Felony 5 Sentences Impact on the Ohio Prison System

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FELONY 5 SENTENCES IMPACT ON THE OHIO PRISON SYSTEM

Melissa Litteral

Abstract

The United States represents 5% of the world’s population but 25% of the world’s prison population. Violent crime in America has decreased over the past 25 years by 51%, yet the American prison population has continued to explode with low-level non-violent felons. Ohio has the 6th largest prison system in the United States and is at a cross roads with the prison system because without significant change, the population will continue to rise. The Ohio General Assembly has worked to decrease the overall prison population by enacting legislation it hoped would assist in decreasing the prison population. This research paper explored the following issues with regard to Ohio’s prison population.

- What impact, if any, has legislation introducing a 5th degree felony had on the overcrowding of Ohio’s prisons?
- What impact, if any, has there been on the prison population due to probation revocations?
- Using best practices, what options are available in Ohio to decrease the prison population?

In order to examine the Ohio prison system, it was important to look at the history of Ohio’s felony sentencing restructuring, starting with sentencing recommendations from the Ohio Sentencing Commission and subsequent legislation. There have been two recent significant pieces of legislation passed in Ohio that address felony sentencing. The most recent
sentencing legislation was House Bill 86 (HB 86), enacted September 2011. This legislation made comprehensive changes to Ohio’s criminal justice sentencing guidelines.

Prior to HB 86, the last comprehensive changes in Ohio were enacted in 1996, through Senate Bill 2 (SB 2). This legislation assisted with sentencing reform and was to assist with overcrowding of Ohio prisons. One significant change as a result of SB 2 was the creation of a new felony tier, known as the 5th degree felony. This felony is the lowest level felony in the sentencing guidelines and has a maximum sentence of 12 months in prison. The question remains as to the impact SB 2 had, if any, on the Ohio prison population, and in particular, the result of legislative changes on prison sentences for defendants convicted of lower-level felonies (known as 4th and 5th degree felonies).

To ascertain these impacts, statistical data was obtained from the Ohio Department of Rehabilitation and Correction (DRC) Bureau of Planning and Research. Surveys were provided to selected judges, probation officers and selected DRC staff. Interviews were conducted with two judges, two prosecutors, two members of DRC staff, the former Director of the Ohio Sentencing Commission, and a probationer facing revocation.

The findings and statistical data obtained suggest that the 5th degree felony tier created by SB 2 has had a negative impact on the prison system. Based on Ohio prison data, on average, 25% of each year’s intakes are for low-level non-violent offenders, many with substance abuse issues, although the survey results indicated willingness by judges to sentence 5th degree felons to community control. The probation surveys indicated that probation officers are trained in evidenced-based practices to assist with changing offender behavior, which may lead more offenders to successfully complete probation, and possibly lead to a decrease in recidivism. However, the probation surveys also indicated that probation officers face higher and more
difficult caseloads, including probationers sentenced to community control on 5th degree felonies who have substance abuse issues - one of the reasons cited for an increase in probation revocations. This suggests that adding the 5th degree felony into the sentencing guidelines played a role in increasing the prison population, thus having a substantial financial impact upon the prison system and state budget.

How can Ohio decrease the prison population? This can be partially accomplished by changing what constitutes a prison sentence for non-violent 5th degree felonies. Additionally, it is important to recognize that data suggests that sending 5th degree felony probation violators to prison is not cost-efficient and does not correct the criminal behavior. Evidence-based practices, that focuses on rehabilitation of low-level non-violent felony offenders utilizing programming and reintegration to assist offenders with changing behavior while in the prison system, is another step in the right direction. DRC-provided initiatives to assist with prison diversion by keeping lower-level felonies in the community are another option. However, these changes alone will not correct prison overcrowding.

There must be meaningful collaboration between the General Assembly, courts, probation, and the prison system on how offenders are sentenced to prison. If this could be accomplished, it could decrease the percentage of lower-level felons sentenced to prison each year by 23 to 25 percent. This could yield a significant reduction on the prison population over time. The cross roads at which Ohio finds itself provides an opportunity for the state to be a leader in decreasing prison overcrowding. By changing sentencing guidelines on 5th degree felonies, the overall prison population will decrease, low-level offenders would be held accountable, and Ohio’s communities kept safer.
Introduction

“Crime is normal because a society exempt from it is utterly impossible.”¹

In order to look at the prison population in the 21st Century, a moment is needed to reflect back to the early history of corrections, dating back to Babylonian and Sumerian Times. Many historians view the Hammurabi Code² as the first recorded set of codes that held individuals accountable by government. To redress wrongs in early times, varied and different punishments were provided to criminals. These punishments ranged from death, torture, imprisonment, mutilation, forfeiture of property, retaliation, and fines. Torture, mutilation and branding were considered corporal punishment and used until the 19th century.³ The imprisonment of offenders is considered a more modern penal practice, but the origins of punishment reveal that the same issues with prisons, such as overcrowding are not new.

The laws by which people in society are held accountable today in the United States are broken down by federal, state and local statutes (codes). Today, prisons are the center of punishment and located throughout the United States; however it was not until the 1790’s that the first prison which held offenders long term was built in Philadelphia, Pennsylvania and became the prototype for the modern prison system. Ohio’s first state penitentiary was built in Columbus in 1813 just ten years after becoming a state. As the first institutions (penitentiaries/prisons) were built, prison overcrowding became an issue. Ironic, that in 2015, overcrowding and budget issues continue to play a predominant part in corrections. The penitentiary was originally used to house offenders who would reflect on their crimes and repent.

¹ Durkheim  E.qtd [Allen, H& Simonsen, Clifford].
² The Code of Hammurabi written about 1750 B.C.
Facilities today are where felons are incarcerated as punishment, although rehabilitation is also a strong focus of incarceration.

In modern times, confinement is dictated by the severity of the crime and varies from state to state. A felony is a criminal offense punishable by death or incarceration in a state or federal confinement for a period described by statute in a given jurisdiction, typically one year or more in a prison. A felony is considered a more egregious act than a misdemeanor. A misdemeanor is an offense usually punishable by incarceration in a local facility for a period described by statute in a given jurisdiction, typically limited to one year or less.4

**Prison Overcrowding and the War on Drugs**

President Reagan’s war on drugs in the 1980’s had a significant impact on prison overcrowding. A primary goal of the War on Drugs legislation was to arrest drug dealers and reduce access of drugs to drug users. There was little or no attention placed on the causes of drug use and/or social problems that lead to addiction, and at the time of this legislation there was little effort placed on treatment.5 This “War” increased work load, and prison overcrowding for the entire criminal justice system. Many drug dealers were arrested, convicted, and placed into the prison systems across the United States. In 1980 prisons held an estimated 319,000 offenders with over 1 million offenders on probation.6 Since the war on drugs and the implementation of harsher sentencing laws there has been 1.1 million low-level or non-violent prisoners added to the United Stated prison population. In 2013, over 1.5 million offenders were held in prisons and

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over 3 million offenders on probation.\textsuperscript{7} It appears that most felony charges today arise out of the offenders desire to obtain drugs or acts committed under the influence of substances of abuse.

Today, Ohio is the sixth largest state prison system. The Ohio prison system consists of 28 institutions throughout the state of Ohio, which includes one Correctional Medical Center, with buildings dating from 1916 to 2000. The Ohio prison system is overly used and this is a systemic issue not just for Ohio, but for all states with increasing prison populations. One source of the increase in prison populations is that legislators do not want their constituents to think they are not tough on crime. Since the 1980’s, several tough sentencing laws were enacted across the United States and Ohio. Those sentencing laws have created concerns when balancing the need for public safety while seeing an increase in the cost for the operation of state correctional facilities.

The Ohio General Assembly has worked to decrease the overall prison population by enacting legislation they hoped would assist in decreasing the prison population. The most recent sentencing legislation was House Bill 86 (HB 86) enacted September 2011. This legislation made comprehensive changes to Ohio’s sentencing guidelines. Unfortunately, these new laws have not resulted in the decreases expected by the legislation. Prior to the most recent legislation, HB 86, the last comprehensive changes were enacted in 1996, known as Senate Bill 2 (SB 2). This legislation was enacted to assist with sentencing reform and the overcrowding of Ohio prisons. One significant change in SB 2 legislation was the creation of a new felony tier, known as the 5\textsuperscript{th} degree felony. This felony is the lowest level felony in the sentencing guidelines and has a maximum sentence of 12 months in prison. Prior to SB 2, Ohio had four

degrees of felonies. The question remains as to the impact SB 2 had, if any, on the Ohio prison population, and in particular, the result of legislative changes on prisons sentences for defendants convicted of lower level felonies (known as 4th and 5th degree felonies). This paper will explore what, if any, impact the introduction of the 5th degree felony has had on Ohio prisons. Additionally, this paper will explore whether probation revocations may have attributed to the increase in the prison population. In Ohio, felony probation is also known as community control. Probation is defined as a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision by way of judicial release.

In 2013, Ohio prison commitments totaled 20,528 individuals. Out of this number 25% were drug offenses and over 23% were probation or community control violators (revocations) from low level 4th and 5th degree felonies. It is worth noting that since 2000, the number of prison inmates using opiates upon intake into the prison system has risen 500%. This increase and the number of low level felony incarcerations and probation revocations indicate the number of offenders who are drug users committing crimes for their addiction and probation violators who will not comply with orders of the Court.

**Probation (Community Control) Revocation**

Once an individual has been placed on probation and fails to follow the conditions set forth under his/her probation conditions the probationer may face revocation. If a revocation is filed, the probationer is entitled to a probable cause and evidentiary hearing. If the judge determines the probationer violated the conditions of probation, the probationer may be continued on probation with additional conditions or sanctions, or the judge may impose a prison sentence.

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sentence. If the probationer is sent to prison for a 5th degree felony the prison sentence will be 12 months or less, unless the defendant has multiple cases or charges, only then may he or she receive a longer sentence.

Possession of drugs, trafficking in marijuana, theft and receiving stolen property are examples of 5th degree felonies with a maximum incarceration of one year in the state of Ohio. These felonies are non-violent felonies which tend to relate to drug use as previously noted.

**Sentencing Modality**

In Ohio, individuals can be sentenced to state prison for a 5th degree felony with less than a one year sentence. The individual may be incarcerated in a local facility (jail) while the case is pending if bond is not posted. Once the prosecution and defense complete negotiations, and the judge makes his/her findings, the defendant may be eligible for a prison sentence. As an example, an individual may have 90 days of jail time credit on a 5th degree felony with a 12 month sentence. The 90 days would be subtracted from the 12 month sentence (jail time credit) and thus the defendant would be incarcerated in state prison for 9 months.

When looking at the overall community control supervision modality of corrections in the state of Ohio, there are an abundance of opportunities to work with probationers/offenders through community-based correctional programs as well as funding initiatives from the Ohio Department of Rehabilitation and Correction to decrease recidivism by implementing programs to assist courts and probation on sending offenders to prison. For example, there are programs based on outpatient treatment as well as other programs such as intensive supervised probation to assist offenders to stay out of the prison system. It should be noted that Ohio has re-entry programs for those individuals leaving the prison system and a record low offender recidivism rate of 27.1 percent. One reason for the lower rate can be attributed to the 2009 court decision
which removed nearly 2,500 people from supervision with the Adult Parole Authority. Other factors, including the continued use of evidenced-based practices, are also keeping the recidivism rate lower than the national average.\textsuperscript{9} With all the opportunities provided one has to wonder, why are prisons overcrowded?

It appears the history of prison overcrowding remains an issue in the present, and the question now is how to change the overcrowding issue for the future. This paper will explore the following on prison populations in Ohio:

1. What impact, if any, has the legislation introducing the 5\textsuperscript{th} degree felony into the sentencing guidelines in 1996 played in the overcrowding of Ohio’s prisons?
2. What impact, if any, has there been on the prison population by probation revocations?
3. Finally, with research data indicating best practices, what options are available in the state to decrease the prison population?

Literature Review

The United States has the highest prison population in the world according to the International Centre for Prison Studies.\(^{10}\) The United States houses over 25 percent of all prison inmates on the planet. When you look at these statistics, what are criminal justice professionals and legislatures doing about America’s prison population? As a country we spend four times more on prison incarceration than we do on educating our children.\(^{11}\) The cost of operating the country’s prison population is not currently sustainable. For example, if you build more prisons, surely more individuals will be placed in the prison system. The cost to tax payers will continue to increase unless other measures are taken to find alternative ways to change the type of offenders being sentenced to prison. Specifically, the many offenders who are being sentenced to prison are non-violent, low-level felony offenders with major drug addiction issues and criminal histories.

In Ohio, the prison population has been debated by the General Assembly and other practitioners in the criminal justice system for years. Ohio has roughly a 1.5 billion dollar price tag when it comes to operating state prisons. The average cost for housing Ohio inmates is $68.14 per day, or $24,870 per year per offender.\(^{12}\) According to the Urban Institute, Ohio was one of 10 states to build more prisons during the 1980’s and 1990’s. This was during the “War on Drugs” and when the General Assembly was “tough on crime.”\(^{13}\) When Ohio built new prisons, those prisons filled up with inmates, many of whom were non-violent felons.


Today the Ohio prison population is over 50,000 inmates, which exceeds the prison systems maximum capacity by almost 32%. In an effort to be forward thinking the General Assembly in 1991 created the Ohio Sentencing Commission to assist and advise on sentencing laws and prison overcrowding.

The Ohio Sentencing Commission conducted significant research on the impact of felony sentencing in Ohio which encompassed sentencing, prison population, and probation in Ohio. The General Assembly instructed the Ohio Sentencing Commission to develop a sentencing policy by matching criminal penalties with available resources and by promoting a full range of sentencing options to decrease prison overcrowding. “The commission’s task was to make recommendations to provide relief for the Ohio prison system without compromising public safety.”14 In an effort to revamp the prison crowding issue and simplify Ohio sentencing laws, the Commission recommended drastic changes to the sentencing guidelines and also recommended a new felony tier.

Prior to the development of this new tier, Ohio had four tiers of felonies with multiple (12) variations of those felonies.15 The four tiers of sentencing along with the increase in drug convictions had contributed to the increase in the prison population. The sentencing commission’s recommendations were prepared and the Ohio legislature passed the new sentencing guidelines known as Senate Bill 2 (SB 2) effective July 1, 1996. As with any implementation, the creation of the 5th degree felony sentence had an impact on prisons, local jails, and Ohio’s probation system. During Fiscal Year 1992, The Department of Rehabilitation and Correction average daily population was an average of 35,234 and had an average

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expenditure per inmate of $32.22 per day or $11,791.09 per year per offender. Today, the average expenditure per inmate is $68.14 per day or $24,871.10. As of December 2014, the total population was 50,870.

The Sentencing Commission’s report also forecasted prison population projections and reviewed the Ohio Department of Rehabilitation and Correction (DRC) prison population forecast. Based on the report, the sentencing commission and DRC differed as to the baseline projections which were “what would happen if no changes were made?” and “what implications would be imposed from the sentencing commission’s changes?” The baseline projections also did not, per the report, consider the impact of increased funding for intermediate sanctions that were proposed at the time. The report did consider the effect of the new Community-Based Correctional Facilities (CBCF’s) that were going online.

There are currently 18 (CBCF’s) in the state of Ohio. These facilities were created as a partial response to the growing prison population. CBCF’s are residential programs that provide comprehensive programming addressing offender needs such as chemical dependency, education, employment, and family relationships. The intensity of programming in CBCF’s significantly impacts their cost per day, but results in high successful completion rates and positive impacts on recidivism. Table 1 below depicts some of the baseline projection from (DRC) and the Ohio Sentencing Commission (OCSC) along with the actual population data for those years.

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Table 1. Ohio Estimated and Actual Incarceration Data

<table>
<thead>
<tr>
<th>Year</th>
<th>DRC</th>
<th>OCSC</th>
<th>Consensus</th>
<th>Actual</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>52,528</td>
<td>46,487</td>
<td>49,508</td>
<td>46,806</td>
</tr>
<tr>
<td>2000</td>
<td>54,587</td>
<td>47,403</td>
<td>50,995</td>
<td>46,537</td>
</tr>
<tr>
<td>2001</td>
<td>56,444</td>
<td>48,185</td>
<td>52,315</td>
<td>45,244</td>
</tr>
<tr>
<td>2002</td>
<td>58,062</td>
<td>49,115</td>
<td>53,589</td>
<td>44,917</td>
</tr>
</tbody>
</table>

As previously noted, Ohio’s prison population is over 50,000 inmates. This would clearly indicate that while more prisons were built in the 1990’s and sentencing laws restructured, Ohio still incarcerated more offenders than capacity permits. In 2011, as the prison population totaled 50,627, and in response to the rising inmate population, the Ohio legislature enacted House Bill 86 (HB 86).

**HB 86: What It Did for Criminal Justice in Ohio**

A goal of HB 86 was to assist with keeping non-violent felony four and five offenders out of prison by making it mandatory that certain 4th and 5th degree offenders without a criminal history receive mandatory community control. Officials predicted in March 2012, there would be significant declines in sentencings to prison tied to HB 86 reforms with a projected population of 47,250 by July 2015. Unfortunately, present predictions still indicate an increase in the overall prison population as it may climb to 52,169.\(^{19}\) The prison population for 2012 was 49,713, in 2013 it was 50,419, and in 2014 the total prison population was 50,510.

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While the Ohio Sentencing Commission and the General Assembly with HB 86 worked to make changes to the state’s prison population there are still unanswered questions as to how 5th degree felony sentences may have had an impact on the prisons, local jails, and Ohio probation system. HB 86 (sentencing reform) incorporated some of the following, effective September 2011:

**Earned Credit:**
- Increased earned credit from 1 to 5 days per month for certain offenders;
- All sex offenders were excluded from earned credit eligibility;
- Caps overall earned credit and/or program completion credit at 8% of offenders sentence;
- Provision did not apply to those offenders sentenced prior to September 30, 2011.

**Mandatory Drug Provisions:**
- Created new categories and potentially shorter mandatory terms for trafficking in/or possession of marijuana and hashish;
- Made changes to other mandatory felony 3 drug penalties.

**Judicial Release:**
- Offenders who served more than 10 years might be eligible to apply for judicial release, depending on his/her crime;
- Restored judicial release eligibility for offenders with five year sentences;

The provision also applied to inmates who were incarcerated at time bill was passed.

**DRC Recommended Judicial Release:**
- Judicial Release recommendation which permits the Director of the Department of Rehabilitation and Correction to recommend to the court that an inmate that
has served 80% of their stated prison term should be considered for judicial release.

**Intervention in Lieu of Conviction (Diversion):**

- Permitted repeat offenders that did not have prior offenses of violence, and expanded the eligibility to persons charged with specified theft and other offenses.
- Permitted felony 4 drug possession offenses eligible for Intervention in Lieu of Conviction.

The overcrowding of prisons is not just an Ohio issue but a national issue.

There are 17 states where the prison population is now higher than the capacity of the facilities designed to hold them. At the end of 2013, Illinois was housing 48,653 prisoners, according to data published by the Bureau of Justice Statistics. The state’s prison facilities are designed to hold just 32,075 prisoners, meaning the system is operating at 151 percent of capacity. North Dakota’s 1,571 prisoners live in space meant for 1,044 people, 150 percent of capacity. Nebraska, Ohio, Delaware, Colorado, Iowa and Hawaii are all holding a prison population equal to more than 110 percent of capacity.\(^\text{20}\)

The current incarceration practices are not sustainable for any state. This does not mean that as citizens should be soft on crime, but rather, smarter in the manner in which rehabilitation and sentences are implemented. It is important that public safety is not compromised in the quest to change how individuals are sentenced to prison. In 2013, 24.84% of the total prison commitments were lower-level felonies sentenced to prison for drug offenses in the state of Ohio. The lower-level felons who are sentenced to prison are less likely to have the opportunity, 

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due to the length of their sentence, to have treatment or other programming offered by DRC. To change the revolving door on the low-level felony, those individuals with drug convictions will continue to be involved with crime until they are provided meaningful treatment prior to receiving incarceration based on their criminogenic needs and risk for reoffending. The Ohio Risk Assessment Tool is not utilized on sentences where defendants take a plea deal and bypass the pre-sentence investigation process and are sentenced straight to prison, which often happens with those facing 5th degree felony charges. The Ohio Risk Assessment Tool can only assist in determining if an individual is at risk for recidivism.

In particular, felony cases involving opiates continue to increase in Ohio. Ohio Attorney General Mike DeWine calls heroin an “epidemic” in Ohio. Emergency medical responders and law enforcement report calls about heroin-related overdoses are a common occurrence, while police respond to an increasing amount of crime such as thefts and burglaries. Additionally, Ohio’s opiate and prescription drug epidemic has severely strained law enforcement, criminal justice, and stretched the capacity of Ohio’s publicly-funded alcohol and other drug addiction treatment services system. Nationally, the number of persons who had heroin dependence or abuse in 2013 (517,000) was similar to the numbers in 2009 through 2012 (ranging from 361,000 to 467,000), but it was higher than numbers in 2002 through 2008 (ranging from 189,000 to 324,000).

Clearly this is a factor contributing to the increased prison population. In 2013, an estimated 21.6 million persons aged 12 or older were classified with substance dependence or

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abuse. This is an epidemic which can be attributed to social and cultural issues. Further, in 2013 the criminal justice population was an estimated 1.5 million adults aged 18 or older who were on parole or other supervised release from prison at some time during the past year. About one quarter (27.4 percent) were current illicit drug users, with 20.4 percent reporting current use of marijuana and 12.1 percent reporting current nonmedical use of psychotherapeutic drugs. These rates were higher than those reported by adults aged 18 or older who were not on parole or other supervised release during the past year (9.3 percent for current illicit drug use, 7.5 percent for current marijuana use, and 2.4 percent for current nonmedical use of psychotherapeutic drugs).

In 2013, an estimated 3 million adults aged 18 or older were on probation at some time during the past year. More than one quarter (31.4 percent) were current illicit drug users, with 23.5 percent reporting current use of marijuana and 12.3 percent reporting current nonmedical use of psychotherapeutic drugs. These rates were higher than those reported by adults who were not on probation during the past year (9.0 percent for current illicit drug use, 7.3 percent for current marijuana use, and 2.3 percent for current nonmedical use of psychotherapeutic drugs).

These cases all have an impact on the community, courts, local jails, and ultimately the prison system.

Research shows that strong community supervision programs for lower-risk, non-violent offenders not only cost significantly less than incarceration, but when appropriately resourced

and managed, can cut recidivism by as much as 30%.\textsuperscript{26} An article called, “One in 31: The Long Reach of American Corrections” provides states with a blueprint and specific case studies for strengthening their community corrections systems, saving money and reducing crime. Research-based recommendations include:

- Sort offenders by risk to public safety to determine appropriate levels of supervision;
- Base intervention programs on sound research about what works to reduce recidivism;
- Harness advances in supervision technology such as electronic monitoring and rapid-result alcohol and drug tests;
- Impose swift and certain sanctions for offenders who break the rules of their release but who do not commit new crimes; and
- Create incentives for offenders and supervision agencies to succeed, and monitor their performance.\textsuperscript{27}

The state of Ohio has adopted many of the above recommendations supported by research. The Bureau of Justice Statistics article on Probation and Parole in the United States (2014), indicates that approximately 1 in 51 adults in the United States was under community supervision at year end 2013, the lowest rate observed since 1996.\textsuperscript{28} Further the article highlighted that movement both onto and off probation increased during 2013, with about 2,094,100 entries and 2,131,300 exits.\textsuperscript{29} The National Institute of Corrections data for 2013, indicates Ohio has a rate about 13% higher than the national average of incarcerated (in prison) adults per 100,000. For probation the rate is 89% higher than the national average number of probationers per 100,000 people and 2013 crime rates indicate Ohio is about 5% higher than the

national average rate. Property crimes account for around 91% of the crime rate in Ohio which is about 9% higher than the national rate. The remaining 9% are violent crimes and are about 18% lower than other states.\textsuperscript{30}

Substance abuse costs the taxpayers over $600 billion annually and treatment can help reduce these costs. Drug addiction treatment has been shown to reduce associated health and social costs by far more than the cost of treatment itself. Treatment is also much less expensive than its alternatives, such as incarcerating addicted persons. For example, the average cost for one year of methadone maintenance treatment is approximately $4,700 per patient; whereas one full year of imprisonment costs taxpayers approximately $24,000. According to conservative estimates, every dollar invested in addiction treatment programs yields a return of between $4 and $7 in reduced drug-related crime, criminal justice cost and theft.\textsuperscript{31} Figure 1 below indicates the number of individuals incarcerated for drug offenses from 2011 through 2014 in the Ohio prison system.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{drug-commitments.png}
\caption{Annual Drug Related Commitments}
\end{figure}

It is a fact that a large number of individuals who are sentenced to prison on a probation revocation either could not or would not stop using drugs. The drug of choice in Ohio is heroin; it’s cheap and highly addictive. Ohio has the 12th highest drug overdose mortality rate in the United States.\textsuperscript{32} Probation officers work with offenders to change their behavior by providing guidance and encouragement on how to change their behavior. Probationers are sent to numerous treatment programs including inpatient and outpatient treatment modalities to assist with their addiction issues. Some have been given the opportunity for residential treatment not once, but twice in trying to get their addiction issues under control, and to ultimately change their behavior and attitude toward their drug addiction. Sentencing a 5\textsuperscript{th} degree felon who has a substance abuse issue to prison does not benefit the system (due to cost and overcrowding concerns) or the defendant/probationer (who is not able to resolve his/her underlying drug addiction).

Unfortunately, some defendants/probationers will refuse treatment. An arrest and incarceration is merely an interruption in their lives, and once out, individuals return to using drugs and engaging in criminal activity for their habit. If a defendant is placed on probation for a 5\textsuperscript{th} degree felony drug offense, probation terms dictate what type of conditions are required such as drug treatment. However, when a defendant/probationer will not comply with a court order, continues drug use, and fails to report per probation conditions, and probation officers and the court has exhausted all other alternatives, then the only option for the court may be to impose a prison sentence. In some cases, defendant’s facing probation revocation are now choosing prison instead of probation during revocation hearings on a 5\textsuperscript{th} degree felony. State Senator Bill Seitz, (Ohio) a driving force behind HB 86, has stated that some judges have “sabotaged” HB 86.

by increasing the number of offenders they send to prison on probation violations and other sentencing options available through HB 86.  

The courts are going above and beyond typical responses with low-level felony offenders from training their staff in utilizing best practices, assisting probationers in implementing specialized dockets, and applying for grants through the DRC for prison diversion. The revocations have increased due to the amount of non-compliance from probationers as well as unresolved addiction issues. In reviewing the prison commitments for drug offenses, this category is why some defendants/probationers ultimately arrive in the system and are ultimately revoked. Millions are spent on treatment dollars, but if the individual will not voluntarily attend treatment or participate in an in-patient or out-patient treatment program, non-violent 5th degree felonies will continue to violate probation and be sentenced to prison until some sentencing changes are made.

In 2009, the estimated cost for each intake into the prison system for male inmates was $194.13 and for female inmates $470.23. The short term 5th degree felony commitments are a costly method of incarceration on the Ohio correctional system. The days served for 5th degree felonies for less than 90 days and 90 days to 180 shows the amount of offenders staying short term in the prison system. This short term sentence does not provide offenders with sufficient time to change their behavior with treatment opportunities from DRC nor does it have an impact on their criminal behavior. Table 2 indicates the amount of short term 5th degree felony commitments sent to prison for 2013.

Table 2. 2013- 5th Degree Felony Commitments Sentenced and Community Control Violators

<table>
<thead>
<tr>
<th>Number of 5th Degree Felons</th>
<th>Number of Days Served</th>
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<tr>
<td></td>
<td>0-90</td>
</tr>
<tr>
<td>Sentenced</td>
<td>145</td>
</tr>
<tr>
<td>Community Control Violators</td>
<td>251</td>
</tr>
</tbody>
</table>

*Note: Sentenced indicates no community control sanctions imposed. *
*Data collected by Ohio Department of Rehabilitation and Correction Bureau of Research and Evaluation.*

There were 4,641 community control violators sentenced to prison out of the total 20,094 incarcerations for fiscal year 2012.

Citizens expect accountability from those in the criminal justice system, and in the past, the expectation was more focused on punishment. The expectation should be to consider changing the offender behavior so the offender can stop cycling through the prison system. The dependence on drugs in the United States is a major issue for the correctional system. Treatment in the past was not one of the top priorities for correctional systems as it was more about punishment and confinement. Programming today is a top priority in the correctional setting. Treatment-based programming and using evidenced-based practices can assist in decreasing probation violations and the prison population issues. However, it must be noted that treatment is voluntary and offenders/probationers have the right to decline treatment. Treatment should be made mandatory prior to any prison sentence for low-level felony drug charges. The social and cultural aspect of drug use has changed in society and until treatment needs in response to this demand are fully addressed, there will still be a revolving door impact on the correctional system. Drug dependent criminals will continue to violate societal laws and return to incarceration as long as their addiction issues are not addressed. Cycling in an out of prison for
short-term incarcerations will not change the offenders’ behavior when it comes to their drug addiction and the crimes they commit which fuel that addiction. It will also continue to place a strain the prison population.
Methods

In order to examine the use of 5th degree felony charges and subsequent sentencing in Ohio, it is important to look at the history of Ohio’s Felony Sentencing Restructuring, from the time SB 2 was passed to the present time, using information from the Ohio Criminal Sentencing Commission report (1993) and information from DRC data. The goal was to identify data from the Ohio DRC, Bureau of Planning and Evaluation, along with survey questions and interviews to determine what has contributed to Ohio’s prison overcrowding.

In order to find out the overall view of 5th degree felonies and their impact on the prison system, judges, prosecutors, the previous Director of the Ohio Criminal Sentencing Commission, Ohio Department of Rehabilitation and Correction Staff (DRC), Probation Chiefs and Officers, and a probationer facing revocation of a 5th degree felony were surveyed and interviewed about their opinions and experiences.

The survey questions were sent by Survey Monkey, with a greeting explaining the research project, except to the judges. The judges were contacted via their staff in order to receive the survey as the judges preferred the surveys be sent through their staff. Their responses were received by fax and email. All survey respondents were advised their personal information would not be released and only the data from the surveys would be shared.

Only those in the court system who work directly with felony offenders were selected as respondents. The probation officers and chief probation officers surveyed were selected from the Ohio Chief Probation Officers Association trainings and staff members representing various jurisdictions. This forum provided an opportunity to have surveys completed from officers all over the state representing a wider range of geographical responses rather than one centralized area.
In checking with the Ohio Judicial College, Ohio has 244 Common Pleas Judges and from that number, those judges in the General Division totaled 162. A convenience sample was drawn through the author’s associates, including Chief Probation Officers and Court Administrators, to request respective judges to complete the survey. The judges were selected by contacting the respective courts in the Southern Ohio area and by asking judicial staff if the particular judge would be willing to participate in the survey.

The respondents selected from DRC were selected based on the opportunities provided through the Ohio Chief Probation Officers Association and Community Corrections Act meetings.

The survey was designed for efficiency, that is, the time to complete the survey was expected to take five to seven minutes in order to maximize the number of responses. This was done by keeping the number of questions to 10 or less. The questions were structured to include response options including multiple choice, yes/no, and open-ended text explanations.

The survey questions were developed to be the same for each group. For example, the selected Common Pleas Court Judges-General Division had the same questions which related to the sentencing of offenders. The DRC staff questions were about the prison system. The questions asked of probation officers pertained to 5th degree felons and probation practices. The survey greeting for the probation officers and DRC staff is located in Appendix A. The survey questions asked of judges are located in Appendix B. Probation Officer survey questions are located in Appendix C. DRC staff survey questions are located in Appendix D.

The surveys were sent out on October 11, and returned by November 10, 2014. A total of 68 surveys were sent to the various groups. A total of 48 surveys were returned from all three groups. Twelve responses were received from judges, 29 responses were received from probation
staff and 8 responses were received from DRC. The survey resulted in a 72% overall rate of return. The Ohio Chief Probation Officers Association contacts provided the most responses with a return of twenty-nine (29) out of the thirty seven (37) surveys sent to the various members and their staff. There are approximately 160 members in this association representing probation agencies throughout Ohio.

The Common Pleas General Division Judges were the hardest to obtain participation. Judge e-mail addresses are not readily available. However, the Ohio Judicial Conference provided a list of General Division Courts to assist in locating contact information for the various courts. Several calls were made to courts judicial staff inquiring as to whether or not the judges from the court would participate in the survey. Out of the 15 courts contacted, 19 judges were asked to complete the surveys with 12 responding. Some courts contacted had multiple judges assigned to the court. If there had been judicial training for judges by the Ohio Supreme Court during the time of this research, the author could have capitalized on access to a larger number of judges with a larger geographic representation of judges.
The Ohio prison system DRC has over 11,000 staff. The individuals asked to participate were based on interactions with the author from prior meetings and inquiries to the different offices to request participation. Finally, twelve (12) surveys were sent to selected staff at DRC. Out of the 12 DRC surveys sent to staff members, eight (8) surveys were returned. Figure 2: above, provides the geographical area representing where responses were received from the respondents. DRC staff was not indicated in this figure as the central office for this agency is located in Franklin County. The surveys were analyzed using Survey Monkey for the Ohio Department of Rehabilitation and Correction (DRC) and Probation Officers. The judge surveys were analyzed and manually tabulated.
Interviews were conducted with two Common Pleas Court Judges, two employees of DRC, one probationer facing revocation, two prosecutors, and the previous Director of the Ohio Sentencing Commission. The first judge was selected based on opportunity and the second judge was selected after being provided as a resource by the first judge interviewed (i.e., snowball sampling). The DRC staff was selected based on prior opportunities to work with individuals on other projects. One probationer was interviewed based on opportunity to ask questions while at the court. The two prosecutors were selected based on opportunity and location. Finally, the previous Director of the Ohio Sentencing Commission was interviewed for his first-hand knowledge of the Ohio Sentencing Commission, which was established in 1990 by the General Assembly. He also provided input about SB 2 (1996) and HB 86 (2011).
Findings

The findings were analyzed by reviewing the responses from the selected Common Pleas Judges, DRC staff, and probation officer surveys along with the interviews conducted. In order to analyze all data the findings were divided by each respondent group.

Common Pleas Court Judges (General Division) Survey

Judge responses were split (6 vs. 6) on whether the court issued more sanctions before or after HB 86 (mandatory probation). When further probed about what types of sanctions had increased since HB 86, the judges offered the following:

- Community-based correctional facilities,
- Outpatient drug and alcohol treatment, and
- Local jail sanctions, and electronic home monitoring.

These responses are indicative of additional resources being utilized for 5th degree felony cases as well as for HB 86 5th degree felonies.

Just over half (7 of 12) of the judges indicated that since HB 86, they had more dispositions where probationers were offered probation but refused, opting for a prison term. This response demonstrates that a small majority of defendants charged with lower level felonies would rather have a prison term than be placed on probation. One reason cited from the interviews is the defendants’ attorneys may stipulate to an agreed-upon sentence on a low-level felony and this provides defendants a minimal prison sentence. In some cases, due to the length of time left on the sentence for probation revocations, the defendant may receive local jail time.

Anecdotally, some judges, prosecutors, and probation officers will refer to 5th degree felony charges as “enhanced misdemeanors.” Therefore, judges were asked formally in the survey about this. Out of the 12 responses, 8 judges indicated they did not believe 5th degree
felonies were enhanced misdemeanors. Additionally, the majority of judges (7 of 12) indicated that no change was needed for 5th degree felonies, and would not be better served as a misdemeanor or a higher-level felony charge. The other 4 judges indicated they believe 5th degree felonies are enhanced misdemeanors. The “other” responses, included one judge who suggested to keep 5th degree felony charges as a felony, but the sentence would be a maximum of 12 months in jail; and another judge suggested that if 5th degree felonies were victimless charges, the charges should be misdemeanors.

In Ohio, Common Pleas Court Judges can only sentence an offender to jail up to 180 days (R.C 2929.16.). A small majority (5 of 9) of the judges indicated that if legislation permitted a sentence to local jail for up to 12 months, they would order it. The remaining responses provided other comments. Additionally, judges who responded to the survey expressed the following concerns:

- the state passing the responsibility to local governments without funding,
- local sentencing cost too expensive, and
- local jail overcrowding.

The responses are summarized in Appendix E.

The majority of surveys received from the judges (12) indicate these judges are more than willing to place offenders on community control, whether or not the individual was a non-HB 86 case or HB 86 case. It should also be noted that HB 86 did not make a difference to the surveyed judges in regard to sentencing a first time offender on a 5th degree felony to prison. Those surveyed reviewed the criminal history of defendants and would not sentence a defendant with a first time 5th degree felony to prison. This, in part, explains the data from the Department of
Rehabilitation and Correction that this provision in HB 86 did not provide the decrease in the prison population as forecasted.

The individuals who receive community control are provided opportunities to successfully complete probation by following probation conditions such as attending drug treatment through group sessions and individual sessions. Some first time offenders qualify for diversion programs if they meet the defined criteria. “Intervention in Lieu” is a diversion program in Ohio that if the defendant meets the criteria and successfully completes the necessary treatment, they do not have a felony on their record. In some cases, when a probationer fails to follow court orders instead of sentencing the individual to prison or a local jail sanction, the probationers are administratively terminated. The reason for administrative termination is that the individual may have utilized many rehabilitative resources, such as a community-based correctional facilities or other lockdown programs unsuccessfully, but if there is no time left on their sentence (e.g., due to jail time credit) the individual cannot be sent to prison. As one judge indicated, these cases are “torture for probation.” This is due to the short amount of time (12 months) that a defendant has as an underlying sentence. These defendants utilize many resources and tend to accumulate jail time credit, which leaves little time remaining for probation staff to work with the offender if the other resources are not effective.

The 5th degree felony was created in the sentencing changes of SB 2. Based on the findings and the continued issues with the sentencing of short term 5th degree felonies, the 5th degree felony tier created in SB 2 has had a negative impact on the prison system. If SB 2 had a positive impact on the prison population by reducing the numbers, HB 86 legislation would not have been necessary to assist with prison overcrowding.
Ohio Department of Rehabilitation and Correction (DRC) Staff Survey

The General Assembly has been trying to find ways to decrease the amount of individuals moving into the prison system by providing funding incentives for investing in the community and to deter the sentencing of non-violent lower level felonies such as the 5th degree felony. In response to the prison overcrowding, the corrections respondents (5 of 7) felt that 5th degree felons who are sentenced to prison has had an impact on prison overcrowding. Further, when looking at the cost effectiveness of housing these non-violent offenders in the prison, half (4 of 7) believe 5th degree felons should be placed in the community. Two of the respondents skipped this question.

Because the costs of operating prisons continue to increase, the respondents were asked if they believed if it costs the same for an individual at reception (intake into the prison system) who will serve a prison sentence of 12 months or less. Out of the correction responses just over half (4 of 7) believe it does cost the same. In reviewing the data from DRC and looking at the degree of felonies in the system, respondents were asked which felony had the biggest impact on the population. The felony that had the biggest impact was 3rd degree felony with the 1st degree felony following closely behind.

The 5th degree felony was not mentioned regarding impact on the prison system, and to follow up on this finding by interviewing a DRC staff member, the respondent indicated that the higher-degree felons are in the system longer and therefore have a more significant impact when considering days served. The 5th degree felony is a large part of the prison system; however, these sentences are more short-term as opposed to the longer terms of incarceration for higher degree felonies.
Probation Officer Survey

As the prison system has seen an increase in population, some probation departments have also experienced an increase in the supervision of non-violent 5th degree felonies as reported by the respondents. This is not due to HB 86 legislation, but has more to do with the number of lower-level felonies entering the criminal justice system. Supervision of offenders has changed in Ohio over the last decade with probation officers providing evidenced-based practices to offenders to assist them with changing their offender behavior by focusing on the criminogenic needs and risk responsivity factors of the probationer.

In asking probation officers if their court utilizes more sanctions on 5th degree felonies, the majority of probation officers (26 out of 29) responded that their court was using more sanctions. This finding reaffirms that Ohio judges and probation staff use multiple resources to attempt to change offender behavior. A majority of the responses identified evidenced-based practices in use across the state. In addition, some respondents reported use of graduated responses by using homework, increased reporting to probation, increased treatment sessions, and assignment to intensive supervision. See Table 3 below for the type of sanctions employed by the court.

Table 3. Types of Sanctions Utilized for 5th Degree Felony Probationers

<table>
<thead>
<tr>
<th>Sanction Type</th>
<th>Survey response totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outpatient Treatment- Alcohol/Drug</td>
<td>26</td>
</tr>
<tr>
<td>Local Jail Sanctions</td>
<td>24</td>
</tr>
<tr>
<td>Community-Based Correction Facility</td>
<td>21</td>
</tr>
<tr>
<td>Electronic Home Monitoring</td>
<td>17</td>
</tr>
</tbody>
</table>
A few responses from probation officers indicated that they have supervised dispositions in which probation was offered, but the defendant refused probation in lieu of a prison term. Additionally, 62% of probation officers indicated that they have seen an increase in probation revocations of 5th degree felonies. See Table 4 on reasons for probation revocation hearings.

<table>
<thead>
<tr>
<th>Reason</th>
<th>Survey Response Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug and Alcohol Violations</td>
<td>16</td>
</tr>
<tr>
<td>New Felony Charge</td>
<td>15</td>
</tr>
<tr>
<td>Failure to Complete Required Treatment</td>
<td>13</td>
</tr>
<tr>
<td>New Misdemeanor Charge</td>
<td>9</td>
</tr>
</tbody>
</table>

When asked what type of evidenced-based practices officers used to assist probationers in changing their behavior, the most common response (25 of 29) was the use of the curriculum, Thinking for a Change.

<table>
<thead>
<tr>
<th>Type of Program/Curriculum</th>
<th>Survey Response Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thinking for a Change (T4C)</td>
<td>25</td>
</tr>
<tr>
<td>Carey Guides</td>
<td>18</td>
</tr>
<tr>
<td>Effective Practices in Community Supervision</td>
<td>16</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
</tr>
</tbody>
</table>

With the emphasis probation departments and officers have placed on evidence-based practices, a survey question asked about the overall attitude of probationers.
A small majority (55%) of probation officers reported a change in probationers’ attitudes since the implementation of evidence-based practices in their agency. In exploring further about how 5th degree felonies had impacted their job, just under half (48%) of officers indicated there had been an impact. The respondents listed higher caseloads, which can lead to officer frustration and reported more time and paperwork has to be completed on moderate to high risk probationers who have a higher risk of recidivism. Probation officers are utilizing more evidence-based practices which also takes increased time with probationers. Some officers are using cost-benefit analysis, behavior chains, and role play to assist offenders with changing their criminal behavior. The officers also reported they were conducting more group facilitation. A summary of additional responses from probation officers are located in the Appendix F.

Finally, interviews were conducted to follow-up on the findings from the surveys. In interviewing two judges, both were consistent in the belief that community control for lower level felons was the best use of resources. Additionally, both judges agreed that the public expectation is still based on punishment, instead of correcting the problem with community control. One judge also concluded there is an increase in the public awareness of the drug problem in Ohio as many Ohioans have been impacted by the heroin epidemic, and this may help to open the public’s eyes to the cost of incarcerating non-violent 5th degree felonies.

The two prosecutors yielded different opinions. When discussing anecdotally whether or not 5th degree felonies are “enhanced misdemeanors” one prosecutor agreed with the statement and felt 5th degree felonies should be eliminated. The other prosecutor disagreed and felt the felonies were not enhanced misdemeanors and the solution was not to eliminate the 5th degree felonies, but increase or enhance the punishment on the 5th degree felony to have an opportunity to work with the offender and build in more time to hold them accountable. Both prosecutors
agreed that 5\textsuperscript{th} degree felons should receive community control instead of prison if the defendant does not have a lengthy criminal history. Both prosecutors agreed that with the addition of the 5\textsuperscript{th} degree felony to the sentencing guidelines there has been an increase in case filings and more individuals needed to process these cases. To determine the amount of 5\textsuperscript{th} degree felony sentences, a review of the local prosecutor’s office confirmed the increase in 5\textsuperscript{th} degree felony convictions.\textsuperscript{34} Table 6 provides a breakdown of cases which were resolved with a 5\textsuperscript{th} degree felony conviction. These responses were in line with the surveys of judges, staff from DRC, and probation officers.

Table 6. Percentage of 5\textsuperscript{th} Degree Felony Convictions

<table>
<thead>
<tr>
<th>Year</th>
<th># of Felony Indictments</th>
<th># of Cases Resolved with 5\textsuperscript{th} Degree Conviction</th>
<th>Percentage of 5\textsuperscript{th} Degree Felony Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>817</td>
<td>342</td>
<td>42%</td>
</tr>
<tr>
<td>2010</td>
<td>673</td>
<td>300</td>
<td>45%</td>
</tr>
<tr>
<td>2011</td>
<td>706</td>
<td>295</td>
<td>42%</td>
</tr>
<tr>
<td>2012</td>
<td>629</td>
<td>263</td>
<td>42%</td>
</tr>
<tr>
<td>2013</td>
<td>657</td>
<td>298</td>
<td>45%</td>
</tr>
</tbody>
</table>

In interviewing two staff members from DRC, the questions were based on the 5\textsuperscript{th} degree felony and whether or not the prison system should be housing the 5\textsuperscript{th} degree felonies. Both corrections respondents felt community control was the answer in sentencing 5\textsuperscript{th} degree felons. As a follow up, corrections staff were asked about 5\textsuperscript{th} degree felony probation revocations.

\textsuperscript{34} Greene Co. Ohio Prosecutor data was listed to demonstrate the amount of 5\textsuperscript{th} degree felony convictions from just one county in Ohio.
Both respondents agreed that sending offenders to short-term incarceration without treatment is most likely only delaying the individual from engaging in new criminal activity. Additionally the former Director of the Ohio Sentencing Commission when asked about 5th degree felonies concluded that locking away people is not going to solve the problem on non-violent felonies. He was asked the same question regarding comments about felonies being “enhanced misdemeanors” and he stated that he was aware of those comments and suggested that prison should be reserved for violent offenders.

Finally, the opportunity to interview a probationer facing revocation provided insight as to why some probationers were refusing additional drug treatment and continuing on probation. The probationer knew with having one 5th degree felony, with jail time credit from being in a locked down treatment program, that he could receive a “deal.” The deal in his mind was a 7 to 8 month short-term sentence instead of having to report to a probation officer and follow court ordered probation conditions. The probationer also indicated that prison is much better than local jail. He concluded that you have more freedom to move around in the facility and can be released without any supervision or rules to follow from a parole officer on some felonies. This is known as post release control in Ohio and can be either mandatory or optional. Overall, interviews corresponded and support the results of the surveys.
Conclusions and Recommendations

The focus on correctional reform in Ohio is a long-term issue. In studying the purposes and responsibilities of Court’s, three specific purposes (the 6th, 7th, and 8th) pertain directly with the incarceration of individuals to: “Deter Criminal Behavior,” to “Rehabilitate Persons convicted of Crime,” and to “Separate Convicted Persons from Society.”35

In reviewing the 6th purpose -- deterring criminal behavior -- the courts act as the public forum for the pronouncement of punishment when persons are convicted of a crime. Deterrence of crime is the product of the public’s perception that crimes are regularly and swiftly punished. Based on this premise and the data findings, sentencing outcomes for those convicted of a 5th degree felony in Ohio does not deter criminal behavior. HB 86 legislation was passed to assist the prison overcrowding problem in Ohio. From the review of the findings in this paper, this legislation has not accomplished this goal.

Thus, the majority of individuals in the criminal justice system who have already been convicted of other crimes are not deterred by a 5th degree felony sentence. The punishment is 12 months or less and the odds are that the individual will not be incarcerated for that length of time due to jail time credit (earned during engagement with other non-incarceration resources). In cases in which the defendant declines probation, he or she would have to work on changing his/her behavior without support from the criminal justice system, which is their best option.

Survey responses from judges and probation officers indicated some defendants are choosing prison over probation. We know effective deterrence results in a reduction of crime. Presently, there is no effective deterrence for criminal behavior resulting from drug use. Drug offenses and drug use has a societal and cultural impact, which ultimately affects the prison

35 NCSC, Institute for Court Management, Adapted from Ernie Friesen’s talks and writings on the Purposes of Courts
system. Data from DRC indicates that the 5th degree felony continues to be the largest segment of the prison population, but on a short-term basis as opposed to those sentenced to longer terms. Based on these forgoing conclusions, the following recommendations are offered.

**Conclusion 1: Non-violent lower-level felons continue to be sentenced to prison.**

The issue of prison overcrowding and substance abuse is not unique to Ohio. Unfortunately, based on the present sentencing guidelines, unless changed there will still be non-violent lower-level felonies sentenced to the institution as well as those found in violation of probation conditions. Sentencing non-violent felons is not cost effective nor will it fix the substance abuse and recidivism issue.

**Recommendation 1:**

The Ohio Sentencing Commission, DRC, General Assembly, Ohio Judicial Conference and the Ohio Chief Probation Officers Association should work together to decrease the prison population and changing offender behavior to achieving a decrease in recidivism.

This should be done by having regional meetings with not just the selected members of the Sentencing Commission, but should encompass all participants who deal with offenders including judges, probation officers, and prosecutors in each county. A survey should be conducted in every Common Pleas Court that sentences offenders to prison. This survey should also be provided to probation officers. The survey should ask what is working and what is not working. The General Assembly should review the 5th degree felony and whether or not a 5th degree felony with less than a 12 month sentence should be sentenced to prison and whether or not 5th degree felony probation violators should be sentenced to prison for probation revocations. Roughly 23% of the total number of individuals sentenced to DRC for 2012 and
2013 were community control violators. A discussion should also include whether probation revocations should only be sentenced to local jails as an option.

Opportunities for discussion with prosecutors should be included as some 5th degree felony sentences are stipulated (i.e., agreed upon sentences) to less than 12 months. It is recommended courts be afforded the opportunity, through legislation, to provide diversion programs, and not just prosecutors who, only now by statute, have this opportunity to divert defendants to these programs. The reason for this is probation officers should be monitoring diversion programs and working with the defendants on changing their behavior with evidenced-based practices.

Diversion programs should also be afforded to those defendants who make a mistake who are not eligible under the Intervention in Lieu of Conviction statute and are facing a non-violent felony. Mistakes have a lasting impact on employment along with the stigma of being a convicted felon to those offenders who have made a mistake which was a non-violent offense. There are multiple programs and opportunities for those substance abuse offenders, but nothing for those others who should have an opportunity to redeem themselves. This would provide an incentive for those offenders and an opportunity not to have a felony conviction on their criminal record.

**Conclusion 2: Substance abuse contributes to Ohio’s prison overpopulation.**

Substance abuse is a major issue in the criminal justice system, and unfortunately, a societal issue as well. Until substance abuse is addressed by all major areas of society it will continue to be a costly issue to all states.

**Recommendation 2: Ohio Mental Health and Addiction Services should be tasked to develop a campaign that combats the societal and cultural impact of drugs in Ohio.**
Data indicated a significant number of low level offenders placed into the criminal justice system for drug convictions. Mental Health and Addiction Services provide numerous funding initiatives in Ohio. A portion of their funding should be provided to start a major campaign, similar to the seat belt campaign of the 1980’s. Drug use will not change until a change is made in how our society views and responds to substance abuse. There is co-occurrence of substance abuse and mental health in lower-level felonies which is under-addressed by the state.

The 7th Purpose of the Court to rehabilitate offenders is to bring about change to a person’s behavior. The sentence or more appropriately, for rehabilitative purposes, the program imposed on the criminal, is intended to return him/her to society as a law-abiding person. The 7th purpose to Rehabilitate Persons convicted of a crime does not work on 5th degree felonies. The reason simply stated is that a 12-month sentence to prison minus jail time credit does not provide the prison or probation staff the amount of time necessary for treatment to be effective at changing the offender’s behavior. Changing the offender’s behavior from the impact drugs or alcohol has played in their lives and reducing incidents of criminal behavior generally takes more than a short-term prison sentence. When you look at the name for the Ohio Prison system, the Ohio Department of Rehabilitation and Correction the name itself indicates that “rehabilitation” is a priority for the prison. Providing the necessary programming, specifically drug treatment, will assist with these low-level offenders who believe going to prison is the easy way out of changing their behavior.

From a probation officer’s perspective, a conviction of a 5th degree felony sentence where the defendant is placed on probation provides limited time for effecting change in behavior or overcoming addiction when the defendant fails to complete treatment and accumulates jail time credit. The court may not have options, due to the fact that there is little if any remaining time
left on the defendant’s sentence, to impose additional sanctions or treatment intervention and thus the probationer may be sent to prison for a short-term commitment.

The surveys clearly demonstrate that the courts and probation officers are using local resources to provide offenders convicted of 5th degree felonies with the opportunity for success. It is also clear that rehabilitation should be a priority for the prisons and a priority for the courts and probation. Further, the surveys indicate that the courts and probation officers are making every effort to provide the 5th degree felons with the resources necessary for success. The data does not support the claim that the courts tried to “sabotage” HB 86 by sending probation revocations to prison. The problem is the sentencing options for those convicted of a 5th degree felony and the limited length of the sentence remaining for the defendant. These are factors leading to an increase in probation revocations.

As indicated from the surveys, 5th degree felons with a drug issue are the most complex cases for whom to provide services. Probation officers reported having higher caseloads with the increase in 5th degree felony convictions. They also reported that probationers with drug addiction issues are more non-compliant than other probationers and require more resources. One reason for non-compliance with some of the 5th degree felons are that the original indictment was a higher-level felony, which was later reduced to a lower-level felony during the plea negotiations. Finally, some defendants would rather take a short-term prison sentence if they only have a single felony conviction and bypass the probation process.

The data from legislation reflecting the 129th (2011-2012) and the 130th (2013-2014) General Assemblies indicates at least 13 new felony offenses. In cases involving new felony offenses, some misdemeanors were increased to a 5th degree felony, while other bills made it easier in some ways for a 5th degree felony offender to receive a prison sentence.
Conclusion 3: There is need for a central repository for probation data.

The data on the amount of probationers and probation officers in the State of Ohio is difficult to obtain. There is no clear repository to find this information.

Recommendation 3: The General Assembly should follow up on legislation from SB 2 and HB 86 which would provide a data repository on probation in Ohio.

Based on research, including the Council on State Government report which indicated that Ohio did not have a system for the collection of such data, it is difficult to find accurate data on probationers in Ohio. It is also difficult to find the answer as to how many actual probation officers are employed in the state. HB 86, which was effective in 2011, asked the Supreme Court of Ohio to adopt a Rule of Superintendence to provide for monthly statistical data collection from local probation departments, including: a count of probationers that month; a count of those terminated that month by type of termination, including revocation; and the total number supervised at the end of that month.36

While the state spends millions to assist local jurisdictions with funding to divert offenders from prison, the state of Ohio actually does not have a true number of how many individuals are on probation in the state of Ohio, nor is there a true number of how many probation officers work for the courts. A designated agency within Ohio should be accountable to track and monitor how many people are on probation and what resources are used on probationers who are successful. The Ohio Supreme Court could adopt a Rule of Superintendence even though this was established in the 2011 legislation. This would begin the data collection process, but establish a more comprehensive data repository to assist the legislature and courts in providing the actual services needed.

Conclusion 4: Legislation that mandates incarceration for low-level felons and substance abusers have an impact upon prison overcrowding.

The impact on the prison system based on laws passed by the General Assembly that incarcerate low-level felons and substance abusers are not effective.

Recommendation 4: The General Assembly should review the overall impact of any new criminal statute(s) to determine whether the crime should be a 5th degree felony.

When introducing new legislation, the General Assembly should complete a review of the impact a 5th degree felony sentence will have on the prison system.

According to the 8th purpose of the court, when all else fails, courts are responsible for ordering convicted criminals to be separated from society and to protect society from their behavior. The 5th degree felon who is incarcerated for a short amount of time and has received no treatment will return to society and return to the criminal behavior that ultimately led him/her to their behavior. The 5th degree felony sentence does not provide meaningful punishment or any rehabilitative properties to change the individual’s behavior. The introduction of the 5th degree felony, has however, had an impact on the criminal justice system. Some of the unforeseen impact from SB 2 and the 5th degree felony has been an increase in workload not only for court and probation staff, but for the Prosecutor’s and Clerk’s office. So the impact on SB 2 created more criminal filings for the increases in felony cases which resulted in the need for more corrections officers, police officers, and probation officers. There also been a need for more prosecutors to handle the increases in felony cases. Table 6 demonstrated the percentage of 5th degree felony convictions in Greene County Ohio.

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37 NCSC, Institute for Court Management, Adapted from Ernie Friesen’s talks and writings on the Purposes of Courts.
Conclusion 5: Probation revocation has an impact on prison overcrowding.

Probation violators should not be sentenced to prison for sentences of less than one year.

Recommendation 5: The General Assembly should provide the courts with the opportunity to utilize a local jail sanction of 12 months or less when sentencing offenders who have violated community control. The General Assembly should also consider how other states handle non-violent probation violators.

It is recommended the General Assembly change (RC 2929.16) to permit common pleas judges to sentence offenders up to 12 months on single 5th degree felony sentences and provide jail as an option on sentencing 5th degree probation revocations.

Conclusion 6: Substance Abuse programs in community and local jails offer a model for a prison drug treatment program.

The Department of Rehabilitation and Correction (DRC) has provided funding initiatives for treatment programs in the community and local jails. Those offenders who are convicted of a low-level, non-violent substance abuse crime(s) should be sentenced to a prison that is dedicated to substance abuse.

Recommendation 6: In order to provide the low-level felons convicted of drug charges or those offenses to support their drug habit, DRC should have a prison dedicated to providing treatment services for these offenders.

DRC currently has a reintegration center established in the prison system. While reentry is a critical component to decrease recidivism, substance abuse should also be considered on a wider scale. Each prison has programming available, but DRC should take that one step further and designate a substance abuse prison that is not optional for the offender to attend. This prison would focus on changing offender behavior. If convicted of a drug offense, the individual should
be assigned to the substance abuse prison. Even if 5,400 felons were moved to a treatment prison, DRC may still be overcrowded, but the recidivism rate may decline with the focus on treatment and changing offender behavior.
Appendix A

Initial Communication with Survey Respondents

Email: Ohio Department of Rehabilitation and Correction Staff
Email: Chief Probation Officers and probation officers
Subject: National Center for State Courts-Fellows Research Project

My name is Melissa Litteral, and I am the Director of Greene County Adult Probation. I am currently enrolled in the National Center for State Courts Institute for Court Management Fellows Program. As part of the program participants must undertake a significant research project. My project will be to examine the Overcrowding of Ohio’s Prison. My research is to see if there is a correlation between prison overcrowding and 5th degree felonies. I know your time is valuable and I thank you for your input with this research project. All data collected will be used in the research, however your personal information will not be listed.
Appendix B

Judicial Questionnaire Survey on 5th Degree Felonies

1. Does your court utilize more sanctions since HB 86 (mandatory probation) than before HB 86 went into effect? Yes/No

2. If the answer to Q1 was Yes, please check the appropriate boxes.
   - Community Based Correctional Facility
   - Out Patient Drug and Alcohol Treatment
   - Local Jail Sanction
   - Electronic/Home Monitoring
   - Monitored Time
   - Other ______________

3. Since the implementation of HB 86 (mandatory probation) have you had dispositions where probation was offered and the defendant refused probation so they could serve a prison term instead of probation? Yes/No

4. If Yes, to question 3 please check the appropriate box.
   - Sentenced to local jail time
   - Placed on community control
   - Placed on community control and immediately revoked
   - Defendant revoked
   - Stipulated prison term
   - Other __________

5. Do you believe 5th degree felony cases are “enhanced misdemeanors”? Yes/No
6. Do you believe the 5th degree felony would be better served as a misdemeanor or a higher level felony?

   Higher level felony

   No Change needed in sentencing 5th degree felonies

   Misdemeanor

   No opinion

   Other _____

7. If legislation permitted Common Pleas Court Judges to sentence 5th degree felonies to local jail for up to 12 months, would you sentence to local jail time?

   Yes/No Other ______

8. If your answer to Question 7 was No, please check the appropriate responses.

   Prison Sentence is appropriate for 5th degree felonies

   Local jail space is not adequate in my county for housing 5th degree felonies

   Other __

9. What has been your experience in sentencing 5th degree felonies?
Appendix C

Probation Officers Survey on 5th Degree Felonies

1. Does your Court use more sanctions on 5th degree felonies? Yes/No

2. If the answer to Q1 was Yes, please check the appropriate sanctions utilized?
   - Community Based Corrections Facility
   - Out Patient Drug and Alcohol Treatment
   - Local Jail Sanctions
   - Electronic/Home Monitoring
   - Other

3. Since the implementation of HB 86 (mandatory probation) have you had dispositions where probation was offered and the defendant refused probation so they could serve a prison term instead of probation? Yes/NO

4. If you answered Yes to Question3, please check the appropriate box?
   - Defendant Revoked
   - Sentenced to local jail sanction
   - Other

5. Have you seen an increase in probation revocations of 5th degree felonies? Yes/No

6. If Yes to Question 5, what were the violations that resulted in revocation?
   - New felony charges
   - New misdemeanor charges
   - Drug and alcohol use
   - Failure to complete required treatment
7. What type of evidenced based practices are you utilizing in supervising probationers?
   (EPICS) Effective Practices in Community Supervision
   Carey Guides
   Thinking for a Change
   Other

8. Have you observed a change in probationer’s attitude and compliance since your agency
   increased the use of evidenced based practices? Yes/No/ N/A/Other
Appendix D

Survey Questions for Ohio Department of Rehabilitation and Correction

1. Have 5th degree felons sentenced to prison had an impact on prison overcrowding? Yes/No

   Other

2. Is it cost effective to house non-violent 5th degree felonies in the State prison or should they
   be housed in local jails? Yes/No/Other

3. Does it cost the same for an individual at intake who will serve a six month or less sentence
   as an offender who will serve over 12 months in prison (reception cost only)? Yes/No

4. What degree of felony has had the biggest impact on the prison population?

   Felony 1
   Felony 2
   Felony 3
   Felony 4
   Felony 5
Appendix E

Summary of Judge Responses

When judges were asked about their experiences with sentencing 5th degree felonies, a wide range of responses were received. The following information is a summary of those open ended responses. The most common theme of the surveyed judges was to order community control. The other responses included prison up to and including administrative termination of the case.

Community Control (Probation):

- Most defendants receive community control with varying degrees of success.
- Relatively high rate of completing community control/high percentage of sentences are community control.
- If amenable to it, defendants are sentenced to community control.

Prison:

- I am opposed to the use of local resources for community control or incarceration if the defendant is not open to or amenable to community control. If not prison for 6-9 months.

Jail:

- Local sanction only- [5th degree felonies are?] not appropriate offenses for prison sanction.

Treatment:

- Most 5th degree felonies and those not HB 86 cases are generally non-violent drug cases that should receive treatment instead of prison.

Administrative Termination:

- Get rid of them.
Appendix F

Summary of Probation Staff Responses

When probation staff were asked about their experiences with 5th degree felonies, a wide range of responses were received. The following is a summary of those open-ended responses. The most common theme for probation staff was the increase in case load and officer frustration.

Higher Case Loads:

- More group facilitation.
- We are placing more offenders on community control supervision than sending to prison. Increase amount of time with probationers.
- Using extra time and resources on individuals who know they only have 12 months prison on the table. By the time they use up multiple resources and accrue jail time credit they end up serving a sentence much shorter than they deserve.

Officer Frustration

- Higher rate of non-compliance probationers:
- More time and commitment has been spent on each offender and increased paperwork.
- Spend more time with non-compliant probationers.
- More time dedicated to the fifth degree felony where the defendant was not a good candidate.
- 5th degree felonies are very time consuming.
- It appears we do more work necessary to avoid prison on F5 cases and generally the F5 cases are those of returning criminals continuing to conduct themselves in criminal behavior.