Before the **Ohio Senate Judiciary Committee, Senator Nathan Manning, Chair**

Judge Frederick D. Pepple, Court of Common Pleas, Auglaize County, Ohio,
and former Chair of the **Ohio Criminal Justice Recodification Committee**

Remarks concerning Recodification Committee goals and remarks on moving forward.

Before I start my remarks on the Recodification Committee, I want to implore you to modify the sentencing statutes regarding penalties for organizations committing criminal offenses. The idea that an organization can commit serious crimes and continue to operate with such woefully inadequate penalties is shocking. And the purposes and principles of felony sentencing does not adequately address these matters. I believe that you would all agree that 2929.11 needs to be amended to address the purposes and principles of felony sentencing of an organization differently than an individual.

As you know, the **Ohio Criminal Justice Recodification Committee** was appointed pursuant to statute by both the President of the Ohio Senate and the Speaker of the Ohio House of Representatives tasked with the responsibility to recommend to the General Assembly and the Governor a new Criminal Code.

The CJRC's charge was to recommend a plan for a simplified criminal code that would result in possible penalties proportionate to the offense committed when compared to and considered among the other criminal offenses. We were challenged to "reach for the fences" and reform the laws, and encouraged by leadership and many interested parties.

The original timeline was to finish within about a year and five months. By breaking the work down into smaller workgroups, we were well on our way to meeting that timeframe when we were asked by some to slow down our work for purposes known only to those legislators. One member of the committee in a leadership position in the House expressed that our committee should only simplify the language and not address substantive reform.

We eventually did finish our work despite being told directly by the then-Speaker that our package of compromises and months of hard work by staff and the volunteer members of the committee would never be acted upon.

Finishing our report, I want to stress that the report was a series of compromises. In order to get support for our work, it was necessary to compromise in ways that tied different parts of the package together.

My main objective was to simplify the sentencing statutes and to abandon both SB2 from 1996 and HB 86. The so-called truth-in-sentencing provisions in SB2 have been so diluted as to be meaningless. Taking discretion away from courts in sentencing felons has not proven to result in the desired effects.

The idea of an indeterminate sentence for serious offenders arose out of different agendas. I wanted serious offenders held longer and not be released without the Ohio Parole Board conducting a risk assessment prior to release.

Director Mohr desired to have a way to keep inmates in longer who are violent, to punish bad behavior in prison and motivate prisoners to comply with work and programming, and only release those violent offenders after additional time to attempt to rehabilitate them. He, too, spoke of the terrible release of offenders who they would have liked to keep longer.

Tim Young understood the need to keep truly violent folks in longer, but without sentences that contained huge "tails" such as the former "7 to 25 years" indeterminate sentences, and he wanted a meaningful appeal of the "outlier" sentences that some judges were imposing by giving the defendants a *de novo* review of the sentence by the appellate court using the same statutory criteria, effectively giving to a limited number of defendants who were harshly sentenced a second chance. I was willing to give him that review only if it applied only to the outliers, a very limited number. Tim was willing to agree to an indeterminate sentencing package for serious felonies with a limited tail, but he wanted the appeal rights in exchange. We compromised.

The prosecutor on our workgroup never brought one idea to the table, but instead would agree eventually to the compromise that Tim and I worked out. But at the final vote, the prosecutor did not agree on the vote.

Those compromises included eliminating restrictions on judges from sentencing felony offenders to prison. However, this envisioned taking many of the F-5's that are not violent or sexual down to Misdemeanor 1's. Taking many M-1's down to M-2's. But reinstating provisions that punish bad actors who reoffend by enhancing by one degree crimes committed by those with two or more priors within 3 years. Not a forever lookback, but a three year lookback.

These included moving many F-4's down to F-5's, and moving the 36-month F-3's to F-4's, but keeping the more serious F-3's as F-3's. Within this framework was an agreement to increase the penalties for felonies. For the F-5's a definite term of up to 15 months. For the f-4's, up to 30 months. For the F-3's, indeterminate terms with minimums ranging from 1 to 5 years and the maximums at half of the minimum.

I preferred simply stacking the minimums and maximums, but Tim opposed that strongly, so we compromised on only one "tail" per sentence no matter how many counts. That keeps the "tail" low. Some judges seem to have difficulty wrapping their brains around that concept given their reaction to Reagan Tokes that adopted some, but not all, of our ideas.

I wanted to simply return to probation and parole under the pre-SB2 model. One of our committee members was an architect of SB2 before she was on the Ohio Supreme Court, so I knew that would be an impossible task. I still believe that a straight-forward one-time sentence, followed by suspension of that sentence, and use of indeterminate sentences subject to parole consideration of a risk assessment done immediately prior to the release decision would be far better for protection of society and even protection of the defendants for the most serious offenders being released.

The Reagan Tokes automatic presumption of release ignores the data. We are requiring judges to use a risk assessment tool when setting bond release decisions, and when sentencing offenders. But we are not using an updated risk assessment tool when releasing serious offenders. Remember, the indeterminate sentences are only for those most serious non-capital, non-life sentences. Why not assess their risk at that time. I would point out that nations in the EU such as Germany use risk assessments prior to release of many serious offenders.

I have attached to these remarks a Chapter 2929 draft of what was proposed to the Committee in 2019. Frankly, so many years have gone by that I do not recall accurately the discussions especially of the meetings after the Speaker effectively ended serious consideration.

I ask you to review the document from 2019 that I provided—and consider it with an open mind.

I also have prepared a simpler version that simply returns probation and parole for the serious offenders and does so with simpler methods that rely upon decades of case law as being both Constitutional and workable. BUT remember that you really must make the possible penalties more proportional by adjusting what is and what is not a Felony, and what level of Felony should be attached to a crime.

I point out that my proposal adds to 2929.12 the requirement for the court to consider a risk assessment tool approved by the Ohio Supreme Court before sentencing an offender to prison. I also point out that my proposal reduces the sentencing statute to two pages, the probation statute to two pages and the judicial release statute to two pages, and provides most of what you are trying to do.

My proposal for using the "old" language pre-SB2 would also need adopting probation language instead of "community control sanctions", parole language instead of "post release control" and would eliminate CCS and PRC altogether.

I know that Tim Young has strong feelings about especially one judge who sentences harshly. Yet, I believe that throwing the baby out with the bath water is never a good idea. You should hold judges responsible for their decisions by giving to them the authority and responsibility to decide sentences based upon all the facts. And you should give those who I will refer to the cases that are the "outliers"—the extremes—the opportunity to have the appellate courts apply the same statutes and same facts that the trial courts have and give only the outlier cases a *de novo* review…such as when a trial judge stacks more than the three most serious offenses.

I urge you to let judges be judges and eliminate the procedural "magic words" and leave the procedural requirements up to the Ohio Supreme Court and its rule making ability.

I urge you to simplify the Code with a view towards clarity and using tried and true legal concepts that have been time-tested, as probation and parole have been.

- Amend 2929.11 to address organizations convicted of felonies
- Amend 2929.31 to increase penalties against criminal organizations
- Change sentencing to be imposed once, with some or all suspended
- Adopt Probation instead of Community Control Sanctions
- Adopt Parole instead of Post Release Control
- If not intending to be prison eligible, amend to misdemeanors
- If a felony, make prison eligible
- Simplify sentencing procedures
    - Let Ohio Supreme Court adopt procedural requirements
    - Urge Ohio Supreme Court to adopt a suggested uniform sentencing journal entry
- Allow a *de novo* review of consecutive sentencing by appellate courts using the same criteria as the trial courts, but limit this to only the outliers, such as when more than 3 counts are stacked
- If you do not adopt the entire package as proposed, please do not credit the Recodification Committee with the origin…..

Thank you for inviting me and for listening.