

December 10, 2019

Sara Andrews, Executive Director
Ohio Criminal Sentencing Commission
65 South Front Street, 5th Floor
Columbus, Ohio 43215

Re: Brief Response to Louis Tobin's December 9, 2019 Letter

Dear Director Andrews,

Thank you for providing time at the upcoming Ohio Criminal Sentencing Commission meeting to discuss the letter sent last month to the Commission by public health and criminal justice experts. As you will recall, in that letter we asked that "the Ohio Criminal Sentencing Commission begin a public examination of the use of homicide charges in accidental overdose cases throughout the state and their impact on public safety and the opioid crisis." The discussion at this week's meeting should serve as a useful start of such a public examination.

We write again after receiving a copy of the letter dated December 9, 2019 sent to you by Louis Tobin, Executive Director of the Ohio Prosecuting Attorneys Association (the Tobin letter). Through this brief response, we wish to dispel some apparent misunderstandings and to highlight how the Tobin letter itself shows why a body like the Ohio Criminal Sentencing Commission should be gathering information and data about the use of homicide charges in accidental overdose cases throughout Ohio.

To begin, our letter neither calls for, nor even suggests, that Ohio prosecutors or judges should be prohibited from bringing lawful charges or imposing lawful sentences. Rather, at this stage, we are eager just to have more reliable and detailed information on charges being brought and sentences being imposed throughout Ohio. Tellingly, the Tobin letter seems to complain about reliance on news reports, but that highlights the very reason we have written to the Commission seeking the collection of better state-wide data. Though the experience may be different for government officials, we find these data are very hard to collect other than from news reports. (Tellingly, the chart for Hamilton County provided in the Tobin letter reveals that even major counties are not tracking these data with any regularity.)

Also inaccurate is the notion that we seek to "absolve people from accountability," rather we are eager to ensure accountability is proportionate to culpability. Absent better data and analyses, it is unclear whether homicide prosecutions target only large-scale drug traffickers or if friends and family of overdose victims who struggle with substance use themselves are sometimes subject to these charges. Interestingly, the Tobin letter asserts that the OPAA has "offered several trainings" on this topic and that prosecutors are using "best practices." We are hopeful the OPAA will make its training materials publicly available and will provide a lot more information on their "best practices." We are eager to hear from prosecutors from around the state about when and why they are bringing these charges and what evidence might support the contention that these prosecutions are effective in reduce drug use or overdose deaths.

Notably, the Tobin letter suggests that homicide prosecutions in accidental overdose cases are essential to public safety and even asserts that Ohio's new "Good Samaritan statute itself often leads to overdose deaths." Though these assertions are not supported by any cited data or other evidence, they serve to highlight yet again that arguments for or against any of these policies are hampered by limited or incomplete data. Our letter does not in any way seek to "place arbitrary limits on the discretion of our elected officials"; we are advocating for more and better data to be collected so that this discretion can be exercised by elected officials in an informed manner and so that all stakeholders and other interested parties can have in-depth and informed discussions about our aims and how to best achieve them.

As we look forward to continuing this discussion in the days and weeks ahead, we will close this letter by noting that the Tobin letter tellingly omitted two recent amendments to the "Purposes of felony sentencing" set forth in Ohio law. Through new laws passed in 2011 and 2018, the Ohio General Assembly made very clear that it does not want prosecutors and courts to focus only on deterrence and retributive punishment. Now, Section 2929.11 of the Ohio Revised Code states:

The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and ***to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.***

It truly is in the spirit of vindicating these revised instructions from the Ohio General Assembly that we request that the Ohio Criminal Sentencing Commission examine the use of homicide charges in accidental overdose cases throughout the state. Our academic work and considerable research suggest that homicide charges in accidental overdose cases do not generally promote effective rehabilitation, nor do these charges appear to deploy the minimum punitive sanctions necessary to accomplish valid punishment purposes. But we come to this discussion with an eagerness to learn more about how prosecutors use these charges, what sentences are resulting, and what evidence-based recommendations might result from a thorough review of these important issues.

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