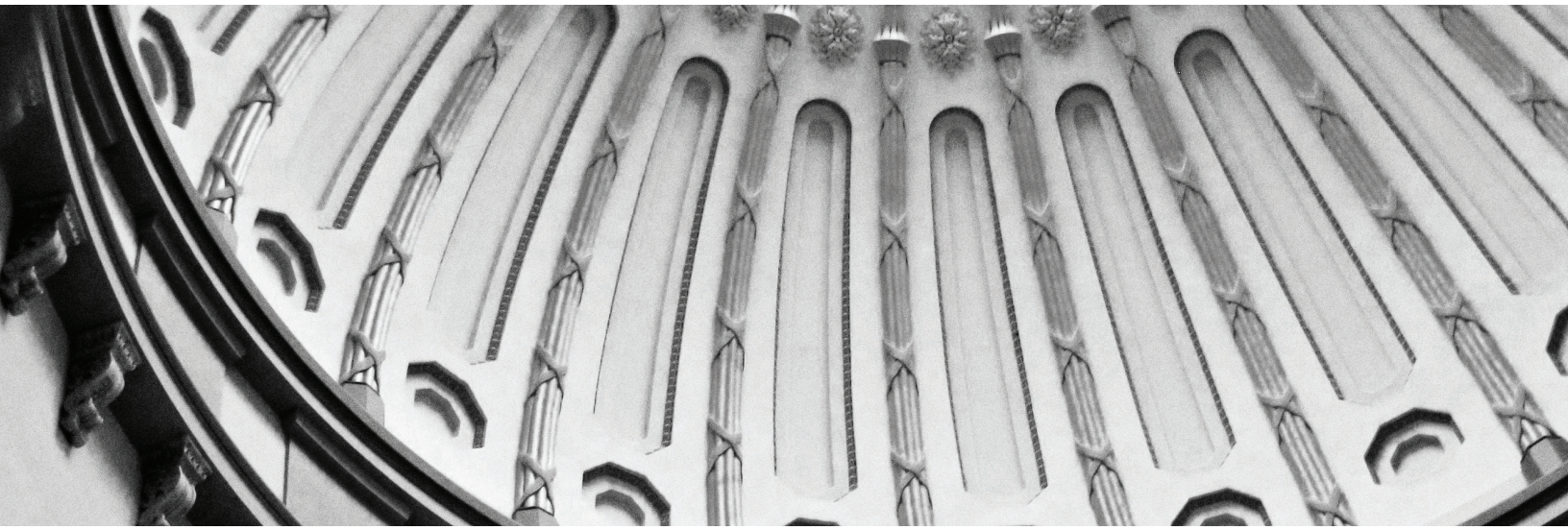
Building on Ohio's sentencing changes to keep prison populations in check

ALLIANCE FOR SAFETY AND JUSTICE

AMERICANS FOR PROSPERITY OHIO

THE BUCKEYE INSTITUTE



Introduction

For the past decade, Ohio lawmakers have been taking important steps to improve the state's justice system, keep people safe, and make better use of limited resources. Policymakers have begun to recognize that sending people to prison means worse outcomes for those suffering from addiction, their families, their communities, and the state budget.

Bipartisan support for criminal justice reforms such as 2011's Justice Reinvestment Initiative (HB 86), Targeted Community Alternatives to Prison (T-CAP) and probation reforms in the last biannual budget (HB 49), and SB 66 from the last general assembly allowed the state to minimally reduce the prison population and take steps to increase the use of local sentencing options to reduce recidivism and connect people to treatment.[1] These efforts, and reducing the use of confinement for juveniles, have garnered well-earned national attention, helped the state avoid or end costly litigation, and saved hundreds of millions of dollars on new prison construction.[2]

As lawmakers turn their attention to the new legislative session, the General Assembly has an opportunity to build on the success of their recent reforms to ensure Ohioans suffering from addiction have the tools necessary to become contributing members of society while potentially saving the state hundreds of millions of dollars every year.

Right now, Ohio spends $1.8 billion on corrections every year and, despite promises of decreased budgets because of reforms, corrections costs have risen. There are numerous reasons for increased spending including inflation, healthcare costs for an aging prison population, and the Department of Rehabilitation and Correction granting tens of millions of dollars back to local governments. But one of the main reasons is that recent changes in the law have not led to the big reductions in prison populations that were projected because not as many people convicted of low-level felonies are being served locally as intended. Substantial prison savings are not realized until a prison facility is closed.

Before lawmakers support a state budget that would increase corrections spending again, they should review the progress and challenges of recent sentencing changes and consider options to strengthen those reforms.

> **"We want a system that protects public safety, is based on equal rights and equal justice, ensures that the punishment is proportional and fits the crime, and gives people real second chances."**
>
> *Mark V. Holden*
> *Senior Vice President & General Counsel*
> *Koch Industries, Inc.*

Key Findings

- HB 86's reforms, alone, may have saved the state $500 million by flattening prison population growth.
- While HB 86 was expected to significantly reduce the prison population, the prison population dropped just 2 percent.
- HB 49 was supposed to reduce the prison population to 47,500 by FY 2019, but right now, the prison population stands at 49,051. Projected reduction of the prison population was off by more than 1,500.
- Local court and county interpretation and implementation of law changes makes a significant difference in prison admissions and the prison population.
- When the legislature has given more direction and led local justice systems on a policy course, like when the law changed felony property offenses to misdemeanors, more significant reductions in prison admissions occurred.

Lawmakers have the opportunity to strengthen and build upon prior sentencing reforms and avoid increased prison spending. Through the leadership of Senate President Larry Obhof and the Senate and House leadership, the Ohio legislature is poised to take the next steps by reclassifying low-level drug possession crimes as misdemeanors and stopping the revolving door of individuals with low-level, non-violent drug offenses going to prison for technical probation violations.

Key Recommendations

To keep Ohio's prison population and prison spending in check, Ohio's legislative leaders and the executive should pass laws to:

- Change simple drug possession to a misdemeanor offense;
- Reduce the number of people in prison for minor violations of probation;
- Provide relief for people living with a past conviction.

These kinds of law changes will help lawmakers contain prison spending, and focus sentencing and criminal justice approaches on the most effective ways to keep Ohio communities safe.

What important steps have Ohio lawmakers taken to build a better corrections system?

Through a series of law changes this decade, Ohio legislators have revised criminal sentencing statutes around a vision that people with addiction problems who are convicted of low-level drug offenses are best served through treatment programs in their communities.

In 2011, the Ohio legislature passed HB 86, which made a number of changes designed to reduce the number of people entering prison for low-level offenses and probation violations.

Some key changes from HB 86 include:[3]

- Changes to sentencing for particular offenses, especially low-level felony drug offenses;
- Stronger laws requiring initial non-prison sentences for Felony 4 and Felony 5[4] cases in certain circumstances;
- The reclassification of some low-level property crimes from felonies to misdemeanors;
- Expanded access to the intervention in lieu of conviction program;
- The creation of a probation incentive grant program designed to reduce the number of people sent to prison because their probation was revoked;
- The creation of a new "risk reduction" sentencing option that allows for early release upon program completion while in prison; and
- A new judicial release option available once someone has served 80 percent of their sentence.

> **"I'm haunted by the belief that if my son Garrett would have received treatment for drug addiction, instead of a felony charge, he would be alive today. [A] felony conviction was too much. I firmly believe it was the point of no return for my son.**
>
> ***Richard Hughes, a New Franklin, Ohio resident who lost his son, Garrett, to a drug overdose.***

Building on HB 86, lawmakers worked with the executive either through the budget process or by passing stand-alone laws that sought to move Ohio more towards the presumption that many people committing low-level offenses would be better served in the community.

Significant law changes since 2011 that sought to build on and further refine HB 86 include:

- *HB 49, 2017*: The biannual budget, HB 49, included T-CAP, which sends state dollars to counties that voluntarily rehabilitate people convicted of low-level nonviolent offenses. Associated amendments to the Community Control statute intended to cap how long people can spend in prison for technical violations of community supervision. Felony 4 violators were capped at 180 days and Felony 5 violators were capped at 90 days.
- *SB 66, 2018*: Lawmakers explicitly added rehabilitation as one of the purposes of felony sentencing through SB 66. The law increased opportunities for pretrial diversion for people charged with low-level drug offenses, increased access to intervention in lieu of conviction, and expanded judicial discretion to limit the length of probation terms where appropriate. SB 66 also increased access to record-sealing remedies and reduced the number of people entering prison due to technical parole violations.

Did HB 86 and other law changes impact Ohio's prison population as projected?

With the passage of HB 86 in 2011, the general assembly took important steps towards stabilizing, at the time, Ohio's rapidly growing prison population and averting the need for thousands of new prison beds. One estimate from 2014, before several other laws were passed, suggested HB 86 would save the state a half-billion dollars simply by averting new prison construction alone and $78 million a year in additional operating costs.[5]

The challenge lawmakers face today is that, for a variety of reasons, HB 86 did not lead to the kinds of reductions in the prison population that would allow the state to avoid a growing prison budget.

HB 86 *as a whole* did not fully meet projections for containing and reducing Ohio's prison population. A number of different entities, including those that helped lawmakers and the executive craft HB 86, and the Ohio Department of Rehabilitation and Correction, have revised their

estimates of the law's impact.[6] In the years immediately following the passage of HB 86, the Ohio Department of Rehabilitation and Correction had to twice revise their prison population projections to account for limited implementation of key HB 86 programs and reforms.[7]

Similar to what happened around HB 86, HB 49 did not reduce the prison population as originally projected.

HB 49's effort to grow local alternatives to sending someone back to prison for a technical violation and limits on how long someone could spend in prison for a non-criminal technical probation violation were intended to reduce the prison population to 47,500 by FY 2019.[8] HB 49's projected reduction of the prison population is currently off by more than 1,500.

The fact that various projections imprecisely predicted the impact of reforms does not mean that lawmakers' efforts made no difference. Early estimates held that without HB 86 Ohio taxpayers may have had to spend a half-billion dollars more on new prison construction.[9]

But because HB 86 and other sentencing changes are not having the impact on the prison population that lawmakers thought they would, Ohio taxpayers are having to spend more money on corrections than budgeted. In order to respond to a higher-than-expected prison population and the higher costs associated with them, the Department of Rehabilitation and Correction has requested to use the $25.6 million in unspent funds meant to support community-based alternatives to prison to, instead, fund prison operations through the end of the budget cycle.[10] When T-CAP expands statewide, more funds will be needed.[11]

Beyond the costs to taxpayers, if the laws passed are not impacting practice in the way that was originally projected, lawmakers' goals of ensuring local treatment and accountability for those involved in low-level felonies is not being fully realized.

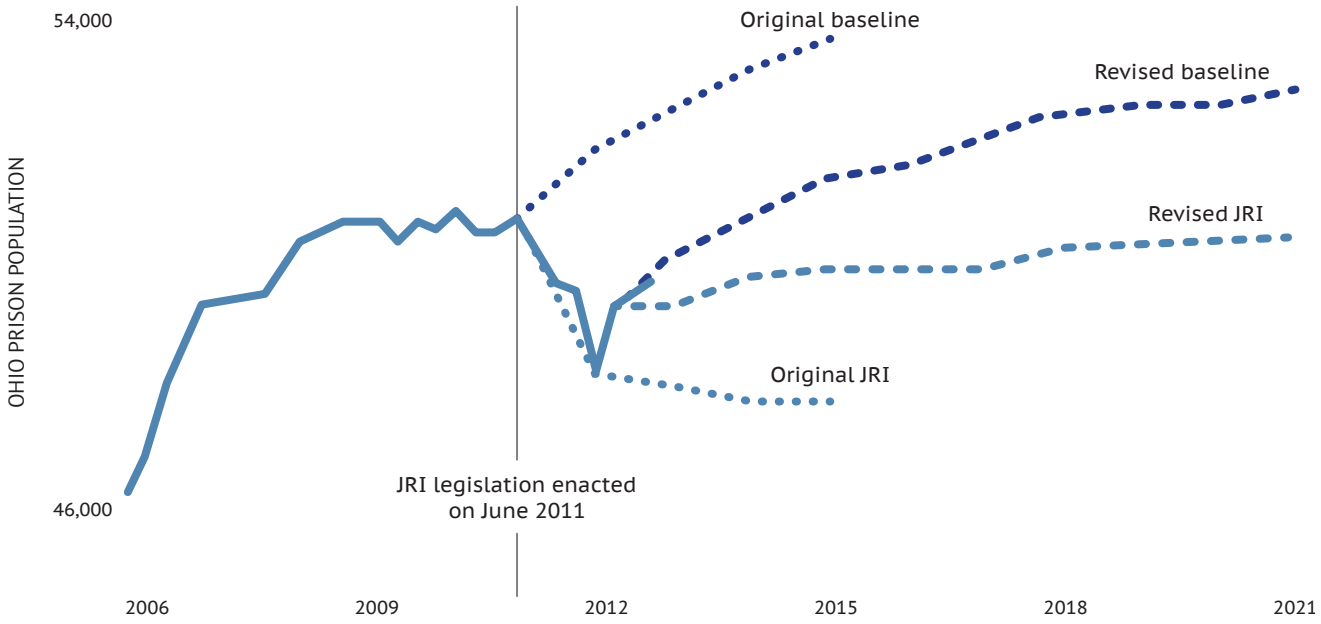
Why are Ohio's sentencing reforms not leading to deeper drops in the prison populations?

There is no way to definitively know why HB 86 and other changes to Ohio sentencing laws, policies, and practices are not having the expected impact on the prison population. Between the legislation's complexity, data limitations, varying degrees of implementation, and other changes in criminal justice practice over the intervening years, it is difficult to construct a clear, concise, and authoritative narrative about why HB 86 *as a whole* did not fully meet projections for containing and reducing Ohio's prison population.

But for lawmakers to make effective choices around a budget that may continue to contribute to growing pris-

HB 86 did not lead to the expected reductions in the prison population

The prison population landed around 50,000 in the years following the passage of HB 86, and has not changed dramatically since.

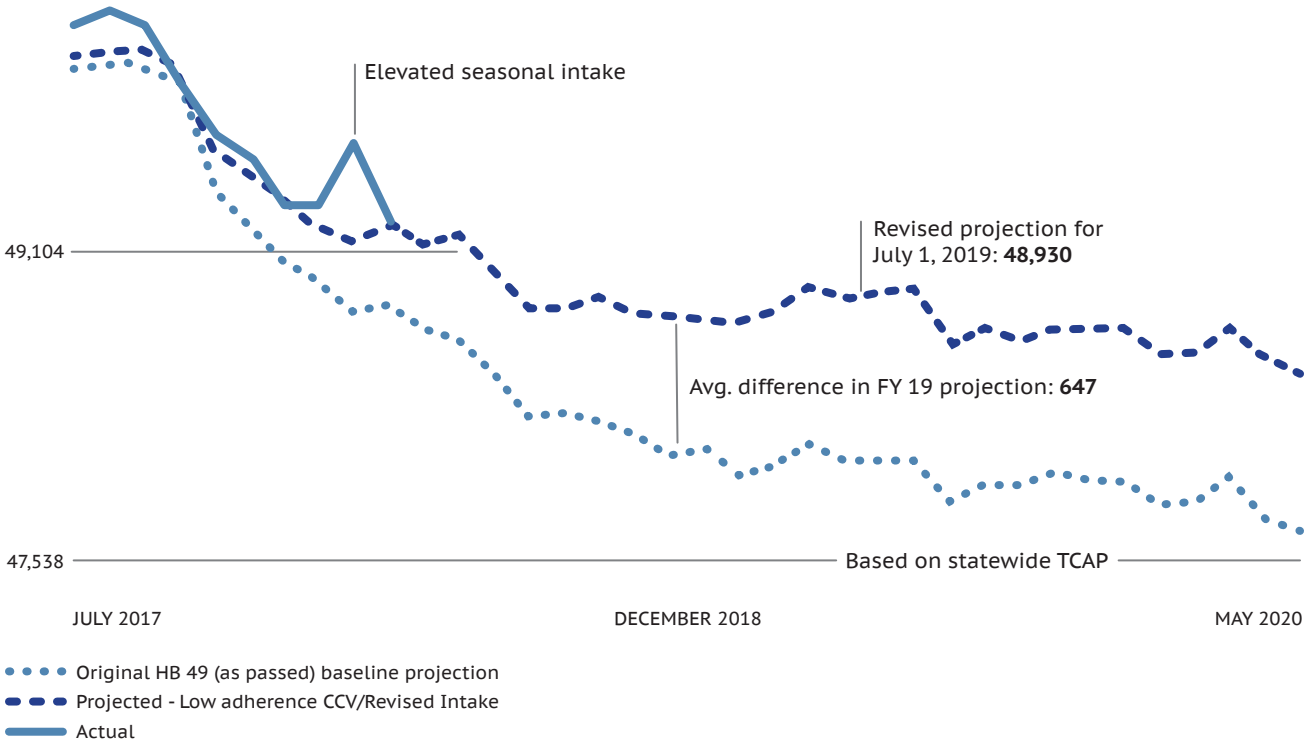


SOURCE: JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT URBAN INSTITUTE, 2014.

HB 49 is not leading to the projected reductions in the prison population

The projected reduction of the prison population is now off by more than 600 as of today, and will be off by 1,500 by July of 2019.

HB 49 BASELINE AND APRIL 2018 REVISED PROJECTIONS



SOURCE: OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. TRANSITION REPORT.

on costs, they can infer a couple of key reasons from local practice and authoritative sources.

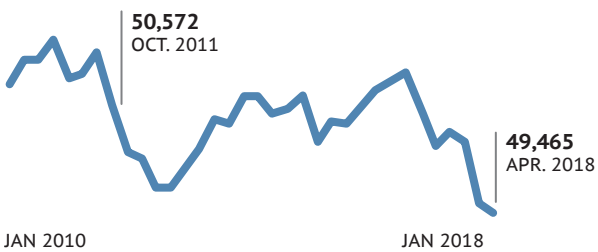
Close examination of certain elements – like those identified by the Ohio Department of Rehabilitation and Correction, the Ohio Sentencing Commission, and by corrections executives – should inform lawmakers' decisions to improve upon existing reforms. Some analyses point to local practices that may be undermining legislative intent.

A May 2018 study of HB 86 and other criminal justice laws commissioned by the Ohio Sentencing Commission[12] found that local implementation of laws is playing a role in Ohio not realizing the projected declines in imprisonment. In short:

- Changes designed to encourage judges toward using probation or other community control sentences for low-level felonies showed unpredictable and, at best, mixed results.
- Elements of HB 86 designed to shift more low-level felonies away from prison and into community supervision did result in fewer admissions to prison for Felony 4 offenses, but had only a minor effect on Felony 5 offenses.
- Other legislation designed to move Felony 5 drug offenses away from prison showed no effect on admissions, and the same was

Since HB 86 was passed, the prison population has dropped by just 2 percent

(1,100 fewer people in prison)



SOURCE: OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, POPULATION REPORTS. THE LATEST PUBLISHED QUARTERLY REPORT WAS THROUGH APRIL 2018.

true for legislation authorizing judges to sentence someone to community control without waiting for a presentence report.

The most recent head of the Department of Rehabilitation and Correction reported early on in the wake of HB 86's passage that there was limited success in shifting some low-level felonies onto probation; however, the following years saw an increase in the number of people sent to prison for community control violations:[13] Local practice around managing probation violations increased the number of prison admissions, and depressed HB 86's effectiveness as a prison population control measure. Since HB 86 passed, the number of people entering prison because of supervision violations has remained higher than projected.

In a Transition Report to the newly elected Governor DeWine, the Department of Rehabilitation and Correction noted that local implementation of HB 49's reforms is having an impact on prison population projections, and the department's growing budget needs. *Locally, efforts to set a cap on probation violation terms at 180 days, versus a year and a half, were generally not being complied with:*

"Courts and prosecutors have claimed that despite the changes made to the Community Control statute, ambiguity exists in the interpretation, and have relied on that ambiguity and an alternate interpretation of the statute to continue to sentence violators to 6-18 month terms instead of 90 or 180 days. Recommitment data indicates an approximate compliance rate with the new language of about 20%. The lack of adherence to the caps imposed in HB 49 has had an immediate and lasting effect on our budget for both FY18 and FY19."

The projections around HB 49 are even further off because some counties that could have volunteered to work with the state to receive funds to develop targeted community alternatives to prison chose not to do so. As of January 2019, 56 of 88 counties are participating in T-CAP on either a mandatory or voluntary basis, consistent with the law and local choices.

In summary, *local interpretation and implementation of the legislature's reforms makes a big difference in whether the laws truly redirect people convicted of low-level felonies to local options rather than prison.*

In sharp contrast, where the law changes have been clearer – giving less room for local discretion on interpretation and implementation – the impact on prison admissions has been more pronounced.

The analysis of HB 86 compiled for the Ohio Sentencing Commission found that the reclassification of low-level thefts from felonies to misdemeanors had a bigger impact on trends; as a percentage of all new admissions to prison, the number of people being admitted for felony theft property crimes dropped more than 30 percent.[14] Researchers did not find clear reductions in prison admissions attributable to other property crime provisions that maintained felony status but established a preference or presumption that the judge use community sentences.[15]

It is difficult to say with certainty why judges or courts in Ohio have declined to use the increased discretion that the law changes have provided and not fully taken advantage of the new sentencing presumptions.

"Ohio is a national leader in criminal justice reform. With sentencing reform, we have an opportunity to build on that success and ensure those suffering from addiction receive the treatment they need. These changes will keep our communities safe, save taxpayer dollars, and help people become contributing members of society."

Daniel J. Dew, Legal Fellow
The Buckeye Institute's Legal Center

In writing about HB 86 in 2014, the national evaluators of Justice Reinvestment in Ohio and a dozen other states note:

"In Ohio, the working group included the chief justice of the State Supreme Court, an associate justice, and the state director of the courts, all of whom approved the policy changes. However, some judges in Ohio were critical of the new sentencing provisions mandated in the final legislation. Work continues in Ohio to educate all judges on the sentencing provisions."

"We need policies that promote getting people the treatment they need and a criminal justice system that reflects our priorities. When someone has an addiction problem, we should eliminate barriers standing in the way of their recovery and success, both in our sentencing and after they have served their time."

Tom Synan
Newton Police Chief

In a memorandum to the Office of Budget and Management noting the fiscal pressures on the Department of Rehabilitation and Correction to contain costs, the interim director of the corrections department noted:

"There continues to be changes in sentencing courts' behavior that results in less-than-projected bed savings, and this budget submission will request changes to address those areas."[16]

What is clear is:

- When the legislature has given more direction and led local justice systems on a policy course, like when it changed felony property offenses to misdemeanors, more significant reductions in prison admissions occurred; and
- How local courts and counties interpret and implement law changes does make a difference in whether people convicted of low-level felonies are sentenced to local options, and prison admissions are reduced.

Lawmakers can build on the progress from sentencing changes, and contain prison spending.

While the Ohio legislature's reforms designed to keep people convicted of low-level drug offenses and technical probation violations out of prison potentially saved the state hundreds of millions of dollars on new prison construction, these reforms alone may not contain prison spending.

For a number of reasons, people facing low-level drug offenses and technical violations of probation continue to enter the prison system despite the strong reforms adopted by the legislature. The reasons for the less-than-expected impact of these changes may stem from local implementation and interpretation of the state laws, and a variety of other factors that are hard to pinpoint or control from Columbus. However, there is some evidence that when lawmakers direct and lead counties and the courts on a particular policy path, the impact of change on the corrections system is more robust.

If lawmakers want to build on the progress they have made through various sentencing changes in the past decade and avoid spending even more money on corrections, further changes to law, policy, and practice need to be made.

To maximize effectiveness, sentencing changes need to apply to people living with past convictions for these crimes. The state legislature recognized the need to link post-conviction issues with sentencing policy when it

passed SB 66; the law provided opportunities for record sealing and rehabilitation programs to Ohioans with multiple convictions.

The post-sentencing consequences of felony convictions are destabilizing and can last a lifetime. As a result, people with a felony conviction are now living with unnecessary barriers: as many as 600,000 people are barred from being eligible for securing employment, housing, and further education. These prohibitions on self-sufficiency carry significant costs for our economy and state budget.

The Ohio legislature is poised to take the next set of important steps on these issues.

Law changes being considered this year that could build upon the sentencing changes that avoided taxpayers spending hundreds of millions of dollars to build new prisons would:

Change simple drug possession to misdemeanors.

Under HB 86 and subsequent law changes, lawmakers recognized that low-level drug felonies, in general, should be treated differently, so that people convicted of these crimes could be sentenced locally, and connected to treatment. By changing the law so that simple drug possession is a misdemeanor-level crime, Ohio would fulfill the vision that treatment, not incarceration, be prescribed when someone's core issues with crime are due to addiction, and ensure this policy approach is the norm, statewide.

Reduce the number of people in prison for minor violations of probation.

While HB 86, HB 49, and SB 66 helped reduce the number of people sentenced to probation whose supervision ends in failure, too many people are still going to prison in Ohio due to technical violations of supervision, not new convictions. There is a need for lawmakers to further strengthen local programs so someone sentenced to probation can get treatment, including navigating a process that will most likely involve relapse, instead of having the challenges of fighting addiction result in a revocation and prison time.

Provide relief for people living with a past felony conviction.

Lawmakers recognized that recovery is a process when it passed SB 66 to provide opportunities for record sealing and rehabilitation programs to Ohioans with multiple criminal convictions. Changing low-level drug possessions from felonies to misdemeanors will help expand this type of relief by applying changes to people living with past convictions for these crimes. A felony conviction results in stigma and a maze of legal barriers that impede rehabilitation – including barriers to employment, housing, and education.

"We applaud Senate leadership for continuing to advance drug sentencing and justice reforms as a priority. It is critical that Ohio make low-level drug possession a misdemeanor because we know that prison and a felony conviction are not effective at treating addiction."

Shakyra Diaz, Ohio State Director
Crime Survivors for Safety and Justice

Endnotes

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4 In the context of a drug offense, a Felony 4 or Felony 5 conviction can result in a prison sentence. See, N.A. Felony Sentencing Quick Reference Guide. (May 2017). https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/judPractitioner/felonyQuickRef.pdf

5 LaVigne, N., Bieler, S., Cramer, L., Ho, H., Mayer, D., & McClure, D. et al. (2014). Justice Reinvestment Initiative State Assessment Report. Urban Institute and Bureau of Justice Assistance, U.S. Department of Justice. Retrieved from https://www.urban.org/sites/default/files/publication/22211/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF

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8 Ohio Department of Rehabilitation and Correction. (2019). Transition Manual. Columbus: Unpublished.

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10 Ohio Department of Rehabilitation and Correction. (2019). Transition Manual. Columbus: Unpublished.

11 "The law also requires any county that participated voluntarily this fiscal year to participate next year, meaning a total of 56 will be a part of it in Fiscal Year 2019. [DRC staff] Ms. Mausser told Rep. Jack Cera (D-Bellaire) that the appropriated amount would be enough to cover what is expected to be an increase in participation next fiscal year." N.A. Controlling Board Moves Funds After Prison Population Drops Less Than Anticipated, Monday, May 21, 2018.

12 Butcher, F., & Tossone, K. (2018). Impact of House Bill 86 & Sentencing-Related Legislation on the Incarcerated Population in Ohio. Case Western Reserve University Begun Center for Violence Prevention Research and Education, prepared for the Ohio Criminal Sentencing Commission. Retrieved from https://case.edu/socialwork/begun/sites/case.edu.begun/files/2018-09/OCSC-Impact-of-House-Bill-86-7-2018_0.pdf

13 Mohr, G. (2013). Testimony before the House Judiciary Committee - House Bill 251

14 Butcher, F., & Tossone, K. (2018). Impact of House Bill 86 & Sentencing-Related Legislation on the Incarcerated Population in Ohio. Case Western Reserve University Begun Center for Violence Prevention Research and Education, prepared for the Ohio Criminal Sentencing Commission. Retrieved from https://case.edu/socialwork/begun/sites/case.edu.begun/files/2018-09/OCSC-Impact-of-House-Bill-86-7-2018_0.pdf

15 Id.

16 Hudson, S. (2018). Fiscal Years 2020-2021 Biennium Operating Budget Request.

About the Organizations

ALLIANCE FOR SAFETY AND JUSTICE

Alliance for Safety and Justice (ASJ) is a national organization that aims to win new safety priorities in states across the country, and brings together diverse crime survivors to advance policies that help communities most harmed by crime and violence.

AMERICANS FOR PROSPERITY OHIO

Americans for Prosperity is a national organization that recruits and unites concerned citizens to advance policies that will help people improve their lives. Through broad-based grassroots outreach, we are driving long-term solutions to the country's biggest problems.

THE BUCKEYE INSTITUTE

The Buckeye Institute is Ohio's leading voice for evidence-based criminal justice reforms, spearheading efforts on bail reform, sentencing reform, civil asset forfeiture and *mens rea* reform. Founded in 1989, Buckeye is an independent research and educational institution – a think tank – whose mission is to advance free-market public policy in the states. By producing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, Buckeye promotes free-market solutions for implementation in Ohio and replication across the country.