



# Office of the Ohio Public Defender

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Timothy Young, State Public Defender

**Substitute House Bill 166  
Reagan Tokes Reentry Bill  
Proponent Testimony Regarding Appellate Review  
Senate Judiciary Committee**

Chair Manning, Vice Chair McColley, Ranking Member Thomas, and members of the Senate Judiciary Committee. My name is Tim Young, and I am the State Public Defender. Thank you for the opportunity to testify on behalf the Office of the Ohio Public Defender (OPD) as a proponent of the appellate review portions of Substitute House Bill 166 (HB166).

The OPD shares the same goals as this committee – to make Ohio as safe as possible by ensuring the right people are in prison for the right amount of time. There are portions of HB166 that move Ohio towards this goal. OPD supports the provision in HB166 that requires the Adult Parole Authority to have caseloads consistent with the standards developed by American Probation and Parole Association. OPD is concerned that the bill allows law enforcement to access the tracking data of all individuals on parole on a GPS monitor without a warrant, without probable cause, and even without reasonable suspicion that the person under supervision was involved in the crime. At best, this provision of HB166 is legally problematic. At worst, it results in law enforcement wasting valuable investigation time looking at persons under supervision whose national re-incarceration rate is only 25%.<sup>i</sup> However, OPD wants to focus this testimony on the incredibly positive changes to appellate review in HB166.

## **Appellate Review**

The extreme nature of Ohio's current sentencing law was made tragically apparent in the recent Ohio Supreme Court case of *State v. Gwynne*.<sup>ii</sup> Ms. Gwynne was sentenced to 65 years in prison for theft related offenses committed while she was working at a nursing home. Many of the items Ms. Gwynne stole were worthless trinkets taken because Ms. Gwynne was a hoarder

with mental health issues. Regardless, 55-year-old Ms. Gwynne was sentenced to die in prison. The Ohio Supreme Court overturned the Fifth District Court of Appeal's holding that the sentence was unconstitutional and found that the Ohio Revised Code does not allow appellate courts to review the sentence imposed by a trial court. Ohio taxpayers are going to spend almost \$28,000 a year<sup>iii</sup> to keep Ms. Gwynne in prison for the rest of her life. To quote Justice Donnelly's dissent, Ms. Gwynne "hardly strikes me as a hardened criminal who needs to stay in prison until she is 120 years old in order to protect the public and that a 65-year prison term is the best use of our limited state and local resources."<sup>iv</sup> This legislature needs to allow appellate courts the ability to overturn unconscionable sentences like this one. Additionally, this legislature needs to implement limits that prohibit nonviolent people like Ms. Gwynne from languishing in prison. HB166 is a step in the right direction. HB166 allows for appellate review of horrifying sentences like the one imposed on Ms. Gwynne.

Pursuant to HB166, defendants can appeal, as a matter of right, any sentence that is not authorized law and any other felony sentence whether for individual, concurrent, or consecutive sentences. The bill creates an appellate structure that gives deference to the trial court, by creating a presumption of proportionality and consistency, for sentences that fall within at lower end of the spectrum for sentence length and gives deference to the defendant for sentences that fall at the higher end of the spectrum for sentence length. A definite sentence that falls within the sentencing range can only be vacated and remanded if the court based its sentencing decision on an error of fact. Consecutive sentences that are under the identified lengths in in the bill carry a presumption in favor of the trial court's finding. However, for sentences that are on the high end of the spectrum, longer than the lengths identified in the bill, the presumption in favor of the trial court is removed.



The aggregate minimum prison term that impacts the standard for review on appeal are as followings: 15 years when the most serious offense is a F1, 12 years when the most serious offense is a F2, 8 years when the most serious offense is a F3, 3 years when the most serious offense is a F4, 2 years when the most serious offense is a F5. In summary, when a consecutive sentence is equal to or less than these years, there is a presumption that the court's findings are supported by the record. When the consecutive sentence is longer than these years, there is no presumption. In either case, the appellate court must vacate and remand if it finds that the consecutive sentences are not clearly and convincingly supported by record.

A question this committee may have is, "where did this language come from?" Last session, OPD reviewed a version of what is in HB166. OPD largely supported the language, and we made some proposed changes for Representative Seitz. On February 8, 2021, a substitute version of this bill was adopted by the House Criminal Justice Committee. At that time, the bill contained alternative appellate review language, developed by OJC, that OPD strongly opposed. We suggested that the bill sponsors use the other proposal with OPD's suggestions. On February 1, 2022, OPD, OJC, Representative Boggs, her staff, and LSC met virtually to discuss edits to the language. On February 2, 2022, OJC suggested the language included in the bill regarding definite sentences that fall within the sentencing range only being vacated and remanded if the court based its sentencing decision on an error of fact. After one additional round of edits regarding the language of the presumption, the current language was drafted and passed by the House. As you can see, these efforts at the end happened very quickly.

Only after the bill passed the House did OPD learn of concerns. Fortunately for this committee, many of those concerns are based on misinformation and hyperbole. On February 10, 2022, OJC and OPD jointly responded to an email from Representative Seitz addressing issues that were raised to him. While OPD and OJC agreed that some language changes may be



necessary, none of the concerns we addressed for Representative Seitz warranted substantive changes to the bill. To be clear, nothing HB166 prohibits a trial judge from giving the sentence of their choosing. They are still free to give any sentence they want that is permitted by law. HB166 did not narrow what is permitted at sentencing in any way. HB166 simply fixes the abhorrent outcome in *Gwynne* by giving defendants the ability to appeal sentences and removing the presumption in favor of the trial court for extremely long sentences.

It has also been suggested that this language will lead to an appeal from every defendant. First, let us not forget defendants have a constitutional right to appeal. Second, 90 – 95% of cases are resolved through plea bargaining, eliminating the need for appeals in many of those cases. Finally, defense counsel has an ethical obligation to only file appeals for which there is a good faith basis.<sup>y</sup> Ethics rules prohibit frivolous appeals. Furthermore, many individuals will not want to risk appealing for fear their sentence will be longer on remand after the state has a second bite at the apple. It is also important to remember we have heard these claims before. This exact argument was used to oppose the Serious Mental Illness death penalty bills. Opponent were wrong then that every death penalty inmate would file a SMI motion, and they are wrong now that this bill will result in every defendant appealing. Please do not be misled by these baseless claims.

## **Conclusion**

Perhaps the Office of the Ohio Public Defender is just too fond of small government and personal liberty, but we believe individuals should have a right to appeal their sentence, particularly, if the state is seeking to incarcerate that person for a long period of time. That sentence should be subject to meaningful review. This legislature owes it to Ohioans to ensure that when the state takes away someone's liberty, it is done fairly and justly. That is what the appellate review provisions in HB166 are working towards. Thank you for the opportunity to testify as proponent of the appellate review part of HB166. I'm happy to answer any questions.



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<sup>i</sup> Bill Keller, *Seven things to know about repeat offenders*, The Marshall Project, March 9, 2016, <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders>.

<sup>ii</sup> *State v. Gwynne*, 2019-Ohio-4761.

<sup>iii</sup> Legislative Service Commission Fiscal Note & Local Impact Statement for SB221

<sup>iv</sup> *State v. Gwynne*, 2019-Ohio-4761, at ¶ 77.

<sup>v</sup> Ohio Rules of Professional Conduct 1.2(d)(1)

