

**COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO
HALL OF JUSTICE
224 EAST MAIN STREET
LANCASTER, OHIO 43130**

**RICHARD E. BERENS
JUDGE
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April 4, 2012

David Diroll, Executive Director
Ohio Criminal Sentencing Commission
Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431

Dear Mr. Diroll:

As a result of Ohio House Bill 86, effective September 30, 2011, judges cannot sentence certain felony offenders to prison, unless prison officials notify the judge that Community Control (probation) programs are not available to an offender (which is not likely, if ever, to happen). Even though a judge, who has heard the case, the offender's criminal history, and the victim's input has determined the offender should go to prison, prison officials now have the power to overrule the judge's decision. In effect, this law results in mandatory Community Control (probation) for many offenders who, prior to September 30, 2011, could have been sent to prison at sentencing.

Advocates of H.B. 86 supported this law because they argued too many offenders who committed less serious felony crimes were being sent to prison and the State could no longer afford to imprison them. Advocates cited theft, drug abuse, and other less serious felonies as examples of the type of case to which the new law would apply. However, a thorough review of the offenses to which H.B. 86's (in effect) mandatory community control provisions apply shows that many offenses classified as nonviolent offenses¹ of the fourth or fifth degree to which this law applies cannot be honestly characterized as minor offenses or as "low-level" in terms of the actual or threatened harm or financial loss caused to victims or that to public safety. Offenses for which H.B. 86 now requires a judge to place an eligible offender² on community control without

¹ See Ohio Revised Code Section 2901.01(A)(9) for list of "offenses of violence."

² An eligible offender is one who commits a felony of the fourth or fifth degree not classified as an "offense of violence" and (1) has no prior felony convictions or convictions for misdemeanor offenses of violence within the previous two years and who (2) did not possess a firearm at the time of the offense; (3) did not cause physical harm to another person while committing the offense; and (3) did not violate a term of bond set by the court. See Ohio Revised Code Section 2929.13(B)(1)(a) and (b).

the option of imposing a prison term, except under extremely limited circumstances controlled exclusively by the Ohio Department of Rehabilitation and Corrections³ include:

- **Sex Offenses**: Unlawful Sexual Conduct with a Minor; Promoting Prostitution; Disseminating Material Harmful to Juveniles (under 13 years old); Pandering Obscenity Involving a Minor (including when the obscene material involves a participant who is a minor); Illegal Use of a Minor in Nudity-Oriented Material or Performance; and Failure to Register
- **Invasion of Homes and Other Structures**: Trespass in a Habitation; Breaking and Entering
- **Drug Trafficking Offenses**: Trafficking in Drugs (including the trafficking of marijuana in the vicinity of a school or juveniles, trafficking in up to 1000 grams of marijuana, 49 doses of LSD or heroin, or up to 5 times the “bulk amount” of Schedule III (i.e. ketamine, barbituates), IV (i.e. Phenobarbital,), and V (i.e. buprenorphine) drugs); and Corrupting Another with Drugs
- **Offenses Involving Terrorism or Weapons of Mass Destruction**: Money Laundering in Support of Terrorism (up to \$25,000); Illegal Assembly or Possession of Chemicals or Substances for the Manufacture of Prohibited Weapons; Illegal Movement of Nuclear Materials; and Conveyance of a Dangerous Ordnance Into a Courthouse
- **Theft & Fraud Offenses Causing Serious Financial Loss to Victims**: Pyramid Scheme; Theft; Forgery; Defrauding Creditors; Receiving Stolen Property; Unauthorized Use of a Computer (“hacking”) (**all involving up to \$150,000 loss to victims**); Identity Fraud; and Securities Fraud (both involving up to \$7,500 loss to victims)
- **Property Offenses Causing Serious Financial Loss and/or Psychological Harm to Victims**: Vandalism; Desecration of a Place of Worship (either **involving up to \$100,000 loss to victims**)
- **Offenses Raising a Serious Danger to the Public**: Failure to Comply with Order or Signal (“Fleeing and Eluding”); Impersonation of a Police Officer with the Purpose to Commit or Facilitate a Felony; Use of Poison in the Manufacture, Sale, or Distribution of Intoxicating Liquor; Selling Contaminated Blood; and Reckless Violations of Radiation Storage Regulations

For example, an offender on any given day could have sexual intercourse with a 14 year old girl, break into his neighbor’s garage and steal tools worth \$20,000, buy and sell up to 49 doses of heroin or LSD, and, upon being pursued by law enforcement in his vehicle, commit the offense commonly known as fleeing and eluding. If so, as a result of H.B. 86, at sentencing, a judge could not sentence the offender who committed these five so-called “low-level” offenses to prison. At sentencing, the court must place this offender on Community Control and can only order the offender to serve a prison sentence if the Ohio Department of Rehabilitation and

³ See Ohio Revised Code Section 2929.13(B)(1)(c).

Corrections notifies the court that Community Control “programs”⁴ are not available⁵ (which is extremely unlikely, if ever, to occur). The result is that even though the judge has determined that an offender should go to prison, the offender can only go to prison if State prison officials approve that decision. Under H.B. 86, the judge who is required to place this offender on Community Control could only sentence the offender to prison after the offender violated Community Control, perhaps by committing another crime.

Under the law prior to the enactment of H.B. 86, a judge sentencing any offender for any offense involving felony four and five offenses had the discretion to weigh the circumstances of the offense in light of the overriding purposes and principles of sentencing. The court had the discretion to order a prison term if that was the sanction necessary to punish the offender and protect the victim and the public by discouraging the commission of that offense by the offender or by others. Prior sentencing law permitted judges to tailor a sentence to the individual circumstances and offender, ordering the maximum sanction of imprisonment where necessary to meet the purposes and principles of sentencing. H.B. 86 removed that discretion and individualized determination, leaving the public faced with the reality that a person who commits one of the more serious offenses listed faces only the prospect of a period of probation as short as one year.

Beyond restricting the court’s ability to impose a prison sentence when necessary and appropriate to deter the particular offender who is before the court, this new sentencing law does little to deter other individuals who may be inclined to commit these types of crimes. The legislature has enacted a law that has removed the basic defining characteristic of a felony offense—imprisonment in a State penal institution at sentencing—as a potential penalty. Felony offenses are intended to be a more serious class of criminal offenses because of the degree of harm or loss caused by their commission. Felony offenses are more serious crimes that have historically (at least until passage of H.B. 86) merited more serious penalties. The Ohio Legislature and Governor Kasich have sent the opposite message to offenders and those likely to commit serious crimes.

And it gets worse. The mandatory community control provisions in H.B. 86 apply to eligible first-time felony offenders and to offenders who have not committed a misdemeanor offense of violence within 2 years. Therefore, offenders who may have committed their first felony offense but have a long history of nonviolent misdemeanors for which they have already

⁴ Such as halfway houses, residential treatment facilities, and house arrest.

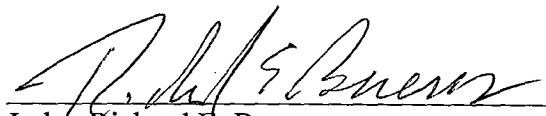
⁵ See Ohio Revised Code Section 2929.13(B)(1)(c).

been sentenced to serve time in a county jail and have been given the opportunity for rehabilitation through Community Control programs must be placed on Community Control yet again. H.B. 86 encourages these offenders to continue their conduct because offenders know that, even if they commit a felony, they will only face Community Control, or at worst a short term in the county jail, not prison.

It is time for the legislature to reconsider this particular aspect of H.B. 86 and restore judicial discretion to allow judges to impose imprisonment at the time of sentencing on felony 4 and 5 offenders when necessary and appropriate. At the very minimum, the law should be amended so as to make it not applicable to the more serious felony 4 and felony 5 offenses to which I have previously referred, and other offenses beyond the scope of this article.

Judges throughout Ohio have historically taken a very measured and restrained approach when imposing state prison terms at sentencing for first-time felony 4 and felony 5 offenders. Prior to H.B. 86, a minority of first-time felony 4 and felony 5 offenders were sent to prison. A majority were placed on Community Control with sanctions such as local jail time, counseling, and/or a term in a community-based rehabilitation facility. Some offenders were sent to prison when it was deemed necessary to meet the purposes of sentencing set forth in state law: protection of the public and deterrence as to future crime by the offender or the public in general. Although I intend to follow the law now in place and am confident my fellow judges will do so as well, H.B. 86 unnecessarily ties our hands in meeting the purposes of sentencing set forth in Ohio law.

I am urging the citizens of Ohio to contact their elected State representatives and the Ohio Sentencing Commission to let your voice be heard. Judges in the courtroom should decide which offenders need to go to prison, not bureaucrats at the Ohio Department of Rehabilitation and Corrections. The threat to public safety and harm to victims far outweigh the cost to the State of imprisoning offenders who need to be in prison.



Judge Richard E. Berens
Fairfield County Common Pleas Court,
General Division

Judge Richard E. Berens has been a Common Pleas Judge since 2003. Prior to 2003, he was engaged in the private practice of law for 18 years, primarily as a criminal defense attorney. He began his legal career as a Legal Intern in the Columbus City Prosecutor's Office in 1983.