Chairman Grendell, and Members of the Judiciary Committee: Thank you for the opportunity to offer proponent testimony in behalf of HB 86.

Like the great majority of other criminal justice interest groups, the Ohio Association of Criminal Defense Lawyers ["OACDL"] supports the passage of HB 86. With a bill of this scope and purview it is not unusual for someone to support some and oppose other provisions of the Bill, as do our colleagues the Ohio Prosecuting Attorney Association ["OPAA"], who testified last week, and earlier before this Committee on SB 10. Our reason for offering testimony today is to discuss one of the Bill's provisions regarding Judicial Release that the prosecutors voiced an objection to in Mr. Murphy's testimony before this Committee, and to urge the Members to reject their advocated position.

I. *Some Legislative history*: *Shock Probation becomes Judicial Release*

"Judicial Release" entered the Ohio Revised Code with the overhaul of the Ohio Criminal Code occasioned by implementation of SB 2 of the 121st General Assembly, effective July 1, 1996. It incorporated similar provisions termed "Shock probation" and "Super-shock probation," which existed under the pre-SB 2 criminal code and statutorily defined the legal authority of the sentencing judge to release an offender after the offender had entered the custody of the Ohio Department of Rehabilitation & Correction ["ODRC"].

Generally speaking, "shock probation" applied to offenders serving definite prison terms for lower level felonies, and required an offender to apply for release after serving between 30-60 days after they had entered state custody.

"Super-shock" probation applied to prison terms for more serious felony offenses, and required the offender to file for release after they had served a total of six months of their prison sentence.

One critical difference between Shock *vs*. Super-shock probation, and the focus of our discussion today is this: Shock probation was focused on assuring that the offender had experienced life in the prison system, and would be "shocked" by that experience into not wanting to return in the future. On the other hand, the focus of "Super-shock" probation was to provide the more serious offender a release opportunity in the future after he had endured a sufficient length of punishment. Although eligible after serving only six months, the offender remained eligible over the remainder of the lengthy prison term, and some judges crafted judicial release

opportunities after years of imprisonment. In the most unusual of my cases, the sentencing court granted super shock probation after the client had served twelve years in prison.

With only minor changes, this basic structure formulated as shock probation and super-shock probation was incorporated into the Judicial Release law implemented under SB 2. Lower level offenders became eligible after serving 30-90 days following their entry into the custody of the ODRC; offenders serving prison terms two years or greater became eligible after serving a designated term of their sentence.

II. *HB 130 of the 127th General Assembly*:

In scope and reach, HB 130 was much like the current Bill under discussion: a multi-faceted piece of reform legislation. Although generally geared much more towards re-entry reforms, the text of the Bill, as introduced, did incorporate some small changes in the Judicial Release provisions. Specifically, under the mistaken rationale of seeking to "harmonize" the statutory language regarding eligibility periods, HB 130 as introduced altered the eligibility of the more serious offenders to read exactly the same as the language of the lower offenders, measuring their eligibility from the day they "were delivered into a state correctional institution."

Under the sponsor's leadership (Rep. John White), a group of interested parties, including OPAA and OACDL, continued meetings on HB 130 to consider alterations even after the bill was voted out of the House of Representatives in April, 2008. One specific change which the working group identified and recommended was amending the provision measuring eligibility of offenders serving more than two years from their "delivery into entry into a state correctional institution," and thereby preserve what was then current law, measuring eligibility as of the service of a designated part of the prison term.

The amendment to the judicial release provisions in HB 130 was crafted along with a multitude of other amendments to the bill, and were submitted by the Sponsor for incorporation into the bill. In regard to amending the judicial release provisions, the OPAA did not oppose the amendment.

However, in the hyperactivity of the "lame duck" legislative session of the

127th General Assembly, these amendments never received a hearing, and HB 130 barely made it to the Senate on December 17, 2008. Signed by the Governor, HB 130 became effective on April 7, 2009.

III. *Senate Bill 22 of the 128th General Assembly to the rescue*:

All of the judicial release provisions of the amendment which was never accomplished to HB 130, were quickly re-inserted into the text of SB 22 of the 128th General Assembly, introduced on February 10, 2009 , and which is the forerunner of this Bill. SB 22 was heard by the Senate Criminal Judiciary Committee, and favorably passed by the Committee on June 18, 2010, after an amendment to the judicial release provisions offered in behalf of the OPAA was rejected by the Committee.

However, SB 22 never made it to the Senate floor for a vote,

IV. *This Committee should reject any amendment to the eligibility provisions of HB 86*:

As I have counseled many clients, "don't confuse **eligibility** for judicial release with **getting** judicial release. There is a world of difference." Just because an offender is legally eligible does not mean the judge has to grant, or even should grant, a motion for judicial release. And it should not be forgotten that the prosecuting attorney has the right to oppose judicial release, and (unfortunately for many clients) their opposition is often given great weight by the sentencing court.

In reality, most offenders charged with serious felony offenses are arrested, and held in county jails while their cases are scheduled and heard in court. By the time they are convicted and sentenced in court, they will have served on average between three months and six months in jail. Under well-settled Ohio law, they are entitled to have all time in jail credited against any prison term imposed. For example, an offender who spent three months in jail prior being sentenced to serve a prison term of three years will only have to serve two years and nine months in prison before being released by ODRC because of expiration of the prison term.

Under the Bill, an offender serving a non-mandatory prison term of less than two years becomes eligible for judicial release after serving 30 days of the non-mandatory prison term. The prosecutors argue that such an offender, if accredited

with jail time credit, might become eligible for judicial release prior to entering DRC custody, and thereby not ever see the inside of a prison cell. It is difficult to calculate how extremely unlikely is this scenario. At the sentencing hearing, the judge has the option to consider the offender for probation, or as technically termed, Community Control sanctions. If the judge rules that the offender should be sentenced to Community Control sanctions, there is no need for a motion for judicial release. Even if the offender files a motion for judicial release the day following the sentencing hearing, under current law as well as under the Bill, **the judge has 60 days in order to schedule a hearing on the motion** for judicial release. Certainly, the offender will have obtained at least 30 days in DRC custody by the time of that hearing on the motion. For this reason, the argument of the prosecutors on this issue, that the offender could be released before entering prison, is highly unrealistic and theoretically improbable.

For the offender sentenced for a prison term exceeding two years but less than five years, under the Bill the offender is eligible after serving six months of the non-mandatory prison term. Relatively few offenders serve more than six months in jail before entering DRC custody for offenses carrying non-mandatory prison terms, and therefore they will not become eligible before entering DRC custody. And, as explained above, the procedure requires a court hearing within 60 days of the motion for judicial release being filed.

As for the offenders serving five year prison terms, under the Bill eligibility for judicial release is set after the offender has served four years of the non-mandatory prison term. In this case, there is no realistic or theoretical likelihood that an offender will have served four years in the county jail before being sentenced. The same is true for offenders serving non-mandatory prison terms over five years in length, which the Bill requires they serve five years before becoming eligible for judicial release. All of these offenders will have served the great majority of their prison terms within DRC custody.

As to the notion that only "hard time" (as opposed to county jail time) should count towards eligibility for judicial release for any offender, the notion ignores the reality that the conditions in our county jails are significantly inferior to the general conditions maintained in our state correctional institutions. Because of the over-crowded conditions in our budget-strapped county jails, oftentimes the worst part of the entire penal experience for offenders is the time they spent in the county jail prior to entering ODRC custody. That time should count just as much for eligibility purposes as the law already requires for jail time accrediting from prison terms

imposed.

However, the most compelling reason for acknowledging that jail time should count towards eligibility is this: in the calendar year 2009, approximately 1000 inmates convicted of F-1, F-2, and F-3 offenses were released from ODRC custody on motions for judicial release. (Appended) If each of those 1000 inmates had served just three months in jail prior to being sentenced (a "low ball" example), then every fourth inmate released would have aggregated one total inmate-year of time in DRC custody that would not have been necessary had the jail time of these four inmates been accredited against their judicial release eligibility. It follows, that altogether, if all 1000 of those inmates had served three months in jail prior to sentencing, the aggregated total would be 250 inmate-years served in ODRC custody which would not have been necessary if their jail time had been accredited against their judicial release eligibility.

In short, one easy way to reduce the Ohio prison population by 250 inmates in the next year is to pass HB 86 in its current form, which permits granting jail time credit against the eligibility time for offenders serving more than two years. And now for the best part: the prison population is reduced by another 250 inmates in the following year, and every year thereafter. And it should be easy, because these inmates have already served that time sitting in our county jails before they are delivered into a state correctional institution.

V. *Conclusion*:

The Committee should reject any amendment offered in behalf of the OPAA regarding changes to the eligibility for judicial release.

Current law is a result of a change in the law under HB 130 that the Sponsor of that proposed legislation realized was a mistake and unsuccessfully attempted to change before it was enacted. The same fix has been the subject of clean-up legislation ever since, including HB 86.

Allowing jail time credit to be utilized in computing eligibility time for offenders serving prison terms because Ohio law recognizes that time served in county jails must count against the prison terms imposed by the court. It is also right, because none of these offenders are going to become eligible for judicial release without experiencing time in a state correctional institution.

Finally, HB 86 is a painless way to allow ODRC to shrink the prison population by 250 inmates on an annual basis. At annual budgetary cost of $25,000/inmate, the annual savings is approximately $6,250.00.

Respectfully submitted,

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