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TO THE CRIMINAL JUSTICE COMMITTEE
OHIO HOUSE OF REPRESENTATIVES

In Opposition to Am. Sub. H.B. 3

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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 Am. Sub. H.B. 3. In June 2019, I appeared before the Committee to voice concern about several evidentiary aspects of H.B. 3 which have since been deleted in the amended substitute bill. Nonetheless, I incorporate those comments and ask the Committee to consider them in opposing the uncodified provision in the amended substitute bill that requests the Ohio Supreme Court to consider Rules amendments for domestic violence cases.

My comments today address several substantive criminal law issues related to the bill:

- Expanding the definition of aggravated murder to include murder of a family member when the defendant has a prior offense for domestic violence.
- Expanding felony domestic violence to include blocking the victim's air passage, regardless of intent or harm caused.
- Mandating consideration of a domestic violence lethality assessment screening tool when a court considers release on bail and/or sentencing.

1. Expanding aggravated murder, R.C. 2903.01 (lines 201ff. of Am. Sub. H.B. 3)

Murder under R.C. 2903.02(A) is defined as the purposeful killing of another. Under the bill, a person who commits a purposeful killing of a family member and who also has a prior domestic violence offense commits aggravated murder under R.C. 2903.01 – not murder. As a result, the possible punishment increases from 15 years to life, for murder, to a life term for aggravated murder which, within the discretion of the sentencing judge, can include life without parole and will never allow for parole before 20 years. Murder and aggravated murder, at their respective cores, both carry life sentences – the difference between them is when, if ever, the Parole Board is able to exercise discretion to consider release on parole under appropriate conditions and supervision.

While any purposeful killing is serious and should be punished appropriately, carving out a special provision in the domestic violence context is not consistent with the remainder of the aggravated murder provision of the Revised Code. Nowhere else in R.C. 2903.01 is a purposeful killing of another raised to aggravated murder on the basis of a prior conviction. Thus, a person who has a prior murder conviction and murders again will still be guilty of murder, not aggravated murder. Yet, under this bill, a person who purposely kills a family member and who has a prior misdemeanor domestic violence conviction commits aggravated murder.

Similarly, carving out family members as a specially protected class of victims whose purposeful killing raises what would otherwise be murder to the offense of aggravated murder is out of context. The only specially recognized victims whose purposeful killing becomes aggravated murder by virtue of their identity are:

- Children under 13,
- Law enforcement officers in the performance of duty, and
- First responders when the intention was to kill a first responder.

These specially protected classes are unique. Society has a *parens patriae* role with respect to children, and a special duty to protect those who serve as peace officers or first responders.

But domestic murders, as serious as they are, are not necessarily committed by the type of cold-blooded murderers for whom it is appropriate to throw away the prison key. Domestic murders are frequently committed during a fit of anger, oftentimes where there is a two-sided argument. The penalty for murder – a life sentence with no parole opportunity for at least fifteen years – is severe, yet still allows the Parole Board to make a meaningful determination at an appropriate time, about rehabilitation and the likelihood of recidivism on an individual basis. Those offenders who have not demonstrated that they have reformed their lives can, in the

discretion of the Parole Board, be held until they die. Those offenders who have demonstrated that they are not the same person that entered prison fifteen years ago have the chance for parole (although our experience tells us that it is exceedingly rare for the Parole Board to release a murderer on their first parole review).

In contrast to the penalty for murder, the penalties for aggravated murder prolong the period of time before which the Parole Board can act, by an additional five, ten or fifteen years depending upon whether the sentence imposed is life imprisonment with parole eligibility at 20, 25 or 30 years. If a judge imposes a sentence of life without parole for aggravated murder, the prison door is locked shut and the Parole Board is powerless to let the reformed offender free.

Ironically, the increase in punishment under this bill could be particularly onerous on battered spouses, some of whom have committed a prior domestic violence offense even though, for the most part, they, themselves, have been the victims of abusive spouses. In our experience, because of the turbulence in which they find themselves, battered spouses will sometimes call the police when attacked, and sometimes fight back when attacked. Yet, oftentimes, particularly when it is their first time as a criminal defendant facing a misdemeanor domestic violence charge for fighting back, the battered spouse will plead guilty in hopes that a quick resolution of the case will enhance familial reconciliation. When, at a later time, the battered spouse finally can take no more and, regrettably, kills their abuser, they are convicted of murder. In these cases, the offender oftentimes had learned from the experience and is an excellent parole candidate at fifteen years.

Under this bill, that same battered spouse would be convicted of aggravated murder. Despite all of the extenuating circumstances present in such a case, the Parole Board is powerless to act until the offender has been incarcerated for at least 20, 25 or 30 years; and, should the trial

judge (who has no way to look into the future) decide in the emotions of the courtroom moment to impose a sentence of life without parole, the battered spouse will die in prison, regardless of how well they have progressed in their life journey.

Moreover, the difference between aggravated murder without a death specification and aggravated murder with a death specification is a fine line. The amended substitute bill does not make this new form of aggravated murder a capital offense, *per se*. However, if the death occurred attendant to a kidnapping (which in Ohio does not have to be anything beyond restraining the victim during the attack itself), then aggravated murder, accompanied by a specification relating to the kidnapping, can be indicted as a capital offense.

Respectfully, this is too much.

2. Restricting the airway as a form of domestic violence, R.C. 2919.25 (ll. 260ff.)

A parent who, with no intent to harm their child, covers the mouth of a crying baby in church should not be committing a third-degree felony under the laws of the State of Ohio. Neither should a teenager when trying to imitate the WWF while wrestling his brother. Yet that is what Am. Sub. H.B. 3 technically does.

While, hopefully, no prosecutor would be this draconian in the exercise of discretion, laws should not be written in such a way that prosecutorial discretion is the only barrier between innocent activity and a conviction. Moreover, in that child custody battles can become nasty, it would be very possible for an estranged spouse to use the expanded definition of domestic violence to their advantage in a custody case.

And for what reason? If, in fact, serious physical harm was caused, the conduct already constitutes a second-degree felony for felonious assault under R.C. 2903.11. If serious physical harm is attempted but not caused, then attempted felonious assault is already available as a third-

degree felony – which is how the bill would criminalize such conduct under proposed R.C. 2919.25(E)(6). And felonious assault against a family member already has the same ability to enhance a future domestic violence case as would the bill's new addition to the domestic violence statute – so future enhancement is not a concern under the status quo.

In the end, there are enough laws that protect all of us against assault from family members. Moreover, if a particular offender or offense warrants it, the individual circumstances relating to the domestic nature of the offense can adequately be addressed at sentencing under the current Revised Code.

3. Domestic violence screening results, R.C. 2935.033; at sentencing, R.C. 2929.12 and 2929.22; and at bail hearings, R.C. 2937.23 (ll. 680ff., 2222ff., 2386ff., 2515ff, and 2604ff.).

Mandating that the results of a domestic violence lethality assessment screening tool be considered at every sentencing and every bail hearing is not going to enhance the quality of either sentencing or bail determinations. These assessment tools, employed by police responding to an alleged incident of domestic violence, utilize information given in an emotionally charged context by alleged victims at a time when those victims are often upset. At times, the alleged victims, because they realize a family member is being arrested, will understate concerns for their safety. At other times, the alleged victim will overstate those same concerns.

Rather than mandate the consideration of these tools at the sensitive stages of bail and sentencing, the Revised Code and Rules of Criminal Procedure currently allow judges to consider any relevant information provided by the prosecutor and, particularly since the passage of Marsy's Law, by the alleged victim. Prosecutors and victims are in the best position to know and present the facts to the court directly – without the filter of an assessment tool that was facilitated by law enforcement, which, understandably, is "engaged in the often competitive

enterprise of ferreting out crime." *United States v. Johnson*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

This is not to say that assessment tool results should never see the courtroom. But the Revised Code and Criminal Rules already allow for the consideration of such evidence as part of the judge's plenary authority to consider all relevant evidence at both bail and sentencing. Giving these assessment tools special recognition in the bail context places them ahead of specially designed bail risk assessment tools, which are not recognized as having to be considered under Crim. R. 46, either currently or as proposed by the Supreme Court for amendment in July 2020.

Similarly, the sentencing statutes currently speak of factors to be considered. The amended substitute bill is now including assessment results as the only evidence specifically mandated to be considered at sentencing. Respectfully, this places the assessment tool out of context vis-à-vis the panoply of other evidence that can be considered at sentencing.

Finally, the mandatory consideration provisions, in that they affect how bail and sentencing hearings are conducted, are procedural in nature and thus are of questionable constitutionality under the Modern Courts Amendment, Ohio Const. Art. IV, Sec. 5.

Conclusion

For these reasons, I oppose the provisions of the amended substitute bill discussed above. Unless those provisions are deleted, I urge you to vote "no" on Am. Sub. H.B. 3. And, while I am unable to be present in person today, I am happy at a future time to appear before the Committee to answer any questions you may have.