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TO: House Criminal Justice Subcommittee on Criminal Sentencing

FROM: Gary Daniels, Chief Lobbyist, ACLU of Ohio

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RE: Criminal justice issues in Ohio

To Co-chairs Grendell and Galonski, and members of the House Criminal Justice Subcommittee on Criminal Sentencing, thank you for this opportunity to present remarks on criminal justice issues and reform in Ohio. My name is Gary Daniels, and I am Chief Lobbyist for the ACLU of Ohio.

The stated purpose of this hearing is to review “ways the legislature can protect the public, make laws less complicated, reform prisons and assist rehabilitated offenders who are looking for a second chance.”

It is my goal to broadly address all those issues with specific concerns and recommendations as follows:

BACKGROUND

As I believe members of this committee are aware, the ACLU of Ohio is very active here at the Statehouse with our main priority being Ohio’s mass incarceration crisis and the various issues that contribute to it. Our biggest, but not only, motivation for the amount of resources and attention we pay to these issues are because all aspects of our criminal justice system negatively impact people and communities of color far more than their white counterparts.

Of course, our efforts are not limited to the Ohio Statehouse. We engage in these efforts and seek reform around the state and in local communities. Such efforts are also not limited to Ohio; the ACLU is immersed in these issues at the federal level and in every state across the country.

In Ohio, we have numerous mass incarceration problems at all levels. One of the most discussed, but rarely addressed, problems is the size of our prison population. Ohio prisons have been dangerously overcrowded for decades. In a system designed to accommodate approximately 37,000 people, we instead have almost 50,000 people locked up. The blame for this falls squarely on the legislature.

STATEHOUSE-TO-PRISON PIPELINE

It is no exaggeration to say every single week the Ohio legislature is in session one, if not all, of the following are true: Bills are introduced, heard by committees, or passed that a) create new crimes, b) enhance existing sentences, or c) expand the scope of current laws to apply to more people or actions.

The end result is more people go to prison, and they go for longer periods of time. After experiencing a slight reduction in prison population in recent years, the system's numbers now continue to climb. The ACLU of Ohio (among others) predicts our prison population will reach an all-time high in the next several years.

This is primarily because of last session's passage of Senate Bill 1, which dramatically raised the penalties for fentanyl and fentanyl-related offenses, and Senate Bill 201, which brought back indefinite sentencing for a host of felony offenses. Putting many more people in prison for longer periods of time is exactly what these bills were intended to do, and they will succeed at that.

This session, Senate Bill 55 raises penalties for many drug-trafficking offenses. It was passed by the Senate and currently awaits a House floor vote. If passed, this bill will also add many more to prison for longer periods. Again, by design.

These are not the only examples but they are the three that will most negatively impact our prison population for years to come. Indeed, the amount of bills introduced and/or passed to lock people up are so prevalent the ACLU of Ohio coined this phenomenon the "Statehouse-to-Prison Pipeline" after a similar phenomenon, the school-to-prison pipeline.

We are so concerned about this ongoing, thoroughly bipartisan problem we released reports after each of the past two legislative sessions detailing the breadth of this issue. For these reports, we read through all 2,148 bills introduced during that four year period to identify those that put lock more people up, enhance sentences, and expand current law. It should be noted locking up more people is the primary purpose of many of these bills while others have this effect but are only a portion of the bill's intended purpose. Here is what we found:

132nd OGA (2017-2018)

- 1,114 bills introduced. 796 by the House, 348 by the Senate
- House bills introduced contributing to Pipeline = 94
- Percentage of all House bills = 11.8%
- Senate bills introduced contributing to Pipeline = 43
- Percentage of all Senate bills = 12.3%
- Total bills that became law = 22

131st OGA (2015-2016)

- 1,004 bills introduced. 628 by the House, 376 by the Senate
- House bills introduced contributing to Pipeline = 67
- Percentage of all House bills = 10.6%
- Senate bills introduced contributing to Pipeline = 24
- Percentage of all Senate bills = 6.4%
- Total bills that became law = 16

As you can see, at least from 2015-2018, the problem is getting worse, not better. This is especially true in the Senate which almost doubled from one session to the next the amount of bills introduced that contribute to the Pipeline.

I have discussed this issue with lawmakers over the years when they introduce bills like these. The common response is there particular bill will not add many to our prisons or jails. What they fail to realize is, while their bill may only be a small percentage of the problem, their bill also joins numerous others that collectively make this all so much worse.

In short, the number one reason we find ourselves in this mass incarceration situation is because of the actions (and inaction) of state legislators.

DRUG SENTENCING AND RELATED ISSUES IN OHIO

The so-called War On Drugs is an abysmal failure using any objective standard. Yet, Ohio continues to subscribe to and perpetuate it. While so many other states recognize we cannot arrest, convict or incarcerate our way out of drug problems, we continue to do exactly that with harmful results.

Ohio has made some improvements in this regard. The biggest impact in the past decade came via the passage of House Bill 86, which took effect in September 2011. The primary goal of HB 86 was to route low-level, felony drug offenders to alternatives that are not prison. When the legislature passed that bill and Governor Kasich signed it, Ohioans were promised this was the first step to more significant reform. Over eight years later, Ohio is still waiting.

There were also projections about how the passage of HB 86 would reduce our prison population by several thousand people. That did not happen. Instead, today, we shamefully have *more* people in Ohio prisons than when HB 86 was enacted.

This is not the fault of HB 86. Ohio prison numbers would undeniably be worse without HB 86. But, multiple other factors have led to our prison numbers not improving. Perhaps most significant among these factors is the aforementioned Statehouse-to-Prison Pipeline.

To be clear, Ohio has passed additional legislation to improve sentencing in Ohio. However, none of it has been what the ACLU of Ohio considers significant reform. If it were significant reform, we would not still have overcrowded prisons, overflowing jails, and would not still be locking up people for addiction.

EFFECTIVENESS OF PAST POSITIVE EFFORTS

Among the positive efforts undertaken in recent years by the Ohio General Assembly we can and should include are greater attention to and progress in:

- Reintegrating people back into society after a prison sentence.
- The expansion of record sealing and expungement.
- Reducing the amount of collateral sanctions for people with criminal records.
- Finding alternatives to prison via intervention in lieu of conviction and related means.
- Reducing the suspension of drivers' licenses and easing the ability to regain those licenses after suspension.

But, with all due respect and gratitude to those who have worked to make these improvements reality, they have not gone nearly far enough and are often loaded with restrictions and disqualifiers that prevent them from helping even more people. Rarely is a bill introduced to improve mass incarceration concerns that is not watered down through the legislative process, often because of the concerns or objections of prosecutors and/or judges who so often resist meaningful reform.

WHAT DOES TRUE, IMPACTFUL REFORM LOOK LIKE?

At the ACLU of Ohio, we believe any attempt to address significant reform should start with, and always keep in mind, the end goal of that effort. Whatever relief or reform then should be constructed around achieving that goal.

We advocate for reform resulting in 10,000 less people in our prisons. There are those who think advocating for such a decrease is unrealistic, or even radical. Such criticism is emblematic of how we got here in the first place. To be clear, even a 10,000 person reduction would *still* leave our prison system above capacity.

So dire is this problem we could literally decriminalize all drugs retroactively and empty our prisons of every single person serving time for a drug offense and our system would, again, still be above capacity. So, when we speak of meaningful reform we do not mean only for those issues involving drug crimes or those with drug problems. Those should be considered the low-hanging fruit of reform, despite our state's current inability to adequately address it.

There are ways a 10,000 (or more) reduction can be accomplished. But the Ohio General Assembly has, thus far, shown very little appetite for taking on this effort. For more detailed information about how these types of reduction can be accomplished in Ohio, we urge you to review the information via this link – <https://50stateblueprint.aclu.org/states/ohio/>.

These Ohio-specific recommendations are part of the ACLU's national Smart Justice 50-State Blueprint where we outline needed reform across the country, specific to each state.

That said, in general, we again repeat our desire to think broadly about reducing our prison population by at least 10,000 people and then construct reform goals around that much-needed reduction.

More specifically, here are additional specific policies and changes the ACLU of Ohio recommends and endorses to create desired change:

Understanding of Laws

Because this committee specifically lists making laws less complicated as a concern, we urge members to revisit the recommendations from the Ohio Criminal Justice Recodification Committee. This committee was created by the legislature for two purposes – 1) to redraft and reorganize portions of the Ohio Revised Code precisely to make our laws easier for all involved to understand and 2) to recommend substantive changes to criminal laws.

Its membership consisted of legislators, judges, prosecutors, law enforcement, criminal defense attorneys, and others. After hundreds of collective hours of meeting, debating, and considering these matters, the committee's recommendations were released in June 2017. Despite this effort, those recommendations still remain almost entirely ignored 2.5 years later.

End the Statehouse-to-Prison Pipeline

Simply stop introducing and passing bills to send more people to prison and jail and/or saddle them with a criminal record. Bills that create new crimes and enhance sentences are unnecessary and counterproductive. There is not an offense or dangerous action in Ohio that is not already punished.

The primary reason for these Pipeline bills appear to be because a single, unfortunate event happens somewhere and the legislator from that district believes the response requires a broad change in law that impacts many, many more who commit an offense that sounds anywhere close to the one that attracted the attention. Then we wonder why we have so many in prison and jail, why we have so many Ohioans with criminal records, and why so many people are shut out of jobs, careers, housing and education. Speaking of this:

Collateral Sanctions

Collateral sanctions are formal and informal barriers placed upon a person after they served a sentence, or have been convicted of a felony or misdemeanor, or who are still being otherwise formally sanctioned for their offense.

In Ohio, we are unfortunately huge fans of collateral sanctions as we have an alarming almost 1,000 that prevent people from getting a job, earning a living, and enjoying many of the benefits most of us take for granted who are not in this situation. Collateral sanctions also include making broad categories of people ineligible to work a wide range of jobs and obtain professional licenses.

Many of these collateral sanctions are found in state law and originated from the misguided belief people must pay for their crimes for the rest of their lives or at least long after they served their sentence or fulfilled their punishment. As a result, we have created a gigantic underclass of people with little or no hope of significantly or meaningfully improving their lives. This does not serve them, their families, our communities, or our state.

Thankfully, more and more attention is being paid to this issue and further improvements are on the horizon. Still, much more needs done.

Reform Post-Release Control/Parole

Ohio's system of determining who is or is not eligible for post-release control is broken. We have one of the worst – if not the actual worst – sets of rules and regulations in the entire country for determining who should be granted post-release control. Currently, the Adult Parole Authority has unlimited and unfettered discretion to make these decisions. That is a giant problem.

In addition, the APA has long operated with very little transparency, to the detriment of many and Ohio as a whole. The ACLU of Ohio is thankful Gov. DeWine and DRC Director Chambers-Smith have developed, implemented, and continue to work on improvements in this regard and to improve the fairness of the process. Much more needs done but we look forward to monitoring these recent changes to determine their effectiveness.

Bail Reform

Across Ohio, large numbers of people are and remain locked up for one simple reason – they do not have money. The population we speak of are people who are held in jail, and otherwise would be free to leave jail, if they could afford it. These are your constituents who were arrested, have not yet been convicted of anything, but will remain locked up pre-trial. People in this situation make up two-thirds of the people in our local jails.

In recognition of this unfair – and we argue, unconstitutional – system, bail reform is occurring across the country. Sometimes it is an individual court or county working on its own policies and procedures. Other times, state legislatures have passed reforms. Increasingly, reform is coming via litigation.

We trust we will all hear more about bail reform in Ohio in the coming months and beyond. As always, the ACLU of Ohio is willing to work with all dedicated to ending this practice. For now, we will also caution against relying on opponents of reform who continue to use outdated, inaccurate, and false arguments and information to argue why bail reform is not needed or has failed elsewhere.

Reform Inside Prisons

While I suspect the ACLU of Ohio and this committee have different ideas of what major, structural reforms should occur, there are current concerns this committee should know more about and further examine.

In short, far too many people leave Ohio's prisons worse off than when they arrived. Others benefit from some available rehabilitative programming and opportunities. Still others remain ineligible from participating in helpful programs or receiving these opportunities. These are all important considerations as almost everyone sentenced to prison eventually leave and reenter society.

Ohio would benefit from a major expansion of in-prison programming, treatment of various kinds, expanded educational and occupational opportunities, and much more. Too many leave prison rightly complaining and concerned they were not provided with adequate tools to succeed once they get out.

As well, an expansion of earned credit would be most welcome. Earned credit further incentivizes people to participate in positive efforts to improve their lives. When they do, there should be additional recognition and reward. This also helps contribute to a decrease in prison population. Unfortunately, Ohio is among the stingiest in all the country with regard to earned credit. This needs to change.

Availability and Expansion of Effective Drug Treatment

Currently, there are multiple bills in the legislature to expand drug treatment and route additional people to treatment after they commit a crime. Passage of these bills will result in additional demand for treatment. However, Ohio right now does not have near enough available options for, or availability of, drug treatment.

If we are serious about reforming how we handle drug crimes and those who commit crimes because of drug problems, we must make sure treatment is available for them. If we do not, we set them up for failure.

In addition, Ohio suffers greatly from an analysis or studies of how effective drug treatment is in and across Ohio. It is not enough to simply spend money on expanding treatment. We must also ensure that treatment is effective and affordable. Ohio is not there yet.

Data Collection and Reporting

Underpinning all of these mass incarceration issues, problems, and recommendations is the frustrating lack of data and information available about our current system.

Sometimes this information is available to those in the system itself – the courts, the judges, the prisons and jails, and others – but is not publicly available to the rest of us. Many other times, there is a complete absence of data and information.

This is extremely troubling. Without adequate information, we fail to completely learn what is working and should be continued or expanded. We also fail to learn enough about what is not working and should be changed or abandoned.

This has been a problem for decades. A big reason we do not have this data collected, reported, and available is because Ohio does not have a unified court system. Instead, we have some courts that keep some data digitally and other data via hard copy records. We have courts that use different terminology from court to court, making comparative analysis extremely difficult. We have some courts that collect data on some things that differ from data being collected by other courts.

This is unacceptable in 2019. Ohioans and everyone involved must and deserve to have a much better idea of what its government and the entire criminal justice system – police, prosecutors, judges/courts, jails, prisons, reentry, parole and probation systems, and more – is doing, where they are succeeding, and where they are not. To illustrate this point, here are some brief examples of what we, the larger public, do not know in Ohio:

- How many people are granted intervention in lieu of conviction in Ohio? For what reasons are they denied/accepted? Which courts grant it more/less? What offenses are more/less likely to lead to it?
- Of the people in prison for drug possession offenses, what substance led to their conviction? How many receive prison time vs. how many do not? What is the racial breakdown of those who receive those prison sentences vs. those who do not?

Learning From Those Directly Impacted

The ACLU of Ohio is deeply appreciative of this opportunity to present our thoughts on mass incarceration issues in Ohio and this committee's interest in hearing from others. However, we all – the ACLU of Ohio included – must do a better job listening to and learning from those Ohioans personally impacted by our criminal justice system. They have a perspective many of us will never have, and if we are working to improve things on their and others' behalf, their voices are instrumental to achieving real progress.

Accordingly, if this committee is going to continue holding hearings on broad issues of criminal justice reform, we suggest reserving a hearing specifically for those who have been impacted. Likewise, we suggest members of this committee visit prisons and jails to speak with and learn from people currently incarcerated.

Conclusion

Ohio need not sacrifice safety for reform. Ohio becomes more safe with widespread reform and when the thousands upon thousands of Ohioans with criminal records are able to become more than their worst misfortunes and mistakes. The United States is the leading incarcerator in the world, and Ohio is one of the top states in the U.S. for doing the same.

This need not be an ongoing, inevitable reality in our state. We can change this and we must. But, it requires a lot of attention and effort, particularly from the Ohio General Assembly, which is and will remain the most impactful avenue for needed statewide reforms.

Changing the way we do things is like a Rube Goldberg machine – lots of parts, switches, and levers that affect each other and everything around them. Deficiencies in one area, such as a lack of effective drug treatment, can lead to a lack of success in other areas.

Is Ohio up to the task? Is the Ohio General Assembly? We sincerely hope so and the ACLU of Ohio remains fully committed to this cause and working with members of this committee, lawmakers, elected officials, stakeholders, and the directly impacted to achieve fundamental positive change throughout our great state.