THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
MEREDITH O'BRIEN, PRESIDENT
BLAISE KATTER, PUBLIC POLICY CHAIR

February 9, 2021

OPPOSITION TESTIMONY TO SB 25

Chairman Manning, Vice Chair McColley and Ranking Member Thomas:

Thank you for the opportunity to testify on behalf of the Ohio Association of Criminal Defense Lawyers in opposition to the current version of Senate Bill 25.

First, we thank Senator Gavarone for her hard work on relapse avoidance and protecting the sanctity of substance addiction facilities. Although there are many commendable portions of this bill, we have serious concerns with some of the language of the bill as currently drafted and would respectfully suggest some targeted changes to help further the purpose of the proposal.

Geographic Distance Limitations Are the Least Effective Way to Target this Behavior

As a matter of principle, geographic restrictions, such as the 1000-foot buffer zone proposed in this bill, are the least effective way to target the predatory behavior this bill is designed to combat. The flaw in using a specific geographic restriction is that it is both overbroad and ineffective at the same time. It is overbroad because it has the potential to sweep in activity that is not specifically targeted at the addiction service provider, and thus would not merit the increased penalties. However, it is simultaneously not completely effective at targeting that behavior, as a person would still be able to target a person coming from an addiction service facility, so long as the person was more than 1000 feet away from the premises. As a member of this Committee remarked last General Assembly, whatever the distance is set at, there will always be the problem of (arbitrarily) drawing a line.

Therefore, we strongly urge this committee to drop the geographic line-drawing and instead rework this prohibition towards those people specifically targeting these facilities and the people using these critical services.

We would recommend that the prohibition be specifically tailored to the harm, and would propose that "in the vicinity of an addiction services provider" be changed to the following language:

An offense is committed "in the vicinity of a substance addiction services provider" if either of the following applies:

1. **The person knowingly commits the specified drug trafficking offense on the premises of a community addiction service provider; or**

2. **The person knowingly solicits or targets any other person who was present at, or is connected with, any program or service provided by a substance addiction services provider, either while the program or service was occurring, or when the other person is traveling to or from the program or service.**

This language strikes an appropriate balance by adding increased penalties to those who deliberately prey on persons seeking treatment for substance abuse addiction by directly targeting those individuals – a much more effective manner to achieve this laudable goal.

Level of Penalty for Defrauding a Urine Test

The OACDL also has significant concerns about the harshness of the penalty for defrauding a urine test as a portion of community control. We suggest that the degree of penalty for these offenses be reconsidered, with the following thoughts in mind.

First, there are distinct tiers in the seriousness of the offense. Certainly, the most "egregious" of these frauds would be defrauding the court system with a fake test. That should appropriately be the most serious form of the offense. However, making that offense a "flat" F3 with no considerations of the nature of the offense that the person committed to be on community control is disproportionally harsh. A person who uses a fake urine test to potentially avoid 30 days in jail on a lower-level misdemeanor is not at all the same as a person using a fake urine test to avoid a potential lengthy prison sentence. Therefore, to be proportional to the harm caused, the offense should be tailored to be equal to the most serious level of offense for which the person was sentenced to community control. Therefore, if the person was on community control for a felony, this offense would remain a felony, but at the same level of felony that the person was sentenced for.

The next most serious version of this offense would be if the fraudulent test was used to defraud a public official or government agency, or to obtain some sort of governmental benefit. That is most akin to the current crime of Obstructing Official Business or Falsification, and should be treated similarly. This legislation has the appropriate level for this circumstance, making it an M2 with subsequent offenses M1s.

Finally, the least serious of these offenses would be when there is no governmental involvement whatsoever and the drug test is merely between two private parties. The private parties have their own abilities and methods for sanctioning this behavior without it needing to be a major misdemeanor and involving the criminal justice system in such cases. This is really similar to Disorderly Conduct and should be treated as such. This should be classified as a minor misdemeanor with repeat offenders subject to an M4.

Therefore, to summarize, we suggest the following levels of offenses be considered:

1. Defrauding the Court (Community Control) – the degree of offense should be the **same degree** as the most serious offense the person was convicted of that led to the community control sanction.

2. For defrauding any other public official or governmental agency, the fraud should be as it currently is, **an M2 with subsequent offenses being M1s**.

3. For any other fraudulent urine test not involving any governmental agency or benefits, between purely private actors, the offense should be an **MM with subsequent offenses elevated to an M4.**

Finally, language should be included to make clear that this section is the exclusive section to be used when prosecuting this sort of behavior.

Language Clean Up

Finally, a minor point regarding the "know or have reasonable cause to believe" language. That standard is a well-established standard in Ohio appearing in several sections and providing a clear standard of behavior (both subjective and objective). However, we strongly object to the phrase "it is more likely than not" following the standard. This irreparably conflicts with well-settled definitions of mens rea standards. For something to be "knowingly" the fact must lead to a "probable" conclusion; for it to be reckless a "likely" outcome. To further dilute that with the "more likely than not" language would unnecessarily confuse the well-established standards and lead to confusion and contradictions, making it unworkable in practice. This bill should continue to use the standard of "knows" (subjective) or "reasonable cause to believe" (objective) and strike the phrase ("it is more likely than not") as unnecessarily duplicative and contradictory.

Thank you for your consideration.

Respectfully,

Blaise Katter

OACDL Public Policy Chair