Office of the Ohio Public Defender

Timothy Young, State Public Defender

Interested Party Testimony Regarding SB25
Drug Crime Near Addiction Services
Sponsor Senator Gavarone

Chair LaRe, Vice Chair Swearingen, Ranking Member Leland, and members of the House Criminal Justice Committee. My name is Niki Clum, and I'm the Legislative Policy Manager for the Office of the Ohio Public Defender (OPD). Thank you for the opportunity to testify as an interested party of Senate Bill 25 (SB25).

OPD thanks Senator Gavarone and the senate for all the work on this bill. The substitute version of this legislation is a vast improvement from the as-introduced version. Some of OPD's concerns have been alleviated. We appreciate Senator Gavarone's willingness to incorporate feedback from interested parties.

As this committee knows, SB25 creates an enhanced penalty when drug trafficking occurs within a 500 feet of community addiction service provider. It has been suggested that SB25 is needed to deter trafficking near these locations. Yet, there is no evidence that longer prison sentences deter drug offenses. The fact that the War on Drugs has been such an abysmal failure is evidence that longer

prison sentences do not deter crime.[1] Among other researchers, the National Institute of Justice found that "severity of punishment does little to deter crime." Further, the idea that Ohio will solve the drug crisis if we incarcerate all the drug traffickers is not realistic. Targeting just the supply of drugs is ineffective "because of the demand and the money that can be made, other people will step in."[2]

Despite research and data that longer prison sentences do not deter drug activity, if we assume that a penalty enhancement may deter drug trafficking, then the standard must be that the individual "knowingly" trafficked near an addiction service provider. As this committee knows, the bill requires that the individual "know or should know" they were trafficking near an addition service provider. OPD asked for, and is supportive of, this change. However, it has been suggested in this committee that perhaps the mens rea should be "recklessly." The stated purpose of this bill is to deter people from selling drugs to addicted individuals who are in treatment. A person must know they are trafficking near an addiction service provider for this bill to be in anyway effective. An individual cannot be deterred from doing something they don't know they are doing.

[1] 2015 Pew Research Survey found that harsher federal sentencing laws for drug offenses did not led to reductions in drug use; 2014 research by Peter Reuter at the University of Maryland and Harold Pollack at the University of Chicago found that heavy police enforcement and extended prison sentences do not effectively stop the flow of drugs and drug use; Economist at Columbia and the University of Michigan found that the threat of longer prison sentences does not reduce crime.

[2] Leo Beletsky, Drug Policy Expert and Northeastern University Law Professor

It has been suggested around this bill and others that it is nearly impossible for prosecutors to prove a "knowingly" standard, because we can never know what is in a person's head. A noncomprehensive review of the Ohio Revised Code found 146 offenses that require a "knowingly" mens rea and approximately 35 offenses that require a "recklessly" mens rea. There are over 43,000 people in Ohio prisons, I promise you some of those individuals were convicted of an offense with a "knowingly" mens rea. The Ohio Jury Instructions tells jurors that a person acts "knowingly" when "the person is aware of the existence of the facts and that his acts will probably cause a certain result or be of a certain nature." The jury instruction goes on to say, "[s]ince you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness of the probability that" the alleged outcome would result.[3] Prosecutors are more than capable of proving a "knowingly" mens rea by putting on evidence of the facts and circumstances surrounding the alleged offense. From there, juries have shown they can determine if the person acted knowingly, even if the person is claiming they did not. The law does not excuse willful ignorance.[4] The mens rea in SB25

[3] Ohio Jury Instruction CR 417.11
[4] Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, St. John's Law Review, Number 4 Volume 88, Winter 2014, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6696&context=lawreview.

should continue to require that defendant knows or should know they are trafficking need an addiction service provider. Further, this committee should not worry that prosecutors are unable to get convictions in cases with a "knowingly" mens rea.

The penalty enhancements contemplated in SB25 can result in bad public policy outcomes because they disproportionately impact minority populations. In densely populated urban areas, an individual is more likely to be within 500 feet of community addiction service provider compared to someone in a rural area where the population and buildings are more spread out. Not to mention community addiction service providers are more likely to be located in urban areas. Since minority populations also tend to be located in urban areas, minorities disproportionately suffer the consequences of these types of enhancements.[5]

SB25 also prohibits using synthetic urine or additive; using one's own urine expelled before the test during the test; or using someone else's urine to defraud a drug test. The bill also prohibits selling urine knowing or having reasonable cause to believe that it is more likely than not that any other person will attempt to use the urine to defraud a test. The offense is a misdemeanor of the second

[5] *Disparity by Design: How drug-free zones impact racial disparity – and fail to protect youth*, Justice Strategies, March 24, 20006, https://www.justicestrategies.org/publications/2006/disparity-design-how-drug-free-zone-laws-impact-racial-disparity-and-fail-protect-.

degree and a misdemeanor of the first degree for any subsequent offense. However, the offense is a felony of the third degree if it was committed to defraud the individual's alcohol, drug, or urine screening test administered as a condition of community control, putting the offense on the same level as Unlawful Sexual Conduct with a Minor, Gross Sexual Imposition, Fleeing and Eluding, and Aggravated Vehicular Homicide and Assault. It bares asking if defrauding a drug test is on par with these other offenses that involve sexual misconduct and possible death. OPD submits to you the answer is a resounding "no."

These provisions of SB25 are a solution in search of a problem. I spoke with OPD's Director of Trial Services, and OPD is unaware of cases where individuals are charged with providing their urine for the purpose of defrauding a drug test. Even the Legislative Service Commission Fiscal Note states that "the number of violations resulting in a criminal case is expected to be relatively small." Currently, the state can charge the individual with Obstruction of Official Business, Falsification, or Tampering with Evidence. In fact, Tampering with Evidence is a felony of the third-degree offense. Therefore, if the facts of a particular circumstance are so severe as to warrant a felony charge instead of a misdemeanor or a violation of supervision, that is already an option for prosecutors.[6]

[6] Usually, under current law, the person using the faux urine would face a community control or probation violation. Amendment 2650-1 requires community control officers to report violations "to a judge, prosecutor, assistant

While OPD does have some concerns with SB25, the bill is greatly improved, and that is why we are an interested party instead of an opponent. We appreciate all the work that Senator Gavarone has put into this legislation. Thank you for the opportunity to testify today before your committee. I am happy to answer questions at this time.

prosecutor, prosecutor's office, or other person or agency charged with the adjudication or prosecution of crimes." However, lines 1552- 1558 of the bill require parole officers and others to report the offense to law enforcement instead of just handling the conduct as a violation of supervision or an employment application issue. SB25 will make the offense a third-degree felony every time in these circumstances since it must be reported to law enforcement.