

HB365 Interested Party Testimony, House Criminal Justice Committee – November 28, 2017
Presented by – Sara Andrews, Director

Chairman Manning, Vice-Chair Rezabek, Ranking Member Celebrezze and members of the House Criminal Justice Committee, thank you for the opportunity to testify regarding HB365 and share an abbreviated historical perspective of sentencing in our State. In acknowledgment of the tragic circumstances that brought us here, God Bless Reagan Tokes, her family and all of those who knew and loved her.

Borrowing from my friends at the Pennsylvania Commission on Sentencing, today's perspective is important because, "Sentencing is the lynchpin of the criminal justice system. Sentencing influences – and is influenced by – events that happen both earlier and later in the chronological progression of a criminal case. Understanding the relationships between those events is crucial." I've done my best to condense 40 plus years into the confines of legislative-committee-hearing-time.

Ohio's sentencing evolution is consistent with national trends – we are not an outlier. So, you may ask, how did we get here?ⁱ

1970's

In 1974, Ohio criminal code was significantly rewritten based upon the Model Penal Code. It retained indeterminate sentencing with the judge selecting the minimum term from a range set by statute for each of four felony levels. Ohio's eight prisons held 10,707 inmates on July 1, 1974.

Until the mid-1970s, Ohio's criminal code had few mandatory sentencing statutes. The "tough on crime" era began in the late '70s with the enactment of compulsory sentences for certain drug offenses.

1980's

In the '80s, the General Assembly added mandatory terms for a broader array of crimes. The signature bill of the era—SB199 (1984)—mandated longer terms for high level "aggravated" felons, especially on repeat offenses, and for those having guns while committing felonies. Similar legislation added longer mandatory terms to misdemeanor law, with increased penalties for impaired drivers. The end result was eight new sentencing ranges added to the original four ranges from the 1974 criminal code.ⁱⁱ

SB199 enacted the most sweeping mandatory terms in Ohio's modern history, the prison population was expected to hit new heights. That, in part, was the bill's intent. As of July 1, 1983, the prison population had risen to 18,030, which prompted Governor Richard Celeste to create the bipartisan Governor's Committee on Prison Crowding.

In its 1986 report, the Committee stalemated over whether the state should build more prisons to meet the challenge, rewrite the felony sentencing structure, or both. The Committee did make several proposals that were enacted or funded by the General Assembly with bipartisan support. Those included creating earned credit program(s), fostering more use of halfway houses, encouraging the adoption of parole guidelines, expanding community-based correctional facilities (CBCF's) and enacting provisions to govern sentencing reductions if an overcrowding emergency occurs (ORC 2967.19).

Ohio also began a half-billion-dollar prison construction program that significantly expanded the capacity of the system over the next decade. Despite a net gain of over 17,000 beds, as new prisons opened, the number of inmates grew to again exceed capacity.

1990's

Governor Celeste put together a second blue ribbon panel of judges, prosecutors, law enforcement officers, legislators, defense attorneys, and state and local officials. By the time the Governor's Committee on Prison and Jail Crowding reported in March 1990, the prison population had reached 31,268 in space designed for 19,848.

In the '90s, the legislature made felonies out of offenses that were formerly misdemeanors (such as domestic violence, nonsupport and impaired driving) and there were dramatic new mandatory terms for sexual offenders. This was also the time of the "Crack Era". The saying was that officials have addressed 10 of the last one drug epidemics.

Mandatory sentencing bills targeted the worst criminals and even before the mandates, judges were routinely sentencing high percentages of these criminals to prison. This began a subtle shift in prison crowding, moving from prison intake (admitting new prisoners to prison) to length-of-stay in prison. Additionally, during this era, the Parole Board grew more cautious, releasing far fewer offenders at their first parole hearings, also contributing to longer length-of-stay in prison.

The number of prison inmates grew by nearly 400% in the 16 years between 1974 and 1990. The second Crowding Committee decided that systemic change was needed. It recommended that the General Assembly create a sentencing commission to develop comprehensive plans to deal with crowding and a range of other sentencing goals including public safety, consistency, and proportionality (punishment to fit the crime).

Acting on the task force's recommendation, the General Assembly created the Ohio Criminal Sentencing Commission later in 1990 as part of SB258. The Commission was created in response to four concerns: prison population and cost, overly complicated sentencing laws, racial disparity in sentencing, and lack of judicial discretion.

1993

The Commission's charge was to create a comprehensive sentencing structure that was proportionate, mindful of public safety, promoted uniformity across the state retained reasonable judicial discretion, incorporated a full range of criminal sanctions, and matched criminal penalties with available correctional resources.

Accordingly, the Commission's first report, a recommended overhaul of felony sentencing, was completed on July 1, 1993. The Commission decided against the grid-style matrix, recommended by sentencing commissions in other states and the federal system, in favor of a determinate system based on judicial discretion and the concept of "truth in sentencing."ⁱⁱⁱ

The prison population on November 1, 1993, stood at 40,274. The state had spent \$850 million on prison construction between 1982 and 1993, and the annual operating cost of the Department of Rehabilitation and Correction (DRC) was \$750 million.^{iv}

1996 – Truth in Sentencing

The truth in sentencing scheme in Ohio, known as Senate Bill 2^v became effective July 1, 1996. The legislation established a type of determinate sentencing structure called a presumptive system, that required minimum sentences with judicial discretion from a range of possible punishments. Many felt that SB2 was probably the most honest truth in sentencing scheme enacted in the country because most other states defined “truth” as 85% of the truth.

These changes grew out of:

- A sense that the public found indeterminate sentencing confusing. In practice pre-SB2, “6 to 25” never meant 25 and often didn’t mean 6, since parole eligibility came after about 4 years.
- The knowledge that the inmate’s actual time served was not determined by the elected judge in a public forum, but by the Parole Board—an unelected body meeting in private.
- A sense that the Parole Board sometimes acted arbitrarily, as Board decisions varied widely.
- A desire to give greater control over sentences to judges, so that all concerned—court, defendant, victims, and public—know that stated sentences equate more closely to time actually served.
- A desire to foster a broader range of correctional alternatives; and
- A desire to make prison populations more predictable for fairness and budgetary purposes.

1997

Shortly after SB2 was enacted, concerns emerged that the sentence ranges authorized for sexual assaults, particularly rape, were inadequate. SB2 set sentence ranges based on the average terms actually served at the time it was developed. But public attitudes regarding sexual offenders were getting tougher. Beginning with HB180, effective in 1997, the General Assembly responded with various measures, culminating in potentially long, indeterminate sentences for certain high-level sex offenders.

2000

As a disincentive for misbehavior in prison, SB2 had what was called “bad time”. The Ohio Parole Board, upon recommendation of the prison’s warden, could add bad time to a prisoner’s sentence. It could only be imposed for behavior that would be a crime outside prison. The statute allowed the Parole Board to assess bad time in increments of 15 to 90 days per incident, up to a maximum of 50 percent of the offender’s stated prison term.

In 2000, Ohio’s bad time provision was found unconstitutional for appearing to permit an administrative body (the Parole Board) to augment a judge’s definite sentence with additional time in prison for a crime.

Following that decision, proposals were drafted, but not enacted, to make clearer that bad time was part of the prison sentence by instructing judges to impose a basic prison term, then adding a disciplinary term that can include bad time and time for post-release control violations. The proposals generally redefined bad time violations to make clear they cover “serious misconduct” in violation of a prison rule, rather than “crimes”.

2006 – 2007

A series of United States Supreme Court decisions^{vi} led to two 2006 decisions (*State v. Foster*, 109 Ohio St.3d 1 and *State v. Mathis*, 109 Ohio St.3d 54) by the Supreme Court of Ohio that dramatically changed the guidance given to judges by SB2. Generally, those decisions are credited with a steady rise in prison population.

SB2 retained fairly broad judicial discretion because Judges could choose a sanction from within a statutory range. However, the statute required judges to make certain factual findings before imposing more than the minimum sanction, imposing the maximum sanction, or imposing consecutive sentences.

The Supreme Court of Ohio held that the guidelines in SB2 were merely advisory and that judges have full discretion to impose any sentence falling within a statutory range for an offense and no longer need to make findings or give reasons for imposing any sanction falling within that range.

By 2007, “[T]he Ohio Department of Rehabilitation and Correction reported that the prison population was approaching 49,000; projections made before *Foster* were revised upward by 2,150 beds over the next decade and the dramatic cumulative effect of minor changes in individual sentences were highlighted,”^{vii} as well as a surprising increase in female offenders and offenders from rural Ohio counties.

2008 – 2011

While prison crowding increased in the years since 1996, it wasn’t until 2008 that the population began to exceed pre-SB2 levels. Ohio’s prison population topped 50,000 for the first time in 2008.^{viii}

For years, the prison population increased as prison intake grew. However, examination of the growth in Ohio’s prison population revealed—even with mandatory sentences and scores of new laws that increased penalties for particular offenses—intake, or admitting new prisoners to prison, was not the primary driver (although a factor). Instead, the increasing prison population was and is largely fueled by increases in inmates’ average length-of-stay,^{ix} or the same prisoners staying in prison longer.

A decade into the implementation of SB2, prisons were crowded, there was a push toward a broader use of the former indeterminate sentences for high-level felons and there was resounding recognition that the felony sentencing code had become more, not less, complex.

As one commentator succinctly put it, “[E]xceptions often swallow rules and make it difficult to read and apply the basic statutes.”^x Individually, each change seems logical enough, but the complexity and cost increase significantly and generally reflect the heightened sensitivities of an individual interest group, rather than careful public policy analysis. During this same time, in 2008, the Commission proposed a simplification to the Ohio Revised Code – by thousands of words and miles of paper.

Also in 2008, to help address prison crowding and preserve scarce resources, Ohio joined a group of more than 28 states in the Justice Reinvestment Initiative (JRI).^{xi} The goal was to develop strategies to improve public safety and control costs for taxpayers by prioritizing prison space for serious and repeat offenders and invest some of the savings in alternatives to incarceration that are effective at reducing recidivism among low-level offenders.

By 2011, Ohio faced record budget deficits and record prison populations. Ohio prisons were holding 50,500 inmates, which is 6.5 times the number held in 1974 and 31 percent over its rated capacity, with about 12,500 more inmates than the prisons were built to hold.^{xii}

With the assistance of JRI and many other policy makers, legislative recommendations to manage non-violent offenders in the community were crafted while at the same time bills were enacted to increase penalties for

violent and gun related crimes. The subject of length of stay and remedies to “fix *Foster*” were discussed and drafted, but landed on the cutting room floor when the final package was delivered to the Ohio General Assembly.

The proposals in that final package were enacted in House Bill 86^{xiii}, effective September 30, 2011 and then later supplemented by revisions made in House Bill 487^{xiv} (effective September 10, 2012) and by Senate Bill 337^{xv} (effective September 28, 2012). A sampling of the provisions included were:

- Raising felony theft thresholds;
- Elimination of the disparity in criminal penalties between crack and powder cocaine offenses;
- Capping sentence lengths for mid-level felony property and drug offenses;
- Eliminating certain sentence enhancements for drug offenders;
- Creating a “risk reduction” sentencing option that allows certain offenders to shorten their time behind bars if they complete assigned programming;
- Expanding judicial release policies;
- Requiring creation of administrative policies to prioritize intensive residential community correction programs for higher-risk offenders and those who otherwise would be sentenced to prison; and
- Requiring courts to use a validated risk assessment tool at various points in the criminal justice process, including at sentencing.^{xvi}

2015 - Present

The fiscal strain of burgeoning prisons and costs are pervasive. Between 1990 and 2010, corrections expenditures grew by 400 percent, with only Medicaid outpacing their growth in state budgets.^{xvii} Ohio had the 7th fastest-growing prison population in the nation between 2005 and 2015. While at the same time, the Bureau of Justice statistics reported that Ohio ranked third in the nation for the number of people on probation – 1 in 48 adults on probation.

The state’s criminal code has also become increasingly complex and fraught with provisions that are exceedingly difficult to administer. Consider that our quick reference guide for felony sentencing is seven pages long and remarkably isn’t inclusive of all detail necessary for application. And, further, one provision alone, 2929.14 Definite Prison Terms, is 13 pages long, 100 paragraphs, nearly 8,000 words and includes 85 ‘ifs’. (credit Justice Center staff 11-09-17).

The Ohio Criminal Justice Recodification Committee (CJRC) was created by the 130th Ohio General Assembly in 2014 to study the state’s existing criminal statutes. The CJRC’s charge was to recommend a plan for a simplified criminal code, making efficient use of resources through flexible yet consistent statewide policies.^{xviii}

The group began meeting in earnest in 2015 and in June 2017 recommended comprehensive changes to the sentencing code designed with three goals in mind: to prioritize prison for dangerous and violent offenders, to incentivize offenders to target and change their behavior and prepare them for reintegration into society, and to empower judges to exercise their discretion to fairly and proportionately sentence offenders, i.e.) recommending an indeterminate sentencing structure.

As of July 2017, the DRC operates 27 institutions, with a FY2018 budget of \$1,823,007,660, and the number of people incarcerated was 50,301. On November 2, 2017, Director Mohr said that the institutional count was

49,860, the lowest since March 2013. He also noted that the number is significantly above the funded prison population level for this fiscal year of 49,104. A current number of those on probation is unavailable, Ohio does not collect statewide probation data, but even without that number we know Ohio has one of the largest probation populations in the nation.

What's next?

Reoccurring themes include prison crowding, the complexity of the laws surrounding sentencing, increased funding for and targeted use of community punishments, responding to drug scourges and the preservation of prison beds for the most violent offenders. The reality is that we are suffering from the cumulative effect of tinkering with sentencing structure on limited data sources and a crime-by-crime basis. Continuing to advance criminal justice policy and legislation on narrow circumstances and data does not contribute to public safety or advance the administration of justice.

HB365 addresses the interest of public safety, the preservation of prison beds for the most violent offenders and the fundamental purposes and principles of sentencing. It also presents us with the opportunity for an efficient, timely and comprehensive review of indeterminate versus determinate sentencing and the future of truth in sentencing while considering ways to simplify the governing statutes and the impact of previous legislative enactments. The expectation is, simply stated, proactive recommendations that change lives AND deliver on the fundamental purposes and principles of sentencing (i.e., protect the public from future crime and punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources).^{xix}

The leverage that has emerged for such a review includes a revived Sentencing Commission. In the last two years the Commission has worked to develop the internal capacity to assemble and analyze available data about the inflows and outflows of the criminal justice system and has taken the lead for a re-engagement of JRI. It has also engaged in academic partnerships to advance data informed policy through the evaluation and impact of HB86 and other major sentencing related legislation since 2011 with Case Western Reserve University; is exploring the use of predictive analytics in criminal justice law and policy development with the University of Cincinnati; and is collaborating with The Ohio State University Moritz College of Law and John Glenn College of Public Affairs on several projects.

All of that, aided by recommendations from the Recodification Committee and the desire of this Committee and other members of the General Assembly to implement wise, responsible legislation to protect the public signals this is a pivotal time for criminal justice and sentence reform in Ohio. The Commission stands ready to provide a forum for responsive consideration of HB365 and is well-positioned to do so because its only vested interest in the outcome is a collective will to equalize and preserve justice.

Chair Manning, thank you again for the opportunity to testify today and I'm happy to answer any questions that you and Committee members may have.

ⁱMuch of the historical information from Diroll, David, *Prison Crowding: The Long View with Suggestions*, 2011, <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf>.

ⁱⁱRauschenberg, Fritz **Sentencing Reform Proposals in Ohio** *Federal Sentencing Reporter*, Vol. 6 No. 3, Nov. - Dec., 1993; (pp. 166-168)

ⁱⁱⁱRauschenberg, Fritz **Sentencing Reform Proposals in Ohio** *Federal Sentencing Reporter*, Vol. 6 No. 3, Nov. - Dec., 1993; (pp. 166-168)

^{iv} <http://www.drc.ohio.gov/Portals/0/Reentry/Reports/Monthly/2017/July%202017%20Fact%20Sheet.pdf?ver=2017-07-17-095457-560>

^vAm.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7163-7814

^{vi} *Blakely v. Washington*, 111 Wn. App. 851 (2002) *rev'd*, 542 U.S. 296 (2004) and *United States v. Booker*, 375 F.3d 508 (2004) *aff'd*, 543 U.S. 220 (2005).

^{vii} Diroll, David, *A Decade of Sentence Reform – 2007*,

<http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf>

^{viii} Diroll, David, *Survey of Judges, Prosecutors, & Defense Attorneys and Code Simplification – 2009*

<http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/MonitoringRpt2009.pdf>

^{ix} Diroll, David, *Prison Crowding: The Long View with Suggestions*, 2011.

<http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf>

^x Diroll, David. *A Decade of Sentencing Reform – 2007*

<http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf>

^{xi} JRI is a public-private partnership that includes the U.S. Justice Department's Bureau of Justice Assistance, Pew Charitable Trusts, Council of State Governments Justice Center, Crime and Justice Institute at Community Resources for Justice, Vera Institute of Justice, and other organizations.

^{xii} Diroll, David, *Prison Crowding: The Long View with Suggestions*, 2011.

<http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf>

^{xiii} http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_86

^{xiv} http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_487

^{xv} http://archives.legislature.state.oh.us/bills.cfm?ID=129_SB_337

^{xvi} <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment>

^{xvii} <http://gppreview.com/2015/10/13/not-all-bad-on-the-criminal-justice-front-crime-sentencing-and-corrections-reform-gains-momentum-across-the-states/>

^{xviii} <http://ocirc.legislature.ohio.gov/>

^{xix} <http://codes.ohio.gov/orc/2929.11>, Purposes of Felony Sentencing