STATEMENT OF JOHN T. MARTIN
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CUYAHOGA COUNTY, OHIO

TO THE CRIMINAL JUSTICE COMMITTEE
OHIO HOUSE OF REPRESENTATIVES

IN OPPOSITION TO H.B. 3

June 13, 2019
11:00 a.m.

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Chairman Lang
Vice-Chair Plummer
Ranking Member Leland
Members of the Committee:

Thank you for the opportunity to address my concerns regarding H.B. 3. Much of what I have to say has been separately addressed in the remarks of Mark A. Stanton, Chief Public Defender of Cuyahoga County. I agree with his comments and would add the following.

Proposed R.C. 2945.483 and proposed 2945.484 will both be held by courts to violate the Modern Courts Amendment – Article IV, Section 5(B) of the Ohio Constitution. Having served on the Ohio Supreme Court's Rules Commission from 2013 through 2018, I have had first-hand exposure to the procedural-substantive dichotomy that Article IV, Section 5(B) has put in place in Ohio. The proposed statutes are forthright about their intention to replace the rules governing the admission of hearsay and "other crimes" evidence that are currently found in Evid. RR. 801 et seq., 404 and 405, respectively. This explicit conflict will be resolved by courts eventually holding the statutes unconstitutional.[1] The result will be that, following a trial under these proposed statutes, should they be codified, victims and/or their families will have to undergo a second trial, thus denying them closure. And my client, the defendant, will similarly have to run the gauntlet of trial twice. Everyone loses.

I understand that the Rules Commission is currently considering rules amendments that would accomplish similar, if not identical, changes to Ohio's evidentiary procedure – but via amendments to the Rules of Evidence. Obviously, rules amendments will not run afoul of the Modern Courts Amendment, because the rules are the appropriate body of law for the types of changes contained in proposed R.C. 2945.483 and 2945.484. Thus, a "no" vote on H.B. 3, or

[1] *See Erwin v. Bryan*, 125 Ohio St.3d 519, 929 N.E.2d 1019, 2010 -Ohio- 2202.

support of an amendment to the Bill to eliminate these proposed statutes, can be understood as a recognition of the separation of powers constitutionally mandated by the Modern Courts Amendment when it comes to the issue of evidentiary procedure.

To be sure, I am opposed to these two proposed statutes for other reasons as well, many of which have been addressed by Mr. Stanton. The Rules of Evidence presently contain provisions that permit hearsay evidence that is both non-testimonial and reliable via a number of hearsay exceptions that could arise in domestic violence cases where the declarant is unavailable (or, in the case of the Evid. R. 803 exceptions, even when the declarant is available), for example:

Evid. R. 803(1) -- Present Sense Impression

Evid. R. 803(2) – Excited Utterance

Evid. R. 803(3) – Then Existing Mental, Emotional, or Physical Condition.

Evid. R. 803(4) – Statements for Purposes of Medical Diagnosis

Evid. R. 804(B)(2) – Statement Under Belief of Impending Death

Simply put, any non-testimonial statement that does not fit within one of these five existing exceptions is probably not reliable enough to be admitted under proposed R.C. 2945.483 in any event.

As for the "other acts" exception to Evid. RR. 404 and 405 that would be codified by proposed R.C. 2945.484, any liberalization of these evidentiary rules is an invitation to make trials less reliable. Thirty-four years of practicing law, including eleven years as a federal prosecutor, has taught me that a jury who believes a defendant committed a past act of domestic violence will immediately think that the defendant has "done it again this time." While that is not necessarily so, no competent defense attorney will allow such evidence to come into court

unchecked. As a result, there will be a mini-trial over whether the prior act of domestic violence occurred at all – alleged victims of these prior allegations will have to testify in a case where what happened to them is not even the issue at trial. Juries will be diverted from focusing on what happened in this case. And many defendants will be convicted, not on the basis of the offense charged, but because the jury has the feeling that, even if the proof of the new charge has not convinced the jury of the defendant's guilty beyond a reasonable doubt, the defendant deserves to be convicted because of the prior act or acts. That is inconsistent with the presumption of innocence and with fundamental fairness. In the end, "[t]he purpose of a criminal trial is to discover the truth in a manner that insures meticulous protection to the rights of the accused."[2]

But these objections to the merits of the proposed statutes should be the subject of discussion in the Rules Commission. For the House and Senate, the question is much more preliminary and the answer is much more direct: Changes to the Rules of Evidence cannot enter the doors of the State Capitol as bills. Rather, those changes must first exit the doors of the Ohio Supreme Court as proposed rules amendments and then come to the General Assembly for final approval via the Rules-making process.

Finally, I would note that I have other objections to H.B. 3, not detailed herein, but which in large part are being addressed by other entities, including the Ohio Public Defender and the American Civil Liberties Union.

Thank you, and I welcome your questions.

[2] *Opinion of the Justices* [of the New Hampshire Supreme Court to the New Hampshire Senate], 131 N.H. 583, 557 A.2d 1355 (1989) (Johnson, J.).