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TO: Ohio Senate Judiciary Committee

FROM: Morris J. Murray, Defiance County Prosecuting Attorney, on behalf of OPAA

 RE: Summary of testimony on S.B. No. 66

 **TESTIMONTY AND COMMENTS TO THE SENATE JUDICARY COMMITTEE ON S.B. NO.66**

Good Morning Members of the Committee, Thank you for the opportunity to address issues of concern to Ohio’s Prosecuting Attorneys regarding S.B. 66. There are several pieces of this legislation with which OPAA has no opposition. I will focus my comments on three specific places in the Bill where we have concern. Those areas of concern are in connection with changes to 2929.11, 2951.041 and 2953.31.

Regarding the proposal in R.C. 2929.11 and use of the term “rehabilitation”, let me be clear, Ohio Prosecutor’s do not oppose and in fact, advocate rehabilitation as an important objective when sentencing criminal offenders. However, we believe provisions of the R.C. as they currently exist, already adequately provide guidance to sentencing courts. The current wording directs that Courts “shall consider” the need for “rehabilitating the offender”. However, the proposed change in S.B. 66 inserts the term “to rehabilitate the offender” as the #2 overriding purpose of felony sentencing. This places rehabilitation on the same level as the primary purpose of sentencing, which is “to protect the public”. It also places rehabilitation ahead of punishment, effectively telling Courts that this is the order of priority they are to consider when sentencing felony offenders in Ohio. We believe the proposed wording unnecessarily and inappropriately elevates the term and may influence many Courts, even in more serious cases.

Again, the current versions of 2929.11(A) is sufficient and properly instructs Courts to consider rehabilitation as method of protecting the public from future crime. The stated overriding purposes of felony sentencing, as currently set forth in 2929.11, have been debated in the past and the outcome has been to maintain public safety and punishment where they are and to maintain rehabilitation as an important component and tool available to sentencing Courts. We therefore urge that the term “to rehabilitate the offender” not be included at the place as proposed, rather, “rehabilitating the offender” remain as currently placed in the first paragraph of 2929.11 (A).

Another provision of this Bill that has raised concern by Prosecutors is the proposal under R.C. 2951.041 dealing with intervention in Lieu of Conviction. The proposal under Section (B)(1) deletes several important eligibility limitations. That section *currently* reads as follows:

**(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:**

**(1) The offender previously has not been convicted of or pleaded guilty to a felony offense of violence or previously has been convicted of or pleaded guilty to any felony that is not an offense of violence and the prosecuting attorney recommends that the offender be found eligible for participation in intervention in lieu of treatment under this section, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender under division (B)(2) of section**[**2929.13**](http://codes.ohio.gov/orc/2929.13)**of the Revised Code or with a misdemeanor.**

The proposal in S.B. 66 deletes *all* of the above language following the phrase “any felony of violence”. Prosecutors believe the deleted limitations should remain as guidance to Courts and that eliminating them has the potential to overly expand the use and sometimes abuse of Intervention In lieu of Conviction. Please note that Prosecutors have no issue with the use of Intervention In lieu of Conviction. In appropriate cases, it is a valuable option for offenders with minimal criminal records who can legitimately demonstrate that their addiction or mental health issues played a role in the commission of an offense. Unfortunately, it can also be overused and abused. Many offenders have meaningful histories and often other information is available to Prosecutors and Courts that should cause an offender to be denied the Intervention in Lieu option. If an offender commits new offenses, if they are unwilling to comply with supervision, the benefit, essentially a privilege granted by the Court, should be removed as an option. The deletion of the limitations makes overuse likely. Someone who has violated rules of supervision must have a consequence or supervision becomes meaningless. An offender who has failed to complete Intervention in Lieu on a pending offense should not be allowed to, in effect, “start over” in the same status. It should be Noted that denying an offender Intervention in Lieu *does not* eliminate his or her opportunity for treatment and other rehabilitative resources. Those opportunities remain available for a Court to put in place as conditions of Community Control. This approach is similar to the concept of progressive discipline.

We are also suggesting that the proposed change at 2951.041(B)(3) is of grave concern. This proposal removes Third Degree Felony possession offenses from the disqualifying criteria. Prosecutors are concerned that the reality of current drug possession laws requires substantial amounts of various controlled substances to be possessed before one gets to the Felony three level. By deleting this restriction, we believe serious offenders, those who may be well documented to be involved in the drug trafficking culture, will be “eligible” for the privilege of Intervention in Lieu of conviction.

Based on these considerations please reconsider the proposed deletions of the provisions of 2951.041(B) as discussed above, to be unnecessary.

S.B. 66 also proposes changes to R.C. 2953.31(A)(1)(a) regarding the definition of “Eligible Offender”. This definitional section applies then to those seeking to seal a record of conviction under 2953.32. We note that this section has been changed several times, most recently in 2014. Each change has expanded who is eligible to seal a record of conviction. We feel strongly that the proposed changes under consideration go too far and, in a disservice to the public and may result in felons with lengthy criminal records becoming eligible to have conviction records sealed. Defining “Eligible Offender” to include virtually all offenders convicted of fourth and fifth degree felonies (with the exception of sex offenders or offenses of violence) leaves a potentially huge number of offenders eligible, many of whom should not even be considered. The definition has no limitation on the number of times an offender may have been convicted. Any Prosecutor can provide examples of lifetime criminal offenders who may have committed double digit fourth and fifth degree felonies and similar numbers of misdemeanors. Under the proposed definition of “Eligible offender” folks with these kinds of histories become eligible. It is also important to note that while the current trend is to view fourth and fifth degree felonies as minor offenses, and there has been much discussion from ODRC about incarcerating nonviolent drug offenders, many fourth and fifth degree felonies, while not defined as offenses of violence, do, in fact have victims. Crimes like Breaking and Entering, Theft from Elderly, Identity Theft and many others have impacts. Allowing an offender with a substantial criminal history, who has committed these types of offenses, to seal those convictions is perhaps an injustice to those victims. While Courts may still exercise some direction, the overbroad eligibility will certainly create inconsistencies among judges, something the legislature seems to want to minimize.

For these reasons, Ohio’s Prosecutors respectfully encourages this committee to reconsider this eligibility expansion as set forth in the proposed change to R.C. 2953.31(A)(1)(a) and to leave current eligibility criteria in place.