



CRIMINAL SENTENCING COMMISSION

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Legislative & Judicial Brief

A Message from Sara Andrews, Director



The Legislative & Judicial Brief is designed to share information and spark conversation. The Commission strives to move ideas to solutions that advance public safety, realize fairness in sentencing, preserve judicial discretion, provide a meaningful array of sentencing options, and distinguish the most efficient and effective use of correctional resources.

-Sara Andrews

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LEGISLATION IMPACTING SENTENCING & PASSED IN DECEMBER 2022
SB 288 REVISE THE CRIMINAL LAW (MANNING)

The bill was introduced on February 2, 2022. It was passed in the Senate on November 30, 2022, and in the House on December 14, 2022. The bill makes multiple changes to criminal law. Some of the changes are outlined here. The bill expands when people convicted of crimes can seek to have their criminal records sealed and expands expungement eligibility. The bill removes minor misdemeanor marijuana paraphernalia convictions from criminal records, states that these convictions do not constitute a criminal conviction, and they need not be reported to employers or professional licensing agencies. The bill modifies the 80% release mechanism in several ways, notably by creating a presumption in favor of release if recommended by DRC. The bill also modifies the transitional control statute. One way the bill modifies transitional control is by reducing the reach of the judicial veto. Currently, the judicial veto is applicable to sentences of 2 years or less. Under the bill, the judicial veto of transitional control is only available when an offender is sentenced to 1 year or less. The bill adds an emergency release mechanism for prisoners when the governor declares a state of emergency due to a pandemic or any other public health crisis. The bill expands earned credit by allowing inmates who are eligible the ability to earn up to 15% off their sentence (currently only a max. of an 8% reduction of a prison term is allowed). The bill expands the Good Samaritan law to allow for immunity from prosecution for possession of drug abuse instrument and drug paraphernalia offenses. The bill removes fentanyl testing strips from the possession of drug paraphernalia code section. The bill reduces the penalty for underage drinking offenses from a first-degree misdemeanor to a third-degree misdemeanor. The bill changes the texting while driving law to include simply holding or supporting an electronic wireless communications device or entering letters, numbers, or symbols and makes this a primary offense. The bill creates a felony offense of strangulation, with penalties ranging from the fifth-degree level to the second-degree level. The bill also creates a new felony offense of fraudulent assisted reproduction, making it a third-degree or second-degree felony for a health provider to fraudulently or without consent use their own sperm during fertility treatment. The bill changes the offense of petty theft to misdemeanor theft. The bill adds firefighters and emergency medical workers to a special victim class for aggravated vehicular homicide offenses. The bill makes it a first-degree misdemeanor to disrupt or disquiet any assemblage of people meeting for a religious purpose. The bill modifies the look-back period for felony OVI offenders and adds harmful intoxicants to the definition of drug of abuse, thereby expanding the OVI code section to expressly include driving under the influence of harmful intoxicants. The bill modifies felony speedy trial rights by allowing the state to request an additional 14 days of speedy trial time. The bill allows county correctional officers the ability to carry guns.

HB 462 TO PROHIBIT SWATTING (MILLER)

The bill was introduced on October 25, 2021. It was passed in the House on November 30, 2022, and in the Senate on December 14, 2022. The bill creates the new offense of swatting. The bill makes it a fourth-degree felony to a second-degree felony to report or cause to be reported false or misleading information to law enforcement under circumstances where the report is reasonably likely to cause an emergency response and does cause an emergency response.

SB 16 REGARDS CIVIL ACTIONS BY, AND CRIMES AGAINST, FIRST RESPONDERS (SCHAFFER)

The bill was introduced on January 26, 2021. It was passed in the Senate on June 2, 2021, and in the House on December 14, 2022. Some of the changes this bill makes are outlined here. The bill removes the statute of limitations for conspiracy to commit, attempt to commit, or complicity in committing aggravated murder or murder. The bill creates the offense of unlawfully impeding public passage of an emergency service responder. The bill prohibits certain sex offenders from volunteering with organizations that support minors. The bill also modifies the penalties for assault when the victim is a first responder.



THE UNIFORM SENTENCING ENTRY

The Ohio Criminal Sentencing Commission—in partnership with the University of Cincinnati School of Information Technology—is continuing its work developing a web-based platform for uniform entry templates for sentencing, [the Ohio Sentencing Data Platform \(OSDP\)](#). Started in 2020, the pilot project has expanded much more rapidly than anticipated; currently 89 Judges are engaged with the pilot project in some way.

The OSDP is designed to tell the story of sentencing in Ohio. The story begins when judges implement the uniform entry templates into their existing court processes.

For more information, please contact Sara Andrews, sara.andrews@sc.ohio.gov.

SUPREME COURT OF OHIO DECISIONS

[State v. P.J.F., Slip Opinion No. 2022-Ohio-4152](#), decided November 23, 2022. The defendant was convicted of one felony of the fifth-degree count of non-support of a dependent. As a condition of his community-control, he was ordered to make payments in accordance with the existing domestic relations child support order. After several years elapsed the trial court heard a request to terminate community-control and, ultimately, issued an order discharging the defendant from community control. In so doing, the court also noted that the defendant had failed to comply with the conditions, specifically he failed to make child support payments. After the required time had elapsed, the defendant filed a motion to seal his conviction. The motion was granted. The state appealed, arguing that because the defendant had failed to abide by all of the conditions of his community-control there was no “final discharge.” The appellate court agreed with the state and reversed the judgment of the trial court. The Supreme Court disagreed, and ultimately held that the termination of the community control was a “final discharge” for purposes of sealing eligibility. In so holding, the court distinguished between *conditions* of nonresidential community-control pursuant to R.C. 2929.17 and financial community control sanctions pursuant to R.C. 2929.18. The court held that a defendant completes a R.C. 2929.18 financial community-control sanction by paying the debt in full, and a defendant completes a R.C. 2929.17 nonresidential community-control sanction at the end of its duration.

Revised Code Section(s): 2919.21, 2929.17, 2929.18

[State v. Yerkey, Slip Opinion No. 2022-Ohio-4298](#), decided December 5, 2022. The defendant was convicted of two felony counts of violating a protection order. The victim, the defendant’s ex-wife, requested restitution for lost wages relating to 7 full days’ worth of work that she missed due to voluntarily attending court hearings. The victim also requested restitution for attorney fees, medical bills, and counseling bills. The trial court ordered restitution for the lost wages but declined to order restitution for the other expenses. When issuing this restitution order, the trial court found that the lost wages could be “arguably directly and proximately related to the cases.” The appellate court reversed the restitution order. The Supreme Court affirmed the appellate court and held that the statutory meaning of restitution was not altered or expanded by Marsy’s Law. Thus, unless the lost wages are directly and proximately caused by the offense, lost wages are not able to be recouped through a criminal restitution order. The majority did note, however, that restitution could be considered directly and proximately caused by the offense when a victim misses time at work because of an injury to the victim caused by the offense.

Revised Code Section(s): 2929.18

[State v. Brunson, Slip Opinion No. 2022-Ohio-4299](#), decided December 5, 2022. The defendant was convicted of 22 serious felonies, including 3 counts of aggravated murder. As a result of his convictions, the defendant was sentenced to life in prison without the possibility of parole. He remained silent at sentencing and waived his right to allocute. The opinion of the Supreme Court focused on 3 issues. Relevant to sentencing was the issue of whether the trial court erred when it considered the defendant’s silence and waiver of the right to allocute in determining whether the defendant had a lack of remorse. The court held that when a defendant maintains their innocence by pleading guilty and taking a case to trial, the trial court errs when it considers the defendant’s decision to remain silent and waive allocution when determining whether there was a lack of remorse.

Revised Code Section(s): 2929.12

NEWS

NEW COMMISSION CHAIR

Chief Justice Sharon L. Kennedy began her term as Chief Justice of the Supreme Court of Ohio on January 1, 2023. Pursuant to R.C. 181.21, Chief Justice Kennedy has also begun her tenure as chair of the Ohio Criminal Sentencing Commission. Click [this link](#) to learn more about Chief Justice Kennedy.

PROSECUTOR PREPARATION OF JUDGMENT ENTRY

The Ohio Board of Professional Conduct recently issued an advisory opinion answering two questions. The Board ultimately concluded that a prosecutor may prepare a judgment entry at the direction of a judge, but that the prosecutor should not engage in subsequent communications with a court about changes or edits that concern substantive matters or issues on the merits unless opposing counsel is included in the communications. The full advisory opinion can be viewed [here](#).

REQUEST FOR PUBLIC COMMENT

The Ohio Criminal Sentencing Commission has convened a Sentencing Roundtable Workgroup under the direction of Reginald Wilkinson, EdD. The Workgroup began meeting in January of 2022. The group had met consistently throughout the year and has recently completed its draft version of the Sentencing Roundtable Workgroup Report & Recommendations. The draft report can be viewed [here](#). Public comment on the recommendations contained in the draft report is being requested. Public comment should be sent to Sara.Andrews@sc.ohio.gov by February 1, 2023.

BUDGET

State agencies who receive appropriated funds have submitted their budget requests to the Office of Budget Management (OBM). OBM will continue to work with Governor DeWine and his staff to formulate preliminary budget recommendations over the course of this month. The Governor has until January 31, 2023 to submit his executive budget to the General Assembly.

SUPREME COURT OF OHIO DECISIONS continued

[In re D.R., Slip Opinion No. 2022-Ohio-4493](#), decided December 16, 2022. The juvenile offender in this case was adjudicated delinquent for sexually assaulting a 12-year-old when the offender was 16 years old. The juvenile court classified him as a Tier I juvenile-offender registrant. At the completion-of-disposition hearing, and in accordance with R.C. 2152.84(A)(2)(b) which requires that offenders 16 or 17 years old at the time of the offense have their classification continued, the juvenile court continued the classification. The majority noted that, because R.C. 2152.85(B)(1) does not permit a juvenile offender to request a classification review for three years, the Tier I classification would follow the juvenile into adulthood. The majority held that because R.C. 2152.84(A)(2)(b) did not allow the juvenile court discretion to determine whether to continue the classification into adulthood, the statute is fundamentally unfair as applied to this juvenile offender and violates due process. The court remanded the case to the juvenile court to hold a new completion-of-disposition hearing and determine whether the classification should be continued or terminated.

[State v. Ashcraft, Slip Opinion No. 2022-Ohio-4611](#), decided December 23, 2022. The defendant in this case was, for the second time, convicted of failing to provide a change-of-address notification for sex offender registration. The trial court sentenced the defendant to serve a 3 years and 9 months prison term. The 9-month term was imposed in addition to the 3-year term. The 3-year term was imposed because R.C. 2950.99(A)(2)(b) states that when an offender is a repeat violator of failing to provide a change-of-address notification for sex offender registration the court shall impose a definite prison term of no less than 3 years in addition to any other penalty or sanction. The defendant challenged this sentencing scheme on appeal. The appellate court upheld the sentence and stated that the trial court was permitted to impose the 9-month term in addition to the 3-year term. The Supreme Court affirmed the appellate court.

[State v. Morris, Slip Opinion No. 2022-Ohio-4609](#), decided December 23, 2022. The defendant was convicted of numerous serious felony offenses including complicity to aggravated murder. He was 17 years old at the time of the offenses. As a result of his convictions, he was sentenced to life imprisonment with parole eligibility after 38 to 43 years. The trial court did not specifically state on the record that it had considered the defendant's age before imposing its sentence. The Supreme Court held that the failure to expressly consider the defendant's age as a factor in sentencing constituted cruel and unusual punishment.

[State v. Bollar, Slip Opinion No. 2022-Ohio-4370](#), decided December 9, 2022. This appeal answers a certified-conflict question: whether Ohio's legislature has specifically authorized cumulative punishments for multiple firearm specifications that were committed as part of the same act or transaction under the narrowly tailored, specifically designated circumstances set forth in R.C. 2929.14(B)(1)(g), when the underlying felonies attendant to the firearm specifications are merged at sentencing as allied offenses of similar import pursuant to R.C. 2929.14(C)(4). The defendant in this case pleaded guilty to both involuntary manslaughter and felonious assault, each of which carried a firearm specification. He also pleaded guilty to having weapons under disability and an accompanying firearm specification. At sentencing, the trial court merged the involuntary manslaughter and felonious assault counts but imposed consecutive three-year prison terms for each count's linked firearm specification pursuant to 2929.14(B)(1)(g). The Supreme Court held that the plain language of R.C. 2929.14(B)(1)(g) requires the imposition of separate prison terms for multiple firearm specifications in situations like the one in this case, and the certified-conflict question is answered in the affirmative.

Revised Code Section(s): 2929.14, 2941.25

[State v. Grievous, Slip Opinion No. 2022-Ohio-4361](#), decided December 9, 2022. The defendant was found guilty after a jury trial of aggravated-murder and a specification for an aggravating circumstance. Thus, with the absence of an applicable exception, the law required that he be sentenced to either death or one of three life sentences. During the sentencing phase of his trial, the jury did not find proof beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors and then recommended a sentence of life imprisonment without the possibility of parole. In accordance with R.C. 2929.03(D)(2)(c), the trial court followed this recommendation and sentenced the defendant to life imprisonment without the possibility of parole. The defendant appealed his sentence, challenging the constitutionality of R.C. 2953.08(D)(3), which limits the grounds for appeals involving sentences like his under that section. The appellate court upheld the constitutionality of R.C. 2953.08(D)(3) and further held that R.C. 2953.08(D)(3) precluded appellate court review of the merits of a constitutional challenge to an aggravated-murder sentence. The Supreme Court of Ohio upheld the appellate court's decision related to the constitutionality of R.C. 2953.08(D)(3) but reversed and remanded the portion of the appellate court judgment related to that court's decision to decline to review the merits of the defendant's constitutional challenges to his aggravated-murder sentence. The portion of the judgment that was reversed and remanded was based on the Supreme Court's decision in [State v. Patrick](#), 164 Ohio St.3d 309, 2020-Ohio-6803 holding that R.C. 2953.08(D)(3) does not preclude an appellate court from reviewing a constitutional challenge to an aggravated-murder sentence.

Revised Code Section(s): 2953.08, 2929.03

[State v. Hough, Slip Opinion No. 2022-Ohio-4436](#), decided December 13, 2022. In this case, the defendant was indicted on 12 counts related to his driving the wrong way on a highway exit ramp, while intoxicated, and killing another driver and injuring three passengers. Prior to trial, his counsel filed a motion for a competency hearing. The trial court never ruled on the motion, no competency evaluation was ordered, and no hearing was held. The Supreme Court followed its precedent and held that a trial court must hold a competency hearing when one is requested prior to trial. The court then proceeded to determine whether the error in this case was harmless. Ultimately, the court concluded that the error was not harmless because there were sufficient indicia of the defendant's incompetence. The convictions were vacated, and the cause was remanded to the trial court.

Revised Code Section(s): 2945.37

SUPREME COURT OF OHIO DECISIONS continued

[State v. Bailey, Slip Opinion No. 2022-Ohio-4407](#), decided December 14, 2022. The defendant was convicted of multiple felony counts, including kidnapping and rape. At the time of sentencing, the trial court concluded that the kidnapping and rape counts did not merge for purposes of sentencing. The defendant did not object to that decision. Because the defendant did not object at the trial court, appellate review is limited only to plain error. To establish plain error, a defendant must establish that an error occurred, the error was obvious, and that there is a reasonable probability that the error resulted in prejudice. See [State v. McAlpin](#). The court of appeals held that the decision not to merge the kidnapping and rape counts was plain error. Ultimately, the Supreme Court reversed that decision. In so doing, the court recognized that the law governing the merger of allied offenses is dependent on the specific facts of each case. As such, the court concluded that the trial court's decision not to merge the kidnapping and rape counts did not constitute an obvious error (if error at all). The defendant did not establish plain error and the court of appeals decision to merge the kidnapping and rape counts was reversed.

Revised Code Section(s): 2941.25

[State v. Barnes, Slip Opinion No. 2022-Ohio-4486](#), decided December 15, 2022. The defendant pleaded guilty to an amended charge of involuntary manslaughter for his role in a shootout that left one person dead. Prior to his sentencing on that count, he filed a motion to withdraw his guilty plea. The basis of the motion was that the night before sentencing he viewed, for the first time, a video of the shooting that included audio. The defendant's attorneys had previously allowed him to view video of the offense, but never with audio. The defendant claimed that the audio in the video supported his self-defense claim and, thus, he wanted to withdraw his guilty plea. The trial court held two hearings on that motion and ultimately declined to allow the defendant to withdraw his plea. The appellate court upheld that decision. Here, the Supreme Court of Ohio reversed the judgment of the court of appeals affirming the trial court's judgment. The majority held that the defendant had a reasonable and legitimate basis to withdraw his guilty plea before sentencing.

[State v. Jones, Slip Opinion No. 2022-Ohio-4485](#), decided December 15, 2022. The defendant was placed on a 5-year period of community control in 2016, with a 2-year prison term reserved. At the time she was placed on community control, the trial court did not inform her that if she violated the court could run the 2-year reserved term consecutive to any other prison term. In 2018, she was convicted of robbery in a different county and sentenced to a 3-year prison term. The trial court revoked the defendant's community control and ran the 2-year reserved term consecutive to the 3-year term. The Supreme Court held that when a court revokes community control, it may require that the reserved prison term be served consecutively to any other sentence then existing or then being imposed. However, the consecutive sentence can only be imposed if, at the time it imposed community control, the trial court informed the defendant that a consecutive sentence on revocation of community control was a possibility.

Revised Code Section(s): 2929.14, 2929.15, 2929.41, former 2929.19

[State v. Gwynne, Slip Opinion No. 2022-Ohio-4607](#), decided December 23, 2022. This is the second time this case has been before the Supreme Court of Ohio. The defendant was sentenced to a total of 65 years in prison, stemming from her convictions for multiple theft related offenses that occurred over the course of multiple years. In this appeal, the court was asked to determine if a trial court errs when it sentences a defendant to consecutive terms of imprisonment, when such a sentence is clearly and convincingly not supported by the record. Ultimately, the Supreme Court remanded the case to the court of appeals to decide whether the sentence in this case was clearly and convincingly supported by the record. In remanding the case, the court held that 2929.14(C)(4) requires that trial courts, when making the consecutive sentence determinations, must consider the overall number of consecutive sentences and the aggregate sentence to be imposed when making the required necessity and proportionality findings.

Revised Code Section(s): 2929.14, 2953.08

UPCOMING LEGISLATIVE SESSIONS

Senate: January 31, 2023, February 8, 2023, February 15, 2023, February 22, 2023.

House: January 11, 2023, January 25, 2023, February 1, 2023, February 8, 2023, February 15, 2023, February 22, 2023.

SB 201 APPELLATE DECISIONS TRACKING UPDATE

As part of our efforts to inform and educate practitioners on the implementation of changes in the law, the Commission had started tracking appeals that raised issues related to SB 201, "The Reagan Tokes Law". This case tracking effort began immediately after the law became effective. However, as the appellate decisions were released, it became increasingly clear that the issues related to SB 201 were repetitive in nature and, therefore, maintaining an exhaustive catalog would not serve the interests of practitioners. Therefore, while the Commission staff continues to review all appellate decisions related to SB 201, we will no longer be updating the dedicated SB 201 appeal tracking document on the Commission's website. Consistent with our commitment to maintain up to date resources for practitioners, we will continue to work diligently to constantly monitor and update all our documents to ensure they reflect the latest changes in the law - whether through the passage of legislation or through case decisions.

- Alex Jones, Criminal Justice Counsel

Next Meeting of the Full Commission:

Thursday, March 16, 2023 at 10:00 a.m.

**Ohio Judicial Center 65 S. Front Street Columbus, Ohio 43215
Room 101 and remote (details to be posted)**

**Working committees meet between full Commission meeting dates.*



**With gratitude and thanks to primary contributor:
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Questions, Comments, Suggestions? Contact: sara.andrews@sc.ohio.gov

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