



Judicial Impact Statement

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FELONY SENTENCING and JUVENILE JUSTICE REFORM 129th General Assembly

House Bill 86
Rep. Lou Blessing
Rep. Tracy Heard

The Ohio General Assembly is considering reform of Ohio's felony sentencing laws and juvenile justice system. The reforms are intended to reduce the amount of public funds used to operate state prisons, to reduce the number of offenders in prison for violation of low to moderate level offenses, to increase the availability of community control sanctions, to provide the right to a jury determination of all significant facts consistent with the U.S. and Ohio Constitutions, and to reform the juvenile justice system. The Ohio Judicial Conference has prepared this Judicial Impact Statement to inform the Ohio General Assembly and other interested parties about the impact that these reforms may have on the judiciary, as well as to submit our recommendations for improving the proposals and the administration of justice.

Reforms currently being discussed and embodied in House Bill 86, will have a significant impact on Ohio's judiciary. While in most instances the proposed changes will improve Ohio's justice system, some provisions need careful attention. In general the reforms will bring Ohio into compliance with federal constitutional requirements, promote fiscal efficiencies in the state prison system, encourage greater reliance on community control sanctions, and reform the juvenile justice system.

The impact of these reforms is discussed in three parts; part one focuses on the constitutional requirements of the right to a jury trial sometimes referred to as the "*Foster fix*," part two discusses the proposals to reform felony sentencing, and part three talks about reforming the juvenile justice system. Underpinning our recommendations is respect for the independence of the three branches of government and the unique role each branch plays in the checks and balances that are so crucial to the American system of democracy. While our recommendations will focus on enhancing judicial discretion, promoting clarity of the law, and ensuring Ohio's compliance with the U.S. and Ohio Constitutions, we also share with the other branches of government a commitment to efficiency in managing state institutions, protecting public safety and preserving public confidence in the law and the justice system.

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.

PART ONE: RIGHT TO A JURY TRIAL: JUDICIAL FACT-FINDING DURING SENTENCING.

During the last decade there have been a number of decisions by the U.S. Supreme Court regarding the meaning of the 6th Amendment, with a majority of the court moving in the direction of broader protections for the 6th amendment right to jury trial.¹ In light of these U.S. Supreme Court rulings, the Supreme Court of Ohio ruled that Ohio's mandatory criminal sentencing statutes were unconstitutional to the extent that they required judges to conduct independent fact finding that involved an element of the offense that was not proven before the jury beyond a reasonable doubt. Specifically, *State v. Foster* struck down sections of Ohio's Revised Code that dealt with maximum concurrent sentences, consecutive sentences, repeat violator sentences, and violent offender and major drug offender sentences. The legal effect of *Foster* has been to remove unconstitutional provisions from the Ohio Revised Code. What remains to be done is for the Ohio General Assembly to re-write the text to match that legal meaning.

Judicial Impact and Recommendations. The Ohio Revised Code contains language that was declared unconstitutional in *State v. Foster*. That language is null and void and the continued inclusion of those unconstitutional code sections contributes to the confusion of all Ohioans, including members of the Ohio Bar. To make changes consistent with U.S. Supreme Court and Supreme Court of Ohio rulings would improve the clarity of existing law, promote public understanding of the law, and promote public confidence in the law and legal system. The Ohio Judicial Conference recommends the removal of the sections of the Ohio Revised Code that were declared unconstitutional and severed from the Ohio statutes by *State v. Foster*. This would satisfy the immediate need for clarity in this area, it would promote harmony between the Ohio Revised Code and case law, and it would promote public confidence in the law and legal system. The Ohio General Assembly should take the following steps:

(1) Eliminate R.C. 2929.14(B) and (C), 2929.19(B)(2) and 2929.41(A) which were excised in their entirety by the Supreme Court of Ohio in *State v. Foster*.

(2) Eliminate R.C. 2929.14(E)(4) which required judicial findings for consecutive terms, 2953.08(G) which referred to review of statutory findings for consecutive sentences in the appellate record, and 2929.14(D)(2)(a) (iv) and (v) and 2929.14 (D)(3)(b) which required findings for repeat violent offenders and major drug offenders.²

¹ *Apprendi v. New Jersey*(2000), *Ring v. Arizona* (2002), *Blakely v. Washington* (2004), *U.S. v. Booker* (2005), *Cunningham v. California* (2006), and *Oregon v. Ice* (2009)

² In February 2006 ORC Section 2929.14(D)(2)(b) was declared unconstitutional in *State v. Foster* (2006). In May 2006 the General Assembly corrected this infirmity in HB 95, 126th and it became effective in August 2006. Unfortunately HB 95 altered 2929.14 (D)(2)(a)(iv) and (v) in a way that is inconsistent with the *State v. Foster* ruling. That is why 2929.14 (D)(2)(a)(iv) and (v) needs to be modified instead of 2929.14(D)(2)(b). In December 2010 the Supreme Court of Ohio ruled in *State v. Hodge* that ORC sections 2929.41(A) and 2929.14(E)(4), though unconstitutional in 2006 could be re-enacted by the General Assembly given the recent U.S. Supreme Court ruling in *Oregon v. Ice*, which ruled that the 6th Amendment does not inhibit States from assigning to judges, rather than juries, the finding of facts necessary to the imposition of consecutive sentences for multiple offenses.

Following this recommendation would restore consistency to the law but it would not restore the sentencing guidance the legislature intended when enacting the *pre-Foster* language. Ohio judges will accept and follow policy guidance in sentencing to the extent that this can be restored without violating constitutional principles. Restoring such guidance in terms of legislative preference for the most cost effective means that satisfy the purposes and principles of sentencing will serve to moderate sentencing practices among judges.

The Ohio Criminal Sentencing Commission has made recommendations for restoring this guidance in favor of community control, minimum prison terms, reserving maximum terms for the worst offenders, and concurrent sentences for offenders with multiple offenses, all where consistent with the statutory purposes and principles of sentencing. These recommendations are founded in good reason and are likely to have a moderating effect on prison sentences overall.

One recommendation of the Ohio Criminal Sentencing Commission deserves further consideration and modification. In addition to giving guidance with a preference for concurrent sentences for offenders who commit multiple offenses, the recommended language would mandate concurrent sentences unless the sentencing judge justifies in its journal entry, subject to appeal, sufficient reasons for imposing a greater sentence. This provision unnecessarily restricts the judicial discretion of the trial judge, invites unwarranted and expensive appeals funded by the state, and invites appellate panels to insert their judgment for that of the trial judge. Without this provision trial courts are always subject to review for abuse of their discretion. This provision will result in extensive litigation questioning the sufficiency of the trial courts justification whenever a consecutive sentence is imposed, often at state expense, and undermine public confidence in the administration of justice.

While the preference for a concurrent sentence is well grounded in economic and rehabilitative policy, the mandate is an undue restriction on judicial discretion. The circumstances surrounding offenders who commit multiple offenses very often justify sentences beyond concurrent terms and trial judges well trained and experienced in balancing these interests are in the best position to make these determinations. The law should recognize that consecutive sentences are often appropriate and consistent with the principles and purposes of sentencing. If the legislature desires to reign in the unusual imposition of a sentence that exceeds some arbitrary limit, then it should set that limit at a point beyond the imposition of a concurrent sentence.

PART TWO: SENTENCING REFORM –Prison Population Reduction

Dire economic times and a rapidly expanding prison population have conspired to create severe overcrowding in Ohio's correctional facilities that will be difficult to solve given the fiscal constraints that Ohio is facing. The need to reduce the cost of incarcerating offenders has led to a number of sentencing reforms. The reforms are intended to hold offenders accountable in more meaningful ways, to help administrators to make smarter and more effective use of community correction programs, and to strengthen probation supervision.

The Ohio Judicial Conference appreciates the opportunity to participate at early stages in the development of this legislation. An overwhelming majority of the provisions in this legislation will have a positive impact on the courts and improve the administration of justice. The economic challenges that Ohio faces are daunting and the Ohio Judicial Conference wants to provide information that will help policy makers to craft effective policy solutions. This section of the Judicial Impact Statement describes the probable, practical impact of proposed felony sentencing reforms, discusses the impact that reforms to reduce the prison population will have on the administration of justice, and makes recommendations for furthering the policy goals of lawmakers while minimizing unintended and negative consequences on the courts.

Impact and Recommendations.

House Bill 86 is intended to save money and reduce the prison population. While primarily this approach is a policy shift that is within the legitimate authority of the legislative and executive branches of government, in some instances these reforms will have a dramatic impact on Ohio courts. The reforms that will have the most dramatic impact on Ohio's courts are listed below with a discussion of impact and a recommendation to mitigate the negative impact on the courts.

(1) House Bill 86 Undermines Judicial Discretion. There are several changes to the Ohio Revised Code that have been proposed in an effort to serve the public policy of reducing the expensive costs associated with prison incarceration by relying more on local community control sanctions whenever possible. While the Judicial Conference recognizes the authority of the General Assembly to set sentencing policies, the General Assembly should recognize the separate and independent role that judges play in sentencing. The proper administration of justice requires that judges exercise discretion. 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 crimes. 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 fair and proportionate in individual cases. Furthermore, judges have unique insights into the consequences that particular sentences will have upon individual offenders, their victims, and the general public. It is our hope that the reforms adopted by the Ohio General Assembly will respect the constitutional role that judges play in sentencing as well as in the other related areas that are discussed below.

Recommendation: Enhance judicial discretion.

(2) House Bill 86 Reduces Sentencing Options—Replaces Prison with Mandatory Community Control Sanctions for Certain First Time Felony 4 and 5 Offenders (R.C. 2929.13). House Bill 86 creates mandatory use of community control sanctions for felony 4 and 5 offenders (R.C. 2929.13). This prohibits judges from sentencing felony 4 and felony 5 offenders to prison and requires judges to impose community control sanctions instead. This limits the capacity of judges to fashion sentences that are appropriate to the individual facts and circumstances of a case. It shifts the discretion away from the judge to the prosecution and the selection of charge in the plea bargaining process. Likely results of enactment of this provision include convictions for more serious offenses and short prison stints combined with judicial release, or longer terms in local jails that could displace misdemeanants in already crowded local facilities.

Judges already overwhelmingly impose community control sentences on these offenders pursuant to current law at R.C. section 2929.13 which prefers community control and outlines certain factors which favor prison over community control. Any statutory restriction on a prison sentence for these offenders must be harmonized with R.C. section 2929.13. The version of this legislation adopted by the House of Representatives recognizes this and represents a significant improvement by moving the restricting language to the more appropriate place in the code and harmonizing the law by expanding the exemptions and applying the remaining factors favoring prison to those offenders who do not fall under the restriction. It still retains the mandatory language for a lesser range of offenders. One favored option would be to give the court discretion to impose a prison sentence if, having first considered community control the judge determines that no combination of available community control sanctions will adequately fulfill the overriding purposes and principles of felony sentencing set forth in section 2929.11 of the Revised Code. At a minimum, the legislature should carefully consider each of the current factors favoring prison and determine if, as a matter of policy they should be retained for this or any class of offenders. Judges will respect and follow the clear guidance ultimately provided.

The Ohio Judicial Conference recommends that the reform proposal maximize the discretion of judges to apply community control sanctions whenever appropriate, but leave open the possibility for judges to incarcerate felony 4 and felony 5 offenders.

Recommendation: Retain preference for community control sanctions, and permit judges to impose prison sentences when appropriate and consistent with the purposes and principles of sentencing established by law.

(3) House Bill 86 Reduces the Amount of Time Served by Felony Three Offenders (R.C. 2929.14). House Bill 86 proposes to make the penalty range for felonies of the third degree to nine, twelve, eighteen, twenty-four, and thirty-six months. The current penalty range is one, two, three, four, and five years. This change will reduce the maximum possible punishment for felonies of the third degree by 40% and the median for the new range is eighteen months rather than three years. The goal of this proposed change is to reduce the number of prison beds by reducing the average amount of time being served by offenders who commit third degree felonies.

Historically, the Ohio Judicial Conference has been reluctant to comment on legislation that changes criminal penalties because these changes are substantive policy choices made by the legislative branch. However, judges think this penalty change will impact the administration of justice by affecting the willingness of the parties to engage in plea bargaining where there is not a true intermediate range between upper and lower level felonies. Further, this change will undermine public confidence in the fairness of the sentencing scheme by impairing the judge's ability to fashion a sentence that is proportionate based on the seriousness of the offense.

First, as a practical matter, it is likely that prosecuting attorneys will be much more reluctant to plea bargain an offense which is classified as a first or second degree felony to a lesser offense which is a felony of the third degree. Under current law, prosecutors know that a first or second degree felony, if reduced to a third degree felony gives the judge the option of imposing a five-year prison term if the judge feels it is warranted. If the penalty range is changed as proposed, it is likely that many prosecutors will cease to plea bargain below the second degree felony level. This could result in more and longer prison sentences and an overall increase in the number of prison beds required.

Next is the issue of proportionality. There are serious offenses that are classified as felonies of the third degree such as unlawful sexual conduct where there is a 10 or more year age difference, sexual battery, a second felony OVI offense, child endangerment where there is serious physical harm cause to the victim resulting from the violation of a duty of care or protection, aggravated vehicular assault, abduction, robbery, burglary, aggravated involuntary manslaughter, and third offense domestic violence. These offenses are predominantly crimes of violence and bear more similarity to first and second degree felonies in terms of sheer gravity, than to fourth and fifth degree felonies.

Recommendation: Retain the ability for the judge to impose a four or five year penalty for felonies of the third degree.

(4) House Bill 86 Reduces judicial discretion over low to moderate risk offenders. House Bill 86 creates the Ohio Risk Assessment System or ORAS (R.C. 2929.15) as a tool to determine the risk that an offender will re-offend. It prohibits courts from sentencing certain Felony 4 and Felony 5 offenders to a community-based correctional facility if that offender was determined to be a "low to moderate risk" on the ORAS. Instead of structuring a system where ORAS results can be used to better inform judicial sentencing decisions, the proposal uses the ORAS tool to reduce judicial discretion to fashion a proper sentence that punishes the offender, protects the community from future offenses, and uses resources in an economical and productive way. This new tool has great potential and should be used to inform judicial discretion, not limit or replace it.

The Judicial Conference recommends that the General Assembly remove or modify this provision to clearly communicate a preference for community control for this class of offenders and retain judicial discretion over sentencing decisions that involve offenders with a low to moderate risk to re-offend. Judicial sentencing practices can best be achieved through training, evidence-based analysis, and management of funding through performance based evaluation of community corrections programs. These efforts will ensure that judges are fully aware of the statutory preferences in the law and the most effective and efficient use of all resources, local and state, to affect offender behavior and carry out the principles and purposes of sentencing.

Recommendation: Retain judicial discretion over low to moderate risk offenders.

(5) House Bill 86 Expands Options to Reduce Time Served. House Bill 86 provides three ways that criminal offenders can serve less time in prison. These options are mutually exclusive.

- a) Risk Reduction Sentences (R.C. 2929.143 and R.C. 5120.036). This proposal authorizes courts to recommend that certain offenders be eligible for a reduced sentence based on the offender's participation in risk reduction programming. The proposal contains certain limits or concessions, including that participating offenders will not accumulate earned credit, that the prosecutor and the defense attorney must agree to the risk reduction sentence, that the offender must agree to risk assessments for subsequent offenses, and that the offender must participate in a treatment program ordered by Ohio Department of Rehabilitation and Correction.

This proposal will have a positive impact on the administration of justice by encouraging rehabilitation and reducing the cost of longer prison stays. It is recommended that the Ohio General Assembly remove the requirement that the prosecutor and defense attorney agree to the sentence. It is sufficient for the prosecutor and defense attorney to express their views to the judge at sentencing. The court should, as is its role, have full authority to make the final sentencing decision and the final release decision with the option of scheduling a hearing prior to release. This optional hearing enhances the credibility of the program by allowing judicial review. Another option to encourage judges and other criminal justice interested parties to embrace this provision would be some third party oversight of the programming offered and the standards for determining successful completion. We also suggest that the law state whether it is necessary that the judge notify the offender that they are a candidate for this program and at what point in the proceedings that notice should take place.

Recommendation: Remove the requirement for the prosecutor and defense to agree in advance; authorize judges to hold a hearing with offenders prior to their release; clarify whether and when it is necessary for the judge to provide notice to the offender.

- b) Judicial Release (R.C. 2967.19, 2929.20). This sentencing reform proposal adds a new procedure for judicial release and creates a new class of post-incarceration offenders. The provision establishes procedures and authorizes the Director of the Department of Rehabilitation and Correction to petition courts for release of certain offenders who have served 85% of their sentence. Offenders serving life terms for specified serious offenses are not eligible for release under this provision. The hearing and notice requirements mirror current law procedures for judicial release. However, if release is granted under this provision, the offender is under the supervision of the Adult Parole Authority, rather than the court; the court must order electronic monitoring for first and second degree felony offenders for the balance of the sentence which may or may not continue depending on whether the offender is subject to post-release control.

The Ohio Judicial Conference supports authorizing the Director of the Department of Rehabilitation and Correction to petition courts for early release of certain offenders who have completed at least 85% of their sentence. In the course of the evolving sentencing reform

discussion, the cumulative effect of minor changes to the original concept have resulted in the creation of post-incarceration procedures that will be difficult to administer. The court is more likely to grant release, if the court establishes the conditions of supervision and maintains supervisory authority. Mandatory electronic monitoring makes the level of supervision stronger, but also more expensive. Certainly electronic GPS monitoring should be a condition of release for certain offenders, but the judge should have discretion to manage that condition to best supervise the offender at a sensible cost. Clear delineation of authority is more likely to result in sensible determinations consistent with the specific risks associated with the release.

Additionally, under current law the definition of eligible offender excludes any person who is serving an aggregate prison term that is more than ten years. Prison terms of such magnitude suggest the underlying offense is particularly severe and it is not likely that judicial release would be granted in these cases. However, judges observe that there may be circumstances where a judge would grant judicial release. Allowing judges the discretion to consider and grant judicial release in these cases assures that only those offenders who need to be incarcerated are incarcerated.

Recommendation: Restore authority for court supervision through control; require the court to consider electronic monitoring for first and second degree offenders and remove the mandate; remove the ten year cap on eligibility for judicial release.

- c) Earned Credit (R.C. 2967.193). This proposal increases the amount of credit offenders may earn towards a reduction in their sentence for each completed month during which the offender productively participates in programming focused on rehabilitation. The legislation specifically exempts offenders serving sentences for sexually-oriented offenses, and those offenders approved for risk reduction sentence. The legislation also specifies that the aggregate days of earned credit cannot exceed 8% of the total prison term.

The Ohio Judicial Conference believes this is a policy choice for lawmakers. Judges have observed that earned credit, because it is earned, is better than “good time.” Moreover, to be consistent with “truth in sentencing,” less time is better than more and oversight of programs is essential to maintain public confidence that the programs offered are legitimately based in rehabilitation and not just an early release mechanism to manage beds.

Recommendation: None

(6) House Bill 86 Expands Intervention in Lieu of Conviction (R.C. 2951.041). House Bill 86 expands eligibility for intervention or treatment in lieu of conviction for those offenders with mental illness or developmental disabilities and offenders charged with the following criminal offenses: theft (2913.02), unauthorized use of a vehicle (2913.03), passing bad checks (2913.11), 2913.13, misuse of credit cards (2913.21), forgery; identification card offenses (2913.31), or non-support or contributing to non-support of dependents (2919.21). Judges have found existing programs that permit intervention in lieu of conviction to be very successful at treating mental illness, alcohol addiction, and drug addiction that often lead to criminal behavior. Once the individual receives treatment, usually the criminal behavior ceases. We believe that expanding the number of criminal offenses that are eligible for intervention in lieu will have a very positive impact on the administration of justice.

Recommendation. None

(7) House Bill 86 Replaces Prison Sentences with Community Control Sanctions for Felony Non-Support Violations (R.C. 2919. 21). House Bill 86 specifies that before putting someone in prison for failing to pay child support, spousal support, or other support order, the court must first consider placing the offender on one or more community control sanctions. Furthermore, it provides that this preference for community control does not apply if the court determines that the imposition of a prison term is consistent with the purposes and principles of sentencing or if the offender has a previous conviction for non-support and was either sentenced to a prison term for the violation or was sentenced to one or more community control sanctions. This permissive authority will have a positive impact on the administration of justice. The Department of Rehabilitation and Correction has pledged to expand grant funding to all 88 counties for proven successful programming for these offenders.

Recommendation: None

(8) House Bill 86 Sets Higher Standards for Hiring, Training, Evaluating and Reporting on Probation (R.C. 2301.27, 2301.271, 2301.30, 5149.311). House Bill 86 establishes procedures for the court to follow when hiring a chief probation officer and directs the adult parole authority to establish minimum training standards. There are also supervisory and data reporting requirements that have been added to the current duties of the common pleas court. These reporting requirements include: publishing the minimum number of supervisory contacts; establishing a graduated response policy that gives notice of what types of violations will be addressed administratively and what types of violations will be addressed by the court; and reporting to Department of Rehabilitation and Correction on the number of persons on probation (probationers under supervision at the beginning of the month, probationers added during the month, probationers terminated during the month, and total probationers served during the month). Prior to amendments in the House of Representatives, this provision also authorized the Department of Rehabilitation and Correction to add any other data elements that the Department believes will allow for better measurement of the types of individuals placed on probation and their outcomes at termination.³

House Bill 86 also creates the Probation Improvement Grant and Probation Incentive Grant. These new provisions require Department of Rehabilitation and Correction to establish and administer grant programs to provide funding to the courts that are successful in reducing the number of offenders sent to prison. Department of Rehabilitation and Correction is required to specify the policies, practices, and programs funded by the grant and must conduct evaluations of the effectiveness of those programs. Further, the Department of Rehabilitation and Correction may deny funds if the court fails to achieve the expectations. In order to be eligible for either grant, the court of common pleas probation department must comply with the statutory hiring, training, and reporting requirements and must use the single validated risk assessment tool.

³ Section 8 – Supreme Court of Ohio Rule of Superintendence regarding collection of statistical data relating to operation of probation departments. Uncodified provisions of HB 86 request adoption of a Rule of Superintendence that provides for the collection of the following data: a count of the number of individuals placed on probation; a count of the number of individuals terminated from probation in the month covered by the report, listed by type of termination, including revocation; and the total number of individuals under supervision on probation. This data is to be collected on a monthly basis.

The Ohio Judicial Conference supports the establishment of statewide standards, identification of effective probation practices, and the collection and evaluation of outcome and performance data. We recognize that this will give the executive and legislative branches the tools they need to evaluate the success of their policy goals, maintain program accountability, measure program outcomes and results, and modify programs as needed. Since the courts will have the burden of implementing the training standards and supplying much of the information needed for this performance based evaluation, Ohio judges should be involved in developing training standards and any determination to expand the information that will be collected. Specifically, we recommend that the General Assembly include language in 2301.30(G) that requires the court's agreement before the Department of Rehabilitation and Correction adds data elements. The approach used in the House passed version of the bill, requesting the Ohio Supreme Court to develop reporting requirements by rule, sufficiently satisfies this necessity regarding new data. A provision should be added to require the Department of Rehabilitation and Corrections to consult and collaborate with the Supreme Court of Ohio in developing any standards for training probation officers.

Administrative burdens and separation of powers issues could result from a broad statutory authority granted to the Department of Rehabilitation and Correction to collect data that would "allow for better measurement of the types of individuals placed on probation and their outcomes." The Ohio Judicial Conference is aware that one of the objectives of sentencing reform as drafted in House Bill 86 and the Justice Reinvestment Policy framework is to strengthen probation supervision by establishing statewide standards that define effective probation policies and practices followed by the collection of data indicating outcomes in order to inform policymakers and control costs. The Judicial Conference supports this objective. Nonetheless, the judiciary must maintain its status as an independent branch of government in responding to the need for enhanced statistical data.

It is well recognized that business managers and policy makers need data in order to make well informed decisions. Judges desire the same maximum level of information before making sentencing determinations. Policy makers should be careful when linking automatic or mandatory justice system funding allocations to statistical outcomes and financial goals. The principles that serve as the foundation of our justice system are at the very core of the purpose of government. Despite judicial recognition of the reality of limited funding, judges remain committed by oath to those constitutional and statutory foundation principles.

Recommendation: Subject all subsequent additions to the information to be reported by courts and probation departments and the development of training standards to the authority of the judicial branch. Avoid mandating judicial decisions based on statistical reports and funding mechanisms.

(9) House Bill 86 Redefines Absconding from Adult Parole Authority Supervision (R.C. 2921.34). House Bill 86 specifies that offenders under supervised release detention are not subject to criminal prosecution under the escape statute. Supervised release detention is defined as supervision by a DRC employee while the offender is on any type of release other than transitional control or placement in a community-based correctional facility. The provisions extend to nine consecutive months the period of time that an offender can avoid being prosecuted for failing to report to the Adult Parole Authority as a condition of their supervision, and it removes the consecutive service requirement. This is a policy determination by the legislature in defining the elements of the offense of escape. The time element should be sufficient for the adult parole authority to recover most absconders and manage administratively under adult parole authority rules without further prosecution. However, any such “grace period” may encourage the offender to push the limit.

Recommendation: None.

(10) House Bill 86 Defines Concurrent Supervision Offenders (R.C. 2951.022). House Bill 86 defines concurrent supervision offenders and establishes procedures for the supervision of these offenders. Concurrent supervision offenders are offenders who are not incarcerated and are subject to supervision by multiple supervisory authorities. In general, and subject to statutory criteria, these offenders will be supervised by the court that imposed the longest possible sentence. The new provisions allow courts to enter into agreements to transfer supervision and provide that, in the event of a subsequent conviction, jurisdiction to sentence the offender may be transferred to the supervising court. Judges believe this provision of House Bill 86 will have a positive impact on the judiciary and the administration of justice overall, however they note that some courts serving as supervisory courts may not have the capacity to meet the administrative burdens of collection and distribution of the concurrent supervision offenders’ financial obligations.

Recommendation: Amend this provision to clarify that the supervising court has full authority over collecting all of the concurrent supervision offender’s financial obligations and that the supervising court may order the concurrent supervision offender to pay financial obligations to the original sentencing court.

(11) Eliminate the Penalty Distinction Between Cocaine and Crack (R. C. 2925.03, 2925.05, 2925.11, 2929.01). House Bill 86 eliminates the legal distinction between cocaine and crack by increasing the penalty for large amounts of powder and decreasing the penalty for small to medium amounts of crack. This is a policy decision within the exclusive control of the Ohio General Assembly and the Governor of Ohio. Nonetheless, judges believe this penalty equalization will improve public confidence in the law.

Recommendation: None.

(12) Clarify that the Validated Risk Assessment Tool Need Only Be Obtained If A Risk Assessment Is Ordered by the Court. The current language requires the stated courts to use the single validated risk assessment tool selected by the department of rehabilitation and correction. It is unclear if this is required for every case or only when an assessment is ordered. Many courts, especially high volume courts like Municipal and County Courts, do not need to order an assessment in order to proceed to sentencing.

Recommendation: Clarify that if the court orders an assessment then the state selected tool shall be the tool used.

(13) Change the Direction from "Publish" to "Establish" Standards for Supervision of Probationers. The current language requires the various probation departments to "Publish" standards for supervision of probationers. Courts and Probation officers would prefer the word "Establish" which would satisfy the intent that such standards be created and followed but avoids questions regarding how publishing would be accomplished. There was also concern that publishing would give information to the offenders that might encourage them to take advantage of the opportunity to push the limit.

Recommendation: Change the proposed language in R.C. section 2301.30 (D) from "Publish" to "Establish" in order to give effect to the intent to create local standards and avoid unnecessary publication.

PART THREE: JUVENILE JUSTICE REFORM

The separate juvenile justice system in the United States was created during the late part of the nineteenth century as one part of the larger Progressive Movement, which also included changes in child welfare and child labor laws. This separate system was created because, as a society, we began to recognize the inherent differences between juveniles and adults and believed that juveniles should not, therefore be subjected to the same punishments as adult criminal offenders. The reformers “believed that society’s role was not to ascertain whether the child was “guilty” or “innocent,” but “What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.”⁴ As such, it was believed that it was more appropriate for the child to be “the object of the state’s care and solicitude,” and that the state should proceed as *parens patriae* or “for the purpose of protecting the...interests and the person of the child.”⁵ What developed then, was a system of juvenile courts that granted judges wide discretion and used very informal processes and rules in order to give judges the flexibility to act creatively and in the best interests of the child.

Despite the recognized differences between juveniles and adults, the juvenile justice system came under attack during the second half of the twentieth century for what seemed to be an arbitrariness of decisions in juvenile cases that was caused by the lack of procedural safeguards and by the “unbridled discretion” of judges who lacked training.⁶ The response was a series of decisions by the United States Supreme Court that granted juveniles many of the procedural protections available to adults. Not long after this, the public started to question the value of the juvenile justice system as a whole due to a spike in juvenile crime and the perception that the system was soft on juveniles who were committing serious crimes. State legislatures nationwide promptly responded to these criticisms by enacting legislation expanding the class of juveniles that could be transferred to adult court, requiring juvenile courts to transfer some serious juvenile offenders to adult court, and requiring mandatory sentences for certain crimes.

Since the late 1990’s, when many of the more stringent reforms in juvenile justice were made, youth advocates have pushed for policies to be adopted that would require the incarceration of fewer juvenile offenders. Their theory is that the “get tough” policies of the 1990’s “violate what we know about youth development and behavior, and are producing worse, rather than better, outcomes for youth, communities, and taxpayers.”⁷ This modern juvenile justice reform movement has led to important changes in juvenile justice practice in Ohio, and is the backdrop for the juvenile justice reform amendments that were recently added to House Bill 86.

Impact and Recommendations. House Bill 86 contains several provisions that will reform the juvenile justice system in Ohio. The bill will codify a juvenile competency statute, make Ohio a member of the Interstate Compact for Juveniles, eliminate most mandatory transfers to adult court, and grant judges more discretion to grant early judicial release to juvenile offenders serving time on gun specifications. These issues will be discussed separately below.

⁴ *In re Gault*, 367 U.S. 1, 15 (1967).

⁵ *Id.* at 16.

⁶ *Id.* at 19.

⁷ See A ROADMAP FOR JUVENILE JUSTICE REFORM (2008), Annie E. Casey Foundation, KIDS COUNT Data Book, p. 6.

House Bill 86 Provides Court Procedures for Determining Juvenile Competency (R.C. 2152.51). Under current Ohio law, there is no statute that provides specifically for competency determinations for juveniles. Instead, over time each of the eighty-eight counties individually has molded the adult competency statutes, which are found in R.C. 2945.37 through 2945.39, for use in juvenile proceedings. This has led to a lack of uniformity in juvenile competency determinations, and has proven difficult for courts to implement and use given the vast differences between adults and juveniles in areas such as, maturity, sense of responsibility, impulse control, complex thinking and others. For these reasons, the Supreme Court of Ohio, the Ohio Criminal Sentencing Commission, and the Ohio Judicial Conference have been working to develop a competency statute for juveniles. In 2009 the Supreme Court of Ohio, along with the Ohio Department of Youth Services and the Ohio Department of Mental Health formed a task force for this same purpose. This proposal is included in House Bill 86.

The concept of a juvenile competency statute has been included on the Ohio Judicial Conference's Legislative Platform since 2007 and the Judicial Conference's Juvenile Law & Procedure Committee has reviewed and endorsed the proposal that is now included in House Bill 86. The juvenile competency statute included in House Bill 86 will improve the clarity of the law and public confidence in the law by creating a uniform procedure that will help to ensure the proper treatment of juveniles who may be incompetent due to mental illness, mental retardation, developmental disability, or lack of developmental capacity. The bill will also improve the administration of justice by eliminating some appeals that arise when a juvenile's competency is in question. It is also likely that the statute will marginally increase court caseload and court workload as practitioners and the public become aware of the availability of juvenile competency proceedings. Moreover, the statute's requirement that the court bear the costs of competency evaluations, costs that will ultimately be passed along to the counties, may be burdensome to the counties given the current economic environment and the likely cuts to the local government fund in the 2012-2013 biennial budget.

While judges are supportive of the state adopting a juvenile competency statute, they raised concerns with two provisions of the proposal. First, proposed R.C. 2151.351 makes the juvenile competency statute applicable to cases in which juveniles are charged with unruly offenses and juvenile traffic offenses. Judges are concerned that making competency proceedings available for these low level offenses will lead to significantly more motions to determine competency and thereby significantly increase the number of competency evaluations. This will drive up costs, increase court caseload and court workload, and delay the administration of justice. Second, judges are concerned with the provision in proposed R.C. 2152.58(B) that would permit the court to contact a competency evaluator ex parte to obtain clarification of the evaluator's competency report. Historically, ex parte communications such as this have been disfavored in the law because of concern that it deprives parties of the due process of law. As such, judges believe that the inclusion of this provision could violate constitutional principles regarding ex parte communications and that it will therefore have a negative impact on public confidence in the law.

Recommendation: Adopt the competency procedures but limit the availability of these proceedings to delinquency cases. Clarify that the court should not contact a juvenile competency evaluator ex parte, even if such contact is only to seek clarification of the evaluator's report.

House Bill 86 Adopts the Interstate Compact (R.C. 2151.56). The 2008 Interstate Compact for Juveniles will allow the State of Ohio and the juvenile courts to better track, transfer and supervise those juveniles who are moving between states and who have been adjudicated juvenile delinquents or status offenders, or who have run away from home, or who have absconded or escaped from the supervision or control of the probation or parole authority. Importantly, while Ohio is currently a member of the 1955 Interstate Compact on Juveniles, the 1955 Compact suffers from several flaws that made the creation of the 2008 Compact necessary and warrant its adoption in Ohio. Specifically, the 1955 Compact suffered because it lacked uniform statutory language between states, mechanisms to enforce compliance, and effective information sharing between states. These flaws made it difficult for states to resolve disputes and led to haphazard results in the transfer and supervision of runaways and juvenile delinquents. This seriously frustrated the purposes of the Compact

The 2008 Interstate Compact, which has been adopted by 45 states and the Virgin Islands, is a complete revision of the 1955 Compact, and is designed to solve the problems that surround the interstate movement of juveniles that the original Compact failed to address. The new Compact solves these problems largely through the creation of an Interstate Commission that is charged with overseeing changes to the model Compact language, is granted enforcement powers when necessary, and is charged with data collection so that it can act as a warehouse to allow states to share information on the movement of juveniles. This will bring clarity to the law, improve the administration of justice, and promote public confidence in the law. Finally, as a member of the Interstate Compact, Ohio will rely on the Interstate Commission to resolve disputes with other states. This deference to the Commission is a condition of membership and consistent with Ohio's long history of cooperation with other states.

Recommendation: Adopt the 2008 Interstate Compact for Juveniles and include an emergency clause to ensure Ohio's continued participation, which will expire on June 30th.

House Bill 86 Eliminates Mandatory Bindovers, SYO's and SYO Dispositional Sentences (R.C. 2152.02). As mentioned above, in the 1980's and 1990's the juvenile justice system nationwide came under scrutiny due to a spike in juvenile crime rates and due to the perception that certain juveniles were being let off easy, especially if the juvenile had committed a serious crime or crimes. At the height of this spike in the juvenile crime rate, the number of juveniles incarcerated in the Ohio Department of Youth Services' facilities numbered over three thousand. Then, legislative reform efforts were enacted in Ohio and elsewhere that mandated the transfer, or bindover, of juveniles to adult court for the prosecution of certain crimes and required that other juveniles be designated as serious youthful offenders and be given a blend of traditional juvenile and adult criminal sentences, or a serious youthful offender dispositional sentence. In other words, the decision was made by the legislature that certain youthful offenders were not properly within the jurisdiction of the juvenile courts due to the seriousness of their acts. At the same time, the state started to provide more funding to juvenile courts to provide juveniles with an alternative to incarceration in the form of community based treatment. Now, the number of juveniles housed in Department of Youth Services' facilities numbers below one-thousand and public outrage about juvenile crime has dissipated.

House Bill 86 would eliminate the distinction between mandatory and discretionary bindovers, serious youthful offender designations, and serious youthful offender dispositional sentences by giving judges added discretion in these areas. As a general matter, Ohio judges defer to the General Assembly on matters of policy. The determination that certain crimes are or are not outside of the jurisdiction of the juvenile courts is a policy matter that is wholly within the purview of the legislature. As a whole, however, the Ohio Judicial Conference favors increased judicial discretion and this amendment to House Bill 86 would provide judges with additional judicial discretion to do what they think is best based on the individual circumstances of each case. Finally, the amendment is likely to increase juvenile court caseload and workload as fewer cases will be transferred to adult court.

Notwithstanding the Judicial Conference's position on increased judicial discretion, judges did raise concerns with one provision of this portion of the bill. Specifically, R.C. 2151.312(B)(2) as amended states that a child alleged to be or adjudicated unruly should not be held for more than twenty-four hours in a detention facility except when a case is transferred to adult court. It is not the practice of Ohio's juvenile judges to transfer unruly cases, which involve low level status offenses, to adult court. Additionally, there is no authority elsewhere in the code for judges to transfer unruly cases.

Recommendation: Remove the proposed language in R.C. 2151.312(B)(2) [lines 1269 - 1270] as it relates to the transfer of cases in which a child is alleged to be unruly. Judges do not have the authority to transfer unruly cases. Furthermore, judges do not seek the authority to transfer unruly or status offenses, since they are of a less serious nature and do not warrant transfer to adult court.

House Bill 86 Expands Judicial Release (R.C. 2152.17). Also in the 1990's, the General Assembly enacted laws, otherwise known as gun specifications, that require the incarceration of juveniles as well as adults for a mandatory minimum period of time for the commission of certain acts while displaying, brandishing, indicating the possession of, or using a gun. While this was not part of the juvenile justice reform movement per se, the inclusion of juveniles within the gun specification law was nevertheless a legislative response to serious juvenile crime. House Bill 86 would do away with some of these mandatory minimums in favor of judicial discretion to grant early release to juveniles serving time on certain gun specifications.

Again, the Judicial Conference on the whole favors increased judicial discretion and the judicial release amendments that were added to House Bill 86 generally give judges more discretion to grant early release to juveniles serving time on certain gun specifications. Nevertheless, amendments to R.C. 2152.17(B) appear to limit, rather than increase, judicial discretion to commit a child for complicity on a gun specification. Moreover, it creates a different standard for complicity than is found in other areas of the Revised Code. Judges are unaware of any justification for this limitation on judicial discretion and believe that current law provides the appropriate amount of discretion

Recommendation: Keep the current language of R.C. 2152.17(B) to maintain judicial discretion to apply the gun specification statutes to a juvenile accomplice.

House Bill 86 Will Reduce Treatment Options (R.C. 5139.43). As was previously mentioned, part of the juvenile justice reforms in Ohio in the 1990's provided juvenile courts with incentives to divert certain juvenile offenders from Ohio Department of Youth Services Institutions to community based treatment. One of the largest initiatives created by the legislature was the Reasoned and Equitable Community and Local Alternatives to the Incarceration of Minors initiative or RECLAIM. This program uses a formula that allows the Department of Youth Services to divert money that would be used on the costs of incarceration to juvenile courts for use in paying for community based treatment. This initiative has been very successful at reducing the population of DYS institutions and at helping youth be rehabilitated locally.

House Bill 86 will amend R.C. 5139.43, the statute establishing the felony delinquent care and custody fund, to require that moneys in the fund be prioritized to research-supported, outcome-based programs and services. While Ohio judges have not had the chance to study how this will impact their use of RECLAIM dollars, the provision appears to limit judicial discretion to use RECLAIM dollars on programs that have proven successful but that are not necessarily research supported. Judges, especially those in rural areas, are concerned that this could severely limit their options for ordering community based treatment.

The Ohio Judicial Conference recommends maintaining judicial discretion to use RECLAIM dollars. This will allow judges to continue to use programs that are beneficial to youths in their community but that may not be research supported.

Recommendation: Preserve judicial discretion over use of RECLAIM dollars.