WRITTEN TESTIMONY

IN OPPOSITION TO HB 4451

BY THOMAS NORTH

A Michigan citizen and former judge (1992-2007)

Dear Committee Members:

I am hereby providing my testimony regarding HB 4451, pending before you and scheduled for testimony on June 3, 2009. I have reviewed the bill on the legislative website. This testimony is unsolicited by anyone. I am unable to appear in person on June 3 in Lansing to testify.

There are fundamental and severe problems with HB 4451. These problems fall into three categories: 1) Lack of any definition of many key words therein, to give the general public, who may be charged with crimes, any notification of what those words mean in any fashion that would inform the public of what the government is attempting to compel them to do; 2) more critically, a legislative bill that the legislature and government have absolutely no legal power to enact, because such bill would criminalize completely innocent inaction by citizens, as opposed to some wrongful affirmative act, such as those that form the basis of all other state crimes; and 3) failure to set forth necessary affirmative defenses to this proposed "crime" for reasons such as lack of age of majority, or mental or physical inability to communicate with law enforcement.

1) HB 4451 completely fails to define what the following words and phrases (that appear therein) mean for purposes of the bill: "present at the scene", "emergency", or "grave" (in conjunction with the phrase that follows, "physical harm"). None of those words or phrases are self explanatory with the kind of legal precision that is necessary to give the general public notice of when they might be compelled by government to communicate to law enforcement. All of those words and phrases have as many different meanings and definitions as there are people to define them, i.e., the word "emergency" for example has a different meaning for every person. There are some things most all people would agree are an "emergency", such as a criminal physical assault. But most things are subject to reasonable disagreement. Is a "flat tire" on a busy highway an emergency? For some yes, others, no. The term "physical harm" is reasonably clear, but any number of people could also reasonably disagree about what physical harm is "grave" or not. And, what constitutes being "present at the scene"? In other words, what is the "scene" and how far geographically does it extend outward? Is anyone within eyesight or earshot "present at the scene"? Or just those who are right on top of it, etc.? How do you define this?

Definitions that are precise are critical to all criminal statutes. The Michigan Supreme Court has established as case law in Michigan that criminal statutes must be

construed strictly and are not subject to judicial interpretation at all. These court decisions were entered for the two reasons: that the general public must be given advance notice of what is or is not a prohibited act, and that must be defined by province of the legislature, which makes the criminal laws (and NOT by later court interpretation of terms or phrases). The latter is obviously so that citizens know IN ADVANCE what is or is not a crime, so that they can attempt to conform to that. Government cannot pass a criminal law that is ambiguous, and then after a person has made every attempt to interpret it, to comply, come back later through the courts and say "gotcha", just because government through a court does not agree after the fact with the person's interpretation.

For example, if HB 4451 passes, a person charged under it could have failed to communicate with law enforcement, but that may be because they had a sincere belief that they were not "present at the scene", that there was not an "emergency" , or that the "physical harm" was not "grave." But if some prosecutor disagrees with the defendant's definition, he or she can charge the person with a crime, and prosecute them, causing them tremendous legal expense that most people cannot afford (or appoint them an incompetent public defender), hundreds of hours of time (which they may not have in their lives) and aggravation that potentially creates fatal stress upon them. All just because of a reasonable disagreement over what words mean. Not to mention, if the court disagrees with them, they could be forcefully incarcerated or fined. It is not enough to leave them to take their chances in court. The legislature must define all words and phrases in advance. not the courts. This is YOUR job (NOT the job of courts or citizens to guess later at what you meant).

2) Most critically, those of you in the legislature have NO power whatsoever, even collectively, to start making INACTION in any situation a CRIME. A crime is an affirmative act, or contribution as a conspirator or aide to an affirmative act, that is defined by the legislature to be wrongful, and therefore criminal. But inaction or failure to act by an innocent citizen can NEVER be criminalized. Any attempt by the legislature to do so is void and invalid. Inaction or failure to act can only be a basis legally for CIVIL LIABILITY, not criminal liability. It is never a crime just to do nothing!!! Those of you in government do not have an power to compel innocent citizens to do anything just by happening to be present at a place when something else happens at the hands of another person. What HB 4451 attempts to do is make it a crime for anyone to be present at the scene of other crimes that create "grave" physical harm, as if everyone present is aiding and abetting, unless they communicate with law enforcement. This is BIG GOVERNMENT run amok!!! Government has no power to tell private citizens what to do, or compel them under penalty of being charged with a crime. An individual's free choice to do nothing supersedes government power in a free nation and state. It is not your place in government to decide otherwise, and no one has elected you to do that.

3) Finally, HB 4451 evidences thoughtless drafting in another way. The bill fails to provide for an affirmative defense for most of the scenarios that can be envisioned in which it may be impossible for a citizen to comply by communicating with law

enforcement, or even attempting to do so. Juveniles under 17 can be petitioned into the Family Division of Circuit Court for delinquency for committing any offense that would be a crime for an adult. So, HB 4451 makes it juvenile delinquency for any child who is old enough to know that there is "grave physical harm" present to fail to communicate with law enforcement if they are present at an emergency scene, even if they have no ability to communicate. Even two year olds for the most part know physical harm when they see or hear it, but that does not make them old enough to contact the police. Michigan law does not provide for any defense based on age. How ludicrous this bill is for that reason alone! This ridiculous requirement of HB 4451 is because of the attempt to start criminalizing inaction, not just affirmative acts. Because the youngest children are physically and mentally incapable of committing the kinds of acts that are currently crimes, it is unheard of for anyone under about 5 years of age to be petitioned as a juvenile delinquent. But once you start criminalizing inaction without exceptions or defenses, you even younger children into delinquents if they are just present at the scene. Even for older children, HB 4451 fails to explain how they are supposed to on their own attempt to communicate with law enforcement without assistance of a parent or guardian.

What about adults who are mentally incompetent or physically incapable to communicate? I suppose for those who are mentally incompetent, they can try to claim that they are not mentally competent to stand trial, maybe a defense of insanity, or some may be mentally incapable of meeting the "knowing" element. But Michigan law does not contain any defense to crimes for physical incapacity. The only defense such a person has is the factual defense that they were physically incapable of doing what they are charged with. But once again, when you start trying to criminalize inaction or failure to act, you make all these persons criminals, since Michigan law does not allow them to defend based on their personal characteristics that may have nevertheless prevented them from communicating. HB 4451 would make it a crime for a mute person to fail to communicate with law enforcement something they saw or heard while present at a "scene", and leave them with no legal defense to the charge. And yes, we do have crazy and over zealous prosecutors in this state who will charge even helpless people in the above situations (I know some who definitely would relish doing so).

HB 4451 seems to assume something that is not true, that every person happens to have a cell phone with them at all times that is operational, and that there is a cell signal. The bill fails to fundamentally account for the very common scenario that would result when there is no means of communication or even transportation to communication, present at the scene. So now you would be making it a crime for a person to fail to communicate because they cannot afford a cell phone, or because there does not happen to be a phone at the scene, or because they are unable to transport themselves to a place where there is communication. You would charge a person with a crime when they try to call police but there is no cell phone signal there for the call to go thru, which is certainly not their responsibility. As a person living in the Upper Peninsula, I can tell you that over 50% of the U.P. does not have a cell phone signal, so if one comes upon a traffic accident with injuries for example, they may not be able to communicate with law enforcement unless

they leave the scene and therefore fail to try to tend to the injured instead. So now you put a person in a position that they must choose between staying and administering medical
aid but being charged with a crime for doing so, or leaving to go somewhere that has a cell signal to call police, in which case the injured may die for lack of help.

HB4451 is an example of extremely troubling current patterns of how our state legislature operates. Someone hears of an isolated problem and immediately jumps to the conclusion that there should be some kind of law passed, mostly just to make it look like the legislature is doing something. Many bills that have been drafted and then approved by the House Judiciary Committee for a floor vote in recent years evidence lack of thought and foresight, and extreme overreaching of governmental power. There is almost no effort to even think about how the bills will realistically affect everyday citizens, or even whether they are constitutional. Many of the bills are very sloppily drafted, and as stated, without even defining the words and phrases so that citizens and the courts can know what they mean and how to apply them in life.

For all of the above reasons, HB 4451 is invalid from the outset, and does not deserve any further waste of time or money to consider it in the House of Representatives. Some of the above problems, such as lack of government power to criminalize inaction, cannot be cured by any amendment.

June 1, 2009

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