

OHIO SENATE

**JUDICIARY COMMITTEE
MARCH 21, 2017**

SENATE BILL 20

OPPONENT TESTIMONY

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

Our Association offers supplemental testimony to address two points of contention between the testimony offered by proponents and opponents in previous hearings. We hope to clarify these two points in the legislative record before the Committee.

(1) *Ohio law did not fail in the sentencing of Destiny Shepherd's abuser:*

My partner Sarah Schregardus has previously testified that an inconvenient truth about the case against Terence King, Destiny's abuser, is that a much greater prison term was handily available to the court to impose upon him. Specifically, King had been found guilty of three felony offenses: Felonious Assault, and two different violations of Child Endangering, one an F-2 (duty of due care) and an F-3 (abuse of a child). At the conclusion of his trial, King was found guilty of all three offenses.

Prosecutors testified after Ms. Schregardus and simply denied her legal argument.

Under long-standing Ohio law, an offender can be sentenced to consecutive prison terms for multiple offenses, unless the court finds the offenses to be "allied offenses of similar import" under R.C. 2941.25.

Ohio courts have ruled, again and again and again, that Felonious Assault and Child Endangering are not allied offenses of similar import.

Here are the cases:

- 1) *State v. Robinson*, Logan App. no. 8-08-05, 2008-Ohio-4956
- 2) *State v. Garcia*, Franklin App. no. 03AP-384, 2004-Ohio-1409
- 3) *State v. Potter*, Cuy App no 81037, 2003-Ohio-1338;
- 4) *State v. Ross* (1999), 135 Ohio App.3d 262, 733 N.E.2d 659
- 5) *State v. Anderson* (1984), 16 Ohio App3d 251, 275 N.E.2d 492 (overruled on other grounds)
- 6) *State v. Journey*, Scioto App. no. 09CA3270, 2010-Ohio-2555 (also holding simple assault and child endangering do no merge)
- 7) *State v. Mooty*, Montgomery App. 25669, 2014-Ohio-733.

In each one of these seven appeals, the court of appeals upheld the consecutive prison terms imposed against an offender, like Terence King, convicted of Felonious Assault and Child Endangering. The court in the *Journey* appeal said this: "Courts

have consistently found that the offenses of felonious assault and child endangering are not allied offenses of similar import. (§ 25)

Under the authority of these cases, Terrence King could have received a total of 24 years in consecutive prison terms for his three offenses. The question is: why did he not ?

The answer is found in the transcript (appended) of the sentencing hearing (Tr. at 487):

THE COURT: *All right. Actually before we proceed any further, is that your understanding Mr. Wilson [prosecutor], that these three counts merge into one?*

MR. WILSON: *Your honor, I do believe that all three counts are similar offenses of allied import that would merge for the purpose of sentence.*

I get no pleasure out of pointing to the mistakes of others, but mistakes must be recognized before condemning the law which was mistakenly interpreted by judges and lawyers.

Of the cases cited above, perhaps the most instructive is *State v. Mooty*, a 2014 Montgomery County appeal, which by the way is in the same appellate district as Clark County where Terrence King was convicted. In the *Mooty* case, Mooty was charged with Felonious Assault and Child Endangering, and after a trial was convicted of both offenses. The trial judge imposed consecutive prison terms. On appeal, Mooty's appeal lawyers did not even challenge the imposition of consecutive prison terms because Ohio sentencing law is so well-settled on this point.

I do not see how it could be any clearer, that Terrence King could have been sentenced to up to 24 years on his three convictions. Should anybody seek to dispute this legal point, I hope that you will ask them to show you their cases which support that argument.

(2) The Fiscal Note to SB 20 fails to consider significant costs to local and state governments based upon added costs of litigation for experts witnesses.

The essential factual issues presented by the definition of “Permanent disabling harm” are (1) the permanent nature of the injury, and (2) the “substantial impairment” of the person’s ability the ordinary demands of life.

Ms. Schregardus has previously testified that many of these factual issues are not questions that can be addressed within the ordinary knowledge of layman witnesses, and will require medical or psychological experts to inform the jury or judge as to their respective expert opinions. Again, the prosecutors testified after Ms. Schregardus, and dismissed her argument, saying that we already deal with these issues under current law, and experts are not needed.

Just so you don’t think that we are “crying Wolf” and making this stuff up, I would like to point you to the Fiscal Note of HB 384 of the 125th General Assembly, a predecessor of the bill before this Committee. HB 384 was the first bill within my memory which sought to impose a mandatory prison term (five years) upon conviction of a new specification based upon permanent physical injury:

“for causing serious physical harm which resulted in permanent injury or damage to the intellectual, physical, or sensory functions of the victim and that permanently and substantially impair the victim’s ability to meet the ordinary demands of life.”

I am sure this statutory language sounds familiar to you. It is essentially the same as the specification in this bill.

Yet, here is what the Fiscal Note (appended) to HB 384 noted:

“County Criminal Justice systems: The bill will likely effect the trials of offenders and children in the courts of common pleas by potentially increasing the burden on prosecution and defense counsel to prove or disprove respectively that the offend’s or child’s crime resulted in serious physical harm to the victim. *It is likely charging an offender or child with the serious physical harm specification will require expert medical and psychological testimony depending on the type of harm that the victim allegedly experienced. Expert testimony can result in significant costs that the county will be largely responsible for paying on behalf of the prosecution and, potentially, indigent defendants.*”

Since approximately 85% (or more) of all felony criminal cases involve indigent defendants who are provided court-appointed counsel and court-authorized experts in the preparation of their defenses, the potential of these “significant costs” are substantial. Although the reimbursement rate from the state public defender commission to the counties is currently much closer to 50 % than it was in 2004, it is nonetheless true that the “significant costs” to be borne will be picked from the pockets of taxpayers, whether they are county or state taxpayer pockets.

How can we be certain that these potential litigation costs are real? Because one of the primary functions of our Association is to offer professional training of the criminal defense bar in Continuing Legal Education seminars around Ohio, to focus training on these type of trial skills. We will see to it that defense lawyers are prepared to fully litigate these issues. Where prosecutions often rely upon medical and psychological experts to testify in proof of the charges against the accused, it is our responsibility to make sure that the accused has resort to the same kind of experts in defending against that proof. A right to a fair trial requires no less.

Finally, the type of factual issues that are raised by this specification (permanency; substantial impairment of demands of life) are the same type of issues that are litigated in claims involving the Bureau of Workmens Compensation. Those cases almost routinely involve medical experts offering their medical evaluations, diagnoses and prognoses in evidentiary hearings. In fact, an entire new sub-professional specialty, the Certified Independent Medical Examiner, was created to fulfill the needs of the parties (employers and employees) for evidentiary proof relating to these claims of injuries. I have spoken with Michael T. Kelley, M.D., who serves in the Employer Services Department of Nationwide Childrens Hospital, and is involved in the litigation of Workmens Compensation Claims against Childrens Hospital, and has deep Workmens Compensation experience. If there are additional hearings to be had on this bill, Dr. Kelley has expressed a willingness to appear and testify before this Committee on the relatedness of those medical issues to the similar issues raised by the provisions of SB 20 and provide an anticipated measure of the costs of these experts.

It is respectfully submitted that additional time for hearings on this bill should be taken, if for no other reason to request that the Legislative Services Commission re-examine their Fiscal Note to SB 20, and reconcile the present Note with the Fiscal Note issued in relation to HB 384 of the 125th General Assembly.

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THE COURT OF COMMON PLEAS
OF CLARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs-

TERRANCE KING, III.

Defendant.

CASE NO. 06-CR-1215
07-CA-0116

BEFORE: THE HONORABLE DOUGLAS M. RASTATTER, JUDGE

October 3, 2007

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A-P-P-E-A-R-A-N-C-E-S

On behalf of the Plaintiff:

D. ANDREW WILSON, ESQ.
Assistant Clark County Prosecutor
80 East Columbia Street
Springfield, Ohio 45502

On behalf of the Defendant:

SHAWN A. THOMAS, ESQ.
Clark County Public Defender's Office
50 East Columbia Street
Springfield, Ohio 45502

ALSO PRESENT: Ethan Cox
Clark County Sheriff's Department

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1 B.C.I.I. This defendant took a polygraph examination
2 and was asked whether or not he hit the baby's head,
3 whether or not he shook the baby. He failed that
4 polygraph miserably.

22:16:10 5 Randi Shepherd was administered the same
6 polygraph. She passed whether or not she had any
7 knowledge of that.

8 So that's something that is not admissible in
9 the trial, but I wanted to let you know it's part of
22:18:22 10 that -- what did happen in this case.

11 So thank you very much for your service. The
12 State of Ohio believes that your verdict is a correct
13 one.

14 THE COURT: All right. Ladies and
22:19:30 15 gentlemen, I thank you for your service. I know it's
16 been a long two days. I appreciate your patience,
17 your diligence. I'm confident that you took this
18 matter extremely seriously, and I know you
19 deliberated thoroughly; and I appreciate that.

22:19:40 20 And the admonition is lifted. You're free to
21 talk about the case if you choose to do so.
22 Certainly, that's entirely up to you. If you decide
23 to talk the case at all with anybody, you're welcome
24 to do that.

22:19:58 25 And I do appreciate your service. It's very

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1 Important and critical service in our community. So
2 with the Court's sincere appreciation, you are free
3 to go at this time.

4 Thank you.

22:17:14 5 ---
6 (WHEREUPON, the Jury was released
7 from service at 10:16 p.m.)
8 ---

9 THE COURT: All right. The defendant,
22:18:20 10 having been convicted of all three counts in the
11 indictment, the Court will proceed with disposition
12 at this time.

13 Is there anything further, Mr. Thomas?

14 MR. THOMAS: Your Honor, we believe
22:18:30 15 that -- that these three counts merge together into
16 one for sentencing purposes giving the Court a range
17 of up to eight years in the penitentiary. We'd ask
18 the Court to take the facts into consideration as
19 found in issuing the decision.

22:18:40 20 Thank you.

21 THE COURT: All right. Actually
22 before we proceed any further, is that your
23 understanding, Mr. Wilson, that these three counts
24 merge into one?

22:18:50 25 MR. WILSON: Your Honor, I do believe

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1 that all three counts are similar offenses of allied
2 import that would merge for purposes of sentence.

3 THE COURT: Did the State want to make
4 an election as to which count the Court proceeds
22:18:14 5 under?

6 MR. WILSON: We'd actually prefer to
7 proceed under Count 2, which is the second degree
8 felony child endangering.

9 THE COURT: All right. Mr. King, is
22:20:00 10 there anything you'd like to say at this time before
11 the Court imposes sentence on you?

12 THE DEFENDANT: Your Honor, I got to
13 say you all going to see me again. That's all I got
14 to say. You all will see me again, Your Honor. You
22:20:12 15 can't do what you all did to me, man. It's not
16 right, man. You all messing with the tapes, man, not
17 showing the jury every detail.

18 You all put parts in the trial, what I wanted
19 to put in there, man. That's all I got to say. I
22:20:20 20 ain't got nothing else to say, man. You all will see
21 me on appeal. That's all, man.

22 You all take me away from my family cause you
23 all, you know what I'm saying? You all have no
24 proof, no evidence or nothing. You all take me away
22:20:40 25 from my family because of what they're saying, you

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1 know what I'm saying? I feel I ain't got a fair
2 trial or nothing, man. Nothing.

3 THE COURT: The State have anything?

4 MR. WILSON: Your Honor, the victim's
22:21:00 5 mother, Randi Shepherd, would like to read a
6 statement to the Court. For the State.

7 RANDI SHEPHERD: Your Honor, my name
8 is Randi Shepherd. I am Destiny Shepherd's mom. I
9 hate what Terrance King did to my baby. No child
22:21:20 10 should ever have to go through what she has been
11 through. Destiny will never be the same baby she
12 once was before.

13 No matter how much therapy or medical
14 attention she receives, she will always be unhealthy;
22:21:40 15 and she will always have brain damage. I cannot
16 understand how someone could hurt a baby. There is
17 no excuse for it.

18 This was no accident because you can't
19 accidentally shake a baby and cause injuries this
22:21:50 20 severe. He should be punished. Please give Terrance
21 the maximum sentence he can get. Destiny has
22 received a life sentence. Whatever he gets, he can
23 never change. This will never change.

24 My family has already suffered both
22:22:10 25 emotionally and financially because of his actions.

Fiscal Note & Local Impact Statement

125th General Assembly of Ohio

Ohio Legislative Service Commission

77 South High Street, 9th Floor, Columbus, OH 43215-6136 ☎ Phone: (614) 466-3615

☎ Internet Web Site:

BILL: DATE: **March 9, 2004**

STATUS: **As Introduced** SPONSOR: **Rep. Raussen**

LOCAL IMPACT STATEMENT REQUIRED: **Yes**

CONTENTS: **Requires the imposition of a five-year prison term upon an offender who c
serious physical harm of a certain nature to a victim**

State Fiscal Highlights

STATE FUND	FY 2004	FY 2005	FUTURE YEARS
General Revenue Fund			
☎ ☎ ☎ ☎ Revenues	- 0 -	- 0 -	- 0 -
☎ ☎ ☎ ☎ Expenditures	- 0 -	- 0 -	Increase, starting as early as FY 2006, peaking at upwards of \$3.3 million in FY 2025 or later

Note: ☎ The state fiscal year is July 1 through June 30. ☎ For example, FY 2004 is July 1, 2003 ☎ June 30, 2004.

☎ ***Department of Rehabilitation and Correction.*** ☎ The Department calculates that the bill ☎ s serious physical harm specification and resulting increase in its annual inmate population will require almost 150 inmate beds be added to the prison system over time. ☎ LSC fiscal staff estimate that DRC will need to begin adding some of these inmate beds as early as FY 2006, with the need for the almost 150 inmate beds peaking at FY 2025 or so. ☎ The annual operating costs associated with these additional 150 inmate beds may be calculated using two separate annual inmate cost estimates: (1) marginal cost per inmate bed, and (2) total cost per inmate bed (fixed plus marginal). ☎ Based on a relatively recent conversation with DRC, it appears that its marginal annual cost per inmate bed is around \$2,700. ☎ Assuming that were true, then the marginal annual cost of 150 additional inmate beds is estimated at \$405,000 (150 additional inmate beds x \$2,700). ☎ The Department ☎ s current total annual cost per inmate bed is \$21,872. ☎ Using that figure, then the total annual cost of 150 additional inmate beds is estimated at \$3,280,800 (150 additional inmate beds x \$21,872). ☎

☎ ***Department of Youth Services.*** ☎ At this point, the effect of the bill ☎ s serious physical harm specification on the Department of Youth Services ☎ annual care and custody costs is uncertain. ☎ Younger delinquent children committed to DYS may be the group most affected by the bill, as an older delinquent child (ages 16 or 17) who commits a crime that results in serious physical harm to the victim is probably very likely to be bound-over and prosecuted as an adult under current law. ☎ Bound-over offenders, if convicted, would presumably then be sentenced to the custody of the

Local Fiscal Highlights

LOCAL GOVERNMENT	FY 2004	FY 2005	FUTURE YEARS
Counties			
^{FF} _{FD} ^{FF} _{FD} ^{FF} _{FD} ^{FF} _{FD} Revenues	- 0 -	- 0 -	- 0 -
^{FF} _{FD} ^{FF} _{FD} ^{FF} _{FD} ^{FF} _{FD} Expenditures	Potential increase, likely to exceed minimal in some local jurisdictions	Potential increase, likely to exceed minimal in some local jurisdictions	Potential increase, likely to exceed minimal annual in some local jurisdictions

Note: ^{FF} For most local governments, the fiscal year is the calendar year. ^{FF} The school district fiscal year is July 1 through June 30.

^{FF} **County criminal justice systems.** ^{FF} The bill will likely effect the trials of offenders and children in the courts of common pleas by potentially increasing the burden on prosecutors and defense counsel to prove or disprove respectively, that the offender ^{FF}s or child ^{FF}s crime resulted in serious physical harm to the victim. ^{FF} It is likely charging an offender or child with the serious physical harm specification will require expert medical and psychological testimony depending on the type of harm that the victim allegedly experienced. ^{FF} Expert testimony can result in significant costs that the county will be largely responsible for paying on behalf of the prosecution and, potentially, indigent defendants.

^{FF} **County revenues.** ^{FF} It does not appear that the bill will directly affect county revenues.

Detailed Fiscal Analysis

The bill makes the following modifications to current law:

- § Requires the imposition of a five-year prison term upon an offender who caused serious physical harm of a certain nature to a victim.
- § Requires the court impose that prison term in addition to the sentence for the underlying offense.
- § Requires the court to commit a child to the Department of Youth Services for a definite period not exceeding five years if the court determines that the child would be guilty of a serious physical harm specification.
- § Requires the court also commit such a child to the Department for the underlying delinquent act.

At this point in time, LSC fiscal staff has uncovered no data detailing the frequency with which adults and children in Ohio commit a felony offense of violence annually that result in the type of serious physical harm specified by the bill. § Thus, it is unclear how many offenders and delinquent children might be affected annually by the bill § s serious physical harm specification and related sentencing requirements. § Given the number of felony offenses of violence that are committed in Ohio annually, it appears that the fiscal effect of the bill could be potentially significant in terms of the annual operating costs of the state and county criminal and juvenile justice systems. § § In addition, the bill specifies over 30 felony offenses of violence that, if committed by an offender or a child, and the act results in the requisite type of harm to the victim, then the offender or child would be subject to the bill § s serious physical harm specification and related sentencing requirements.

State fiscal effects

The bill § s most noticeable effect on the state will be in terms of increasing the annual expenditures of two state agencies: § the Department of Rehabilitation and Correction (DRC) and the Department of Youth Services (DYS). § At this point, the magnitude of the increase in DRC § s annual incarceration costs appears likely to fair greater than any possible increase in DYS § s annual care and custody costs.

Department of Rehabilitation and Correction expenditures

According to an analysis by the Department of Rehabilitation and Correction, approximately 78 offenders currently being sentenced annually to prison for committing an offense of violence could have been charged with the bill § s serious physical specification if that specification was part of the state § s existing criminal law when those offenders were sentenced. § However, under current law, for a variety reasons, offenders may not always be charged with, convicted of, or plead guilty to specifications that already exist in the state § s criminal law. § For example, of those offenders sentenced to prison under circumstances that could have included a gun specification, roughly one-fifth, or 20%, actually include a gun specification as part of their time to be served.

By presumably extending prison stays beyond what they would have otherwise been under current law, the bill's serious physical harm specification will trigger a "stacking" effect. This effect refers to the increase in Department of Rehabilitation and Correction's inmate population that occurs, as certain offenders stay in prison longer and the number of offenders entering the prison system does not decrease.

Estimating the likely increase in DRC's annual incarceration costs is complicated by the fact that the stacking effect triggered by the bill will reflect numerous underlying changes in the length of prison sentences served by offenders committing different offenses of violence. For example, because of the 30-plus offenses of violence tied to the bill's serious physical harm specification, some offenders who might receive a prison sentence that includes the serious physical harm specification in the future are serving sentences of around 12 months under current law, while other offenders are serving prison sentences of 20 years under current law.

The Department calculates that the bill's serious physical harm specification and resulting increase in its annual inmate population will require almost 150 inmate beds be added to the prison system over time. LSC fiscal staff estimate that DRC will need to begin adding some of these inmate beds as early as FY 2006, with the need for the almost 150 inmate beds peaking at FY 2025 or so.

The annual operating costs associated with these additional 150 inmate beds may be calculated using two separate annual inmate cost estimates: (1) marginal cost per inmate bed, and (2) total cost per inmate bed (fixed plus marginal). Marginal cost can be used when a relatively small number of offenders are likely to be added to DRC's total annual inmate population. Marginal costs include things such as food, clothing, medical care and so on. Based on a relatively recent conversation with DRC, it appears that its marginal annual cost per inmate bed is around \$2,700. Assuming that were true, then the marginal annual cost of 150 additional inmate beds is estimated at \$405,000 (150 additional inmate beds x \$2,700). The Department's current total annual cost per inmate bed is \$21,872. Using that figure, then the total annual cost of 150 additional inmate beds is estimated at \$3,280,800 (150 additional inmate beds x \$21,872).

Thus, the estimated annual increases in DRC's annual incarceration expenditures are likely to start as early as FY 2006 and peak at upwards of \$3.3 million around FY 2025 or so.

Department of Youth Services expenditures

At this point, the effect of the bill's serious physical harm specification on the Department of Youth Services' annual care and custody costs is uncertain. Younger children committed to DYS may be the group most affected by the bill, as an older delinquent child (ages 16 or 17) who commits a crime that results in serious physical harm to the victim is very likely to be bound-over and prosecuted as an adult under current law. Bound-over offenders, if convicted, would presumably then be sentenced to serve a prison sentence in the custody of the Department of Rehabilitation and Correction (DRC).

Revenues

It does not appear that the bill will directly affect state revenues.

Local fiscal effects

County criminal justice expenditures

The bill will likely effect the trials of offenders and children in the courts of common pleas by potentially increasing the burden on prosecutors and defense counsel to prove or disprove respectively, that the offender "s or child "s crime resulted in serious physical harm to the victim. " It is likely charging an offender or child with the serious physical harm specification will require expert medical and psychological testimony depending on the type of harm that the victim allegedly experienced. " Expert testimony can result in significant costs that the county will be largely responsible for paying on behalf of the prosecution and, potentially, indigent defendants.

County revenues

It does not appear that the bill will directly affect county revenues.

LSC fiscal staff: " Laura A. Potts, Budget Analyst

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