



# Ohio Judicial Conference

The Voice of Ohio Judges

House Finance Committee  
Judge Howard H. Harcha  
Scioto County Common Pleas Court  
House Bill 49 – Felony Five Sentencing Proposal  
April 5, 2017

Good morning, Chair Smith, Vice-Chair Ryan, Ranking Member Cera, and members of the House Finance Committee. I am Judge Howard Harcha from the Scioto County Common Pleas Court. I am the current Co-Chair of the Ohio Judicial Conference Community Corrections Committee and a past President of the Ohio Common Pleas Judges Association. I want to thank you for the opportunity to provide testimony today on the provision in House Bill 49 that would prohibit judges from sentencing certain non-violent felony five offenders to prison. The Judicial Conference has heard 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 have included with my written testimony a copy of a Judicial Impact Statement that gives a more detailed explanation of judicial concerns. I will try to keep my remarks today brief but I do want to highlight for you some of the more significant consequences of what is proposed.

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. Judges agree that the community and these offenders are typically better served through treatment and community sanctions. Judges also recognize, however, that the offenders must be motivated to successfully complete their treatment and supervision. 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. This 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

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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.





# Judicial Impact Statement

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## House Bill 49 (Biennial Budget) R.C. 2929.34 - Felony Five Sentencing

### TITLE INFORMATION

House Bill 49, the State's biennial budget bill includes, among other things, an amendment to Revised Code section 2929.34 to prohibit a person sentenced to a prison term that is twelve months or less from serving that prison term in an institution under the control of the department of rehabilitation and correction if that person was convicted of a felony of the fifth degree, subject to certain exceptions. The proposal provides that the person shall instead serve the term in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse; in a community alternative sentencing center or district community alternative sentencing center, in a minimum security jail, or in a community-based correctional facility. In addition, the limitation on the authority to send these offenders to prison comes with additional funding (\$19 million in FY 2018 to be distributed to counties that volunteer to participate; \$39 million in FY 2019 when the prohibition on prison becomes mandatory statewide) that will be distributed at a daily rate for every felony five offender that is treated in the community.

### IMPACT SUMMARY

Overall, the proposed change to R.C. 2929.34 will negatively impact the administration of justice in Ohio and diminish public confidence in the law. Most importantly, the proposal will undermine court-ordered opioid treatment. It will also undermine public confidence in the courts, may violate the constitutional separation of powers, and limits judicial discretion to fairly administer justice. It will result in more convictions for higher level felony offenses, additional community control violations due to the removal of the possibility of prison time, and additional expenses locally to house and treat these offenders in the community.

### BACKGROUND

The 129<sup>th</sup> Ohio General Assembly enacted House Bill 86 in 2011 with the stated goals of reducing the population of overcrowded prisons, reducing state funds spent on imprisonment, and targeting more state funding to community based corrections programs and facilities. Among the provisions in House Bill 86 intended to achieve these goals was a prohibition on sentencing certain first-

### Sponsor

Rep. Ryan Smith

### Version

As Introduced

#### What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

time, non-violent fourth and fifth degree felony offenders to prison when community control is available as an alternative. The Judicial Conference opposed this provision at the time and has advocated since for a restoration of judicial discretion over felony four and five sentencing.

To go along with the limitation on felony four and felony five sentences, the bill authorized the Ohio Department of Rehabilitation and Correction (ODRC) to establish and administer probation improvement and incentive grants for courts of common pleas that supervise felony probationers. These grants provide ODRC funding to court probation departments to encourage them to adopt policies and practices that reduce probation violations. In furtherance of this goal, funding is allocated based on the number of probationers within a jurisdiction and provides a performance-based level of funding tied to a reduction of probation revocations. ODRC retains authority to deny a grant subsidy if the applicant fails to comply with the terms of the grant agreement. In addition, it has authority to evaluate court probation policies, programs, and their effectiveness, and authority to establish minimum standards of quality and efficiency of grant programs. Courts must maintain programs that meet certain standards.

The proposed change to R.C. 2929.34 found in House Bill 49 is an extension of the above changes. The proposal further limits judicial capacity to administer justice and does so in the name of providing more community resources and better treatment for non-violent felons. It fails to recognize the actual sentencing practices currently used by most judges and does not account for several potential unintended consequences that will result from the removal of prison as a consequence of felony behavior. The proposal does not allow the court to account for one of the two overriding purposes of felony sentencing - to protect the public from future crime by the offender and others.

## JUDICIAL IMPACT

It is the position of the Ohio Judicial Conference that the proposal in House Bill 49 to amend R.C. 2929.34 will undermine court-ordered opioid treatment and public confidence in the courts. It may violate the constitutional separation of powers and limits judicial discretion to fairly administer justice.

### *Undermines 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 and, as much as anyone, strive to find and implement solutions that will prevent relapse, reduce recidivism, and improve public safety. The proposed change to R.C. 2929.34 will make this significantly more difficult.

The proposal removes an important tool that judges use to encourage treatment - the possibility of prison. Despite perceptions about judicial sentencing of non-violent felony drug offenders, the vast majority of judges use prison for these offenders as a last resort. In fact, these judges report that they send these offenders to prison only after they have committed multiple felonies or violated community control five, six, or seven times. Without the possibility of prison for a non-violent felony drug offense or for a community control violation on that underlying offense, offenders will be less likely to submit to and complete treatment. Removing the potential of prison removes the court's ability to address a defendant's failure to comply with community control. Felony five offenders must be motivated to successfully complete their treatment and/or supervision. That motivation must include the possibility of prison or many offenders will simply refuse to go to treatment or to abide by the conditions of their community control. Treatment and therapy, while vital to rehabilitation and the reduction of recidivism, do not deter crime.

Ultimately, the proposal will dramatically reduce the effectiveness of successful drug court programs that rely

on the possibility of prison to encourage compliance.

### *Undermines Public Confidence in the Courts*

The amendment to R.C. 2929.34 removes a basic defining characteristic of a felony offense – imprisonment in a state penal institution – as a potential penalty. The amendment undermines the capacity of the law to deter crime because offenders will recognize that, even if they commit a non-violent felony drug offense or violate community control on that underlying offense, they will face only a short term in a local facility or additional time on community control. Requiring courts to punish felons as the equivalent of misdemeanants while continuing to label them as felons will diminish the public's confidence in the courts and in the courts' ability to provide public safety. 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 having a job is one of the biggest factors in preventing recidivism.

Additionally, judges have observed that the changes to felony four and felony five sentencing made in House Bill 86 have 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 and 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, facilities that have no or few treatment programs.

The proposed change to R.C. 2929.34 will exacerbate these problems.

### *May Violate the Constitutional Separation of Powers*

In the policies of criminal justice, the General Assembly has the right to establish the purposes and principles of felony sentencing and the parameters within which felons may be sentenced. The Supreme Court of Ohio has said, however, that the "determination of guilt is a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary." *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132. More importantly, the "essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others."

House Bill 49, like House Bill 86, proposes to grant courts funding in exchange for treating non-violent felony five offenders in the community. The funding for this as proposed in House Bill 49, while substantial, does not begin to cover the costs of what will now be borne locally. More importantly, it is not clear whether, like in House Bill 86, this funding will be tied to the implementation of ODRC designed policies and practices. To shift the cost of oversight to local government and then seek to reduce the financial burden on local government in exchange for ODRC oversight over the management and control of offenders through funding in this manner raises constitutional separation of powers questions.

Grant funding from the executive branch must not come with strings that enable it to influence judicial decision-making.

### *Limits Judicial Discretion to Fairly Administer Justice*

The proper administration of justice requires that judges exercise discretion in all judicial proceedings, including criminal sentencing. If judges are to fulfill their constitutional duty to secure just results for the

people of Ohio, judges need the flexibility to fashion appropriate sentences given the particular facts and circumstances of individual cases and crimes. Judges are uniquely positioned to advance the interests of justice in criminal sentencing. Judges have the legal training, and accumulate the experience necessary, to develop fair, impartial, and consistent sentencing patterns. Through their training and experience, judges develop the reasoning skills needed to weigh circumstances and make fair judgments. By repeatedly applying the law to diverse fact patterns, judges develop a keen sense of what is a fair and proportionate criminal sanction in individual cases. Importantly, the experience judges acquire in criminal sentencing brings with it, too, unique insights into the consequences that particular sentences will have upon individual offenders, their victims, and the general public. Justice cannot be achieved through a "one size fits all" approach to criminal sentencing.

The proposed amendment to R.C. 2929.34 essentially creates a one size fits all approach for 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. In other words, it grants non-violent felony fives quasi-immunity for their actions because 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. In this way, House Bill 49 contradicts ODRC's own philosophy with regard to data driven sentencing. While treatment and community control might be appropriate for 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. Judges need the discretion to make this determination and to sentence appropriately.

## RECOMMENDATION

The Ohio Judicial Conference recommends that the amendment to R.C. 2929.34 be removed from House Bill 49 and that the additional funding in the bill be made available on a voluntary basis to judges who choose to treat these felony five offenders in the community.