STATEMENT OF MARK A. STANTON
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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 what I perceive to be serious problems with H.B. 3. While I believe that H.B. 3 is flawed, both constitutionally and as a matter of policy in a number of areas, I am particularly concerned about two aspects of the Bill that will ultimately lead trial courts to commit reversible errors. Those two aspects are:

- Proposed R.C. 2945.483, which expands the admissibility of hearsay statements in domestic violence cases;
- Proposed R.C. 2945.484(B), which expands the admissibility of other acts evidence in domestic violence cases.

My objections to these provisions are fourfold:

1. These two provisions violate the Modern Courts Amendment, Article IV, Section 5, of the Ohio Constitution.
2. Proposed R.C. 2945.483 violates the Sixth Amendment right of confrontation.
3. Proposed R.C. 2945.483 will result in the inclusion of unreliable evidence that will raise significant due process concerns. Ironically, the hearsay exception being created may help reluctant victims of domestic violence inject false exculpatory evidence into the trial.
4. Proposed R.C. 2945.484(B) will result in the inclusion of unreliable evidence and thus raises significant due process concerns.

Each of these concerns is addressed in my following comments.

1. The Modern Courts Amendment

The starting point for any constitutional challenge to proposed R.C. 2945.483 and proposed 2945.484 is the Modern Courts Amendment – Article IV, Section 5(B) of the Ohio Constitution. Under the Modern Courts Amendment, Ohio has drawn a constitutional line of demarcation between the authority of the Supreme Court and that of the General Assembly when it comes to making law: The Supreme Court determines the procedural law of Ohio via the rule-making process, and the General Assembly determines substantive law. To be sure, the General Assembly may foray into the procedural realm but only so long as a statute in this regard does not conflict with the Supreme Court–promulgated rules of procedure. These rules of procedure include the Rules of Evidence. When a statue conflicts with the Rules of Evidence on a procedural matter, the statute must yield to the rule.[1]

Proposed R.C .2945.483 and 2945.484 explicitly state that they are usurping the Rules of Evidence with respect to hearsay (Evid. R. 801 et seq.) and the admission of character evidence (Evid. RR. 404-405). In so doing, the proposed statutes explicitly set forth a violation of the Modern Courts Amendment.

2. The Sixth Amendment Right of Confrontation

The Sixth Amendment right of confrontation requires that testimonial statements be subject to the "crucible of cross-examination,"[2] described by one of our history's foremost legal scholars as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[3] Under the Sixth Amendment, when a statement is testimonial, the defense must be able

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

[2] *Crawford v. Washington,* 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[3] 5 J. Wigmore, Evidence § 1367 (3d ed. 1940).

to cross-examine the declarant, with few exceptions not relevant to this legislation. Statements are testimonial when made under circumstances where the declarant reasonably would believe that the statement could be used in connection with future legal proceedings. Among those statements that courts have uniformly recognized as testimonial are statements made to police describing criminal activity reported by the declarant to further the investigation and prosecution of an alleged crime.[4] In specifically recognizing these types of statements as the types of statements that could be admissible under proposed R.C. 2945.483, the proposed statute is explicitly violating the Sixth Amendment.

3. R.C. 2945.483 Invites Unreliable Statements to Be Admitted Into Evidence

Proposed R.C. 2945.483 does not limit itself to testimonial statements. Non-testimonial statements that are "reliable" are admissible when they are made at or near the time of the alleged domestic violence and are in writing or electronically recorded. While there was a time in our society when a written statement was looked upon as being a more formal pronouncement and thus more likely to be reliable, social media and texting have made that custom a thing of the past. Today's text messaging, while written, is nothing more than yesterday's gossip over the backyard fence. Retractions of untrue written statements transmitted via Twitter, Instagram, Facebook, *etc.*, are a daily occurrence among those in the public spotlight – should an imprimatur of reliability really attach to the written word when the written word is transmitted in one's car while waiting for the light to turn green?

Moreover, to the extent that domestic violence victims will at times try to create false explanations for what has happened in an effort either to inculpate or exculpate their partners, this hearsay exception provides an opportunity for after-the-fact revisionism that in some cases

[4] *State v. Arnold,* 126 Ohio St.3d 290, 933 N.E.2d 775, 2010 -Ohio- 2742.

will unfairly incriminate and in other cases unfairly exculpate the accused. The end result is to drift further from the truth-seeking that the Rules of Evidence attempt to achieve.

To the extent that the admission of this unreliable hearsay is incriminating, the defendant will argue, both at trial and on appeal, that the Fourteenth Amendment Due Process right to a fundamentally fair trial has been violated. This may result in reversals on appeal. On the other hand, to the extent that false exculpatory evidence results in undeserved acquittals, there will be no appeal – instead, the system will have failed the victim.

4. Other acts evidence

The paramount consideration in a criminal trial is to establish what a defendant did or did not do – it is not an inquiry into a defendant's general character. For that reason, Evid. R. 404(B) carefully limits the admission of acts other than those relating to the charges in the case. To be admissible, "other acts" must relate to the charges, by showing, for example, that the defendant acted with knowledge or intent or as part of a criminal plan. Juries are appropriately shielded by Evid. R. 404(B) from the inherently prejudicial distraction of judging the nature of a person on trial – and instead are focused on the facts as they relate to the charges in the case.

By overriding Evid. R. 404(B), proposed R.C. 2945.484 now opens the door to trials-within-the-trial, where a defendant's prior alleged acts of domestic violence are admissible to prove bad character of the defendant. This will result in jury confusion and divert the jury from what should be the task at hand – did the defendant do what is alleged in this case, not what is not alleged and relates to some past time and place? Moreover, this misdirection of the jury from the task at hand raises undeniable due process issues.

Conclusion

In the end, our goal must be to seek the truth. Proposed R.C. 2945.483 and R.C. 2945.484 will not accomplish this goal. Moreover, because of the blatant unconstitutionality of these provisions vis-à-vis the Modern Courts Amendment, those courts and prosecutors that follow these laws, should they be enacted, are likely to find that those convicted under the new laws will be returning for a new trial after winning their appeals. As a result, everyone loses – defendants run the gauntlet of trial twice, victims and their families are denied closure because of re-trials, and the public's confidence in a fair and impartial judicial system is eroded.

I urge you to vote "no" on H.B. 3. And I am happy to answer any questions you may present.