



THE OHIO PROSECUTOR

October 2020

In This Issue

At the Statehouse

- Priority Legislation

Membership Services

- Community Outreach
- Guest Column - Public Sector Employees and First Amendment. Free Speech Under *Garvetti*
- OPAA App
- Amicus Committee

New and Noteworthy

Training

- OPAA Fall Training Webinar
- 2021 Training Dates

OPAA Officers

Contact Us

www.ohiopa.org



From your Executive Director...



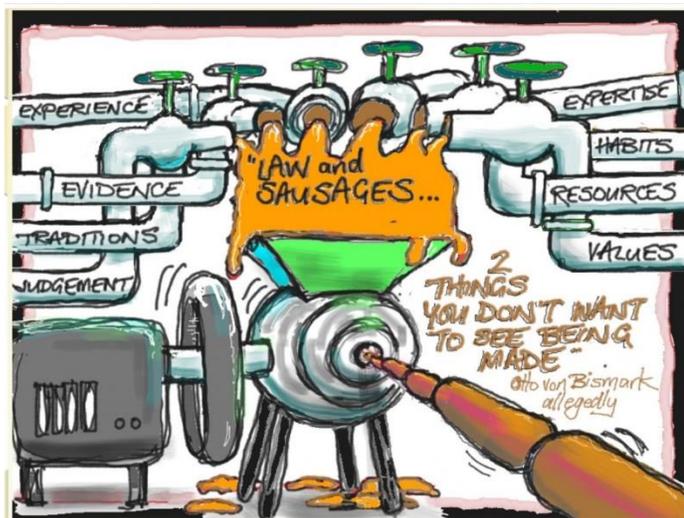
Louis Tobin
OPAA Executive
Director

The 133rd General Assembly will soon come to an end. But not before we go through what will surely be another unpredictable lame duck session. The General Assembly has plenty of stuff on their holiday plate. Everything from demands to repeal and possibly replace House Bill 6, the scandal tarnished nuclear bailout legislation, to dealing with the continued economic and human fallout from COVID-19. They will also still find time to debate, and possibly enact, some big changes to our criminal justice system. As always, the legislative portion of this newsletter lists what I consider to be our priority legislation. The unfortunate reality these days is that most of these bills have a negative impact on your work and most likely on your community. I want to draw particular attention to the three proposals that I am most concerned with going into lame duck:

- 1) Senate Bill 3 (Drug Law Reform). I am not sure what else can be said about this bill that has not already been said many times over the last twenty months. While I think it will be difficult for the House to pass such sweeping reform in such a short amount of time, the bill remains a top concern. It is a Senate priority bill that influential members of the Senate badly want and it has broad support from a bipartisan group of advocates.
- 2) Senate Bill 256 (Juvenile Parole Eligibility). This bill repeals the possibility of LWOP sentences for juvenile offenders and establishes parole eligibility at 18 years in non-homicide cases and 25 years in homicide cases for juveniles sentenced as adults. The bill has been promoted as a necessary response to recent U.S. and Ohio Supreme Court cases regarding the sentencing of youthful offenders. It goes way beyond what this line of cases requires, however, and instead enables the parole board to significantly reduce a judge's sentence in a way that rolls back truth-in-sentencing. This bill too has broad support from a bipartisan group of advocates.
- 3) Senate Bill 237/House Bill 381 (Self-Defense). These are identical bills that would make Ohio a stand your ground state, create a mechanism by which a person claiming self-defense could obtain pre-trial immunity, and expand the circumstances under which a person is justified in using force in self-defense. Lame duck is always a ripe time for politically controversial legislation like stand your ground. Two years ago during lame duck we got the bill that shifted the burden of proof to the state in self-defense cases. I expect more debate on these bills before the end of the year. While OPAA will be advocating in Columbus

to defeat or at least change the worst aspects of these bills, there is simply no substitute for grassroots advocacy. So please consider talking to or writing to your own legislators about these three proposals in particular but also any of the others listed below that you may have an interest in. All hands on deck in the midst of a storm. If you need some talking points, let us know.

Lou



At the Statehouse

Below is a current list of priority legislation along with the OPAA's position. For a full list of bills that we are tracking visit www.ohiopa.org. If you have any questions about the work of the legislature or the status of any legislation please let us know!

HB1 INTERVENTION IN LIEU OF CONVICTION (PLUMMER P, HICKS-HUDSON P) To modify the requirements for intervention in lieu of conviction and for sealing records of conviction.

Current Status: 9/16/2020 - BILL AMENDED, Senate Judiciary, (Fifth Hearing)

Position: Support

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-1>

HB3 AISHA'S LAW - DOMESTIC VIOLENCE (BOYD J, CARRUTHERS S) To add domestic violence circumstances to the offenses of aggravated murder and endangering children, to establish local domestic violence high risk teams, and to require law enforcement officers to utilize a qualified lethality assessment screening tool to refer high risk victims to a local team.

Current Status: 9/16/2020 - Senate Judiciary (first hearing)

Position: Amend

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-3>

HB5 PUBLIC DEFENDER LOAN REPAYMENT (HILLYER B, LELAND D) To establish the Ohio Public Defender State Loan Repayment Program.

Current Status: 1/21/2020 - Senate Finance, (Fifth Hearing)

Position: Amend

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-5>

HB136 DEATH PENALTY-MENTALLY ILL (HILLYER B) To prohibit imposing the death penalty for aggravated murder when the offender had a serious mental illness at the time of the offense.

Current Status: 6/3/2020 - REPORTED OUT, Senate Judiciary, (Seventh Hearing)

Position: Oppose

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-136>

HB178 CONCEALED WEAPONS REFORM (HOOD R) To modify the Weapons Law by renaming a concealed handgun license as a concealed weapons license, allowing a concealed weapons licensee to carry concealed all deadly weapons not otherwise prohibited by law, repealing a notice requirement applicable to licensees stopped for a law enforcement purpose, authorizing expungement of convictions of a violation of that requirement, and allowing a person age 21 or older and not prohibited by federal law from firearm possession to carry a concealed deadly weapon without needing a license subject to the same carrying laws as a licensee.

Current Status: 5/28/2020 - House Criminal Justice, (Second Hearing)

Position: Amend

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-178>

HB215 REAGAN TOKES-REENTRY (BOGGS K, CARFAGNA R) To modify the Corrections Law regarding a Department of Rehabilitation and Correction reentry program for certain offenders, maximum workload and caseload standards for parole and field officers, GPS monitoring of offenders released from prison, and entry into LEADS of specified information about GPS-monitored offenders, and to require the Ohio Criminal Sentencing Commission to appoint an Offender Supervision Study Committee.

Current Status: 2/26/2020 - BILL AMENDED, House Criminal Justice, (Fourth Hearing)

Position: Support

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-215>

HB277 ELECTRONIC RECORDING - CUSTODIAL INTERROGATIONS (PLUMMER P, WEST T) To revise the law governing the electronic recording of custodial interrogations.

Current Status: 6/3/2020 - Referred to Committee Senate
Local Government, Public Safety and Veterans Affairs
Position: Oppose
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-277>

HB337 CHILD ADVOCATES-COMMUNICATION (STEIN D, GALONSKI T) To provide generally a privilege for communications between a qualified advocate rendering advocacy services and a victim of certain crimes, to exempt the nondisclosure of that privileged communication from the offense of failure to report a crime, and to generally require a qualified advocate to report child abuse or neglect of the victim.
Current Status: 2/20/2020 - House Criminal Justice, (First Hearing)
Position: Oppose
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-337>

HB354 WEAPONS DISABILITY DATA PORTAL (PLUMMER P, SWEARINGEN D) To require the juvenile court to expunge all records sealed pursuant to the juvenile sealing law upon the person's twenty-eighth birthday, to expand the circumstances under which a person has a weapon under disability, to specify that moderate or severe substance use disorder is a mental illness for purposes of the law governing civil commitments, to require the Director of Public Safety to create and maintain the weapons disability data portal, to impose certain consequences on specified entities that fail to comply with data submission requirements, and to make an appropriation.
Current Status: 10/16/2019 - House Finance, (Fifth Hearing)
Position: Monitor
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-354>

HB381 STAND YOUR GROUND (KELLER C, HOOD R) To enact the Ohio Stand Your Ground Act to modify the law regarding self-defense.
Current Status: 6/10/2020 - House Criminal Justice, (Fourth Hearing)
Position: Oppose
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-381>

HB403 SENTENCING REQUIREMENTS - TRANSITIONAL CONTROL (HILLYER B, GALONSKI T) To eliminate the requirement that a sentencing court must assent to the transfer of a prisoner to a transitional control program.
Current Status: 11/18/2019 - Referred to Committee House Criminal Justice
Position: Oppose
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-403>

HB415 PROHIBITION OF PROSTITUTION PROCEEDS (POWELL J) To prohibit a person from receiving proceeds of prostitution.
Current Status: 2/13/2020 - House Criminal Justice, (Second Hearing)
Position: Monitor
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-415>

HB431 SEXUAL EXPLOITATION DATABASE (ABRAMS C, CARFAGNA R) To create the Sexual Exploitation Database and to make an appropriation.
Current Status: 9/2/2020 - Senate Judiciary (first hearing)
Position: Monitor
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-431>

HB552 LIFE SENTENCES - MINORS (GALONSKI T, MANNING D) Regarding a bar against a sentence of life without parole, and special parole dates, for offenders who committed the offense when under age 18.
Current Status: 5/5/2020 - Referred to Committee House Criminal Justice
Position: Oppose
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-552>

HB610 CRIME VICTIM RIGHTS (CUPP B) To make changes relative to the rights of crime victims.
Current Status: 5/19/2020 - House Criminal Justice, (Second Hearing)
Position: Amend
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-610>

HB703 STUDY, IMPLEMENT PROFESSIONAL POLICE PRACTICES (PLUMMER P, ABRAMS C) To express the intent of the General Assembly to study and implement professional police practices in Ohio.
Current Status: 8/31/2020 - Referred to Committee House State and Local Government
State Bill Page:
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-703>

SB3 DRUG SENTENCING REFORM (EKLUND J, O'BRIEN S) To modify the controlled substance possession and trafficking prohibitions and penalties and the drug and alcohol abuse civil commitment mechanism.
Current Status: 8/31/2020 - Ref to House Criminal Justice
Position: Oppose
<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-3>

SB13 HUMAN TRAFFICKING-JUVENILES (FEDOR T)

To require a juvenile court to hold a delinquency complaint in abeyance in certain cases related to prostitution or human trafficking and to provide that the same elements for the offense of trafficking in persons that apply to a victim under the age of sixteen also apply to a victim who is age sixteen or seventeen.

Current Status: 2/13/2020 - House Criminal Justice, (Second Hearing)

Position: Support

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-13>

SB28 PROTECTION ORDER VIOLATION PENALTIES (HOTTINGER J)

To increase the penalty that applies to the offense of violating a protection order under certain circumstances.

Current Status: 1/30/2020 - House Criminal Justice, (Second Hearing)

Position: Support

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-28>

SB48 SPEEDY TRIAL RULES (EKLUND J)

To narrow the scope of speedy trial rules.

Current Status: 5/16/2019 - House Criminal Justice, (Third Hearing)

Position: Support

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-48>

SB54 PROHIBIT DEATH PENALTY-MENTAL ILLNESS (EKLUND J, WILLIAMS S)

To prohibit imposing the death penalty for aggravated murder when the offender had a serious mental illness at the time of the offense.

Current Status: 7/17/2019 - SUBSTITUTE BILL ACCEPTED, Senate Judiciary, (Third Hearing)

Position: Oppose

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-54>

SB55 ENHANCE PENALTIES-DRUG TRAFFICKING (GAVARONE T)

To enhance penalties for certain drug trafficking offenses committed in the vicinity of a community addiction services provider and to name the act's provisions the "Relapse Reduction Act."

Current Status: 7/17/2020 - VETOED BY GOVERNOR

Position: Support

State Bill Page:

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-55>

SB133 MANAGEMENT OF RELEASED OFFENDERS (O'BRIEN S)

To modify the Corrections Law regarding a Department of Rehabilitation and Correction reentry program for certain offenders, maximum workload and caseload standards for parole and field officers, GPS monitoring of offenders released from prison, and entry into LEADS of specified information

about GPS-monitored offenders, and to require the Ohio Criminal Sentencing Commission to appoint an Offender Supervision Study Committee.

Current Status: 11/13/2019 - Senate Judiciary, (Fourth Hearing)

Position: Support

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-133>

SB146 DOMESTIC VIOLENCE-CHOKING (KUNZE S, ANTONIO N)

To expand the offense of domestic violence to also prohibit a person from knowingly impeding the normal breathing or circulation of the blood of a family or household member by applying pressure to the family or household member's throat or neck or blocking the family or household member's nose or mouth.

Current Status: 10/2/2019 - Senate Judiciary, (Third Hearing)

Position: Support

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-146>

SB160 RECORDS EXPUNGEMENT (O'BRIEN S, RULLI M)

To provide a mechanism for the expungement of records of most convictions that, depending on the category of the offense, are at least 10 years old, 15 years old, or 20 years old, and to eliminate the waiting period for sealing a record related to a no bill.

Current Status: 9/25/2019 - Senate Judiciary, (Second Hearing)

Position: Oppose

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-160>

SB196 TESTIMONIAL PRIVILEGE-SEX CRIMES (EKLUND J)

To provide generally a testimonial privilege for communications between a qualified advocate rendering advocacy services and a victim of domestic violence, human trafficking, menacing by stalking, or sexual violence, to exempt the nondisclosure of that privileged communication from the offense of failure to report a crime, to require a qualified advocate to report knowledge or reasonable suspicion of child abuse or neglect of the victim except for privileged communications, and to specify circumstances in which the victim is considered to have waived the privilege.

Current Status: 11/6/2019 - Senate Judiciary, (Second Hearing)

Position: Oppose

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-196>

SB221 FIREARMS REGULATIONS (DOLAN M)

To provide for the issuance in specified circumstances of a Safety Protection Order to apply regarding a person who a court determines is under a drug dependency, chronic alcoholic, or mental health-related firearms disability; to specify LEADS and NCIC reporting and removal procedures for current types of protection orders; to require the submission to the Attorney General for inclusion in LEADS of findings of IST or NGRI; to modify some of the prohibitions under the offense of "unlawful transactions in weapons" and add new prohibitions and exemptions under the offense, including a new exemption if a state background check mechanism the bill enacts is used and does not indicate that the

prospective transferee is barred from firearms possession; to provide in specified circumstances for the issuance of a seller's protection certificate under the new state background check mechanism; to increase the penalty for certain firearms-related offenses in specified circumstances; to modify the law governing the entry of arrest warrants into LEADS as extradition warrants; to expand the law regarding the provision of drug and alcohol test results to law enforcement personnel; and to provide a new exception to the testimonial privilege for specified medical and dental personnel regarding certain probate court proceedings.

Current Status: 12/3/2019 - Senate Government Oversight and Reform, (Third Hearing)

Position: Monitor

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-221>

SB237 SELF-DEFENSE (JOHNSON T) To enact the Ohio Duty to Retreat Act to modify the law regarding self-defense.

Current Status: 1/21/2020 - Senate Government Oversight and Reform, (Fourth Hearing)

Position: Oppose

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-237>

SB239 PROHIBIT SEXTING (MANNING N) To generally prohibit sexting by a person under 19 years of age.

Current Status: 2/5/2020 - Senate Judiciary, (Second Hearing)

Position: Amend

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-239>

SB247 PROHIBIT PROSTITUTION (SCHAFER T, FEDOR T) To prohibit a person from engaging in prostitution and receiving proceeds of prostitution, to modify certain soliciting offenses and penalties, to create the Sexual Exploitation Public Database, and to make an appropriation.

Current Status: 2/19/2020 - Senate Judiciary, (Second Hearing)

Position: Amend

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-247>

SB256 BAR LIFE SENTENCE-UNDER 18 (MANNING N, LEHNER P) Regarding a bar against a sentence of life without parole, and special parole dates, for offenders who committed the offense when under age 18, and to amend the version of section 2907.02 of the Revised Code that takes effect on March 22, 2020, to continue the provisions of this act on and after that date.

Current Status: 9/23/2020 – **PASSED BY SENATE**; 28-4

Position: Oppose/Amend

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-256>

SB278 PAROLE PROCEDURES (EKLUND J, LEHNER P)

To modify parole procedures regarding prisoner access to information and materials, presence of counsel, uniform standards, and appeals of decisions.

Current Status: 5/6/2020 - Referred to Committee Senate

Judiciary

Position: Oppose

<https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-278>

Legislative information provided by actionTRACK - Hannah News Service, Inc.

For a list of all bills that the OPAA is tracking, please visit

<http://www.ohiopa.org/legislation1.html>

Join us at the Statehouse!

Whether you are in town to testify or just spending time away from your county, let us show you around the Statehouse. Call Lou or Steve at the office and we will work out the details.



Membership Services

Community Outreach

Pickaway County Prosecutor's Office SALT Council

In Pickaway County, we have a very active SALT Council. For those of you who are unfamiliar with SALT, it stands for Seniors and Law Enforcement Together. Our group has been spearheaded by Dep. Dale Gillette who does a great job working with the Seniors and keeping them active. Every year, well except for this crazy year, SALT hosts a seminar for seniors in the community as well as for other local business owners and our local banks. All of the speakers focus on issues specific to our senior population. I have done a presentation on Safe Banking since the inception, in an attempt to assist individuals from being scammed either by outsiders or by family members.

This idea first came from Ross County's Prosecutor Office. They were nice enough to share their outline with me and we have made it our own in the years since. We are willing to share our power point with other counties, if any of you are interested.

I start by explaining the role of the Prosecutor's Office. I explain what we do and who we represent since most folks only see prosecutors in the role of criminal charges, indictments and trials. I explain that we do not represent members of the public, nor do we

represent the banking community. If a bank has a specific question, they need to speak with their own counsel.

I am very fortunate to live in a small, rural community. We have three locally owned banks in addition to the large corporate banks that everyone is familiar with such as Chase and Fifth Third. Having small hometown banks makes it easier to get information because we know who to contact and who to ask what the bank needs to be able to share client information with law enforcement. Often, a hometown bank will assemble the information as they wait on a subpoena or court order.

Privacy expectations should be important to all individuals. A person's information is confidential and banks do not give up that information easily and they should not. Yearly, each of us receives a notice in the mail from our banking institutions that explains the confidentiality of your accounts and that none of your confidential information is to be shared with third parties.

This is the codified law both in Ohio and at the federal level. The Financial Services Modernization Act of 1999 leads the way in making sure that your information stays confidential and is not shared with others. The Act requires companies (banking, lending, etc.) to establish a privacy policy pertaining to the protection of the consumer's personal nonpublic information stored by the company. It does, however, allow for disclosure "to protect against or prevent against or prevent actual or potential fraud, unauthorized transactions, claims or other liability."

Ohio law allows superintendents of financial institutions to disclose information to law enforcement authorities conducting criminal investigations. R.C. 1121.18. Sometimes, when there is an issue, our local banks notify law enforcement agencies in our county that there could be a problem where a disabled person or a senior is being taken advantage of by another party, usually a family member or close friend.

I always advise those at the seminar to call law enforcement or Adult Protective Services if they believe that someone is being taken advantage of in their community. While we know that certain individuals are mandated reporters, I ask that those in our community look out for each other. The Revised Code defines who is a mandated reporter in cases of abuse, neglect or exploitation of an adult. It also gives those individuals immunity from civil or criminal liability. R.C. 5101.63.

We can all list mandatory reporters such as attorneys, physicians, clergy and law enforcement officers. The law in Ohio has changed over the years and now, it includes an employee of a bank, savings bank, savings and loan association, or credit union. R.C. 5101.63(A)(2)(cc). Reporting abuse of our elders isn't just the right thing for our banks to do, it is mandatory.

Theft from the elderly can cause devastating financial losses for many families. The courts can send someone to prison if found guilty or they can be placed on community control, but the outcome is almost always the same...we can't get all the

money back for the victim. And, because the perpetrator is sometimes a family member, seniors are often reluctant to ask for help or are unsure where to seek help.

I encourage seniors and others to try to utilize the same teller as much as possible. I bank at a place where a high school classmate works and I always want her to wait on me. First, she knows me and she also knows my banking habits. If my habits would change, she would be the first to know that something might be wrong.

What should you look for? A new association with someone, increased frequency in coming to the bank, an increased number of transactions, an increase in cash withdraws, numerous checks for home improvement or car repairs and an increase in transfers from savings to checking are just a few of the things a bank might recognize.

Once again, I am very lucky to have great financial partners in my county. More than once, the institution itself has alerted law enforcement to a potential problem. I encourage everyone to look out for family members, friends, and neighbors because exploitation of our elderly population is all around us.

Thank you to Pickaway County for providing this information. If your county would like a community outreach program featured please email the information to Steve or Lou.

Guest Columnist - Ryan C. Spitzer Zashin & Rich Co., L.P.A **Public Sector Employees and First Amendment Free Speech Under *Garcetti***

Social media's increasing daily presence, in conjunction with a number of recent high-profile topics, have led employees and employers alike to consider what First Amendment rights public sector employees possess. Furthermore, given the ever-expanding usage of various communication platforms, employers have been - and will continue to be - asked to review employee speech on a more frequent basis.

Public employers must be careful to review the nature of the employee's speech, when the speech occurred, and under what circumstances the speech occurred before making any determinations as to the appropriateness of the employee's speech.

This article reviews the standard articulated, provides recent examples of how courts have evaluated employee speech claims, and provides a framework by which public sector employers can review employee speech moving forward.

***Garcetti* – Review and Standard**

In 2006, the Supreme Court decided the case of *Garcetti v. Ceballos*, 547 U.S. 10 (2006), which has become the benchmark for public employee First Amendment claims and solidified the Supreme Court's analysis with respect to public employees and First Amendment rights.

Ceballos was a Deputy District Attorney who reviewed a police affidavit and determined that the affidavit contained significant misrepresentations used to procure a search warrant. Ceballos relayed his concerns about the affidavit to his superiors through memorandums, and eventually testified for the criminal defendant about those concerns. After testifying, Ceballos alleged that he was subjected to a number of retaliatory actions by his employer, and eventually sued his employer arguing that the employer's actions in response to his communications about the affidavit violated his First Amendment free speech rights.

In holding that Ceballos' speech was not constitutionally protected, the Supreme Court held that "[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," while "[a]t the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."

Courts have engaged in the following three step inquiry after *Garcetti*:

- (1) Was the individual speaking as an employee or as a private citizen? If speaking as a private citizen, continue to (2).
- (2) Was the employee speaking on a matter of public concern? If so, continue to (3).
- (3) Did the public sector employer have an adequate justification for treating the employee differently from any other member of the general public?

Recent Case Law Interpreting *Garcetti*

Several recent cases further explore the Supreme Court's standard under *Garcetti*.

First, consider *Venable v. Metropolitan Gov't of Nashville and Davidson County*, 2019 WL 7020353 (M.D. Tenn. 2019). Venable was an officer with the Metropolitan Nashville and Davidson County Police Department ("MNPDP"), and engaged in an off-duty Facebook conversation after the shooting of Philando Castile in Minnesota.

During the course of the conversation, Venable posted a number of comments, including: "Yeah, I would have done 5," in response to a comment that Castile was shot four times. "You don't shoot just one. If I use my weapon, I shoot to kill and stop the threat." "It's real and it's what every cop is trained to do. Move to Mexico." "There ARE bad cops!!! NO one is sitting here saying every cop is a good one. Ha. Why are you not talking about how many white people are killed by cops every day!?!?!? You are

given statistics that more whites are killed by cops than blacks yet you still stay on the issue of feeling sorry for blacks or only post if a black is involved. You're blind."

One participant in the Facebook conversation warned Venable that he could be in "serious trouble" based on the "grossly unprofessional" statements. Another expressed the hope that Venable's comments not "go viral." Both comments proved prescient. In posting his comments, Venable did not state he was an MNPDP officer. Nevertheless, within minutes of the postings the Department received a complaint about Venable from one of the participants in the conversation. An hour later, a Chamber of Commerce board member filed his own complaint.

The Department immediately relieved Venable of duty and began an investigation. When the Civil Service Commission upheld his termination, Venable unsuccessfully appealed. The Court rejected Venable's First Amendment claim. The Court found that "there can be no doubt that Venable's statements touched on matters of public concern. He was discussing his personal views about police officers and the dangers they face."

The Court further held that "[t]he speed with which citizens complained to the MNPDP also undercuts Venable's suggestion that he should not be held accountable because he did not identify himself as a Nashville police officer. What he did do was postings under his real name, and the postings clearly suggested that the poster was a police officer. It could not have surprised Venable that a rudimentary search on the internet would reveal that the 'Anthony Venable' in Nashville making the posts was a MNPDP officer." Lastly, the Court held that it had "no hesitation in concluding that the MNPDP could reasonably predict that Venable's comments would be disruptive to its mission and affect officer morale. The comments were made directly in response to a police shooting at a time when police shootings were a hot topic of debate among members of the public and the subject of nationwide protests. Making matters worse, the comments came on the very day that the Chief asked that the citizens of Nashville not judge its police officers by actions of police in other departments, and pointed out that officers shoot to kill only as a matter of last resort. At a minimum, Venable's postings could be viewed as undercutting or contradicting the Chief."

A similar issue was considered in *Williams v. City of Allentown*, 2020 WL 1166062 (3d Cir. 2020). Williams, a Sergeant in the Allentown Police Department, commanded the Youth Division, where he was responsible for developing public programs for the City's youth and improving police recruitment efforts.

In January 2017, one of Williams' co-workers approached him off duty, seeking advice on whether he could run for political office. The co-worker told Williams that he was considering running against then-Mayor in an upcoming election and "asked Williams for aid, and to provide an opinion regarding any potential conflicts with employment by running for political office." Williams answered that he saw "no basis" why the employee could not run.

The co-worker approached Williams a second time a month later – again off duty – and told Williams that he was close to “going public.” During that conversation, Williams suggested that the co-worker speak with the then-Chief of Police about his decision to run for mayor. The co-worker subsequently met with the Chief and “told [Chief] Morris of Williams’ affiliation and aid.” During these meetings, the Chief “used language that made the co-worker feel threatened and there would be reprisal or retaliation if the worker ran for the Mayor’s Office.”

The week after the co-worker announced his candidacy, Williams was ordered to appear before the Chief, who informed him that he was being reassigned to work as a patrol officer for the night shift. Williams sued the Department, alleging his transfer was retaliation for engaging in protected speech.

A federal appeals court allowed Williams to proceed with his lawsuit. The Court’s decision turned on the *Garretti* holding treating speech as an employee (which the Court found was not protected by the First Amendment) differently than speech as a citizen (which can be protected).

The Court focused on whether Williams spoke to the co-worker as a private citizen. Williams alleged that his conversations with the co-worker were made off duty and involved his personal opinion. Williams asserted that he did not have a duty to give advice and/or allow an employee to run for political office. The City argued that Williams’ conversations to the co-worker were made pursuant to his job duties and related to his work because Williams provided advice to a subordinate relating to the City’s rules and policies surrounding their duties as police officers.

The Appellate Court upheld the trial court’s determination: Williams was not employed to give advice to employees about City policies, nor was his speech part of the work he was paid to perform on an ordinary basis. Based on the allegations of his complaint, which have not been challenged or controverted by the City, Williams was speaking as a private citizen on a matter of public concern.

In contrast, the Seventh Circuit Court of Appeals recently dismissed a public sector employee’s First Amendment complaint in *Lett v. City of Chicago*, 946 F. 3d 398 (7th Cir. 2020). Lett was an investigator for Chicago’s Civilian Office of Police Accountability, tasked with reviewing allegations of police misconduct. In 2016, Lett was working on an investigation into police involvement in a civilian shooting. The office’s Chief Administrator directed him to include in the report a finding that police officers had planted a gun on the victim of the shooting. Lett refused because he did not believe that the evidence supported that finding.

Lett raised his concerns, which made their way to the Chief Administrator, and, not long after, Lett was removed from his investigative team and was subsequently removed from investigative work altogether. He was directed to perform janitorial duties. The Chief Administrator opened an internal investigation

which concluded Lett had violated the office’s confidentiality policy and ordered that Lett be fired.

Convinced that the internal investigation was “a hit job,” Lett initiated a grievance through his union. An arbitrator ordered the office to reinstate him with back pay and to expunge his record. However, when Lett returned, the Administrator immediately placed him on administrative leave with pay. Lett was eventually assigned on paper to the Police Department’s FOIA office, but was not allowed to return to work.

Lett sued the City, alleging that his supervisors retaliated against him for his refusal to write false information in his report which violated his First Amendment rights. The Seventh Circuit Court of Appeals dismissed Lett’s lawsuit, finding his actions were not protected by the First Amendment because Lett would have never been tasked with reviewing such reports had it not been for his professional responsibilities.

The Court noted that Lett would have had neither occasion nor reason to refuse the request if not for his job. As a result, under *Garcetti*, Lett’s refusal to amend the report was speech which owed its existence to his professional responsibilities and did not grant him a First Amendment cause of action.

How Public Sector Employers Should Evaluate Employee Speech

A frequent source of confusion lies with how employers should make the determination as to whether or not an employee was speaking as a private citizen or public employee, and whether or not the speech was made pursuant to the employee’s official duties.

The Supreme Court has instructed employers to consider “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” See *Lane v. Frankes*, 573 U.S. 228, 240 (2014). If the employee spoke pursuant to their official duties, the employee did not speak as a private citizen. Therefore, it would be immaterial whether the speech addressed a matter of public concern.

Determining whether the employee’s speech falls under the scope of an employee’s duties requires a fact-specific evaluation of the employee’s respective job duties by the employer. However, there are several factors courts consider when determining whether an employee’s speech was made pursuant to their official duties, such as: (i) “the ordinary scope of the employee’s duties”; (ii) “the setting”; (iii) “the audience”; (iv) “the subject matter of the speech”; and (v) “the impetus for the speech.” *Holbrook v. Dumas*, 658 Fed.Appx. 280, 288 (6th Cir. 2016)

The more factors pointing towards the speech being made in the employee’s official capacity, the more likely it is that the employee’s speech is not constitutionally protected by the First Amendment.

In sum, employers need to determine if the employee was speaking as an employee or as a private citizen. This requires a review of

the employee's job duties. If the speech was made pursuant to the employee's job duties, the employer must next consider whether the speech involved a matter of public concern. If the speech involved a matter of public concern, the possibility of a First Amendment claim arises, subject to whether or not the public employer had justification for treating the employee differently from any other member of the general public.

Conclusion

As discussed above, when public sector employees speak on matters of public concern as a private citizen, it is likely that the employee retains some degree of First Amendment protection. Because of this, it is imperative that employers conduct a thorough review of any concerning employee speech (whether on or off-duty).

Employers must familiarize themselves with the standards described above, as public employer reviews of employee speech will only increase with the passage of time.

Ryan Spitzer works in Zashin & Rich's Columbus office, and regularly advises clients on all employment matters. If you have questions about your office's social media policy or questions concerning employee speech, please contact Ryan at rs@zrlaw.com or (614) 224-4411.

Law Clerk Keri A. Richardson assisted in the legal research utilized in this article.

Amicus Committee

The OPAA Amicus Committee considers requests from members to submit amicus briefs on behalf of the Association and seeks volunteers to write the brief should the request be granted. Here are recent decisions and other action on cases the Association has weighed in on:

Recent Requests

State of Ohio v. Kelly Foreman, O.S.C. 2020-0866 (3rd District, Seneca County, Case No. 13-19-01)

Amicus Support Requested By: Derek DeVine, Seneca County Prosecutor.

Amicus Brief Volunteer: Paul A. Dobson, Wood County Prosecutor, David T. Harold, Assistant Prosecuting Attorney.

Issue: Whether the presence of drug metabolites in a defendant's body, without more, suffices to establish venue in the charging county when a conviction for drug possession requires the state to prove that an offender had control over a thing or substance.

State of Ohio v. Daniel Gates (5th District, Stark County, Case No. CA 000153)

Amicus Support Requested By: John Ferrero, Stark County Prosecutor

Amicus Brief Volunteer: Melissa Schiffl, Delaware County Prosecutor

Issue: Whether factual information from ordinary citizens who call 911 regarding suspicious, though not necessarily criminal, behavior in addition to law enforcement's own observations of unusual behavior when responding to the call are sufficient indicia of reliability to warrant a Terry stop that ultimately results in an arrest and seizure.

State of Ohio v. Nicholas Gedeon, O.S.C. 2019-1566 (9th District, Summit County, Case No. 29235)

Amicus Support Requested By: Sherri Bevan Walsh, Summit County Prosecutor

Amicus Brief Volunteer: Mat Heck, Montgomery County Prosecutor, Heather Ketter, Assistant Prosecuting Attorney.

Issue: Where a defendant has been granted intervention in lieu of conviction with conditions, and they subsequently file a motion for withdrawal of the guilty plea, whether the motion is treated as post-sentence motion to vacate pursuant to Crim.R. 32.1, and the defendant bears the burden of demonstrating that withdrawal of the plea is necessary to correct a manifest injustice.

State of Ohio v. Leandre Jordan, O.S.C. 2020-0495 (1st District, Hamilton County, Case Nos. C180559 and C180560)

Amicus Support Requested By: Ron O'Brien, Franklin County Prosecutor

Amicus Brief Volunteer: Ron O'Brien, Franklin County Prosecutor, Steve Taylor, Assistant Prosecuting Attorney.

Issues: (1) Whether a warrantless public arrest can be made where there are no exigent circumstances. (2) Whether evidence discovered following such a warrantless arrest may be suppressed when the arresting officers were acting on a good-faith belief that a warrantless public arrest could be made without exigent circumstances. (3) Whether evidence discovered following such an arrest may be suppressed when it was discovered pursuant to a search warrant.

State of Ohio v. Daniel J. Campbell, O.S.C. 2020-1187 (5th District, Fairfield County, Case No. 2019 CR 0270)

Amicus Support Requested By: Kyle Witt, Fairfield County Prosecutor

Amicus Brief Volunteer: Ron O'Brien, Franklin County Prosecutor, Seth Gilbert, Assistant Prosecuting Attorney.

Issue: Whether a probation officer can search a probationer's personal property without a warrant, and with no general or specific probable cause, reasonable suspicion, or other standard being met suggesting that the probationer is engaging in some criminal activity or probation violation but where the probationer has provided general consent to searches as part of the terms and conditions of probation.

New and Noteworthy

Annual Meeting – in-person event changed to virtual

Well, once again we planned on an in-person event, only to have another spike in the COVID-19 numbers to thwart our plans. We will persevere! The 2020 virtual Annual Meeting will include both civil and criminal prosecutor training tracks along with complete professional conduct hours. On the criminal side, topics include investigating and dealing with drone complaints; an Ohio Supreme Court update (with some SCOTUS thrown in); the Parole Board and your active role in the process; a case study using conviction review units and processes; an overview of Marsy's Law; Evidence Rule 404(B); and a case study on using forensic genetic genealogy to narrow down suspects and solve a case. The civil side will explore the latest with township law and pipelines; contract law basics and top tips; employment law for prosecutors; copyright law; roads, bridge, and ditch laws; jail & road patrol liability; and library law. The agenda and registration form will be emailed the first week of November, with hard copies going out as soon as possible after printing. As we have not heard back from all speakers, the schedule may be adjusted prior to the training. We will, of course, keep you posted!

Coming to a Statehouse near you....Lame duck



Lame Duck: *noun* Short, infamous period after the general election when the legislature does a load of its business before new office holders take office.

OR.....



SB3 call to action

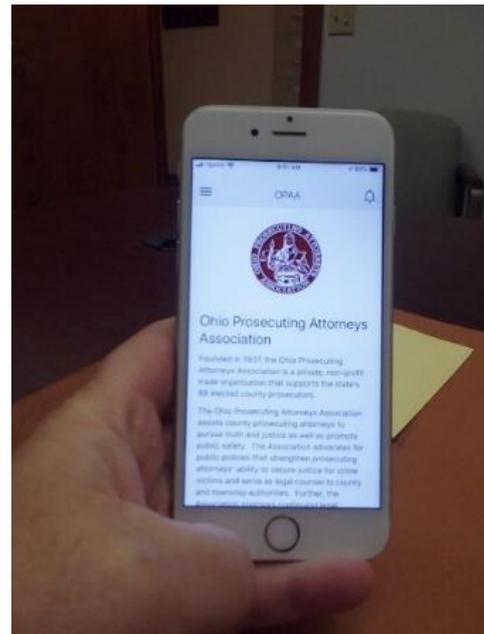
As mentioned in Director Tobin's message above, we need your help making a final push to defeat Senate Bill 3. We are sure that many of you are as tired of this battle as we are. Lou has mentioned that it feels a lot like the movie Groundhog Day and to quote Bill Murray's character from that movie... "There is no way that this winter is ever going to end as long as this groundhog keeps seeing his shadow. I don't see any other way out. He's got to be stopped. And I have to stop him." A strong grassroots effort by prosecutors, judges, and sheriffs over the next several weeks can stop this bill.

As you know, the bill is now in the House of Representatives. Please consider contacting your State Representative sometime before Thanksgiving to educate them or *re-educate* them about the dangers of this bill. Phone calls, texts, emails, and letters are all great but consider inviting them to sit down with you, your judges, and your sheriff to together have a private discussion. You know the flaws with the bill. They are largely unchanged. As Lou mentioned, if you need talking points contact us.

We thank you for your efforts!!

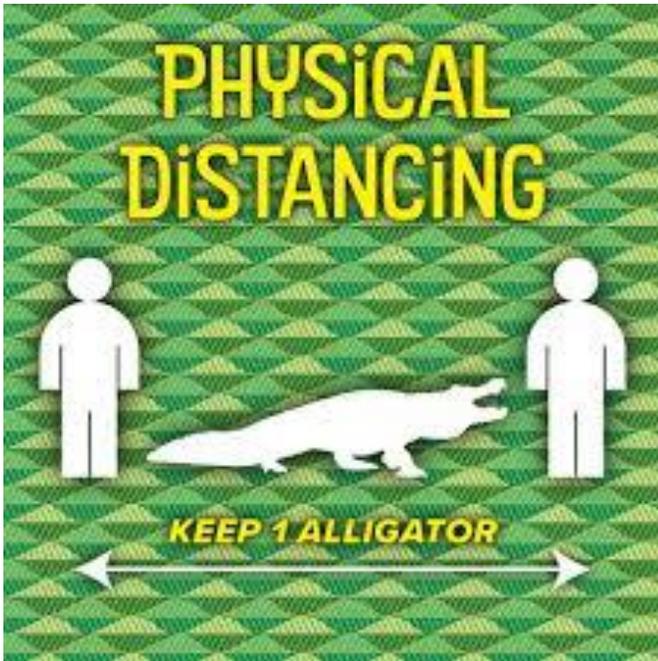
OPAA App

Be sure to download the free OPAA app!



OPAA Training

Fall Training - The virtual OPAA Fall Training was a great success with over 300 registrations from 64 counties. CLE credits have been submitted to the Supreme Court.



Virtual Annual Meeting
December 10 and 11, 2020
(see article above)

2021 Training Dates:

2021 New Prosecutor Training
January 28 and 29
Sheraton Columbus Hotel at Capitol Square

2021 Spring Training
April 15 and 16
Sheraton Columbus Hotel at Capitol Square

2021 Summer Workshop – TBD

2021 Fall Training
September 23 and 24
Crowne Plaza Cleveland at Playhouse Square

2021 Juvenile Prosecutor Training
October 14
Sheraton Columbus Hotel at Capitol Square

2021 Annual Meeting
December 16 and 17
Hilton Columbus at Easton

Your 2020 OPAA Officers



Juergen A. Waldick
Allen County
President



Daniel R. Lutz
Wayne County
President-Elect



Michael C. O'Malley
Cuyahoga County
Vice President



Jane Hanlin
Jefferson County
Treasurer



Kevin S. Talebi
Champaign County
Secretary

