

**NIX THE “FIX”: AN ANALYSIS ON OHIO’S CRIMINAL
SENTENCING LAW AND ITS EFFECT ON PRISON
POPULATION**
AMBER G. DAMIANI*

I. INTRODUCTION

For decades, Ohio has been trying to find ways to combat its rising prison population. With the introduction of Senate Bill 2 (hereinafter S.B. 2) in 1996,¹ the Ohio legislature thought it had found some relief when the number of inmates housed began to decrease after the first full year of the law’s implementation. However, this progress stalled in 2006 when the Ohio Supreme Court ruled Ohio’s sentencing system under S.B. 2 unconstitutional and effectively rewrote sentencing protocols.

By 2007, the Ohio Department of Rehabilitation and Correction (hereinafter O.D.R.C.) was operating at 126.9% capacity and housing 48,482 inmates, which was up from the 45,189 inmates that were recorded in the previous year.² From here, the numbers only began to rise. By 2009, Ohio had reached a record high of 50,884 inmates, with O.D.R.C. operating at 132.8% capacity.³ In 2011, House Bill 86 (hereinafter H.B. 86) was enacted with the goal of reducing the growing number of inmates housed with O.D.R.C.⁴

To this end, H.B. 86 targeted those committing low-level felonies for the first time by guiding judges to impose community control sanctions

Copyright © 2019, Amber G. Damiani.

* J.D., Capital University Law School, *summa cum laude*, 2019; M.A., Ohio University, 2016; B.A., Ohio University, 2015. I would like to thank Professor Scott A. Anderson of Capital University Law School. This paper would not have been possible without his invaluable guidance and legal insight throughout the process of writing this Article. I would also like to thank my mother, Drema G. Tarantelli, for her unwavering love and support in this endeavor.

¹ David J. Diroll, *Thoughts On Applying S.B. 2 to “Old Law” Inmates*, OHIO CRIMINAL SENTENCING COMM’N, <https://supremecourt.ohio.gov/Boards/Sentencing/resources/general/SB2.pdf> [<https://perma.cc/8XCV-FDX6>].

² OHIO DEP’T. OF REHAB. AND CORR., MASTER POPULATION COUNTS (Jan. 1, 2007), <https://www.drc.ohio.gov/reports/population-count> (Fourth Quarter 2006); OHIO DEP’T. OF REHAB. AND CORR., MASTER POPULATION COUNTS (Jan. 1, 2006), <https://www.drc.ohio.gov/reports/population-count> (Fourth Quarter 2005).

³ OHIO DEP’T. OF REHAB. AND CORR., MASTER POPULATION COUNTS (Jan. 1, 2009), <https://www.drc.ohio.gov/reports/population-count> (Fourth Quarter 2008).

⁴ Diane V. Grendell, *Consecutive Sentencing Deja Vu*, 26 OHIO LAW., Jan.–Feb. 2012, at 8, 9.

versus imposing a prison sentence. However, this plan failed miserably; the prison population continued to increase over the years. The explanation for this failure comes from H.B. 86's incorrect diagnoses of the prison overcrowding problem.

Although it is true that low-level, nonviolent offenders did make up a large percentage of those incarcerated, the majority of those incarcerated were there because they had recidivated or violated the requirements of their community control sanction. Further, judges were already adhering to the practice of sentencing first-time, nonviolent offenders to community control sanctions instead of prison sentences, given SB 2's sentencing presumptions. Thus, H.B. 86 enacted a law which was targeted at a population of offenders who were not actually in prison.

The question for Ohio lawmakers now is what legislative changes will accurately address prison overcrowding and mitigate the rising prison population. This article attempts to answer this question. In doing so, this article will discuss the Sixth Amendment's impact on judicial sentencing, Ohio's judicial response to those constitutional requirements, and Ohio's legislative responses to reducing prison population over the past decade. Finally, this article suggests that the key to solving Ohio's prison overcrowding problem is a legal one and proposes methods to further reform Ohio's sentencing law, while still remaining true to criminal justice principles and comporting with constitutional requirements.

II. SIXTH AMENDMENT'S RIGHT TO A JURY TRIAL AND ITS IMPACT ON JUDICIAL SENTENCING

Historically, an individual's right to a jury trial is anchored in two Constitutional protections.⁵ First, the Constitution of the United States affords an individual the right, "in all criminal prosecutions, . . . to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"⁶ Second, the Constitution of the United States protects an individual from being deprived of one's "liberty . . . without due process of law"⁷ In criminal proceedings, "due process of law" requires that "the prosecution bear[] the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements."⁸ The rights prescribed by the Sixth

⁵ *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

⁶ U.S. CONST. amend. VI.

⁷ U.S. CONST. amend. V.

⁸ *Sullivan*, 508 U.S. at 277-78 (internal citations omitted).

and Fifth Amendments are inherently connected and, read together, entitle an individual to the right to have a jury find every fact beyond a reasonable doubt in order to be convicted guilty of the crime for which he or she is charged.⁹

Viewing these protections within the context of judicial sentencing procedures, the procedural safeguards afforded by the Constitution extend to determinations of sentence length.¹⁰ When construing a federal statute, the Court opined that, other than a defendant’s criminal history, any fact that increases the maximum penalty for a crime “must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.”¹¹ When presented with the question of whether the protections of the Fifth and Sixth Amendments as applied to federal sentencing structures would produce the same result as when analyzing state sentencing procedures, the Court held that the coexistence of one’s right to a jury trial under the Sixth Amendment and one’s right to due process under the Fourteenth Amendment “commands the same answer in [a] case involving a state statute;” thus, a State is bound by the same Constitutional requirements when contemplating its sentencing systems.¹²

Although the State has the inherent power to define its crimes, including the elements of the crime and the crimes’ corresponding sentence,¹³ a State cannot “circumvent the protections of [the Constitution] merely by ‘redefining the elements that constitute different crimes, [and] characterizing them as factors that bear solely on the extent of punishment.’”¹⁴ In 1986, the United States Supreme Court first addressed

⁹ *Id.* at 278.

¹⁰ *Mullaney v. Wilbur*, 421 U.S. 684, 703–04 (1975).

¹¹ *Jones v. United States*, 526 U.S. 227, 252 (1999).

¹² *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

¹³ *Id.* at 471.

“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally ‘within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,’ and its decision in this regard is not subject to proscription under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.’”

McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (internal citations omitted) (quoting *Irvine v. California*, 347 U.S. 128, 201–02 (1954)).

¹⁴ *Apprendi*, 530 U.S. at 485 (quoting *Mullaney*, 421 U.S. at 698).

this issue of characterization when the constitutionality of States' sentencing structures whose systems made a distinction between "sentencing factors" and "elements" were challenged.¹⁵ An "element" of a crime is a fact in the definition of an offense that must be proven in order to be convicted of a particular crime.¹⁶ A "sentencing factor" is a circumstance that "supports a specific sentence *within a range* authorized by the jury's finding that the defendant is guilty of a particular offense."¹⁷ The Court first addressed this distinction when a Pennsylvania sentencing statute allowed a judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant possessed a firearm during the commission of the offense.¹⁸ This sentencing scheme was challenged on two grounds: first, visible possession of a firearm is an element of an offense, not a sentencing consideration; second, the burden of proof being a preponderance of the evidence standard violates Due Process.¹⁹ First, the Court upheld the distinction in the sentencing scheme on the basis that it is within the State's power to define its crimes and penalties for those crimes, and the State was simply giving statutory weight to "one factor that has always been considered by sentencing courts to bear on punishment."²⁰ Second, the Court upheld the burden of proof standard because "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof."²¹

In 2000, the Court revisited this distinction in *Apprendi v. New Jersey* and clarified that when a "sentencing factor" increases the maximum penalties the defendant is facing, then it is a "sentence enhancement" because it effectively operates as an element of a greater offense, and thus needs to be proven beyond a reasonable doubt.²² Furthermore, the Court made it clear that whether something is an "element" of an offense or a "sentencing factor," it is a question not of its "label," but of its "effect" on the defendant's sentence.²³ Even when a State labels a circumstance as a "sentencing factor," if the effect of that circumstance is "used to describe

¹⁵ *McMillan*, 477 U.S. at 81–82.

¹⁶ *Apprendi*, 530 U.S. at 501.

¹⁷ *Id.* at 494 n.19.

¹⁸ *McMillan*, 477 U.S. at 81.

¹⁹ *Id.* at 83.

²⁰ *Id.* at 89.

²¹ *Id.* at 91–92.

²² *Apprendi*, 530 U.S. at 494 n.19.

²³ *Id.* at 494 ("[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

an increase beyond the maximum authorized statutory sentence,” then it is the “functional equivalent of an element of a greater offense” that was not proved under the burden of the jury’s guilty verdict for the crime with which the defendant is charged.²⁴ Although the holding in *Apprendi* does not explicitly overrule the decision in *McMillan*, it makes the distinction between an “element” and a “sentencing factor” irrelevant for purposes of a constitutional analysis of judicial sentencing.²⁵

Moreover, the Court in *Apprendi* set a new precedent for what the Constitution requires of state judicial sentencing.²⁶ Under New Jersey law, a defendant guilty of a second-degree felony could be sentenced to prison for five to ten years; however, in *Apprendi*, as a part of the plea arrangement made between both parties, the State reserved the right to ask the judge at sentencing to impose a higher penalty based on a “hate crime sentence enhancement,” if the judge found by a preponderance of the evidence that the offender had a “biased purpose.”²⁷ After the plea of guilty was entered, the judge held an evidentiary hearing to determine if the hate crime sentence enhancement applied.²⁸ After hearing all the evidence, the judge ruled that the enhancement did apply based on his finding that Apprendi’s motivation behind the crime was racial bias.²⁹ Apprendi appealed on the grounds that the judge’s finding of fact to enhance his sentence violated Due Process under the Fourteenth Amendment, and the Court had to reexamine all of the precedent on the constitutional requirements of judicial sentencing.³⁰ In its decision the Court established that the Sixth and Fourteenth Amendments require that, other than a defendant’s criminal history, any fact that increases the maximum sentence length for an offense, must be found beyond a reasonable doubt by a jury.³¹

²⁴ *Id.* at 494 n.19.

²⁵ *Id.* at 495 (“[M]erely because the state legislature placed its hate crime sentence ‘enhancer’ within the ‘sentencing provisions’ of the criminal code ‘does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.’” (internal citations omitted)).

²⁶ *Id.* at 490.

²⁷ *Id.* at 470.

²⁸ *Id.*

²⁹ *Id.* at 471.

³⁰ *Id.* at 490.

³¹ *Id.* at 476 (internal citations omitted). Although a defendant’s criminal history is considered a “fact” that the judge finds, there is no Constitutional concern because prior convictions are subjected to their own proceedings and “procedural safeguards;” additionally, the desire to prevent recidivism does not “relate to the commission of the offense itself.” *Id.* at 488, 496 (internal quotation marks omitted).

Since this decision, the Court has had to clarify the scope of its ruling in *Apprendi*.³² In *Ring v. Arizona*, the Court established that capital punishment sentencing structures must also afford a defendant facing capital punishment the protection of having every aggravating fact proven beyond a reasonable doubt by a jury.³³ Under Arizona law, a defendant could only be sentenced to death if, after a separate sentencing hearing, the judge found that there was “at least one aggravating circumstance and there were no mitigating circumstances sufficiently substantial to call for leniency.”³⁴ The jury had found Ring guilty of first-degree felony murder after a death occurred during the commission of an armed robbery.³⁵ The judge found that Ring had committed the crime in an “especially heinous, cruel, or depraved manner,” and even though his minimal criminal record was a mitigating factor, it was not a factor that rose to the level of affording leniency; thus, the judge sentenced Ring to death.³⁶ On review, the Supreme Court overruled prior precedent to settle *Apprendi*’s application to death penalty statutory sentencing schemes, specifically holding that it is unconstitutional under *Apprendi* when a State’s sentencing structure allows a judge, not the jury, to make factual determinations necessary for imposing capital punishment.³⁷ Thus, sentencing procedures for capital punishment are subjected to the same constitutional requirements.³⁸

A similar holding is found in *Blakely v. Washington* with a sentencing scheme that implemented a grid system,³⁹ where offenses were given a particular range based on an “offender score,” class of felony, and “seriousness level;”⁴⁰ however, a judge could impose a sentence above the standard range if he found substantial justification for finding an “exceptional sentence.”⁴¹ Under Washington law, Blakely was charged with first-degree kidnapping after he abducted his estranged wife, bound her, forced her at knife point into a wooden box in the back of his truck,

³² See *Ring v. Arizona*, 536 U.S. 584, 585 (2002); *Blakely v. Washington*, 542 U.S. 296, 296 (2004).

³³ *Ring*, 536 U.S. at 589.

³⁴ *Id.* at 592 (internal quotation marks omitted).

³⁵ *Id.* at 591.

³⁶ *Id.* at 593 (internal quotation marks omitted).

³⁷ *Id.* at 609.

³⁸ *Id.*

³⁹ See WASH. REV. CODE § 9.94A.510 (Table 1 – Sentencing Grid).

⁴⁰ See WASH. REV. CODE § 9.94A.51 (Table 2 – Crimes included within each seriousness level).

⁴¹ *Blakely*, 542 U.S. at 299.

and then ordered his son to follow in another car under the threat that he would shoot his mother (Blakely’s wife) if he did not comply.⁴² Blakely reached a plea agreement with the State, where he pleaded guilty to the reduced charge of second-degree kidnapping.⁴³ As a part of the plea agreement, Blakely admitted to the elements of second-degree kidnapping where domestic violence and use of a firearm was involved, but admitting to no additional facts.⁴⁴ Under Washington’s grid system, using the “offender score” and “seriousness level,” the presumptive range was forty-nine to fifty-three months in prison.⁴⁵ Thus, the State recommended a sentence within this standardized range of time statutorily prescribed for this type of offense.⁴⁶

However, after hearing the victim’s account of what happened, the judge rejected the State’s sentence recommendation, and used his statutory authority to impose an “exceptional sentence” of 90 months.⁴⁷ Under Washington law, the judge could depart from a statutorily prescribed sentence if he found aggravating or mitigating circumstances.⁴⁸ The judge found the victim’s account of events supported his finding that Blakely acted with “deliberate cruelty,” which is an aggravating circumstance that authorized the judge’s ability to exercise discretion and impose a higher sentence.⁴⁹ This sentence was thirty-seven months beyond the standard

⁴² *Id.* at 298.

⁴³ *Id.* at 299.

⁴⁴ *Id.* at 298–99.

⁴⁵ *Id.* A “presumptive sentencing guidelines” structure meets the following conditions:

- (1) the appropriate sentence for an offender in a specific case is presumed to fall within a range of sentences authorized by sentencing guidelines that are adopted legislatively created sentencing body, usually a sentencing commission;
- (2) sentencing judges are expected to sentence within the range or provide written justification for departure;
- (3) the guidelines provide for some review, usually appellate, of the departure. Presumptive guidelines may employ determinate or indeterminate sentencing structures.

Bureau of Justice Assistance: National Assessment of Structured Sentencing, *infra* note 54, at xii.

⁴⁶ *Blakely*, 542 U.S. at 300.

⁴⁷ *Id.*

⁴⁸ *See* WASH. REV. CODE § 9.94A.535 (Departures from the guidelines).

⁴⁹ *See* WASH. REV. CODE § 9.94A.535(3)(a). Under current Washington law, the code section for aggravating circumstances states “Aggravating Circumstances – Considered by a Jury – Imposed by the Court,” but when the law was challenged in *Blakely* the judge was allowed to consider and find these facts alone, without the jury, to make his decision to impose a sentence that exceeds the maximum amount of time prescribed by the statutory presumptive range. *See Blakely*, 542 U.S. at 300 n.1.

maximum sentence, and imposed more than three additional years to Blakely's sentence without one additional fact being found beyond a reasonable doubt by a jury.⁵⁰ Blakely appealed, arguing that this sentencing procedure violated his rights under the Sixth Amendment to have a jury determine the "legally essential" facts of his sentence.⁵¹

When making its decision, the Court reiterated its holding in *Apprendi*, and further clarified that the "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."⁵² Stated another way: if the State sentencing scheme makes it so that a judge is allowed to find additional facts that are not supported by a jury's verdict in order to determine an offender's sentence, then the system does not comport with the Constitution.⁵³

Extending the rule to determinate sentencing systems,⁵⁴ *Apprendi* laid to rest another State's sentencing scheme.⁵⁵ Under California law, the sentencing procedures followed a determinate sentencing scheme where the offense was defined to have a lower, middle, or upper term.⁵⁶ For example, when an offender was convicted of continuous sexual abuse of a child under the age of fourteen, California's sentencing scheme provided three separate and fixed terms of imprisonment: six years in the lower term, twelve years in the middle term, and sixteen years in the upper term.⁵⁷

Similar to the sentencing procedures in Washington seen in *Blakely*, California law prescribed that judges were required to impose the middle term, unless there were aggravating or mitigating circumstances that would warrant imposing the upper or lower sentence.⁵⁸ Further, the fact of an

⁵⁰ *Id.*

⁵¹ *Id.* at 301.

⁵² *Id.* at 303.

⁵³ *Id.* at 303–04.

⁵⁴ *National Assessment of Structured Sentencing*, U.S. DEPT. OF JUSTICE: BUREAU OF JUSTICE ASSISTANCE, xii, <https://www.ncjrs.gov/pdffiles/strsent.pdf> [<https://perma.cc/TSW5-WGSD>] (A determinate sentencing scheme imposes "sentences of incarceration in which an offender is given a fixed term.").

⁵⁵ See *Cunningham v. California*, 549 U.S. 270, 270–71 (2007).

⁵⁶ *Id.* at 277.

⁵⁷ *Id.* at 275.

⁵⁸ *Id.* Washington and California laws were similar in that they both required that the judge impose a standardized sentence set forth by the legislature based on type of crime or offender, whether that be selecting a term within a range or adhering to a specific fixed term; however, both States sentencing schemes allowed the judge to use his discretion to impose higher or lower terms based on the finding of facts.

aggravating or mitigating circumstance was to be found after the judge considered several factors, including “any further evidence introduced at the sentencing hearing.”⁵⁹ The Supreme Court applied its holdings from *Apprendi* and *Blakely*, and found the middle term to be the “relevant statutory maximum” because this is the term that is authorized by the jury’s findings *alone*.⁶⁰ Thus, when the law allows the judge to find facts beyond those authorized by the jury in order to elevate the sentence to the upper term, the sentencing system will not “withstand measurement against [the Supreme Court’s] *Sixth Amendment* precedent.”⁶¹

Additionally, following *Blakely*, the Federal Sentencing Guidelines came under scrutiny.⁶² When implementing the Federal Sentencing Guidelines, Congress chose to adopt a “mandatory-guideline system,”⁶³ where each offense was prescribed a particular range of sentence length based on offense level and an offender’s criminal record.⁶⁴ Additionally, under this procedure, judges were required to consider the Federal Sentencing Guidelines and impose a sentencing within the range, unless they found aggravating or mitigating factors to warrant departure.⁶⁵

Mr. Booker was charged with possession of cocaine with the intent to distribute and found guilty by a jury of that crime, specifically finding that he had 92.5 grams of cocaine in his possession.⁶⁶ The Guidelines prescribed Booker a sentence ranging from 210 to 262 months in prison.⁶⁷ However, the judge held a separate sentencing hearing and found that Booker had actually possessed 566 grams of crack and that he was also guilty of obstructing justice.⁶⁸ After finding these additional facts, Booker’s “offense level” increased; thus, altering where his offense

⁵⁹ *Id.* at 277 (internal quotation marks omitted).

⁶⁰ *Id.* at 293.

⁶¹ *Id.*

⁶² *See* United States v. Booker, 543 U.S. 220, 220–21 (2005).

⁶³ *Id.* at 233 n.2. *See also* U.S. SENTENCING GUIDELINES MANUAL, § 5A (U.S. SENTENCING COMM’N 2016) (Sentencing Table), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf [<https://perma.cc/FVB6-ML5S>]. Similar to the sentencing grid system employed by Washington, the Federal Sentencing Guidelines’ sentencing scheme consists of using the “offense level” on the vertical axis of the chart, and “criminal history” on the horizontal axis of the chart. Moving down the chart based on offense level, and across the chart based on criminal history will provide the offender’s “guideline range” applicable for a given offense. *See generally id.*

⁶⁴ *Booker*, 543 U.S. at 233 n.2.

⁶⁵ *Id.* at 234.

⁶⁶ *Id.* at 227.

⁶⁷ *Id.*

⁶⁸ *Id.*

originally fell on the grid and increasing presumptive range.⁶⁹ When sentencing Booker pursuant to the Guidelines, the judge found that Booker's sentence would actually range from 360 months to life imprisonment, and the judge sentenced Booker to 30 years in prison.⁷⁰

Considering *Apprendi*, the Court found the sentence unconstitutional because the trial court judge found facts and imposed a sentence prescribed from a higher range than authorized by the jury verdict.⁷¹ Moreover, the Court claimed there was no significant distinction between the Federal Sentencing Guidelines and the sentencing system employed in *Blakely*, and held that it was the "mandatory" nature of the procedure implemented by both Washington's grid system and the Federal Guidelines that made the systems unconstitutional.⁷²

However, the Court's conclusion that it was the "mandatory" nature of the guidelines that made them unconstitutional does not follow logically from the precedent set by *Apprendi* for two reasons. First, the Constitutional concern in *Apprendi* is the separation of power between what the judge can do and what power is reserved for the jury.⁷³ Thus, when a State whose system allows judges to find facts that increase an individual's sentence beyond what is prescribed by the legislature for a particular type of offense or offender, then the sentencing system in effect allows judges to use their discretion to circumvent an individual's Sixth Amendment right to have a jury decide facts that would increase one's sentence.⁷⁴ The unstated separation-of-powers concern is exemplified by Justice Scalia's discussion of *Apprendi*'s rule and the scope of the Sixth Amendment regarding individual sentencing frameworks. In *Blakely*, Justice Scalia posits that—regardless of which sentencing framework a State uses—when the legislature sets specific parameters through its sentencing law, and the jury has the power to authorize the specific upper and lower bounds of the punishment through its factual determinations, then the judge cannot go beyond these parameters without the sentence being unconstitutional.⁷⁵ Thus, *Apprendi* puts forth a bright-line rule that seeks to constrain a judge's ability to exercise discretion in sentencing by

⁶⁹ *Id.* at 235.

⁷⁰ *Id.*

⁷¹ *Id.* at 232–33.

⁷² *Id.* ("This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.").

⁷³ *Blakely*, 542 U.S. at 301.

⁷⁴ See generally *Apprendi*, 530 U.S. 466.

⁷⁵ *Blakely*, 542 U.S. at 308.

limiting him to selecting a sentence term within the bounds set forth by the legislature and authorized by the jury’s finding of fact.⁷⁶

In contrast, the Court in *Booker* appears to be more concerned with creating more room for judicial discretion in sentencing decisions when it centers its decision around the “mandatory” nature of the Guidelines. The Court anchors the bulk of its decision on the claim that the Guidelines violate *Apprendi* because the statutory language for imposing a sentence requires judges to select a sentence in response to differing sets of facts.⁷⁷ However, this conclusion does not seem in line with the substance of *Apprendi*’s ruling because the issue is not whether a judge can use his discretion to select a sentence in response to differing sets of facts, it is whether the facts the judge is basing his decision on were found beyond a reasonable doubt by a jury.⁷⁸ Justice Stevens outlines this point in his dissent in *Booker*, asserting that the Federal Sentencing Guidelines as originally enacted do not violate the Sixth Amendment.⁷⁹ In reaching its conclusion, Justice Stevens asserts that the Court misinterprets the meaning of the statutory language with too narrow a reading when the Court understands the words “the court” to mean “the judge without the jury.”⁸⁰ Justice Stevens posits that, “as a textual matter, the word ‘court’ can certainly be read to include a judge’s selection of a sentence supported by a jury verdict.”⁸¹ Justice Stevens explains that, had the jury made the factual finding that the judge made, there would be no Sixth Amendment violation concerning the sentence imposed because the range would have been determined within statutory bounds with facts authorized by a jury.⁸²

Booker received a sentence of 360 months. His sentence was based on four factual determinations: (1) the jury’s finding that he possessed 92.5 grams of crack (cocaine base); (2) the judge’s finding that he possessed an additional 566 grams; (3) the judge’s conclusion that he had obstructed justice; and (4) the judge’s evaluation of his prior criminal record. Under the jury’s finding, the maximum sentence authorized by the Guidelines was a term of 262 months. *If* the 566 gram finding had been

⁷⁶ *Id.*

⁷⁷ *Booker*, 543 U.S. at 233.

⁷⁸ *See generally Apprendi*, 530 U.S. 466.

⁷⁹ *Booker*, 543 U.S. at 272.

⁸⁰ *Id.* at 286.

⁸¹ *Id.*

⁸² *Id.* at 272–73.

made by the jury based on proof beyond a reasonable doubt, that finding would have authorized a Guidelines sentence anywhere between 324 and 405 months . . . [t]hus, if the two facts, which in this case actually established two separate crimes, had both been found by the jury, the judicial fact finding that produced the actual sentence would not have violated the Constitution.”⁸³

Further, Justice Stevens seems to urge the point that a judge would still have a broad discretion within the Guidelines as originally designed:

[T]he judge could have considered Booker’s obstruction of justice, his criminal history, and all other real offense and offender factors without violating the *Sixth Amendment*. Because the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and [a judge’s] discretionary decisions *within* those ranges, they allow *ample* latitude for judicial factfinding that does not even arguably raise any *Sixth Amendment* issue.⁸⁴

Thus, the concern under the Sixth Amendment is not whether a judge *can* find facts when sentencing an offender, but whether the facts the judge does find are first authorized by a jury.

Second, the issue in *Apprendi* is not concerned with whether the particular framework of the sentencing system violates the Sixth Amendment, but whether the implementation of the system authorizes a judge’s interference with a power reserved to the jury by the Sixth Amendment.⁸⁵ Justice Steven’s position, in *Booker*, that the Guidelines could comply with *Apprendi* without altering the sentencing system as designed is supported by Justice Scalia’s opinion in *Blakely*.⁸⁶ In *Blakely*, Justice Scalia specifically addressed the issue of whether the particular sentencing scheme in question is the source of the Sixth Amendment violation that is at issue in *Apprendi*.⁸⁷ When Justice O’Conner posited the assumption that a determinate sentencing scheme would comport with the

⁸³ *Id.* (emphasis added) (internal citations omitted).

⁸⁴ *Id.* at 273 (emphasis added).

⁸⁵ *Blakely*, 542 U.S. at 308 (“[T]he Sixth Amendment by its terms is not a limitation on judicial power, *but a reservation* of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the power of the jury.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

Sixth Amendment because it imposes a limit on the freedom a judge has when making sentencing decisions,⁸⁸ Justice Scalia blatantly stated that the issue in *Blakely* “is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.”⁸⁹ Justice Scalia advanced this point by highlighting the lack of evidence there is to support the position that a sentencing system’s ability to withstand constitutional scrutiny is determinative on how much judicial discretion it authorizes.⁹⁰ In fact, Justice Scalia opined that a State whose sentencing scheme follows an indeterminate-sentencing model, allowing for more judicial discretion, would still be able to pass Constitutional muster because it does not interfere with the jury’s power:⁹¹

Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.⁹²

Thus, it does not seem that a sentencing system’s framework will necessarily determine its constitutionality. Further, even when a judicial sentencing decision is found to violate *Apprendi*, the legislature can respond by merely implementing *Apprendi*’s requirements into its current framework instead of adopting a completely new method.⁹³

Additionally, the conclusion that both Justice Scalia and Justice Stevens reached regarding judicial discretion would seem to be supported by the majority opinion when it states that the Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence

⁸⁸ *Id.* at 308 (“Justice O’Conner argues that, because determinate sentencing schemes involving less judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former.”).

⁸⁹ *Id.* at 308.

⁹⁰ *Id.* at 309.

⁹¹ *Id.* at 308 (“Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury’s traditional role of finding the facts essential to lawful imposition of the penalty.”).

⁹² *Id.*

⁹³ *Id.* at 309–10.

within a statutory range.”⁹⁴ Moreover, “when a trial judge exercises his discretion to select a specific sentence within a defined range, *the defendant has no right to a jury determination of the facts that the judge deems relevant.*”⁹⁵ Thus, it stands to reason why the majority in *Booker* would focus on the “mandatory” nature of the Guidelines in order to find the system unconstitutional, as opposed to simply invalidating the sentence due to the judge finding facts not authorized by the jury.⁹⁶ Undoubtedly, the majority’s true underlying concern was with how the guidelines limited a trial court judge’s discretion in sentencing; making the prescribed sentencing ranges “advisory” eliminates this threat.⁹⁷

Moreover, this shift toward broadening judicial discretion and away from the strict application of *Apprendi*’s rule took on a new light when the Court created an exception to what had appeared to be a bright-line rule under *Apprendi*.⁹⁸ In *Oregon v. Ice*, the Court faced the question of whether the Sixth Amendment required a jury determination of every fact used by a judge when deciding whether to impose a consecutive or concurrent sentence on an offender.⁹⁹ The Court opined that in light of historical practice and respect for State sovereignty—where a judge has traditionally had the discretion in this area—States’ have an interest in making legislative reforms regarding the imposition of multiple sentences.¹⁰⁰ In declining to extend *Apprendi*’s rule in *Ice*, the Court distinguished the cases, claiming that *Apprendi* has only been applied to “sentencing for a discrete crime, not—as [in *Ice*]—for multiple offenses, different in character or committed at different times.”¹⁰¹ Furthermore, a

⁹⁴ *United States v. Booker*, 543 U.S. 220, 233 (2005).

⁹⁵ *Id.* (emphasis added).

⁹⁶ *Id.* at 245–46.

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory . . . incompatible with today’s constitutional holding. We conclude that the provision must be severed and excised . . . [s]o modified, the federal sentencing statute, as amended, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges but it permits the court to tailor the sentences in light of other statutory concerns as well.

Id. (internal citations omitted).

⁹⁷ *Id.*

⁹⁸ *See also Oregon v. Ice*, 555 U.S. 160, 173–76 (2009) (Scalia, J., dissenting).

⁹⁹ *Id.* at 163.

¹⁰⁰ *Id.* at 164.

¹⁰¹ *Id.* at 167.

judge using facts in determining whether an offender’s sentences should run concurrently or consecutively does not encroach “upon facts historically found by the jury,” nor does it pose any threat to the jury’s role of serving as a procedural protection between the State and the Defendant at trial.¹⁰²

However, Justice Scalia addresses in his dissent that this is a strange conclusion and distinction to make.¹⁰³ Up until *Ice*, the Court had applied *Apprendi* as a hard-and-fast rule that if a State made an increase in a defendant’s sentence based on the judge finding facts not authorized by the jury, this would be a violation of the Sixth Amendment.¹⁰⁴ Moreover, in applying *Apprendi*’s rule, the Court previously rejected the argument that relied on the fact that States reserved the authority to determine sentencing, or that historical practice leaned toward common-law judges exercising discretion in determining sentences.¹⁰⁵ Thus, it becomes more apparent that the Court is moving away from a rigid application of *Apprendi*’s rule, and placing more importance on a judge’s discretion and a State’s sovereignty in determining sentencing.¹⁰⁶

However, the scope of the *Apprendi* rule has seen one more incremental change since *Ice*.¹⁰⁷ In 2013, the Court eliminated the distinction between facts that increase the maximum sentence length and facts that increase a mandatory minimum sentence length.¹⁰⁸ As it stands today, every defendant is afforded the protection of having any fact that would increase the mandatory minimum or the maximum length of a defendant’s sentence, other than that of a prior conviction, submitted to a jury and found beyond a reasonable doubt, unless the judge is finding a fact for the purpose of determining whether to impose consecutive or concurrent sentences.¹⁰⁹

¹⁰² *Id.* at 169. Historically all sentences would run consecutively, and the Court is making the assertion that the offender is actually benefiting from a sentencing system that allows the judge to find facts in order to determine whether an offender’s sentence should run concurrently. “Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.”

¹⁰³ *Id.* at 173 (Scalia, J., dissenting).

¹⁰⁴ *Id.* at 173–74 (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 174–75 (Scalia, J., dissenting).

¹⁰⁶ *Id.* at 167–70.

¹⁰⁷ See generally *Alleyne v. United States*, 570 U.S. 99 (2013).

¹⁰⁸ *Id.* at 2163–64.

¹⁰⁹ See *Alleyne*, 570 U.S. 99; *Apprendi*, 530 U.S. 466; *Ice*, 555 U.S. 160.

Moving forward, States must be mindful of the Constitutional jurisprudence on sentencing law.¹¹⁰ It seems there is no real limitation on the type of structure available to States when making decisions regarding which system to employ.¹¹¹ However, regardless of whether the State employs a determinate or indeterminate scheme, or any variation of the two, the State will need to ensure that its system does not leave any room for a judge to be able to find facts that were not authorized by a jury or admitted by the defendant, unless the determination goes to whether the sentences should run concurrently or consecutively.¹¹²

III. OHIO'S FELONY SENTENCING SYSTEM AND ITS JUDICIAL RESPONSE TO *APPRENDI*, *BLAKELY*, AND *BOOKER*.

A. *Ohio Sentencing Reform: Senate Bill 2 and "Truth-in-Sentencing"*

In 1993, the Ohio Sentencing Commission (hereinafter The Commission) submitted proposals to the Ohio General Assembly designed to reform Ohio's felony sentencing system with the hope that a new sentencing system would increase public safety, simplify sentencing laws, and help manage the prison population.¹¹³ With a prison population at 49,000 inmates and rising, there was an immediate need for a new system in order to manage the prison crowding.¹¹⁴ In 1996, the 121st General Assembly enacted S.B. 2, which adopted the proposals put forth by the Commission.¹¹⁵ Under S.B. 2, hundreds of Ohio's criminal code provisions reworked how judges sentenced convicted felons.¹¹⁶

The first significant change in Ohio's sentencing scheme was its move toward a "truth-in-sentencing" model.¹¹⁷ The "truth-in-sentencing" model generated from the goal to restore the confidence of Ohioans.¹¹⁸ Ohioans confidences had been largely lost under the prior indeterminate-sentencing system due to the uncertainty and the "fictions" that the sentencing laws

¹¹⁰ See *Alleyne*, 570 U.S. 99; *Apprendi*, 530 U.S. 466; *Ice*, 555 U.S. 160.

¹¹¹ See *Alleyne*, 570 U.S. 99; *Apprendi*, 530 U.S. 466; *Ice*, 555 U.S. 160.

¹¹² See *Alleyne*, 570 U.S. 99; *Apprendi*, 530 U.S. 466; *Ice*, 555 U.S. 160.

¹¹³ David J. Diroll, *A Decade of Sentencing Reform: A Sentencing Comm'n Staff Report*, OHIO CRIMINAL SENTENCING COMM'N, at 11 (Mar. 2007), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf> [<https://perma.cc/T5H4-J249>].

¹¹⁴ *Id.* at 7.

¹¹⁵ *Id.* at 11.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 14.

provided.¹¹⁹ Under the pre-S.B. 2 sentencing law, the felony sentencing system consisted of both indeterminate and determinate sentencing: the indeterminate sentences allowed “the Ohio Parole Board to release felons relatively early from prison or to hold them for long periods,” and the determinate sentences, which were reserved primarily for lower-level felony offenses, required release only after a fixed term was served.¹²⁰

Juxtapose this sentencing scheme with that implemented under S.B. 2’s sentencing law: Ohio adopted determinate sentences for all felony convictions, except murders and those offenders who were sentenced under previous law.¹²¹ This system imposed sentences with fixed terms: if a judge thought it was appropriate for an offender to get eight years, the offender would get eight years.¹²² Further, the new law eliminated the executive early release power of the Ohio Parole Board—an executive branch agency—and placed the power in the judges’ hands to hear requests for early release.¹²³ Ultimately, S.B. 2 provided the judge with more control over the *actual* length of the sentence that an offender would receive.¹²⁴

A second change under S.B. 2’s sentencing scheme was its implementation of a “guidance” system based on offense level.¹²⁵ Under this guidance system, a judge was directed by a “presumption” toward imposing prison time or, conversely, a “presumption” toward imposing a community control sanction based on what the level of the offense was.¹²⁶ Those “high level offenders,” convicted of first degree and second degree felonies, had a presumption of prison.¹²⁷ However, “lower level felons,” convicted of fourth degree and fifth degree felonies, had a presumption of

¹¹⁹ *Id.* (The public confidence under the indeterminate sentencing system ranges came from an uncertainty in *actual* sentence terms imposed because the laws would say one thing but do another: If a court wanted to assure that a rapist served, say, four years in prison, the judge would have sentenced the offender to “6 to 25” years. The 25 was hyperbole, given parole practices at the time. Even the “minimum” six years wasn’t always served. Each inmate was eligible for a decrease for good behavior. This “good time” reduction was supposed to be earned, but it was given so liberally that it appeared earned by breathing.)

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 11, 14.

¹²⁴ *Id.* (Under S.B. 2’s truth-in-sentencing, when a judge imposed an eight-year sentence on an offender, that sentence would ensure “[t]he defendant, the victim, and the public all knew that the offender was going to prison for eight years.”)

¹²⁵ *Id.* at 11–12.

¹²⁶ *Id.* at 12.

¹²⁷ *Id.*

receiving a community control sanction, unless the judge made one of several statutorily provided aggravating circumstances which would authorize the judge to depart from imposing the community control sanction and, instead, sentence the offender to serve prison time.¹²⁸ As a checks-and-balances measure, S.B. 2 also enacted an appellate level of review for when judges went against the guidance: any departure from the guided presumption had to be put on the record, and the judge's decision was "subject to scrutiny by appellate courts."¹²⁹

Along with the newly enacted guidance toward community control sanctions for offenders who were less threatening to the public, S.B. 2 authorized a broader range of potential options at a judge's disposal for imposing these sanctions, including a "local jail, halfway house, [] community based correctional facility . . . electronic monitoring, house arrest, intensive probation," financial sanctions, or "any reasonable combination" of sanctions available.¹³⁰ Under this sentencing system, the move toward keeping non-violent offenders out of prison, and using these community-based correctional methods instead, began showing progress on one of the underlying goals of S.B. 2: reducing Ohio's prison population.¹³¹

After S.B. 2's enactment, the prison population began to show a pattern of steady decline after experiencing decades of consistent growth;¹³² and this decline in prison population stayed consistent for the years to follow.¹³³ Those who were in prison were those more serious, violent, and repeat offenders, where "less menacing offenders" remained a part of society and received community sanctions.¹³⁴ The effect of S.B. 2 on prison population was apparent: a seven percent drop in the number of inmates "over capacity" within the first decade.¹³⁵ Further, the prison

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 20.

¹³² *Id.*

¹³³ *Id.*; see also *Institution Census Reports*, OHIO DEPT. OF REHAB. & CORR. (1997, 2001–2018), <http://www.drc.ohio.gov/reports/institution-census> [<https://perma.cc/83ZS-KJ5C>]; *Ohio's Prison and Jail Incarceration Rate 1978-2015*, PRISON POLICY INITIATIVE (May 2017), https://www.prisonpolicy.org/graphs/OH_Prison_Jail_Rate_1978-2015.html [<https://perma.cc/82NR-FS5X>].

¹³⁴ *Id.* at 20.

¹³⁵ David J. Diroll, *Prison Crowding: The Long View, with Suggestions – 2011 Monitoring Report*, OHIO CRIMINAL SENTENCING COMM'N, at 10 (Mar. 2011), <https://web.archive.org/web/20180510222703/https://www.supremecourt.ohio.gov/Boards/>

(continued)

population was at 45,962 inmates in January of 1997, and by 2005, the prison population had fallen and remained steady at roughly 44,000 inmates.¹³⁶ However, these improvements were undercut and the numbers began to move in the opposite direction when the Ohio Supreme Court re-wrote the guidance given to judges under S.B. 2’s sentencing law.¹³⁷

B. The “Foster Fix”

Following the United States Supreme Court decisions in *Apprendi*, *Blakely*, and *Booker*, the constitutionality of Ohio’s felony sentencing structure was called into question.¹³⁸ In *State v. Foster*, the Ohio Supreme Court consolidated four cases on appeal to address the question of whether Ohio’s felony sentencing structure violated the Sixth Amendment because of impermissible judicial fact-finding.¹³⁹ Taken together, the cases presented challenges to the Ohio statutes that require judicial fact-finding to impose (1) a sentence exceeding the minimum term for those who have never been to prison; (2) a sentence consisting of prison time instead of a sentence of community control for fourth- and fifth-degree felonies; (3) a repeat-violent-offender specification; (4) a major-drug-offender specification, and (5) consecutive sentences.¹⁴⁰ Despite the fact that the majority of the Ohio appellate courts determined that *Blakely* was inapplicable to Ohio’s sentencing structure, the Ohio Supreme Court found that portions of Ohio’s sentencing law violated the holding in *Blakely*.¹⁴¹ The Ohio Supreme Court rejected the State’s argument which attempted to distinguish Ohio’s sentencing scheme from the system employed by Washington,¹⁴² and the Court “elected to not split hairs about which facts are appropriate for judges and juries.”¹⁴³ Instead, the Ohio Supreme Court mimicked the United States Supreme Court’s method in *Booker* to *fix* everything in one fell swoop: “Everything within the broad sentencing

Sentencing/resources/Publications/MonitoringReport2011.pdf [https://perma.cc/KM2F-XZ MB].

¹³⁶ *Id.* (To demonstrate the significance of this reduction, Executive Director Diroll states, “This decade of ‘weight management’ under S.B. 2 saw the most significant leveling of the inmate population since 1974, *despite* having the tougher penalties on high end felons. It is the only prolonged period with static prison population in several decades.” (emphasis added)).

¹³⁷ Diroll, *supra* note 113, at 17.

¹³⁸ *Id.*

¹³⁹ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶¶ 1, 28.

¹⁴⁰ *Id.* at ¶ 28.

¹⁴¹ *Id.* at ¶¶ 50–83.

¹⁴² *Id.* at ¶¶ 50–51.

¹⁴³ Diroll, *supra* note 113, at 18.

ranges became available to judges [and] [t]he guidance in S.B. 2 that directs judges within the ranges is unconstitutional.”¹⁴⁴ In order to achieve this, the Court excised the language that required the judges to make findings before departing from issuing community control sanctions for low-level felonies, or minimum sentences for those higher level offenders who have never been to prison before.¹⁴⁵

Further, the Ohio Supreme Court claimed making the presumptive-sentencing guidelines “advisory” was the necessary remedy to make Ohio’s sentencing system comport with the United States Supreme Court decision in *Blakely*.¹⁴⁶ However, the drastic alteration of Ohio’s sentencing structure leaves one to question whether the Court’s underlying motive was really to give judges back their discretion because:

The Court in *Foster* did not limit its analysis in which a defendant faced a greater sentence, as was the factual predicate for the *Apprendi*, *Blakely*, and *Booker* cases. Rather, the Ohio Supreme Court deftly adapted the language in these cases to attack the S.B. 2 provisions limiting judicial discretion with respect to imposing longer sentences than the legislature has prescribed.¹⁴⁷

Not only was the Court’s remedy an incorrect application of the Sixth Amendment’s rule regarding an offender’s right to a jury trial under *Apprendi* and *Blakely*, but the Ohio Supreme Court’s solution in making Ohio’s sentencing system merely “advisory” for judges directly undercut goals the General Assembly had set out to achieve under S.B. 2.¹⁴⁸ Among these setbacks includes the progress Ohio had made in increasing consistency in sentencing and reducing its prison population.¹⁴⁹

The fix under *Foster*, effectively broadening the available range to which a judge has the discretion to sentence an offender, raised the issues of whether a lack of consistency in sentencing would return (as it was the

¹⁴⁴ *Id.* at 18–19.

¹⁴⁵ *Id.* at 19–20. “Accordingly, we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Foster*, 109 Ohio St.3d 1, 845 N.E.2d at 498, ¶¶ 98–99.

¹⁴⁶ *Id.* at ¶ 102.

¹⁴⁷ Ann Marie Tracey, *Has the Fat Lady Sung on Sentencing Guidelines? The Impact of Booker, Blakely, Apprendi and Foster on Ohio’s Sentencing Protocol*, 34 N. KY. L. REV. 71, 94 (2007) (Discussing the Ohio Supreme Courts analysis in *State v. Foster*).

¹⁴⁸ *Id.*

¹⁴⁹ Diroll, *supra* note 113, at 17.

case under pre-S.B. 2 law) and of what impact this broad discretion would have on Ohio’s prison population.¹⁵⁰ As the Director of the Ohio Sentencing Commission, David Diroll, predicted correctly in 2007:

After *Foster*, it seems logical to assume that there will be new pressures on Ohio’s prison population. Judges no longer have to justify giving a prison sentence beyond the minimum on a first commitment to prison, giving the maximum sentence, or stacking consecutive terms. Judges who felt constrained by these aspects of S.B. 2 have been liberated.¹⁵¹

Since the Ohio Supreme Court issued its decision in *Foster*, the prison population has seen a steady increase.¹⁵² From 2006 to 2010, Ohio’s prison population had risen from 46,871 to 50,880 inmates.¹⁵³ With projections indicating the prison population was only going to continue increasing, without some type of reform, this incarceration problem would cost hundreds of millions in additional State spending.¹⁵⁴

IV. OHIO’S LEGISLATIVE RESPONSE: HOUSE BILL 86

By 2011, prison overcrowding in Ohio was approaching a frightening record: O.D.R.C. was thirty-three percent over capacity and nearing 51,000 inmates.¹⁵⁵ In order to address this problem, among others, House Bill 86 was enacted. This legislative reform made various changes to Ohio’s felony sentencing scheme; among them, it codified the Ohio Supreme Court’s decision in *Foster* expanding judicial discretion.¹⁵⁶ This criminal justice reform was supposed to reduce Ohio’s prison overcrowding and

¹⁵⁰ *Id.* at 19–20.

¹⁵¹ Diroll, *supra* note 113, at 20.

¹⁵² *Institution Census Reports*, *supra* note 133; *Ohio’s Prison and Jail Incarceration Rate 1978-2015*, *supra* note 133.

¹⁵³ *Id.*

¹⁵⁴ Michael Shields, *Post 2018-2019 Budget Bite: Alternatives to Incarceration*, POLICY MATTERS OHIO (Oct. 16, 2017), <https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/budget-policy/post-2018-2019-budget-bite-alternatives-to-incarceration> [https://perma.cc/ZT8D-Q3NL].

¹⁵⁵ Matthew Mangino, *Ohio’s Prison Population Rising*, JUSTICE CTR.: THE COUNCIL OF STATE GOVERNMENTS (July 2, 2016), <https://csgjusticecenter.org/jr/ohio/media-clips/ohios-prison-population-rising/> [https://perma.cc/YK6X-HDP9].

¹⁵⁶ *Enacted House Bill 86: Felony Sentencing & Juvenile Justice*, OHIO JUDICIAL CONFERENCE (July 20, 2011), <http://hirenetwork.org/sites/default/files/Ohio%20Judicial%20Conference%20-%20HB%2086%20Enacted%20-%20Summary.pdf> [https://perma.cc/A5W-BMWR].

was “projected to save taxpayers \$46 million by 2015.”¹⁵⁷ However, H.B. 86 was a drastic failure.

By October 2012, numbers showed that Ohio’s prison population was still on the rise, despite the reform’s efforts.¹⁵⁸ When the reform showed no progress in addressing Ohio’s rising prison population problem, O.D.R.C. “speculated that implementation challenges were greater than anticipated, especially with regard to educating judges on the [H.B. 86] reforms.”¹⁵⁹ Further, the projections were revised to indicate a “smaller impact on the prison population than originally projected.”¹⁶⁰ However, even these smaller projections didn’t hold up.¹⁶¹

From a legal standpoint, this result is not surprising. The two major changes H.B. 86 made regarding sentencing laws had not shown additional improvement to Ohio’s prison population because judicial practice was already tailored to H.B. 86’s specified practices under S.B. 2.¹⁶² First, the law placed limits on judicial sentencing for fourth and fifth degree felonies, requiring that judges impose a community control sanction.¹⁶³ However, judges could sentence an offender to prison, regardless of the laws “mandatory” nature, *if* the court “believes no appropriate community sanction [was] available” and O.D.R.C. could not provide the court an alternative sanction.¹⁶⁴ Thus, this provision of H.B. 86 did not actually change much about how low-level felonies were already being sentenced by prior law.

The second change with regard to Ohio’s felony sentencing structure under H.B. 86 was merely to codify the decision in *Foster*.¹⁶⁵ The bill formally repealed the language from provisions on the minimum, maximum, and consecutive sentences that remained in the code that the Ohio Supreme Court felt did not comport with the Constitutional requirements of judicial sentencing as they pertain to the Sixth Amendment.¹⁶⁶ In terms of fixing the guidance toward imposing the

¹⁵⁷ Mangino, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See David J. Diroll, *H.B. 86 Summary: The 2011 Changes to Criminal and Juvenile Law*, OHIO CRIMINAL SENTENCING COMM’N (Sept. 26, 2011), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/legSummaries/HB86Summary.pdf> [<https://perma.cc/7U9A-LKRW>].

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.* at 8.

¹⁶⁵ *Id.* at 9–10; See also House Bill 86, *supra* note 156, at 1.

¹⁶⁶ Diroll, *supra* note 162, at 10.

minimum sentences, H.B. 86 removed the language “to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources*” because “*determine* sounds like *make findings*” and that runs the risk of being unconstitutional under *Apprendi*, *Blakely*, and *Foster*.¹⁶⁷ In regard to the limitation S.B. 2 placed on imposing maximum sentences, absent some aggravating circumstances, H.B. 86 simply eliminates the language enacting this discouragement completely.¹⁶⁸ Thus, it neither leaves encouragement for judges to impose minimum sentences on those being committed to prison for the first time, nor reserves the maximum sentences to those offenders who commit the most extreme variation of an offense.¹⁶⁹ These changes to S.B. 2’s implementation under *Foster* alone could explain how “prison terms have increased by 5 months, on average” after these S.B. 2 “provisions helped to keep the prison population static between 1997 and 2006.”¹⁷⁰

The last major excision that *Foster* made to S.B. 2’s design was to strike the provision that allowed the judges to fact find in order to determine whether a consecutive or concurrent sentence was necessary.¹⁷¹ However, the Ohio Supreme Court reversed its decision concerning a judge’s ability to find facts when determining whether to impose a consecutive or concurrent sentence on an offender.¹⁷² Thus, H.B. 86 revived the provisions from S.B. 2 that provided for the presumption toward imposing concurrent sentences and limited the imposition of consecutive sentences.¹⁷³ However, it is unclear how much effect reenacting this provision since it was reenacted without the other portions of S.B. 2 which provided for the judicial guidance, as Diroll states:

The Senate rejected simpler language in the House-passed version in favor of the pre-existing statutory wording. The reason: the old language has been tested in the courts since

¹⁶⁷ *Id.* (emphasis added) (internal quotation marks omitted) (Further, “[t]he Senate rejected House-passed language (suggested by the Sentencing Commission) to simply encourage the minimum as a matter of state policy without requiring ‘findings,’ ‘determinations,’ or special appellate review.”).

¹⁶⁸ *Id.* (“The Senate rejected the House-passed language that would have saved the guidance on maximum terms in a *Foster*-friendly way.”).

¹⁶⁹ *Id.* at 9.

¹⁷⁰ *Id.* at 10.

¹⁷¹ *Id.*

¹⁷² See generally *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768; see also *Oregon v. Ice*, 555 U.S. 160, 160 (2009).

¹⁷³ Diroll, *supra* note 162, at 10.

1996. However [,] [t]he Senate amendments remove the companion direction to judges to give reasons for consecutive sentences, which could limit the value of the revived language as a check on the prison population.¹⁷⁴

Further, H.B. 86 removes the secondary “check” on judges by removing various portions of the appellate review, which was in place to ensure a judge follows the guidance appropriately.¹⁷⁵

Moreover, H.B. 86 was doomed from the start for two reasons. First, the changes that were made to the sentencing law were already effectively in place, and had already showed no positive effect on Ohio’s prison population.¹⁷⁶ Furthermore, merely making changes to the language, but not the substance of the law, will not cut it because Ohio’s mass incarceration problem needs more than merely “trying to make state law more clear and consistent”¹⁷⁷ As Stephen JohnsonGrove, deputy director of the Justice and Policy Center, asserted: “Better grammar is not going to make us safer and it’s not going to shrink our crisis-level overcrowded prisons”¹⁷⁸ Hancock County Common Pleas Judge Routson “expressed early criticism about House Bill 86,” claiming that “law makers superficially targeted fourth- and fifth-degree felons”¹⁷⁹ Due to the fact that low-level felons make up nearly half of all inmates¹⁸⁰—and it seems illogical to house nonviolent felons among murderers and rapists—it would appear that fourth- and fifth-degree felons are the proper population of inmates to target in hopes of reducing the prison population while keeping the public safe. However, the lawmakers failed to take into consideration that “even before the law, judges rarely sentenced these offenders to prison for a first offense”; it was much more likely that a nonviolent offender were to end up in prison because of later

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 11.

¹⁷⁶ Jim Siegel, *Legal groups detail ways to reduce Ohio’s prison population*, THE COLUMBUS DISPATCH (Mar. 26, 2016), <http://www.dispatch.com/content/stories/local/2016/03/26/legal-groups-detail-ways-to-reduce-ohios-prison-population.html> [<https://perma.cc/J524-442Z>].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Ryan Dunn, *Law Didn’t Shrink Ohio Prison Population*, COURIER (FINDLAY, OHIO), Aug. 2, 2014, 2014 WLNR 21134275.

¹⁸⁰ *Id.*

violating the terms of his community control.¹⁸¹ Thus, when the law enacted merely codifies current legal practice and has not shown any progress in reaching overarching goals, it stands to reason that there will be no further progress.¹⁸²

Second, H.B. 86 diagnosed the legal issue incorrectly when it codified the decision in *Foster* in hopes of reducing Ohio’s prison population. This is because the Supreme Court of Ohio confused the “state of *relevant* federal constitutional law” when issuing its decision in *Foster*.¹⁸³ Moreover, the Ohio Supreme Court decision “painted with a wide brush” and applied the *Booker* remedy without giving a close enough consideration to the case law.¹⁸⁴ Had the Ohio Supreme Court given a closer analysis of *Apprendi* and its progeny, it would have seen two things: (1) the Sixth Amendment’s concern is not whether judicial fact-finding occurs, but whether the facts the judge is using were first authorized by the jury within the limits set by the legislature; and (2) whether a judge has limited or unlimited discretion is not determinative of whether a sentencing system will comport with the Sixth Amendment.¹⁸⁵

Further, the Ohio Supreme Court failed to notice that many of the findings the judge makes under S.B. 2 do not resemble those that entail a factual distinction that would be left for the jury; rather, they pose more of a legal question because “[d]eciding whether a particular term ‘demeans the seriousness of the conduct,’ or ‘is the ‘worst form of the offense,’ or ‘is not disproportionate to the conduct’ are logically issues for the judge based on his or her sentencing experience.”¹⁸⁶ The decision in *Foster* may have carried the stamp of the Sixth Amendment under *Apprendi*, *Blakely*, and *Booker*, but it was really a “Trojan Horse” and

in its belly was a strong sense of separation of powers that was offended by S.B. 2’s attempts at meticulously guiding judicial discretion. After all, the case didn’t really do much to reinforce the right to a jury trial, especially since it

¹⁸¹ *Id.* (emphasis omitted) (“The notion that there’s this 19-year-old kid who made the one mistake in his life and he’s being shipped to Orient (prison) is a myth,” Routson said . . .”).

¹⁸² *See id.* (Case Western Reserve University School of Law professor, Lewis Katz, believes “[t]his prison reform weakly addressed three decades of casually incarcerating nonviolent criminals.”).

¹⁸³ Diroll, *supra* note 135, at 12.

¹⁸⁴ *Id.*

¹⁸⁵ *See Blakely*, 542 U.S. at 308–09.

¹⁸⁶ Diroll, *supra* note 135, at 13.

ultimately gave judges more power to sentence without restrictions.¹⁸⁷

This is further evidenced by the data on judicial decisions in sentencing, which indicate “the number of offenders receiving the minimum sentence favored by S.B. 2 on first commitment to prison has declined after *Foster*” and “the use of the maximum term, disfavored by S.B. 2, ha[d] appreciably increased since *Foster*.”¹⁸⁸ Evidently, judges after *Foster* were content with not having their “length-of-stay” decisions be guided by S.B. 2.¹⁸⁹

Although the Ohio Supreme Court may not have contemplated the drastic long-term effect on prison overcrowding that the decision in *Foster* would have, clearly the provisions did matter because it has only been since the guidance for judges was struck down that the prison population turned back towards an upward climb.¹⁹⁰ One thing is clear from the fallout after the “*Foster* Fix”: unlimited judicial discretion is not the answer to Ohio’s mass incarceration problem.¹⁹¹ Further, finding an effective way to limit or guide judicial discretion in sentencing is the only legal way to make progress in reducing Ohio’s prison population.

V. THE NEXT STEPS FOR OHIO’S PRISON POPULATION AND FELONY SENTENCING LAW

A. *The Ohio Criminal Justice Recodification Committee’s 2017 “Comprehensive” Sentencing Plan and Senate Bill 66*

Since H.B. 86, there have been various other legislative changes, which have had little or no effect on Ohio’s prison population.¹⁹² In recent years, Ohio’s prison population has reached staggering proportions, showing a twelve percent increase in the last decade “despite violent crime reaching a 30-year low”¹⁹³ In hopes to find a solution to the prison population problem, among other things, the legislature created a panel

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 14 (emphasis added).

¹⁸⁹ *See id.*

¹⁹⁰ *Id.* (“DRC estimates that the *Foster* decision—while increasing sentences by just under five months per inmate—accounts for a gain of 4,000+ inmates since the ruling . . .”).

¹⁹¹ *See id.*

¹⁹² *See generally* Jenna Grant, *New Felony Sentencing Guidelines Take Effect*, COURT NEWS OHIO (Apr. 1, 2013), http://www.courtnewsOhio.gov/happening/2013/sentencingGuidelines_040113.asp#.XIFtIJNKjUI [<https://perma.cc/7FTS-DVXT>].

¹⁹³ Siegel, *supra* note 176.

called the Ohio Criminal Justice Recodification Committee to cultivate “smart on crime” policies to move Ohio forward.¹⁹⁴

The most recent legislative change in Ohio’s felony sentencing law, adopted from the Ohio Criminal Justice Recodification Committee’s comprehensive proposal, may be a promising step in regard to reducing prison overcrowding.¹⁹⁵ Senate Bill 66 (hereinafter S.B. 66) went into effect in October of 2018 and it has made several changes to Ohio’s sentencing law.¹⁹⁶ First, it included “rehabilitating the offender” as a purpose for felony sentencing.¹⁹⁷ Expanding the overriding principles of felony sentencing to include rehabilitation requires the court provide a sentence which is “reasonably calculated” to achieve the offender’s rehabilitation, as well as the other felony sentencing principles under the pre-existing law.¹⁹⁸ Second, the bill enacts a limitation on judicial sentencing for offenders convicted of fourth- and fifth-degree felonies, where judges are required to sentence an offender to a community control sanction, unless the offense is one of violence or a “qualifying assault.”¹⁹⁹ Further, if an offender were to violate the terms of his community control sanction, the law limits the judge to sanctioning the offender to a community-based correctional facility or jail as a penalty, as opposed to a

¹⁹⁴ *Id.*

¹⁹⁵ See Andrew Welsh-Huggins, *Ohio Prison Population Again Drops Below 50,000 Inmates*, ASSOCIATED PRESS (Dec. 20, 2017), <https://www.usnews.com/news/best-states/ohio/articles/2017-12-20/ohio-prison-population-once-again-drops-below-50-000-inmates> [https://perma.cc/856W-8FV6]; see also *Monthly Fact Sheet*, OHIO DEP’T OF REHAB. & CORR. (Oct. 2018), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Oct%202017%20Fact%20Sheet.pdf?ver=2017-10-20-100212-670> [https://perma.cc/WR8K-UHG3]; *Monthly Fact Sheet*, OHIO DEP’T OF REHAB. & CORR. (Dec. 2018), <https://drc.ohio.gov/Portals/0/Dec%202018%20Fact%20Sheet.pdf> [https://perma.cc/JC6C-C9RT] (Ohio’s prison population has decreased by 932 inmates between October 2017 and December 2018.); Siegel, *supra* note 176.

¹⁹⁶ S.B. 66, 132nd Gen. Assemb. (OH. 2017).

¹⁹⁷ Dennis M. Papp, *S.B. 66 Final Bill Analysis*, OHIO LEGISLATIVE SERV. COMM’N, at 1, <https://www.legislature.ohio.gov/download?key=11103&format=pdf> [https://perma.cc/B8XE-S4S6].

¹⁹⁸ *Id.* at 3.

The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.

OHIO REV. CODE § 2929.11 (2018).

¹⁹⁹ Papp, *supra* note 197, at 3.

prison sentence.²⁰⁰ Third, it makes intervention in lieu of conviction more obtainable for those charged with offenses where drugs or alcohol were a contributing factor to perpetrating the offense.²⁰¹ Lastly, it loosens the requirements for an offender convicted of low-level felonies to be eligible for having their record sealed.²⁰²

Although these changes may be promising, it is hard to know SB 66's true effect because the steady decline in prison population began in September of 2017—before SB 66's implementation.²⁰³ In fact, the noteworthy drop below 50,000 inmates occurred within the first two months of SB 66's enactment.²⁰⁴ Thus, it seems far too little time passed after enactment to suggest a strong relationship between the legal changes of S.B. 66 and the decrease in prison population. Additionally, there is little research to support that these changes have directly affected the prison population. Over time, the effect of this law may become clearer.

B. Will Senate Bill 66 Succeed?

When taking a closer look at S.B. 66's sentencing scheme, it will not succeed because it is unconstitutional under *Foster*. Under S.B. 66, judges

²⁰⁰ *Id.* at 4.

²⁰¹ *Id.* at 6–8. (Pursuant to R.C. 2951.041, Intervention in Lieu of Conviction is a treatment program the offender undergoes while under supervision of the court. If they complete the program successfully, they can have their case dismissed). See OHIO REV. CODE § 2951.041(D)&(E) (2018).

²⁰² *Id.* at 9–10.

²⁰³ See *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Sept. 2017), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Sept%202017%20Fact%20Sheet.pdf?ver=2017-09-12-112010-787> [<https://perma.cc/R8TS-N3BZ>]; *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Oct. 2017), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Oct%202017%20Fact%20Sheet.pdf?ver=2017-10-20-100212-670> [<https://perma.cc/JNN3-YERR>]; *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Nov. 2017), <https://drc.ohio.gov/Portals/0/Reentry/Nov%202017%20Fact%20Sheet.pdf?ver=2017-11-27-102816-780> [<https://perma.cc/4EMD-3P38>]; *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Dec. 2017), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Dec%202017%20Fact%20Sheet.pdf?ver=2017-12-21-135231-917> [<https://perma.cc/LV6V-SF9E>]; *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Jan. 2018), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2018/Jan%202018%20Fact%20Sheet.pdf?ver=2018-01-18-154326-453> [<https://perma.cc/K4JY-LQEF>].

²⁰⁴ See Andrew Welsh-Huggins, *supra* note 195 (“Ohio’s adult prison population has fallen below 50,000 inmates for the first time in more than four years, giving hope to officials trying to reduce the number of inmates behind bars.”); see also *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Oct. 2017), <https://drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/Oct%202017%20Fact%20Sheet.pdf?ver=2017-10-20-100212-670> [<https://perma.cc/R8TS-N3BZ>]; *Monthly Fact Sheet*, OHIO DEP'T OF REHAB. & CORR. (Dec. 2017), <https://drc.ohio.gov/Portals/0/Dec%202018%20Fact%20Sheet.pdf> [<https://perma.cc/CC65-X568>].

are required to impose a community control sanction for fourth and fifth degree felonies that are not offenses of violence or qualifying assaults, if certain facts are found.²⁰⁵ Under *Foster*'s logic, this would essentially create a type of mandatory minimum for purposes of a Sixth Amendment analysis.²⁰⁶ Thus, when the court is given the discretion to impose prison time, instead of a community control sanction, *if it finds certain aggravating factors*,²⁰⁷ then it violates *Foster*.²⁰⁸

Putting aside its unconstitutionality, there has been some backlash from the legal community regarding S.B. 66's effect on public safety, implementation, and funding.²⁰⁹ It seems S.B. 66's approach to improving prison overcrowding is to eliminate the majority of judicial discretion in sentencing altogether.²¹⁰ These kinds limitations on judicial discretion have not gone without their criticisms. Some believe simply “[l]imiting judges’ sentencing decisions [may] not meet state expectations” of reducing the prison population.²¹¹ Critics suggest reducing the prison population will take looking “beyond judges and sentencing.”²¹² Improvement in other areas of criminal law can help to expand the meaningful options judges have when sentencing offenders, such as reducing mandatory minimum prison sentences, redefining felony offenses, or increasing the availability of community control sanctions in non-urban counties.²¹³

An additional measure to keeping low level offenders out of prison—aside from restricting judges from sentencing these offenders to prison on a first-time offense, or community control sanction violation—is to improve the status of reentry programs and reducing recidivism of those offenders who are already housed in prison.²¹⁴ Treatment programs are a start for

²⁰⁵ OHIO REV. CODE. § 2929.13(B)(1)(a)(i)–(xi) (2018).

²⁰⁶ See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, 489–90, ¶¶ 52–64 (*Foster* equates a presumption of community control to a “presumptive minimum” for determining the minimum sentence for Sixth Amendment purposes).

²⁰⁷ OHIO REV. CODE § 2929.13(B)(1)(b)(i)–(xi) (2018).

²⁰⁸ See *Foster* at ¶¶ 52–64, 849 N.E.2d at 489–90.

²⁰⁹ See generally Ed Balint, *Judges: New Felony Sentencing Law puts Stark at Risk*; CANTONREP (Oct. 3, 2017), <http://www.cantonrep.com/news/20171003/judges-new-felony-sentencing-law-puts-stark-at-risk> [https://perma.cc/N49T-T44D].

²¹⁰ *Id.*; see OHIO REV. CODE § 2929.13(B)(1)(a) (2018) (“[T]he court *shall* sentence the offender to a community control sanction . . .”) (emphasis added).

²¹¹ *Dunn*, *supra* note 179.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ EDWARD LATESSA ET AL., UNIV. OF CINCINNATI, EVALUATION OF OHIO’S PRISON PROGRAMS: FINAL REPORT 23–28 (2015), <https://www.uc.edu/content/dam/uc/corrections/d> (continued)

those who have not been in prison or are struggling with a substance abuse problem;²¹⁵ further, certain reentry programs have also shown positive results in the way of reducing recidivism for those who are getting out of prison. Therefore, improving program designs and increasing availability of reentry programs may show progress toward reducing prison overcrowding.²¹⁶

Moreover, critics do not believe S.B. 66 is a long-term solution.²¹⁷ Given the type of changes S.B. 66 implements, it may turn out to be more of a “weight management” plan, as opposed to a diet for Ohio’s prison population.²¹⁸ If this recent decrease in prison population hits a plateau, a proposal for sentencing law that provides for more limitations on “length-of-stay” in sentencing may be the next step in bringing Ohio prisons back down to capacity.²¹⁹ One possible option would involve reviving the guidance under S.B. 2, which encourages imposing the minimum sentence possible on an offender, while still achieving overarching-sentencing principles, or shortening the increments available for sentencing high- and mid-level felonies.²²⁰

However, this option seems precarious with Ohio’s determinate sentences because—although the court in *Foster* misapplied the law when diagnosing the problem—S.B. 2, nonetheless, remains unconstitutional under *Foster*. Though, Ohio could resurrect these limitations under S.B. 2 and be sure to avoid scrutiny under *Foster* and *Apprendi* if the law provides for a jury determination of aggravating factors—during trial or at a bifurcated sentencing proceeding—being used by judges to impose more than the minimum sentence.²²¹ Following *Apprendi*, the Kansas legislature

ocs/IntheNews/Prison%20Study%20Final%20Report%202010-26-15.pdf [https://perma.cc/UH9S-E846].

²¹⁵ Jackie Borchart, *Ohio bill could reduce prison time for nonviolent offenders who violate parole*, CLEVELAND METRO NEWS (Feb. 22, 2017), http://www.cleveland.com/metro/index.ssf/2017/02/ohio_bill_would_reduce_prison.html [https://perma.cc/85MH-WYMK].

²¹⁶ LATESSA ET AL., *supra* note 214, at 24 (Vocation/apprenticeship, college classes, unit management programs, and recovery services programs have been shown to be generally effective in reducing recidivism).

²¹⁷ *See generally* Ed Balint, *supra* note 209.

²¹⁸ *See generally* Diroll, *supra* note 135.

²¹⁹ *Id.* at 15.

²²⁰ *Id.* at 18.

²²¹ *See Booker*, 543 U.S. at 261 (this approach was advocated by the dissent when discussing how to revise the federal sentencing guidelines, as well as expounding that when judges wish to depart upward, they are also able to consider any facts to which the defendant pleads guilty and waives his rights under *Apprendi/Blakely*. *See id.* at 328 (Breyer, J., dissenting)).

implemented a version of this bifurcated proceeding by enacting a bifurcated jury procedure.²²² Moreover, the Court in *Blakely* held this bifurcated-proceeding approach was a constitutional method for correcting sentencing schemes that violated the Sixth Amendment.²²³ Although this option may pass constitutional muster, implementing a bifurcated-jury proceeding will do little to reduce prison population.²²⁴

C. Indeterminate sentences as a practical and effective solution.

In order to ensure Ohio’s sentencing scheme withstands constitutional scrutiny moving forward, the General Assembly must implement indeterminate prison terms for felonies in place of the current definite prison terms. Indeterminate sentencing passes constitutional muster because it does not interfere with the jury’s power; although the judge may find facts, the sentence does not increase beyond the legislature’s authorized minimum or maximum sentence in any way when imposing a sentence within the range.²²⁵ Simultaneously, indeterminate prison terms promote rehabilitation as a purpose for Ohio’s felony sentencing, a purpose enacted under S.B. 66.²²⁶ Moreover, indeterminate sentences will address the legal community’s concerns about limiting judicial discretion. Judges have more discretion when they can determine a sentence out of a range of possible sentences, as opposed to selecting from a list of definite sentences, because they have the freedom to assess specific characteristics of the offender and the offense, and provide a sentence that will more effectively promote rehabilitation and protect public safety.²²⁷ Further, a well-crafted

²²² Terri Savely, *Sentencing Guidelines*, 86 J. KAN. B. ASSN. 23, 25–27 (2017), https://cdn.ymaws.com/www.ksbar.org/resource/dynamic/blogs/20170912_144354_15115.pdf [<https://perma.cc/6Q5L-J733>].

²²³ *Blakely*, 542 U.S. at 309.

²²⁴ See Savely, *supra* note 222, at 27–30 (Savely discusses Kansas’ struggle to reduce its growing prison population. Clearly, Kansas having a bifurcated proceeding has done little to decrease Kansas’ prison population since it has been on the rise prior to implementing the bifurcated proceeding).

²²⁵ *Blakely*, 542 U.S. at 309 (“Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury’s traditional role of finding the facts essential to lawful imposition of the penalty.”).

²²⁶ See MICHAEL TONRY, WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT 3–4 (2011) (indeterminate sentencing promotes utilitarian principles, such as rehabilitation).

²²⁷ See *Blakely*, 542 U.S. at 309.

Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser

(continued)

indeterminate sentencing scheme will also increase the Parole Board's role in reducing prison population. The Parole Board knows the most about the prisoners in its prisons and giving it the power to reward good prisoners and release those who are well-behaved and rehabilitated will encourage prisoners to work harder to get better and will allow the Parole Board to make more room in Ohio's prisons.

Although indeterminate prison terms pose many benefits, they must be carefully crafted in order to be an effective solution to reducing Ohio's prison population. If the sentencing range prescribed to each felony is too broad, prison population may not improve because unlimited judicial discretion may result in extended prison terms and inconsistency in sentencing, as we have seen post-*Foster*. Thus, it is imperative that judicial discretion in a defendant's length-of-stay is limited.²²⁸ Accordingly, the prison ranges prescribed for each level of felony needs to be narrow enough to sufficiently limit judicial discretion; however, they must also be broad enough to provide the parole board the appropriate discretion in releasing rehabilitated prisoners.

VI. CONCLUSION

For decades, Ohio has struggled with managing its increasing prison population. In 1996, Ohio prisons' population growth saw some relief when the legislature enacted S.B. 2, which placed limitations on judicial discretion in sentencing. However, these efforts were effectively eradicated by the Ohio Supreme Court's decision in *State v. Foster* in 2006. Popularly known as the "*Foster* Fix," the Ohio Supreme Court's decision rewrote the sentencing law put in place by S.B. 2 by allowing unfettered judicial discretion in sentencing, which undermined all the progress that had been made in reducing prison overcrowding. It was at this time that the prison population turned back toward a pattern of steady increase once again. Since *Foster*, the Ohio General Assembly has taken many efforts to combat the rising prison population. Most recently, the legislature enacted S.B. 66 in 2017, which revives some limitations on judicial discretion in sentencing. In the year since implementation, Ohio's prison population has decreased. However, S.B. 66's sentencing scheme will ultimately fail as unconstitutional under *Foster*. As it stands now, Ohio State prisons were only built to house roughly 38,600 inmates, and as

sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

²²⁸ For instance, lowering the maximum authorized sentence by each range.

of December of 2018, O.D.R.C. housed over 49,250 inmates, remaining more than 10,000 inmates over capacity.²²⁹ Although some improvement has occurred, there is more progress to be made in combating Ohio’s decades-old problem of prison overcrowding. The solution to effectively reducing Ohio’s prison population, which will also withstand constitutional scrutiny, is to enact a sentencing scheme which utilizes indeterminate sentence ranges that limit length-of-stay in sentencing decisions.

²²⁹ See Siegel, *supra* note 176; see also *Ohio prison inmate population continues slow decline*, ASSOCIATED PRESS (Jan. 2018), <http://www.wfmj.com/story/37232465/ohio-prison-inmate-population-continues-slow-decline> [<https://perma.cc/93YA-QPWB>].

