OHIO
CRIMINAL SENTENCING COMMISSION
65 SOUTH FRONT STREET • 5TH FLOOR • COLUMBUS, OHIO 43215-3431 • TELEPHONE: 614.387.9305 • FAX: 614.387.9309

Sentencing and Criminal Justice Committee

May 16, 2019

Agenda

I. Call to Order & Approval of Meeting Notes of February 2019 meeting

II. Old Business

A. Appellate Review Draft Discussion
The committee will discuss the proposed redraft of §2953.08

B. Substitute Senate Bill 3
Discussion of Interested Party meetings for Sub SB3

C. Drug Chapter Workgroup update
Update on Drug Chapter Workgroup

III. New Business

A. Regan Tokes Law Amendment Proposals
Review of potential legislative fixes to 132 SB 201's indefinite sentencing provisions

B. Legislative Update
Discussion of newly introduced legislation

Upcoming Meetings

Ohio Criminal Sentencing Commission	**June 27th, 2019** **Rhodes Tower, 29th floor** **Conference room 2925**
Sentencing and Criminal Justice Committee	**July 18, 2019** **Ohio Judicial Center, Room 281**

Sentencing and Criminal Justice Meeting
February 21, 2019

Call to order and approval of November 15, 2018 minutes:
Judge Spanagel called the meeting to order and Scott Shumaker noted the members in attendance. The minutes of the Committee's November 2018 meeting were approved as read.

Old Business
Appellate Review Draft Discussion:
Scott Shumaker discussed the status of the Appellate Review draft, detailing the history of the Commission's efforts to address §2953.08 and the workgroups efforts to reach consensus. The members of the workgroup have agreement on nearly all provisions, but had reached a loggerheads with regards to expansion of a prosecutor's right to appeal a sentence.

Jill Beeler then spoke, noting the time and attention that has gone into the draft and highlighting the Ohio Public Defender's objection to the draft. They voiced the concern that expanding the State's right to appeal a sentence reopens a final judgement and places the defendant in jeopardy without any risk to the State's interest. From their perspective, the State and a defendant are not on equal footing in this case, as a defendant has a liberty interest at stake.

Chip McConville discussed OPAA's desire for parity in expanding the statute. He felt that a prosecutor's interest in a just outcome is significant, and that the abuse of discretion standard put in place by the draft is sufficiently high to protect a defendants interest – the state would have a high burden to meet in order to change a final judgement on appeal.

Magistrate Boone asked the stance of Appellate court judges, and it was noted that this draft began with Judge Sean Gallagher of the 8th District Court of Appeals. He was unavailable for the meeting, but Scott Shumaker and OJC representatives detailed his position on the matter – that the expansion of the State's right to appeal was a compromise effort to garner prosecutor support for the draft.

Members then discussed compromise changes to the draft, including limiting the (B)(4) right to appeal to F1, F2, and presumptive prison F3 offenses, to avoid numerous appeals for F4 and F5 offenses where a prison sentence is not imposed. Judge Selvaggio suggested having Judge Gallagher discuss the proposals with both OPD and the OPAA and having him present at the March meeting. Judge Spanagel suggested a Committee vote on the proposal with a majority and minority report to inform consideration at the March meeting of the Full Commission.

Magistrate Boone then suggested that it seemed as though there was room for compromise, and Director Andrews suggested that workgroup members discuss revisions with plans to present the draft to the committee again in May for a full commission vote in June. Members also discussed clarification of the role of the Committees within the larger structure of the Sentencing Commission. Discussion of the draft was then tabled until the next meeting.

Drug Chapter Workgroup update:
Director Andrews then discussed the efforts of the Drug Chapter Workgroup, including efforts to look into expansion of Community Alternative Sentencing Centers (CASC's) with an eye towards providing places where individuals could receive needed treatment that might not occur in a jail setting. Committee members discussed the relatively few CASC's currently in existence and research Commission staff has done on the subject. The Drug Chapter Workgroup has also discussed an Intervention in Lieu of Prosecution proposal by Judge Fred Pepple that would involve filing drug possession charges under seal and only unsealing those charges if the defendant does not successfully comply with treatment.

Lara Baker-Moorish also noted that the Ohio Justice and Policy Center has some ideas centered around record sealing that are being floated to the legislature. Scott Shumaker noted that it remains to be seen what Senate Bill 3 will entail, and the legislative direction it will provide will be helpful.

Bail Reform Update:
Scott Shumaker discussed how the proposed changes to Rule 46 in 2018 have evolved into a task force on pretrial issues convened by the Supreme Court. Director Andrews is a member of the task force, and they expect to have a report (informed by the efforts of the Commission's Ad Hoc Committee) made public in April. Members also heard a brief update on the status of the pretrial services grant in cooperation with the Office of Criminal Justice Services.

New Business
Senate Bill 201 Implementation:
Mr. Shumaker then presented a powerpoint demonstration of Senate Bill 201 "The Reagan Tokes Law" and discussed efforts of the Commission staff to provide implementation training for stakeholders around the state. He noted that Judge Sean Gallagher, Judge Reginald Routson and the OJC have greatly helped carry the load as well. Commission staff and the OJC will work with legislators to address issues that need to be addressed with the legislation.

Legislative Update:
Scott then gave a brief update on legislation introduced in the 133rd general assembly.

Committee Roster Update:
Members were asked to review the Committee roster attached to their materials and it was noted that Magistrate Boone has recently joined the Committee, as well as a member from the OACDL.

Adjourn:
With no further business before the Committee, a motion to adjourn was made and passed.

APPELLATE REVIEW DRAFT – 5-16-19

2953.08 Appeal as a matter of right - grounds.

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant in the following circumstances:

(1) The sentencing court imposed only one sentence, or imposed multiple sentences and ordered the offender to serve the individual prison terms concurrently.

(2) The sentencing court imposed any prison term to be served consecutive to another prison term.

(3) An additional prison term was imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code.

(4) The sentence fails to comport with all mandatory sentencing provisions, indefinite sentencing provisions, or is not otherwise within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14 (A) of the Revised Code.

(5) The sentencing court abused its discretion in determining that the defendant's individual sentence comports with the principles and purposes of felony sentencing as set forth in section 2929.11 of the Revised Code and the seriousness and recidivism factors as set forth in section 2929.12 of the Revised Code.

(6) The sentencing court denied a timely motion for judicial release after a hearing conducted pursuant to 2929.20(D) or (E).

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence fails to comport with all mandatory sentencing provisions, indefinite sentencing provisions, or is not otherwise within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14 (A) of the Revised Code.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(4) The sentencing court abused its discretion in determining that the defendant's individual sentence comports with the principles and purposes of felony sentencing as set forth in section 2929.11 of the Revised Code and the seriousness and recidivism factors as set forth in section 2929.12 of the Revised Code.

(C)(1) For the purposes of this section, "sentencing range(s)" means a jointly recommended range from which the parties request the judge to choose a sentence, and "sentencing cap(s)" means a joint recommendation for a maximum amount of time the parties are requesting be imposed.

A sentence or an aggregate prison term imposed upon a defendant is not subject to review under this section if the sentence or the aggregate prison term is authorized by law; has been jointly recommended or agreed to by the defendant and the prosecution in the case, including a specific sentence as well as a jointly recommended sentencing range(s) or sentencing cap(s); and the sentencing court imposes a sentence or aggregate prison term consistent with that agreement. The sentencing court's imposition of consecutive service shall not be subject to review if the aggregate prison term imposed is within the jointly recommended sentencing range or sentencing cap.

(2) A sentence imposed for murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(D) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (A)(6) or (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question or denies a motion for judicial release at a hearing conducted pursuant to 2929.20(D). A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(E) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section2951.03 of the Revised Code and does not cause that report to become a public

record, as defined in section149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(F)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) or (C)(4) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence or the manner in which the sentences are to be served, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A) or (B) of this section shall reverse and remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings. The failure to include any findings made at the time of sentencing in the sentencing entry shall be harmless error unless the offender can demonstrate prejudice.

(2) The court hearing an appeal under division (A) or (B) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court, under an abuse of discretion standard.

The appellate court may vacate an individual felony sentence, or the imposition of consecutive or concurrent service of multiple sentences, under the abuse of discretion standard of review and remand the matter to the sentencing court for a de novo resentencing hearing on that portion of the sentence or sentences only where the appellate court finds any of the following:

> (a) That the trial court abused its discretion in making statutory findings because the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) of section 2929.14, division (C)(4) of section 2929.14 subject to the limitations in division (I) of this section, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence fails to comport with all mandatory sentencing provisions or is not authorized by any provision of the Revised Code;
>
> (c) That the sentence is not within the statutory range of prison terms for the applicable degree of felony as provided by section 2929.14 (A) of the Revised Code;

(d) That the sentencing court abused its discretion in determining that the defendant's sentence imposed for any felony offense comports with the principles and purposes of felony sentencing as set forth in section 2929.11 of the Revised Code and the seriousness and recidivism factors as set forth in section 2929.12 of the Revised Code subject to the presumption established in division (H) of this section.

(G) On an appeal under division (A) or (B) of this section challenging the sentence imposed upon any individual felony offense, there is a rebuttable presumption that the individual sentence is consistent and proportional under R.C. 2929.11 and 2929.12 if the sentence(s) are within the authorized range for the offense or offenses and the individual sentences are imposed to be served concurrently. This presumption is rebuttable by either the defendant or the government.

(H) An appellate court hearing an appeal challenging the imposition of multiple sentences to be served consecutively under section (A) or (B), shall examine the purposes and principles from section 2929.11 and the factors from section 2929.12 of the Revised Code to determine if the trial court abused its discretion (1) by imposing consecutive service based on the trial court's reliance on the sentencing factors considered under R.C. 2929.19(B)(2)(a) or, (2) if the proponent of the sentencing challenge can demonstrate with specific references to the record, based on all the factors considered under R.C. 2929.12(B)(2)(a) being unsupported by any evidence. An appellate court shall not reverse the imposition of consecutive service based on any of the R.C. 2929.12 factors that are not offered for consideration or independently considered under R.C. 2929.19(B)(2)(a). If the appellate court determines that the sentencing court abused its discretion as stated in this subdivision, the appellate court may reverse and remand for a de novo sentencing hearing. In such a hearing, the sentencing court may consider the factors under section 2929.12 and section 2929.14(C)(4) of the revised code anew to determine whether some or all of the individual prison terms are to be served consecutively or concurrently.

(I) An appellate court hearing an appeal challenging the imposition of a single sentence or a series of sentences imposed concurrently under section (A) or (B), shall examine the purposes and principles from section 2929.11 and the factors from section 2929.12 of the Revised Code to determine if the trial court abused its discretion. The appellate court, reviewing such sentences, shall give the trial court's sentence a presumption that both the purposes and principles from section 2929.11 and the factors from section 2929.12 of the Revised Code were properly considered and applied. The appellate court shall not overturn a single or concurrent sentence within the applicable range because the trial court did not identify any of the relevant factors under section 2929.12. It is presumed that the individual sentence, or sentences, are consistent and proportional under R.C. 2929.11 and 2929.12 if the sentence(s) are within the authorized range for the offense or offenses and the individual sentences are imposed to be served concurrently. An appellate court shall only reverse such a sentence under section (A) or (B) where the appealing party can specifically delineate how the sentencing court abused its discretion in imposing such a sentence.

(J) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the Supreme Court.

APPELLATE REVIEW DRAFT – 5-16-19

R.C. 2929.14(C)(4)

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds based on and articulated from the relevant seriousness and recidivism factors under R.C. 2929.12 and as required under 2929.19(B)(2)(a), that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.19(B) ((2) (a)

(2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) If a consecutive sentence or consecutive sentences are imposed, identify the relevant factors under R.C. 2929.12 that are either offered by the defendant or the prosecution or identified by the trial judge, that are determinate of the findings required under R.C. 2929.14(C)(4). The trial court is not required to identify the relevant factors under R.C. 2929.12 that weighed in favor of defaulting to concurrent service of the sentences imposed.

OHIO
CRIMINAL SENTENCING COMMISSION
65 SOUTH FRONT STREET • 5TH FLOOR • COLUMBUS, OHIO 43215-3431 • TELEPHONE: 614.387.9305 • FAX: 614.387.9309

Drug Chapter Workgroup – Notes for April 24, 2019 Meeting

I. SUBSTITUTE SENATE BILL 3 AND CHIEF JUSTICE'S PROPOSALS –

Senate Bill 3 was amended with a substitute bill (hereinafter SubSB3) on March 6, 2019, replacing placeholder language with a 500+ page bill that sponsors believe enhances the ability to punish drug traffickers while providing relief from the collateral consequence of conviction for individuals caught in the throes of addiction. The bill:

- redefines threshold amounts,
- reframes the trafficking and possession statutes;
- reduces low level possession to an unclassified misdemeanor subject to up to 364 days in jail;
- creates a method to hold drug possession cases in abeyance while treatment occurs;
- expands record sealing opportunities for those convicted of low level possession offenses;
- and expands access to civil commitment proceedings.

It is also important to note that the bill's sponsors Senators John Eklund and Sean O'Brien have stressed that this bill is to be viewed as a starting point for discussion going forward. They have solicited feedback from interested parties at meetings in recent weeks, and plan for further discussion of the bill in committee hearings in the near future.

As workgroup members may note, several of the provisions of the bill mirror the consensus areas for potential reform that the workgroup has highlighted. This document is intended to highlight those areas for comparison – notes in blue are areas where this Workgroup's consensus topics are addressed in SubSB3. Notes appearing in red reflect workgroup discussions on the topics.

Also of interest to the group since the last meeting are refined versions of proposals put forth by Chief Justice Maureen O'Connor aimed improving criminal justice outcomes for individuals suffering from substance abuse issues. These proposals address both Intervention in Lieu of Conviction procedures and record sealing provisions of the code. Attached to this document is a short synopsis as well as the specific language of those proposals. Notes appearing in green reflect considerations from the Chief Justice's proposals.

II. CONSENSUS TOPIC: expanding the civil commitment process by increasing availability and/or revising the legal mechanism

Suggested Changes or Ideas Proposed:

- Expand/improve involuntary commitment process for individuals with substance abuse disorder who present a danger to themselves or others.

  SubSB3 makes several changes to civil commitment requirements and procedures, aimed at increasing access to treatment without the requirement of criminal charges. It includes provisions allowing for proof that an individual has overdosed and required an opioid antagonist to be revived 3 times, that they had overdosed while in a vehicle, or that they had overdosed in the presences of a minor as evidence that they are a danger to themselves or others [lines 6033-6036]. This evidence would satisfy requirement of proof the individual is a danger to themselves or others [6142-6145].
  Awaiting further input from OJC/Probate Judges.
  4-24-19

- Give law enforcement ability to initiate the commitment process – any one of three conditions establish a presumption that the individual was a danger to themselves or others:
  1) The individual had required the use of NARCAN to revive them three or more times previously
  2) The individual had overdosed while in a motor vehicle
  3) The individual had overdosed in the presence of a child

  SubSB3 does not currently contain provisions allowing for law enforcement to initiate the civil commitment process – as detailed above, it uses the above 3 conditions as evidence for the probate judge to consider.
  2-15-19: the language is too narrow; add "failed treatment" as a fourth condition.
  04-24-19: Only speaks to Commitment – inpatient treatment might not be best plan for some individuals
  04-24-19: Methamphetamine not addressed by overdose language

- Increase availability and effectiveness of civil commitment, including ability for judicial referral

  SubSB3 eliminates some filing fees in civil commitment proceedings [lines 6008-6010] and allows that proof of insurance be shown in lieu of the requirement that half the cost of treatment be posted along with the filing [6090-6091]. It also allows courts to order periodic examinations of individuals under civil commitment to determine if they are still in need of treatment [6154-6157].
  Concerns about ability to pay
  More changes to ORC 2929.34 "Where imprisonment to be served"?

— §307. 932 **Community Alternative Sentencing Centers** – expand eligibility and clarify language in ORC.

Not currently addressed in SubSB3 – were a topic of discussion during interested party meetings.

Possible avenues: clarification of "time served" and sentences; increase types of offenses that are eligible for CASC or determine criteria for CASC; determine Medicaid eligibility for possible "detention" centers

— Establish civil and criminal pathways to treatment:
Convert CBCF from ODRC facilities to OMHAS facilities, and permit civil commitments by hospitals, doctors, and family members via

1) emergency commitment by hospitals/doctors

2) ex parte petitions with review by probate courts within ten days (so that family members can intervene before an overdose and without needing criminal charges)

4-24-19: CBCF's not in favor of this provision.

— Permit drug courts to commit criminal defendants to OMHAS facilities for up to 14 days, whether in treatment in lieu of conviction cases, diversion program cases, or community control cases.

— If needed, permit OMHAS to transition individuals into longer-term commitments, sober living houses run by OMHAS, or outpatient treatment with a treatment plan.

— Allow OMHAS to provide for facilities through the existing local MHAS boards, contract with mental health providers for counseling and medically-assisted treatment, and contract with non-profits to provide sober-living housing. If not enough space is available to meet the demand, allow OMHAS to contract with county jails for the commitment period, so long as treatment professionals provide services for those committed.

— Require OMHAS to provide mental health and addiction services to all jails (municipal, county and regional) for all inmates, including evaluations and screening of mental health and addiction issues. Require OMHAS to recommend treatment alternatives to the courts involved (municipal, county and common pleas).

— Require PSI writers to assist with appropriate sentencing for all misdemeanants and felons with indicia of mental health or substance abuse issues. The PSI writers must have been hired by a court funded by the Ohio Department of Public Safety, and must use ORAS scores and mental health and addiction evaluations by approved OHMAS providers. The PSI writers must assist in the evaluation before the prison sentence occurs. This will not occur for felonies with mandatory prison sentences or not otherwise eligible for CCS.

No update

II. Consensus Topic: diminish or eliminate the stigma of a felony – expand use of and access to ILC, Intensive Supervision, Drug Courts, and Probation.

Suggested Changes or Ideas Proposed:

- Increase access to and successful completion of treatment.
  Ongoing – Governor's budget request for drug court funding

- Establish the option of Intervention in Lieu of Prosecution (ILP).
  SubSB3 provides courts with the ability to hold possession offense proceedings in abeyance and stay the proceedings if the defendant has no prior drug trafficking or possession offenses, agrees to a treatment program specified by the court, and waives their speedy trial rights – similar to intervention in lieu but specifically without the requirement that the offender enter a guilty plea before acceptance into the program [lines 3159-3170].
  See new – §2951.0411
  4-24-19: Concerns about difficult mechanisms to establish and enforce, separation of powers, and overlap with ILC

- Expand drug courts and ensure that graduates walk away without a felony record.
  SubSB3 allows immediate dismissal and sealing of misdemeanor and felony F4 and F5 drug possession offenses upon successful completion of ILC or a drug court treatment program [lines 2963-2973].
  Chief Justice O'Connor has proposed reducing the required waiting period to seal convictions for low level offenses from three years to one year, and allowing an unlimited number of non-violent, non-sex offense F4 and F5 offenses to be sealed.

- Enact "recovery sentencing" for defendants with addiction or mental illness, by refining current law (ORC 2929.15) to more broadly require the use of professional assessment. If the assessment indicates that the person is addicted or has mental illness, and treatment is recommended, a rebuttable presumption is established that the court impose community control with treatment. Definitions of mental illness and addiction are cross-referenced to current §5119.01, "recovery sentencing" means mental health treatment services or addiction services and recovery supports certified under §5119.36 of the Revised Code or offered by a properly credentialed community addiction services provider, and includes services developed under §5167.04 of the Revised Code. Language provided also includes a rebuttal of the presumption for reasons already enumerated in statute that allow sentencing a fourth or fifth degree offense to prison.
  §2929.13, 2929.15, 2929.151, 2929.16, 2929.17, 2929.19, 2929.21, 2929.25, 2929.26, 2929.27, 2929.34 – JR recommendations constituting "Recovery Sentencing"

SubSB3 proposes the following definition for technical violation [lines 5417-5427]:
… a violation of the conditions of a community control sanction imposed for a felony of the fifth degree, or for a felony of the fourth degree that is not an offense of violence and is not a sexually oriented offense, to which both of the following apply:

(a) The violation does not consist of a new criminal offense that is a felony or that is a misdemeanor other than a minor misdemeanor.

(b) The violation is committed while under the community control sanction.

This definition differs from that proposed by JRI 2.0's "Recovery Sentencing" provisions. JRI 2.0 suggested that technical violation be definite as a violation that is not "criminal conduct or behavior" and specifically included relapse evidenced by drug test results. It also included absconding as a technical violation. "Recovery sentencing" also stressed that the sanction should be based on the seriousness of the violation, although it, like SubSB3, retained the technical violator caps of 90 days for F5's and 180 days for F4's. Interested party meetings may lead to further refinement of the "technical violation" definition.

§2951.041 – Require judges to articulate the specific reasons for rejecting the participation application of a defendant. Provide local courts the resources to perform the behavioral health assessments needed to determine whether offenders suffer from a substance use disorder and if they are appropriate candidates for ILC. These ideas are central to Chief Justice O'Connor's proposal to refine the ILC statute.
Not included in SB3
4-24-19: Strong agreement on need for findings on the record.

- §2951.041 – Revise the section for clarity and ease of administration
  Suggestion not included in SB3
  See Judge Selvaggio's draft simplification of ILC – 4/24/19: Should workgroup adopt this draft as part of its proposal?

- Allow for concurrent jurisdiction between Common Pleas and Municipal/County Court.
  SubSB3 contains jurisdictional provisions that need revision [lines71-91, 124-135]. During discussions with interested parties, the sponsors have discussed the 132 HB 354 provisions previously discussed by this workgroup – namely statewide application of the Seneca county model of concurrent jurisdiction enacted in that bill. Sponsors may introduce amended language along those lines, allowing prosecutor's to choose whether to file drug possession charges – be in in municipal or common pleas court.

  Given SubSB3's misdemeanor drug possession provisions, there is a concern in some jurisdictions that Common Pleas courts might use their Rule 21 authority to shift these cases onto municipal courts that might not be able to handle the increased caseload. This concern was noted by sponsors and they are interested in crafting a solution.

III. Consensus Topic: diminish or eliminate the stigma of a felony – Record Sealing; Expungement; Certificate of Qualification of Employment

(record sealing quick reference guide available here)

SubSB3 creates an enhanceable unclassified misdemeanor possession offense punishable by up to 364 days in a local jail, and that offense generally encompasses current F4 and F5 possession offenses. The questions of defelonization and threshold amounts were not topics of discussion at interested party meetings, as sponsor wish to hear testimony on what may be contentious topics. However, consideration of SubSB3's provisions around sealing the records of possession offenses are relevant to discussion of this workgroup.

4/24/19 – members would like to take a closer look at SB3's treating of F4 and F4 possession offenses as misdemeanors for sealing purposes.

- Reduce the amount of time from three years to one year for those convicted of low-level drug-related felonies have to wait before they are eligible to have their records sealed.
  Not included in SB3

- All F4 and F5 offenses can be sealed one year after discharge.
  Not included in SB3
  Chief Justice O'Connor has proposed reducing the required waiting period to seal convictions for low level offenses from three years to one year, and allowing an unlimited number of non-violent, non-sex offense F4 and F5 offenses to be sealed.

- 4/24/19: Sealing for offenses after extended period (10/20 years without new offense)
  Subject no t addressed in SB66 discussion.

- Sealing after 1 year for any F4/F5 possession offense. Provide for records to be unsealed for subsequent offense.
  SubSB3 allows immediate sealing of low level possession offenses after completion of a drug treatment program or ILC [lines 5635-5647].

- Redraft statute for clarification, ease of administration.
  Not included in SB3.
  Statutory draft needs to be revised/updated.

- Replace existing statutes with a new statutory scheme which gives primary consideration to a classification specific timeline structure that also allows for increasing judicial discretion over time to seal distant offenses. Sealing statutes need to account for the passage of time in determining eligibility, rather than focusing solely upon either the number of convictions or the type of conviction.
  Not included in SubSB3

- Revisit and improve processes for the Certificate of Qualification for Employment. Consider expanding to misdemeanor convictions.
  Not included in SubSB3
  4/24/19 – members would like to see CQE for misdemeanor language – Chambers of Commerce interested in expansion here. Cost and filing fees should be addressed as they vary widely by jurisdiction.

- At the court's discretion cases that the Court deems were caused by drug addiction can be sealed after three years, except F1/F2 crimes of violence and sex offenses.
  Not included in SubSB3
  The Chief's proposals expand sealing for individuals with a third degree felony conviction from one misdemeanor and on F3 to two misdemeanors and two F3 convictions

- Allow low-level felony drug possessors to petition to have prior felony conviction changed to a misdemeanor. By allowing petition for the low-level felony offenses to be deemed misdemeanors, this also means that misdemeanor sealing provisions would apply.
  SubSB3 includes provisions allowing for prior convictions for low level possession offenses that have been defelonized to have those convictions treated as misdemeanors for record sealing purposes – meaning eligible offenders could apply to have unlimited convictions for low level possession sealed, and the convictions would not count towards the total number of felony convictions when considering eligible offender status [lines 5658-5664].

V. Items from 2/15/19 Workgroup Meeting

- Appropriate for legal clinics to assist with record sealing –
  Work with OSBA on this subject

- Data and website removal – consequences of digital proliferation of arrest and conviction data

- Clemency and redemptive pardon – sealing of old cases, i.e. 20 years

- Charting access to sealed records – who can and should have access

VI. New Items for Consideration

- Good Samaritan – "fix the statute"; eliminate 30-day wait period
  Interested party meetings discussed potential fixes to the Good Samaritan statute

- Transitional Control – removing judicial veto
- Conspiracy – add illegal conveyance to the Conspiracy statute
- Involuntary Manslaughter – trafficking a drug that causes/contributes to death of another
- Retroactivity
  SubSB3 sponsors noted that retroactivity is a subject they prefer not to address in the bill
- Technical Violations – eliminate cap; definition – see OCCA chart
- Penalties and thresholds – see OCCA chart
- Earned Credit – see OCCA chart

OHIO
CRIMINAL SENTENCING COMMISSION
65 SOUTH FRONT STREET • 5TH FLOOR • COLUMBUS, OHIO 43215-3431

REAGAN TOKES LAW

PROPOSED AMENDMENTS

- **DEFINITIONS OF TERMINOLOGY –** SB201 introduces several terms that would benefit from clear and concise definition, and existing defined terms could also benefit from additional clarification in light of the new indefinite sentencing provisions. Definitions of the following terms would ease practitioner implementation of the new sentencing structure and aiding understanding of the interplay of specifications, definite terms, and indefinite minimum and maximum terms.
    - **Most serious felony** – not currently defined – should be objective and not subjective decisions to avoid disparate impact
    - **Minimum term**
    - **Maximum term**
    - **Stated Prison Term** – clarify definition vs prison term – include "stated minimum" and "stated maximum"
    - **Exceptional conduct or adjustment to incarceration**
    -
- **FIX TO SENTENCING FORMULAS** – Remove "or definite term" from consecutive sentence formula in RC 2929.144(B)(2) and place it in concurrent sentencing formula in RC 2929.144(B)(3) to solve consecutive sentence issues(below)
- **ORDER OF SERVICE OF SENTENCE ISSUES** – Existing 2929.14(C)(9) addresses how definite terms previously or subsequently imposed interact with indefinite terms – however, this provision needs to be expanded to allow practitioners to properly advise defendants of the impact of their sentences. Areas that need to be addressed include:
    - **Concurrent sentences w/in same case** – Potential for a longer definite term to be run concurrent to an indefinite term, no guidance from statute as to what happens to the potential maximum term.
    - **Concurrent sentences between multiple files** – A defendant could have sufficient jail time credit to cause expiration of a minimum term on one file but a maximum term that exceeds the minimum and maximum on another file. What then becomes of the maximum term?
    - **Consecutive sentences between multiple files** – Can ODRC extend incarceration of a minimum term that before a defendant would begin serving another indefinite minimum term?
    - **Consecutive indefinite sentences and life sentences** – Similarly, can ODRC extend incarceration beyond the minimum term before the defendant begins serving the mandatory portion of a life sentence?

  - **Contemporaneous sentencing of multiple files** – two issues
    - 2929.14 says previous or subsequent – not contemporaneous sentencing.
    - Depending on answers above, can a judge structure the order of indefinite sentences at the sentencing hearing?
- **EARNED REDUCTION OF MINIMUM PRISON TERM (ERMPT)** – Incentivizing good behavior in prison is a laudable goal, but several concerns have arisen amongst stakeholders with regard to ERMPT hearings.
  - **Is the defendant entitled to counsel** – unlike judicial release, this process is started administratively by DRC – In some counties full time public defenders may be available to represent these defendants but many jurisdictions may lack the resources to provide counsel.
  - **Are mandatory sentences eligible** – generally mandatory sentences include a provision exempting them from reduction by RC 2967 – As with sexually oriented offenses, a provision specifically excluding mandatory sentences would be beneficial (as would a definition of "mandatory sentence")
  - **Subpoenaing of DRC staff to testify** – Clarification of what "information" the sentencing court is to consider at an ERMPT, particularly from prosecutor and victim. Can prosecutor subpoena DRC staff to testify?
  - **Concerns about timeframe** – some courts worried that 90 days is not sufficient time to schedule a hearing, have defendant transported, review information, etc.
    - **Feasibility of conducting hearings via videoconference**?
    - **Must a court schedule a hearing**? What if they wish to agree to the reduction?
  - **Appellate review of denial of ERMPT** – Is a denial by the sentencing court of a reduction subject to review under 2953.08? Can DRC appeal that decision, or just the defendant?
  - **Still eligible for earned credit** – These defendants are still eligible for some form of earned credit – does that count towards a presumed early release date?
  - **Removal of judicial veto** – Should the release decision be purely administrative and determined by DRC – judges have expressed concern about the lack of meaningful discretion in reviewing ERMPT.
- **JUDICIAL RELEASE ISSUES** – can a defendant still apply for judicial release after the expiration of the minimum term? Does the judge then have authority to return them to prison if they violate community control?
- **EXTENDING INCARCERATION BEYOND MINIMUM TERM** – is this administrative decision subject to appellate review?
  - **Is defendant entitled to counsel at the hearing**?
-