

CCDLA
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February 26, 2013

Hon. Danté Bartolomeo, Co-Chair
Hon. Diana S. Urban, Co-Chair
Select Committee on Children
Room 011, Capitol Building
Hartford, CT 06106

Re: Raised Bill 6464

Dear Chairpersons Bartolomeo and Urban:

CCDLA is a not-for-profit organization of more than three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association of Criminal Defense Lawyers, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished.

CCDLA opposes Raised Bill No. 6464, An Act Concerning Shaken Baby Syndrome. The proposed bill would allow a parent, grand parent, sibling, babysitter, or other caregiver to be prosecuted for a class C or B felony, regardless of their intent to cause injury to the child, and based only on allegations that they shook the child and that injury ensued. The bill could have the effect of criminalizing innocent conduct such as bouncing a child on the knee, physical play with the child, or the conduct of a panicked parent jostling a child who may be choking or otherwise in distress. The bill removes from the equation whether the shaking, jostling, or bouncing was done with intent to harm the child, or in a manner that recklessly or negligently ignores the possibility of harm.

The bill also criminalizes conduct that was not engaged in intentionally or purposefully, but merely accidentally. Minor trauma may cause disproportionate harm to infants. Certainly it is appropriate to advise parents and caretakers not to shake babies, just as it is wise to advise them not to drop babies or to place them in positions from where they could fall, or in which siblings or objects could fall on them. Babies are developmentally vulnerable, and some may be more vulnerable than others. We simply do not know how much force, or shaking, causes damage to any particular baby.

A trial under Raised Bill 6464 would essentially center only on expert medical testimony regarding the ultimate issues: was the child shaken and whether injury ensued. Jurors would not be required to consider whether the defendant acted with intent to cause harm, or with a reckless or criminally negligent state of mind. In fact, jurors would be required to convict, even where they found that the defendant had acted accidentally.

The bill is counterintuitive to Connecticut's Criminal Code which generally seeks to criminalize and punish conduct accompanied by a malicious state of mind (intent, recklessness, criminal negligence), more severely than it does conduct accompanied by an innocent or non-malicious state of mind. A more culpable mental state calls for a more serious charge and punishment. For example, all assault offenses require a culpable mental state. Assault in the first and second degree require an intent to cause injury (or serious physical injury), extreme indifference to human life, and/or recklessness. Assault in the third degree also requires intent to cause injury, recklessness, or criminal negligence. Assault in the first degree is a class B felony. Assault in the second degree is a class D felony. The lowest level of assault, Assault in the third degree, which requires a culpable mental state, is a Class A misdemeanor. The instant bill would punish someone more severely for harboring no malicious mental state, or acting accidentally, than would be a person who harmed another with intent to cause injury, acting recklessly, or with criminal negligence.

When our legislature has sought to address conduct that victimizes a particularly vulnerable segment of society, it has wisely chosen not to dilute the elements of the underlying offense, but has upgraded the punishment for that offense when committed against the vulnerable victim. For example, Sec. 53a-59a attaches the mandatory minimum punishment of five years incarceration for anyone found guilty of assault in the first degree of an elderly, blind, disabled, or pregnant person, or a person with an intellectual disability. The legislature did not remove any of the elements of assault in the first degree and offer a watered down version of it to make it easier to convict those charged with the offense, but instead subjected the guilty actor to the enhanced penalty of a five year mandatory minimum sentence, once his conduct had been proven beyond a reasonable doubt.

Raised bill 6464 does not fill a void in Connecticut's statutory scheme. There is no dearth of Connecticut law criminalizing the conduct targeted by the bill. Section 53-21, risk of injury to a minor, designates as a class C felony the conduct of any person who willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child. Additionally, as previously discussed, there are a number of assault offenses that proscribe the conduct relevant to the bill. Moreover, our homicide statutes, murder, manslaughter (varying degrees), and negligent homicide, are applicable where death occurs in situations contemplated by the bill, if the circumstances call for such charges.

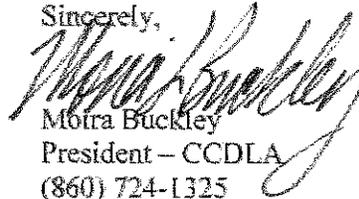
Finally, and perhaps most significantly, the bill ignores the inexact science at the root of Shaken Baby Syndrome. The underpinnings of the SBS diagnosis, in recent years, have been challenged, and in several cases, have resulted in acquittals or reversal of convictions of innocent caretakers prosecuted and convicted based in what amounted to incorrect or unreliable expert

testimony. Case in point: In 2009, Audrey Edmonds, who had been convicted of reckless homicide under the Shaken Baby Syndrome theory, was freed after a Wisconsin court questioned the sufficiency and reliability of the medical testimony that supported her conviction a decade earlier. An article chronicling her case is attached to this testimony. Ms. Edmonds' case demonstrates the dangers of a bill such as 6464 that essentially codifies and enforces a scientific hypothesis that is still in a state of medical and scientific flux.

Surely the protection of our children is paramount and punishment of those who purposely hurt them is necessary. However, Raised Bill 6464 does not further this objective. Raised Bill 6464 will only lead to questionable prosecutions and increases the risk that innocent persons will be convicted based on purely medical or scientific testimony that, by itself, may be unreliable evidence of guilt.

Please feel free to contact me if you wish to discuss this further. Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Motra Buckley".

Motra Buckley
President - CCDLA
(860) 724-1325



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AUDREY EDMUNDS

Eleven years in prison as a result of erroneous medical testimony

Audrey Edmunds, who babysat neighborhood children in her home in Waunakee, Wisconsin, while awaiting the birth of her third child, was convicted in 1996 of first-degree reckless homicide for the suspected shaking death of an infant in her care.

Six-month-old Natalie Beard died on October 16, 1995, after her mother, Cindy Beard, left her with Audrey. Cindy mentioned that Natalie had been fussy that morning and had taken only half of her bottle, but both Cindy and the father of another child said she otherwise seemed normal. An hour later, Audrey summoned police and paramedics. When they arrived, Natalie's pupils were dilated and she seemed to be having trouble breathing. She was rushed to a hospital in nearby Madison, where she died that evening.

An autopsy revealed that Natalie had suffered extensive brain damage, and a forensic pathologist attributed the death to shaken baby syndrome (SBS). On March 19, 1996, Edmunds was charged with first-degree reckless homicide.

When she came to trial the following December in the Dane County Circuit Court, the prosecutor, Assistant District Attorney Gretchen Hayward, presented several expert witnesses who testified to "a reasonable degree of medical certainty" that Natalie had been a victim of SBS. The experts unequivocally told the jury that, after suffering her fatal injury, Natalie would have had "an immediate and obvious response" and would not have seemed to be normal when her mother left her with Audrey.

Audrey took the stand in her own defense, testifying that she had not shaken Natalie. Her defense lawyer, Stephen Hurley, presented an expert who testified that the fatal injury could have been caused earlier. Indeed, Natalie's medical records showed that she had been treated repeatedly for lethargy, irritability, vomiting — symptoms sometimes resulting from brain injury — suggesting that the parents could have caused her death.

Hayward countered, in closing, that the medical history was irrelevant — and the jury agreed, finding Audrey guilty after eight hours of deliberation on

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November 26, 1996. Judge Daniel Moeser sentenced her to 18 years in prison.

The conviction stunned Audrey's friends and neighbors, who simply could not believe that she possibly could be guilty. One neighbor told the *Madison Capital Times*, "She is such a warm and caring person. I've seen her in some stressful situations and been impressed with how she dealt with them. There's just no way Audrey could have done something like this." Another was quoted by *Madison Magazine* as saying, "I never, ever even considered she might have done it. I understand she was the last person with the child, but anyone who knew her knew there was just no way."

Hayward, the prosecutor, dismissed such sentiment, insisting that Audrey's supporters simply "didn't know the real her" and that the stress of being pregnant contributed to her presumed crime.

Hayward, of course, was not alone in the firm belief that Audrey was guilty. At the time of her trial, and for years to come, no credible medical expert questioned that Natalie had been a victim of SBS."

By 2006, however, medical opinion had changed significantly. As a result, Keith Findley, co-founder of the Wisconsin Innocence Project, came to Audrey's defense. He filed a motion for a new trial asserting that in the decade since her conviction "a large body of new scientific evidence has emerged that supports her claim of innocence."

At an ensuing hearing, Findley presented experts who testified that symptoms they once thought were proof of SBS had been linked in to dozens of other causes, including accidents, illness, infection, old injuries, and congenital defects. One expert, Dr. Patrick Barnes, a pediatric neuroradiologist at Stanford University, testified that even something as mundane as an ear infection could spread to the brain with fatal consequences.

Judge Moeser, the trial judge, denied Findley's motion, but on appeal the Wisconsin Court of Appeals held on January 31, 2008, that "a shift in mainstream medical opinion" had cast doubt on whether shaking could have caused the brain injury that caused Natalie Beard's death. The court ordered a new trial for Audrey, but the District Attorney's office dropped the case on July 11, 2008. — *Researched by Rob Warden*



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