# Ohio Judicial Conference

The Voice of Ohio Judges

House Finance – Subcommittee on Transportation
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H.B. 49 – Interested Part Testimony – Felony Five Sentencing
March 22, 2017

Good morning, Chair McColley, Ranking Member Reece, and members of the Finance Subcommittee on Transportation. Thank you for the opportunity to present interested party testimony today on the provision in House Bill 49 that would prohibit judges from sentencing certain non-violent felony five offenders to prison. Overall, the Judicial Conference is hearing from common pleas and municipal judges across the state that this change will negatively impact the administration of justice in Ohio and diminish public confidence in the law. I come before you today to highlight some of the concerns that we have heard and to point out some potential unintended consequences of this proposal.

First, and foremost, we are concerned that this proposal will undermine court ordered opioid treatment. Ohio judges are sensitive to the challenges that the State of Ohio faces in dealing with the opioid epidemic and the impact of the epidemic on state funding and prison space. Judges are on the front lines of the opioid problem. They are your partner and the Executive branch's partner in the fight. As much as anyone, judges strive to find and implement solutions that will prevent relapse, reduce recidivism, and improve public safety. The proposed change to felony five sentencing contained in this bill will make this significantly more difficult. By and large, judges send low level felony offenders to prison only as a last resort. Every judge that I have talked to about this issue agrees that the community and these offenders are typically better served through treatment and community sanctions. Almost all of them follow that statement up by saying that these offenders must be motivated to successfully complete their treatment and supervision, and that the ability to look an offender in the eye and tell them that prison is possible if they refuse to go to treatment or refuse to abide by community control is a powerful motivator. Our fear is that the removal of prison will make offenders less likely to submit to and complete treatment. It could dramatically reduce the effectiveness of successful drug court programs across the state.

Second, we are concerned that the proposal will undermine public confidence in our courts. The proposed amendment to RC 2929.34 removes a basic defining characteristic of a felony offense – imprisonment in a state penal institution – as a potential penalty. This undermines the capacity of the law to protect the public from future crime by the offender and others, one of the two overriding purposes of felony sentencing. Offenders will recognize that, when they commit a non-violent felony drug offense or violate community control on that offense, they will face only a short term in a local facility or additional time on community control. While this may be enough to deter many offenders, at some point (after four, five, six non-violent felony fives or four, five, or six community control violations) judges feel like they are out of options locally. This is the population that we are talking about that judges are sending to prison.

Additionally, by refusing to classify a crime that the legislature decides should not be punished with prison as a misdemeanor, an offender may avoid going to prison but will not avoid the collateral consequences of having a felony record. This is significant because one well known collateral consequence of a felony is difficulty obtaining employment and employment is one of the biggest factors in preventing recidivism.

Third, this proposal is an extension of the limitations on felony four and felony five sentencing that were enacted in House Bill 86 in 2012. Judges have observed that those changes merely resulted in prosecutors bringing more serious charges and being less willing to accept plea agreements at felony four/felony five levels. This has resulted in more serious convictions with short prison stints combined with judicial release. This is one reason the prison population reduction goal of House Bill 86 has not been realized. House Bill 86 has also resulted in longer terms in local jails displacing misdemeanants with felons in already overcrowded facilities. The proposed change to RC 2929.34 will exacerbate these problems. I have heard from municipal judges, for example, that this change will make any mandatory jail time for an OVI a statutory myth because there simply will not be enough jail space.

Finally, the proposal essentially creates a one-size-fits-all approach to sentencing non-violent felony five offenders – no prison regardless of other circumstances. Under the bill, a judge will be prohibited from sending a first time non-violent felony five to prison, a first time non-violent felony five who has violated community control multiple times to prison, a seventh time non-violent felony five to prison, and a seventh time non-violent felony five who has violated community control multiple times to prison all the same. The punishment is the same regardless of how many felony fives the individual commits or how many times they violate community control. Furthermore, the one-size-fits-all approach applies regardless of an offender's Ohio Risk Assessment System (ORAS) score, an assessment of offender risk and need that ODRC stresses as important in every other situation. While treatment and community control might be appropriate from someone who receives a low score for likelihood of re-arrest and recidivism, prison might be appropriate for someone who receives a high score in those categories. In this way, House Bill 49 contradicts ODRC's own philosophy with regard to data driven sentencing. Judges need the discretion to make this determination and to sentence appropriately.

I thank you for your time. I am happy to answer any questions.