



# Ohio Prosecuting Attorneys Association

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Senate Bill 288  
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Chairman Manning, Vice-Chair McColley, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to offer testimony on the parts of Senate Bill 288 regarding judicial release and earned credit. Our Association is opposed to these changes.

## **Recidivism Rates**

Before I discuss the substance of our concerns with these changes, I'd like to spend a couple of minutes discussing recidivism rates. I've included footnotes to three recidivism reports, two from the Bureau of Justice Statistics at the US Department of Justice and one from the Ohio Department of Rehabilitation and Correction, that I think are useful to understanding why the changes to judicial release and earned credit, as well as some of the other changes in SB 288, are bad for victims and bad for public safety in Ohio. I encourage all of you to spend some time looking at these full reports, in particular the BJS reports. A few highlights from these reports:

### *BJS 10-Year Follow-Up (2008-2018)<sup>1</sup>*

- Among persons released from state prisons in 2008 across 24 states, 82% were arrested at least once during the 10 years following release.
- Overall, nearly 7 in 10 prisoners (69%) released in 2008 had an arrest within 10 years that resulted in a conviction. See Table 7.
- During this period, 4 in 10 persons (40%) released from prison in 2008 were arrested for a violent offense. See Table 11.
- Prisoners with 10 or more prior arrests had a cumulative arrest percentage of 55% within 1 year, 84% within 5 years, and 89% within 10 years. Prisoners with 4 or fewer prior arrests had a cumulative arrest percentage of 24% within the first year, 57% within 5 years, and 67% within 10 years. See table 6.

### *BJS 5-Year Follow-Up (2012-2017)<sup>2</sup>*

- Among persons released from state prisons in 2012 across 34 states about 6 in 10 (62%) were arrested within 3 years, and 7 in 10 (71%) were arrested within 5 years.

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<sup>1</sup> [https://bjs.ojp.gov/BJS\\_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs](https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs)

<sup>2</sup> <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf>

- Prisoners with 10 or more prior arrests had a cumulative arrest percentage of 81% during the five years following release. Prisoners with 5 – 9 prior arrests had a cumulative arrest percentage of 70%. Prisoners with four or fewer arrests had a cumulative arrest percentage of 55%. See Table 6.
- Among persons released from state prisons in 2012 across 34 states 28.3% were arrested for a violent offense within 5 years. That number jumps to 32.4% if the most serious commitment offense from which they were released was also a violent offense. See Table 11.
- The likelihood of rearrest was higher for those who served less than the median amount of time before release. This effect was even more pronounced for violent offenders. In other words, the likelihood of an offender recidivating decreased as their time spent in prison increased. See Table 14.

#### *ODRC Recidivism Report*<sup>3</sup>

- The 3-year recidivism rate for individuals released from prison in 2016 was 32.69%, more than 5% higher than it was in 2011. See Figure 1.
- The 1-year, 2-year, and 3-year recidivism rates have increased every year since 2011. See Figure 5.
- The 3-year recidivism rate for individuals convicted of crimes against persons was 36.94%. See Figure 9. This number was slightly over the 30% in the 2016 report that reflected the 3-year rate for individuals released in 2012.

#### **Earned Credit Expansion**

Senate Bill 288 increases the maximum amount of earned credit a prisoner may earn for participating in programming or completing a second program from 8% to 15% of the prisoner’s term.

We are opposed to this expansion for two reasons. First, the current concept of earned credit of up to 8% was adopted in House Bill 86 that became effective in September 2011. As the above ODRC recidivism report shows, recidivism has increased every year since 2011. Simply put, the state is letting people out of prison sooner and sooner, as a means of controlling prison population, and with public safety as an afterthought. Earned credit is based on an undefined concept of “productive participation” in programming, and without any requirement to demonstrate actual rehabilitation. Recidivism rates are trending in the wrong direction because of it. Second, earned credit isn’t transparent for victims and continues to chip away at the idea of truthful sentencing on which public confidence in the law depends.

#### **Judicial Release – Emergency Qualifying Offenders**

Senate Bill 288 authorizes any offender who is not serving a non-mandatory sentence or non-mandatory portion of a sentence to immediately seek judicial release during a state of emergency declared by the governor. The offender may file multiple subsequent motions for release if one motion is denied. The court is authorized to grant the release without a hearing.

This proposal presents legal, practical, and public safety concerns.

- (1) Authorizing a court to grant judicial release without a hearing, and therefore without any opportunity for victim input, is a clear violation of a victim’s right to be heard under Marsy’s Law.
- (2) There is no general requirement that the release be related to the condition causing the declaration of the emergency. The amendment provides only that the court shall grant a judicial release to a state of

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<sup>3</sup> <https://drc.ohio.gov/Portals/0/2021%20Final%20Report.pdf>

emergency-qualifying offender if the court determines that the risks posed by incarceration to the health and safety of the offender, because of the nature of the state of emergency, outweigh the risk to public safety if the offender were to be released from incarceration. This serves to mandate the granting of the motion to the extent that health plays a role but health is not a generally required predicate to granting the motion. In other words, there is no need to show any actual connection between the need to release the offender and the reasons the emergency was declared.

- (3) Courts can expect to be flooded with motions for judicial release any time a Governor declares a state of emergency. Frivolous and vexatious filings can be expected. If a natural disaster occurs in one corner of the state and the Governor declares a state of emergency, it can be expected that inmates across the state who aren't serving the mandatory portion of sentence will file for judicial release, possibly multiple times. Despite the frivolous nature of these motions, courts will be forced to use already limited judicial time and resources to deny thousands of motions for judicial release.
- (4) From a public safety standpoint and victim standpoint, it is simply not a good idea to throw open the prison doors and throw out the rule of law simply because we are in a state of emergency.

### **Judicial Release – ODRC Director Recommendation**

Senate Bill 288 creates a second new category of offenders who can receive judicial release upon recommendation of the director of ODRC. Under the amendment, such a recommendation creates a rebuttable presumption that the court shall order the judicial release. The presumption can be rebutted only if the prosecuting attorney proves to the court, by clear and convincing evidence, that the release of the offender would constitute a present and substantial risk that the offender will commit an offense of violence.

No standards are imposed on the ODRC director in order for the director to make such a recommendation. The director will be empowered, in an ex parte fashion, without any input from a judge, prosecutor, or victim, to make a recommendation for release that makes any thoughts that the judge, prosecutor, or victim may have about such a release all but irrelevant. This too arguably violates Marsy's Law by making the victim's constitutional right to be heard meaningless.

The standard for rebutting the presumption created by the Director's recommendation makes it likely that ill-considered recommendations based on no standards will result in the release of dangerous offenders that the court will be unable to keep in prison. This could be so even when there is a substantial risk that the offender will reoffend in the future, albeit not a "present" risk, or even when there is a present but only moderate risk of reoffending. Even when the state can show by a preponderance (i.e. that it's more likely than not) that the defendant poses a present and substantial risk the statute would still require that the offender's release be granted. Finally, there is no way for the court to deny the release if the risk is that the offender will commit a non-violent offense, even if there is clear and convincing evidence that there is a present and substantial risk that the offender will do so. This completely disregards the harm to victims and the societal havoc that can be caused by non-violent offenses.

Given the recidivism rates in the studies above, and some of the ill-considered decisions that we discussed that ODRC makes regarding transitional control, this amendment should be terrifying. A full one-third of people convicted of violent offenses are arrested for a new violent offense within 5 years. And yet, under this amendment courts will be forced to release these offenders early simply because the risk of future violence is a few months, a year, or three years away. This risk is even higher for property crimes.

We all have an obligation to the public and our focus shouldn't stray so far from criminal justice policy that first and foremost addresses public safety, protects innocent victims, and punishes those who won't live by the rules of a civilized society. These amendments disregard the impact that crimes have on the public, their impact on victims, the broader implications for public safety, and the rule of law. The public will be less safe and victims less confident in our justice system because of them.

Thank you again for the opportunity to testify. I would be happy to answer any questions.