OHIO HOUSE OF REPRESENTATIVES

CRIMINAL JUSTICE COMMITTEE
JANUARY 10, 2012

HOUSE BILL 265

OPPONENT TESTIMONY OF

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I am Barry Wilford, Public Policy Director of the Ohio Association of Criminal Defense Lawyers. We are an organization of 800 or so members of the members of the private bar and public defenders who comprise the criminal defense bar in this state, and who share a passion for justice in the operation of the criminal justice system.

We respect the distinguished Chairman of this Committee who is a sponsor of House Bill 265, but we strongly oppose this effort to effectuate a fundamental change in the Ohio law, and not for the first time.

I. *Historical perspective on the predecessors of HB 265*:

Perhaps a little historical perspective is helpful in assessing where we are and where we have been with the proposed changes that would be accomplished by HB 265, which would defeat the current right of all defendants in Ohio courts to elect to waive his right to trial by jury and have his or her guilt decided by the judge assigned to his case.

This idea is anything but new. In fact, this is the 5th time in the past 20 years that the Ohio Prosecuting Attorney Assn has sought this change in Ohio law.

- The first attempt, was with HB 653, which was introduced on February 4, 1993 in the 120th General Assembly. The bill was assigned to this Committee and never made it out of this room.

- The second attempt was with Senate Bill 106, which was introduced on April 24, 1997 in the 122nd General Assembly, by the distinguished member of this Committee, then Senator Louis Blessing. The bill was assigned to the Criminal Judiciary Committee, which did not report the bill.

- The third attempt was with House Bill 541, which was introduced in the 124th General Assembly, and which was assigned to this committee. It too never made it out of this room.

- The fourth effort was with a proposal in 2008 submitted to the Supreme Court of Ohio's Commission on Rules of Practice and Procedure. Submitted by the prosecutor's member of the Commission, this hearing presented the only time this proposal has been submitted for a vote in any deliberative body of Ohio. It was defeated on a vote of 11-3.

And, here we are again, an idea that has never gone anywhere, but just won't go away.

II. *Editorial reaction to HB 265*:

Although there has been no opposition testimony before this committee previously scheduled on HB 265, it has received considerable opposition testimony in the newspapers all across this state.

Most newspapers around the state have found the controversy of this proposal to be newsworthy, reporting on the bill in their statehouse coverage. Surprisingly, however, the idea at the center of this proposed legislation has also captured the interest of their editorial boards, and they have sounded off one after another, after another, in strongly worded editorials opposing the bill:

- The *Akron-Beacon Journal*: "The option of a bench trial enhances public confidence, the state vigilant in protecting the rights of the accused, a conviction standing taller. The choice [of judge or jury trial] flows logically and appropriately from the burden on the prosecution to prove its case." (November 22, 2011)

- The *Columbus Dispatch*: Headline: "Change unnecessary: Defendants should keep the right to choose trial by judge or jury."(December 2, 2011)

- The *Cleveland Plain Dealer*: Headline: "No need to reset scales by allowing Ohio prosecutors to veto trial by judge." (December 9, 2011)

- The *Toledo Blade*: "The test of a judicial change of such magnitude should be whether it enhances justice, not the number of other states that use the procedure. There is no compelling reason to alter a system that has served Ohio justice well for generations. . . . The scales of justice in Ohio do not need to be rebalanced." (January 3, 2012)

III. *Review by the Ohio Judicial Conference*:

You have received copies of the Judicial Impact Statement prepared this past November by the Ohio Judicial Conference, so you are aware of strong stance

against HB 265 by the judges. And, you have heard and read what the Ohio Prosecuting Attorney Association feels about the opinion of the judges: in the testimony of the distinguished prosecuting attorney of Ashtabula County, Thomas Sartini, current president of the OPAA, they describe the judges' reasoning as "flawed."

The prosecutors take issue with the judges' stated opinion that Ohio Criminal Procedure 23 needs to be revamped in order to facilitate the interplay between a defendant's right to waive trial by jury under current law and the new-found right of the State to a jury trial under HB 265. The opinion of the Judicial Conference is that enactment of HB 265 will not accomplish a self-executing amendment of Criminal Rule 23; procedural Rules have to be amended by the Rule amendment process, and with all due respect, not by the legislature.

I will happily leave it there, except to make two points:

(1) the prosecutors are acutely aware of the well-settled basis in law for the Judicial Conference's position, which is quite evident from the fact that they sought to effectuate this change in law by going through the Rules amendment process in 2008. They have only argued that the legal reasoning which require that process is "flawed" since they were strongly rejected by the vote of the Commission which recommends amendments to the Rule; and

(2) the Judicial Impact Statement in question here is the strongest expression of opposition by the Ohio Judicial Conference to a proposed piece of criminal justice legislation within recent memory. Nevertheless, the Judicial Conference has recommended a path forward which will allow for a coordinated approach by which the legislature and the rule-making process can accomplish changes of both the substantive law and procedural law necessary for implementation of the changes sought by HB 265.

IV. *HB 265: On the merits of the bill*:

In the testimony of OPAA President Sartini, two arguments were presented in behalf of enacting HB 265:

(1) **The "Uneven Playing Field:"the State is not getting justice or fairness in trials by judges**. This argument is bizarre when faced with the accepted

statistical figure that 95% of all criminal defendants plead guilty rather than access the "uneven playing field" which supposedly tilts in their favor. Further undermining the argument is that the State succeeds in the great majority of trials where the defendants do not plead guilty. Question: where is the compelling need demonstrated which one would think appropriate before making this fundamental change in the Ohio criminal justice system?

(2) **HB 265 will increase public confidence in the law.**

(A) It should first be observed that if the newspaper editors around Ohio have any sense of the pulse of public opinion, then this claim of the prosecutors rings very hollow. None have endorsed this bill; every major City newspaper outside of Cincinnati has expressed opposition to it.

(B) The prosecutors venture into an area that they really know nothing about when they argue that the financial costs of a jury trial in a felony trial is a matter of no financial consequence to "vast majority" of criminal defendants. That opinion shows surprising ignorance of the provisions of the Revised Code and Administrative Rules that govern the Department of Rehabilitation and Correction which provide for the monthly confiscation of any funds in an inmate's prison account over $15 where a certified judgment for court costs and fines are forwarded to the prison by the clerk of courts. Furthermore, the financial expense of legal fees in misdemeanor prosecutions is a large factor which guides criminal defendants in these prosecutions to proceed in more trials before judges than jurys, year in and out.

Actually, the only party to a criminal case that has no "skin in the game" is the prosecuting attorney, a fact observed by the Ohio Judicial Conference in its recommendation that if HB 265 is enacted, the bill should be amended to include a stipulation that the prosecuting attorney office will pay the court costs in cases where the jury trial is the result of the prosecutor's exercise of its right to a jury trial.

(C) In its third and final consideration, the prosecutors argue that Criminal Rule 29 will still allow for judges to weed out "weak" or "marginal" cases by granting acquittals at the end of the State's case, thereby lessening the risk of jurys convicting on insufficient evidence. Actually, HB 265 will accomplish just the opposite: it will functionally repeal Criminal Rule 29, because the bill provides for a right to a jury determination on the charges brought by the prosecution.

Dismissing a case for legal reasons (*e.g,* lack of speedy trial; statute of limitation; *etc.*) will still allow judges some legal basis to terminate some prosecutions. But the right to a jury determination of the charges must be interpreted to mean that no other fact-finder (*i.e.*, trial judge) has the authority to invade the province of the jury to weigh the evidence and grant an acquittal if it finds the evidence wanting. And as Chairman Slaby -- former judge Slaby-- probably recalls, in conflicts between laws governing substantive rights and laws governing legal procedure, the laws governing substantive law control.

For these reasons, the argument of the prosecutors regarding the availability of Criminal Rule 29 to remain available to weed out weak prosecutions and is simply incorrect as a matter of law. Criminal Rule 29 will be rendered meaningless by enactment of HB 265.

(D) **Speculative fiscal impact**:

The prosecutors belittle the likelihood of significant fiscal impact on local court administrations by the exercise of their new-found rights to jury determinations under HB 265. One thing is certainly clear: there will be more jury trials. In municipal courts, in county courts, in juvenile courts, and in common pleas courts. How many more ? No one knows that answer.

There is also real potential for significant increase. Consider the fiscal impact of the decision of the prosecutor to nullify the defendant's waiver of jury in a death-penalty case. Longer time in selecting a jury; longer trials in the presentation of the evidence; jury sequestration at local hotels and meals during the deliberations, and then sentencing hearing at the end, which can oftentimes be like a second trial itself, and which include a repeat of sequestration and meals during deliberations. The difference in the administrative costs of a jury trial and three-judge trial in these kind of cases can be enormous, running into tens of thousands of dollars.

V. *Conclusion*:

As the Ohio Judicial Conference and newspaper editors around Ohio has repeatedly opined, we believe there is no compelling reason that has been demonstrated to justify this fundamental change in Ohio law which has governed over the past eighty years.

This Committee has good reason to do what every committee in three different Ohio General Assemblys has done: refuse to report the bill.

Respectfully submitted,

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