. was and P was not.

Sentencing: James

Phase I: Sentencing conclusions after reading PSI, Probation officer recommendation and defendant statement

Count	**Sentence**
Count 3: Abduction (F3)	
Count 7: Felonious Assault (F2)	
Count 10: Obstructing Official Business (M2)	
Count 11: Attempted Rape (F2)	
Concurrent or Consecutive? (2929.14(C)(4))	
Community Control: How long? Conditions?	

In reaching this decision what was important to you?

What other information do you want to know that you think could be revealed in the hearing?

What do you want to discuss with the probation officer?

Sentencing: James

Phase II: Sentencing conclusions after hearing from attorneys at hearing

Count	**Sentence**
Count 3: Abduction (F3)	
Count 7: Felonious Assault (F2)	
Count 10: Obstructing Official Business (M2)	
Count 11: Attempted Rape (F2)	
Concurrent or Consecutive? (2929.14(C)(4))	
Community Control: How long? Conditions?	

What information from the attorneys was helpful to you?

What information from the attorneys did not help you?

What information do you still want to hear?

Sentencing: James

Phase III: Sentencing conclusions after hearing from victim representative and offender

Count	**Sentence**
Count 3: Abduction (F3)	
Count 7: Felonious Assault (F2)	
Count 10: Obstructing Official Business (M2)	
Count 11: Attempted Rape (F2)	
Concurrent or Consecutive? (2929.14(C)(4))	
Community Control: How long? Conditions?	

What questions would you have wanted to ask the offender?

If your conclusions changed from your initial thoughts on sentencing, why did they?

Why did you choose the sentencing option you did?

Sentencing: Michael

Phase I: Sentencing conclusions after being presented with facts of the case.

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

In reaching this decision what was important to you?

What other information do you want to know that you think could be revealed in the hearing?

Sentencing: Michael

Phase II: Sentencing conclusions after hearing from attorneys at hearing

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

What information from the attorneys was helpful to you?

What information from the attorneys did not help you?

What information do you still want to hear?

Sentencing: Michael

Phase III: Sentencing conclusions after hearing from victim and offender

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

If you chose community control, why?

What questions would you have wanted to ask the offender?

If your conclusions changed from your initial thoughts on sentencing, why did they?

Why did you choose the sentencing option you did?

Civil Law and Procedure

Hon. D. Chris Cook
Lorain County Common Pleas Court

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

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THE SUPREME COURT *of* OHIO
JUDICIAL COLLEGE