The scope of our duties are outlined in RC 181.23, to design a fair criminal sentencing structure that protects public safety focusing on proportionality between the offense and the sentence; applying the principles of punishment, deterrence, fairness, rehabilitation, and treatment; establishing deterrence through predictable and consistent certainty in sentencing; and utilizing state and local correctional assets. You are reminded that this statute spawned SB2, and applies to us.

On December 15th, our Drafting Committee reported to the Workgroup and the Ohio Sentencing Commission that we had reached a consensus that we could repurpose those same legislative mandates and best promote the objectives of the purposes and principles of sentencing within a modified and modernized rehabilitative model, utilizing indefinite sentences, and adopting evidence based modalities of rehabilitation in both probation and parole would.

Comments on our proposals ran the gamut and that was reflected in the positions of state prosecutors, with emphasis on punishment, and the defense bar, with emphasis on rehabilitation. Woven throughout the responses was a complaint that our document lacked specificity. And as one of our members recently reminded us, the devil is in the details.

We are twenty seven years from SB2, and armed with enhanced understanding of rehabilitation. We have arrived at a penological inflection point where we need to reassess criminal sentencing the the context of contemporary best practices guided by evidence based scholarship.

A retrospective of penological history presents a context in which to balance these issues of social order and matters of liberty.

From 1894 to 1984, the Rehabilitative Model of criminal sentencing governed both state and federal penological practices. It was predicated upon the erroneous belief that crime was pathological and that indefinite penitentiary sentences were necessary to accomplish treatment. Because judges were given unfettered sentencing discretion, symmetry in sentencing was lost with unconscionable variations in sentences for similarly situated offenders.

Parole boards also were given broad latitude in release decisions resulting in idiosyncratic judgments, disparities, and unpredictability.

In 1984, faced with a 354% violent crime increase since 1960, Congress found that asymmetrical sentences, uncertainty in time served and the abject failure

of prisons to rehabilitate represented systemic failure. The mantra became: "Nothing worked." I'll return to this in a minute. Congress jettisoned the Rehabilitative Model for the Retributive Justice employing determinate sentences. It not only rejected the Rehabilitative Model, it rejected rehabilitation as a principle of sentencing. Punishment thereafter was guided by retributive, educational, deterrent and incapacitative modalities and practices.

Ohio addressed the same sentencing issues, inconsistencies and rising crime rate as the federal government. It established a Sentencing Commission in 1990, and out of that came SB 2, wherein Ohio replaced its rehabilitative model of sentencing with "truth in sentencing" intended to promote certainty and proportionality in felony sentencing by embracing determinate sentences with the overriding purpose to protect the public and punish the offender considering incapacitation, deterrence, rehabilitation and restitution.

Judges were given discretion to determine the most effective way to comply with the purposes and principles of sentencing. That required judges to consider seriousness and recidivism factors together with victim's impact. There is a suggestion that these factors should be quantified and ranked to interpret how a sentence was arrived at. But the factors do not lend themselves to that kind of analysis. Comparing serious physical harm to an offender's elected office is apples to oranges.

Under SB2, discretion was circumscribed by judicial fact-finding when a trial court imposed maximum sentences, consecutive sentences or enhanced penalties for repeat-violent or major –drug offenders. In 2006, *State v.Foster* removed those guardrails and held that trial courts have full discretion to impose a prison sentence within a particular statutory range and were no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.

The impact of *Foster* is clearly shown in the numbers: in 1996, the year SB2 became effective, the prison census was 46,174; in 2006, the year *Foster* was decided, the prison census was 45,843. SB 2, "Truth in Sentencing," did what was intended, it stabilized the prison census. By 2010, the census had soared to 51,145, and it remained at that level until 2019. SB 2 did not drive up Ohio's prison population, rather *Foster* did. To minimize asymmetrical sentences, we need to reinstate thoughtful guardrails within a range of sentences and in the imposition of consecutive sentences.

Within the same time frame, two other consequential movements impacted the criminal sentencing paradigm: the Court Futures Movement and evidence-based sentencing.

Beginning around 2000, the Ohio Supreme Court encouraged creation of specialty dockets to address the drug crisis that was impacting the courts. The process awaken the judiciary to restorative modalities of holistic, therapeutic justice in the form of diversion through drug, mental health and veterans courts in which criminal due process is relaxed and treatment is coerced by threat of punishment. We have not yet statistically determined efficacy, but as an alternative to jailing or imprisonment these dockets present a valuable service of diversion within the penological toolbox.

Secondly, in 2005 Dr. Wilkinson introduced us to evidence based-practices at a Community Correction Act Symposium. Prison rehabilitation programs and community correction grant programs did not work. Some of the ODRC rehab programs actually increased recidivism.

The University of Cincinnati informed us that criminogenic factors had been identified that, when married to individual offender profiles and interpreted by algorithms, quantified with probability what methods of rehabilitation would probably succeed. This was a paradigm shift. We are informed that Ohio's risk assessment tool in both valid and reliable. It is now legislatively mandated for use in every aspect of sentencing and rehabilitation in the administration of criminal justice.

That has opened the door for foreseeable and predictable rehabilitation for inmates who are eligible. It comes with a warning, however, that the risk assessment should not be used in determining what sentence should be imposed.

> [The] use of risk assessments to determine sentences erodes certainty in sentencing, thus diminishing the deterrent value of a strong, consistent sentencing system that is seen by the community as fair and tough…Swift, certain and fair sanctions are what work to deter crime, both individually and across society. We know that certainty in sentencing - certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed - simultaneously improves public safety and reduces unwarranted sentencing disparities…

Armed with proven methods of rehabilitation and diversion while faced with the rise of violent crime and overwhelmed with opiate deaths, it is the time to rethink best practices in how to protect the public, punish offenders and rehabilitate those that can and should be rehabilitated.

As I speak, 75% of inmates in Ohio are imprisoned for violent offenses. The % will increase as more and more low level non-violent offenders are shunted into alternative sentencing. At the same time we are recommending earned incentivized early release or parole eligibility based on objective standards of performance. We should scrutinize other early release exit ramps and scrutinize their continued need.

Violent offenders should serve a stated minimum term before their rehabilitation programing counts toward accelerating their release. A minimum term establishes certainty in sentencing in the eyes of the prisoner, the victim and the public. It also serves as a deterrent by withholding incentivized release until a stated time is served. Certainty, deterrence and incapacitation are foundational under our enabling statute, RC181.23.

We have heavily focused our attention on rehabilitation because we understand that most felony prisoners will be reintegrated into society whether on parole or release. And rehabilitation assures some degree of public safety. I suggest that some form of consequential punishment should remain in place for non-violent property crimes, whether at the F4&5 or M1 levels. Many of these offenses also have victims. And within police powers that address public health, safety and welfare, such offenses are those that touch the public the most. Public confidence should be protected.

With evidence based rehabilitation, we have the tools to change the paradigm of recidivism for those felons who are willing the engage in good faith and effective participation. But we can not forget that incapacitation, and deterrence precede rehabilitation in their respective placement in RC 2929.11(A). I can assure you that no criminal has ever been deterred from crime when the most significant punishments risked were rehabilitation and treatment.

Our system of criminal justice is adversarial, fault based, precedent bound and common law in a jury model. Neither our constitution nor bill of rights embrace sociological jurisprudence.

Judge Selvaggio, we need to know whether we are on the right track. Will Davies and Alex Jones will flesh out the 12 recommendations found in our most recent iteration.