



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Opposition of HB365 Reagan Tokes Law Sponsors Hughes and Boggs

Chairman Manning, Vice Chair Rezabek, Ranking Member Celebrezze and members of the House Criminal Justice Committee, thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender in opposition to Substitute House Bill 365.

Substitute House Bill 365 (HB365) could cost Ohio as much as \$191.3 million annually, a 10.5 - 12% increase to DRC's overall budget. Of this, \$143.5 million annually reflects the increased cost of incarceration, a 10.5% increase to the total prison population. \$31.6 – \$44.7 million annually reflect the necessary changes, required under the bill, to bring parole officer caseloads in line with the American Probation and Parole Association's published standards; a 33 - 44% increase in the number of field officers. Finally, the bill would cost another \$1.3 – \$3.1 million annually to implement the GPS portions of the bill; roughly a 270% to 650% increase in the DRC budget for GPS monitoring.

The Office of the Ohio Public Defender (OPD) based these calculations on budget and population data available on DRC's website and projections from the Ohio Legislative Service Commission's Fiscal Analysis. The yearly incarceration cost of \$143.5 million was calculated by reviewing 2013 - 2015 population data broken down by inmate security level. The OPD then assumed every individual with a security classification level of one and two will be released upon reaching their minimum sentence, and individuals with a security classification of level three, four, and five will serve their maximum sentence. The OPD made this assumption based on indications we received from DRC that they will be inclined to release security level one and two individuals when they reach their minimum sentence without a hearing.

The OPD does not offer our calculation of \$143.5 million annually as “the absolute answer” to the question of the cost of this bill. It is simply our best calculation available. To give perspective, if all inmates under this bill served the maximum sentence, the cost exceeds \$500 million annually. Clearly, that is not a realistic outcome but the cost of \$143.5 million annually is a very realistic probability based upon the bill as presently drafted and the data available on security classification levels. \$143.5 million annually reflects a yearly prison population increase of 1,731 individuals a year. Assuming a prison can hold 1,450 individuals, HB365 will require DRC to build 3.75 new prisons over the next three and a half years. DRC Director Gary Mohr has previously stated that “to build one prison and operate it for two decades costs one billion dollars.”¹ Therefore, Ohio will need to spend \$700 million to build the required four new prisons. Where Ohio will obtain almost three quarters of billion dollars is unknown.

Obviously, DRC is in the best position to calculate the fiscal impact of HB365. In December, OPD made a public records request for DRC’s records that reflect their calculations on the fiscal impact of this bill. DRC recently indicated that they do not have calculations reflecting the changes in the substitute bill. The OPD remains hopeful that DRC will provide calculations. In the meantime, the OPD felt compelled to perform calculations of the most current publically available data so that this committee is aware of the potential fiscal impact of this legislation.

The Legislative Service Commission Fiscal Analysis originally suggested the bill will result in a “slight increase in the overall” prison population resulting in a minimal increase to the annual cost. However, the fiscal analysis is no longer applicable as the bill is drastically different in form and substance from the introduced version. DRC also has openly contradicted the fiscal analysis suggesting that they believe the impact to the prison population and budget will be much more significant.

It is undeniable that the changes made in the substitute bill will result in many individuals serving longer sentences, which will result in increased cost for Ohio. One of the provisions in HB365 that will

¹ Namigadde, Adora, *As Prison Reach Capacity, Ohio Offers Some Offender An Alternative Path*, WOSU Public Media, March 7, 2017, <http://radio.wosu.org/post/prisons-reach-capacity-ohio-offers-some-offenders-alternative-path>



contribute to this fiscal impact is the change to the process for determining if an individual should be released early. Under the previous version of the bill, this determination was made by DRC. The substitute bill allows DRC to make a recommendation of early release, but the sentencing court ultimately makes the decision of whether to release the individual early. The sentencing court can deny DRC's recommendation for the early release without a hearing. If the court holds a hearing, the sentencing court considers the information submitted by DRC, the prosecutor, and the victim. Requiring a full hearing with victims and prosecutors in order to grant a recommendation by DRC for early release will largely eliminate it. Under current law, DRC can recommend early release when an inmate has served 80% of their sentence, which uses a comparable process to the changes in HB365. Courts have proven unwilling to grant 80% release as it is granted in less than .1% of cases, less than 1 out of 1,000.²

Realistically, judges lack available court time to conduct early release hearings for all of their indefinite sentencing cases. The congested court system will likely deny early release requests without a hearing simply for judicial economy reasons. Additionally, the purpose of making early release available is to incentivize inmates to take advantage of helpful DRC programming. Allowing the prosecutor and victim to present evidence at the early release hearings will convert the hearing into another sentencing hearing. Instead of considering the inmate's good behavior while incarcerated, the sentencing court will again consider the facts of the underlying case. If the facts of an inmate's offense can prevent them from getting early release, there is no incentive for that individual to display "exceptional conduct" while incarcerated.

By functionally removing the earned early release mechanism, that was originally included in the bill, in part, to help alleviate prison overcrowding, HB365 further exacerbates prison overcrowding and incarceration costs. Even Senator Bacon said on the floor of the Senate that very few people will get early release under the bill, and the Senate language is actually more favorable to inmates than

² See DRC Monthly Fact Sheets – Monthly Supervision Counts.



HB365. In SB201, the court cannot deny the early release recommendation without a hearing. Permitting DRC to decide who gets early release is the more logical approach. DRC will have a better understanding of the conduct of the inmate while incarcerated and an incentive to reduce the population of their overcrowded prisons by releasing the lowest risk individuals.

Another change in the substitute version of the bill is that any confinement credit can only be credited toward an offender's minimum prison term but not their maximum prison term. For example, an individual may be confined pretrial for one year in jail prior to entering DRC for a sentence of 6 - 9 years. If that individual only serves his minimum sentence of 6 years – he will receive credit for the one year he served in jail, and he will serve 5 years in DRC custody. However, under this bill, if that individual is held beyond his minimum sentence, his one year of jail time credit will not be applied to his maximum prison term. Not applying confinement credit towards an individual's maximum prison term is unconstitutional. It is well established in both state and federal case law that individuals must get credit for time spent in the state's custody.³

Denying individuals their confinement credit will result in some individuals being incarcerated for longer than their maximum prison term. In the example I just discussed, if that individual serves his maximum 9 years in DRC, in addition to the one year in jail prior to entering DRC, he will serve a total of 10 years in the state's custody for this offense. This is a violation of the 14th Amendment's equal protection clause.⁴ A wealthy person that posts bond will serve little or no time in jail pretrial. However, indigent individuals who cannot afford bond may be held in jail pretrial in addition to potentially serving their maximum prison term. HB365 will create an unconstitutional statutory scheme that disproportionately impacts poor people by potentially forcing them to spend more time in the state's custody.

³ See *State v. Fugate*, 117 Ohio St. 3d 261, 2008-Ohio-856; *White v. Gilliam*, 351 F. Supp. 1012 (S.D. Ohio 1972).

⁴ *State v. Piersall*, 20 Ohio App. 3d 110, 112 (1st. Dist. 1984).



Finally, another reason HB365 will have a devastating impact on the state's budget is because the bill allows DRC to rebut the presumption of release when an individual serves their minimum prison term without a hearing, other than in cases where DRC feels the individual poses a threat to society. Under the previous version of the bill, DRC's limited resources would force them to be judicious when determining whether to hold a hearing to rebut the presumption of release. DRC would be forced to focus its resources on maintaining incarceration for high-risk individuals. Under the substitute bill, DRC gets, basically, an automatic rebuttal of the presumption of release in most cases. Under this scheme, it will be easier to maintain the incarceration of individuals, and more individuals will be held beyond their minimum sentence. Again, this change will result in a further increase to the prison population and an unmanageable strain on Ohio's budget.

HB365 also will force Ohio to choose between risking correctional officer safety and building more prisons to house all the individuals serving these unnecessarily long sentences. If new prisons are not built, the current facilities will be forced to house growing inmate populations despite already housing inmates at 129% of prison capacity. Prison overcrowding leads to increased violence in the facilities, which will result in even fewer inmates getting released and the overcrowding crisis getting worse and worse. This is dangerous for correctional officers and inmates. This kind of overcrowding inevitably leads to lawsuits and a federal judge dictating to Ohio how to run its prisons.

In light of this shocking price tag and impact to the prison population, this committee should consider adding an amendment that requires DRC to collect aggregate demographic data of inmates and data comparing individuals sentenced under indefinite and definite sentencing regarding their respective rates of: release, recidivism, in-prison program utilization, in-prison disciplinary violations and the severity, and supervision violations. Then Ohio will be able to determine whether the money spent on this law is actually producing the desired outcome.

What happened to Reagan Tokes is a tragedy. It is reasonable that this legislature would want to pass laws that make Ohioans more safe in light of this terrible case, but this legislation will not make



Ohioans more safe. There is no evidence that longer prison sentences reduce recidivism or make communities safer.⁵ If HB365 will not make Ohioans safer, then why is Ohio willing to potentially spend \$191.3 million annually on this bill and \$700 million in prison capital costs? If Ohio has this kind of additional budgetary surplus, there are effective ways to spend this money to reduce crime – most of it should be invested in early childhood education, child protective services, drug treatment, and mental health treatment. The reality is that Ohio does not have this kind of surplus.

Ohio, and DRC specifically, have limited resources. The money to fund this bill will have to come from somewhere. More than likely, it will have to come from the budget for programing, including programs implemented to combat the opioid crisis. Many Ohio communities, large and small, are relying on drug treatment programing. Instead, this legislation will move a money away from helping Ohio communities combat the opioid crisis and towards incarcerating individuals for longer periods time with absolutely no hope of reducing crime.⁶

Thank you for the opportunity to speak today before your committee. I am happy to answer questions at this time.

⁵ *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prison*, Urban Institute Justice Policy Center, <http://apps.urban.org/features/long-prison-terms/reform.html>; citing Sered, Danielle, *Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration*, https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy_downloads/accounting-for-violence.pdf; Durlauf, Steven N. and Nagin, Daniel S., *Imprisonment and Crime: Can both be reduced?*, 2011 American Society of Criminology, Criminology & Public Policy, Volume 10 Issue 1, January 26, 2011.

⁶ *Id.*

