

House Bill 49  
Ohio Senate General Government Subcommittee  
May 18, 2017

Testimony of Judge Eamon Costello  
Madison County Common Pleas Judge

Chairman Jordan, Vice Chairman O'Brien, and members of the General Government Subcommittee,  
Thank you for allowing me to provide testimony on House Bill 49. My name is Eamon Costello and I  
am the Common Pleas Judge for Madison County.

H.B. 49, as each of you know, contains a provision that will make non-violent, non-sex offense  
fifth-degree felonies mandatory community control unless the offender has a prior felony  
offense of violence or a prior felony sex offense. I have been involved, on a daily basis, in  
handling criminal cases since 1993. For the last eighteen of those years I have been involved in  
the daily handling of felony criminal cases. During that time there have been numerous changes  
to felony sentencing laws in the State of Ohio.

In 1996, under S.B. 2, Truth in Sentencing was passed creating a fifth-degree felony. Prior to S.B.  
2, only four levels of felonies existed in the State of Ohio. Increasingly in the twenty-four years I  
have been involved in the system, guidance through presumptions and mandatory sentences  
have been increased and judicial discretion has been reduced.

I am mindful of the realities that this body and the Ohio Department of Rehabilitation and  
Corrections are faced with. Prison overcrowding is a real problem and I am not here to suggest  
that it is a problem which can be ignored. Budget revenues are down and you face the difficult  
task of passing a balanced budget. A difficult task for which I do not envy you. Notwithstanding

these realities, I wish to comment on the practical impact of the fifth-degree felony portion of H.B. 49.

As a judge, the loss of judicial discretion to impose a penitentiary sentence simply removes a tool from my toolbox. Perhaps the two biggest factors that influence my decisions on sentencing day are the underlying facts of the case and the defendant's prior criminal history. Indeed, you can have two offenses which are the same violation of the same statute but have very different fact patterns which may cause you to look at the offenses differently even though they are the same charge. There is a human element that is eliminated when judicial discretion is taken away. The second factor that is most significant to me is the prior criminal history of the person before me. Do they have prior felony convictions? If so, how many? How many years have passed since the last felony conviction? How many times prior have they been placed on probation or community control and how did they do? If they were placed on community control previously and consistently violated the terms that may be a significant indicator as to whether they are likely to comply with community control in the case before me. As much as we like to look at these things as mathematical equations they simply are not and require a human being to review those facts and that history to determine an appropriate sentence.

Any time a legislative body passes a statute which requires a mandatory disposition whether it be a mandatory prison sentence or mandatory community control that judicial discretion is removed and in my view unintended results can occur. If it is the position of this body that the modifications to sentencing law contained in H.B. 49 must be passed then I strongly urge this body to examine the offenses that are defined as "violent" offenses in O.R.C. 2901.01(A)(9)(a).

In order for you to fully understand the impact of this vote, you should consider this non-exhaustive list of offenses considered to be “non-violent”:

• Trafficking in Drugs (which includes Heroin)	§2925.03
• Gross Abuse of a Corpse	§2927.01(B)
• Criminal Child Enticement	§2905.05
• Vandalism	§2909.05
• Breaking & Entering	§2919.13
• Endangering Children	§2919.22(C)
• Violating Protection Order	§2919.27
• Harassment with Bodily Substance	§2921.38
• Escape (F5)	§2921.34
• Illegal Conveyance of Weapons or Prohibited Items into Grounds of Detention Facility or Institution	§2921.36
• Theft in Office	§2921.41
• Carrying Concealed Weapons	§2923.12
• Possession of a Firearm in Liquor Permit Premises	§2923.121
• Illegal Conveyance or Possession of a Deadly Weapon or Dangerous Ordinance or Firearm in School Safety Zone	§2923.122
• Illegal Conveyance or Possession of a Deadly Weapon or Dangerous Ordinance or Firearm into a Courthouse	§2923.123
• Possession of a Deadly Weapon under Detention	§2923.131
• Improper Handling of a Firearm in a Motor Vehicle	§2923.16
• Unlawful Possession of a Dangerous Ordinance/ Illegal Manufacture or Possession of Explosives	§2923.17
• Improper Furnishing of Firearms to a Minor	§2923.21

Perhaps the most significant offense affecting Ohio today which is not an offense of violence is drug trafficking. There is no single issue affecting this state, the criminal justice system and the people of Ohio more than the opiate epidemic. Indeed, there has been significant commentary on the need for millions of more state dollars to assist in handling Ohio’s opiate epidemic and make no mistake, it is an epidemic. 80-90% of my felony caseload involves offenses committed by people addicted to opiates. These offenses quite clearly include drug possession and drug trafficking but additionally 80-90% of the property crimes such as theft, receiving stolen

property, breaking and entering and burglaries that occur in Madison County are committed by people addicted to prescription pills or heroin. There simply is no question that we must have more effective prevention and more effective treatment in dealing with this complex issue. Having said that, it is inconceivable to me that in the same bill which allots 170 million dollars more to address Ohio's opiate epidemic that we would simultaneously include a provision that would bar Ohio judges from sentencing fifth-degree felony heroin traffickers to the penitentiary.

If this Bill were to go through in its current form, I could have somebody before me having pled guilty to five fifth-degree felony counts of trafficking in heroin. These offenses would require mandatory community control, i.e., prison is not an option. It is not unusual in drug trafficking cases for the defendant to have previously been convicted of drug trafficking. A defendant may be in front of me with numerous prior felony convictions for drug trafficking and the court would be powerless to impose a penitentiary sentence. Furthermore, if the defendant was placed on a term of community control which typically includes a requirement that they not commit further crime, that defendant could go out and pick up additional fifth-degree felony drug trafficking charges as many times as they like and never face a prison sentence. They could be violated because they would have indeed violated the terms of their community control, the court at the community control violation hearing would be powerless to impose a penitentiary sentence. Surely, this is not a desired result of this legislation.

Members of the Senate, I encourage you to remove the modifications to fifth-degree felony sentencing from the Budget Bill. In the absence of following that recommendation, I strongly encourage you to examine which offenses are excluded as non-violent offenses, i.e., breaking

and entering, drug trafficking, etc. and consider whether or not those offenses should be included in this modification. I submit to you that many of them should not be included and I cannot be any more firm in my belief that drug traffickers at this time and place should never be in position where prison is not a possibility. Thank you for your consideration and while I certainly acknowledge that I do not have all the answers to all the difficult problems that you face, I wish to offer my experience to you to answer any questions that you may have on this Bill or future bills as it relates to changes which affect the criminal justice system. Thank you for considering my thoughts.