



# Judicial Impact Statement

[www.ohiojudges.org](http://www.ohiojudges.org)

September 12, 2012

Christina Madriguera Esq., Legislative Liaison/Analyst

Seeking Sponsor

## F4 & F5 Offender Placement

### PROPOSED TITLE INFORMATION

To modify language in Ohio Revised Code 2929.13(B)(1)(a), 2929.13(B)(1)(b), and 2929.13(B)(1)(c) to reinstate judicial discretion to sentence offenders to a term of imprisonment in cases where the offender has been convicted of or pleaded guilty to a felony of the fourth or fifth degree and the court believes that no community control sanctions, if imposed on that offender, would adequately fulfill the overriding principles and purposes of sentencing. And to modify Ohio Revised Code 2951.03 to grant permissive authority for courts to order presentence investigation reports for felony offenders where necessary.

### SUMMARY OF IMPACT

Prohibiting courts from sentencing felony four and felony five offenders to prison limits the court's capacity to fashion sentences that are appropriate to the facts and circumstances of each individual case. Failure to restore this judicial discretion will likely result in 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. Additionally, judges should have discretion to not order presentence investigation reports in felony cases. Current law requiring courts to order presentence investigation reports prior to sentencing offenders to community control sanctions is wasteful of resources for some offenders, who, by statute must receive community control sanctions.

### BACKGROUND

Discussions regarding the unsustainable costs of corrections in Ohio have been taking place in the General Assembly since the 128<sup>th</sup> General Assembly. Senator Bill Seitz (R-Green Township) and Senator Shirley Smith (D-Cleveland), co-sponsors of Senate Bill 22 which died at the end of the 128<sup>th</sup> General Assembly, have been leaders of the legislative branch in this dialogue. Dire economic times and a rapidly expanding prison population with unsustainable costs provided the momentum needed for the Executive branch to become active in identifying prison population reduction strategies.

In late 2008, Ohio Governor Ted Strickland, Chief Justice Thomas J. Moyer, and House Speaker Armond Buddish requested technical assistance from the Council

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.

of State Governments to develop a data-driven justice reinvestment policy framework to reduce spending on corrections and reinvest in strategies to increase public safety.<sup>1</sup> An inter-branch working group was appointed consisting of legislators and agency directors to review analyses provided by the Council of State Governments Justice Center's policy experts. In addition to this inter-branch working group charged with reviewing the data collected, the Council of State Governments Justice Center convened a series of focus groups and interviews with practitioners and stakeholders from around Ohio including the Judicial Conference, prosecuting attorneys, public defenders and court-appointed counsel, behavioral health treatment providers, victim advocates, judges, local government officials, chief probation officers, community corrections directors, and law enforcement.

The result of these analyses was a thirteen-point policy framework recommended to the General Assembly which addressed the following objectives: to hold first-time property and drug offenders accountable in more meaningful ways by requiring them to serve probation terms and attend treatment, to adopt statewide administration criteria for community correction programs that prioritize placement for people who would benefit most from intensive supervision and treatment, and to establish statewide standards for probation to ensure greater consistency from county to county.

This framework was incorporated into House Bill 86 which was co-sponsored by Senator Bill Seitz (R-Green Township), Senator Shirley Smith (D-Cleveland), Representative Lou Blessing (R-Cincinnati), and Representative Tracy Maxwell Heard (D-Columbus). The goals were to reduce overcrowded prisons, to reduce state funds spent on imprisonment, and, where-ever possible, to re-target funds spent on corrections to evidenced-based community corrections programs and probation programs.

Throughout the legislative process, the judges and staff of the Ohio Judicial Conference were active participants in the debate and drafting of House Bill 86. The Judicial Conference was and remains supportive of the vast majority of the provisions enacted in House Bill 86, which, in its final form brought Ohio into compliance with constitutional requirements following the Supreme Court of Ohio's opinion in State v. Foster, 109 Ohio St.3d 1 (2006). House Bill 86 was also designed to promote fiscal efficiencies in the state prison system, to encourage greater reliance on community control sanctions, and to reform the juvenile justice system. However, there are provisions in House Bill 86 prohibiting judges from sentencing offenders who have committed a felony of the fourth or fifth degree to prison. These provisions caused the Judicial Conference great concern during the legislative process which was voiced in meetings, letters, public testimony, and a Judicial Impact Statement dated June 3, 2011.

Under House Bill 86, which became effective September 30, 2011, judges cannot sentence certain first-time, non-violent fourth and fifth degree felony offenders to prison unless prison officials notify the judge that Community Control programs are not available to that offender. Prior sentencing law permitted judges to tailor a sentence to the individual circumstances and offender, ordering the sanction of imprisonment where necessary to meet the purposes and principles of sentencing. House Bill 86 removed that judicial discretion and individualized determination.

The Judicial Conference objects to these provisions as enacted and urges the General Assembly to repeal this aspect of House Bill 86.

---

<sup>1</sup> This technical assistance was provided in partnership with the Public Safety performance Project of the Pew Center on the States and made possible through funding support provided by Pew and the United States Department of Justice Bureau of Justice Assistance and the State of Ohio.

**JUDICIAL IMPACT**

**Ohio Revised Code 2929.13 as amended by House Bill 86 eliminates judicial discretion and substitutes statute for decision. “Substitute statute for decision, and you shift the center of authority, but add no quota of inspired wisdom”<sup>2</sup>**

As amended by House Bill 86, Ohio Revised Code 2929.13 provides, in pertinent part:

...

(B) (1) (a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

(b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) The offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

---

<sup>2</sup> Cardozo, Benjamin, “The Growth of Law” p. 133 (1924)

(c) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than forty-five days after receipt of a request from a court under this division, the department shall provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court, if any. Upon making a request under this division that relates to a particular offender, a court shall defer sentencing of that offender until it receives from the department the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court or for forty-five days, whichever is the earlier.

If the department provides the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court shall impose upon the offender a community control sanction under division (B)(1)(a) of this section, subject to divisions (B)(1)(b)(i) and (ii) of this section. If the department does not provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court may impose upon the offender a prison term under division (B)(1)(b)(iii) of this section.

As enacted, House Bill 86 stated above limits the capacity of judges to fashion sentences that are appropriate to the facts and circumstances of each individual case. Judges are elected by their communities to administer justice. Certainly they have the training and experience in law as required by the Ohio Revised Code, but this expertise is amplified by the confidence that their communities have granted them. Judges are directly accountable to their communities to administer justice in line with their mores, values, and expectations. There are many decisions involved in the evolution of a criminal case. Decisions are made in the interest of justice by police, prosecutors, and defense attorneys. The judge is the person who the people have decided should be the final arbiter when it comes to sentencing and punishment.

The Ohio Judicial Conference consistently advocates for judicial discretion because it is fundamental to our system of government and the doctrine of separation of powers. Our system of government separates power among three co-equal branches of government and requires each branch to act as a check upon the other. It is well settled that the judicial power of the state is vested exclusively in the courts.<sup>3</sup> By statutorily prohibiting imprisonment as punishment for certain felony offenders, House bill 86 has shifted judicial authority away from the court to the prosecution and the selection of charge in the plea bargaining process. House bill 86 also granted to the department of rehabilitation and correction the ultimate authority to determine which offenders within a certain class will be eligible for a prison sentence even where the court has determined that no

---

<sup>3</sup> Section 1, Article IV, Ohio Constitution. *State v. Bodyke*, (2010), 126 Ohio St. 3d 266, 280.

community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing. Without discretion in sentencing, the judiciary cannot be said to be truly independent and without an independent judiciary we put separation of powers at risk.<sup>4</sup>

Judges observe that enactment of these provisions has resulted in convictions for more serious offenses and short prison stints combined with judicial release. They have also resulted in longer terms in local jails thereby displacing misdemeanants in already crowded local facilities.

Further, the mandatory community control provisions apply to eligible first-time felony offenders and to offenders who have not committed a misdemeanor offense of violence within two years. This means that offenders who may have committed their first felony offense but have a long history of non-violent misdemeanors for which they have already been sentenced to serve time in a county jail and have been given the opportunity for rehabilitation through community control programs, must be placed on community control yet again. In essence the legislature has enacted a law that has removed the basic defining characteristic of a felony offense – imprisonment in a State penal institution – as a potential penalty. In this way House Bill 86 undermines the capacity of the law to deter crime because offenders know that, even if they commit a felony, they will only face community control or a short term in county jail, not prison. This undermines the strength of the courts and the entire criminal justice system.

Under the law prior to the enactment of House Bill 86, a judge sentencing any offender for felony four or five offenses had the discretion to weigh the facts and circumstances of the offense in light of the overriding purposes of felony sentencing. Those purposes are to protect the public from future crime of the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources R.C. 2929.11<sup>5</sup>. Prior sentencing law permitted judges to tailor a sentence to the individual circumstances and offender, ordering the maximum sanction of imprisonment where necessary to meet the purposes and principles of sentencing. House Bill 86 removed that individualized determination, leaving the public faced with the reality that a person who commits one of the more serious offenses in this category faces only the prospect of a period of probation as short as one year.

Additionally, R.C. 2951.03 requires courts to order a presentence investigation report for all persons who are sentenced to community control sanctions. The corresponding Ohio Criminal Rule is 32.2. As they are drafted now, the statute and the rule require a presentence investigation report in felony cases before a sentence of community control sanctions can be given. The judges believe this statute and accompanying rule should be permissive in all felony cases (it is permissive in misdemeanor cases). If this statute were permissive in felony cases, courts would save time and effort in performing a presentence investigation report for those cases where

---

<sup>4</sup> Ohio Judicial Conference Policy Statement on Judicial Discretion and Mandatory Sentencing. Prepared by the Ohio Judicial Conference Criminal Law and Procedure Committee, May 5, 2008.

<sup>5</sup> R.C. 2929.11(A) a court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

they know the imposition of community control sanctions is clear. By making the statute and rule permissive, judges would still retain the discretion to order presentence investigation reports in the cases where they believe it is necessary.

The Supreme Court of Ohio Criminal Rules Subcommittee has contemplated such a change to Criminal Rule 32.2, however the Court will not promulgate this change to the rules of procedure until the General Assembly acts to change the substantive law from mandatory to permissive.

Ohio’s judges share with the other two 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. However, the Judicial Conference believes that elimination of judicial discretion to sentence fourth and fifth degree felony offenders to prison undermines the fair and efficient administration of justice. While courts should have authority to not order a presentence investigation report in felony cases where it is necessary, courts should not be required to conduct presentence investigations in every instance. As a result, we urge the General Assembly to adopt the following changes to the Ohio Revised Code.

**RECOMMENDATION**

To make the following changes to Revised Code 2929.13.

...

~~(B) (1) (a) Except as provided in division (B)(1)(b) of this section, i~~ If an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree ~~that is not an offense of violence,~~ the court shall sentence the offender to a community control sanction of at least one year's duration ~~if—UNLESS THE COURT BELIEVES THAT NO COMMUNITY CONTROL SANCTIONS ARE AVAILABLE FOR ITS USE THAT IF IMPOSED ON THE OFFENDER WOULD ADEQUATELY FULLFILL THE OVERIDING PRINCIPLES AND PURPOSES OF FELONY SENTENCING. all of the following~~ apply:

~~— (i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.~~

~~— (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.~~

~~— (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty five day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.~~

~~— (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:~~

~~— (i) The offender committed the offense while having a firearm on or about the~~

~~offender's person or under the offender's control.~~

~~—(ii) The offender caused physical harm to another person while committing the offense.~~

~~—(iii) The offender violated a term of the conditions of bond as set by the court.~~

~~—(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.~~

~~—(e) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than forty five days after receipt of a request from a court under this division, the department shall provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court, if any. Upon making a request under this division that relates to a particular offender, a court shall defer sentencing of that offender until it receives from the department the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court or for forty five days, whichever is the earlier.~~

~~— If the department provides the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty five-day period specified in this division, the court shall impose upon the offender a community control sanction under division (B)(1)(a) of this section, subject to divisions (B)(1)(b)(i) and (ii) of this section. If the department does not provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty five-day period specified in this division, the court may impose upon the offender a prison term under division (B)(1)(b)(iii) of this section.~~

~~...~~

~~(2) If division (B)(1) of this section does not apply, except as provided in division (B)(3), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:~~

~~(a) In committing the offense, the offender caused physical harm to a person.~~

~~(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.~~

~~(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.~~

~~(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.~~

~~(e) The offender committed the offense for hire or as part of an organized criminal activity.~~

~~(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.~~

~~(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.~~

~~(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.~~

~~(i) The offender committed the offense while in possession of a firearm.~~

~~(3)(a) If the court makes a finding described in division (B)(2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.~~

~~(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.~~

And to make the following change to Ohio Revised Code 2951.03

(A)(1) AT THE DISCRETION OF THE COURT no person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court. ...