OHIO
CRIMINAL SENTENCING COMMISSION
65 SOUTH FRONT STREET • 5TH FLOOR • COLUMBUS, OHIO 43215-3431 • TELEPHONE

HB1
IMPACT STUDY REPORT

JANUARY 2022

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I. BACKGROUND

On December 17, 2020, HB1 (133rd General Assembly) was amended on the floor of the Ohio Senate. The Ohio House of Representatives concurred with those amendments on December 22, 2020 and passed the bill. Amendments to the bill included language to define the Ohio Criminal Sentencing Commission (commission) as a criminal justice agency and expand the duties of the commission to study the impact of the provisions of the bill, as noted in the following.

> *Ohio Revised Code §181.27.*
>
> *(A) In addition to its duties set forth in sections 181.23 to 181.26 of the Revised Code, the state criminal sentencing commission is hereby designated a criminal justice agency, as defined in section 109.571 of the Revised Code, and as such is authorized by this state to apply for access to the computerized databases administered by the national crime information center or the law enforcement automated data system in Ohio, and to other computerized databases administered for the purpose of making criminal justice information accessible to state criminal justice agencies.*
>
> *(B) In addition to its duties set forth in sections 181.23 to 181.26 of the Revised Code, the state criminal sentencing commission shall do all of the following: (1) Within ninety days after the effective date of this section, pursuant to section 181.23 of the Revised Code, commence a study of the impact of sections relevant to the act in which this section is enacted, including but not limited to, changes to sections 109.11, 2929.15, 2951.041, 2953.31, 2953.32, 5119.93, and 5119.94 of the Revised Code, and continue studying that impact on an ongoing basis. (2) Not later than December 31, 2021, and biennially thereafter, submit to the general assembly and the governor its findings regarding the study described in division (B)(1) of this section, in a report that contains the results of the study and recommendations.*

Accordingly, in January 2021, the commission began planning its study of the provisions and assembled a workgroup composed of judges, prosecutors, defense attorneys, court administrators, probation officers, academicians, and state agency officials to help guide its effort. Commission member Lara Baker-Morrish agreed to chair the HB1 Implementation workgroup. At its first meeting on February 26, 2021, the group reviewed a proposed timeline and topics for discussion (workgroup plan).

II. HB 1 IMPLEMENTATION WORKGROUP & PLAN

HB1 CALENDAR OF EVENTS

Jan. 7, 2021: Gov. Mike DeWine signed HB1 into law.

April 1, 2021: HB1 became effective

July 12, 2021: HB1 impact study required to begin [R.C. 181.27(B)(1)].

Dec. 31, 2021: First HB1 impact report due to Gov. DeWine [R.C. 181.27(B)(2).[1]

PROPOSED TIMELINE & DISCUSSION TOPICS

- **February 26, 2021, 10 a.m. – Zoom**
  - Review of Provisions
    - What is included? How should impact be measured? Additional resources and/or contacts?
    - Proposed meeting date for group discussion of each topic
    - Goals for 2021 report and long-term impact outcomes (for 2023 report and beyond)
- **March 26, 2021, 10 a.m. – Zoom**
  Record Sealing: R.C. 109.11, 2953.31, and 2953.32
- **April 23, 2021, 10 a.m. – Zoom**
  Intervention in Lieu of Conviction: R.C. 2951.041
- **May 20, 2021. 10:00 a.m. – Zoom**
  Involuntary Commitment to Treatment, Probate Courts: R.C. 5119.93, 5119.94
- **June 17, 2021. 10:00 a.m. – Zoom**
  Community Control & Incarceration on Technical Violations: R.C. 2929.15
- **July through October 2021: Meeting on August 26, 2021, 10:00 a.m. – Zoom**
  - Preliminary report discussion – outline, content for report
  - Resolve any outstanding issues
  - Update and status of data collection and analysis
- **November 2021 (No meeting)**
  - Finalize draft report
- **December 2021 (No meeting)**
  - Share draft report with members for input and submit final report

1 Reports due "biennially thereafter" December 31, 2021 [R.C. 181.27 (B)(2)].

III. SUMMARY & EXPLANATION OF REPORT ORGANIZATION

The HB1 Implementation Workgroup divided analysis of the bill into four categories of impact to study: (1) sealing a record of conviction; (2) intervention in lieu of conviction (ILC); (3) involuntary court-ordered treatment for alcohol or drug abuse; and (4) community-control changes and technical violations.

Notably, the workgroup acknowledged limitations of its study for the following reasons:

- Currently, there is no central source in the state for tracking the number of requests for record sealing or, consequently, the number of motions filed for sealing that were granted or denied each year. To establish a baseline number of sealing requests for comparison against requests received after the post-HB1 changes, we gathered multiple sources of information, including from the Bureau of Criminal Investigation (BCI), legal aid, and individual courts.
- Ohio lacks comprehensive statewide data on ILC. Further, there are many nuances to the operation of the program in Ohio courts that could not be captured by quantitative data alone.[2] Accordingly, the group decided that in addition to requesting operational data on ILC from criminal courts across Ohio, the commission should take a qualitative approach to understanding ways in which ILC currently operates in the state and the potential impacts as a result of House Bill 1.
- There isn't comprehensive statewide data regarding petitions for involuntary court-ordered substance-use treatment (hereafter "involuntary commitment to treatment") in probate courts.[3] Additionally, the placement of these provisions within the jurisdiction of probate courts meant that many workgroup members were unfamiliar with these types of cases. Therefore, the group decided to take a qualitative approach to understanding this statute and changes by interviewing probate judges and treatment professionals.
- The community-control technical violation provision enacted in HB1 was revised months later in AmSub HB110 (134th General Assembly), which only exacerbated the consensus of the workgroup regarding the complexity of the statute.

2 For example, in the workgroup meetings, multiple participants indicated that their court data would not adequately represent the number of ILC denials because ILC determinations are made largely before any hearings or formal application through court filing.

3 While Ohio probate courts, like all other court types, are required to submit caseload and disposition information regularly to the Supreme Court of Ohio, these types of cases are categorized as "civil actions" along with several other types of cases, such as land sales, appropriation cases, declaratory judgment, among others. For detailed reporting instructions, see: sc.ohio.gov/JCS/casemng/statisticalReporting/formCInstruct.pdf.

IV. WORKGROUP MEMBERS

The following people were invited or participated in the effort to study the impact of HB1. As always, participation on the workgroup or in the work is not an unqualified endorsement of the final recommendations and report.

Lara Baker-Morrish, Chief Counsel, Deputy Columbus City Attorney, *Workgroup Chair*

Brigham Anderson, Lawrence County Prosecutor

Lindsey Angler, Guernsey County Prosecutor

Doug Berman, Moritz College of Law, Ohio State University

Laura Black, Chief of Staff, Cuyahoga County Clerk

Keller Blackburn, Athens County Prosecutor

Jillian Boone, Magistrate & Court Administrator, Fairfield County Court of Common Pleas

Nailah Byrd, Cuyahoga County Clerk of Court

Matthew Crall, Crawford County Prosecutor

Doug Dumolt, Office of the Ohio Attorney General

Hon. Jack Durkin, Mahoning County Court of Common Pleas

David Forman, Legal Assurance Administrator, Twin Valley Behavioral Healthcare

Hon. Laura Gallagher, Cuyahoga County Court of Common Pleas, Probate Division

Hon. Sean Gallagher, Eighth District Court of Appeals

Molly Gauntner, Chief Probation Officer, Franklin County Municipal Court

Cheryl Gerwig , Chief Probation Officer, Wayne County Court of Common Pleas

Hon. Emily Hagan, Cuyahoga County Court of Common Pleas

Lois Hochstetler, Assistant Director for Community Treatment Services, Ohio Department of Mental Health and Addiction Services

Montrella Jackson, Court Administrator, Akron Municipal Court

Blaise Katter, Criminal Defense Attorney

Teresa Liston, Magistrate & Court Administrator, Cambridge Municipal Court

Brian Martin, Research Chief, Ohio Department of Rehabilitation & Correction

Hon. Jennifer Muench-McElfresh, Butler County Court of Common Pleas

Branden Meyer, Fairfield County Clerk of Court

Marta Mudri, Legislative Counsel, Ohio Judicial Conference

Hon. Donald Oda, Warren County Court of Common Pleas

David Painter, Clermont County Commissioner

Colleen Rosshirt, Manager, Case Management Section, Supreme Court of Ohio

Kristin Sutton, Legislative Liaison, Ohio Access to Justice Foundation

Michael Streng, Criminal Defense Attorney

Brian Wittrup, Strategic Initiatives Chief, Ohio Department of Rehabilitation & Correction

Judy Wolford, Pickaway County Prosecutor

Hon. Gene Zmuda, Sixth District Court of Appeals

V. SPECIAL THANKS

The commission relies on the gracious effort and support of many people. Their encouragement, assistance and diligence were a tremendous help in our study of the impact of HB1 and the production of this report.

Our gratitude is extended to:

Senator John Eklund (now Judge) and members of the Ohio General Assembly

Members of the Ohio Criminal Sentencing Commission

Ohio Association of Court Administrators & its members

Angela Lloyd, Director, Ohio Access to Justice Foundation

Ohio Access to Justice Foundation focus group participants

All those who responded to the survey

All those who participated in interviews

Nancy Miller, Magistrate, Lucas County Probate Court

Justin Trevino, Medical Director, Ohio Department of Mental Health and Addiction Services

Jeremy Hansford, Ohio CSO/Nlets 2nd VP, Ohio State Highway Patrol

Erin Waltz, Supreme Court of Ohio Law Library

Shawn Welch, Ohio Judicial Conference

The Pennsylvania Commission on Sentencing

Lara Baker-Morrish, for her dedication as workgroup chair.

We also thank the Ohio Criminal Sentencing Commission interns for summer and fall 2021, for their outstanding work on the supplementary materials of this report:

Katelyn Campisi, Kent State University

Thomas Fechlachos, University of Dayton

David Jordan, Ohio State University

Halle Nahoum, Ohio State University

Sarah Paul, Ohio State University

Kaitlyn Richard, Ohio Dominican University

VI. RECOMMENDATIONS

For reader ease, recommendations are summarized here. However, reviewing the full sections applicable to the recommendations is not only encouraged, but strongly recommended. Further, the following recommendations are intended to be a beginning; there is much more to consider and refine. What follows gives us a place to start.

RECORD SEALING: R.C. 109.11, 2953.31, and 2953.32

- Standardize data collection recommendations for record-sealing information from courts
    - Include in case statistics reports for general division and municipal courts, specifically:
        - Number of record-sealing applications/petitions received
        - Number granted
        - Number ineligible
        - Number denied (for reason other than ineligibility)
    - Access to sealed records for research purposes
        - Anonymized records including information about defendant and offense
    - Use standardized sealing forms in Rule 96 of the Rules of Superintendence for Ohio Courts
        -
- Simplify the process:
    - Clarify the definition of "final discharge"; does it include fines, costs, community service, PRC? Ensure all courts know the requirements.
    - Standardize fees for record sealing
        - While it is $50 across the state, there are reports of some courts adding their own fees to this so that the cost is $150 to $400. This is cost prohibitive for many individuals, particularly those who may want to seal their records to improve their employment opportunities.
    - Centralize the process for those with convictions in multiple courts (e.g., common pleas and municipal courts)
    - Clarify eligibility for those with OVIs and companion felonies in the same case
- Consider automatic expungement or record sealing for convictions after a certain time period, as in Michigan and Pennsylvania
- Enact automatic sealing of non-convictions
- Expand education
    - Sealing vs. expungement (public and courts)
    - Sealing eligibility

INTERVENTION IN LIEU OF CONVICTION (ILC): R.C. 2951.041

- Advance better data collection on ILC programs and outcomes
    - Data in most court case management systems is not aggregated and unwieldy
    - Data does not capture those who do not apply or those who withdraw their motions
        - True ILC "denial rate" is unknown
    - There is a lack of data on post-program measures to evaluate success
        - Examples include recidivism after leaving the program
- Better communicate HB1 changes regarding ILC
    - Some practitioners were unaware of changes to ILC in 2018 in SB66 of the 133rd General Assembly
    - Municipal courts, treatment providers, and defense attorneys specifically noted receiving better communication on ILC changes
        - Recommendations included expanding education to the defense bar and the Association of Municipal/County Judges of Ohio
    - There can be confusion among practitioners because ILC is ever evolving, making eligibility determinations challenging
- Streamline the statute to make it simpler and less confusing
    - Specific recommendations (non-consensus items):
        - Clarify the statute as to who is a good candidate for ILC
        - Formalize ILC so that courts see it as a program rather than an option
        - Standardize ILC assessment reports from treatment providers
- Address the barrier of the ILC cost
    - Guidance about billing for treatment providers
    - Better funding of ILC programs

NOTE: Some expressed desire for change surrounding the difficulty in sealing ILC records with a companion OVI charge. No specific recommendations were made, but the Ohio General Assembly has attempted to address this issue in the past.

INVOLUNTARY COMMITMENT TO TREATMENT, PROBATE COURTS: R.C. 5119.93, 5119.94

- Expand education to judges to make them aware of changes to this law and encourage them regarding its potential
- Include this as a separate case type on the case management reports that probate courts submit quarterly to the Supreme Court in order to collect regular data

- Simplify forms
    - Develop strategies to work more effectively with the medical community (e.g., pilot program that partners a treatment facility and probate court or pilot program with Medicaid and regional facilities)
- Strategize how to make families aware of this option
- Discuss funding options to make treatment available, regardless of financial or insurance status

COMMUNITY CONTROL & INCARCERATION ON TECHNICAL VIOLATIONS: R.C. 2929.15

- The community-control technical violation provision enacted in HB1 was revised months later in AmSub HB110 (134th General Assembly), which exacerbated the consensus of the workgroup regarding the complexity of the statute. Thus, the obvious recommendation is to work toward simplifying the provision.
- Further, the Ohio Department of Rehabilitation and Correction reported this provision may impact about 100 people.

VII. APPENDICES

RECORD SEALING: R.C. 109.11, 2953.31, and 2953.32

Appendix A: Summary for Workgroup Meeting

Appendix B: Data Request

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Appendix F: Record Sealing Pathways

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INTERVENTION IN LIEU OF CONVICTION: R.C. 2951.041

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INVOLUNTARY COMMITMENT TO TREATMENT, PROBATE COURTS:

R.C. 5119.93, 5119.94

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Appendix N: Beds & Facilities

Appendix O: Involuntary Commitment to Treatment Interview Themes & Recommendations

COMMUNITY CONTROL & INCARCERATION ON TECHNICAL VIOLATIONS:

R.C. 2929.15

Appendix P: Summary for Workgroup Meeting

Appendix Q: Recommendations

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HB1 Evaluation Implementation Workgroup

March 26, 2021

Topic: Record Sealing Provisions of HB1 (R.C. 109.11, R.C. 2953.31, and R.C. 2953.32)

R.C. 109.11: Creates an attorney general reimbursement fund within the state treasury to be used for the expenses of the AG to provide legal services and other services to the state. Also specifies that a portion of funds, as specified in R.C. 2953.32 go to BCI for expenses related to sealing or expungement of records.

What changed and why?

$15 for every $50 record-sealing-application fee is earmarked to BCI for expenses related to the sealing or expungement of records. This represents a decrease in the amount of money that is routed to BCI (previously it was $20 of every application fee). However, this statute clarifies that the $15 goes directly to BCI. Previously, the money was allocated to the GRF and then funded back to BCI, so it was not possible to track.

This fund should help to offset expenses for the labor-intensive record sealing process.

Intended outcomes from the legislation?

- Better understanding and tracking of the money that BCI receives to offset costs of record-sealing.

What do we need to know?

- The total amount of funds received by BCI from record-sealing funds after HB1 is enacted on April 12, 2021.

What do we want to know?

- The costs of sealing a record (i.e., employee hours per record).
- The number of records being sealed (before and after HB1).

What would be nice to know?

- How much money BCI was receiving (indirectly, from GRF) prior to HB1.

Are there unintended consequences?

Additional considerations?

R.C. 2953.31: Outlines definitions for terms found in R.C. 2953.31 through 2953.36, on the topic of sealing records of conviction, including specifying "eligible offender" for the purposes of record sealing. Eligible offenders may only seal eligible offenses, as listed in R.C. 2953.36.

R.C. 2953.32: Identifies the timeline for offender eligibility, the considerations of courts and prosecutors, and the process of the courts for sealing a conviction or bail forfeiture record.

What changed and why?

R.C. 2953.31

Record Sealing offender eligibility expanded to include:

- Unlimited sealing of convictions if all are F4, F5, or misdemeanors if none are offenses of violence or sex offenses.
- Up to two felony convictions, up to four misdemeanor convictions, or exactly two felonies and two misdemeanors

R.C. 2953.32

Application for record sealing can now be made at the following times:

- The expiration of three years after final discharge of an F3
- The expiration of one year after final discharge for an eligible F4, F5, or misdemeanor

Intended outcomes from the legislation?

- Increase the number of individuals eligible for record sealing and to decrease the amount of time between the conclusion of their sanctions and eligibility in order to decrease barriers to employment.[1]
- Proponent testimony also mentions reducing the harm done by "collateral consequences" and specifically lists access to employment, housing, public assistance, and education.[2]

What do we need to know?

- Number of individuals eligible for record sealing (before and after HB1).
- Number of individuals applying for record sealing (before and after HB1).

What do we want to know?

- Number of records of convictions sealed (before and after HB1).
- Number of records of dismissals sealed (before and after HB1).
- Number of requests for sealing that are denied (before and after HB1).
- Reasons for denial.
- Is there an association between the expansion of eligible offenses and the amount of denied applications?
- All of the information listed here (and the points under the "need-to-know" category) by offense type and level (before and after HB1).

1 Reps. Plummer and Hicks-Hudson, May 22, 2019.

2 Policy Matters Ohio, June 25, 2020; Megan O'Dell, Ohio Poverty Law Center. House Criminal Justice Committee, May 30, 2019; Jesse Mosser, Supreme Court of Ohio, House Criminal Justice Committee, May 30, 2019; Gary Daniels, ACLU. House Criminal Justice Committee, May 30, 2019; Daniel Dew, The Buckeye Institute. House Criminal Justice Committee, June 6, 2019; Jeff Dillon, Americans for Prosperity. House Criminal Justice Committee, June 13, 2019; Shakyra Diaz and John Cutler, Alliance for Safety and Justice. Senate Judiciary Committee, January 21, 2020; Kelly Smith, Mental Health and Addiction Advocacy Coalition. Senate Judiciary Committee, December 9, 2020.

What would be nice to know?

- When eligible individuals applied for record sealing (as soon as possible, or later).
- The employment status of eligible individuals before and after application.
- Are there unintended consequences?
- Public safety?
- Does expanding those eligible for record sealing encourage racial discrimination by employers?[3]

Additional considerations?

- Code is complex and eligibility may be difficult to determine, particularly without a lawyer.
- Record sealing may have minimal impact because of "unofficial" documentation or records that exist online.
- There are existing statutes that require the disclosure of sealed convictions when applying for some types of employment or professional licenses.[4]

[3] One study showed that the racial gap in callbacks by employers increased among those with restrictions on asking about applicants' criminal history on job applications. Without an explicit indicator of criminal history, employers may rely on exaggerated understandings of racial differences in conviction rates and assume criminal history based on race, resulting in increased racial discrimination (Agan, Amanda and Sonja Starr. 2018. "Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment." *The Quarterly Journal of Economics* 133:191-235.).

[4] Tim Young, Ohio Public Defender. House Criminal Justice Committee, June 6, 2019.

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Dear Court Administrator:

As you know, the 133rd General Assembly passed HB1, and Governor DeWine signed it into law in January 2021. HB1 makes a number of adjustments to criminal justice policy, including obligating the Ohio Criminal Sentencing Commission to evaluate the impact of the legislation, per ORC 181.27.

In order to fulfill our responsibility and evaluate the impact of these changes, we have convened a workgroup made up of various criminal justice stakeholders: judges, magistrates, court administrators, clerks of court, members of DRC, probation officers, and attorneys to help guide us in how best to measure the impact of the provisions included in the legislation.

Among these provisions are changes to record sealing eligibility and the use of intervention in lieu of conviction (ILC). In order to best understand the impact of the changes to local jurisdictions, we will need information from courts. To this end, we are requesting from you the following information on motions for record sealing and ILC before and after HB1 went into effect on April 12, 2021:

Motions to seal:

- Date the motion was filed
- If the motion was granted
- If the motion was denied, reason (eligibility or on merit)
- Felony offense and/or offense level attempting to be sealed
- Demographics of offender (e.g., dob, race, gender, etc.)
- Date of conviction for sealed offense
- Date motion granted or denied
- Any new convictions after sealing

ILC:

- Date ILC requested
- Date ILC granted
- If denied, why
- Offense and/or offense level
- Reason for ILC (substance use, mental illness, intellectual disability, victim of human trafficking)
- Type of ILC supervision/program ordered
- Conditions of ILC
- Length of ILC imposed
- Dates of ILC entry and exit
- ILC placement (facility)
- ILC program exit type (e.g., successful, unsuccessful, other sanction, etc.)
- Demographics
- Defendant risk assessment score
- ILC record ordered sealed
- New convictions during ILC including offense
- New convictions after successful ILC completion

Ideally, this information would be sent to us in two different groups:

1) All of the data that you have from the above list provided monthly beginning January 2018 through April 11, 2021, sent to us when you have it compiled, and

2) All of the data from the above list that you are able to capture **after** HB1 is effective provided monthly from April 12, 2021 through to December 31, 2021 ,sent to us after the beginning of the year in 2022.

We appreciate the time it may take to compile the information and understand that for some courts it may be difficult or impossible to obtain. If it is not possible for you to generate the information, please let us know – that scenario is important for the overall evaluation of impact.

Further, if you can provide only some of the data points or for only some of the time requested, please do – again, the complexity of systems and varying degrees of availability are important for evaluation. Similarly, if you are able to supply some of the information, but only in the form of aggregate reports (e.g., total number of motions filed, number of motions granted, etc.) please submit it.

Please send the information in a format easiest for you – whether that be a word document, PDF, response to this email or excel spreadsheet to Niki Hotchkiss. If you agree to participate, we kindly ask that you include contact information for any follow up that may be necessary in your response. We appreciate your help and hope to hear from you soon.

If you have any questions, please do not hesitate to contact Sara Andrews, Director of the Ohio Criminal Sentencing Commission, or reply to this email.

Sincerely,

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Ohio House Bill 1 Impact Study: Record Sealing Pre-HB1

Currently, there is no central source in the state for tracking the number of requests for record sealing or, consequently, the number of motions filed for sealing that were granted or denied each year. To establish a baseline number of sealing requests for comparison against requests received after the post-HB1 changes, we gathered multiple sources of information, including from the Bureau of Criminal Investigation (BCI), legal aid, and individual courts.

Figure 1 reflects the number of requests received by BCI from local courts to seal records. These requests are submitted with a sealing order signed by a judge. These numbers, however, do not distinguish between dismissals and convictions. BCI is unable to provide additional information about these requests, including the types of offenses that were sealed.

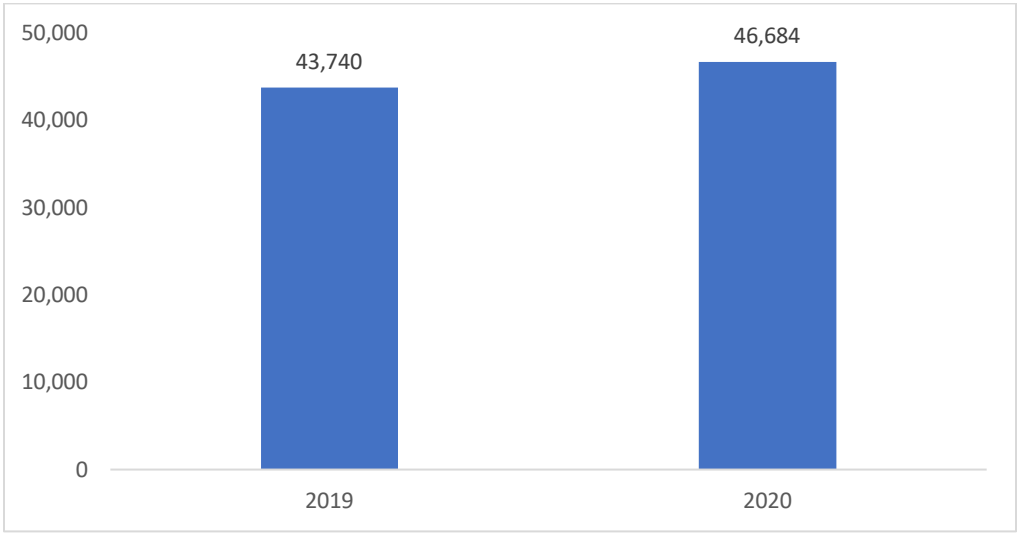

Figure 1. Number of orders to seal records received by BCI each year.

We spoke with legal aid attorneys throughout the state to better understand their experiences assisting individuals with record sealing.[1] Figure 2 displays the number of record-sealing cases that legal aid handled per year in the state of Ohio.

[1] See Appendix D for more information on the legal aid focus group.

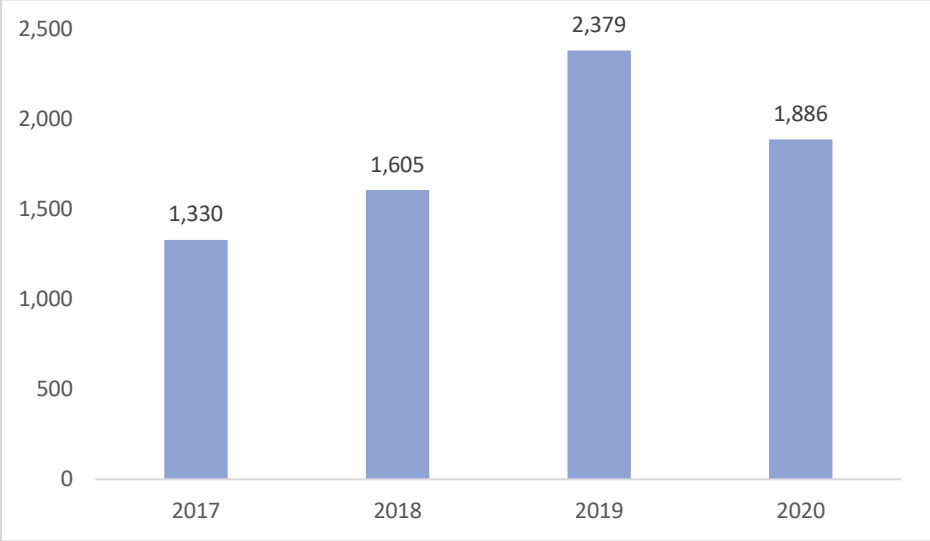

Figure 2. Number of record-sealing cases statewide handled by Legal Aid of Ohio, per year.

For the final source of quantitative information, we reached out to all court administrators with a valid email address on file at each municipal, county, and court of common pleas in Ohio to request a range of information[2] about all motions and orders to seal records from January 2018 through April 11, 2021.

Many courts were unable to provide all the pieces of information requested but provided what they could. Table 1 displays the number of courts contacted, as well as the number that supplied data. Additionally, there were a few courts that contacted us to say that it was not possible to provide any of the data we requested.

Table 1. Number of Courts Contacted and Providing Record Sealing Data.

	Successfully Contacted	Responded with Data	Responded to Say They Could Not Provide Data
Common Pleas	73	12	4
Municipal & County Courts	49	10	0
Total	**122**	**22**	**4**

[2] See Appendix B for data request to courts.

Of the 22 courts that provided data, six gave detailed information including demographics and offense information. Three common pleas courts were able to provide nearly all requested information, two common pleas courts provided the offenses or offense levels of the sealed records and one municipal court provided some demographic information, date of conviction, and offense level.

In all, 84% of applications from these 22 courts were granted from the beginning of 2018 through pre-HB1 2021. There has been a consistent increase in the percent of sealing motions granted, with the lowest level (72%) in 2018, up to 86% in 2019, 89% in 2020 and 94% in 2021.[3] The numbers reflect the year the motions were submitted and the year they were granted or denied, so the grants and denials may not always add to the total. While the exact numbers are different than those received from legal aid — as expected — the trend from 2018 to 2020 is similar.

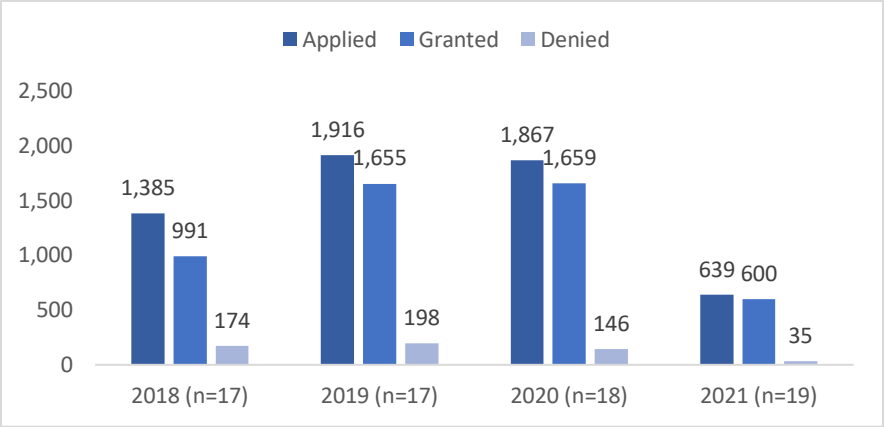

Figure 3. Number of record sealing applications received per year by outcome prior to HB1 implementation.

[3] Based on information received through November 1, 2021.

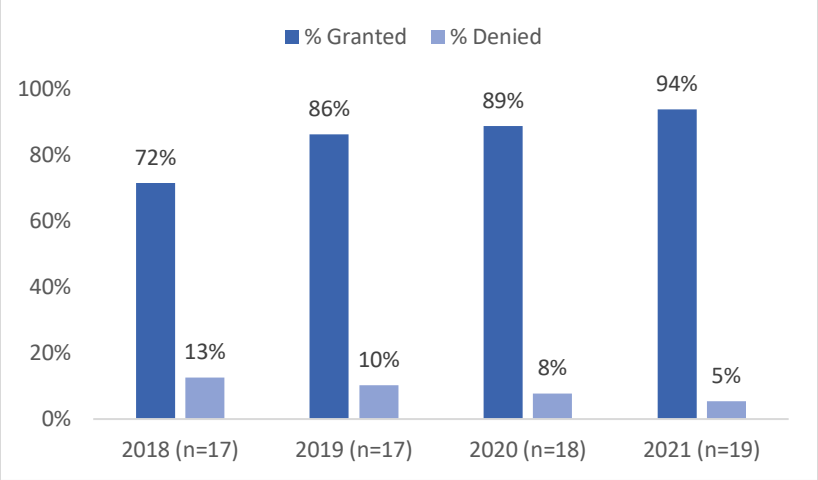

Figure 4. Percent of record-sealing applications granted and denied per year prior to HB1 implementation.[4]

[4] The columns in Figure 4 may not add up to 100%, as some cases filed (and counted) each year may be resolved in the following year or remain pending.

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Legal Aid Focus Group: Data Analysis & Summary

Introduction and Background

Following the passage of House Bill 1, which took effect on April 12, 2021, the Ohio Criminal Sentencing Commission convened the HB1 Implementation Working Group, composed of judges, prosecutors, defense attorneys, court administrators, probation officers, academicians, and state agency officials to guide the study of the impact of the legislation. The working group divided analysis of the bill into four categories of impact to study: (1) sealing a record of conviction (2) intervention in lieu of conviction (ILC), (3) involuntary court-ordered treatment for alcohol or drug abuse, and (4) community control changes and technical violations.

This report focuses on the second category, the sealing of a record of conviction.

To gain insight into the process of sealing a record of conviction, the working group conducted a focus group of practitioners led by Angela Lloyd, executive director of the Ohio Access to Justice Foundation. The focus group was comprised of four attorneys from Legal Aid of Ohio, each of whom represented their own region.[1]

The focus group discussed multiple topics, including typical assistance to clients in the process of record sealing, the impact of record sealing on employment opportunities, barriers clients face when seeking record sealing, reasons for denial in record-sealing requests, and notable changes since the implementation of HB1. The report is arranged by each major topic of discussion that arose from the focus group.

The dominant theme emerging from the focus group was the great impact of record sealing on many aspects of an individual's life, including, but not limited to, economic status, generational poverty, employment opportunities and access to affordable housing. This impact is underscored by legal aid receiving a steadily increasing demand for record sealing assistance and cases per year.

Background Information on Record Sealing in Ohio

Under Ohio law, some adult criminal convictions can be sealed from a criminal record, meaning that individuals do not have to disclose their conviction when applying for most jobs, and the conviction is not found through a criminal-background search. To be eligible to seal a criminal record, individuals must meet one of two sets of criteria based on their prior convictions and offenses. The first set of criteria offers record sealing to an individual with an unlimited sealing of convictions if all are F4 or F5 felonies, or misdemeanors, and if none are violence or sex offenses. The second set of criteria offers record sealing to an individual with up to two felony convictions, up to four misdemeanor convictions, or exactly two

[1] The attorneys included Julie Cortez (supervising attorney at Legal Aid Society of Cleveland), Patrick Higgins (staff attorney at Legal Aid Society of Columbus), Missy LaRocco (pro bono director and managing attorney at Legal Aid Society of Western Ohio), and Ann Roche (staff attorney at Southeastern Legal Services).

felonies and two misdemeanors. If an individual's conviction meets the criteria and an application is submitted, the individual will be considered

An individual is eligible to seal their record after a waiting period, which begins following final discharge and once the individual is finished serving their jail or prison sentence, finished any term of probation or parole, and paid any fines. To seal an individual record, individuals need to gather all documents related to their record including all arrests, convictions, dismissals, nolles, and bills. These records can be obtained from the clerk of the court's office in which an individual was charged and will determine one's eligibility in the record-sealing process.

While the general process and prerequisites of record sealing are dictated by law, there is variation regionally in the approaches to record sealing and the services offered by their respective legal aid organizations. The following section describes each legal aid region's approach to record sealing.

Operations of Record Sealing by Legal Aid Across Ohio

Legal Aid Society of Ohio is a general legal services organization that provides representation and legal advice for citizens of Ohio. One service provided by legal aid is the assistance of record sealing. As illustrated in the following, regional differences exist in how legal aid approaches and offers services on the issue because each regional legal aid is an independent non-profit. Despite these regional differences, legal aid is successful in aiding a large magnitude of clients in record sealing. Across Ohio, legal aid assisted 2,400 sealing and expungement cases in 2019 and 1,800 sealing and expungement cases in 2020, despite the COVID-19 pandemic affecting operations of both legal aid and the courts.[2]

Legal Aid of Western Ohio: Legal Aid of Western Ohio holds pro-bono record-sealing clinics, where attorneys volunteer their time. These clinics are targeted primarily toward residents of urban areas. The large turnout highlights the need for record sealing, especially in urban areas.

Legal Aid Society of Columbus: Legal Aid Society of Columbus serves Ohioans seeking record sealing and expungement help through both its pro bono program and full-service representation. The pro bono program partners with the local bar to recruit volunteers who hold both monthly and quarterly clinics to help Ohioans complete the required forms, prepare for hearings, and provide any legal advice the client needs regarding the process in general.

Full-service representation cases generally are referred to legal aid by community partners, such as workforce development and shelters that are aware of the significant barriers imposed by record holding. Its full-service representation is reserved for cases that will draw heavy objection from the prosecutor, cases that may set precedent or leave an impact, and cases that have a particular interest in poverty-law issues. Patrick Higgins notes that Legal Aid of Columbus specifically targets communities with a history of heavy policing and high incidents of criminal records. Unlike the other legal aid societies, Columbus also serves cases of people who they believe are survivors of human trafficking for relief under R.C. 2953.38.

[2] Due to a lack of statewide data, we are unable to know the proportion of total Ohio sealing cases that are handled by legal aid.

Southeastern Legal Services: Southeastern Ohio Legal Services noted that they began comprehensively providing record sealing aid in 2016, when laws first expanded eligibility. Southeastern Legal Services begins by diagnosing whether a person is eligible for record sealing. If eligible, a client will be guided through the process and receive filing assistance. If necessary, they will provide full representation for priority cases. They identified their priority cases as those they believed there was an incorrect objection about the law or cases that represent some larger poverty issue.

Legal Aid Society of Cleveland: Legal Aid Society of Cleveland has a different method than the other legal aid offices. Instead of holding open clinics, their clients often go to legal aid on their own. Clients must go through a centralized intake process and be identified as needing record sealing. Clients then are routed through the expungement clinics, which are by appointment only and require in-house screening as a prerequisite. At appointments with the expungement clinic, clients meet with volunteer attorneys through the Volunteer Legal Program. Attorneys provide clients with the documents needed to file in court and walk them through the court process. Clients are advised to return to legal aid if they encounter any problems.

While each regional legal aid office approaches record sealing uniquely, one common theme addressed was the importance of pro-bono attorneys and volunteers to the success of their organizations. The legal aid offices rely on pro-bono attorneys to provide services at their clinics and to take on some full-service representation cases. The attorneys note that it is sometimes difficult to attract volunteers, and the volunteers they recruit often do not have backgrounds or experience with record sealing. Due to this, all legal aid offices provide some form of training and resources to their pro-bono attorneys to aid in their volunteer efforts. However, legal aid remains hopeful that the impact of House Bill 1 and the resulting "buzz" sparked in the community will attract more volunteers to aid in their assistance to Ohioans.

Reasons for Approaching Legal Aid

Legal aid clients typically approach the organizations on their own or receive legal services based on referral. When asked why people approach legal aid initially, multiple reasons were given. The attorneys agreed that the most common reason people seek assistance to seal their records is for employment purposes. They note that conviction itself and the resulting criminal record create a barrier to obtaining or advancing employment and the associated required licensing. Aside from wanting to improve employment immediately, some individuals wish to expunge their record when applying to higher-education or technical institutions. Although not all forms of higher education require a background check, some do, and even if the school might not, a future employer may.

Individuals also may go to legal aid seeking to enter the traditional or subsidized housing market. For the traditional market, many landlords do background checks or some form of screening before leasing. For subsidized housing, having a criminal record can render an entire family ineligible.

Legal aid also notes that many clients go on their own, simply wanting to rid the stigma that comes with having a criminal record. Additionally, they note that oftentimes they see clients over the age of 65 who want to expunge their record from decades ago to rid the barriers to participation in the community.

When asked when people typically approach legal aid and whether it is after a certain number of years, the legal aid attorneys noted that there is no specific "time" when a person will try to expunge their record. However, a person must be eligible to begin the process. The felonies and/or misdemeanors an individual

has been convicted of determines how long they must wait to apply for record sealing. The waiting period to apply to seal a record for a misdemeanor, fourth-degree felony, or fifth-degree felony is one year. The waiting period to apply to seal a third-degree felony is three years.[3] This waiting period is significantly decreased with House Bill 1: an individual with a misdemeanor became eligible for record sealing after one year; an individual with one felony conviction became eligible for record sealing after three years; an individual with two felony convictions became eligible for record sealing after four years; and individuals with three to five felony convictions became eligible for record sealing after five years.

Record Sealing Impact on Employment Opportunities

The participants of the focus group highlighted the importance of record sealing to open employment opportunities for which a criminal record may prohibit persons from qualifying. The attorneys from legal aid unanimously agreed that record sealing is especially helpful for most job applications. The attorneys noted how they are continually surprised at the scope of jobs that care about even minor convictions, including jobs often deemed as "undesirable." In particular, the attorneys noted the importance of record sealing for employment licensing. For instance, when an individual who is qualified for a job needs to meet licensing requirements, a past conviction can disqualify them from the license and a job they otherwise are qualified.

While the participants from legal aid agreed that record sealing is significant for employment opportunities, they also noted that even when records are sealed and candidates may pass a background check, sometimes information can still be available online. They note the need for "scrubbing the electronic footprint of the modern world" to remove this harmful barrier.

Beyond the immediate impact of record sealing on employment opportunities, there is a cascading effect in which better employment can change household income, potentially allowing for more opportunities to secure housing. Sealing a conviction can open opportunities to both subsidized and federal housing, for which acceptance is reliant upon a clean criminal record. Furthermore, even individuals entering the traditional housing market often are subject to background or internet checks as pre-requisites to a rental or leasing agreement. The combination of employment and secure housing may further allow individuals and their families to escape generational poverty. Missy LaRocco, of Legal Aid of Western Ohio, highlights this importance. She said, "We are constantly telling people in poverty to pull themselves up by their boot strings and try to do better, but there is only so much they can achieve with a criminal record. Record sealing provides a door to fresh start and better future."

Barriers Faced by Clients Seeking Record Sealing

The attorneys from legal aid identified a myriad of barriers faced by clients in the process of record sealing. Each barrier is described in the following, as well as the implications for a client seeking record sealing.

[3] Contingent on none of the offenses being a violation of R.C. 2953.36.

The first barrier identified, which legal aid also notes as the greatest barrier to individuals who seek to seal their record, is cost. Ohio statute provides that people can be charged a fee of $50 to seal their record. However, the filing fees for record sealing in one court often total $250 due to other court fees or "multiple filings." This amount can increase when clients need to file in multiple courts. This fee is especially high when considering the added costs an individual attending court faces, such as a day's worth of missed work/payment, the costs of childcare, and transportation.

While poverty affidavits are available to those unable to pay the filing fee, one attorney noted that judges maintain discretion to deny poverty affidavits to waive the filing fees when a client is above the specified federal poverty level.[4]

Additionally, unpaid fines or restitutions can increase the cost to record sealing for individuals. An unpaid fine or restitution that goes to final discharge in the process of record sealing may deem an individual ineligible for record sealing, even if the individual met both the conviction and waiting-period requirements. In one legal aid attorney's experience, the judge may take this lack of payment to be an indicator of an individual not being rehabilitated "to satisfaction," as opposed to considering the underlying socio-economic issues behind that lack of payment, such as difficulties obtaining employment with a criminal record or generational poverty. Even if an individual has the ability to pay fines, they may be unaware of their outstanding debt until after their request has been denied due to common misunderstanding or lack of information provided on behalf of the courts.

The second common barrier legal aid attorneys identified is specific to individuals who file to seal their record *pro se* (or on their own behalf) as a by-product of the complexity of legal statutes and its frequent changes. The process of record sealing can be so complex that it is extremely complicated to navigate without professional counsel and may be confusing even with professional counsel. For individuals who choose to undergo this process, they may be unaware of the free support legal aid offers or are unable to access legal aid and their resources. Therefore, they can encounter difficulty throughout the process, especially regarding the technicalities associated with filing paperwork. Individuals face information barriers concerning which files to submit, as well as for which court they are supposed to file in. Further, the technical and legal jargon in the criminal code can be extremely complex and beyond the knowledge of most individuals filing *pro se*.

In one example given, individuals may receive record-sealing objection letters from prosecution, which are not actually finding the individual ineligible, but instead are requesting the court to do so. Sometimes an individual sees this letter and incorrectly assumes they were denied. This results in them failing to attend hearings and being denied for failure to appear. Additionally, many individuals are unaware of their rights as applicants to file an objection if they were denied a hearing.

The third barrier that legal aid identifies is access to information and other technical barriers. They note that access to information is critical. But it has become a huge problem, especially due to the decentralized nature of the Ohio courts system. In Ohio, oftentimes, an individual seeking to seal their record will have to deal with multiple courts, all with their own unique processes of requesting information, filing, and scheduling. Furthermore, some courts do not have online dockets, making it

[4] Ohio Adm.Code 120:1-03.

difficult for legal aid to determine whether an individual is eligible to have their conviction(s) sealed. The lack of information can have real consequences, which is why Ann Roche, of Southeastern Ohio Legal Services, advocates for the continuation of "tech grants."

Reasons for Record Sealing Denial

While legal aid tries to assist all clients who go to them seeking legal advice and assistance with the process, they note that some individuals who seek to seal their record are sometimes denied. There are many reasons why an issue may be denied, but the attorneys mentioned that the most frustrating denial occurs when it is issued without any sort of reason, a vague reason, or an invalid form of reasoning that does not comport with the statute. One example of vague reasoning legal aid provided was an individual not being rehabilitated to the satisfaction of the court. Ms. Roche criticized this vague reasoning and said that "aside from the waiting period set by the statute and after the final discharge, there is no real length of time to say someone has been rehabilitated and they are unlikely to commit offenses." Legal aid also added that it is difficult to achieve rehabilitation without employment, and it is difficult to obtain a job with a criminal record.

Legal aid believes that this vague reasoning can most commonly be attributed to the divided courts when it comes to record sealing in general. Certain judges are more likely to assist with record sealing than others. Ms. LaRocco said, "Unfortunately, what judge, county, and area you are in can really change the outcome of whether or not you are able to get your record sealed on the particular issue because there is a lot of discretion on the rehabilitation aspect."

Aside from vague reasoning, one of the most common reasons for denial of record sealing is due to an individual's failure to pay for the cost of record sealing or other court fees and fines. For individuals unable to pay the costs of record sealing, the courts will say "an individual has not made a good faith effort to pay the costs." However, legal aid maintains that this is not an issue of good faith, but rather an issue of generational poverty preventing individuals from eligibility.

Lastly, legal aid shared that potential biases may arise in the process of record sealing, leading an individual to be less likely approved for record sealing. Many judges serve for a long period of time, seeing defendants more than once. Judges who see individuals for multiple trials over long periods of time may develop contentious relationships that may influence their ruling regarding record sealing. To avoid biases, legal aid recommends changing the process of record sealing to be more consistent across all judges and courts. Furthermore, they suggest random assignment of judges to record-sealing cases to create a level playing field for all cases.

Changes Noticed Since the Implementation of HB1 (April 2020)

Legal aid agreed unanimously that they have seen some positive changes and results since the implementation of HB1. One important change they noted is the expanding recognition that record sealing has a large impact on an individual's life, and that sentiment has led to expanded eligibility. One of the largest impacts noted by Ms. Roche is the decreased waiting period after retributions were paid, because any decrease in wait time helps remove the barriers individuals face on a daily basis.

Another impact they find significant is the removal of the cap on the number of felonies. Patrick Higgins, of the Legal Aid Society of Columbus, said this change is significant because "rather than tying the hands of the court with a strict number that makes someone eligible/ineligible, courts now have more discretion

in whether that person is ready to have their record sealed." They noted that with recent changes in the workforce, record sealing helps people get best situated to support themselves and their families.

Lastly, the attorneys noted that an impact aside from actual changes in the law is the impact it created within the community. Whenever legislation is passed, it helps to raise community awareness and mobilizes individuals. Additionally, it can directly help legal aid by gaining more supporters and volunteers.

Continuing Issues Since the Expansion of Record Sealing via HB1 (April 2020)

While legal aid is in full support of the expansion of record sealing and argues that record sealing is an important and critical step in criminal justice reform, they noted there are continuing issues remaining with the criminal justice system as a whole. Despite these issues, the attorneys contend it is important to continue expanding eligibility, information, and consistency regarding the issue. These problems affect not only the clients, but also legal aid, pro-bono attorneys, and the courts.

One of the largest problems remaining, they said, is that there still is no unified court system, leaving pro-bono attorneys, clients, and legal aid in disarray when filing for record sealing. There is no consistency in directions or standardized methods for filing record-sealing cases. This adds more work on the part of legal aid to ensure that clients and pro-bono attorneys are not being given misinformation. Ms. LaRocco added that "one of the worst things we can do is give misinformation, and that's very easy to do when the courts are all doing things differently." In addition to being cautious of misinformation, it also can be tedious for legal aid and pro-bono attorneys to even access information initially due to the lack of online information for some courts.

The attorneys also added that while the bill significantly expanded the eligibility requirement of record sealing, there is a new hurdle presented with getting the sealing through the court system. Since the passage and implementation of House Bill 1, they have witnessed a lag time for both courts and their clerks to learn about the changes in eligibility. This was not especially surprising to legal aid as they noted there is always a period of adjustment after policy changes are implemented. However, the fact most cases need to go through municipal courts, which are by far the busiest courts, adds to this lag. They say that this adjustment period, and lack of education overall, impacts both progress on the issue and the success of House Bill 1.

In addition to the lag from the courts, legal aid has noticed that the magnitude and volume of cases demanded is exceeding the capacity of their systems. The courts already are overflowed from the COVID-19 pandemic and adjusting to new guidelines furthers this lag. In addition, legal aid noted there are not enough attorneys who are familiar with this process and who donate their time.

Despite these remaining problems, legal aid believes that House Bill 1 was an important step to reform and raising awareness and they continue to advocate for expansion of record sealing, along with the standardization of the Ohio court system.

Conclusions and Recommendations

The attorneys agreed unanimously that record sealing is extremely important for both past and future defendants. Record sealing is critical in decreasing the collateral consequences of being involved in the criminal justice system such as obtaining employment, housing, and more. Record sealing also has an impact on economic status and generational poverty. Further, the attorneys noted that record sealing is important to clients who routinely are reminded of their conviction and record, no matter how old it is. Record sealing helps individuals feel more dignified from a system that judged and burdened them. Record sealing allows individuals to move forward from past criminal-justice involvement and get a second chance, without forcing them to relive their trauma in everyday interactions.

Regarding House Bill 1, the attorneys continually highlighted the importance of expanded eligibility, the decreased waiting period, and the removal of the cap on the number of felonies. They also added that the legislation itself generated awareness and education around the issue, which has sparked enthusiasm and the potential for more volunteers.

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Ohio House Bill 1 Impact Study: Criminal Record Sealing and Expungement Processes in Other States

Efforts to expand eligibility for the sealing of criminal records are not unique to Ohio. Several states such as Michigan, Pennsylvania, Connecticut, Louisiana, and Vermont have made efforts to expand eligibility, as well as facilitate the automatic sealing or expungement of certain records. The following is an overview of recent legislative changes in Pennsylvania and Michigan, as well as research addressing potential benefits and concerns of expanded criminal record sealing.

"Expungement" and "Sealing": A Distinction without a Difference?

Many states distinguish between "expungement" proceedings for criminal records and the "sealing" of a criminal record. However, in Ohio, "the legal process for expungement of records and sealing of criminal records occur at the same time. In other words, the term 'expungement' and 'sealing' are one and the same."[1] Over time, these terms have come to be used interchangeably and cause a great deal of confusion when comparing processes across states. For purposes of this document, the terms "sealing" and "expungement" will be used interchangeably and refer to the process of hiding a criminal record from public view.

Expanding Eligibility for Sealed Records

Recent legislative efforts in Michigan and Pennsylvania have resulted in increased opportunities to seal criminal records. The following is a brief overview of the legislation, as well as specifics about implementation and funding.

Michigan: Clean Slate

A 2017 study conducted in Michigan attempted to identify contributing factors in the uptake rate.[2] The study estimated that only about "6.5% of all eligible individuals receive expungement within five years of the date they qualify for one."[3] While 74% of applications for expungement were successfully granted between 2016 and 2017 alone, records showed that more than 91% of eligible applicants do not even attempt the process.[4] This reveals the largest barrier to expungement participation and is a product of the

1 *Expungement, Wrongful Conviction, CQE's and CAEs in Ohio: Expungement,* Franklin County Law Library, 2021.

2 Uptake rate is defined as the rate at which those who are legally eligible for expungements actually receive them. Prescott, JJ and Sonja Starr. 2020. "*Expungement of Criminal Convictions: An Empirical Study*." Harvard Law Review 133:2461-2555.

3 Prescott and Starr, 2020, pg. 2466.

4 Prescott and Starr, 2020, pg. 2489.

study; "When criminal justice relief mechanisms require individuals to go through application procedures, many people who might benefit from them will not do so."[5] Recent legislation in Michigan, to be implemented in 2023, addresses many of these barriers by allowing for automatic sealing of several offenses.

In Michigan, the passage of "Clean Slate" legislation expanded those eligible for record sealing and outlined a process for automatic record sealing. The new legislation allows up to two felonies and four misdemeanors[6] to be automatically sealed following a waiting period. The waiting period is seven years for misdemeanors and 10 years for felonies. The waiting period begins either after the imposition of the sentence, or the completion of any term of imprisonment, whichever occurs later. Some offenses are excluded from eligibility, such as life offenses and sexual offenses.[7]

Similarly, Michiganders now are eligible to apply for up to three eligible felonies to be sealed and expands the opportunity for an unlimited number of misdemeanors to be set aside. It also incorporated into its expungement package a provision titled "One Bad Night," which allows for numerous convictions, felonies, and misdemeanors to be treated as one conviction for the purposes of applications for expungement.[8] The package maintained a narrower encompassment based on stakeholders and push-back from legislators and excluded crimes of violence, as well as sexual offenses and DUIs – although there has been legislation to encompass minor drunk-driving convictions in recent months.[9] Both House Bills 4219[10] and 4220[11] referencing eligibility for expungement of operation of a motor vehicle under the influence are in the process of being enacted and are awaiting signature by Gov. Gretchen Whitmer.[12]

Michigan Implementation

Michigan counties were allotted a two-year gap to formulate a tangible plan for implementation. The Clean Slate Pilot Program was granted a $4 million buffer to be used as "stop gap" for expungements until the law goes into effect in 2023.[13] It reallocated this grant utilizing its Michigan Works! Agencies (MWAs) located around the state. Currently, 16 MWAs are utilizing $125,000 per location to cover

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5 Prescott and Starr, 2020, pg. 2478.

6 The limit of four misdemeanors are those offenses punishable by 93 days or more. There "appears to be no limit on the automatic expungement of misdemeanors punishable by less than 93 days." Kamau Sandiford, Clean Slate Program Manager, Safe & Just Michigan. Personal Communication, November 30, 2021.

7 Mich.Comp.Laws 780.621g(5).

8 Norman, Michael *Automatic Expungement: Expectations vs. Reality,* 2021.

9 Staff of Site 9&10 News, *Michigan House Passes New DUI Expungement Bill,* 9&10 News, 2021.

10 House Bill 4219, Michigan Legislature, 2021.

11 House Bill 4220, Michigan Legislature, 2021.

12 See Appendices F(2) and F(3) for flowcharts of Michigan's sealing processes.

13 McClallen, Scott, *$4 million to help Michiganders expunge records via Clean Slate Pilot program,* The Center Square, 2021.

additional staff time, documentation, and court fees associated with the expungement process until its automated aspect is fully functioning. The remaining $2 million is divided per agency on a formula promulgated by the state, to determine "potential participation" per agency, to maximize the available services.

An estimated amount for overall implementation in Michigan has not yet been published and it is not known whether its current funding is on target to successfully implement the automated functioning system by 2023.

Michigan identifies potential activities and positions that assist in successfully implementing the program in each MWA. The state gives specific recommendations that can be used at the discretion of each MWA to individualize how each will function most efficiently.

Included in the recommendations is the establishment of "… an MWA staff position to act as an Expungement Navigator."[14] The duties of such a position would include, but are not limited to, "evaluating criminal records for eligibility, making contact and referrals to local prosecuting attorneys and public defenders' offices, participant program registration, referral to other MWA program or legal staff, preparation of required documents, and obtaining required certifications."

Other suggestions include reaching out and contracting a relationship with an attorney or law office that has experience with expungements and criminal law, or "…establishing an attorney position within the MWA or the additional support for an attorney already employed by the MWA or the local government entity."[15]

Further suggestions come in the form of outreach for the MWA programs, which can include activities, events, and means of circulating information.[16] Each MWA is required to submit a plan of action that details what programs it plans to implement, as well as new positions that will be created and an overall action plan describing the two-year transition.

Pennsylvania

Pennsylvania's automatic system allows for the expungement of nonviolent misdemeanors after 10 years if the former offender doesn't have a subsequent conviction.[17] The state also implemented the program to seal a backlog of cases that already passed their eligibility to be expunged. Consequently, they began sealing 30 million criminal cases in June 2019. Two years into the program, officials continue to seal approximately 100,000 offenses per month.[18]

[14] Department of Labor and Economic Opportunity, *Clean Slate Pilot Program,* 2020.

[15] Department of Labor and Economic Opportunity, 2020.

[16] Department of Labor and Economic Opportunity, 2020.

[17] Jackson, Angie, *It May Become Easier to Clear Criminal History in Michigan,* Detroit Free Press, 2019.

[18] Jackson, 2019.

Pennsylvania estimated a $3-million-implementation cost due to added staff and major equipment upgrades needed to accommodate the automatic system.[19]

In 2018 Pennsylvania's stunning breakthrough was described by former legal aid attorney, Rebecca Vallas, as "…a coalition… that really paved the way for that national bipartisan support that we've seen following Pennsylvania's wake."[20] Pennsylvania saw unannounced support from both "Democrats and Republicans, as well as… communities, business, law enforcement, and even professional football players— [All of whom] joined Community Legal Services and CAP in advancing the first ever clean slate bill in the country."[21]

Additionally, an individual is sometimes ineligible to have a record sealed if they have outstanding court costs and fees. In fact, sometimes the statutory waiting period does not begin until all financial obligations are cleared with the court. "An inability to pay is the predominant reason for outstanding court debt,"[22] which is a contributing factor to low rates of record sealing. In October 2020, Pennsylvania passed a bill that eliminated the requirement that fines and court costs must be paid to courts before a case could be sealed, though restitution is an exception to this legislation.[23] In Ohio, application for sealing or expungement only is available after an allotted amount of time has passed since the conclusion of the sentence. Moreover, currently there is no clear standard for what that "conclusion" is. Outstanding fines and court fees may lengthen this period, thus prolonging the beginning of the eligibility period.

Economic Impacts of Sealing a Criminal Record

There are numerous potential positive impacts to increasing the number of people eligible for record sealing. Most notably, the sealing of a criminal record can expand employment opportunities for former offenders and consequently add more individuals to the labor market, something that is particularly necessary following the COVID-19 pandemic.

Employment

Employers often are unlikely to hire those with criminal records, even if they are minor criminal offenses. The University of Michigan published that the probability of employment alone rose by 6.5% within the first year of obtaining a clean record, with wages increasing by almost 22%.[24] Similarly, studies in California demonstrated annual incomes rising by $6,190.[25]

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19 Jackson, 2019.

20 Jackson, 2019.

21 Amaning, Akua, *Advancing Clean Slate: The Need for Automatic Record Clearance During the Coronavirus Pandemic,* Center for American Progress, 2020.

22 Cusick, Julia, *CAP's Rebecca Vallas Applauds Pennsylvania for Eliminating Fines and Fees as a Barrier to Clean Slate*, Center for American Progress, 2020.

23 Courtney, R. *You Can Clear Your Record Even If You Owe Court Fines and Costs Starting Next Year,* Community Legal Services of Pennsylvania, 2020.

24 Gullen, Jamie, *Why Clear a Record? The Life-Changing Impact of Expungement,* Community Legal Services of Philadelphia, 2018, pg. 4.

25 Gullen, Jamie, 2018, pg. 4.

Additionally, the relief provided by record sealing has shown to directly affect historically disadvantaged groups. Studies advise that, "Because of disproportionate policing and criminalization of certain groups, including people of color, youth, LGBTQ+ individuals, and people with disabilities, those who are already most likely to face discrimination and poverty are also most likely to have arrest records."[26] As a result, there also is a general increase in quality of life among those with sealed records.

The general knowledge regarding expungements from an employer's perspective is a difficult statistic to measure. However new studies reveal a range of attitudes taken by employers toward knowingly hiring individuals with criminal records.

Some argue that employers have a right to know the detailed extent of a potential hire's criminal history. Retired police officer John Cluster, who recently opposed Maryland's expungement legislation, claims that expungement "could give business owners the wrong impression about a job seeker, a view he had based on looking at the records of people who had been arrested multiple times…"[27] One individual Cluster elaborated on had 26 convictions and Maryland law would allow him to seal 23 of them.[28] Cluster claims this is unfair to those hiring, because they are under the assumption that the criminal history of individuals is minimal, due to the majority of convictions that qualify to be sealed.

Conversely, a study conducted by the Society for Human Resource Management and the Charles Koch Institute found that, "…employees, managers, and Human Resources professionals, are open to working with and hiring people with criminal histories."[29] A consensus regarding the high rates of unemployment is causing businesses to discover labor and untapped skill in alternative sources, including those individuals who may have some sort of a criminal history. In fact, according to the study conducted, "Within organizations that have hired those with a criminal record, employers rate the value workers with a criminal record bring to the organization as similar to or greater than that of those without a record."[30]

A breakthrough example of this statistic in-action is demonstrated in the restaurant industry by Hot Chicken Takeover, founded in Columbus, Ohio. Individuals who are hired often have a criminal record, have been previously incarcerated, or face some other barrier to obtaining steady work. Customers willingly and eagerly support this business with the understanding it is run by previous offenders. In 2013, the company profited $6 million in sales between its three locations. Hot Chicken Takeover maintained an employee turnover rate of about 40%, a statistic that is well below industry averages in retail and food service. [31] The expansion of expungements would only prove further that the rate and quality of work is not determined by a record, but those skills and talents showcased when given an equal chance at employment.

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26 Gullen, Jamie, 2018, pg. 7.

27 Beitsch, 2016.

28 Beitsch, 2016.

29 SHRM, *Workers with Criminal Records,* Society for Human Resource Management, 2018.

30 SHRM, 2018.

31 Eaton, Dan *Hot Chicken Takeover staffing up for regional expansion,* Columbus Business First, 2019.

Economic Recovery Post-COVID-19

The U.S. Bureau of Labor Statistics reported in May 2021 that the total number of job openings were estimated at 9.2 million.[32] Specifically in job arenas, such as educational services, and other services,[33] numbers skyrocketed coming out of the year of hardships caused by the 2020 pandemic. Sociologists and other researchers discovered that people had new approaches to job searching and work expectations due to the new realities caused by the unprecedented year. They explained that more people are making family and at-home or virtual work a priority, leaving an abundance of open positions in industries such as restaurant and food service, education, and even health care.[34] For more than 70 million Americans who have a criminal or arrest record, but cannot land certain types of employment due to these records, it creates a large and detrimental gap in job openings and potential hires. This gap exists during a time when their labor contribution is desperately needed.

Many states are uniting new expungement legislation with plans of action to tackle economy recoupment. A group of economists found that "…the cost of barring these individuals [with criminal records] from the workforce is roughly $78 to $87 billion in lost gross domestic product annually."[35]A further study conducted in Pennsylvania found that, "By putting to work just 100 [currently unemployed former inmates] in Philadelphia, it would increase their lifetime earnings by approximately $55 million, income contributions by $1.9 million, and sales tax contributions by $770,000."[36] These numbers demonstrate the abundant impact the previously incarcerated can have economically, as well as the impacts a record can have on obtaining certain employment.

New York has agreed with the case made for expungements as a route to economic relief. New York State Senator Zellnor Myrie said, "We cannot have true economic recovery in the state if we're telling 2.3 million New Yorkers 'Sorry, we don't want your services…I view this much as an economic boon and recovery tool, especially in the age of Covid-19."[37]

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32 U.S. Bureau of Labor Statistics, *Job Openings and Labor Turnover Summary,* U.S. Department of Labor, 2021.

33 "Establishments in this sector are primarily engaged in activities, such as equipment and machinery repairing, promoting or administering religious activities, grantmaking, advocacy, providing dry cleaning and laundry services, personal-care services, death-care services, pet-care services, photofinishing services, temporary-parking services, and dating services"; https://www.bls.gov/iag/tgs/iag81.htm.

34 Long, Heather, *It's not a 'labor shortage.' It's a great reassessment of work in America.* The Washington Post, 2021.

35 Lo, Kenny, *Expunging and Sealing Criminal Records,* Center for American Progress, 2020.

36 Office of the Deputy Mayor for Public Safety, *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia,* Economy League Greater Philadelphia, 2011.

37 Weisstuch, Liza, *To Boost Hiring, New York Makes Case for 'Clean Slate,'* Bloomberg CityLab, 2021.

Can a Criminal Record Ever Truly Be Sealed?

While the economic benefits of a sealed criminal record are well documented at an individual and societal level, there are challenges to truly removing a criminal record from the public. The internet creates a unique challenge to confronting the legislative expansion of record sealing. A simple Google search can help potential employers locate criminal history information from news websites, mugshot photos, and even private companies that house records. James Jacobs, New York University law professor claims, "It's impossible to expunge information in this cyber age."[38] The issue is that the government is publishing criminal records and previous convictions and since they are public records, there currently are no repercussions for sites that continue to hold that information forever, even when an expungement has occurred. The problem with legislation to expand record sealing rests on, "The idea that there only exists one single criminal record, when, dozens of pieces of digital information relay an arrest or conviction across public and private sources."[39]

The issue is complex. The public has a right and it is "essential to democracy" to have access to public records. However, when the public records are no longer accurate and their status is voided, the common good is not protected by the government any longer, but rather harming those affected by its consequences. Several solutions proposed by researchers include reclassification of some pre-convictions as private,[40] or regulating some aspects of criminal data "from its point of origin" that would reduce the need for down-the-road remedies, such as expungements, and demonstrate that sealing records is worth the time and undertaking. [41]

Public Safety Concerns

A common source of concern over expanded criminal record sealing is public safety. A common critique is that by expunging records automatically, people who pose a substantial risk to society will "slip through the cracks." The argument usually includes the potential threat those with criminal records pose to, "…public safety, employers, landlords, colleges, and the general public…"[42] Furthermore, some maintain that the public has a right to know about a person's criminal history.[43] Researchers determined that the recidivism rates for individuals with criminal records do not reflect this type of threat to the general welfare of society. In fact, Michigan found that of those who get their records sealed, a little more than 4% of them are convicted of new crimes within five years of expungement,[44] leaving 96% of those who had their record expunged, crime-free.[45]

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38 Thompson, Christie, *Five Things You Didn't Know About Clearing Your Record,* The Marshall Project, 2015.

39 Lageson, Sarah Esther, *There's No Such Thing as Expunging a Criminal Record Anymore,* Future Tense, 2019.

40 Lageson, 2019.

41 Lageson, 2019.

42 Lo, 2020.

43 Lo, 2020.

44 Jackson, 2019.

45 Lo, 2020.

Researchers hypothesized a few reasons why the recidivism rates are so low among those with sealed records, including that the group qualifying for sealing generally includes low-risk offenders to begin with, the individuals who successfully navigate the expungement process have "resources, motivation and persistence"[46] that allow them to succeed, and at the point many people are eligible for expungement, their likelihood of reoffending has passed the highest point. [47] Additionally, reoffending is more likely to happen within the first year or two after conviction or release from incarceration. Therefore, if someone is eligible for sealing due to a lack of subsequent conviction, they are much less likely to recidivate.[48]

Conclusion

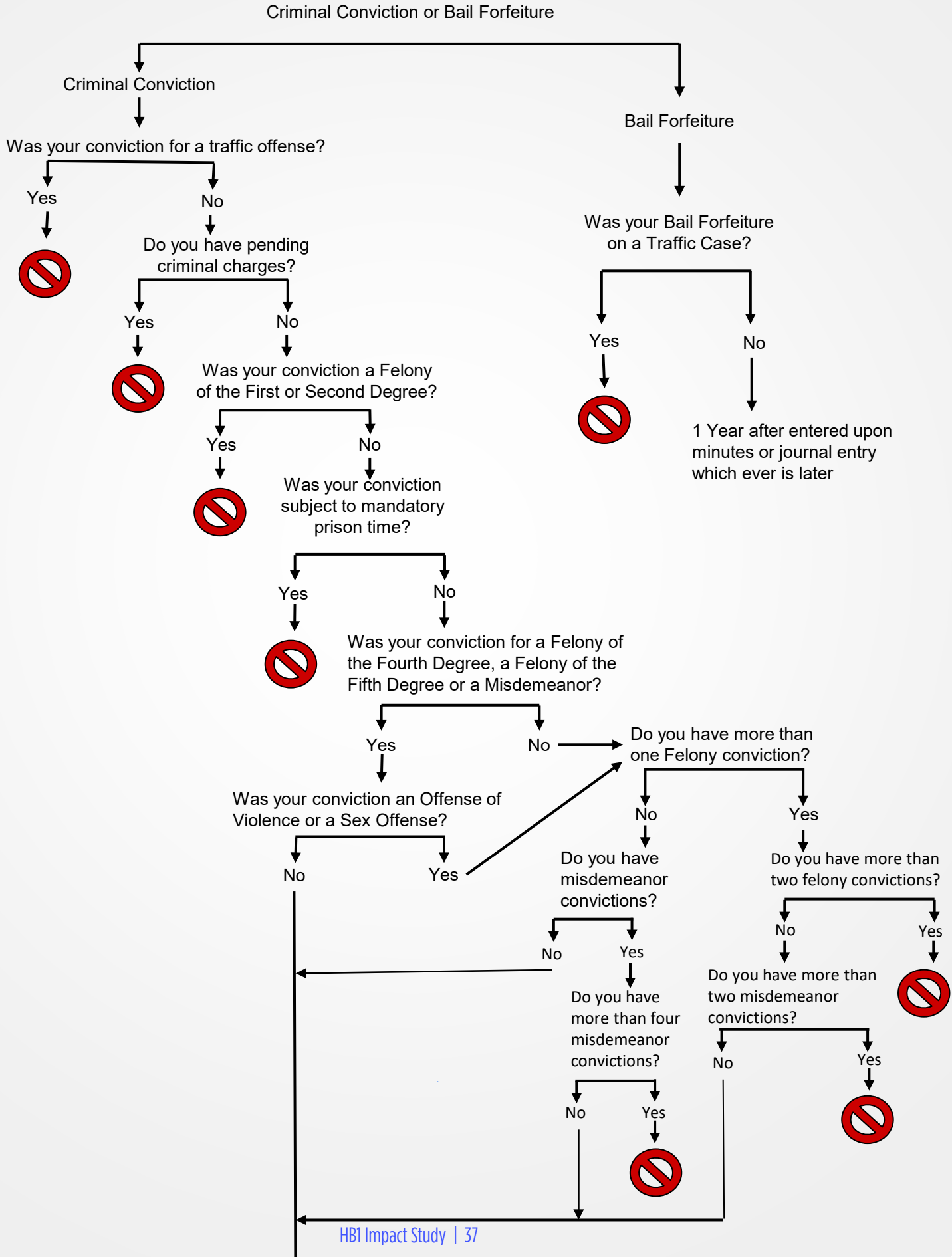
Ohio has an opportunity to follow states such as Michigan and Pennsylvania in further reforming and expanding the opportunities to seal criminal records. Other states, such as New Jersey, have followed the actions taken by these leading states and opened the door to an automatic expansion. Ohio would take a reformative step in criminal justice reform and furthering goals of rehabilitation, while also making a proactive decision to help boost the economy, by giving these individuals a fair chance at better employment. Based on the studies that have been conducted, the risk is relatively low, yet the potential gain is high.

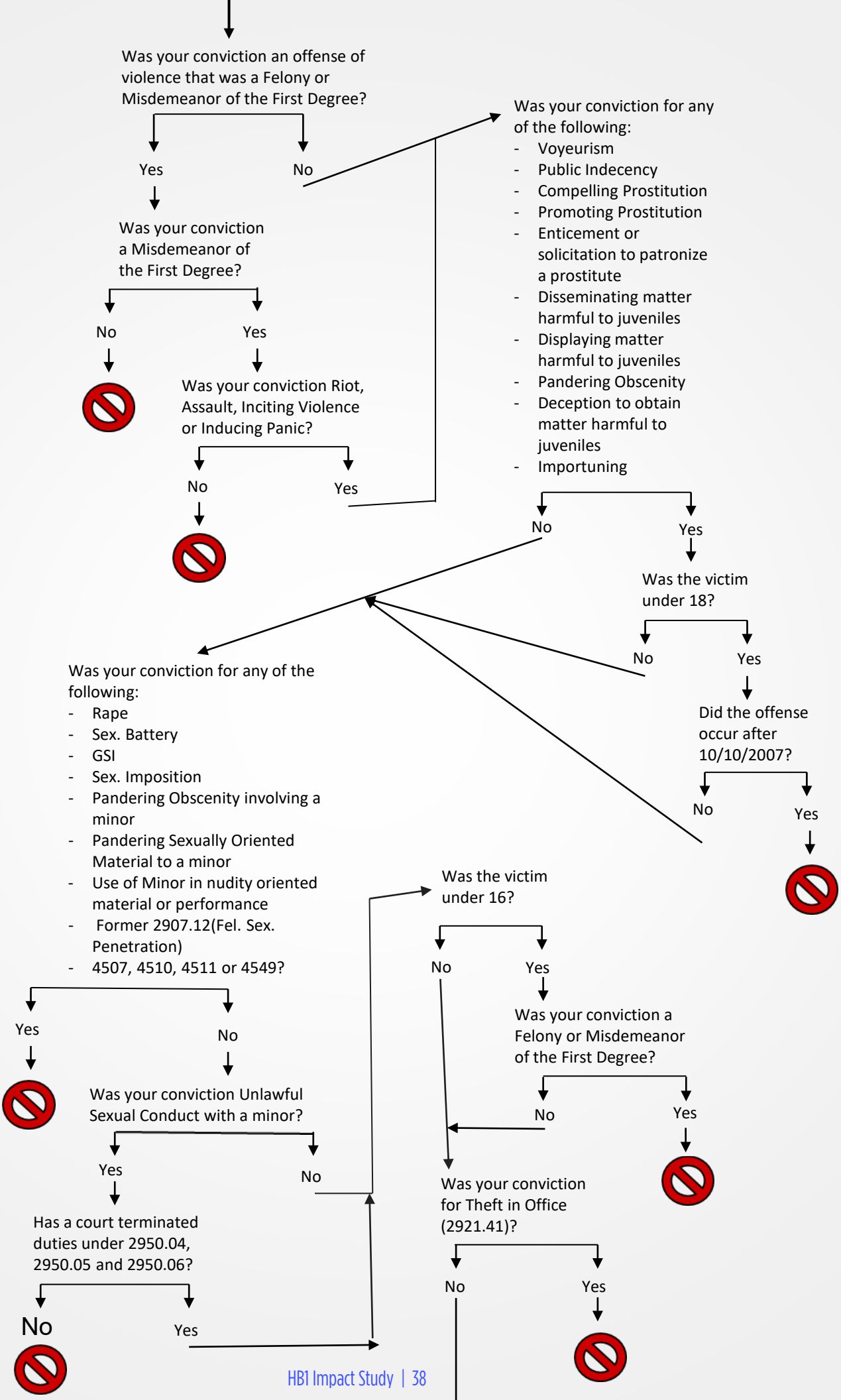
[46] Starr, 2020.

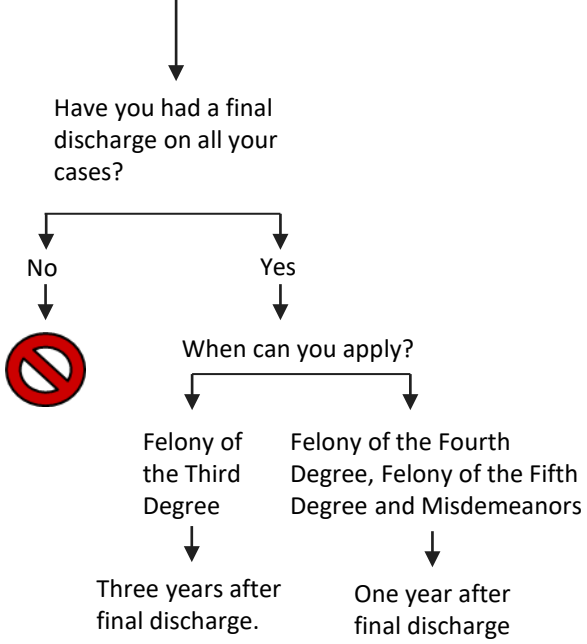
[47] "The relationship between aging and criminal activity has been noted since the beginnings of criminology…the proportion of the population involved with crime tends to peak in adolescence or early adulthood and then decline with age." Jeffery T. Ulmer and Darrell Steffensmeier, *The Age and Crime Relationship,* The Pennsylvania State University, 2014

[48] Starr, Sonja B. *Expungement Reform in Arizona: The Empirical Case for a Clean Slate,* Arizona State Law Journal, 2020

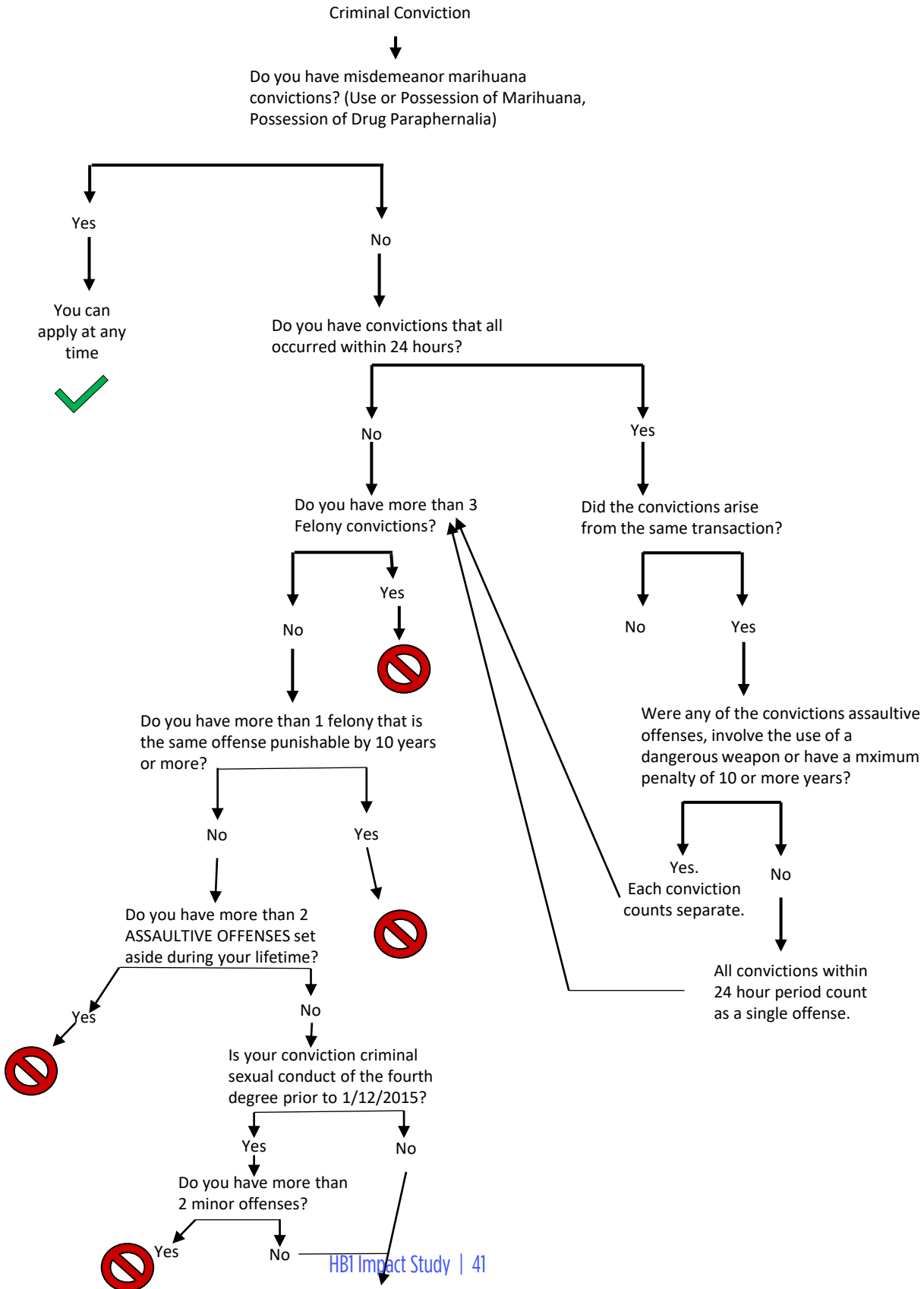
Ohio Clean Slate Pathway

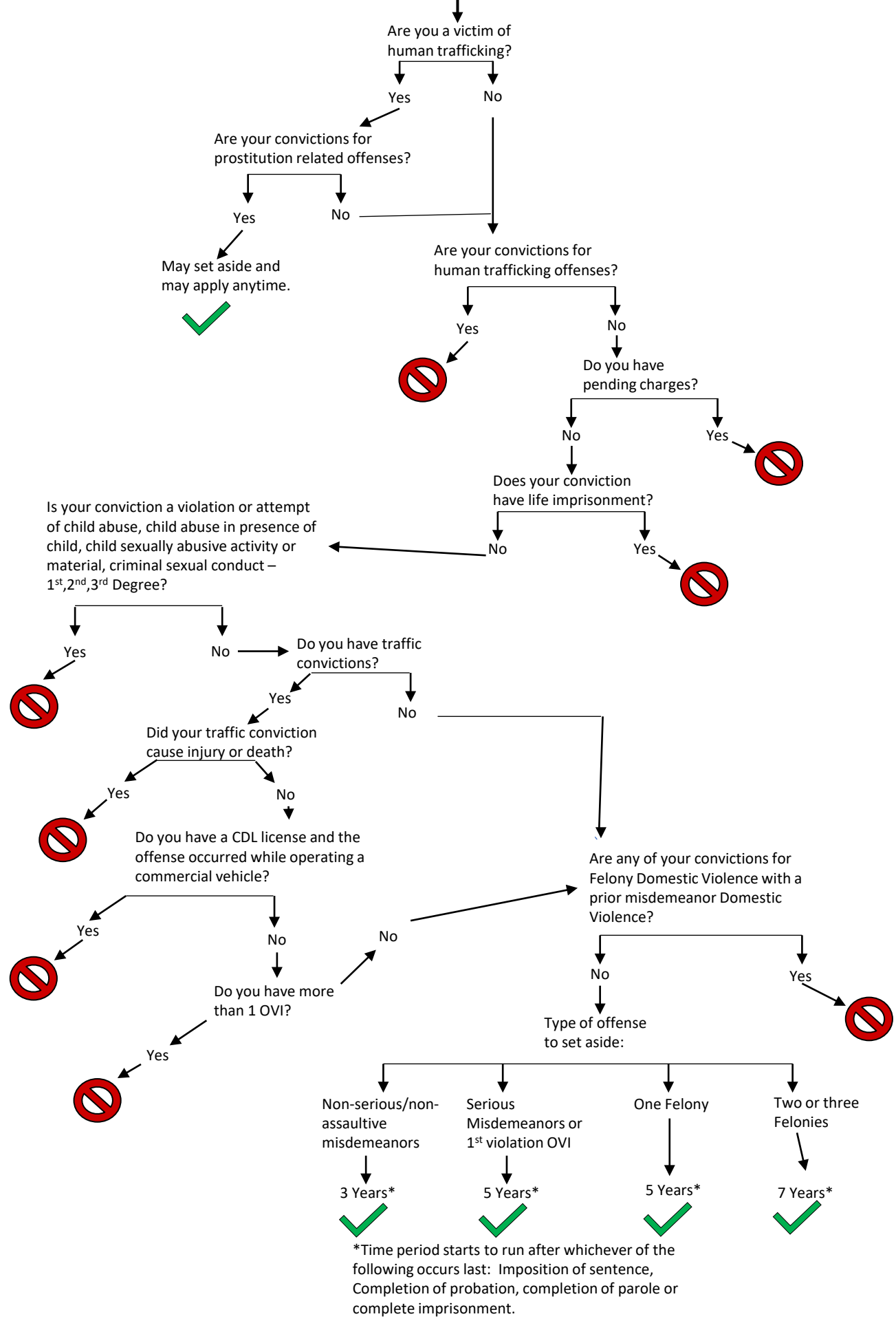



Was your conviction an offense of violence that was a Felony or Misdemeanor of the First Degree?
Yes
No
Was your conviction a Misdemeanor of the First Degree?
No
Yes
Was your conviction Riot, Assault, Inciting Violence or Inducing Panic?
No
Yes
Was your conviction for any of the following:
- Voyeurism
- Public Indecency
- Compelling Prostitution
- Promoting Prostitution
- Enticement or solicitation to patronize a prostitute
- Disseminating matter harmful to juveniles
- Displaying matter harmful to juveniles
- Pandering Obscenity
- Deception to obtain matter harmful to juveniles
- Importuning
No
Yes
Was the victim under 18?
No
Yes
Did the offense occur after 10/10/2007?
No
Yes
Was your conviction for any of the following:
- Rape
- Sex. Battery
- GSI
- Sex. Imposition
- Pandering Obscenity involving a minor
- Pandering Sexually Oriented Material to a minor
- Use of Minor in nudity oriented material or performance
- Former 2907.12(Fel. Sex. Penetration)
- 4507, 4510, 4511 or 4549?
Yes
No
Was your conviction Unlawful Sexual Conduct with a minor?
Yes
No
Has a court terminated duties under 2950.04, 2950.05 and 2950.06?
No
Yes
Was the victim under 16?
No
Yes
Was your conviction a Felony or Misdemeanor of the First Degree?
No
Yes
Was your conviction for Theft in Office (2921.41)?
No
Yes

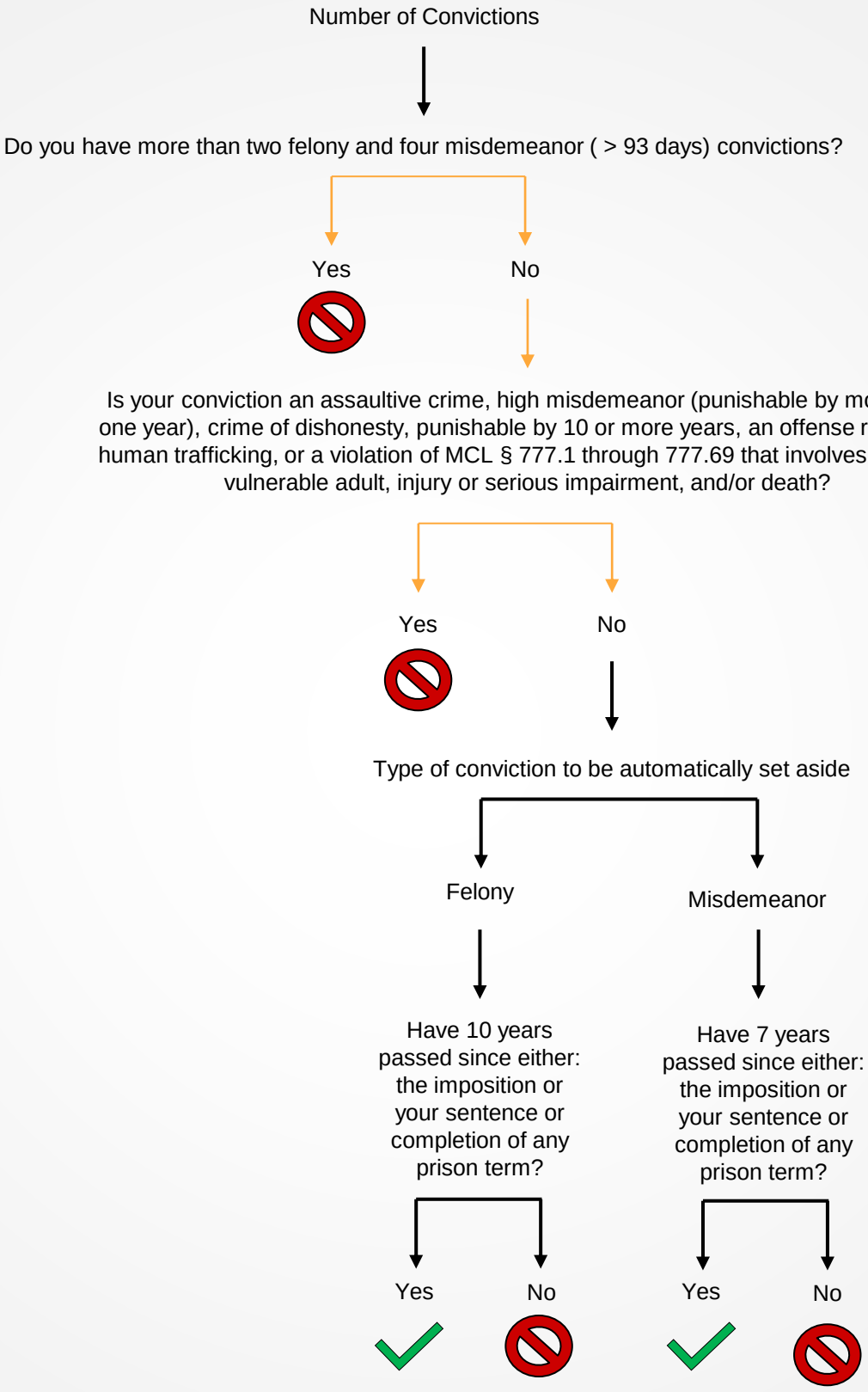

Have you had a final discharge on all your cases?
No
Yes
When can you apply?
Felony of the Third Degree
Felony of the Fourth Degree, Felony of the Fifth Degree and Misdemeanors
Three years after final discharge.
One year after final discharge

Michigan Clean Slate Pathway (By Application)

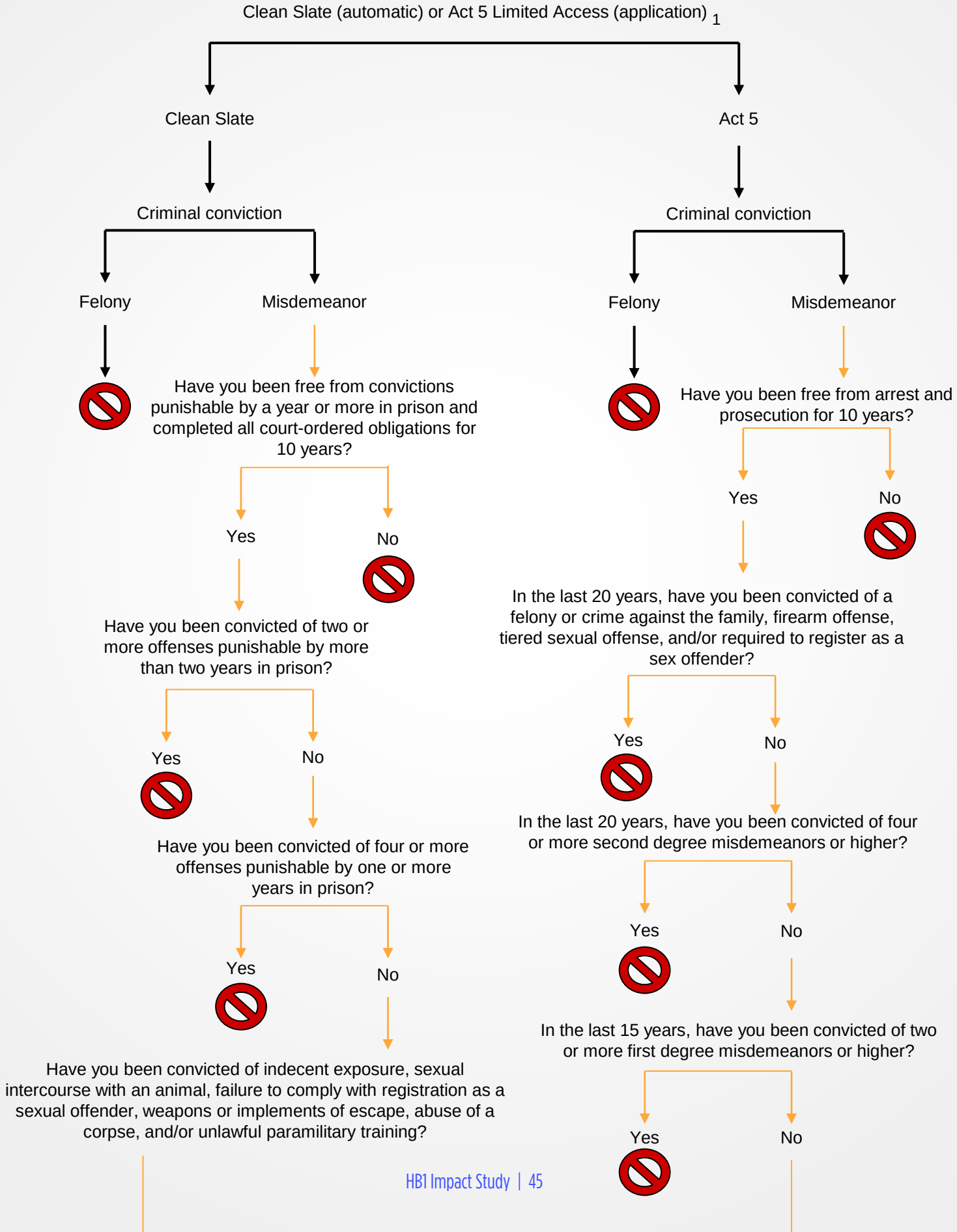



Are you a victim of human trafficking?
Yes
No
Are your convictions for prostitution related offenses?
Yes
No
May set aside and may apply anytime.
Are your convictions for human trafficking offenses?
Yes
No
Do you have pending charges?
No
Yes
Does your conviction have life imprisonment?
No
Yes
Is your conviction a violation or attempt of child abuse, child abuse in presence of child, child sexually abusive activity or material, criminal sexual conduct – 1st,2nd,3rd Degree?
Yes
No
Do you have traffic convictions?
Yes
No
Did your traffic conviction cause injury or death?
Yes
No
Do you have a CDL license and the offense occurred while operating a commercial vehicle?
Yes
No
Do you have more than 1 OVI?
Yes
No
Are any of your convictions for Felony Domestic Violence with a prior misdemeanor Domestic Violence?
No
Yes
Type of offense to set aside:
Non-serious/non-assaultive misdemeanors
3 Years*
Serious Misdemeanors or 1st violation OVI
5 Years*
One Felony
5 Years*
Two or three Felonies
7 Years*
*Time period starts to run after whichever of the following occurs last: Imposition of sentence, Completion of probation, completion of parole or complete imprisonment.

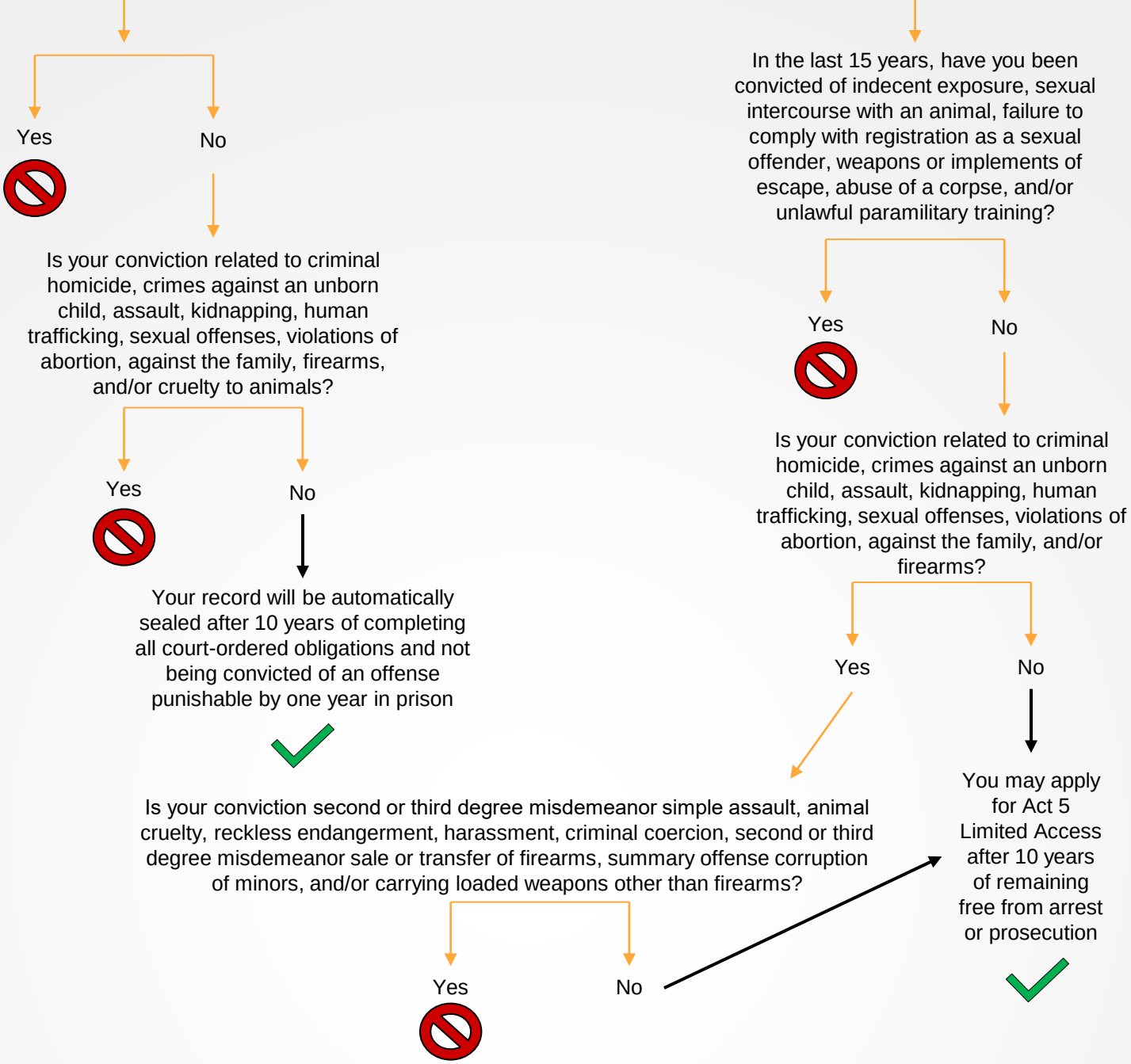
Michigan Clean Slate Pathway (Automatic)



Pennsylvania Clean Slate Pathway



1



1. Compliance Department. “THE PENNSYLVANIA CLEAN SLATE LAW.” Certiphi, 5 July 2019, https://www.certiphi.com/resource-center/background-screening/the-pennsylvania-clean-slate-law/.

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Recommendations: Record Sealing

- Standardized data collection recommendations for record-sealing information from courts
  - Include in case statistics reports for common pleas general-division courts and municipal courts
    - Number of record-sealing applications/petitions received
    - Number granted
    - Number ineligible
    - Number denied (for reason other than ineligibility)
  - Access to sealed records for research purposes
    - Anonymized records, including information about defendant and offense
  - Use standardized sealing forms in Sup.R. 96
    - Include reason for denial in forms
- Overall, simplify the process
  - Clarify the definition of "final discharge." Does it include fines, costs, community service, PRC? Make sure courts all know the requirements.
  - Standardize the fees for record sealing
    - While it is $50 across the state, there are reports of some courts adding their own fees so the cost is $150 to $400. This is cost prohibitive for many individuals, particularly those who may want to seal their records to improve their employment opportunities.
  - Centralized process for those with convictions in multiple courts (e.g., common pleas and municipal courts)
  - Clarify eligibility for those with OVIs and companion felonies in the same case
- Consider automatic expungement, as in Michigan and Pennsylvania
- Automatic sealing of non-convictions
- Education
  - Sealing vs. expungement (public and courts)
  - Sealing eligibility

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HB1 Evaluation Implementation Workgroup

April 23, 2021

Topic: Intervention in Lieu of Conviction Provisions of HB1 (R.C. 2951.041)

R.C. 2951.041: If the court has reason to believe that a person charged with a crime had drug or alcohol usage, mental illness, intellectual disability, was a victim of trafficking or compelling prostitution, then the court may accept request for ILC before a guilty plea. The bill grants a presumption of eligibility for intervention in lieu of conviction (ILC) to offenders alleging that drug or alcohol abuse was a factor in the commission of a crime. If an offender alleges that drug or alcohol usage was a factor leading to the offense, then the court must hold a hearing to determine if the offender is eligible for ILC. The bill requires the court to grant the request for ILC unless the court finds specific reasons why it would be inappropriate, and, if the court denies the request, the court is required to state the reasons in a written entry. If granted, the offender is placed under control of local probation, APA, other appropriate agency, or CCS. The offender must abstain from illegal drugs and alcohol, participate in treatment and recovery, submit to drug/alcohol testing, and other conditions imposed by the court.

What changed and why?

The bill broadens the scope of ILC, requiring that the court must, at a minimum, hold eligibility hearing for each applicant who alleges drug or alcohol usage as a leading factor to the underlying criminal offense. Along with the presumption of ILC eligibility, the court must state the reasons for denial in a written entry. The bill also caps mandatory terms of an ILC plan at 5 years. The bill narrows ILC eligibility in one new way, making an offender charged with a felony sex offense ineligible for ILC (a violation of a section contained in Chapter 2907 of the ORC that is a felony). The court can continue to reject an ILC hearing if the offender does not allege alcohol or substance abuse was a leading factor to the criminal offense. F1-F3 offenses and offenses of violence remain ineligible for ILC.

Intended outcomes from the legislation?

The bill primarily is intended to broaden the scope of ILC by presuming eligibility if drug or alcohol abuse was a factor and requiring a written reason for ILC denial.

What do we <u>need</u> to know?

- The number of ILC applications
- The number of ILC hearings
- The number of ILC acceptances
- The number of ILC denials

What do we <u>want</u> to know?

- Reasons for denial of ILC
- Underlying reason for application (substance abuse, mental health, intellectual disability, victim of human trafficking)
- Level/type of offense (for ILC denials and grants)
- ILC placement
- Type of ILC program exit (successful, unsuccessful, etc.)
- Dates of program entry and exit
- Length of ILC ordered

What would be nice to know?

- Number of successful ILC completions
- Conditions imposed
- Number of ILC ordered sealed
- Number of successful ILC ordered sealed
- Recidivism measures (both during and post-ILC)
- Employment rates
- Cost of ILC (for defendant and court)
- Defendant criminal history
- Defendant demographics

Are there unintended consequences?

- Could this lead to net-widening or other changes in what charges to bring?
- Are there racial disparities in ILC requests, grants, and denials?
- Can conditions of ILC and mandated treatments be cost-prohibitive for defendants? Do courts offer fee waivers or indigent programs?
- Could this result in more people being routed to specialty dockets or other diversion programs instead of ILC? This is especially a consideration in cases where a court may not have an ILC program.

Additional considerations?

- Did HB1 decrease the number of people incarcerated or on CCS for ILC eligible offenses?
- How does ILC compare to prosecutorial diversion, other forms of diversion, and specialty dockets?
- How many courts have an ILC program? How many started after HB1?
- How do we capture data on ILC not being requested?
- How do we capture information that someone is statutorily ineligible and the prosecutor will not amend the charges to make the person eligible?
- Is there a fiscal impact to courts? Defendants?
    - Is it more cost-effective to impose ILC vs other sanctions?
- Is there a workload impact on courts? Supervision?
- Is there a way to know whether ILC is considered? What should be addressed in a local rule?
- A scenario is possible in which a defendant motions for ILC consideration in a court that does not currently have an ILC program. Under new law, a judge would be required to hold a hearing (in applicable situations) and provide written entry for denial. "Absence of an ILC program" is not a statutorily acceptable reason for denying ILC. What happens in this situation?

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Ohio House Bill 1 Impact Study
Report on ILC Interview Themes and Recommendations

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Introduction and Background

Following the passage of House Bill 1, which took effect on April 12, 2021, the Ohio Criminal Sentencing Commission convened the HB1 Implementation Workgroup composed of judges, prosecutors, defense attorneys, court administrators, probation officers, academicians, and state agency officials to guide the study of the impact of the legislation. The workgroup divided analysis of the bill into four main categories of impact to study: (1 sealing a record of conviction (2 intervention in lieu of conviction (ILC, (3 involuntary court-ordered treatment for alcohol or drug abuse, and (4 community control changes and technical violations.

The group determined that Ohio lacked comprehensive statewide data on ILC and that there were many nuances to the operation of the program that could not be captured by quantitative data alone.[1] Accordingly, the group decided that in addition to requesting operational data on ILC from criminal courts across Ohio, the commission should take a qualitative approach to understanding the ways in which ILC currently operates in the state and the potential impacts as a result of House Bill 1.

This study was designed to understand the potential impacts of House Bill 1, and to, for the first time ever, get a baseline understanding of how ILC operates in Ohio. To perform the ILC study, the commission contacted a group of 15 practitioners, eight of whom serve on the working group, for in-depth interviews on the subject of ILC. The interview group included judges, prosecutors, probation officers, magistrates, and a criminal defense attorney. Interviews were conducted throughout June of 2021. Practitioners at both the municipal and common pleas level were represented, from both urban and rural counties across the state. The interviews lasted anywhere from half an hour to more than an hour and a half.

Commission staff recorded the interviews, transcribed the results, and categorized them by theme and commonality of response. This report captures the most salient common themes from these interviews, the diversity of ILC practices across the state, and considerations for the legislature in relation to the impacts of House Bill 1 on ILC. This report does not exhaustively detail everything covered in the interviews but addresses dominant themes from conversations with practitioners engaged with ILC statutes in real-world settings. This report, organized by sections covering each theme, is meant to complement the quantitative study of (available ILC court data to illustrate, to the extent possible, the whole story of ILC's historical operation in Ohio and the impact of House Bill 1.

[1] For example, in the workgroup meetings, multiple participants indicated their court data would not adequately represent the number of ILC denials because ILC determinations are largely made before any actual hearing or formal application through court filing.

Lack of Advanced Data on ILC

Only one common pleas court judge interviewed indicated their court has robust data on ILC, because the grants they receive for the program have rigorous reporting requirements. The rest of the judges interviewed stated that they do not formally track data on ILC. In most common pleas courts, some data exists in the court case management system, but it is not aggregated. Therefore, it is time intensive to mine the data for useful analytical purposes. As a result, most courts are not using data to evaluate ILC at a programmatic level.

Others also pointed out that the data they do have does adequately capture the ILC process. As one judge summarized, ILC is not being denied in their jurisdiction. The prosecution does a background check to determine eligibility and defense counsel will withdraw their motion if someone is statutorily ineligible. So, no denials are reflected in the court's records. For this reason, the data will not reflect why defendants do not get into ILC. The data also does not reflect those who are eligible for ILC and do not apply, for any reason. Further, there is a severe lack of data on what happens to a defendant participating in ILC. Although some jurisdictions maintain data on successful ILC completion rates, it is difficult to track what happens to a defendant after leaving the program. This presents a major challenge for studying the ultimate impact of HB1 beyond the courtroom.

Interviewees also indicated that the majority of those applying for ILC indicate drug or alcohol use as their underlying reason for committing the crimes charged. This may tend to under report mental illness and other co-occurring disorders. One judge stated that because people get charged with drug offenses rather than with having a mental illness, the record of ILC does not always capture those who enter the program with a mental illness.

House Bill 1 Changes Not Formally Communicated

In most cases, changes to ILC because of HB1 were informally communicated in meetings among judges, prosecutors, and court staff. The judges also stated that they communicated ILC changes to defense attorneys at pretrial to make sure they were aware of it. Multiple judges indicated that changes from the bill especially were not communicated well to defense attorneys. One municipal court magistrate even noted that they spoke to multiple defense attorneys who were unaware that the limitation on a defendant using ILC multiple times had been lifted.[2] They did mention that they noticed an increase in defendants requesting a different defense attorney so they could apply for ILC. The magistrate speculated that municipal courts are not seeing many ILC requests because defense attorneys may not know to request it at the municipal level. This holds important implications for the impact of HB1 on ILC practices. It is possible there could be a lag in potential impact of the bill as attorneys become adjusted to the changes it brought about. As noted, in some jurisdictions it is entirely on the defense counsel to raise ILC and they must be aware of the current law to do so effectively.

Impact from House Bill 1

All interview participants were asked if they had experienced any changes because of HB1, including an increase in ILC motions, changes in courtroom practices, etcetera. All municipal and common pleas courts, as well as the defense attorney interviewed, indicated they have not noticed an uptick in case flow or other major changes in their practice. One court said the loosening of ILC restrictions has not had a huge impact because the prosecution still will object to someone with a felony criminal history

[2] This expansion to ILC allowing defendants to use ILC multiple times is a result of Senate Bill 66 of the 132nd General Assembly, which went into effect in 2018.

participating in ILC and the court will usually go along with it. Even some defense attorneys in this jurisdiction believed their clients with multiple felony convictions are better off on community-control supervision in the long run, rather than ILC. Every interviewee indicated that ILC supervision is more stringent than community control or even many specialized docket programs. For this reason, the defense attorney indicated he only advises clients who need to avoid the collateral consequences of a criminal conviction to apply for ILC.

The majority of judges and magistrates interviewed stated that ILC cases typically are the most time- and resource-intensive cases on their dockets. For this reason, they expressed a desire to only place those defendants most likely to complete the stringent requirements of the program on ILC. The overwhelming consensus among interviewees was that nearly everyone eligible for ILC was already being accepted into the program prior to HB1's statutory changes. The interviewees generally agreed that ILC denials are rare and typically are the result of failing to comply with the terms and conditions of the program, or due to past criminal history or past failures in ILC programming. None of the judges or magistrates interviewed had yet written a denial of ILC entry, as now required by HB1. This is likely because most eligible ILC applicants already are accepted in the programs. Further, ILC determinations among the interview group typically were negotiated among the defense attorney and prosecutor before a hearing was held. Defense attorneys even stated that they counsel their client out of an ILC motion if they believe it was not the best route for them.[3] It is important to note that multiple courts stated that defendants themselves occasionally decline ILC, opting for community-control supervision instead.

Notably, one of the municipal court judges interviewed is not using ILC at all, citing only a handful of ILC applications in the past decade. Three judges of this court indicated they believed HB1 would not change this. The court has multiple robustly funded diversion programs for drugs, alcohol, and mental health that they believe are more effective and less cumbersome than ILC. They also noted, that while these diversion programs were funded, ILC currently has no funding stream in their court budget. Multiple other courts mentioned that some individuals who are eligible for ILC are instead placed into different diversion or specialty docket programs, where the court believes they will have a higher chance of success. HB1's changes to ILC statutes may not impact these individuals because they still are largely being directed toward other programs.

The consensus among interview participants was that House Bill 1 largely codified existing practices or did not make a substantial impact on the function of ILC at their respective courts.

Discretion in ILC Program Operation

As one common pleas magistrate summarized, there is a wide diversity of practice based on the elected officials in office, whether the county has a public defender's office or uses private, court-appointed attorneys, and competing views on ILC. In each of the jurisdictions interviewed, defendants are accepted into ILC in differing ways. In one common pleas court, the prosecutor's office reviews everyone at arraignment and refers all eligible defendants to ILC. ILC determinations are negotiated between the prosecution and defense prior to a judge's involvement. At another common pleas court, ILC is entirely raised by defense counsel, without prior discussions with the judge or prosecutor. In the majority of

[3] As the defense attorney explained, in some cases it is easier for a client to get a misdemeanor drug charge and finish a drug court program than going through a lengthy ILC process. This is especially the case if the defendant already had a misdemeanor criminal record and record sealing would not be of added benefit. The defense attorney added that ILC almost always is the most difficult and involved option, where probation was less stringent. They believed that ILC was most appropriate for those who really wanted treatment and for whom record sealing was a major incentive for participation.

courts, ILC determinations are made informally before a hearing is held or an application motion is filed. In one common pleas court interviewed, all ILC determinations are made formally and on the record. In multiple counties, judges stated that they raise the possibility of ILC to all defendants at arraignment. These judges noted that occasionally defense attorneys are not aware of ILC as an option, so they prefer to put it to the defendant as an option to discuss with their defense attorney.

In summary, there is wide variability in the ways in which a defendant is referred for ILC application and placement. Jurisdictions range from prosecutorial-initiated screening and referral, defense-initiated application, and jurisdictions in which the judge actively raises ILC as an option to defendants and their counsel. The variability in ILC placement methods could lead to different opportunities for ILC, based on where one is a defendant.

Prosecutorial discretion also plays a large role in the operation of ILC among the courts. In multiple common pleas courts, the prosecutor's office will amend filed charges to make someone eligible for ILC. This is done when someone is statutorily ineligible for ILC based on the charges filed, but appears to be a good candidate or has no prior criminal history. In most cases, interviewees indicated that amending charges to allow for ILC eligibility is not a routine practice.[4] One judge noted that when starting their ILC program nearly a decade ago, the prosecutor's office would indict in such a way that defendants were ineligible for ILC, whereas now the office is more in favor of ILC in most circumstances, which is reflected in charging decisions. One magistrate who has served in multiple jurisdictions noted that some county prosecutor's offices object to ILC in many more cases than in other counties, but that over time they became more amenable to the use of ILC.

In considering the impacts of House Bill 1 and legislating changes to ILC more generally, it is important to note the wide variety of practices across courtrooms in the state. The impact of expanding ILC statutorily depends on the nuances of how a defendant gets to ILC in the first place. The ways in which a

section. Practitioners on the working group stressed that their court's ILC data does not tell the full story of the functioning of ILC in practice.

Usage of CBCFs for ILC Cases

An issue area where courts were divided was the usage of community-based correctional facilities (CBCF) for ILC cases. Two common pleas courts said that a CBCF is not used at all as a sanction for ILC. One judge specifically objected to the use of CBCF as a sanction for ILC, stating that ILC participants should not be placed in facilities with offenders who committed a level of crime worthy of their placement into a CBCF. This judge believed that if a defendant requires a CBCF placement, they should not be on ILC to begin with. The courts who use CBCF in their continuum of ILC sanctions unanimously do so as a sanction of last resort or based on a high Ohio Risk Assessment System (ORAS) score, but noted that it is not often used.

Issues of Cost and Resources for ILC

Interviewees were divided on the issue of cost as a barrier to ILC participation in their jurisdiction. Notably, one common pleas court and one municipal court expressed that cost is one of the largest barriers to defendants entering ILC. One rural common pleas court noted that cost is an issue that comes up in most of their cases. The cost of ILC assessments in their county averages $500, with only some insurers covering those costs. A probation officer interviewed from this county said their court uses

[4] Specifically, a third-degree felony meth possession was the charge indicated as most likely to be amended.

TCAP funding to pay for defendant's ILC assessments, "otherwise, it would be impossible [for them to participate in ILC]." The court's magistrate expressed that ILC in their jurisdiction is a privilege reserved for those with the resources to pay for assessments, to post bond, to retain private counsel, and/or those with insurance that will cover the costs. The magistrate added that three years ago, ILC was not even an option for those in jail.[5] Similarly, the municipal court magistrate interviewed who utilizes ILC in their court also noted that cost is a major barrier to entry. This court uses surplus funding from the indigent driver alcohol treatment fund to fund ILC assessments and treatment. Use of these funds for purposes of ILC is contingent on there being a surplus, so it is not guaranteed that this grant money is available for funding ILC assessments.

Along with cost, one court stated there is difficulty even scheduling ILC assessments. Local professionals with the appropriate licensure and credentials to conduct ILC assessments often are booked or not doing ILC assessments. The same court noted that in their county, they do not even have a facility that can handle mental-health ILC cases. Another common pleas court said that while cost is not an issue for defendants, sometimes issues with transportation or work requirements interfere with ILC participation.

Multiple common pleas courts stated that defendants do not have an issue with ILC assessment or treatment costs in their jurisdiction. These courts noted ways they address costs, such as waiving court fees for indigent defendants or offering community service, in lieu of fees, to offset the costs of assessments. One common pleas court offers ILC at no cost to defendants through the use of ODRC and specialized docket grants.

Although House Bill 1 aimed to expand ILC, it did not include any funding mechanisms or appropriations. Because of this, there appears to be a large degree of variability in cost and resource barriers for defendants to be assessed or participate in ILC programs. Some courts have found ways to robustly fund their ILC program through grants or otherwise mitigated the impact of costly ILC assessments, while others struggle with defendant's inability to secure payment for the assessment. There also is a variability among jurisdictions in terms of availability of treatment providers who provide services for an ILC program and whether insurers will cover the costs of assessment and treatment. It is possible HB1's impact will be minimal in the counties where cost remains a barrier to ILC participation because the bill did not specifically address this issue.

Lack of Standardized ILC Assessments from Treatment Providers

In addition to the aforementioned issues of costs with treatment providers, the assessment process for ILC also varies widely from county to county.[6] In some counties, the probation department maintains a relationship with a provider, to whom they refer all defendants. In other counties, it is up to the defendant to select an assessment provider. For multiple judges and magistrates at both the municipal and common pleas level, this led to the problem of a lack of consistency for treatment assessments both in terms of

[5] For this court, the only way an individual could attain the statutorily required ILC assessment, which is necessary for ILC eligibility, was if they were out on bond and had insurance. If the individual could not post bond or had bond revoked, then they were unable to get ILC assessments. For security and insurance-billing purposes, in this county, treatment providers were not willing to go to the jail to do assessments. Now, an agreement is in place with the treatment agency to allow for incarcerated defendants to be assessed for ILC while in jail. This is another area where the court uses grant funding for these assessments, which the court cited as being financially and logistically burdensome. It is likely other counties face this same issue without grant funding to allow in-jail assessments.

[6] Under R.C. 2951.041, a defendant must receive an assessment for the purpose of determining program eligibility for ILC, as well as for recommending an appropriate intervention plan.

length and quality. The Ohio Revised Code does not set parameters for what these reports must cover, how the provider is selected, how and to whom the report is delivered, and what kind of process is used during the hearing to present the evidence.

One probation officer noted that the quality of assessments used to be a major problem until they developed a proofing process in which the chief probation officer reviewed every assessment and sent them back to the provider if they were not acceptable. Some counties indicated that assessment variability was not an issue because they had a good working relationship with a reliable treatment provider. Again, because the ILC assessment process and any generated reports are unstandardized and vary by county, the impacts of HB1 are difficult to evaluate. Issues in obtaining a quality assessment plan from a treatment provider could negatively impact a defendant's chances of being placed on ILC, of receiving necessary programming based on their risk and needs, and of the defendant successfully completing the program.

Challenges of an ILC Case with a Companion OVI Charge

Under current law in Ohio, a record involving multiple charges arising out of the same act may not be sealed until all of the charges are eligible for sealing. There are a few exceptions to this rule, but notably if the final disposition includes an OVI, then the final disposition may not be sealed. The law further does not allow for partial sealing of records.[7] One common pleas court probation officer stated that they receive many motions for ILC for defendants who have driving offenses included in their indictments. However, if these defendants successfully complete ILC, they are unable to truly seal their convictions. This probation officer indicated that they had many successful ILC completions in which a defendant still had felony counts appear on their background checks because they could not be sealed with a companion OVI.

A few courts interviewed have found creative, but difficult and time-consuming ways to deal with this issue. These common pleas courts found ways to bifurcate the charges or the case file itself, taking a plea on the OVI and granting them community control (or other sanction) on that charge, and offering ILC on the felony charge. One magistrate and court administrator described the process of doing this as a nightmare logistically. Although some courts have managed this solution, they have described the process as time consuming and burdensome because it requires two separate entries. Again, the issue of OVI charges and ILC participants presents another area of jurisdictional variability and a barrier to ILC entry. Legislative expansion of ILC may disparately impact those with companion OVI charges, depending on whether their jurisdiction allows the bifurcation of charges for record sealing following successful completion of ILC.

Conclusion and Recommendations for ILC

All interviewees were asked to give recommendations and input for the commission's report on HB1. Many issues raised in this report do not lend themselves to easy solutions. Most interview participants indicated a desire to see some of the major challenges raised in the report to be addressed in some manner.

Importantly, participants stressed that the nuanced nature of ILC and lack of data makes analysis on the subject difficult. To this end, many recommended the consideration of better data collection mechanisms, including a way to track ILC eligibility and motions that are withdrawn (as opposed to denied motions). Also missing in the data is a way to track aggregate criminal history to determine the impact of ILC

[7] House Bill 87 of the 133rd General Assembly attempted to address this issue, allowing for the partial sealing of charges dismissed through ILC when those charges are connected to an OVI charge. The bill did not make it out of the Criminal Justice Committee.

outside of the courtroom. Although a few courts tracked ILC completion rates formally, none evaluated program success by measures of recidivism or impacts on the community more broadly.

Another major recommendation was simply offering much better education on changes to ILC, especially to the defense bar and municipal judges association. One specific recommendation was to develop a one- or two-page fact sheet explaining the changes from HB1. At the municipal level, there especially appears to be a lack of awareness about ILC from both attorneys and treatment providers who are not accustomed to performing ILC assessments for municipal courts. Many noted the frequent changes to ILC eligibility as difficult for many to keep up with.

Some raised the recommendation of streamlining the statute without making it too broad or too narrow. General suggestions included simplification of the statute, making the statute clearer on who is a good candidate for ILC, making ILC more formalized so that courts see it as a program rather than an option, and standardizing ILC assessment reports. For courts that struggled with cost and resource issues related to treatment providers, recommendations included addressing the cost of ILC assessments, giving guidance about billing for treatment providers, and better funding of ILC programs. Although multiple courts raised the issue of being unable to seal OVI records, no easy solution presented itself. Therefore, no specific recommendations were made by the interviewees to this end. Similarly, no recommendations were offered in terms of clarifying the usage of CBCF sanctions for those placed on ILC.

As the commission continues to study the impact of the changes of House Bill 1 on ILC, it is important to remain vigilant about the challenges and complexities of studying the topic. This report highlights how HB1 impacted courts across Ohio and it also contributed to a better understanding of ILC as it currently exists in Ohio. As the commission is statutorily obligated to continue studying the impacts of House Bill 1, future studies need to take into account that the tremendous variation in ILC practices results in disparate opportunities for defendants.

Franklin County Municipal Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Franklin County does not use typical ILC strategies
- Lack of ILC cases in Franklin County
- Franklin County utilizes other programs instead of ILC

Participation in ILC

- ILC is *rare* in the Franklin County Municipal Court docket
- Franklin County cites a handful of ILC cases in the past decade
- ILC is not funded - Court utilizes other diversion programs for drug, alcohol, and mental health services/programs
  - Programs utilized are sufficiently funded and less cumbersome than ILC
- Franklin County has no plans to utilize ILC (even after changes implemented by HB1)

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Wayne County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Defense attorney examines a case with defendant to determine eligibility and complete application
- Defense Oriented: ILC is brought to the judge by the defense attorney at pre-trial. The attorney motions for ILC and the defendant is referred to probation for screening
- Goals: Sobriety and Stabilization
- Cost is *not* a barrier
  - Court has strategies to mitigate barriers such as fee waivers and community service
- If the defendant alleges that drug/alcohol usage was an underlying factor of the offense, the judge must hold a hearing. Written reason must be given for denial if a hearing is held.
  - Denials are rare
  - Majority of ILC cases are substance abuse opposed to mental health
- Referral to external treatment provider or professional. Prosecuting attorney and victim may submit input.

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- Several ILC offenders overlap with the certified drug court as an added sanction
- CBCFs (Community Based Correctional Facilities) are rarely used as an added sanction
  - Residential sanctions are more commonly used for offenders struggling with sobriety

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing
- Follows continuum of sanctions, with revocation being very rare

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Warren County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Judge/Prosecutor Oriented: Judge will raise discussion of ILC in every drug case in addition to the prosecutor suggesting ILC to the defense pre-trial
- Judge is responsible for educating defendant on ILC
- Goals: Treatment, Sobriety, and Sustainability
- Cost is *not* a barrier
  - No cost to defendants due to grants such as JRIG, DRC, and Specialized Docket Grants
  - Grants create stringent ILC standards
  - Warren County has a contract in place with Talbert House for ILC assessments
  - Defendants may chose to get assessed independently
- Some charges are amended to make an offender eligible
  - Most Common: F3 Meth Possession Charge
- Screening by probation department
- Referral to an external treatment provider or professional. Prosecuting attorney and victim may submit input

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- CBCF's (Community Based Correctional Facilities) are rarely used in the continuum of sanctions, typically as a last resort

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Fairfield County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Defense-Oriented: Responsibility of the defense to raise ILC to the prosecution, who may object based on bond or criminal history
  - Defense attorney examines a case with defendant to determine eligibility and complete application
- Prosecutors may amend charges to make an offender who is a good candidate and cooperative eligible for ILC
- Screening by probation department
- Referral to an external treatment provider or professional. Prosecuting attorney and victim may submit input.

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- Entry to ILC is Not Prohibitive:
  - Everyone who is eligible gets accepted to ILC
  - Some defendants join ILC who are not suitable for the program
- Cost is a Barrier to Participation:
  - Some defendants do not have $500 to pay for the assessment fee out of pocket
  - Some defendants are uninsured or insurance does not cover the assessment
  - Fairfield County does not have a mental health facility for ILC assessments
  - TCAP grants are available to pay for *some* assessments
- Participation in ILC more common than other diversion programs
- ILC is often a catchall due to lack of other diversion programs

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing
- Fairfield County cites an increase in ILC violations

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Champaign County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Defense-Oriented: Responsibility of the defense to motion ILC
  - Defense attorney examines a case with defendant to determine eligibility and complete application
  - The prosecutor may deny the request but shift towards increasing acceptance
  - Defense not always aware of ILC possibility, Judge may suggest ILC
  -
- Goal: Address the heroin epidemic and think about rehabilitation for drug use
- ILC cases in Champaign County almost almost always drugs cited as underlying factor; not mental illness
- Screening by probation department
- Defendant responsible for completion of assessment, prosecutor must approve
- Court provides a list of treatment providers to obtain assessment
- Everything is done on the record rather than informally

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- Champaign County does *not* use CBCFs in addition to ILC
- The court shall grant the offender's request unless the court finds specific reasons to believe that the candidate's participation in ILC would be inappropriate
  - Reasons for ILC Denial:
    - Demeans seriousness of offense
    - Does not reduce likelihood of future criminal activity
    - Unwillingness to follow court terms and conditions.

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Mahoning County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Defense-Oriented: Defense attorney examines a case with defendant to determine eligibility and must file motion for ILC
- If an offender is charged with a certain criminal offense of the ORC, and the court has reason to believe that drug/alcohol usage was an underlying factor, or that at the time of the offense the offender had a mental illness, was a person with intellectual disability, or a victim of human trafficking, and that was a factor leading to the offender's criminal behavior, the court must hold a hearing.
  - Mostly drug related charges, rarely mental health or alcohol cases
- Prosecutors will amend charges with defense to make an offender eligible for ILC
- Screening by probation department
- Referral to an external treatment provider or professional. Prosecuting attorney and victim may submit input

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- Mahoning County does not use CBCFs in addition to ILC
- Cost is not a barrier to participation, but lack of transportation or work/family requirements may interfere with program completion
- Additional diversion programs (for specific crimes such as JFS) in addition to ILC
- The court shall grant the offender's request unless the court finds specific reasons to believe that the candidate's participation in ILC would be inappropriate
  - Almost all eligible individuals accepted
  - Some defendants decline ILC

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Pickaway County Common Pleas Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
  - Mental Illness
  - Intellectual Disability
  - Victim of Trafficking or Prosecution
- Those who are not eligible:
  - Those convicted of a felony offense of violence
  - The offense is not an F1-3, offense of violence, OVI offense, offenses with mandatory prison sentence, felony sex offense

Inputs

- Defendant
- Defense Attorney
- Judge
- Court Staff
- Prosecution
- Probation
- External Treatment Providers
- Victim

Strategies

- Prosecution-Oriented: Prosecutor examines a case with defendant to determine eligibility. If eligible, it is the defendant's responsibility to apply for ILC
  - Everyone eligible is referred but the defense attorney must make the official motion
- If an offender is charged with a certain criminal offense of the ORC, and the court has reason to believe that drug/alcohol usage was an underlying factor, or that at the time of the offense the offender had a mental illness, was a person with intellectual disability, or a victim of human trafficking, and that was a factor leading to the offender's criminal behavior, the court must hold a hearing.
  - Drugs most commonly cited as underlying factor
- Prosecutorial-Discretion: Prosecution may amend charged to make an offender eligible for ILC
- Screening by probation department
- Referral to an external treatment provider or professional. Prosecuting attorney and victim may submit input.

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- The court shall grant the offender's request unless the court finds specific reasons to believe that the candidate's participation in ILC would be inappropriate
  - If an individual is ineligible or refuses treatment
- Cost is *not* a barrier to participation
  - No formal fee waivers or programs but cost is a non-issue in Pickaway County
- CBCFs used as an additional ILC sanction for some defendants depending on criminal history

Outputs & Outcomes

Completion

- Case Outcome:
  - Proceedings against the defendant are dismissed
  - Defendant may file a motion to have their record expunged

Incompletion
ILC Violation

- Violation Hearing:
  - Defendant may continue with ILC or found guilty
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Cambridge Municipal Court Intervention in Lieu of Conviction (ILC)

Target Population

- Post charge, the defendant must enter a guilty plea
- Those charged with a criminal offense in which the court has reason to believe any of the following was a factor leading to the offense:
  - Drug or Alcohol Usage
- Those who are not eligible:
  - OVI offenses

Strategies

- Magistrate suggests possibility of ILC at arraignment
- Prosecutors maintain discretion on ILC applications, eligibility, and assessments
  - No specific treatment provider for assessments; variability in quality
- Defense attorney examines a case with defendant to determine eligibility and complete application
- If an offender is charged with a certain criminal offense of the ORC, and the court has reason to believe that drug/alcohol usage was an underlying factor and that was a factor leading to the offender's criminal behavior, the court must hold a hearing.
- Assessment by treatment provider.
- Referral to an external treatment provider or professional. Prosecuting attorney and victim may submit input.

Outputs & Outcomes

Completion

- Case Outcome:
  - Plea is vacated and proceedings against the defendant are dismissed.
  - Defendant may file a motion to have their record sealed.

Inputs

- Defendant
- Defense Attorney
- Judge
- Prosecution
- External Treatment Providers
- Victim

Participation in ILC

- If the defendant is deemed eligible, they must enter a guilty plea, criminal proceedings are suspended, and the defendant enters into the conditions of the ILC program
- The court grants the offender's request unless the court finds specific reasons to believe that the offender's participation in ILC would be inappropriate
  - Individuals are rarely rejected, instead many eligible offenders do not apply
- Cost is *sometimes* a barrier to participation
  - Court uses surplus funding from the Indigent Driver Alcohol Fund to fund assessments and recommended treatment
- Barrier to Participation: Lack of program knowledge by attorneys

Incompletion
ILC Violation

- Violation Hearing:
  - Court enters guilty finding
- Defendant's guilty plea is filed and officially convicted of the offense
- Court proceeds to sentencing

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Ohio House Bill 1 Impact Study: Intervention in Lieu of Conviction (ILC) Pre-HB1

Currently, there is no central source in the state for tracking the number of applications for intervention in lieu of conviction (ILC) or, consequently, the number of applications that were granted or denied each year. To establish a baseline number of ILC applications for comparison against requests received after the post-HB1 changes, we gathered available information from the Ohio Department of Rehabilitation and Correction and individual courts.

Figures 1 and 2 display the number of ILC placements in adult parole authority (APA) counties, from 2010 through 2020. While the overall number fluctuated over time, the average number of placements per county remained relatively stable (see Figure 2) until 2020 when the average number of placements increased more than 30% from 2019. The number of placements in 2020 dropped dramatically, with average placements at the lowest level since 2012. However, this is not too unexpected given the COVID-19 pandemic.

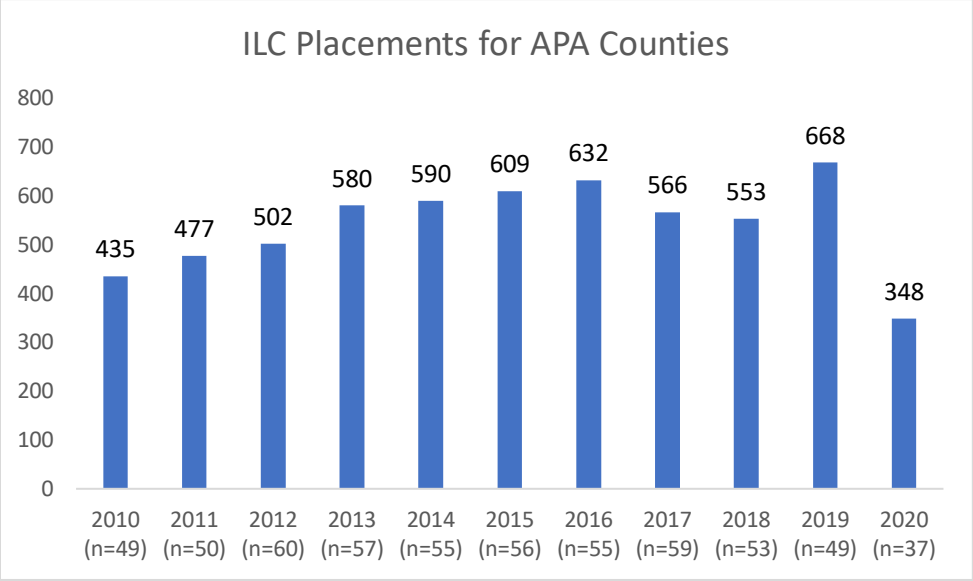

Figure 1. ILC Placements by year, APA Counties.

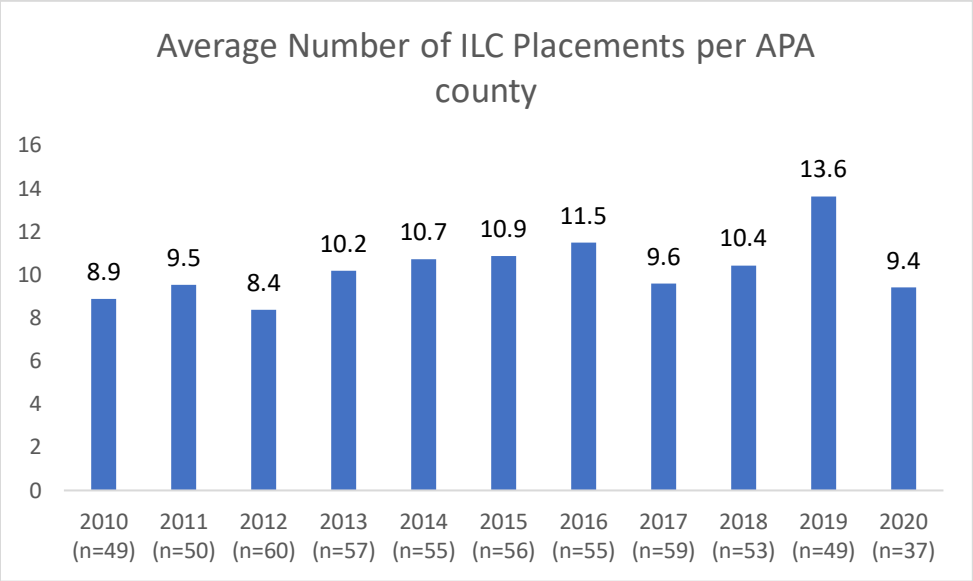

Figure 2. Average number of ILC placements per year, APA counties.

For an additional source of quantitative information, we reached out to all court administrators with a valid email address on file at each municipal, county, and court of common pleas in Ohio to request a range of information[1] from them about applications for ILC from January 2018 through April 11, 2021.

Many courts were unable to provide all pieces of information requested, but provided what they could. Table 1 displays the number of courts contacted, as well as the number that supplied data. Notably, no municipal courts supplied information about ILC. This may be because it is a rarely, if ever, used option in municipal courts.[2] Additionally, there were a few courts that contacted us to say that it was not possible to provide any data we requested.

Table 1. Number of Courts Contacted and Providing ILC Data.

	Successfully Contacted	**Responded with Data**	**Responded to Say They Could Not Provide Data**
Common Pleas	73	9	3
Municipal & County Courts	49	0	0
Total	**122**	**9**	**3**

[1] See the data request to courts, under the Record Sealing section of the appendix.

[2] For an elaboration on why this may be, see the "Themes and Recommendations" document discussing ILC interviews.

Of the nine courts that were able to provide data, three were able to provide detailed information including demographics and offense information. Five courts were able to provide information about the termination of ILC for individuals − that is, if the termination of ILC was successful or unsuccessful.

Figure 3 represents the number of total ILC applications submitted per year from courts submitting data. Figure 4 displays the status of applications for ILC per year, prior to HB1.

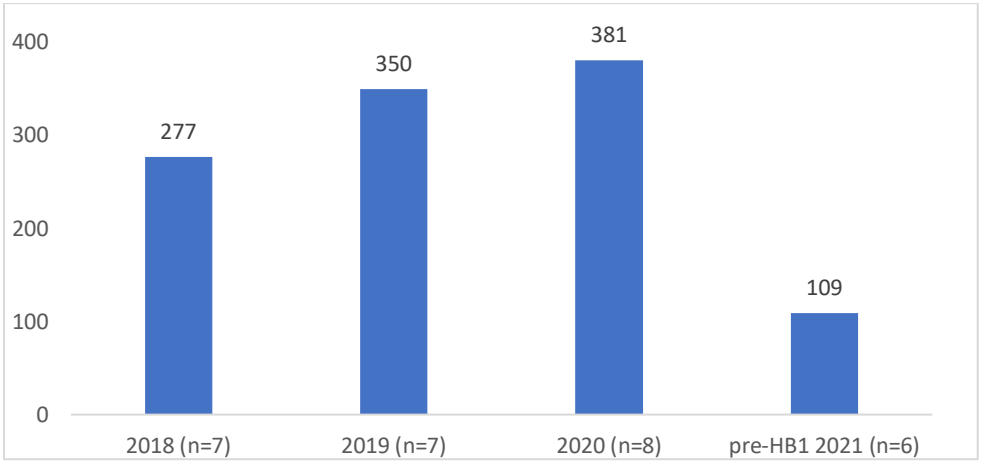

Figure 3. Number of total ILC applications submitted per year, according to Ohio courts.

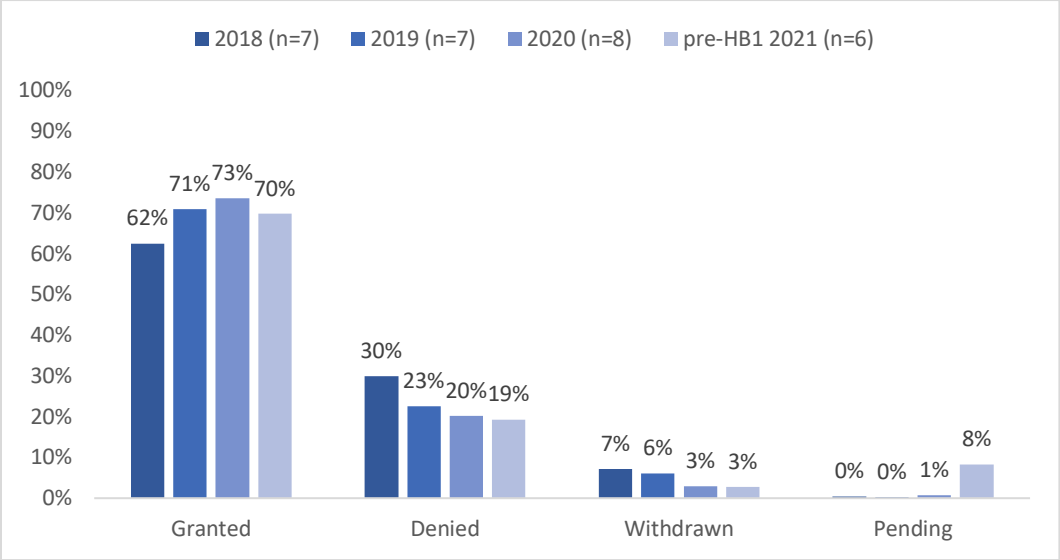

Figure 4. ILC applications by court decision, per year.

The outcomes of ILC per year, for those five courts supplying information, is displayed in Figure 5.

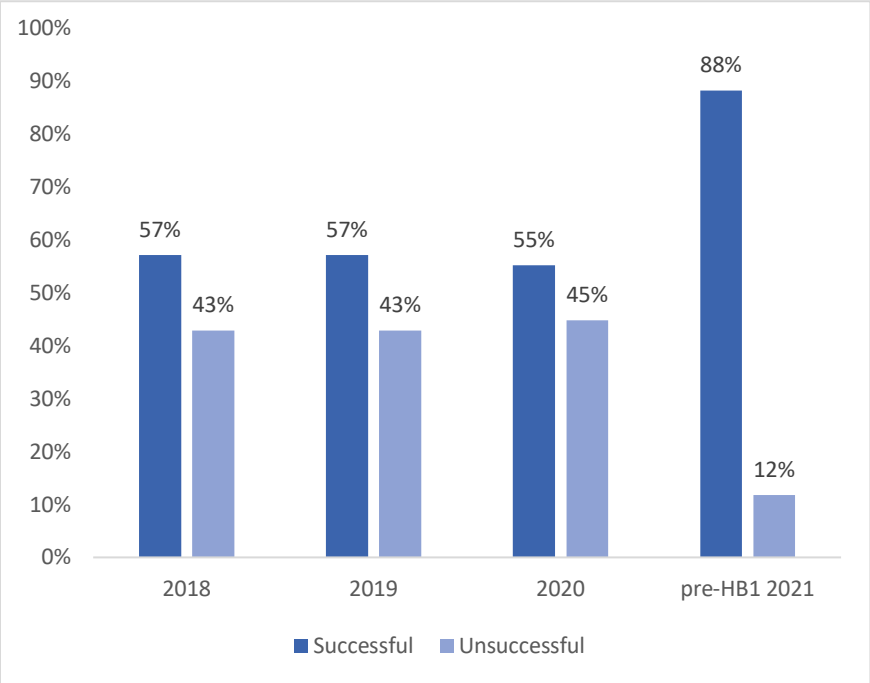

Figure 5. ILC outcomes, by percent of all ILC terminations.

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HB1 Evaluation Implementation Workgroup

May 20, 2021

Topic: Involuntary Commitment to Treatment in Probate Court Provisions of HB1 (R.C. 5119.93 - 5119.94)

R.C. 5119.93: The process by which a spouse, relative, or guardian may file a petition in probate court to initiate proceedings for treatment of an individual suffering from alcohol and other drug abuse.

R.C. 5119.94: Outlines the initiation of proceedings by the court after receiving a petition for involuntary commitment to treatment, including the respondent's right to a hearing and the requirement for a court to make an evidentiary finding on the necessity of treatment. Includes consequences if a respondent fails to comply with court orders.

What Changed?

R.C. 5119.93: The new legislation included more funding options for petitioners, including documentation that insurance would cover these costs, or other documentation that a petitioner or respondent will be able to cover some costs, rather than the original requirement to pay the court 50% of treatment and exam costs. The legislation also removed the requirement for a petitioner to pay a filing fee under R.C. 5122.11.

The bill included the requirement that the petition be kept confidential. If petition includes belief that respondent is suffering from opioid/opiate abuse, then the petition shall include evidence of overdose and revival by opioid antagonist, overdose in a vehicle, or overdosing in presence of minor.[1] A physician who is responsible for admitting persons to treatment may complete the certificate, if they examine the respondent.

R.C. 5119.94: If evidence of an opioid-use disorder is presented at the hearing in the form of overdose and revival by opioid antagonist, overdose in a vehicle, or overdosing in presence of minor, this satisfies the court's evidentiary requirement of clear and convincing evidence that the respondent may reasonably benefit from treatment. If treatment is ordered, the court must specify the type of treatment, type of aftercare required, and the duration of aftercare (between three and six months). The court may order periodic mental-health examinations to determine if treatment is necessary. HB1 removed the requirement that a respondent be given a physical examination by a physician within 24 hours of the hearing date. If a respondent does not complete treatment, they are in contempt of court and a summons may be issued. If the respondent fails to appear as directed in the summons, then they may be transported to the previously ordered treatment facility or hospital for treatment. Costs of this transport are to be added to the costs of treatment.

1 R.C. 5119.93(B)(7).

2 HB1 included adding a section to R.C. 5119.94 regarding emergency hospitalization. However, this was removed in the 134th General Assembly's SB2, signed by Gov. Mike DeWine on April 27, 2021.

Intended outcomes from the legislation?

To enable family members to get help for those with substance-use disorder when a respondent is in imminent danger by making these options more financially accessible. This legislation also gives courts a method by which to enforce the order if the respondent does not complete ordered treatment.

What do we <u>need</u> to know?

- Number of petitions for treatment
- Number of treatment petition hearings
- Type of financial documentation provided (deposit, insurance, other documentation) after April 12, 2021
- Available treatment facilities for involuntary treatment for substance use
- Number Petitions granted

What do we <u>want</u> to know?

- Length of treatment ordered
- Type of substances used by respondent
- Number of contempt citations per respondent

What would be nice to know?

- Outcome of contempt citations
  - Respondent responds to summons or peace officer transports back to treatment
- Success rates of treatment using statute
  - Lack of substance use relapse over certain amount of time
  - Those found in contempt vs. those that are not
- Number of treatment facilities/beds available in each county [R.C. 5119.97(B)]
- Demographic information of petitioner and/or respondent

Are there unintended consequences?

- Potential danger for respondents if they are not properly detoxed?
- Treatment facilities may lack space for respondents.
- Are there collateral consequences of involuntary commitment for substance use?
- Greater chance of overdose for those committed that are not ready for treatment?

Additional Considerations?

- How to improve the reception of the legislation among judges?
  - Inspiration and education
- How do families find out about this option?
  - Advocates
  - Law enforcement

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Ohio House Bill 1 Impact Study:
Involuntary Commitment to Treatment State Comparison Table

State	Year Implemented	Number of Commitments per Year	Maximum Length of Commitment	Success Rate	Who Is Responsible for Treatment Costs?
Ohio	2013 & 2021	Unknown	No statutory maximum, mandated 3-6 months of aftercare	Unknown	Petitioner
Florida	1993	Approximately 21,000 total, based on county data	60 days & 90-day extensions as necessary	69% successfully completed	Petitioner
Indiana	Unknown	Unknown, but process is rarely used for substance abuse issues	90+ days inpatient or regular outpatient treatment (no statutory maximum)	Unknown	Patient
Kentucky	2004	Yearly data unavailable, approximately 1,200 2016 and 2019	360 days	Unknown	Petitioner
Massachusetts	1970	Approximately 4,700	90 days	Unknown	Unknown
North Carolina	1985	Approximately 79,000 petitions (Note: it is unclear how many of these resulted in commitments; includes both substance-abuse and mental-health petitions)	No statutory maximum	Unknown	Unknown

State	Year Implemented	Number of Commitments per Year	Maximum Length of Commitment	Success Rate	Who Is Responsible for Treatment Costs?
Pennsylvania	2018	Expected 25 to 35 people in each of 5 pilot counties in 2022-23	20 days & option for 90-day extension & option for additional 180-day extension	Unknown	Patient
Virginia	2008	Approximately 13,000 (both substance-abuse- and mental-health-related commitments)	30 days & option for 180-day extension	Unknown	Patient, though state aid may be available for those with financial need

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Ohio House Bill 1 Impact Study: Involuntary Commitment to Treatment Beds & Facilities

Introduction and Background

The Ohio House of Representatives passed House Bill 1 (HB1), which took effect on April 12, 2021. Two provisions in HB1 deal with involuntary commitment to treatment. Ohio's involuntary-commitment-to-treatment process allows a spouse, relative, or guardian to petition a probate court to involuntarily commit the person to a treatment program because the loved one is in imminent danger to themselves or others due to substance abuse.

HB1 aimed these provisions at removing barriers to the law, intending to make it easier to get loved ones into treatment outside of the criminal justice system. Even if some barriers are removed, however, its effectiveness is potentially limited by the number of facilities or lack of beds in appropriate lock-down facilities available to accept these individuals. This barrier was brought to light by the House Bill 1 Implementation Working Group, composed of judges, prosecutors, defense attorneys, court administrators, probation officers, academicians, and state agency officials to guide the study of the impact of the legislation.

This potential barrier raises the need for more data to determine the magnitude of the issue. Within the state of Ohio, there are 51 Alcohol, Drug, and Mental Health Boards (ADAMH).[1] ADAMH boards either are contained to a singular county or comprised of multiple counties that are regionally contiguous. Each ADAMH board is required to share information on its available facilities and beds with probate courts. The purpose of this required communication is to have a clear and transparent system of communication to improve efficiency and best serve Ohio residents.

To understand more about how involuntary commitment to treatment operates in the state of Ohio, as well as the availability and barriers to treatment, commission staff contacted all 51 ADAMH boards. Each ADAMH board contacted was asked about both its facility and availability for lockdown beds. Of the 51 ADAMH boards in Ohio that were contacted, 15 ADAMH boards responded to the inquiry.

Operation of ADAMH Boards & Availability across Ohio

Fifteen of the 51 ADAMH boards responded to the inquiry and their responses highlight a lack of data, consistency, and space for Ohioans. Seven of the 15 ADAMH boards reported that they have no appropriate beds within their counties, which highlights a major barrier to treatment. Despite having no beds available, five of the seven boards reported utilizing facilities in neighboring or regionally contiguous counties. These boards utilize cooperation based on regional boundaries to provide beds and treatment to Ohioans in need. In northeast Ohio, Geauga County has no beds available, but has contracts with Lake County to meet the demands of Ohioans. Furthermore, in central Ohio, the Delaware-Morrow

[1] https://www.oacbha.org/mappage.php.

ADAM board does not have lockdown beds, so it refers patients to facilities in regionally contiguous counties, such as Franklin County. These counties exhibit the best example of communication among ADAMH boards identified and may potentially highlight a solution to increasing communication and beds available. Separately, one of the seven boards reported having only outpatient treatment available, which does not address beds available in lock-down facilities for involuntary commitment.

While seven of the 15 respondents reported having no beds available, the other eight ADAMH facilities who responded to the inquiry reported having beds available in lock-down facilities. Those beds are found within hospitals, health/medical centers, and residential treatment centers. While there is no consistency with the number of beds available at a given time, the average number of beds available across all eight boards is 16 beds.

Mahoning County Mental Health & Recovery Board reported the highest number of beds available: 24 general beds and 18 geriatric beds at Mercy Hospital, with the ability to overflow to Windsor-Laurelwood, Highland Springs, Generations, Clear Vista and the Regional Psychiatric hospital in Canton. Despite eight ADAMH boards reporting having beds available, there are limitations on who is accepted. For example, only one board (Athens-Hocking-Vinton Alcohol, Drug Addition, and Mental Health Services Board) reports accepting children. They noted having16 beds for adult women and children in a women's recovery center and two group homes.

While there are clear issues in the availability of beds at lock-down facilities for patients admitted to involuntary commitment to treatment, there is substantial regional variation among which boards responded, which boards have beds available, and which boards report cooperation among regionally contiguous borders. ADAMH boards in northwest and southwest Ohio both had much higher response rates than other geographic regions of Ohio. Additionally, central Ohio also had higher response rates. While response rates do not reveal much regarding comparable data for treatment and beds/facilities, it may highlight that these ADAMH boards have better systems of communication, they may have more beds or staff available at a given time, or that these boards help the other boards with ICT that were non-responsive.

Conclusions and Recommendations

Overall, there is a lack of data on the issue that does not allow for many conclusions or analyses to be drawn. House Bill 1 expanded provisions to allow individuals to enter these programs and receive associated services, but the effectiveness is questioned by the lack of standardized protocol for reporting beds and facility data, inconsistent communication with and among ADAMH boards, and difficulties placing individuals in these treatment centers. For House Bill 1 to have the greatest impact, changes are needed to improve and promote more consistent communication and transparency both between ADAMH boards and from ADAMH boards to the stakeholders involved in the criminal justice process and the public.

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Ohio House Bill 1 Impact Study

Involuntary Court Ordered Treatment for Substance Use: Themes and Recommendations

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Introduction and Background

Following the passage of House Bill 1 (HB1), which took effect on April 12, 2021, the Ohio Criminal Sentencing Commission convened the HB1 Implementation Working Group (working group), composed of judges, prosecutors, defense attorneys, court administrators, probation officers, academicians, and state agency officials to guide the study of the impact of the legislation. The working group divided analysis of the bill into four main categories of impact to study: (1) sealing a record of conviction (2) intervention in lieu of conviction (ILC), (3) involuntary court-ordered treatment for alcohol or drug abuse, and (4) community-control changes and technical violations.

The group determined that Ohio lacked comprehensive statewide data about petitions for involuntary court-ordered substance use treatment (hereafter "involuntary commitment to treatment") in probate courts.[1] Additionally, the placement of these provisions within the jurisdiction of probate courts meant that many workgroup members were unfamiliar with these types of cases. Therefore, the group decided to take a qualitative approach to understanding this statute and changes by interviewing probate judges and treatment professionals.

The original statute allowing for involuntary commitment to treatment went into effect September 29, 2013.[2] In discussions with those in probate courts and members of the treatment community, it was estimated that the numbers of such cases from this original statute were extremely low, ranging from five to fifteen total cases statewide in the past eight years.

Given that most courts would not have experience with these cases, the group discussed approaching those judges known to have dealt with such cases, as well as a few others to get their thoughts on the statute and the HB1 changes. It also was determined that the perspective of treatment providers is important for understanding the impact of this specific piece of the legislation. We reached out to three of the four judges[3] who were known to have experience with these case types and asked for assistance from representatives of the Ohio Department of Mental Health and Addiction Services in recruiting interested members of the treatment community.

In July and August 2021, we interviewed four treatment providers from across Ohio, one probate judge with experience in this type of case and one probate magistrate without experience in this type of case.[4] These interviews lasted between 30 minutes to just over one hour. Given the small number of interviews,

1 While Ohio probate courts, like all other court types, are required to submit caseload and disposition information regularly to the Supreme Court of Ohio, these types of cases are categorized as "civil actions" along with several other types of cases, such as land sales, appropriation cases, declaratory judgment, among others. For detailed reporting instructions, see: sc.ohio.gov/JCS/casemng/statisticalReporting/formCInstruct.pdf.

2 See R.C. 5119.93 and R.C. 5119.94.

3 One of the judges is retired and no contact information was available.

4 We received significant assistance from another probate judge with experience using the involuntary-commitment-to-treatment statute. She helped to increase our understanding and approach to evaluating this topic; her insight will inform this summary.

this summary should not be considered generalizable. However, there were several overlapping themes that offer a better understanding of the considerations of practitioners and judges regarding these statutes and identify where to focus data-collection efforts.

Given the rarity of involuntary commitment to treatment cases since 2013, and that we interviewed respondents just four months after the changes went into effect, no respondents reported noticing any changes because of HB1. Therefore, much of the conversations focused on the reasons the respondent believed the statutes were not more widely utilized. As respondents identified barriers, if applicable, we brought up anything in HB1 that seemed designed to address the issue to get their thoughts on the potential impact of HB1.

Mental Health and Substance Use

All respondents worked both with mental health and substance use, whether as a member of a crisis team, at a counseling center or a crisis facility, as a member of a county alcohol, drug, and mental health (ADAMH) board, or as a judicial officer in the probate courts. Given this background, each of the respondents was able to speak to the similarities and differences with how mental-health and substance-use needs are handled in Ohio.

Four of the six respondents specifically discussed the co-occurrence of mental health and substance use. Two respondents in the treatment field estimated that 75-80% of patients have co-occurring disorders. This is relevant to involuntary commitment because in probate courts, there are systems for involuntary commitment on mental health grounds, as well as substance use. Despite relatively similar statutes, all the respondents had more experience with civil commitments for mental-health reasons than substance use. When asked why they believed this to be the case, one respondent discussed that it is generally more effective first to treat the mental-health issue because it will help the substance-use issue, as many co-occurring disorders he sees are in attempts to self-medicate. Another respondent spoke about multiple cases they were aware of in which people had been "probated" for mental-health reasons who also have a substance-use disorder. This may be due to existing barriers to substance-use treatment generally and specifically involuntary commitment to treatment. These barriers will be discussed in detail in the section below.

Given these overlaps, it appears that treating these behavioral health issues together, or more holistically, would make sense. However, many respondents pointed out that this is not typically the case. Several explained this separation by reviewing the historical separation of mental-health and substance-use treatment in the state. While now they have combined into one institution (represented by ADAMH boards and the Ohio Department of Mental Health and Addiction Services), mental health and substance use still have separate streams of funding and are treated differently by insurance. For example, substance-use treatment has an upfront co-pay while mental health does not.

One respondent mentioned that while both mental health and substance use are brain-based, substance use remains more stigmatized and "knowledge of psychiatric illness is further along than substance addiction." Another respondent discussed the evolution of treatment models for co-occurring conditions from sequential services in the 1980s to parallel treatments currently. For example, a patient might do

some of their treatment elsewhere in the county and then go to her for psychiatric medications. However, because they were treated in another facility it is difficult to coordinate care and medication. The practitioner said she believes true integration and bidirectional treatment to be ideal, though these programs are hard to find. As another respondent pointed out, the "system reinforces separation." This history of separation can be seen, and reinforces, many of the barriers to utilizing the statute that are explained in the following.

Barriers to Utilizing Statute

The bulk of these interviews were spent discussing various barriers to the utilization of the involuntary-commitment-to-treatment statute. We started by asking why they thought utilization of this statute was so rare, which prompted each respondent to identify the multiple barriers. The three most-discussed barriers were lack of available facilities, the effectiveness of involuntary treatment, and the cost of treatment. Others mentioned more specific barriers that may be unique to their county or were not otherwise identified by any other respondent but may be an issue elsewhere. Woven through the discussions of the barriers was an implicit or explicit comparison to the mental-health system, as elaborated above.

Available Facilities

Three respondents indicated an issue to embracing this statute was the lack of facilities appropriate for involuntary commitments. Respondents pointed out that hospitals generally are not equipped for inpatient substance-use treatment. In cases of crisis commitment, those with co-occurring disorders may appear to need hospitalization, but this changes when they no longer are on substances. In these situations, the hospital lets the individual sober up and then releases them.

Others pointed out the need for locked facilities for involuntary commitments and the difficulty in finding those. This may be easier in private facilities, but that has additional cost. One respondent pointed out that capacity – notwithstanding COVID restrictions – was not the issue, but security of facility that hindered admittance. Another respondent in an urban treatment facility reinforced that capacity was not an issue until COVID and that now, given lower capacity, in-patient treatment must be reserved for those with more severe needs.

In other counties, capacity was an issue prior to COVID as well. A respondent in a more rural county discussed patients having to wait in an emergency room for an available bed at the local treatment facility for more than a week. She pointed out that many counties have waitlists to treatment and, as a result, people are started at a lower level of care because there is not a residential treatment bed available. She attributes this primarily to funding and believes there should be a funding mechanism for longer term treatments. She mentioned funding should be at the state or federal level, to overcome the inequality in county funding. The magistrate and judge interviewed both identified a lack of available treatment beds and gave examples of individuals who may have to wait to gain admittance to facilities. The waiting can be especially problematic for individuals who are not going to treatment voluntarily.

The issue of available facilities often overlapped with a discussion of cost. Private treatment facilities are more likely to have availability, but they have a much higher price tag. Given the statutory requirement to provide 50% of the cost of treatment upfront, or documentation that insurance will cover the costs, this

limits the facilities available to many petitioners. A local treatment facility may not accept a certain private insurance or it may not accept Medicaid, thereby limiting access to low-income individuals.

Cost

The financial requirements of the involuntary-commitment-to-treatment statute and the cost of treatment was mentioned by nearly every respondent as a barrier. Often, it was mentioned before any question about barriers was even asked. One respondent started our discussion by stating, "involuntary commitment for treatment is completely implausible." When asked to elaborate on that statement, he mentioned that the requirement — or "bar" — for commitment is as high for treatment as it is for mental health, except it requires prepayment. This was slightly altered in HB1, as it allowed a petitioner to show proof of insurance that would cover treatment or proof of some other way the treatment cost would be covered. When we asked if changes made to the statute through HB1 changed his perspective, as it offered other modes of payment, he said it did address some issues, but that other difficulties remain.

The magistrate we spoke with recalled having two calls with parents inquiring about the options for getting their child into treatment and she explained that cost was the major problem for both families, and that ultimately, they did not proceed. She did not see the change to allow insurance coverage as too helpful because they still must prove the treatment will be paid for in some way.

Two respondents relied on their knowledge and experience with individuals with a substance-use disorder. In their experiences, many of those with substance-use disorders have long alienated their families, who may have tried to intervene unsuccessfully multiple times. Given their substance use, they often are unable to keep a job, are impoverished, and no longer have anyone who would come forward with the resources to pay for at least half of the treatment cost. As one treatment provider said, "clients, by nature of addiction, have lost access to resources." Another elaborated that even if the individual in question is in their twenties and on their parents' insurance, "there is a limit to which that is applicable." Of the move to include insurance as an option to cover the cost of treatment, she said, "it might have been a step in the right direction, but I don't know how much it's really helping."

Multiple respondents highlighted that expanding payment options to include insurance does not address many problems and may even create others because the insurance company may dictate the extent of treatment. A treatment provider pointed out that in assessing patients, it may be the insurance company that dictates in-patient or out-patient care. The judge mentioned that it is difficult to get insurance to pay for a 90-day bed, making them less available at facilities. In addition, the insurance companies' reluctance to pay for more than 30 days of treatment can influence a physician's assessment. The statute requires this assessment and many limit the treatment order to only 30 days due to insurance restrictions. A probate judge can only order what the doctor assesses, and, in her experience, 30 days is an ineffective length of treatment. She said, "all 30 days does is dry you out," but then the real work of healing the brain can take much longer. She believes that 90-day treatment is a good start. Another respondent highlighted a concern that a court can only "follow" a person for three to six months after treatment and in her experience with addiction, that is insufficient and "the brain needs a good year to try to heal."

The cost of involuntary commitment to treatment was contrasted with other court-driven interventions with the two judicial officers we spoke with. Both had significant experience with specialized docket treatment courts. The magistrate spoke about family dependency treatment courts, in which treatment court is presented as an option to parents who face charges of abuse, neglect, and dependency in juvenile courts. Parents must successfully complete treatment or they risk losing custody of their children. While the issue of an "incentive" for treatment will be discussed in the following section, these specialized courts also do not require any proof of payment for treatment.

Effectiveness of Involuntary Treatment

Beyond the practical barriers of facilities and cost of treatment, all respondents expressed concern about the effectiveness of involuntary treatment. Simply put, each of the respondents believed that involuntary treatment was unlikely to be effective. They essentially attributed that to one of two issues: incentives or motivation. Those who cited motivation explained that a person must know they have a problem and want to change, which is not the case with involuntary treatment. One respondent said that people "never choose treatment before hitting bottom." Without that choice, effectiveness may be limited.

The other issue with involuntary commitment to treatment is the lack of incentives or, on the flip side, sanctions associated with the treatment. Three respondents specifically compared involuntary probate commitments with other court-assisted treatment, such as drug courts, and they viewed drug courts as more effective due to the threat of incarceration if they do not follow their treatment plan. The magistrate said they have seen success in family dependency treatment courts because they are engaged in the program. They know if they can get clean, they can get their kids back. The engagement comes with the choice to enter a treatment court. While there is an argument to be made that choosing treatment over incarceration or losing custody of children is not completely "voluntary," individuals in specialized courts have made the specific choice to enter the treatment court. The magistrate we spoke with saw this incentive as key to the process "In the specialized dockets, there are incentives − getting your kids back or not going to jail. In probate court, the only incentive is to be clean. If you're not engaged in it, I don't know. The incentive is internal."

Other

Respondents brought up other barriers to using this statute that were not common among the others we spoke to but may be a factor in counties not represented here. One county mentioned their recent efforts to get court orders for forced medications. While they see a huge success for people able to get through that process, they say it is long and difficult, "like trying to align stars." This suggests that the interaction of medical care with the courts is complicated in this county.

The statute also requires a physician's examination before a court can order treatment. One respondent highlighted difficulty in getting this assessment if the individual is uninsured and there is no evidence of overdose. Not only is the court required to have a physician's examination, but insurance, including Medicaid, will require this for prior authorization. Another court brought up a particular barrier regarding physicians' participation in their county — judges required the physician who performed the examination to physically show up to court when deciding the petition. This barrier was repeatedly highlighted, as this

takes time and money for a physician and makes them less likely to want to assist in the process. This county noted, however, that this was not the case in all counties.

Promise and Potential of Involuntary Treatment Statutes

While no respondents saw this statute as helping a large amount of people with substance-use disorders before they become criminal-justice involved, nearly all agreed that it could be used to help some individuals and families affected by substance use. Respondents emphasized that these statutes could give some hope to families and parents who "feel like they've tried everything."

One respondent was very optimistic about the intervention of probate courts and called such cooperation "vital for such efforts." While he did not think this rule would be effective everywhere, he believed in the "power of the black robe" for the success of such intervention efforts and cited successful assisted outpatient treatment (AOT) existing in some courts, suggesting that involuntary commitment also may be successful in those courts.

Respondents mentioned that this route may be more useful to families that are middle or upper middle class and the person with a substance-use disorder is relatively young and has not gone too far "down the pipeline" of substance use and resorted to criminal behavior. As one respondent pointed out, "If this happened to a young adult in my life, this might be something I would seek out."

Recommendations

Changes to the involuntary commitment to treatment statute, such as allowing proof of insurance as payment for treatment and the ability for judges to issue a warrant for those who leave treatment were identified as improvements by respondents. Ultimately, most saw the barriers to utilizing the statute as still too large to make an impact in substance use.

When asked about recommendations to improve involuntary treatment, some respondents discussed a closer interaction between the medical treatment community, the courts, and insurers (including Medicaid). Specifically, two mentioned that it might be useful to develop pilot programs in a few counties where there is funding provided for treatment in specific facilities, thereby addressing the issue of facilities and cost. One respondent specifically mentioned how particular Medicaid is about recommendations, that working together with providers, insurers, and judges could help to make sure that treatment was accessible.

Another recommendation was to talk with OMHAS to determine how facilities could make small changes, such as the ability to have locked doors, to become appropriate for involuntary commitments. On a similar note, one respondent suggested that probate court personnel be trained through the American Society of Addiction Medicine to understand the best way to help those with substance-use disorder.

Overall, respondents felt that the current statute was disjointed. Treatment providers' concerns reflected that they were not consulted and that they did not believe that those who created the statute and those who

will be responsible for committing individuals understand the key elements to successful treatment, such as knowledge of co-occurring disorders and the time needed for treatment. Judicial officers felt like they were not given the right tools to use this to make it effective, such as ordering a longer period of treatment and introducing incentives or sanctions. The judge we spoke with preferred therapeutic courts in the treatment of substance use because they are "holistic." Perhaps developing this civil-justice approach to substance use to become more of a holistic effort could increase utilization and success.

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HB1 Evaluation Implementation Workgroup

June 17, 2021

Topic: Community Control Changes and Technical Violations (R.C. 2929.15)

R.C. 2929.15: House Bill 1 modified provisions of law that capped the maximum prison sentence available for "technical violations" of community control for felonies of the fourth[1] and fifth degree at 180/90 days respectively. The bill mandates that a prison term imposed for a technical violation may not exceed the time the offender has left to serve on community control or the "suspended"[2] prison sentence. Further, the time spent in prison must be credited against the offender's remaining time under the community control and against the "suspended" prison term in the case.

HB 1 also specifies that the court is not limited in the number of times it may sentence an offender to a prison term as a penalty for violation of a community-control sanction or condition, violating a law, or leaving the state without permission. This provision applies to all levels of felonies and for both technical and non-technical violations, allowing for community-control violators to be returned to community control after imposition of a prison term at the sentencing court's discretion. Offenders sentenced for a technical violation of community control for an F4 or F5 offense must remain under community-control supervision upon their release from prison, if any time remains on their supervision period.[3]

Lastly, the act defines "technical violation" as a violation of the conditions of a community-control sanction imposed for a felony of the fifth degree, or for a felony of the fourth degree that is not an offense of violence and is not a sexually oriented offense, and to which neither of the following apply:

(1) The violation consists of a new criminal offense that is a felony or that is a misdemeanor other than a minor misdemeanor, and the violation is committed while under a community-control sanction.

(2) The violation consists of or includes the offender's articulated or demonstrated refusal to participate in the community-control sanction imposed on the offender or any of its conditions, and the refusal demonstrates to the court that the offender has abandoned the objects of the community-control sanction or condition.[4]

1 F4 offenses of violence and sexually oriented offenses are not subject to the technical violator caps under the bill.

2 When an offender is placed on community control the trial court must select a "reserved" prison term from the range available for the offense; the term "suspended" has no meaning under the post-SB2-sentencing scheme. As passed by the Senate, Am.Sub Bill 110 replaces "suspended" with "reserved" prison term.

3 HB1 also created RC 2929.15(B)(2)(c)(ii), which references an offender serving a community-control sanction as part of a "suspended prison sentence." As current law does not provide for any type of "suspended" prison sentence, that provision is amended in Am.Sub. HB 110 as passed by the Senate to instead reference "residential community control" sanctions – which include terms in jail, CBCF, alternative residential facilities, or halfway houses.

4 See hypothetical for examples.

What changed?

HB 1 as enacted provided a definition of "technical violations," the absence of which led to number of appeals and two Supreme Court of Ohio decisions attempting to define the term.

HB 1 also mandated a return to community control for those technical violators once released from prison and provided courts the option to do the same for both technical and non-technical community-control violators at all other felony levels. These provisions mark a substantial change from how Ohio's sentencing scheme has been interpreted in case law, as historical decisions held that prison sentences and community control are mutually exclusive options at the time of sentencing.

Updates to R.C. 2929.15 in Am.Sub. HB110 (Budget Bill) as passed by the Senate (06/09/21)[5]

- 25483-25498, 25550-25552 – Replaces "suspended" prison sentence with "reserved" prison sentence in (B)(1)(c)(i) and (ii) to correct an error in HB1. The phrase "suspended" prison term is not consistent with current sentencing law.
- 25502-25516 – Moves the provision allowing a defendant to be repeatedly sentenced to prison-term sanctions for violations of community control to (B)(1)(c)(iii).
- 25554-25558 – Gives courts sentencing an offender for a technical violation of community control the option to terminate community control when imposing a prison term for that technical violation, rather than the mandatory return under HB1.
- 25543-25558 – For technical violators serving a residential community-control sanction (jail term, CBCF, halfway house, or alternative residential facility), the prison term imposed for the technical violation is credited against that residential sanction, and the return to community control after the prison term is under the court's discretion, rather than mandatory.
- 25559-25573 – Deletes current (B)(2)(c) as it was moved to (B)(1)(c)(iii).
- 25577-25579 – Conforming change to another community control provision of the budget bill.[6]

[5] These provisions are subject to change, pending consideration of the budget bill in conference and passage by both chambers.

[6] HB110, as passed by the Senate, changes sentencing procedure when a defendant is placed on community control. Current law requires a judge to reserve a specific prison sentence for the offense (HB 110 as passed by the Senate merely requires the judge to inform the defendant of the range of prison terms available for that offense.)

Example of technical vs. non-technical violation determination:

Defendant Bob Badguy is before a court on two counts of possession of methamphetamine, one F4 and one F5. The trial court places Bob on a 3-year term of community control, orders him to:

- Complete drug treatment;
- Use no illegal drugs or alcohol;
- Maintain employment;
- Report to his probation officer bi-weekly, and;
- Commit no new offenses.

The court reserved the maximum term on each count – 18 months on the F4, 12 months on the F5.

Two years later, Bob is back before the court on allegations that he violated his community control in the following ways:

1. Two citations for minor misdemeanor marijuana possession
2. Recently missing three required meetings with his probation officer. Bob attended more than 45 required meetings during his time on community control and claims the missed meetings were the result of mandatory overtime at his job.

Bob remains employed full time, is participating in the required treatment program for methamphetamine, and tests clean for all controlled substances save THC. He insists to the court that marijuana helps to calm him and curb his urge to use methamphetamines and that it helps him fight his addiction. Bob tells the court he intends to continue using marijuana due to these benefits.

The judge finds Bob in violation of his community control and intends to impose a prison sentence.

Are these violations technical?

Under the definition of technical violation provided in RC 2929.15(E)(1)[7] by HB1, minor misdemeanors are specifically excluded from the types of criminal offenses that are **not** considered technical violations. Therefore, a trial court must consider the second part of the definition in (E)(2) – whether marijuana use and missing two appointments constitute an "articulated or demonstrated refusal to participate" either with community control generally, or with a specific condition, and whether that refusal "demonstrates….that the offender has abandoned the objects" of either the community-control sanction or a condition.

Here, Bob specifically was ordered not to use any illegal drugs and to report to his probation officer. Each of the two violations must therefore be weighed as to how they reflect on Bob's performance on community control.

[7] Importantly, the definition of "technical violation" provided by HB1 tells us what technical violations are not – not what they are; note the language in R.C. 2929.15(E) "to which neither of the following apply."

As Bob's articulated refusal to stop using marijuana highlights the difficulty in the definition – the court may find that, as the goal of community control was for Bob to not use **any** illegal drugs, Bob is therefore refusing to participate in community control and is therefore not subject to the 90/180 caps as a technical violator.

The missed appointments, however, may be viewed as a technical violation of community control. Bob has likely not demonstrated a "refusal" to participate in the condition that he meet with his probation officer, given the small number of meetings missed versus those he attended.

If the court sentences Bob to prison, how long will that term be and what will happen upon release?

If the court finds that both violations are technical in nature, Bob would be subject to a maximum 180-day prison term under R.C. 2929.15's technical-violator caps. Upon release from prison, Bob would return to community control in front of the judge for the then remaining 6 months of supervision due to the changes made by HB1.

If the court finds the marijuana violation to be non-technical, Bob could be sentenced to the full reserved terms –12 months on the F5 and 18 months on the F4 – with the court being able to run those terms consecutively if the necessary findings are made.

Intended outcomes from the legislation?

- Define and clarify what constitutes a technical violation of community control.
- Increase discretion regarding sanctions for community-control violators (Giving judges the ability to return an offender to community control.)

What do we <u>need</u> to know?

- Number of technical violators by felony level in prison on, before, and after HB1.
- Number of technical or non-technical violations subject to the Targeted Community Alternatives to Prison (TCAP) program provisions.[8]
- Number of offenders for which community control was terminated and the number of offenders returned to community control after a prison sentence.
- Average sentence length of community-control violators (CCV).

[8] TCAP is a voluntary program wherein counties may elect to have F5 offenders serve a prison term imposed in local jail or CBCF facilities instead of prison, in exchange for additional funding provided by the Ohio Department of Rehabilitation and Correction.

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What do we <u>want</u> to know?

- Did the changes improve application of the law for the definition of technical violation and the ability to use prison terms as a sanction for a violation while keeping the defendant on community control?
- How many defendants are returned to prison for 90/180 days and how many are returned to serve a term from the range (of the reserved term)?

What would be nice to know?

- Does the definition of technical violations in HB1 change the number of offenders sent to prison?
- Does this provision of HB1 result in a shorter length of stay in prison for community-control violators?
- Do the changes result in more defendants being placed on community control as compared to before enactment of HB1?

Are there unintended consequences?

- Could HB1's definition of technical violations and the changes made to CCV practices impact decisions at the original sentencing? In charges filed? In plea negotiations?
- Will more "churn" be created by the provisions allowing prison terms to be imposed for violations of community control more than once?
- Given Supreme Court of Ohio jurisprudence on prison and community control being mutually exclusive options at sentencing, will there be an increase in appeals?

Additional considerations?

- The changes made to community-control provisions by HB1 illustrate the growing complexity of sentencing law in the state, and the need to seek simplification of the criminal code.
- How do we define technical versus non-technical violations for the purpose of data collection and analysis? And, given the ability to use prison as a sanction for a violation, is this a distinction without a difference?

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Recommendations: Technical Violations and Community Control Changes

- The community-control technical violation provision enacted in HB1 was months later revised in AmSubHB110 (134th General Assembly), which exacerbated the consensus of the workgroup regarding the complexity of the statute. Thus, the obvious recommendation is to work toward simplifying the provision. Further, the Ohio Department of Rehabilitation and Correction reported that this provision may impact approximately 100 people.