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To: House Criminal Justice Committee

From: Kevin Werner, Policy Director

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Re: interested party testimony for Am. Sub. SB 288

EXECUTIVE DIRECTOR

DAVID SINGLETON
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Chair LaRe, Vice Chair White, Ranking Member Leland and members of the House Criminal Justice Committee, thank you for the opportunity to provide interested party testimony on Amended Substitute Senate Bill 288. I am Kevin Werner, policy director for the Ohio Justice & Policy Center (OJPC), a nonprofit law firm whose mission is to promote fair, intelligent, and redemptive criminal justice systems.

OJPC had been supportive of this legislation until the recent adoption of concerning amendments. Those amendments have altered the bill to the extent it is now a mismatch for the enormous criminal legal system issues the bill sought to address.

Originally, the bill was supposed to make improvements to a host of areas: record sealing and expungement, earned credit, drug overdose prevention, judicial release, transitional control to name some provisions. Record sealing would have been improved by allowing more criminal records to be sealed, but now felony offenses of the third degree, for example, are capped at two, which effectively makes no change to current law. Why? What data show a logical, comprehensible explanation for limiting record sealing to no more than two felony offenses of the third-degree? How many applicants are coming forward each year to seek record sealing for third degree felonies? What about fourth- or fifth-degree felonies for that matter? The answer is we don't know.

Another change was to add waiting periods to eligibility for expungement of criminal records. First, draw your attention to the distinction between record sealing compared to expungement. The two concepts are markedly different. If we were to ask which is better for the applicant leading a law-abiding life since, record sealing or expungement, its expungement by a mile. Record sealing limitations and exclusions are so numerous, we have to ask ourselves *who we are helping*? Who has access to the economic prosperity that we all want for ourselves? The answer is not anyone with a criminal conviction—even if they get their record sealed.

The bill now includes a 3-year waiting period for misdemeanor offense expungement and a 10-year waiting period for felony offense expungement *beyond* the waiting period for record sealing. Let's examine a scenario that could occur in Ohio. Let's say a person burns four scrap tires to dispose of them¹ over a weekend. Let's say the

¹ Violation of ORC Chapter 3734.03 Open burning or open dumping



prosecutor and judge want to make an example of the person to prevent more open pit burning in the county so the defendant gets maxed out. Burning Man gets 4 third-degree felony convictions—one for each tire—a \$100,000 fine and 16 years in prison. The judge stacked the sentences because of the danger to the public. After the 16-year sentence is over, he gets 2 more years on community control. He can apply for record sealing after a 3-year waiting period after completion of his sentence which includes the post release control time of two years. Burning Man will soon realize sealed criminal records will not prevent background checks from flagging him when he applies for a job after his release. He comes to the realization that expungement is the only way for him to fully reintegrate after his felony conviction. He'll have to wait another ten years before he can apply for expungement. So the least amount of time he is criminally sanctioned is 31 years. I would remind the committee that there are already many offenses that cannot be expunged, but fortunately for Burning Man, open pit burning isn't one of them. Thirty- one years after his offense he can apply to the court to expunge the conviction. Where is the improvement to the process in this scenario? In the interest of transparency, I must tell you that under the bill before you, Burning Man isn't eligible for record sealing or expungement because he has more than two F3 offenses. He would have been as the bill was initially introduced, but not now with amendments. So again, I ask, where is the improvement to the process?

Last session the General Assembly passed Senate Bill 256, landmark legislation that provided a pathway for parole consideration to individuals sentenced as children in the adult court system. That legislation created new timelines for parole eligibility ranging from 15 years to 25 years depending on the underlying offense. Understandably the legislation had to allow for continuance if the parole board voted against release of an individual. The thinking is just because someone is eligible for release does not mean they will be released. The legislation recognized that children are different, and one way the legislation accounted for their uniqueness was by limiting the continuance of the sentence or "the flop" to five years. OJPC argued for lesser time since prisoners had already been incarcerated for 15, 20, 25 years or more. Now though, under this bill, the flop goes up to 10 years. Why? When we look at data available on cases after the law changed, we see that cases typically fall into different categories: release granted, release possible but pending per some further review needed or denial. Those denials are continued for 1-5 years. But most continuances fall between 1-4 years. In other words, most cases do not get maxed out to the 5-year flop. Why, then, does this bill increase the maximum to 10 years?

Another concerning amendment removes the Ohio Criminal Sentencing Commission provisions that would facilitate the development and maintenance of a statewide criminal sentencing database pilot program. This is concerning because criminal justice stakeholders from the defense bar to prosecutors to judges have agreed Ohio is lacking in any meaningful data pertaining to its criminal justice systems. In 2019, Chief Justice Maureen O'Connor tasked the Ohio Criminal Sentencing Commission to establish a



committee “to develop a model, uniform felony sentencing entry to prescribe the most clear and concise minimum language required to comply with Criminal Rule 32 and existing case law and to establish standardized, common data essential for identifying relationships and trends common to all felony courts in Ohio.”² The Court, through its chief, set into motion a series of actions and reviews to get that lacking data. The Sentencing Commission partnered with the University of Cincinnati to create a platform, the Ohio Sentencing Data Platform (OSDP). “The OSDP will help create a data-informed environment that allows for thorough understanding and analysis of the criminal justice system by those involved with the courts and will increase transparency to the public.”³

Mr. Chairman, simple questions⁴ cannot be answered.

How many people are on pretrial supervision in Ohio? How many people are held on bail vs. released pretrial? How many people (statewide) were sentenced for a specific offense this year in Ohio? How many people (statewide) were sentenced at a specific felony level this year in Ohio? How many people are on community control (probation)? When every person leaves the court, where do they go (what is their disposition)? What is the prevalence of plea bargaining in sentencing? How many people are subject to registration requirements and for what crimes? Is there evidence to support the thought that increased penalties are a deterrent for future crime(s)? How many defendants are indigent?

Removing the sentencing commission’s database pilot project from the bill is baffling but in line with criminal justice policy making that is not informed by data. Furthermore, how does the public get access to criminal sentencing data if there is no place for it in the revised code.

Thank you for the opportunity to testify on Amended Substitute Senate Bill 288.

² Ohio Criminal Sentencing Commission, Ohio Sentencing Data Platform website, <https://www.ohiosentencingdata.info/>

³ UC News, “UC partners with Ohio Criminal Sentencing Commission partnership established the Ohio Sentencing Data Platform.” October 4, 2021. Available at <https://www.uc.edu/news/articles/2021/10/uc-partners-with-ohio-criminal-sentencing-commission.html>

⁴ Ohio Criminal Sentencing Commission. The Data Disconnect: Adult Criminal Justice Data in Ohio. January 2019. Available at www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/dataBrief.pdf