

# Legislative & Judicial Brief



## A Message from Sara Andrews, Director



*Yes, it is really August already! After the flurry of legislative activity, we opted for an off month in July – probably a good idea for some recovery time. Now we are back at it and anticipate a compressed, but robust Fall session – so, hang on. Please note a correction to the information regarding HB110, see page 3. We also mentioned last edition that the Criminal Justice Recodification Committee has maintained an aggressive schedule and hoped to have recommendations ready now, but more time is needed, so it may be November 2016.*

*The Legislative & Judicial Brief is designed to share information, spark conversation, enlighten minds and 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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## Court Decisions Impacting Sentencing

### *In re A.G.*, Slip Opinion No. 2016-Ohio-3306

The Supreme Court of Ohio held that juveniles are entitled to the same constitutional double-jeopardy protections as adults, and juvenile courts must conduct the same double-jeopardy analysis in delinquency proceedings as other courts apply in adult criminal proceedings.

In 2012 A.G. was adjudicated delinquent in juvenile court for conduct that would constitute aggravated robbery and kidnapping and two firearms specifications if committed by an adult. The juvenile court committed him to the Ohio Department of Youth Services for minimum terms of one year each for the aggravated robbery and kidnapping adjudications. The court merged the firearm specifications and imposed a one-year commitment term, and ordered all terms to be served consecutively for a total minimum commitment of three years, with a maximum commitment lasting until A.G. turned 21 years old.

A.G. appealed his sentence claiming the juvenile court failed to merge his adjudications for aggravated robbery and kidnapping as allied offenses of similar import and that this failure violated the double-jeopardy clauses of the U.S. and Ohio constitutions. The Eighth District Court of Appeals concluded that the two acts would merge into one offense under R.C. 2941.25 if committed by an adult, but refused to apply the statute to A.G., a juvenile. The court had reasoned that, because criminal statutes do not apply to juvenile proceedings, the juvenile court did not err in refusing to merge acts that would have merged in adult criminal court.

The Supreme Court of Ohio opined that the double-jeopardy clauses in the U.S. Constitution's Fifth Amendment, and Article I, Section 10 of the Ohio Constitution protect against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. The Court's opinion noted that the U.S. Supreme Court has previously found little difference in juvenile delinquency proceedings from traditional adult criminal prosecutions and has ruled that jeopardy attached in juvenile hearings. Citing *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, the Court stated that R.C. 2941.25 codified the constitutional protection against double jeopardy to determine when multiple punishments are to be given. The rule relating to allied offenses of similar import stated in *Ruff* applies to juveniles as well as adults.

### *State v. Mole*, Slip Opinion No. 2016-Ohio-5124

The Supreme Court of Ohio found R.C. 2907.03(A)(13), which makes it a felony for a peace officer to have sex with a minor more than two years younger than the officer, unconstitutional. The Court found that the peace officer provision in the statute violates the equal **protection** clauses of the Ohio and U.S. Constitutions. While other provisions of the statute that apply to specific professions require an occupational relationship with the minor, the peace officer provision applies even when no occupation-based relationship exists between the peace officer and the victim.

In separate dissenting opinions, Justices Sharon L. Kennedy and Judith L. French wrote that the General Assembly only had to have a rational basis for establishing the prohibition and that holding peace officers to a higher standard of conduct is enough justification to pass constitutional muster.

The unlawful-sexual-conduct law prohibits sexual conduct with a minor between the ages of 13 and 15 when the offender is 18 or older and knows the minor's age or is reckless in that regard. The sexual battery statute only requires that the state prove the peace officer had sex with a minor, and not that the peace officer knew the victim's age.

The Court's opinion noted that the General Assembly has a right to classify groups of individuals and set different standards of treatment for those classes, but that the constitution only permits those classifications if there are legitimate reasons for them. The standard to review this law's treatment of peace officers requires the Court to apply a "rational basis" test, which will uphold a law if it is rationally related to a legitimate governmental purpose.

The state argued the rational basis for adding the classification of peace officers without regard to whether they used their professional status to facilitate forbidden sexual conduct was for two reasons: to hold peace officers to a higher standard to ensure integrity and maintain public trust, and to protect minors.

The Court noted lawmakers had focused their criminalization of sexual conduct on those who used their professional status to take unconscionable advantage of minors, except in the case of peace officers. The Court agreed that peace officers occupy a unique position of public trust that calls for special standards and penalties in certain circumstances.



## Court Decisions Impacting Sentencing

### ***State v. Jones*, Slip Opinion No. 2016-Ohio-5105**

The Supreme Court unanimously reversed the Eighth District Court of Appeals' finding that rape and kidnapping charges against the defendant should be dropped where prosecutors waited until the last day of the 20-year statute of limitations to indict him. The Court found that the Eighth District used the wrong standard to determine if the delay prejudiced the defense, and the Court returned the case to the appellate court to evaluate the claim based on standards the Supreme Court previously laid out.

In 1993, a woman reported to Cleveland police that defendant raped her and a rape kit was administered. The victim identified her attacker as the defendant but in the days following the incident police failed to locate the victim and did not gather any further physical evidence or interview any witnesses. The police noted that until S.W. assisted, it was not taking any further investigative steps. The department's report stated Jones was no longer wanted in connection with the case.

The rape kit that had been collected was sent to the Ohio Bureau of Criminal Investigation in 2011, 18 years after the alleged rape, as part of a statewide rape-kit testing initiative. Testing of the kit positively identified the defendant and in August 2013, a grand jury indicted the defendant. The defendant filed a motion to dismiss the case based on unconstitutional pre-indictment delay. He argued that as a result of the delay, his mother, who the victim said was present at the time of the alleged rape, had died. He also said his case was prejudiced by the unavailability of S.W.'s 911 call or any physical evidence from the scene, including S.W.'s clothing.

The defendant asserted the delay was unjustifiable because the police claimed they could not locate S.W., but records indicated she had been arrested by Cleveland police several times after the alleged rape, and they could have pursued the case then. He also argued the DNA match did not justify delay because Jones' identity was known to the police from the beginning. The trial court granted Jones' motion and dismissed the case, noting the loss of physical evidence and the death of Jones' mother prejudiced his case. The Eighth District affirmed the trial court.

The Supreme Court of Ohio noted that although the U.S. Constitution's Sixth Amendment guarantees "the right to a speedy and public trial" when someone is accused of a crime, it does not provide protection to those yet to be accused. In addition, the Court noted, the Sixth Amendment does not require the government act within a particular period of time to investigate and charge someone of a crime, but statutes of limitations do provide an ultimate time limit. However, even if the state brings an indictment within the statute of limitations, if unjustifiable delay in bringing the indictment causes actual harm to the accused's right to a fair trial, the due process clauses of the Ohio and U.S Constitutions provide additional protection.

The Court cited 1984 *State v. Luck*, which stated that pre-indictment delay violates due-process rights "only when it is unjustifiable and causes actual prejudice." In addition, 1998 *State v. Whiting* decision established a "burden-shifting framework" that must be followed to assess a due-process claim based on pre-indictment delay. Therefore, in this case, Jones must present evidence that the delay would actually harm his case. If he does, then the state has to produce evidence that it had a justifiable reason for delay, the opinion explained.

### **Correction – HB110**

#### **HB 110 - Failure to Stop (Corrected from June 2, 2016 edition)**

The bill increases the penalty for failure to stop after an accident when the offense results in serious physical harm to a person from a felony of the fifth degree to a felony of the fourth degree. If death, it increases from a third degree to a felony of the second degree. The bill was amended to also include "Good Samaritan" language that provides limited criminal immunity for minor drug possession for a person who seeks medical help for himself or someone else due to an overdose. The bill was enacted on May 24, 2016 and signed by the Governor on June 13, 2016.

## Ohio Criminal Sentencing Commission Members

### CHAIR

Maureen O'Connor, *Chief Justice*

### VICE-CHAIR

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*Victim Representative*

Paula Brown,  
*Ohio State Bar Association Representative*

Ronald Burkitt, *Juvenile Police Officer*

Kort Gatterdam, *Defense Attorney*

Kathleen Hamm, *Public Defender*

Jason Pappas, *Fraternal Order of Police*

\*the Commission is assisted by its Advisory Committee, for a complete list contact [sara.andrews@sc.ohio.gov](mailto:sara.andrews@sc.ohio.gov)

## Working Committees of the Commission

**Sentencing & Criminal Justice Committee** priorities include the study of criminal penalties and sentencing statutes and patterns in Ohio, recommending statutory change and reviewing national developments and trends on matters of sentencing. The committee is also poised to respond and make recommendations regarding more broad areas including probation, risk assessment, release programs, specialized dockets, community corrections and building, as well as improving, relationships and coordinating the work of the Commission with other justice partners – both state and federal.

**Juvenile Justice Committee** priorities include the review of criminal penalties and sentencing statutes and patterns in Ohio and recommending strategies to combat juvenile delinquency and recidivism.

**Data Collection and Sharing Committee** primary goals are to develop, coordinate and identify ways to collect and promote methods for sharing appropriate data and information with justice system partners.

Each committee consists of a chair, a vice chair and individual members. The committee chairs are Commission Members or an Advisory Committee member. Committee membership may include individuals outside of the Sentencing Commission and its Advisory Committee that have a vested interest in the Commission's work.

All committees generally meet the third Thursday of each month. For a full list of members, work to date and future meeting information, please visit <http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp> or email Sara Andrews at [sara.andrews@sc.ohio.gov](mailto:sara.andrews@sc.ohio.gov).

## 2016 Full Commission Meeting Dates

All meetings are held beginning at 10:00 a.m. at the Thomas J. Moyer Ohio Judicial Center, 65 South Front Street, Columbus, Ohio 43215.

*Working committees meet between Full Commission meeting dates*

Thursday, **September 22, 2016**

Thursday, **December 15, 2016**

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