



Ohio Prosecuting Attorneys Association

Louis Tobin
Executive Director
House Bill 411
Opponent Testimony
November 29, 2018

Chairman Bacon, Vice-Chair Dolan, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to provide opponent testimony on House Bill 411.

While our Association is opposed to House Bill 411, I want to be very clear that we do not oppose compensating wrongfully imprisoned individuals who are actually innocent. Ohio prosecutors would unanimously agree that such a person is entitled to compensation. Our concern with House Bill 411 is that, despite claims by proponents of the bill that the *Brady* rule is fully consistent with actual innocence, case law and the experience of prosecutors simply does not bear this out.

In proponent testimony, Tim Young noted that, for an individual to be successful in a Brady claim, that individual must show that the State withheld either exculpatory or impeachment evidence and that the withholding resulted in prejudice to the individual – meaning that there is a reasonable probability that the trial would have had a different result if the State had disclosed the evidence. But the Ohio Supreme Court has stated that in determining whether a Brady violation occurred “the relevant question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” In other words, a Brady violation may lead to a sentence being overturned due to a lack of confidence in a verdict, but the person may nevertheless be guilty. I want to discuss two cases that highlight this point.

In *State v. Russell*, 2011-Ohio-592, John Russell was indicted in Cuyahoga County on charges of rape, kidnapping, and gross sexual imposition for having improper sexual contact with his minor daughter from the time she was in kindergarten through sixth grade. He was convicted of eight counts of gross sexual imposition and sentenced to five years in prison. Russell’s conviction was based primarily on the victim’s, his daughter’s, testimony about their sexual relationship. Russell’s conviction was overturned based on *Brady* when it was discovered that some dates in the victim’s diary, in which she described the assaults conflicted with other evidence of Russell’s whereabouts on those specific dates. The discrepancy was allegedly not disclosed to the defense, although there is a dispute on this point. There was evidence that the defense had seen this material before trial. The court determined that the evidence raised questions about the confidence of the verdict. Russell subsequently pled guilty to lesser charges because the victim, who had previously attempted suicide, did not want to relieve a trial.

Even more troubling is the case of a man named Anthony Lemons. In 1995, Lemons was convicted of murder for killing someone during a dispute over drugs. The only eyewitness to the murder was in the apartment when the shooting took place. Lemons shot at her as well and missed. Lemons was convicted based on her identification of him and her testimony. He spent 18 years in prison before his case was reversed based on a *Brady* violation when it was discovered that the eyewitness asked to see a live line-up instead of a photo array and during the live line-up

identified Lemons but made a comment that “those are the same shoes the shooter wore.” These facts were not disclosed to the defense. It turned out that the shoes Lemons had on during the lineup, a pair of Nike Air Jordan’s, were not in production at the time of the murder. He did however own a similar pair of Nike Air Jordan’s that were in production at the time of the murder. Hardly evidence of Lemons’ actual innocence. Unfortunately, the eyewitness died while Lemons was in prison and so he cannot be retried.

Under House Bill 411, Anthony Lemons will be eligible for close to \$1 million in compensation. He has six attorneys working for him, at up to \$500 per hour, who accumulated around \$800k in attorney’s fees seeking compensation for him on an actual innocence claim – a claim that was denied. Lemons also has a claim based on an error in procedure pending because the 8th District Court of Appeals decided to bifurcate the claims. House Bill 411 specifically authorizes someone who “had a claim dismissed, has a claim pending, or did not file a claim because the state of the law in effect prior to the effective date of this amendment barred the claim or made the claim appear to be futile” to “file a claim and obtain the benefit of [the] provisions” of the bill. By the time this portion of the claim is over, not only will Lemons be eligible for close to \$1 million in compensation, so will his attorneys – all at taxpayer expense.

Proponent claims that Brady violations are consistent with actual innocence are simply incorrect. House Bill 411 casts a much wider net and will lead to the compensation of individuals like John Russell and Anthony Lemons, individuals who are factually guilty of terrible crimes but who a prosecutor may not be able to retry.

I would like to take just a minute to address two statements made in proponent testimony by the Ohio Innocence Project. They state that the bill will result in taxpayer savings. Regardless of the substance of the bill or our position on it, it is not reasonable to assert that a bill that expands the pool of people who are eligible for taxpayer funded compensation will result in savings for the taxpayer. The LSC Fiscal Note states that there is uncertainty as to how many additional claims will be filed and uncertainty regarding the amount that the state will disburse. Even conservatively estimating the number of newly eligible individuals, as the Public Defender has done, the state will be still be faced with millions of dollars of new liabilities.

They state that this legislation is modest by national standards. It isn’t. Every other state with a wrongful imprisonment statute requires either an acquittal or a showing of actual innocence. Yes, Ohio may offer a modest amount of compensation per year in comparison to other states. We may not provide additional benefits like college tuition assistance. But it is another thing entirely to offer taxpayer funded compensation to individuals who have not been acquitted or cannot establish actual innocence. They point to three states (Colorado, Texas, and Kansas) and the District of Columbia as examples of more liberal statutes. All four states require something similar to what Ohio law requires (i.e. actual innocence) in order for a person to be eligible. Three statutes set the period of limitation for filing a claim at two years, and Texas sets theirs at three. Ohio’s statute of limitations is six years in these cases. Finally, Kansas, which has the nation’s newest wrongful imprisonment compensation statute, caps attorney’s fees at \$25,000. In other words, the states cited by the Innocence Project as having statutes more liberal than Ohio’s actually have statutes that are more conservative in important respects.

Much of the debate around House Bill 411 has centered on the admittedly troubling case of Dale Johnston. If the legislature wishes to compensate Dale Johnston, a man who was innocent of the crime for which he was sent to death row, you should find a way to do so. What you should not do is enact a law that risks compensating people like John Russell and Anthony Lemons. House Bill 411 creates that distinct possibility and Ohio’s prosecutors urge you to vote no.

Thank you for the opportunity to provide testimony on the bill. I am happy to answer any questions.