OHIO HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE
SEPTEMBER 30, 2014

HOUSE BILL 349

OPPONENT TESTIMONY OF

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OHIO ASSN. OF CRIMINAL DEFENSE LAWYERS

Chairman Butler and members of the Committee, my name is Sarah Schregardus, and I am the Co-Chair of the Public Policy Committee 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.

I respectfully urge you not to report Substitute H.B. 349 or "Destiny's Law". The tragic circumstances surrounding the injuries sustained by Destiny Shepherd at the abusive hands of her mother's boyfriend cannot be overstated. However, those horrendous circumstances do not warrant an unnecessary and impractical addition to the Ohio Revised Code.

I. *No prior hearings for oppositional testimony*:

First, although the Committee Notice for today's hearing indicated a "possible vote" on a substitute bill, I would just note for the record that today is the first opportunity to offer opposition testimony on the bill. Review of the Committee's website reflects that the bill received sponsor testimony on January 15, 2014, and proponent testimony on January 22, 2014. No hearings have been scheduled on the bill since that time. Based upon our testimony this morning, we believe the Committee should realize that there are issues that deserve further consideration and testimony before the Committee votes on whether or not to report the bill.

The only difference between the bill as introduced and the substitute bill is the addition of the provisions regarding enhanced rights to reparation funds by victims who have suffered catastrophic physical injuries as the result of criminal conduct. Our Association has no objection to these provisions, although this is the first time they have seen the light of day in this hearing room, and probably deserve additional time to study and review. Our opposition is limited to the provisions of the original and substitute bill regarding a specification for permanent serious physical injury.

II. "*Destiny's case" was mishandled: Terrance King could have received up to 24 years in prison.*

The leading reason that we oppose the bill is because it is totally unnecessary to accomplish the stated goal: to increase the sentence available to offenders who violently cause permanent serious physical harm. In the case of

Destiny Sheperd who has been the current inspiration for this bill - Terrance King ("Destiny's offender") could and should have been sentenced to 24 years in prison had the trial court not merged the three offenses of which he was convicted into one offense, based upon the "allied offenses" merger doctrine. Mr. King was found guilty by a jury of one count of Felonious Assault and two counts of Child Endangering, all felonies of the second-degree, each with a maximum sentence of 8 years, and with the possibility the sentences could run consecutively for a total of 24 years. The prosecutor, under the mistaken legal opinion that he could only proceed to sentence on one of the three counts, elected to proceed on the second count and have the remaining counts merge. However, the law did not require charges of Felonious Assault and Child Endangering to merge then, nor does it do so today. The Second Appellate District, which includes Clark County, has held (decision appended) that these crimes do *not* merge, meaning Terrence King could have been sentenced to up to 24 years imprisonment. So, if the goal of this legislation is to increase the potential sentence for offenders like Terrance King, the law already provides a fully available mechanism to do so – the trial court has the discretion to impose consecutive sentences for non-allied offenses.

III. *This Bill would cost millions annually*:

Moreover, this bill is expensive. Ten years ago, a similar bill was introduced in the 125th General Assembly in 2004 as H.B. 384 to create a specification for criminals who cause "serious physical harm that resulted in permanent injury." After several hearings, the Bill died in this Committee without being reported. Likely this was due in part to the results of the Fiscal Note and Local Impact Statement advising that it would cost the state upwards of $3.3 million annually. See attached Fiscal Note and Local Impact Statement for H.B. 384 (125th General Assembly). Furthermore, the 2004 Fiscal Note estimated the Bill would substantially effect the <u>county criminal justice systems</u> by increasing the burden on prosecutors and defense counsel to prove that the offenders crime resulted in permanent serious physical harm. This accurately captured the resulting effect of the need for medical expert consultation and testimony for both the prosecutor and the defense. Since approximately 85% of criminal charges are brought against indigent defendants, counties would be paying the fees for these experts for both the prosecution and the defense. The State would be responsible for reimbursement to the counties of up to one-half of the cost of the defendant's medical expert's consultation and testimony in cases involving an indigent defendant.

In the most recent Fiscal Note on the current Bill in 2014, the cost has risen to between $4.9 million and $9.8 million annually for the Department of Rehabilitation and Corrections. This is due in part to the significant change between the former bill and the current bill. The former Bill imposed an additional five-year term of imprisonment. However, the current Bill creates a range from a 5 to 10 year term of imprisonment, potentially doubling the additional time and costs of incarceration.

It should be noted, the 2014 Fiscal Note, as introduced, fails to observe any of the local impact by this change in law with regard to the additional litigation surrounding the determination of whether "permanent" harm was caused. The Fiscal Note only reflects the costs of longer terms of incarceration anticipated by the newly enacted specification. It is submitted, that the discrepancy between the 2004 and 2014 Fiscal Notes as to local impact should prompt a request for LSC to address that discrepancy.

IV. *The bill is not only expensive, it is impractical*:

If we are to learn anything from past legislative endeavors of this kind, we should remember that injecting a new evidentiary issue which invites or requires expert testimony into prosecutions and defense of offenders promises to be a very significant fiscal expense. Case in point: the change in Ohio law occasioned by "Megan's Law," which in 1996 ushered in a sexual classification system to determine reporting and community notification requirements of a sex offender based upon whether the offender was "likely to re-offend." Under that law, the trial court was required to hold this hearing as part of the sentencing hearing, or if the offender was already in prison for a sex offense, prior to his release from prison. Thousands of these hearings were held, and the consultation business of psychologists all over Ohio surged with the immediate demand for psychological risk assessments. Costs of prosecution increased significantly in all sex offense prosecutions, as did the costs of the criminal defense. Many thousands of dollars later, the General Assembly passed the "Adam Walsh Act" in 2007, and removed the need for an evidentiary hearing to determine the appropriate sex offender classification.

That fix will not be available with this specification. The specification must be proven beyond a reasonable doubt, and that will require evidence for and invite evidence against.

Under HB 349, the factual medical issue to be determined by a jury, or in a jury-waived trial by a judge, is this: [lines 396-403 of the Substitute bill]

> "(Y) Catastrophic disabling harm" means a severe physical injury that causes a substantial and lifelong impairment to a victim's ability to perform the necessary daily activities required to care for one's self and maintain meaningful employment.
>
> "(Z) Catastrophic disability compensation" means compensation for which a claimant is eligible due to catastrophic disabling harm suffered by a victim."

The evidence on this factual issue will require testimony that will seem much more like a social security eligibility hearing or workman's compensation hearing than a criminal trial.

- What is "substantial" impairment?
- Does "physical injury" include psychiatric injury?
- What is the likelihood of partial or total rehabilitation of the disability?
- Which daily activities are included?

Conclusion

The bottom line is that Substitute Bill 349 is not needed to effectuate the desires of the Clark County Prosecutor in "Destiny's" case seven years ago. Ohio law was available then as it is now to adequately punish offenders who cause serious physical harm. Not only unnecessary, the specification created by the Substitute Bill will impose a potentially enormous fiscal impact upon the resources of the counties and the state.

On behalf of the Ohio Association of Criminal Defense Attorneys, I urge you not to report this Bill.

Respectfully submitted,

Sarah M. Schregardus
Co-Chair of the Public Policy Committee
Ohio Association of Criminal Defense Lawyers