Ohio Prosecuting Attorneys Association

To: All Prosecutors
From: Lou Tobin, Executive Director
Date: March 7, 2022
Re: Senate Bill 288 (Criminal Justice Omnibus Bill)

Senate Bill 288, introduced February 2, 2022, is an 1800 page criminal justice reform measure that includes some of the recommendations of the Ohio Criminal Justice Recodification Committee from several years ago along with a variety of other proposals that have been debated in the General Assembly for several years but have failed to pass as stand-alone measures. While there are some things in the bill that would be beneficial to prosecutors, those things are far outweighed by changes in the bill that would be damaging to public safety and to victims. Our Executive Committee has voted to oppose the measure and to make every effort to see that it is not enacted. To that end, I have compiled the following list of problems with the bill. This represents my best understanding of what is in this very lengthy bill. I'm not sure that it reflects a complete list of problems.

Senate Bill 288 is being touted as non-controversial legislation about relieving the collateral consequences of convictions. In reality, the bill is a massive criminal justice reform bill that will be a huge windfall for criminals. At a time of increasing violence and increasing crime the legislation will make it harder to hold criminals accountable, guarantee that many are released from prison early, and make it easier for people with criminal histories to commit new crimes.

Top 11 ways Senate Bill 288 is bad for victims and bad for public safety in Ohio:

1) Makes it more difficult to obtain a conviction for aggravated murder. R.C. 2901.01(C)(5).

2) Makes it more difficult to obtain a conviction for rape of a child under 13 by allowing child rapists to claim ignorance of the child's age. This seriously jeopardizes the safety of children in Ohio. Rape of a child under 13 is currently a strict liability offense, placing the onus, responsibility and risk where it should be, on the adult perpetrator. R.C. 2907.011.

3) Allows a drunk driver who kills a person while driving drunk to retain their driver's license without any suspension. R.C. 2903.06.

4) Allows misdemeanor domestic batterers to have their records sealed or expunged making it more difficult to hold repeat domestic batterers accountable. R.C. 2953.32.

5) Allows some sex offenders to have records sealed or expunged. R.C. 2953.32.

6) Allows a court to expunge (i.e. destroy) any record that it can seal. This will prevent law enforcement and employers from having any knowledge of certain convictions. Nursing homes, in-home health care agencies, and child day care centers, among others, could be blind to a person's criminal history. R.C. 2953.32.

7) Reduces the punishment for someone who tries but fails to deprive a law enforcement officer of their service weapon. There is generally only one reason to try to take an officer's gun and that is to slay the officer. This bill ignores the danger to the officer and others of this act and rewards the person's failure with a reduced punishment. R.C. 2911.01.

8) Substantially reduces the punishment for people who break into businesses while armed or who break into businesses and attempt to harm or threaten to harm others. R.C. 2911.03.

9) Repeals higher penalties for theft and fraud offenses for particularly vulnerable victims like the elderly or disabled making it more likely that they will be targeted and victimized. R.C. 2913.02, 2913.03, 2913.04, 2913.05, 2913.21, 2913.31, 2913.43, 2913.49, 2913.61.

10) Gives bureaucrats at ODRC the authority to substantially reduce prison sentences for many offenders, through judicial release and transitional control, while minimizing the role of prosecutors, victims, and judges in these release decisions. R.C. 2929.20 and R.C. 2967.26.

11) Allows most offenders, even violent offenders, to seek immediate release from prison during a "state of emergency" and allows for their release without any input from victims or prosecutors. R.C. 2929.20.

Other ways SB 288 is bad for victims and bad for public safety:

Chapter 2901 – General Provisions

- Changes the definition of "affirmative defense," ostensibly in response to the Supreme Court of Ohio's decision in *State v. Nucklos*, 121 Ohio St.3d 332, in a way that is burdensome to the prosecution, overly beneficial to criminal defendants, and will create years of unnecessary litigation. R.C. 2901.05.
- Unnecessarily restricts the use and consideration of prior juvenile adjudications in adult criminal proceedings. These adjudications can be properly considered when an adult defendant has a weapons disability for a juvenile adjudication, as a predicate for the now adult offender's sex-offender registration, and as a sentencing factor. R.C. 2901.08.

Chapter 2909 – Arson and Related Offenses

- Increases the amount of damages a person must cause to be charged with felony arson. More arson offenses will be prosecuted as misdemeanors. R.C. 2909.03.
- Increases the amount of damages a person must cause to be charged with felony vandalism. R.C. 2909.05.
- Reduces the penalty for discharging a laser into the cockpit of an aircraft. R.C. 2909.081.
- Potentially reduces the punishment for terrorism by providing for parole eligibility for terrorists convicted of murder or a first degree felony. R.C. 2909.24.
- Repeals current criminal prohibitions against the possession, use, and manufacture of explosive devices. R.C. 2909.26.
- Repeals current criminal prohibitions against the illegal assembly or possession of chemicals or substances for the manufacture of an explosive device. R.C. 2909.28.

Chapter 2911 – Robbery, Burglary, Trepass, and Safecracking

- Makes it more difficult to obtain a conviction for aggravated robbery by adding a mens rea of knowingly to what is currently a strict liability offense. Strict liability remains appropriate because of the heightened potential for harm during an aggravated robbery. R.C. 2911.01.
- Requires the actual infliction of serious physical harm in order to complete an aggravated robbery. Currently the attempt to inflict the harm is enough. R.C. 2911.01.

- Removes attempts to inflict physical harm from the robbery statute requiring the actual infliction of physical harm. Net effect is that this reduces the punishment for attempting or threatening to inflict harm during the commission of a theft offense. R.C. 2911.02.
- Weakens aggravated burglary so that trespassing in a business, or other occupied structure, with the purpose to commit a criminal offense is excluded. Current law applies to businesses and occupied structures. People will no longer be prosecuted for aggravated burglary for breaking into a business even though this is just as likely to place people at risk. R.C. 2911.03.
- Requires the actual infliction of physical harm for the person to complete an aggravated burglary. Currently the attempt to inflict harm is enough. R.C. 2911.03.
- Weakens burglary so that trespassing in a business, or other occupied structure, with the purpose to commit a criminal offense is excluded. Fails to recognize the risk of harm to persons outside the home. R.C. 2911.12.
- Weakens the penalties for breaking and entering by requiring that the structure in which the offender is trespassing through the use of force, stealth, or deception, have a person present. Burglars will receive a benefit for committing their burglary when no one is present. R.C. 2911.05.
- Reduces penalties for some forms of trespass. R.C. 2911.06.
- Removes breaking into a "strongbox" from the offense of safecracking despite the fact that people and businesses are just as likely to keep valuables or cash in a strongbox. R.C. 2911.07.

Chapter 2913 – Theft and Fraud

- Makes theft up to $2500 a misdemeanor. R.C. 2913.02.
- Reduces penalties for unauthorized use of a motor vehicle. R.C. 2913.03.
- Reduces penalties for unauthorized use of property. Particularly for elderly and disabled victims. R.C. 2913.04.
- Removes attempts to gain access to the law enforcement automated database system from the prohibition on unauthorized use of property. The bill rewards people's failure to gain access to the database. R.C. 2913.04.
- Reduces penalties for telecommunications fraud. Particularly for elderly and disabled victims. R.C. 2913.05.
- Reduces the penalty for passing bad checks. Particularly for elderly and disabled victims. Misdemeanor offenses (up to $2500 under the bill) unlikely to ever be prosecuted because of the resources required for investigation. R.C. 2913.11.
- Reduces the penalty for forgery. Particularly for elderly and disabled victims. Misdemeanor offenses (up to $2500 under the bill) unlikely to ever be prosecuted because of the resources required for investigation. R.C. 2913.31.
- Makes Medicaid fraud up to $2500 a misdemeanor. R.C. 2913.40.
- Makes Medicaid eligibility fraud up to $2500 a misdemeanor. R.C. 2913.41.
- Reduces penalties for illegal use of SNAP benefits or WIC program benefits. R.C. 2913.46.
- Makes insurance fraud up to $2500 a misdemeanor and removes prohibitions on aiding and abetting insurance fraud. R.C. 2913.47.
- Makes workers compensation fraud up to $2500 a misdemeanor. R.C. 2913.48.
- Substantially reduces the punishment for identify fraud when the victim is elderly, disabled, or an active duty service member. R.C. 2913.49.
- Makes receiving stolen property up to $2500 a misdemeanor. R.C. 2913.51.

Chapter 2917 – Offenses Against the Public Peace

- Makes it harder to obtain a conviction for inciting to commit violence by requiring that the conduct actually result in the commission of an offense of violence. This allows people to try to get other to commit violence with no consequences unless the violence actually occurs. R.C. 2917.01.
- Introduces confusion into prosecutions for riot and aggravated riot by requiring that the person "actively" participate in the disorderly conduct that leads to the riot. This is redundant with complicity and will lead to unnecessary litigation. R.C. 2917.02 and 2917.03.
- Makes it more difficult to obtain a conviction for disrupting a lawful meeting, procession, or gathering. R.C. 2917.12.
- Makes telecommunications harassment up to $2500 a misdemeanor. R.C. 2917.21.
- Reduces the punishment for inducing panic even when the violation pertains to the threatened or actual use of a chemical weapon, biological weapon, or radiological or nuclear weapon. R.C. 2917.31.

Chapter 2921 – Offenses Against Justice and Public Administration

- Removes attempt from prohibitions on intimidating public servants, party officials, attorneys or witnesses rewarding those who attempt but fail to accomplish their intimidation. R.C. 2921.03.
- Reduces the punishment for perjury in many cases by tying the degree of perjury to the degree of the charges underlying the offense. This denigrates the sanctity of the judicial system and the oath a person takes as a witness. R.C. 2921.11.
- Reduces the punishment for tampering with evidence from an F3 to an F5 unless the evidence was substantially altered (F4) or destroyed, concealed, or made completely unavailable (F3).
- Makes it harder to obtain a conviction for resisting arrest by changing the mens rea from recklessly to knowingly, providing criminals a better chance at escaping responsibility.
- Makes it harder to obtain a conviction for failure to comply by disallowing consideration of whether the offender failed to stop for traffic lights or stop signs in determining the seriousness of their conduct. Makes the license suspension permissive rather than mandatory. R.C. 2921.331.
- Removes escaping from supervised release from the escape statute making it easier for criminals who are on parole or post-release control to avoid their supervision. R.C. 2921.34.
- Reduces the punishment for attempts to convey deadly weapons and drugs into prisons rewarding people for their own failure. R.C. 2921.36.
- Reduces the punishment for attempting to harass another with a bodily substance such as blood, urine, semen, or feces, rewarding people for failing to make contact with their victim when throwing or expelling the substance. This most often applies to corrections officers at work. R.C. 2921.38.
- Reduces the punishment for attempting to deprive a person of their civil rights. R.C. 2921.45.

Chapter 2923 – Conspiracy, Attempt, and Complicity

- Eliminates the crime of conspiracy as it applies to abduction, certain compelling prostitution offenses, promoting prostitution, arson, some robberies, some burglaries, some forms of corrupting another with drugs, some drug trafficking offenses, and some unauthorized use of a motor vehicle offenses. The bill makes it easier for people to conspire to commit these crimes. R.C. 2923.01.
- Completely eliminates the form of conspiracy that involves aiding in planning the commission of the underlying offense. R.C. 2923.01.
- Allows a person to escape responsibility for conspiring to commit a crime if they abandon the conspiracy at any stage before the conspiracy is completed. Currently they must abandon it prior to the commission or attempt to commit any crime that is the object of the conspiracy. R.C. 2923.01.
- Removes causing an innocent or irresponsible person to commit an offense from the crime of complicity. R.C. 2923.03.

Miscellaneous Provisions

- Makes significant changes to judicial release that would allow most offenders to seek judicial release during any state of emergency flooding the courts with motions for judicial release and throwing open the prison doors during what is already an emergency situation. R.C. 2929.20.
- Makes another significant change to judicial release that would authorize the director of ODRC to cause offenders to receive judicial release while minimizing the role and input of judges, prosecutors, and victims. R.C. 2929.20
- The bill reduces the possible criminal liability of people who commit multiple offenses by replacing the "same conduct" test for merger with a "single event" test. R.C. 2941.25.
- The bill expands the types of offenses for which records can be sealed and allows a court to order the expungement (i.e. destruction) of any records which can be sealed. This includes the opportunity to seal/expunge violent misdemeanor offenses like domestic violence and some sex offenses. The bill's expansion of record sealing to include record expungement is dangerous. There are very good public policy and public safety reasons to not allow the expungement of records. Sealed records are still available to law enforcement under certain circumstances and certain employers considering employment applications. Expunged (i.e. destroyed) records are gone forever. R.C. 2953.31 – 2953.36.
- Expands earned credit from 8% to 15%. R.C. 2967.193.
- Repeals the judicial veto of transitional control when the sentence was less than 2 years. R.C. 2967.26.