A CRITICAL ANALYSIS OF
BALLOT ISSUE 1

For General Distribution

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A CRITICAL ANALYSIS OF BALLOT ISSUE 1

I. COMMON GOALS - DIFFERENT PROCESSES

On a daily basis the Judges of Ohio's Common Pleas Courts see both the ravages of addiction on our communities and the multiple shortcomings of the decades-long war on drugs. The Courts are committed to rehabilitation of offenders in the local community. Incarceration of low-level drug offenders in jail or prison is only used as a last resort to enforce compliance with probation, treatment, and programming requirements. The poorly drafted constitutional mandate of Ballot Issue 1 will defeat the shared goals of the Ballot Issue proponents, the judicial system, and all Ohioans concerned about public safety, addiction and prison overcrowding.

A. State-Wide Reforms to Reduce Prison Incarceration & Increase Drug Treatment

1. *Specialized Docket Court Programs*

The Ohio Supreme Court coordinates and certifies creation of specialized court dockets to maintain low-level offenders in local communities. As of August 2018, there were 245 certified specialized dockets in the state serving juvenile and adult felony offenders. Funds to subsidize payroll of these dockets have been allocated through the Ohio Department of Mental Health and Addiction Services. Specialized dockets allow low-level felony offenders to have their charges dismissed upon completion of court-monitored treatment. The dockets include drug courts and reentry programs that allow for structured early releases from prison with a focus on jobs. Courts also have specialized dockets to avoid incarceration of veterans and active duty military personnel caught up in the criminal justice system. And the state has authorized specialized dockets to avoid incarceration and recidivism of mentally ill defendants, felony theft offenders, and individuals convicted of domestic violence.

Multiple independent studies have demonstrated the effectiveness of specialized docket programs in avoiding incarceration and reducing recidivism while protecting the community.

2. *State Sentencing Reforms and Grant Programs*

For drug offenders whose jobs or residences have precluded participation in specialized docket programs, state law now offers multiple opportunities for "Intervention in Lieu of Conviction" programs. Offenders who document completion of community treatment programs may also have their charges dismissed and their records sealed. The latest reform that allows multiple opportunities for Intervention in Lieu of Conviction comes into effect on October 29, 2018.

The state legislature has recently amended sentencing statutes to restrict and reduce incarceration for low-level, non-violent felony offenders. The Targeted Community Alternatives to Prison (T-CAP) legislation passed in 2017. Nonviolent fifth degree felony offenders may no longer be sentenced to prison. Effective July 1, 2018, none of the courts in Ohio's ten largest counties are sending these offenders to prison.

There is discussion of expanding the T-CAP restriction on prison sentences to fourth degree felonies during the next stage of sentencing reforms. Until then, the ODRC has offered Justice Reinvestment and Incentive Grants (JRIG) to counties to assist in maintaining fourth degree felony offenders in local communities.

In 2017, probation violation statutes were amended to limit incarceration of low-level offenders for non-crime probation violations. State prison incarceration of fourth and fifth degree felony probation violators has become a rare sanction of last resort.

The ODRC has offered additional grant funds to enable county governments to maintain felony offenders in the community. In addition to the more recent T-CAP and JRIG grants, they have provided funds to support Intensive Supervision Probation Programs and Day Reporting Programs. The ODRC has also provided funding for Pre-Sentence Investigations to ensure that the Judges have complete offender information before determining appropriate sentences for felony offenders.

Ohio judges have been compliant with these statewide reforms. The impact on prison populations of these changes is only now beginning to become apparent. Issue 1 proponents ignore the impact of these recent reforms in their cost projections and discussions of substance abuse treatment.

B. <u>Ongoing State Sentencing Reforms</u>

In September 2017, the Ohio Sentencing Commission established the Ohio Justice Reinvestment Committee comprising members from all three branches of state government and state and local criminal justice system stakeholders. With assistance from the federal Bureau of Justice Assistance, The Council of State Governments, and The Pew Charitable Trusts, the Committee is charged with developing policy options that are designed to both increase public safety and contain the costs of corrections. A comprehensive analysis of each stage of the criminal justice system is being conducted by reviewing hundreds of thousands of individual data records. Administrative policies, sentencing patterns, crime trends, treatment modalities, and rehabilitation programs are being analyzed. Data-driven policy options are being developed for consideration by the full Committee in late 2018. Policy recommendations will be provided to the legislature for consideration in early 2019.

The state is not ignoring the problems in the corrections, criminal code, and treatment communities. Study, consultation, discussion and deliberation is occurring throughout the state's criminal justice system to address the concerns identified by proponents of Issue 1. And current efforts are working. As the Ohio Prosecuting Attorneys Association recently noted in a statement opposing Issue 1, "most drug addicted offenders already receive treatment in the community."

C. <u>The Current Treatment Infrastructure and Funding Framework</u>

The current state-county partnership in building a diversion, treatment, and rehabilitative services infrastructure has been crafted over the past several decades. The funding framework is diverse and targeted to specific system deficiencies, needs and programs.

The current treatment infrastructure and funding framework primarily exists between counties and state actors because the municipal court system lacks jurisdictional connections to the felony criminal justice system. The integrated and coordinated network between the felony courts, the corrections community, and the treatment agencies is largely separated from the different needs faced by the misdemeanor-based municipal courts.

D. The Impact of Issue 1 on the Treatment Infrastructure and Funding Framework

Issue 1 abandons the county-state criminal justice infrastructure created to reduce prison overcrowding, provide drug treatment, and implement successful rehabilitation programs.

Issue 1 creates immediate constitutional rights for felony offenders without first developing a municipal court infrastructure and funding framework to successfully support the initiative.

Issue 1 was drafted by out-of-state interests without consultation and input from Ohio stakeholders. The California drafters and backers of Issue 1 ignored Ohio's stakeholders and the recent history of criminal justice reforms in the state.

E. Constitutional Fiat vs. Legislative Reform

Social engineering and policy fiat by constitutional amendment is a dangerous and short-sighted path to criminal justice reform. State constitutions were never intended to embrace specific legislative enactments. As Loyola law professor Justin Levitt testified before congress:

> "State constitutions are (and should be) hard to change. That's in part because it's a limit on legislative discretion. But that limit has a significant downside. As a species, we're fairly notoriously bad at accurately predicting unintended consequences."

As former Supreme Court Justice Antonin Scalia explained, legislative reforms reflect the evolution of societal values – society does not change through a constitution. Legislative priorities of the day should not be set in constitutional cement. Unanticipated changes are inevitable in implementation of broad legislative reforms.

Ohio's current constitution is 167 years old. Amendments justifiably have been few and far between. Constitutional amendments should not enshrine social engineering experiments or pseudo-legislative enactments drafted by wealthy interests based outside of Ohio. Government by referendum overrides the constitutional scheme for separation of powers in a policy making framework. As former state representative John Domenick said:

> "…the Constitution is a document that has done pretty well… We should not just let anyone move in and tamper with it, especially outside interests and people with a lot of money who like to influence not only ballot issues but also peoples' minds with fancy advertising."

Wood County Judge Alan Mayberry said Issue 1 "doesn't belong in the constitution." He explained that, "Times change, drugs change, how we approach the issue changes." Fellow Judge Matthew Reger concurred: "With a constitutional amendment like this, we would not be able to

adjust to new drugs, new situations, to new circumstances. We would be handcuffed." While supporting parts of Issue 1, a spokesperson for Governor John Kasich stated that the complex issues of addiction and the war on drugs "deserve a full discussion in the Ohio General Assembly."

Ohio Supreme Court Chief Justice Maureen O'Connor expressed concern that the constitutional amendment will "freeze our criminal drug offense laws in time." Elected state leaders could not pass laws for needed adjustments discovered after passage of the amendment. She explains that:

> "Another constitutional amendment would be necessary to repeal or modify the Issue 1 constitutional amendment. This would take another statewide election."

Justice O'Connor concludes:

> "Issue 1 may be well-intentioned in design, but its passage would gravely endanger Ohioans. It would be devastating in effect."

Issue 1 proponents argue that a constitutional amendment is necessary because the state legislature has refused to act. But legislative reform continues to be an ongoing process. And the Issue 1 mandate itself relies on multiple actions by the "ineffectual" state legislators for full implementation. Issue 1 proponents criticize the decision-makers who the proponents then rely upon to make the critical implementation and funding decisions to make the amendment functional. The legislators and governor are the democratically elected representatives of Ohio's citizens. Issue 1 supersedes the democratic process of electoral accountability.

II. ISSUE 1 PRISON REFORMS JEOPARDIZE PUBLIC SAFETY

While the public focus of the Issue 1 campaign is addiction and drug offenders, there are major provisions in the constitutional amendment that are completely unrelated to Ohio's drug statutes. These "reforms" focus on reducing the general prison population in Ohio, regardless of offense. The provisions mean that more violent offenders and career criminals will be released into our communities.

A. Early Release from Prison

Subsection (C) of the amendment is titled "Sentence Credits for Rehabilitation." The language mandates that ODRC reduce the prison sentences imposed by judges and grant an early release to offenders who participate in prison rehabilitation programs. The early release mandate applies even if the offender does not complete the specified rehabilitative programs. Judicially imposed sentences will be administratively reduced by up to 25%. If an offender completes a program, they may receive an additional sentence reduction of thirty days beyond the 25%.

1. *Judicial Determination of Appropriate Length of Sentence*

Current sentencing laws are individualized to the circumstances of each case. State law provides judges with a range of potential sentences for each criminal offense. The determination of the appropriate length of incarceration in each case is based on several specific factors that must be

considered by the court. It is important to understand the sentencing process and relevant factors because they become meaningless under Issue 1 – offenders must be given an early release in complete disregard of the factors that justify the original sentence imposed by the judge.

First, the length of a sentence must be calculated based on the overriding purposes of felony sentencing: to protect the public, to punish the offender, and to promote effective rehabilitation "using the minimum sanctions that ***the court*** determines accomplish those purposes…" O.R.C. 2929.11.

Second, in determining the length of a sentence, the court must consider information presented at the offender's sentencing hearing. This information includes statements from the victim or victim's representative. The information also includes statements by the offender and arguments of counsel. O.R.C. 2929.19.

Third, the term of incarceration is determined by consideration of factors relating to the seriousness of the crime and the risk of recidivism. O.R.C. 2929.12 lists 13 factors for a judge to consider in assessing the seriousness of a crime. The statute lists 10 additional factors that must be considered in determining the likelihood that the offender will commit a future crime. None of these factors can be considered when the ODRC is required by Issue 1 to reduce a judicially imposed sentence by 25+%.

Fourth, the judge determining the appropriate length of a prison sentence has access to presentence investigation reports. O.R.C. 2951.03. The reports detail the circumstances of the offense, the offender's criminal and social history, and victim impact statements. The reports may include physical and mental evaluations of the offender. None of this offender-specific information is required to be reviewed in Issue 1's early release mandate.

Finally, state law requires mandatory terms of prison incarceration for certain serious offenses. Specifications added to offenses also carry mandatory minimum terms of incarceration. Such specifications include offenses involving gang activity, firearms, major drug offenders, repeat violent offenders, violent career criminals, offenses in school safety zones or proximity to schools, sexually violent predators, use of body armor, peace officer victims, human trafficking, and/or pregnant victims. O.R.C. 2941.141 et seq. Issue 1 means that the term of sentence required by the law and ordered by the judge is no longer mandatory. The 23 required sentencing factors will not be considered. Prison inmates will be constitutionally entitled to significant reductions in mandatory sentences. The enhanced sentences for especially egregious criminal conduct will no longer be mandatory.

2. *Issue 1 Releases Violent and Dangerous Offenders*

Only three types of offenders are exempt from Issue 1's early prison release mandate: "individuals serving sentences for murder, rape, or child molestation." The drafters of Issue 1 obviously felt there were some offenders whose crimes were so heinous that they should not receive the mandatory early release from their prison sentence. But they wrote the amendment without regard for Ohio's stated "purposes of felony sentencing." And they ignored a multitude of violent and dangerous offenders whose early release poses a continuing threat to public safety. Individuals

serving sentences for the following offenses must be granted sentence reductions under the constitutional amendment:

Attempted Murder	Manslaughter	Felonious Assault
Terrorism	Aggravated Robbery	Aggravated Burglary
Human Trafficking	Child Endangering	Kidnapping
Domestic Violence	Sexual Battery	Aggravated Riot
Gross Sexual Imposition	Possession of Weapons of Mass Destruction	
Drug Trafficking	Escape	Aggravated Arson

And individuals are still eligible for early release even if they have *prior convictions* for "murder, rape, or child molestation."

The amendment does not provide the ODRC with authority to deny a request for a sentence reduction. The amendment does not require court review or even notice to the court or victim of the sentence reduction. The sentence reduction is mandatory so long as an offender participates "in appropriate rehabilitative, work, or educational programming." Twelve-step attendance, trustee work, or correspondence classes would qualify for the constitutional entitlement created by Issue 1 – even if the programs were not successfully completed by the inmate.

Proponents of Issue 1 claim there will be a 17% reduction in prison sentences due to this constitutional mandate. They estimate that annual incarceration populations will be reduced by 3,628 convicted felons. These 3,628 felons will be returning to Ohio's 88 counties regardless of whether they completed any rehabilitation services while incarcerated.

The constitutional amendment entitlement to early release supersedes Ohio's sentencing statutes and the firmly grounded and individualized decisions of the sentencing judges. There are valid public safety reasons for discretionary and mandatory terms of incarceration, especially when dealing with violent, dangerous, and career criminals. Issue 1 presents a real and clear threat to public safety by releasing these high-risk offenders back into our communities.

B. Limited Incarceration for Probation Violators

Subsection (E) of the amendment is titled, "Graduated Responses for Non-Criminal Violations of Probation." This section is applicable to all felony offenders – not just drug offenses. It prohibits incarceration of convicted felony offenders in prison for "non-criminal violations of the terms of their probation." A felony offender placed on probation at sentencing or after a judicial early release from prison can only be sent to prison if they are convicted of a *new* criminal offense.

Felony probationers who violate probation conditions and rules without being convicted of a new crime must be maintained in the community. They will have a new constitutional protection from incarceration. This population includes child sex offenders, violent offenders, predators, stalkers, drug traffickers, and every other category of felony offender. Cuyahoga County Judge David Matia, 2017 Chair of the Common Pleas Judges Association, explained that a domestic violence probationer could visit their victim - call, text and violate a "no contact" orders issued as a

probation condition - and would not be subject to incarceration. Victims would no longer have confidence that they would be protected by the judicial system.

Constitutionally protected non-criminal probation violations include: absconding from supervision, violation of no contact orders, continuing substance abuse, and refusing to comply with supervision rules. If a judge orders house arrest or GPS tracking, an offender can refuse with no consequences. If the probation officer or court responds to the noncompliance with more intensive supervision conditions, the offender can also ignore those "graduated responses" with no consequences. If offenders completely ignore all probation conditions and flee the state, they may eventually be arrested on a warrant. But if they have not been convicted of a new crime, they still cannot be sentenced to prison.

Probation programs and specialized dockets already use a system of graduated sanctions to avoid sending violators to prison. When all the sanctions have been used and an offender still refuses to comply with supervision, incarceration is a necessary last resort.

Proponents of Issue 1 claim that 19.6% of new inmate commitments will be reduced by this constitutional mandate. They estimate that an annual average of 4,019 probation violators currently sentenced to prison will remain in their respective communities. Public safety is jeopardized by this mandate.

Issue 1 proponents may argue that noncompliant probationers can be sanctioned with local incarceration in a county jail or community based correctional facility. This claim ignores two critical facts. First, local confinement facilities currently operate at capacity – there are no available jail beds. And second, Issue 1's funding formula provides zero dollars for local incarceration. Subsection (B)(2)(c) of the funding mandate does not include local incarceration in the list of local criminal justice options. Issue 1 would become an unfunded state mandate on local taxpayers.

Issue 1 makes felony probation supervision a hollow and ineffective tool to monitor and supervise offenders in the community. So long as they have no new convictions, these offenders can act with impunity. Our neighborhoods will become significantly more dangerous.

C. <u>The California Experience</u>

Several years ago, California passed three ballot initiatives focusing on felony sentencing reforms. The ballot initiatives shifted state prisoners to local jails, reclassified felony offenses as misdemeanors, and allowed more early releases of state prisoners. The initiatives were promoted as cost-saving measures that would preserve public safety. The result? From 2015 to 2016, violent crime in California increased 4%. El Dorado County Sheriff John D'Agostino says the sentencing reforms are directly to blame for the increase in violent crime. He said, "The pendulum has swung far enough." Nina Besselman, president of Crime Victims United of California, said at a 2018 rally, "I truly hope each and every legislator that sits behind us comfortably will listen to what their so-called reforms have caused the good people, the individuals, the victims of California."

In March 2018, grass roots activist and former state representative Andrea Seastrand was critical of the California sentencing reforms now proposed for Ohio. She asked, "How did California end up here?" She noted that both violent and property crimes had increased across the state for the second year in a row. She reported that violent crime had increased since 2014 after decades of declining criminal activity. She linked the increases to the criminal sentencing ballot initiatives.

Michele Hanisee, president of the Association of Los Angeles Deputy District Attorneys, believes the increase in violent crime rates has one primary cause – release of offenders from prison under sentencing reforms. She says early release and drug crime reclassifications led to the release of 20,000 inmates. Additionally, 60,000 felony parole violators a year were shifted from state prison to county control. Hanisee said:

> "…why are the violent crime rates going up? You have to stick your head in the sand like an ostrich to think that maybe releasing thousands of felons to local probation doesn't have something to do with it."

Proponents' claims of reductions in certain categories of crime are based on poor data. Property and drug crime statistics in California have been skewed downward by the sentencing reforms. Law enforcement opponents of the reforms have pointed out that the penalties for property and drug crimes "are now so minimal that many are never reported, skewing crime statistics."

III. ISSUE 1 RECLASSIFICATION OF DRUG OFFENSES JEOPARDIZES PUBLIC AND ADDICT SAFETY

A. The Decriminalization of Drug Offenses Jeopardizes Public Safety.

Subsection (D) of the constitutional amendment reclassifies low-level felony drug offenses as misdemeanors. And only some misdemeanor sentencing options may be imposed. While normally a first-degree misdemeanor may be sentenced to up to 180 days of local jail incarceration, Issue 1 prohibits any jail sentence for first and second drug convictions. And if an individual violates a condition of their misdemeanor sentence, they cannot be incarcerated. This effectively makes penalties for drug offenses the equivalent of traffic tickets, regardless of which misdemeanor degree of classification they are assigned. They cannot be incarcerated.

The language of subsection (D) does not distinguish between types of drugs. Possession of any type of drug under the amendment would carry a penalty equivalent to a traffic offense – whether it be marijuana, heroin, cocaine, meth, hallucinogens, or prescription medications. Possession of 49 unit doses of cocaine, heroin, and LSD would all become misdemeanor offenses. This is an example of why a deliberative and discerning legislative approach to drug issues would be superior to a broad constitutional brush which lumps all drugs into one category.

Two particular drugs illustrate the public safety problems with Issue 1's broad reclassification of all drug offenses. First is fentynal. Ohio Supreme Court Chief Justice Maureen O'Connor explained this threat to public safety:

> "Issue 1 would make the possession of powdered fentanyl in amounts less than 20 grams a misdemeanor with only probation as the consequence… no possibility of jail time… 19 grams of fentanyl is enough to kill approximately 10,000 people.
>
> This is unconscionable. Drug dealers would be incentivized to distribute fentanyl in amounts less than 20 grams so those caught possessing it would avoid incarceration."

The second example of dangerous drug offense reclassifications under the constitutional amendment are "date rape" drugs. The common "date" rape phrase is misleading, because the criminal use of these substances is more accurately labeled "drug-facilitated sexual assault" (DFSA). Possession of these drugs is decriminalized by Issue 1. The DFSA drugs include Rohypnol, GHB, Ketamine, and Flunitrazepam. Since illegal possession of these drugs is rarely for personal use due to their completely debilitating impact, possession of these drugs is presumably for the purpose of sexual assault. But unless there is independent evidence that the drugs are possessed for intended sexual assaults, the possessor can only be charged with a misdemeanor with no possible jail time under Issue 1.

The reclassified decriminalization of drug possession also sends a disturbing message to our youth and young adults. Openly shooting up heroin on the square in downtown Canton could not result in a custodial arrest. The addict would be cited, given a notice to appear in court, and sent on their way. Louis Tobin, the executive director of the Ohio Prosecuting Attorneys Association, expressed concern that:

> "It sends a message to people that use of drugs like heroin and cocaine and meth isn't a big deal. Use of those drugs will be punished the same way underage drinking is punished. It will lead to a bigger addiction problem."

The Ohio Prosecuting Attorney's Association and the Ohio Common Pleas Judges' Association have officially taken positions in opposition to Issue 1, arguing that it would leave Ohio with some of the nation's most lenient drug laws.

The Ohio Prosecuting Attorney's Association is concerned that the amendment will make it more difficult to prosecute drug traffickers. Traffickers could deliberately deal in small amounts so they can assert simple possession as a defense.

Issue 1's broad reclassification of non-violent drug offenses creates a significant risk to the safety of our neighborhoods.

B. <u>The California Experience</u>

Ballot Proposition 36 in California mandated drug treatment rather than incarceration. UCLA conducted a study of drug arrests before and after implementation of the ballot initiative. The study found that convicted drug users in California were more likely to be arrested on new drug charges after implementation of Proposition 36. The UCLA study reviewed four years of drug-related court cases. In the time period following implementation of Proposition 36, 50% of

offenders were arrested within 30 months, compared to 38% before Proposition 36. The research underscored the difficulty the state had in getting drug offenders into treatment.

California Ballot Proposition 47 in 2014 reclassified several nonviolent drug felonies as misdemeanors. Recent studies of the impact of the ballot issue do not bode well for Ohio:

> "A Los Angeles Times analysis found that the law had emboldened repeat offenders, especially drug addicts who steal to pay for their habits. A recent Public Policy Institute of California study found little evidence that the measure had increased overall crime rates, but the measure desperately needed a mechanism to force chronic offenders into drug treatment. Incredibly, the California Police Chiefs Association says that participation in drug rehabilitation programs has decreased because of the law."

C. <u>Rising Homelessness – Addict Safety is Compromised</u>

There is increasing attention to the impact of drug sentencing reforms on rising homelessness. When drug treatment is mandated, local residential treatment providers have become more aggressive in recruiting client populations. California grass roots activist and former state representative Andrea Seastrand has drawn a connection to aggressive treatment center recruitment and homeless hotspots in the state. She argues that with the decimation of drug courts and the eliminated threat of incarceration, treatment facilities pull in offenders for profit but quickly abandon them when insurance funds are depleted. She reports the addicts end up on the street after being uprooted from their homes for stays in treatment facilities. They are not able to access transitional housing programs because they have not completed the inpatient component of their treatment.

Homelessness has surged in Southern California in recent years. Jordon Graham of the Orange County Register reported in December 2017 that:

> "There's evidence to suggest a portion of the growth [of homelessness] in some Orange County cities, and to a lessor degree in Los Angeles, can be attributed to the rehab industry's aggressive recruitment of addicts – and their lucrative insurance payments – from around the country.
>
> …in an area with one of the highest concentrations of recovery programs – the coastal region from Costa Mesa to San Juan Capistrano – government officials, social workers, police and residents say they're seeing definitive links… They [addicts] end up getting stuck, homeless, in Los Angeles.
>
> …interstate recruitment of addicts by the treatment industry has caused enough problems that federal lawmakers and officials from California and five other states are exploring how to crack down on widespread abuses.
>
> And in a growing number of neighborhoods, residents say they're dealing with the detrimental effects of a recovery business model that can leave addicts stranded on the streets."

The Issue 1 “Safe Neighborhoods” title is misleading. Some Orange County officials and police say:

> “…the population of homeless addicts has grown over the past two years.
>
> …that is partly tied to Proposition 47, a voter-approved California measure that pushed thousands of low-level criminals from state prisons to community-based supervision programs…
>
> City leaders have suggested that former rehab clients living on the street have contributed to increased crime… Costa Mesa’s property crime increased by 41% - driven by a 62% rise in burglaries and a nearly two-fold jump in auto thefts, according to FBI data.”

Constitutional mandates for treatment without correctional system options create a massive and troubling distortion of treatment economics. As the Orange County Register reported in December 2017:

> “…systemic failures in California’s treatment industry, coupled with a relaxation of penalties for some drug violations, encourages out-of-state addicts to stick around. An investigation this year by the Southern California News Group found that treatment patients can be worth hundreds of thousands of dollars in medical payments from insurance companies. That bounty has spawned a secondary industry of so-called ‘junkie hunters’ who receive kickbacks for selling addicts from around the country to the highest-bidding rehab facility, regardless of the quality of treatment… When the insurance money runs out, some homes kick patients to the streets without follow-up support.
>
> …Himmel, the Dana Point sheriff’s department sergeant, insists there is a connection. ‘Back home in another state, if they relapse, those drug crimes are felonies and they might go to jail if they get caught,’ Himmel said. ‘Here, not only is the weather great, but you only get a ticket if they catch you with meth or heroin.’”

The drug sentencing decriminalization connection to homelessness was also observed in Florida in December 2017:

> “In Palm Beach County – home to Delray Beach – the focal point of Florida’s rehab boom – government counts found a 73% increase over the past two years in the number of homeless youth between the ages of 18 and 24, a demographic that’s a prime target for interstate rehab industry recruiting. Prosecutors there have a name for the patient-brokering schemes that send addicts through a revolving door of treatment, relapsing and homelessness: the Florida shuffle.”

IV. ISSUE 1 DRUG TREATMENT MANDATES WILL FAIL

A. Elimination of the Carrot and the Stick

Specialized dockets and Intervention in Lieu of Conviction programs offer the treatment incentives of a felony dismissal and sealing of the record for those offenders who achieve sobriety and successfully complete treatment.

And the threat of incarceration, even for short periods of time, is a strong incentive for probation and treatment compliance. Addiction recovery research has consistently proven that a best evidence-based practice is use of an incarceration threat as a "stick" to motivate compliance with treatment. As Wood County Judge Alan Mayberry explained in reference to Issue 1:

> "If we can't force them to do anything, then they're not going to do it.
>
> …if there's no consequence to [a treatment order], then they just blow it all off, and there's nothing we can do about it. Nothing."

Judge Matthew Reger concurred:

> "…the system they're proposing would increase the number of people who are not getting treatment."

Issue 1 would effectively end the empirically effective specialized docket approach of drug court diversion programs.

Ohio Chief Justice Maureen O'Connor was blunt in her assessment of Issue 1's impact on treatment:

> "…it will have catastrophic consequences for our state. If Issue 1 passes, Ohio may have some of the most lenient drug crime laws in the nation. We could easily become a magnet for substance abuse activity because there will be, in effect, very little consequence to engaging in such behavior."

Chief Justice O'Connor also predicts that the state's drug court programs would be severely hampered:

> "We know, through multiple studies, that drug courts are effective only when they combine the 'carrot' of treatment and support with the 'stick' of judicial accountability, including incarceration when needed. It is this carrot-and-stick approach that enables judges and drug court teams to use a variety of tools to help people overcome addiction. But Issue 1… takes away the stick."

Municipal courts lack the infrastructure to treat and manage the complexities of addiction offenses. Louis Tobin, the executive director of the Ohio Prosecuting Attorneys Association, said the language of the amendment does not specify clear-cut treatment options. Municipalities lack the

decades of experience and cooperation with state actors that lead to the felony drug treatment infrastructure.

B. The California Experience

As noted, California's Proposition 36 is a similar forerunner to Ohio's Issue 1. Only about 25% of the defendants sentenced to drug treatment under the decriminalization law actually completed their court-ordered programs.

A UCLA study that examined over 200,000 Proposition 36 cases over a four-year period found that nearly a third of the sentenced offenders did not even report for treatment. They got lost in the parking lot between the courthouse and the treatment facility. They knew that there were no consequences for a failure to appear for treatment.

The UCLA study found that of those offenders who reported for treatment, about two-thirds failed to complete programming. Only one-third of the one-third who report for treatment were successful.

V. THE ISSUE 1 FUNDING FRAMEWORK IS FUNDAMENTALLY FLAWED

The mathematics employed by Issue 1 proponents do not add up. They are filled with assumptions and misleading data interpretations. Proponents calculate that their prison reduction mandates would save approximately $136 million a year for redistribution to treatment, local services, and victim services. The projected savings are grossly overstated.

The out-of-state funders of Issue 1 are already positioning themselves to blame treatment funding failures on the State of Ohio. In their literature, they state the $136 million savings estimate assumes "that the state complies with the initiative, allots savings as directed in the ballot language, and does not reduce existing spending…" This is similar to their failures in other states. It is never the fault of poorly drafted ballot issues. Their implementation shortcomings are always blamed on prosecutors, judges, and state legislatures.

A. Projected Prison Savings are Flawed

Issue 1 proponents assume that 5.4% of incarcerated offenders – 2,688 inmates – were in prison because drug possession was their most serious felony offense. This statistic does not assume the 2017 sentencing reforms that became effective in summer 2017 and mandatory in summer 2018. If fifth-degree felony drug possession is an offender's most serious felony charge, that offender is no longer in prison under current Ohio law. The Issue 1 number is grossly inflated.

Issue 1 proponents assume that 19.6% of new inmates were incarcerated for minor probation violations. However, new reforms enacted in fall 2017 dramatically limited prison incarceration for fourth- and fifth-degree felony probation violators. Again, the Issue 1 savings calculation is grossly inflated.

ODRC Director Gary Mohr, who resigned from the agency this past August, said he was encouraged that the recent legislative reforms would "divert low-level, nonviolent felony offenders, many convicted of drug possession, from state prisons to local [county] programs." He noted that in 2017 the state prison population dropped nearly 5%. These updated developments were not considered by the California drafters of Issue 1 when they projected cost savings.

Oklahoma voters passed two criminal justice ballot reform measures similar to the provisions in Issue 1 in November 2016. It was claimed that the Oklahoma initiatives saved $63 million in fiscal year 2018. But in August 2018, Director Joe Allbaough of the Oklahoma Corrections Department said the cost savings report was fundamentally flawed. Director Allbaugh explained to the Governor that the report was not supported by facts and overstated the averted costs. The cost savings report incorrectly calculated inmate numbers and made an inaccurate assumption about inmates serving sentences. The agency that issued the report subsequently said they agreed with many of Allbaugh's points and that additional data was needed.

Oklahoma Ballot Question 780 specifically reduced the crime of drug possession from a felony to a misdemeanor. It came into effect in early 2017. In spring 2018, the Oklahoma Department of Corrections requested a $1 billion budget increase, in part to help build two new prisons. The anticipated prison savings from reclassification of drug offenses did not materialize.

B . <u>Treatment Will Not Be Adequately Funded</u>

The proposed amendment creates immediate constitutional entitlements requiring no action by the state legislature, including the sentencing credits for rehabilitation services, the reclassification of drug offenses, and the retroactive application of these entitlements. However, the allocations to pay for these entitlements is substantially delayed in the language of the amendment. The multi-step funding formula is uncertain, filled with assumptions, and initially stretches from 2019 through 2021.

First, there must be a determination of prison cost savings by the General Assembly. Subsection (B)(2).

Second, there is an up-front funding gap. Projected savings must be detailed in the General Assembly's biennial budget beginning July 1, 2019. Subsection (I)(1). The earliest the funds will be available for the November 2018 entitlement is fall 2019. And it will no doubt take several months for the grant application, review, and awards process, taking the criminal justice system into 2020 with no funds for Issue 1 implementation and treatment.

Third, the savings determination must be readjusted at the close of the biennial budget on June 30, 2021. Subsection (I)(3). The nature of the "adjustment" is completely undefined. Long term calculations of savings are even more uncertain given that the reduction of prison population by drug law reclassification is a one-time event. The ballot language contains no guidance on how subsection (B)(2)(d) mandates should be calculated in subsequent bienniums.

Fourth, there is no allocation formula for distribution of the saved funds. Once the available funds are calculated, local governments must submit grant applications requesting funding to cover the

treatment and rehabilitation expenses of Issue 1. Subsections (B)(2)(b) and (B)(2)(c). Entire counties may go without Issue 1 funds. Rural areas may be completely ignored. There is no guaranteed minimum allocation for each jurisdiction.

Fifth, a major uncertainty is the competitive nature of the nature of the grants. Without a formula based on geography, population, or crime data, it will be an open scramble for funds. Municipalities will be competing against each other and juvenile courts to obtain the Issue 1 money. There are no guidelines to determine which grant applicant is most "deserving."

Finally, the impact of Issue 1 on current funding streams is uncertain. Subsection (B)(2)(a) says the new funding plan is "intended to supplement, not supplant, funding obligations of the state…" But current state allocations targeted to counties for services to the same Issue 1 population are necessarily impacted. TCAP, JRIG, specialized docket subsidies, and CCA ISP funds are targeted for county populations that will now be shifted to municipal courts. Issue 1 contains no transition plan for handling of the transferred responsibilities and obligations.

The Ohio Common Pleas Judges' Association released a strong statement in opposition to Issue 1. In part, the Association noted that the amendment provisions failed "to provide adequate funding for its stated goal of rehabilitation."

Richland County Judge Brent Robinson said Issue 1 does not adequately provide the funding required to handle the mandated treatment infrastructure, "further taxing the local resources needed to battle the opioid epidemic."

The Ohio Prosecuting Attorney's Association explained the shortcomings of ***California's*** treatment funding plan:

> "The independent Legislative Analyst's Office estimated that Proposition 47 would result in savings in the low hundreds of millions of dollars annually. The State awarded the first grants last June, three years after the passage of Prop 47. Grants totaled $103 million over three years. A fraction of what was projected."

C. <u>Municipal Courts Will Not Be Adequately Funded</u>

The Ohio Common Pleas Judges' Association noted that Issue 1 proponents mistakenly assume that a municipal court infrastructure already exists to handle the complex needs of repeat, addicted offenders. The Association expressed concern that the "amendment does not provide adequate funding for treatment infrastructure nor for treatment itself."

The Ohio Prosecuting Attorney's Association explains that:

> "The proposal is another shift of financial responsibility from the state to local government. It is not clear that the savings will be anything other than one-time savings. In year two, and thereafter, once the target population of non-violent drug possession offenders is out of prison, there are no savings to the State. Local governments, however, will remain responsible for the costs of treatment, probation, and jail. California, which adopted a

similar proposal in 2014, has realized only a fraction of the savings that they projected there."

D. <u>There Are No Funds for the Increase in Local Incarceration</u>

Issue 1 mandates are likely to increase incarceration in local jails. Felony offenders who violate probation can only be incarcerated locally. Drug offenders with multiple misdemeanor arrests can only be incarcerated locally. Increased crime from convicted felons granted early releases from prison will necessarily be incarcerated locally.

The increased burden on local confinement facilities is an unfunded Issue 1 mandate. And releases due to jail overcrowding present a threat to public safety.

Proponents argue that subsection (B)(2)(c) allocates 15% of funds to the existing local criminal justice system. However, the list of approved local expenditures under this provision is specific, and it does not include confinement facilities. And these funds are allocated by grants. Proponents appear to be arguing that County Sheriffs should write grant proposals requesting Issue 1 funds to confine arrested and judicially sentenced criminals in their jails. The entire focus of Issue 1 is de-institutionalization of criminal offenders. Since increased funding of jails is not mandated, it is unlikely to materialize.

E. <u>Victim-Focused Needs Will Not Be Adequately Funded</u>

Issue 1 provisions for funding of crime victim trauma programs appear to be a cynical political attempt to portray the plan as a compassionate response to crime victims. But the veneer of concern about crime victims is shallow window dressing. The funds are not targeted to victims of felons receiving mandated early releases from prison. Issue 1 funds are not targeted to victims of crimes committed by the increased Issue 1 probation violators remaining in local communities. The funds are not targeted to victims of drug-driven crimes committed by reclassified misdemeanant offenders. The funds are not earmarked to pay restitution for the losses that crime victims have suffered. And there is nothing in the amendment to coordinate victim services with the rights recognized in the recently enacted Marsey's Law.

The lack of incarceration as an option to enforce victim restitution orders will hurt victims of crime. Failure to pay restitution would be a "non-crime" probation violation, meaning no incarceration would be permitted. As Wood County Judge Matthew Reger explained, "Issue One's passage will eliminate the court's ability to secure restitution for crime victims. Criminals will know that violating a court probation order to pay restitution will have no consequences." The Ohio Common Pleas Judges' Association also stated that Issue 1 would "eliminate the court's ability to secure restitution for crime victims."

Finally, prison early releases are mandated in complete disregard of victim input or rights.

This past spring California crime victims' groups publicly protested, calling for a rollback of the state's referendum-mandated felony sentencing reforms.

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