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TO: Members of the Commission and Advisory Committee

FROM: Sara Andrews, Director

RE: State Issue 1 – The Neighborhood Safety, Drug Treatment, and Rehabilitation Amendment

DATE: September 27, 2018

The purpose of this memorandum is to help inform members of the Commission and Advisory Committee about the language of the 2018 ballot initiative, State Issue 1, and consider potential impact of its provisions. Please note, a similar ballot initiative was presented to Ohio voters in 2002. At that time, the Commission voted to take a position in opposition to the amendment, noting that while Commission members supported treatment over incarceration for drug abusers, the rigid nature of a constitutional amendment was not appropriate for enactment of drug policy.

The Neighborhood Safety, Drug Treatment, and Rehabilitation Amendment was filed with the Ohio Attorney General on December 1, 2017, determined fair and truthful on December 8, 2018, and deemed compliant with the single subject rule on December 12, 2017, by the Ohio Ballot Board. On July 23, 2018, the ballot initiative was certified by the Secretary of State for the November 6, 2018, election, appearing as State Issue 1. It proposes sweeping changes to the criminal justice system including:

- Reclassifying possession of controlled substances offenses from felonies to misdemeanors
- Establishing an earned credit program wherein offenders can earn up to a 25% reduction of their prison sentence for participation in programming at the institution
- Mandating guidelines for graduated responses to probation violations
- Providing a system to calculate the savings of the changes, including provisions for the disbursement of those savings.

Much of Issue 1 reflects ideas long supported by the Commission, such as fostering treatment over incarceration for low level drug addicted offenders. However, given the broad language and obdurate nature of constitutional amendments, it is important to closely examine its specific provisions.

I. Reclassification of Certain Non-Serious, Non-Violent Drug Possession Offenses

Sections (D), (F), and (G) of Issue 1 dramatically alter the administration of drug possession offenses under Ohio law. Crimes involving possessing, obtaining, or using a drug or drug paraphernalia are reduced to misdemeanors (defeloned) and provides that those who were previously convicted or adjudicated delinquent of offenses for possessing, obtaining, or using a drug or drug paraphernalia may petition the sentencing court to have that conviction reclassified as a misdemeanor.

Section (D) of Issue 1 defelonzes offenses of drug possession providing that *“with respect to state laws that make possessing, obtaining, or using a drug or drug paraphernalia a criminal offense, in no case shall any offense be classified higher than a misdemeanor”*. It further limits sanctions for those offenses to no higher than those of a first degree misdemeanor, currently 6 months in jail and/or a \$1000 fine, and provides that the sanctions for this misdemeanor offense *“cannot exceed probation”* until a third conviction in two years. Decisions about the level of misdemeanor classification for each offense are left to the General Assembly.

Section (F) of Issue 1 allows offenders convicted or adjudicated delinquent for possessing, obtaining, or using a drug or drug paraphernalia offenses and who have not completed their sentence, prior to the effective date of Issue 1, to petition the sentencing court to have the conviction or adjudication reclassified to a misdemeanor. The petition may be denied if *“the sentencing court makes a finding and sets forth a particularized factual basis that the individual presents a risk to the public and should not be re-sentenced or released.”* Issue 1 also allows those convicted or adjudicated delinquent for possessing, obtaining, or using a drug or drug paraphernalia offenses that have completed their sentence to petition the sentencing court to have the charge reclassified.

Issue 1 proponents suggest that the language is intended to only apply to possession offenses and convictions currently defined as felonies of the fourth and fifth degree, and that it does not affect trafficking offenses. To that end section (G) of Issue 1 is a limiting/exclusionary section, stating that the provisions of Sections (D) and (F) *“do not apply to convictions for trafficking ... or to convictions for any drug offense that based on volume or weight and as of January 1, 2018, was classified as a first, second, or third degree felony offense.”* For example, Issue 1 reduces possession offenses involving less than 5 grams or 50 unit doses of Heroin, less than 10 grams of Cocaine, and less than 20 grams of fentanyl from felonies to misdemeanors.

Ohio drug laws distinguish between offenses of possession and those indicative of drug trafficking. Trafficking under ORC §2925.03 is defined as:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance or a controlled substance analog;

[AND/OR]

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person



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Possession under ORC §2925.11 is defined simply as

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

Ohio is one of only a few states without some form of “possession with intent to deliver, distribute, etc.” included in the trafficking statute. Generally drug possession and trafficking offenses in Ohio mirror one another in amount, felony level, and penalty – usually starting at the level of a felony of the third degree – when the amount of drugs possessed exceeds what could be argued is an amount for “personal use”. As such, when a person is found in possession of large amounts of controlled substances without sufficient evidence to prove a trafficking offense, the offender can be charged with possession at the same felony level as the trafficking offense. For example, a person found in possession of 50 grams of heroin without evidence to support what would be an F1 trafficking offense can be charged with F1 possession.

However, the limiting/exclusionary Section (G) makes specific reference to “convictions” rather than “charge(s)” or “offense(s)” in its text. Because of this word choice in the exclusionary section, an argument exists that **ALL** drug possession offenses will be reduced to misdemeanors, including first degree felony offenses. This could mean possession of over 100 grams of cocaine, over 40 kilograms of marijuana, over 1,000 doses of heroin, or over 2,000 grams of fentanyl would be a misdemeanor offense. As noted above, when a person is found in possession of large amounts of controlled substances without sufficient evidence to prove a trafficking offense, the offender can be charged with possession at the same felony level as the trafficking offense. Issue 1 also restricts possession to amounts as they were defined as of January 1, 2018, meaning that the changes to fentanyl possession as enacted in SB1 will be rendered moot, as those possession offenses would be reclassified to misdemeanors.

Notably, Commission staff are working on a re-write of the drug chapter to distinguish possession with intent to distribute, incorporating proposals of Ohio Criminal Recodification Committee. The draft proposes to reclassify drug offenses based on the premise that possession over a threshold amount of drugs is likely trafficking – varying amounts by drug type that go well beyond what is reasonable for “personal use” – and to define possession over those threshold amounts as “presumptive trafficking.”

If Issue 1 passes, it becomes effective in 30 days and unless the General Assembly enacts legislation before its effective date there will not be a law under which drug possession can be charged. Current law provides for only a few misdemeanor drug offenses which means the vast majority of felony drug possession charges will not have a provision in place to be charged as a misdemeanor. Additionally, the current statutory speedy trial provisions of ninety days for a first or second degree misdemeanor may also need revision to allow sufficient time to obtain laboratory (drug) results.



II. Sentence Credits for Rehabilitation

Section (C) of Issue 1, Sentence Credits for Rehabilitation, provides that offenders in an Ohio Department of Rehabilitation and Correction (ODRC) institution may earn one half of one day of credit for every day of participation in “*appropriate rehabilitative, work, or educational programming*” at the institution, up to a maximum 25% reduction of the person’s stated sentence. It also provides ODRC the discretion to grant an additional thirty day credit for completion of appropriate rehabilitative, work, or educational programming. Offenders convicted of “*murder, rape, or child molestation*” are excluded from this credit, as are those serving sentences of death or life without parole.

The Commission has long recognized the value of earned (sentence) credit for rehabilitative programs and release options for inmates. Since the passage of Senate Bill 2, Ohio has enacted risk reduction sentences, 80% release provisions, expanded judicial release and eligibility for earned credit. These provisions provide opportunity for productive prison program participation for inmates and can assist in their successful transition back into our communities upon release.

Issue 1 expands Ohio prison earned credit provisions both in scope and breadth. Earned credit for inmates increases from an 8% cap to 25% and the rate at which credit is earned increases from 1 or 5 days per month of participation to ½ day for each day of participation in appropriate rehabilitative, work, or educational programming and allows ODRC to award an additional 30 days of credit for completion of appropriate rehabilitative, work, or educational programming.

Existing provisions in ORC §2967.193 provide credit for educational, vocational, and rehabilitative programming but, exclude mandatory sentences and nearly all sexually oriented offenses, and restricts the amount of credit earned to 1 day per month for those inmates serving a sentence for an offense of violence and per Administrative Rule 5120-2-06, earned credit may only be awarded for participation in programming approved by the Director of the ODRC and listed in the Rule. Current law also requires ODRC to annually seek and consider the written feedback of the Ohio prosecuting attorneys association, the Ohio judicial conference, the Ohio public defender, the Ohio association of criminal defense lawyers, and other organizations and associations that have an interest in the operation of the corrections system and the earned credits program as part of its evaluation of the program and in determining whether to modify the program.

The earned credit provisions of Issue 1 exclude individuals serving time for “*murder, rape, or child molestation*”. Identifying offenders convicted of rape and murder for exclusion is a relatively simple task. However, “*child molestation*” is currently not a specified offense and the term is not defined in the text of Issue 1, which presents the opportunity for substantial litigation. Issue 1 also expands eligibility for earned credit to offenders convicted of serious offenses, such as Drug Trafficking, Aggravated Robbery, Aggravated Burglary, Felonious Assault and Kidnapping for the maximum 25% as well as an additional thirty days credit, at the discretion of ODRC, for completion of appropriate rehabilitative, work, or educational programming.

III. Graduated Responses for Non-Criminal Violations of Probation

Section (E) of Issue 1 provides that within 90 days of its effective date, trial courts with jurisdiction to revoke an *“adult’s or juvenile’s probation for a non-criminal violation shall prepare and submit for approval to the Ohio Department of Rehabilitation and Correction ... guidelines for graduated responses that may be imposed for such [probation] violations.”* It dictates that offenders *“on probation for a felony offense shall not be sent to prison on a probation revocation for non-criminal violations of the terms of their probation”* and goes on to define a *“non-criminal violation”* in Section (J)(8) as essentially anything other than actions resulting in a new criminal conviction.

Issue 1 also defines graduated responses and includes, *“...detention in a county or municipal jail, but only upon the court making a finding and setting forth a particularized factual basis that the individual presents a risk to themselves or the public, and earned rewards, such as reduced sentences for compliant conduct as the trial court deems appropriate”*. As noted above, the required *“accountability-based graduated series of sanctions and incentives”* are subject to the approval of ODRC.

These provisions reflect current debate (and competing case law) for adult felony offenders regarding Ohio’s definition of *“technical violation”* for the purposes of ORC §2929.15(B), which imposes 90(F5) and 180(F4) day limits to prison sentences for *“technical violation[s]”* of community control. Issue 1 expands upon those limits, prohibiting revocation of an adult’s or juvenile’s probation for anything other than a new criminal *conviction*. Trial courts with jurisdiction to revoke adult or juvenile probation must submit guidelines for graduated responses to violations to ODRC for approval. Issue 1 also defines graduated responses and specifies that trial court judges may impose more restrictive sanctions such as jail, if the court makes a finding and sets forth a particularized factual basis that the individual presents a risk to themselves or the public, but prison may only be imposed as a result of a conviction for a new offense.

As with the provisions surrounding earned credit, Issue 1 specifies the guidelines for probation violation responses apply to all offenses except *“murder, rape, or child molestation”*. This means that, for example, a person convicted of a felony of the second degree, such as Burglary, Robbery, or Felonious Assault who overcame the presumption in favor of prison at sentencing and was placed on probation could routinely violate the terms of probation but not be subject to the imposition of the suspended prison sentence absent a new criminal conviction.

Section (E) of Issue 1 may also impact judicial release. Currently, when a person is granted judicial release the remainder of the sentence is suspended and the person is released to community control (probation). Presumably, the community control supervision for judicial release is subject to the same graduated response provision, meaning revocation may only occur for a new conviction – a fact that may contribute to fewer approvals for judicial release.



IV. Calculation of Savings to the State

Section (B) of Issue 1 establishes the method for calculating any potential savings generated by the changes as a result of its passage. It mandates how savings are allocated in the first three biennial budget appropriation cycles and allows for a recalculation of the distribution every three biennial budget appropriation cycles thereafter.

It calculates the savings generated by Issue 1 in Section (I) as the fewer number of days served at ODRC by reducing the length of sentences (time served in prison) by increasing eligibility for and number of days of earned credit, reclassifying offenses of possessing, obtaining, or using a drug or drug paraphernalia from a felony to a misdemeanor, or delinquent adjudications based on such offenses, and the retroactive application of the reclassification of the felony offenses of possessing, obtaining, or using a drug or drug paraphernalia, or delinquent adjudications to a misdemeanor multiplied by a per-diem of forty dollars (\$40.00) a day. It adds that number to the days saved by the graduated response to probation violations in Section (E) which are multiplied by thirty dollars (\$30.00) a day.

Issue 1 mandates that in the first three biennium appropriation cycles, that seventy percent (70%) of the savings be distributed to fund substance abuse treatment programs through grants from the Ohio Department of Mental Health and Addiction Services. The remaining thirty percent (30%) is distributed as fifteen percent (15%) for victim trauma recovery services through programs set up by the Attorney General and fifteen percent (15%) for “*purposes that are consistent with extent of*” Issue 1.

Proponents of Issue 1 project “*at least 100 million in annual budget savings*”. Two other states have passed similar measures – California and Oklahoma. California voters passed Proposition 47 in 2014 and Oklahoma voters passed State Question 780 in 2016. Both of those initiatives reduced felony drug crimes to misdemeanors and, additionally, reduced low felony level property crimes and theft offenses to misdemeanors. California has not realized the savings that supporters of Proposition 47 projected – it has generated slightly over \$103 million in the first 3 years of implementation, far below the estimated \$150-\$250 million annual savings. Oklahoma has only recently released findings of savings attributed to State Question 780, and those findings have been disputed by agencies within the state (i.e. Department of Corrections) thus, estimated savings are unclear.

Commission staff have also initiated a 50 state summary report of drug possession offenses and efforts made to reduce penalties similar to the provisions of Ohio Issue 1. For every state we’ve looked at thus far, the takeaways are: 1.) states enacted statutory change rather than constitutional; 2.) states that have measured impact report a decrease in drug court participation; 3.) most often a subsequent drug possession is punishable as a felony; 4.) more information, data gathering and analysis is necessary to determine the impact.

In conclusion, we continue our analyses and work with interested parties on the impact of Issue 1.

The full text of the amendment and related documents can be found here:

[Issue 1–To Reduce Penalties for Crimes of Obtaining, Possessing, and Using Illegal Drugs
https://www.sos.state.oh.us/legislation-and-ballot-issues/ballot-board/ballot-board-2018/](https://www.sos.state.oh.us/legislation-and-ballot-issues/ballot-board/ballot-board-2018/)