

OHIO HOUSE OF REPRESENTATIVES

**JUDICIARY COMMITTEE
MARCH 10, 2015**

HOUSE BILL 57

OPPONENT TESTIMONY

**BARRY W. WILFORD, ESQ.
OHIO ASSN. OF CRIMINAL DEFENSE LAWYERS**

The Ohio Assn. of Criminal Defense Lawyers (“OACDL”) is 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 thank the Chairman for an opportunity to give opposition testimony on HB 57. The provisions of this bill involve questions of life and death. The lives and deaths of victims as well as their offenders. It involves the lives of the families of victims and offenders. With questions of such gravity, I hope the members of this Committee will take their time in the consideration and deliberation over the answers that it gives to these questions.

This bill was originally introduced in the 130th General Assembly on October 10, 2014 as HB 644. It never really got much consideration before end of the Session. Now it is scheduled for a possible vote today, after hearing just from the sponsor and from the family and friends of a victim who serves as the namesake for the passage of the law. Frankly, I was expecting to hear from the other criminal justice interest groups. There was no fiscal note performed on HB 644 in the 130th General Assembly, and there is none that has been completed on the current bill. I should think the fiscal impact might be valuable information on whether a wholesale overhaul of the sentencing of those serving life sentences is a good idea or not. So, I hope the members of the Committee will want to know more about this bill than it does today before voting on the merits of the proposed law.

Turning to the bill itself, there principally two divisions. The first will raise the minimum parole eligibility for an offender convicted of Aggravated Murder by five years, while adding new alternatives of life sentences of parole eligibility after 35 years, 45 years, and 55 years. The second change is the bill creates a new death specification, that being a purposeful killing committed with prior calculation and design. I will first address the parole eligibility for life sentences, and then separately address the issues relating to the new death specification.

But before turning to my analysis of the bill, I would like to address the case of Justin Back, who was the victim of this ruthless murder and who serves as the namesake of this bill, “Justin’s Law.” From the testimony that you have previously heard, Justin Back was a wonderful young man, who had great promise for his future. His death was a terrible tragedy, and our state is deeply aggrieved by the loss of his future contributions.

Now I must add two things: (1) the case involving the death of Justin Back has absolutely nothing to do with the proposals advanced by this bill; and (2) it would be a huge disservice to the memory of Justin Back to enact a law in his name that accomplishes much more harm than any good that will come from it.

These two observations are based on the fact that one of the killers of Justin Back, Austin Myers, was sentenced to death. The other killer of Justin Back, Tim Mosley, was sentenced to life without parole. The current range of penalties for Aggravated Murder under current Ohio law did not prejudice the prosecution of these offenders in any way, shape or form. Whereas we all might think we should be standing back and cheering for the successful prosecution and conviction of these offenders under current law for sentencing offenders for convictions of Aggravated Murder, instead we are beseeched by this bill to change the possible future sentences in Justin Back's name, even though those changes have absolutely nothing to do with the successful prosecution and conviction of his killers. There is no flaw in the sentencing of his killers under current Ohio law that this bill seeks to correct. His death has nothing more to do with the changes in law proposed by this bill than that the killing of that black boy down in Ferguson.

(A). Parole eligibility for life terms imposed for Aggravated Murder:

Boiled to its essence, the Bill mandates that no offender convicted of Aggravated Murder should have parole eligibility before serving 25 years in prison. Under current law, eligibility for some offenders convicted of Aggravated Murder have parole eligibility after serving only 20 years in prison. Our Association greatly rejects that proposition. And as an attorney who for the past 20 years has represented offenders at parole hearings, including over 100 right now who are serving life prison terms, I emphatically reject the argument presented for this wholesale overhaul of life prison terms on the basis of one single case.

There is an old legal adage attributed to Justice Oliver Wendell Holmes in 1904, which is: "hard facts make for bad law." This observation usually is made in reference to juries and judges who are influenced by disfavored outcomes if the law is interpreted as written, so the law is stretched or shrunk, as the case may be, to interpret the law consistent with a more favored outcome. I believe the adage applies to lawmakers, such as yourselves, just as much as to those who interpret our laws. It is dangerous to approach the framework of the sentencing law for Aggravated

Murder through the lens of how it is viewed with respect to the offenders in the Justin Back case.

Instead of revising the entire structure in the Revised Code for life prison terms pegged to the one horrific case which engendered this bill, someone should give this unfortunate family of the victim the sobering comfort that there is no realistic chance in the known universe that these killers would be released after only serving 20 years. And if they should ask why this offender should even get an opportunity for release after serving only 20 years, they should be told that the parole opportunity is because there are some offenders who received the same sentence by different judges, and that offender may have much less culpability than the two young killers who murdered Justin. In other words, the law sets 20 years as a time for the parole board to sift through some of the less culpable offenders and make sure that some are not serving more time than they deserve; and also, that the other offenders who deserve more time are given more time to serve.

The chances for parole for an inmate who was the principal offender on a conviction for Aggravated Murder being paroled at his first parole hearing are no greater than being struck by lightning (while in prison). I know. Our law office has represented many dozens of such offenders at their first hearings. In 20 years, I can think of two: one a young girl, a minor, who murdered her father who had been molesting her for years. She shot him in the back with his own shotgun. Mindy served 18 years. In the other case, a young offender, barely an adult, in a convenient store robbery shot the clerk with a broken firearm that the state's firearm expert conceded was in dangerous operating condition because it could be discharged without pulling the trigger, and under the facts of the case this offender denied pulling the trigger and had no reason to pull the trigger. Jay served 23 years.

The appended DRC Time Serve Reports reflect that in the calendar year of 2013, the average time served by men for the offense of Aggravated Murder who was released by the Ohio Parole Board was almost 28 years. Characteristic of the accepted reality that most women convicted of Aggravated Murder play a lesser role in the offense than co-defendants who are men, the two women paroled had served an average of 18.68 years. One of them was Mindy. Under this bill, both would have had to serve 5-7 more years in prison before becoming parole eligible.

II. *Death specification: prior calculation and design:*

Besides the startling reversal of 35 years Ohio death penalty law since its re-enactment in 1981, by making the element of “prior calculation and design” the basis for a new death specification, there are other compelling reasons why this Committee should decline the invitation provided by this bill to amend the death penalty provisions available under the offense of Aggravated Murder. The first reason is that a much preferable comprehensive review of that law is presently underway in two different forums, both of which are specifically designed to make recommendations for legislative proposals to the General Assembly: the Joint Task Force to Review the Administration of Ohio's Death Penalty created in 2011 by Supreme Court of Ohio Chief Justice Maureen O'Connor; and the Ohio Recodification Committee, created by HB 483 of the 130th Ohio General Assembly..

As for the death penalty task force, its recommendations were published in 2014, and there are acknowledged reports of legislation being drafted regarding some of those proposals. As for the Recodification committee, it has a two-year mandate to make recommendations for an overhaul of the Ohio criminal code by January, 2016.

Each of these comprehensive reviews of the Ohio death penalty laws offers a much preferable approach than the narrow focus of a single capital case provided by “Justin’s Law” as to whether a new death penalty specification is warranted. The task force’s recommendations are based upon current Ohio death penalty law, and it would undermine the work of the task force to make significant piecemeal changes in the current law before the recommendations are studied.

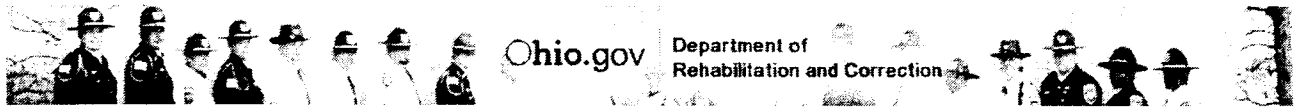
The second reason to forestall consideration of this provision of H.B 57 is that there has been no fiscal note completed on the financial implications to counties and to the state contemplated by this proposed enactment. It is well-documented that death penalty prosecutions are much more costly than non-capital prosecutions, and many of those costs are shared between Ohio counties and states. It is also well-documented that it is more costly to the state to house an offender on death row than elsewhere in prison. And it is highly likely that this provision would result not only with more offenders on death row, but also that more offenders sentenced to life terms will be serving substantially longer prison terms before parole eligibility (if any) than herebefore. From all of the above moving parts, it is easy to predict that the LSC fiscal note when completed will conclude that the costs to local and state government

by enactment of this provision will be “significant.” Rather than advance this bill while “flying blind” to its fiscal implications, the Committee should await this essential determination.

CALENDAR YEAR 2013 TIME SERVED DATA; PAROLE RELEASES* BY SEX AND MOST SERIOUS OFFENSE

MOST SERIOUS OFFENSE	MALES	AVETIME	FEMALES	AVG TIME	TOTAL	AVG TIME
Life-Maximum Sentence	27	22.58	3	19.55	30	22.28
AGGRAVATED MURDER	9	27.97	2	18.68	11	26.28
MURDER	16	20.31	1	21.28	17	20.37
RAPE	1	17.84	0	0.00	1	17.84
TRAFFICKING IN DRUGS	1	15.24	0	0.00	1	15.24
Felony 1	16	20.44	0	0.00	16	20.44
AGGRAVATED BURGLARY	2	24.53	0	0.00	2	24.53
AGGRAVATED ROBBERY	3	17.52	0	0.00	3	17.52
FELONIOUS ASSAULT	2	18.18	0	0.00	2	18.18
FELONIOUS SEXUAL PENETRATION	1	20.40	0	0.00	1	20.40
INVOLUNTARY MANSLAUGHTER	2	15.70	0	0.00	2	15.70
RAPE	5	24.78	0	0.00	5	24.78
VOLUNTARY MANSLAUGHTER	1	13.32	0	0.00	1	13.32
Felony 2	1	18.55	0	0.00	1	18.55
ATTEMPTED RAPE	1	18.55	0	0.00	1	18.55
Felony 3	8	6.62	0	0.00	8	6.62
BURGLARY (OR ATTEMPTED)	1	3.93	0	0.00	1	3.93
ESCAPE	1	5.35	0	0.00	1	5.35
FAILURE TO NOTIFY CHANGE OF ADDRESS	1	2.28	0	0.00	1	2.28
GROSS SEXUAL IMPOSITION (OR ATTEMPTED)	1	15.47	0	0.00	1	15.47
INVOLUNTARY MANSLAUGHTER	1	4.03	0	0.00	1	4.03
RESISTING ARREST	1	6.09	0	0.00	1	6.09
ROBBERY	2	7.89	0	0.00	2	7.89
Felony 5	2	2.18	0	0.00	2	2.18
THEFT/THEFT IN OFFICE	1	0.48	0	0.00	1	0.48
VIOLATE PROTECT ORDER	1	3.87	0	0.00	1	3.87
Other Offenses	1	4.52	0	0.00	1	4.52
PROPERTY	1	4.52	0	0.00	1	4.52
Drug Offenses	3	9.40	0	0.00	3	9.40
FELONY 2	1	22.58	0	0.00	1	22.58
FELONY 3	1	1.09	0	0.00	1	1.09
FELONY 4	1	4.53	0	0.00	1	4.53
ALL OFFENSES	58	18.02	3	19.55	61	18.10

NOTE: Time in Years, excluding time spent in jails



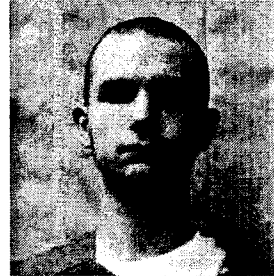
Agency Policies | Organization | Facilities | Offender Information | Programs & Services | Information

Ohio Department of Rehabilitation and Correction Offender Search Detail

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Your search only returned one record

AUSTIN GREGORY MYERS	
Number:	A710008
DOB:	01/04/1995
Gender:	Male
Race:	White
Admission Date:	10/17/2014
Institution:	Chillicothe Correctional Institution
Status:	INCARCERATED



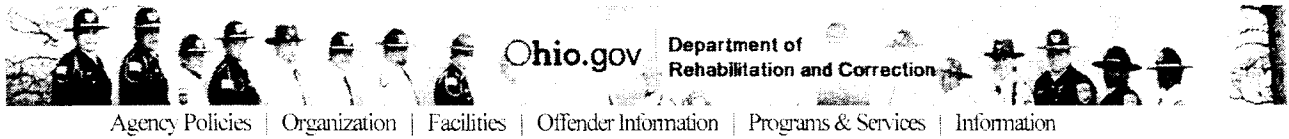
Victim Definition	Ohio Revised Code	Pre-S.B. 2 Felony Sentencing Chart	S.B. 2 Felony Sentencing Chart
Offense Information			
AGG MURDER		Counts: 1	ORC: 2903.01 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: AM <input type="button" value="Victim Info"/>
KIDNAPPING		Counts: 1	ORC: 2905.01 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: First <input type="button" value="Victim Info"/>
AGG ROBBERY		Counts: 1	ORC: 2911.01 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: First <input type="button" value="Victim Info"/>
AGG BURGLARY		Counts: 1	ORC: 2911.31 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: First <input type="button" value="Victim Info"/>
THEFT		Counts: 1	ORC: 2913.02 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: Third <input type="button" value="Victim Info"/>
TAMPER W/EVIDENCE		Counts: 1	ORC: 2921.02 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: Third <input type="button" value="Victim Info"/>
SAFECRACKING		Counts: 1	ORC: 2911.31 5
Committing County: Warren	Admission Date: 10/17/2014		Degree of Felony: Fifth <input type="button" value="Victim Info"/>
ABUSE OF A CORPSE		Counts: 1	ORC: 2927.01 5
			<input type="button" value="Victim Info"/>

Committing County: Warren	Admission Date: 10/17/2014	Degree of Felony: Fifth
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Sentence Information	
Indefinite Sentence Min:	Death Sentence
Indefinite Sentence Max:	Death Sentence
Expiration of Max Sentence:	Death Sentence

Notes
<p>The above information may not contain a complete list of sentencing information for each offender.</p> <p>The supervision period may not coincide with the current offense, but may reflect the offender's remaining supervision obligation from a previous offense.</p> <p>Any person, agency or entity, public or private, who reuses, publishes or communicates the information available from this server shall be solely liable and responsible for any claim or cause of action based upon or alleging an improper or inaccurate disclosure arising from such reuse, re-publication or communication, including but not limited to, actions for defamation and invasion of privacy.</p> <p>Questions concerning the information contained in these documents should be sent via the U.S. Mail to Ohio Department of Rehabilitation and Correction, Attn: Central Records, 770 West Broad Street, Columbus, OH 43222.</p>

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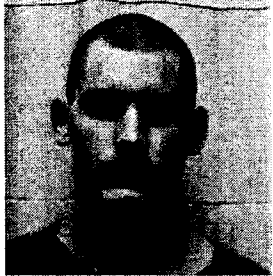


Ohio Department of Rehabilitation and Correction Offender Search Detail

Search

Your search only returned one record

TIMOTHY E MOSLEY	
Number:	A710839
DOB:	10/11/1994
Gender:	Male
Race:	White
Admission Date:	11/14/2014
Institution:	Ross Correctional Institution
Status:	INCARCERATED



Victim Definition	Ohio Revised Code	Pre-S.B. 2 Felony Sentencing Chart	S.B. 2 Felony Sentencing Chart
Offense Information			
AGG MURDER		Counts: 1	ORC: 2903.01 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: AM <input type="button" value="Victim Info"/>
KIDNAPPING		Counts: 1	ORC: 2905.01 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: First <input type="button" value="Victim Info"/>
THEFT		Counts: 1	ORC: 2913.03 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: Third <input type="button" value="Victim Info"/>
TAMPER W/EVIDENCE		Counts: 1	ORC: 2927.12 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: Third <input type="button" value="Victim Info"/>
SAFECRACKING		Counts: 1	ORC: 2911.31 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: Fourth <input type="button" value="Victim Info"/>
ABUSE OF A CORPSE		Counts: 1	ORC: 2927.01 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: Fifth <input type="button" value="Victim Info"/>
AGG ROBBERY		Counts: 1	ORC: 2911.01 5
Committing County: Warren	Admission Date: 11/14/2014		Degree of Felony: First <input type="button" value="Victim Info"/>
AGG BURGLARY		Counts: 1	ORC: 2911.11 4
			<input type="button" value="Victim Info"/>

Committing County: Warren	Admission Date: 11/14/2014	Degree of Felony: First
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Sentence Information	
Indefinite Sentence Min:	Life Sentence
Indefinite Sentence Max:	Life Sentence
Expiration of Max Sentence:	Life Sentence

Notes
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