



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Opposition of House Bill 3 Aisha's Law Sponsor Representative Boyd and Carruthers

Chair LaRe, Vice Chair Swearingen, Ranking Member Leland, and members of the House Criminal Justice Committee. My name is Niki Clum, and I am the Legislative Liaison for the Office of the Ohio Public Defender. Thank you for the opportunity to testify in opposition of House Bill 3 (HB3).

The Office of the Ohio Public Defender (OPD) would like to express our deepest sympathies to friends and family of Aisha Fraser. It is understandable that such a terrible situation makes 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 would like to express our gratitude to Representatives Boyd and Carruthers. We appreciate their willingness to consider OPD's concerns and suggestions. We also appreciate that much of the bill will move Ohio in the right direction to respond to incidents of domestic violence more appropriately. Proponent testimony brought to light that there are victims that have been failed by our current system, where laws currently in place were apparently not utilized.

OPD's opposition to HB3 is based on the following three provisions that should be removed before the bill is passed:

- 1) The bill makes the killing of a victim aggravated murder when the accused was previously convicted of felony domestic violence or a felony of violence and the victim suffered seriously physical harm.
- 2) Victims of domestic violence and must be screened by an evidence-based lethality assessment screening tool, and the court is required to consider the lethality assessment for sentencing if one was conducted.

- 3) The bill makes recklessly impeding the normal breathing or blood circulation of a family or household member by applying pressure to the throat or neck, or by covering the nose and mouth, a felony of the third degree regardless of whether there is harm to the victim or any intent to cause “protractedly injure.” Please note that the standard in the bill is “recklessly,” not “knowingly” as proponents claimed last session.¹

OPD shares the bill sponsors desire to deter crimes of domestic violence. However, expanding the offense of aggravated murder will have no deterrent effect. Under current law, the offense of murder is punishable by 15 years to life in prison. Aggravated murder is punishable by 20 years to life, 25 years to life, 30 years to life, life without parole, or death. There is no evidence that harsher penalties deter crime.² Particularly, in the context of domestic violence, individuals are not acting rationally given the complex relationships that are the backdrop for these offenses.

HB3 will, however, expand the number of offenses that are death penalty eligible. An aggravated murder becomes death penalty eligible when one of the aggravating factors delineated in R.C. 2929.04 is also present. It is not hard to imagine that an aggravating factor will be present when these cases occur, especially given the domestic violence context. For example, if kidnapping also occurred during the offense, the offense is death penalty eligible. Kidnapping can be committed by simply moving the victim any distance – like moving them from standing to the floor. For this reason, OPD still sees substitute HB3 as an expansion of death penalty eligibility, and OPD opposes all expansions. Murder rates in states with the death penalty are consistently higher than in states without the death penalty.³

¹ Line 264.

² *Five Things About Deterrence*, National Institute of Justice, Office of Justice Programs, <https://nij.gov/fivethings/pages/deterrence.aspx>; citing Daniel S. Nagan, *Deterrence in the Twenty First Century*, 2013; see also David J. Harding, *Do Prisons Make Us Safer? New research that prisons prevent far less violent crime than you might think*, Scientific American, June 21, 2019, <https://www.scientificamerican.com/article/do-prisons-make-us-safer/>; *Locked In: The True Causes of Mass Incarceration-and How to Achieve Real Reform*, John Pfaff, Feb. 2017; *Until We Reckon: Mass Incarceration, and a Road to Repair*, Danielle Sered, March 5, 2019.

³ *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>



Ohio taxpayers pay approximately \$3 million per death penalty case⁴ compared \$1 million per life without parole case,⁵ The fact is, the death penalty has also proven to be an expensive and ineffective crime deterrent.⁶

Second, the bill requires that law enforcement do a lethality screening at the time of the arrest.⁷ The bill also states the court “shall consider the result of any screening” at the time of sentencing.⁸ This could create a situation where the sentencing court is crafting a sentence around facts that were not proven at trial, or may have even been disproved at trial. For example, an individual could answer questions for the lethality screening that suggest the incident involved attempted murder. However, a jury could find a defendant not guilty of attempted murder, but guilty of felonious assault. The court would be required to consider a lethality assessment that was based on the defendant committing attempted murder when he or she committed felonious assault. This may result in a more severe penalty than is warranted by the facts established at trial.

Finally, as I have testified previously before this legislature, strangulation and suffocation can already be charged as a second-degree felony under the current felonious assault statutes. Under Ohio Revised Code 2903.11 felonious assault is the knowing act of causing “serious physical harm to another or another’s unborn.” If an individual is strangled and the resulting injury is like some of the injuries described during last session’s proponent testimony, then charging that perpetrator with felonious assault is permitted and appropriate as those injuries would constitute “serious physical harm.” In some cases of strangulation, however, serious physical harm may not result. In those situations, the appro-

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

⁵ See *the Cost of Ohio’s Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <http://otse.org/deathpenalty-cost/>

⁶ *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-deterrent>

⁷ Lines 2931 – 2937.

⁸ Lines 723 – 726.



appropriate charge is a felony of the third degree attempted felonious assault, misdemeanor assault, or misdemeanor domestic violence. To be clear, under current law, choking can be a third-degree felony, even if serious physical harm does not result, as long as the offender intended to cause serious physical harm.

It is also important to keep in mind that Ohio courts have broadly interpreted the term “serious physical harm.” Courts have held that unconsciousness⁹, mental distress,¹⁰ or even bruising¹¹ constitute “serious physical harm” and can result in a second-degree felony conviction with a presumption for prison. The case law does not support the assertion that the charge of felonious assault is only for circumstances that involve a weapon as proponents claimed last session. Further, under current law, “physical harm” is established when there is any visible mark on the victim,¹² or even if there is no mark, if the victim claims they experienced pain.¹³ Ohio law currently has a low threshold for strangulation and suffocation to be charged as felony. If prosecutors are failing to do so, as it appears from proponent testimony they are, that is a deeper problem with our criminal justice system that this bill will not fix.

HB3 also specifies that it is not necessary for conviction for the state to prove that the accused intended “to kill or protractedly injure” the victim.¹⁴ Under current law and HB3, domestic violence can occur between any “household or family members,” not just spouses. The offense of domestic violence can be charged for altercations between siblings. As Former Senator Sean O’Brien has previously

⁹ *State v. Czajka* 101 Ohio App.3d 564, 656 N.E.2d 9 (Cuyahoga, 1995). See, *State v. Thomas*, 6th Dist. Lucas No. L-17-1266, 2019-Ohio-1916, ¶159; *State v. Spaulding*, 2017-Ohio-7993, ¶13, 93 N.E.3d 1057 (Sandusky, 2017); *State v. Sales*, 9th Dist. Summit No. 25036, 2011-Ohio-2505, ¶19.

¹⁰ *State v. Cooper*, 139 Ohio App.3d 149, 743 N.E.2d 427 (Clermont, 2000); *State v. Cooper*, 139 Ohio App.3d 149, 743 N.E.2d 427 (Clermont, 2000); *State v. Carpenter*, 8th Dist. Cuyahoga No. 94709, 2011-Ohio-211.

¹¹ *State v. Jarrell*, 4th Dist. Scioto No. 08CA3250, 2009-Ohio-3753, ¶ 14, citing *State v. Worrell*, 10th Dist. Franklin No. 04AP-410, 2005-Ohio-1521, ¶147–51, rev’d on other grounds; *State v. Parks*, 5th Dist. Licking No. 99-CA-0076, 2000 WL 221968; *State v. Barbee*, 8th Dist. Cuyahoga App. No. 82868, 2004–Ohio–3126, at ¶ 60; *tate v. Burdine–Justice*, 125 Ohio App.3d 707, 709 N.E.2d 551 (Butler, 1988).

¹² *Westlake v. Filiaggi*, 8th Dist. Cuyahoga No. 93599, 2010-Ohio-4481, ¶15; *Westlake v. Filiaggi*, 8th Dist. Cuyahoga No. 93599, 2010-Ohio-4481, ¶15.

¹³ *In re Bowers* 11th Dist. Ashtabula No. 2002-A-0010, 2002-Ohio-6913.

¹⁴ House Bill 3, I_133_0147-15 Lines 379 – 381.



pointed out, if two brothers are wrestling, the language in HB3 could result in one brother being convicted of a felony of third degree even if he never intended to cause his brother harm and ultimately caused no harm.

OPD has previously proposed a compromise that would classify **Strangulation with Intent to Cause Physical Harm** as a misdemeanor of the first degree, **Strangulation that Causes Physical Harm** as a felony of the fourth degree – keeping the presumption for community control, and **Strangulation that Causes Serious Physical Harm or with a Prior F4 Strangulation Conviction as a second degree felony** – keeping presumption for prison. It is important to keep in mind that, according to case law, a strangulation case will be a second-degree felony whenever the victim is bruised, loses consciousness, or suffers mental harm. Additionally, the offense will be a fourth-degree felony when the victim has a mark on their neck or experiences pain.

Classifying all strangulation and suffocation cases as third degree felonies will not deter future crimes.¹⁵ Longer prison sentences do not result in further rehabilitation or reductions to recidivism.¹⁶ The money Ohio would spend on incarcerating these individuals would be better spent on education, job training, mental health counseling, and substance abuse counseling, which the data shows are linked to reductions in recidivism.¹⁷ In cases of domestic violence where serious physical harm has occurred as a result of strangulation, prosecutors are free to charge strangulation as a felony under current law. However, offenses that result in little harm or no harm, and where there was no intent to cause harm, should not be felonies of the third degree.

¹⁵ *Five Things About Deterrence*, National Institute of Justice, Office of Justice Programs, <https://nij.gov/five-things/pages/deterrence.aspx>; citing Nagan, Daniel S., *Deterrence in the Twenty First Century*, 2013.

¹⁶ *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prison*, Urban Institute Justice Policy Center, <http://apps.urban.org/features/long-prison-terms/reform.html>; citing *Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration*, Danielle Sered, https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy_downloads/accounting-for-violence.pdf; *Imprisonment and Crime: Can both be reduced?*, Steven N. Durlauf and Daniel S. Nagin, 2011 American Society of Criminology, Criminology & Public Policy, Volume 10 Issue 1, January 26, 2011.

¹⁷ *Reducing Recidivism*, A project of the Council of State Government Justice Center, June 2014, The National Reentry Resource Center, https://csgjusticecenter.org/wpcontent/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf.



As-drafted, the three sections of HB3 addressed in this testimony will not make domestic violence victims safer, but will have detrimental consequences on the Ohio criminal justice system. The OPD asks that these points be addressed. Thank you for the opportunity to provide testimony.

