



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Opposition of HB3 Aisha's Law Sponsor Representatives Boyd and Carruthers

Chairman Lang, Vice Chair Plummer, Ranking Member Leland, and members of the House Criminal Justice Committee. My name is Niki Clum, and I'm the Legislative Liaison for the Office of the Ohio Public Defender. Thank you for the opportunity to testify in opposition of HB3.

The Office of the Ohio Public Defender would like to express our deepest sympathies to friends and family of Aisha Fraser. It is understandable that such a terrible situation would make this legislature want to act. However, bad facts make bad law. This legislature needs to fight the temptation to make drastic changes to our criminal justice system after a tragic event. Good public policy should be based on data and research in consultation with experts, not from a place of sadness or anger.

OPD opposes the provisions in HB3 that expand the use of the death penalty in cases of aggravated murder where the victim was a household or family member and the individual has a prior domestic violence conviction. It is important to note that the bill does not specify that it must have been a prior felony domestic violence conviction. A misdemeanor of the fourth degree where the individual was convicted of making threats would make the case death penalty eligible.

OPD shares the bill sponsors desire to deter crimes of domestic violence. However, making these cases death penalty eligible will have no deterrent effect. Murder rates in states with the death penalty are consistently higher than in states without the death penalty.¹ The fact is, the death penalty has not and will not deter homicide, particularly in cases of domestic violence.² HB3 will not make

¹ *Deterrence: States Without the Death Penalty Have had Consistently Lower Murder Rates*, Death Penalty Information Center, 2014, <https://deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>

² *Study: 88% of Criminologist do not believe the death penalty is an effective deterrent*, Death Penalty Information Center, <https://deathpenaltyinfo.org/study-88-criminologists-do-not-believe-death-penalty-effective-deterrentsddgfsfd>

victims of domestic violence any safer, but it will cost Ohio a lot more money. In Ohio, the average death penalty case costs Ohio taxpayer approximately \$3 million per accused.³ This is compared to life without the possibility of parole cases that cost the state approximately \$1 million per accused.⁴

OPD's shares the ACLU's concerns addressed in their testimony about the inequitable way the death penalty is carried out. Out of respect for the committee's time, OPD will not repeat those concerns now. However, it is important to remember that the death penalty is not even being carried out in Ohio currently out of concern that lethal injection is cruel and unusual. Twenty-one states and the District of Columbia have abolished the death penalty. Not including Ohio, four additional states have a moratorium on it. This is the direction the country is moving. HB3 asks this state to take large and expensive step backwards.

HB3 also seeks to change the law around the admissibility of out-of-court statements made by victims. Effectively, the law attempts to circumvent the Ohio Rules of Evidence regarding hearsay by allowing statements from alleged victims if a) the statement describes the infliction or threat of physical injury on declarant, b) the declarant is unavailable, c) the statement was made at or near time of injury or threat, d) the statement was made under circumstance that would indicate trustworthiness, and e) the statement was made in writing, electronically recorded, or was made to a physician, nurse, paramedic, or law enforcement officer. This portion of HB3 is unconstitutional under both the Ohio Constitution and the U.S. Constitution.

First, many of these statements are already admissible. Statements made at/near time of injury or threat are frequently admissible under the present sense impression hearsay exception⁵ or the excited utterance hearsay exception.⁶ These exceptions are commonly used in domestic violence

³ See *the Cost of Ohio's Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <http://otse.org/deathpenalty-cost/>

⁴ See *the Cost of Ohio's Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <http://otse.org/deathpenalty-cost/>

⁵ Evid.R. 803(1)

⁶ Evid.R. 803(2)



cases. Statements made to medical professionals are already their own hearsay exception as statements for purposes of medical diagnosis or treatment.⁷ Despite some of these statements being admissible under the current rules of evidence, there is a constitutional issue with HB3's attempt to codify the admissibility of evidence.

As Representative Seitz mentioned during sponsor testimony, Article IV, Section 5 of the Ohio Constitution establishes that the Ohio Supreme Court has the sole authority to prescribe rules governing the procedure of the courts and that “[a]ll laws in conflict with such rules shall be of no further force or effect....” Ohio Rule of Evidence 802 further clarifies that the legislature does not have the authority to broaden or otherwise modify the hearsay rules stating that, “[h]earsay is not admissible **except as** otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly **not in conflict with a rule of the Supreme Court of Ohio...**” Emphasis added. Further, the Ohio Supreme Court has held that the Ohio Rules of Evidence “control over subsequently enacted inconsistent statutes...” and those inconsistent statutes have no force of law.⁸ Because the rules of evidence supersede statute, any provision of HB3 that conflicts with the rules governing the admission of out-of-court statements will have no force of law.⁹

Even if the appellate courts should find that these provision of HB3 have the force of law, there are U.S. Constitutional issues. As I previously mentioned, HB3 attempts to declare hearsay statements made to law enforcement officers as admissible if other factors are present. The U.S. Supreme Court has found that out-of-court statements to a law enforcement officer are testimonial and cannot be admitted into evidence under a hearsay exception as that would be a violation of the confrontation clause of the U.S. Constitution.¹⁰ HB3 does require that the statement be made under “circumstance(s) that would indicate trustworthiness.” However, the U.S. Supreme Court has held even hearsay

⁷ Evid.R. 803(4)

⁸ quoting *State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 49; citing *In re Coy* (1993), 67 Ohio St.3d 215.

⁹ *In re Coy* (1993), 67 Ohio St.3d 215.

¹⁰ *Crawford v. Washington*, 541 U.S. 36, 53



statements with an “indicia of reliability” do not overcome the confrontational clause issue.¹¹ The constitutional issues of this provision of HB3 are insurmountable.

HB3 also seeks to make prior acts of domestic violence admissible as character evidence, meaningful admissible to show that the individual committed domestic violence once, therefore, the individual must have done it again. First, it is important to point out that HB3 would make any allegation of domestic violence admissible, not just prior convictions. Second, this provision conflicts with the Ohio Rules of Evidence Rule 404, and, therefore, will not have the force of law pursuant to the Ohio Constitution as previously discussed.

Additionally, as Representative Seitz discussed during sponsor testimony, prior acts of domestic violence are frequently admitted into evidence to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹² There is even case law that allows prior bad acts to be admitted for reasons not delineated in the list¹³ as long as the bad acts are not admitted to show that the individual did something bad in the past so they must have committed the offense in the present.¹⁴ However, that is exactly what HB3 seeks to do.

The U.S. Supreme Court has held, “there is...no question that propensity would be an ‘improper basis’ for conviction.”¹⁵ With the upmost respect to the bill sponsors, OPD agrees with the U.S. Supreme Court that this provision is bad public policy. The Ohio Rules of Evidence recognize that this evidence is extremely prejudicial, and that is why the rules prohibit the jury from hearing about prior bad acts as evidence of propensity. It is easy to imagine that, regardless of the evidence in the present case, a jury

¹¹ *Crawford v. Washington*, 541 U.S. 36, overruling *Ohio v. Roberts*, 448 U.S. 56.

¹² Evid.R. 404(B)

¹³ *State v. Cumberledge*, 11th Dist., 2012-Ohio-3012, HN2 “Evid.R. 404(B) delineates a non-exhaustive list of acceptable reasons for admitting testimony of prior bad acts into evidence...the key issue in determining admissibility is whether the evidence is merely meant to show that a defendant had acted consistent with his prior behavior, or whether its submission is meant to prove a fact that is consequential to the case.”

¹⁴ Evid.R. 404(B) “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”

¹⁵ *Old Chief v. United States*, 519 U.S. 172, 182, (1997), quoted by *Dibble v. Klee*, 2019 U.S. Dist. Lexis 17214 *14.



would conclude - once an abuser always an abuser. This portion of HB3 ignores the fact that people are capable of great change. Founder of Equal Justice Initiative Bryan Stevenson famously said, "I believe that each person is more than the worst thing they've ever done." For a more pop culture reference, Black Widow said in Avengers: Endgame, "I don't judge people on their worst mistakes." HB3 seeks to convict people for domestic violence for the rest of their life because at some point they were accused or convicted of committing the act.

For the reasons discussed above, HB3 will be an expensive law as it will inevitably lead to litigation on numerous fronts. Further, the policies in HB3 would take Ohio in the wrong direction. This committee should decline to move this bill forward. Thank you for the opportunity to testify today before your committee. I am happy to answer questions at this time.

