Ohio Judicial Conference

The Voice of Ohio Judges

SB 288 – Interested Party Testimony
Senate Judiciary Committee

Committee Chair Senator Manning, Vice-Chair McColley, Ranking Member Thomas and Senate Judiciary Committee members,

I am Judge Stacy Wall of the Miami County Court of Common Pleas. I serve the Ohio Judicial Conference as a member of the Criminal Law and Procedure Committee.

Thank you, Senator Manning, for taking on this enormous project. And thank you for including some important provisions in SB 288 that will help streamline and modernize the Code, a goal the OJC finds particularly worthy.

There are, however, some parts of SB 288 which cause us concern and those mostly have to do with early release of inmates from prison. Before I go into specifics, I would like to be clear that there are several ways – under current law and under the bill – that an inmate can serve a shorter sentence than was imposed by the judge, including treatment transfer, earned credit, the risk reduction program, the 80% release program, transitional control and judicial release.

Section 2967.26(A)(2) abolishes the transitional control veto that judges have maintained after enactment of SB 143 of the 130th General Assembly. Before SB 143, judges could veto any request for transitional control, regardless of the length of the sentence. Currently, judges can only veto requests for transitional control for sentences of two years or less. Transitional control operates by eliminating the last 6 months of a person's sentence; for a sentence of two years or less this could account for 50% of the sentence. Under the bill, a judge would not be able to veto any request for transitional control. The requirements that ODRC uses to recommend inmates for transitional control determine eligibility, but not suitability. A judge is likely very familiar with the suitability of someone to be on transitional control, because that person was likely under the court's supervision on probation, then violated multiple times before being sent to prison.

Section 2929.20 appears to codify some of what happened during the recent pandemic lockdown by creating a "public health emergency" judicial release option. Under Sec. 2929.20(D), there is no limit to the number of times an inmate can apply for "public health emergency" judicial release, which is problematic from an administrative standpoint. The OJC feels that 2929.20 is the wrong place in the statute for this type of inmate release. Rather, that language more logically fits into either Sec. 2929.20(N) [medical release] or Sec.

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2967.18 [overcrowding release] and the release could follow the mechanisms already set out in those respective sections, with some changes that recognize the specifics of a public health emergency. During the pandemic, everyone applied with the same boilerplate motion that said there is a pandemic, overcrowding, and fear. These are all conditions that were in the hands of ODRC and thus logically, ODRC would be the appropriate organization to know when there was a true medical emergency.

Section 2929.20(O)(1) creates a presumption for judicial release if the ODRC Director provides a letter recommending judicial release to the sentencing judge (currently, inmates apply for judicial release on their own and their ability to do so is not changed in the bill). As written, this section makes it almost impossible for a sentencing judge to decide not to grant early release, as a letter from the ODRC Director would require the sentencing judge to find that, by clear and convincing evidence, a future act will occur: specifically, that the release will result in a "present and substantial risk that the offender will commit an act of violence" in the future. This judicial release expansion should be removed from the bill in its entirety because it oversteps the constitutionally necessary separation of powers.

Assuming it will not be removed from the bill for this reason, we would make several suggestions: first, if the ODRC Director would like an inmate to leave prison early, why couldn't the inmate be released through the parole system and then be supervised by Adult Parole? If the intent of the bill is to ensure that the ODRC Director's decision to release an inmate early trumps the decision of the judge, we would respectfully suggest that the judge be removed from the decision altogether. Of course, there is more than one way to do this; the ODRC Director could send a letter to the sentencing judge to consider in applying judicial release, but it should not carry a presumption in favor of release. A primary consideration is the sentencing judge has information on the case that ODRC would not have. All judges are bound by statute to apply the principles of sentencing: (1) protect the public from future harm; (2) punish for the offense committed; and (3) effectively rehabilitate. It is this last principle – effective rehabilitation – that sentencing really aims at, which the judge decides based upon the offender's conduct while on bond and the presentence investigation report. Judges give the offenders many chances before sentencing to prison and to set aside the judge's knowledge of the offender defeats the principles of sentencing the judge sought to enforce.

If I could take a moment to share just one example, it may be clear how the ODRC's release interferes with the Court's background that necessitated a prison sentence. I had an offender with a F5 Possession of Fentanyl Related Compound. He applied for intervention in lieu of conviction (ILC), in which his lawyer withdrew the request after he was not going to be found eligible. He entered a plea and was sentenced. He had had many opportunities in the past to rehabilitate and always was unsuccessful. In fact, he had had 5 felonies previously reduced to misdemeanors and in 8 separate cases had violated his probation. Just two years before his sentencing, he had been given the opportunity for but did not complete drug court. Despite all of these chances, I sentenced the defendant to community control with inpatient treatment that he indicated he would complete. The Court had him assessed and had an inpatient bed available. He was transported to treatment. Once he was inside the treatment facility, he refused treatment and was transported back to the jail, costing time and resources. I actually set a sentencing review hearing for another chance at treatment at which time he refused and said he wanted to serve his prison term rather than completing

treatment, a much harder path. He received a 10 month sentence and had nearly a month of jail credit. So going into prison for essentially a 9 month term in January, I received a notice for transitional control, only about 45 days after he arrived at the institution. I objected to it for the reasons I just explained. This was all information ODRC would not have had. In March, 2 months after the transitional control request, he has filed for judicial release. If you do not even count the 5 felonies reduced or the number of times he has had an opportunity on probation, including drug court, but just look at the opportunities in my direct case, he started the ILC process, was given community control, was transported to treatment, was given an opportunity for review and then at his request was sentenced to prison. To take the discretion away from the sentencing judge ignores all information the Court had when issuing sentence. Thus ODRC's authority to release directly contradicts the principles of sentencing the Courts abide by. This is not a unique case as it happens often.

On a second case, I recently arraigned a woman who was given transitional control and instantly recommitted. When I asked for basic information, she was homeless. She had been released from transitional control and was not placed on post release control so she had nowhere to go. No assistance. This is not rehabilitation. Again, taking away the input of the Court is detrimental as it goes against everything the Court strives to achieve.

Not too long ago, we all adapted to indefinite sentencing. The goal was to be able to focus post release control on those serious offenders. Since then, post release control has been weakened, is discretionary and is for shorter periods of time. Several times I have had someone at arraignment where I have asked the parole officer how the offender is doing on PRC, i.e. has there been clean urine screens, only to hear he reports by phone and there is no urine screen. These F3s, F4s and F5s are falling far short of rehabilitation. Removing the court from various release mechanisms, as SB 288 attempts to do, only compounds the likelihood of recidivism.

Switching to another topic, the bill streamlines and simplifies the process for sealing and expunging criminal records. Judges agree that current statutes on this subject are complicated and confusing, and judges have no problem with expanding eligibility for sealing and expunging. However, if more former offenders take advantage of the expanded eligibility, which is a laudable goal of this bill, more time and resources from courts and their staffs will be needed to process these applications. Existing law allows courts to charge a small fee for these applications, but it does not permit courts to retain any of that fee: it is to be divided between the state and the local funding authority. We would simply ask that SB 288 include an amendment allowing courts to retain a portion of the application fee, to offset the increase in workload that will result as this legislature expands access to and eligibility for sealing and expunging of records.

Finally, I would like to highlight several provisions in the bill that were included at the OJC's request, and to thank the sponsor for being receptive to these changes. The bill allows grand juries to inspect multicounty correctional facilities, bringing the law in harmony with existing provisions allowing for the inspection of county jails. The bill also makes several traffic-law corrections, such as including in the "harmful intoxicant" in the definition of "drug of abuse" for purposes of OVI conviction, correcting some omissions regarding whether driving in an emergency is an affirmative defense to certain driving-under-suspension

offenses, correcting an error regarding repeat violations of driving in a special zone, and clarifying the maximum eligible prison sentence for an F3 OVI.

Thank you very much for the opportunity to speak today on SB 288. I'm happy to answer any questions you might have.