

OHIO HOUSE OF REPRESENTATIVES

**CRIMINAL JUSTICE COMMITTEE
NOVEMBER 28, 2012**

HOUSE BILL 477

OPPONENT TESTIMONY OF

**SARAH M. SCHREGARDUS, ESQ.
OHIO ASSN. OF CRIMINAL DEFENSE LAWYERS**

Chairman Combs and members of the Committee, my name is Sarah Schregardus, 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

We respect the former Chairman of this Committee and Representative Bubp, who sponsored House Bill 477, but we oppose this effort to effectuate a fundamental change in the Ohio law and appellate procedure.

At the outset, while this Bill is relatively short, there are multiple aspects of the law that will change if this Bill is passed as written. At the outset, I would suggest that the issues that are addressed in this Bill are better left for the Ohio Supreme Court Rules Committee as set forth by the Modern Court Amendment, delegating the rules to appellate procedure. Relegating these issues to the Ohio Supreme Court, at a minimum, reduces significant litigation over the constitutionality of this Bill that is essentially guaranteed to result from the passage of this Bill. By way of example, currently pending before the Ohio Supreme Court, scheduled to be argued in February of 2013 is *In re: M.M.*, a case directly relevant to this legislation which considers the validity and interpretation of the State's right to appeal suppression issues under R.C. 2945.67.

I would also offer that, on behalf of the OACDL, we are not opposed to every aspect of this Bill, there are sections that address legitimate inconsistencies that have merit, however, the Bill as it stands should not be passed.

Sec. 2945.67(B): The delayed appeal

It should be noted that nowhere in the civil world, does anything similar to a delayed appeal exist: if any attorney misses a deadline, for the plaintiff or the defendant, there is no delayed appeal, no remedy for missing the statute of limitations.

A defendant's ability to request a delayed appeal is a result of the unique circumstances defendants are in. For defendants, especially indigent defendants with court appointed attorneys, after they are convicted and sent to jail, then transported to prison, that is the last time they see their attorney. It is common practice for the same attorney who represented the defendant at trial not to represent the defendant on appeal because an attorney is forbidden to raise his or her own ineffectiveness, one of the most common issues raised on appeal. The trial judge then appoints another attorney who is supposed to contact the defendant. Many times, that new appointed attorney never gets the notice that he or she was appointed, thru no fault of their own, and then by the time it has been figured out that the defendant didn't have an appeal, the thirty days has lapsed. This type of mistake is very common. The law permitting a delayed appeal and requiring the defendant to prove why he was unable to meet the 30 day deadline serves a very important purpose.

On the other hand, the same reasoning does not apply to prosecutors. For the prosecutor, the same office that handles the trial level work, handles the appellate work. Everyone involved

on the prosecutor's side is a lawyer – versus the nonlawyer, often uneducated, defendant and his changing lawyer.

Also, within this section is the provision permitting a cross-appeal as of right for the prosecutor in the event a defendant is granted a delayed appeal. We do not oppose this section if the same rights were extended to the defendant in the event the State seeks a delayed appeal and is granted one.

Sec. 2945.67(A): Appeal as of right – Interlocutory appeals

This Bill will give the prosecutor a mechanism by which to hold a trial hostage in a manner unchecked by the trial judge. The way the law currently works under Criminal Rule 12(K), is that the only way the prosecutor can file an interlocutory appeal, is to certify that:

- (1) the appeal is not taken for the purpose of delay;
- (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The Rule further states that if the State opts to do this:

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification [AND] if an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

Criminal Rule 12(K).

This law reasonably limits the power of the state. By removing these safeguards, this Bill increases the ability of the state to file an interlocutory appeal, without certifying under Rule 12, now ANY final appealable order, without regard to Rule 12. To make sure this Committee understands the depth of the definition of "final appealable order", a trial court's decision granting a defendant a polygraph at state expense is a final appealable order. *State ex rel Leis v. Kraft*, 10 Ohio St.3d 34, 37. HB 477 makes no provision that a defendant should be released on bond pending appellate review, or that the speedy trial time does not toll. Conceivably, the prosecutor could file an interlocutory appeal on the trial court's decision to granting a defendant a polygraph at state expense, requiring the defendant to sit in prison, and put a trial on hold for a year, while the state appeals – if the trial court's decision is upheld, there is no consequence to the state, while for the defendant, he has spent the entire time incarcerated and losing witnesses for his defense.

Appeal as of Right - Capable of repetition yet evading review

The courts of appeals are intended to act as advisory courts. Specifically, this issue is currently being litigated in *In re M.M.* currently pending in the Ohio Supreme Court. The reality of this type of appeal is that it would proceed after a defendant was found not guilty - therefore the defendant could not be retried. But then why would the defendant have to continue to be a party? The outcome of the State's appeal would not affect the defendant one bit – the acquittal is secure and the case is over. The State thus gains the advantage of being able to pursue an issue on appeal in a case where no one with an actual stake in the outcome has the opportunity to participate in the case – which the results can then be used against future defendants who have an actual stake in the outcome.

This specific issue is particularly susceptible to constitutional litigation (Article IV, Sec. 3 – appellate jurisdiction) regarding whether the appellate courts can issue advisory opinions.

Furthermore, this law will substantially undermine Criminal Rule 12(K). As discussed earlier, this provision places certain requirements on a prosecutor if he chooses to appeal. However, under the HB 477, a prosecutor no longer has to comply with Criminal Rule 12(K) - he can simply wait to see the result from the jury and then appeal.

Unopposed Provisions

We have no opposition to the addition of chief legal officers of a municipal corporation that is similar to a village solicitor or city director of law, as found in section 2945.67(A).

We have no opposition to allowing the prosecutor to be able to file a cross-appeal if a defendant is granted a delayed appeal; however, we would ask that if the provision providing for a delayed appeal to the prosecutor is adopted, that there be an amendment to include a provision for a cross-appeal as of right for a defendant in the event of a delayed appeal for the prosecutor.

We have no opposition to the appointment of counsel for indigent defendants in the event of the state's appeal.

Conclusion

The bottom line is that there are many facets to this Bill that far exceeds any seemingly benign intentions to level the playing field for prosecutors. On behalf of the Ohio Association of Criminal Defense Attorneys, I urge you not to report this Bill as written, and I thank you for your time.

Respectfully submitted,

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