



# Buckeye Firearms Association

Government Oversight and Reform Committee  
The Ohio Senate  
132<sup>nd</sup> General Assembly  
1 Capitol Square  
Columbus, Ohio 43215

November 30, 2018

***Re: Written Testimony as a Proponent for H.B. No. 228***

Dear Committee Members,

Ronald Lemieux, for and on behalf of Buckeye Firearms Association, presents this testimony **in favor** of passing H.B. No. 228 (the “Bill”).

The Bill makes necessary changes to Ohio law to ensure that all Ohioans: 1) receive a fair trial in matters of self-defense (burden-shifting); 2) can respond prudently and appropriately in deadly force encounters (duty to retreat); and 3) are not discriminated against for possessing firearms as a tenant in subsidized rental property. This Bill also makes changes to weapons control definitions with regard to a “sawed-off firearm” and criminal penalties associated with carrying a concealed weapon. Finally, the Bill adds new language to R.C. 2923.20 (Unlawful transaction in weapons) by adding provisions to address “straw purchases” in Ohio.

**I. Burden-shifting in Self-defense Cases, R.C. 2901.05 (Lines 538-615)**

Under R.C. 2901.05, a defendant in a criminal case is required to prove all elements of self-defense by a preponderance of the evidence. Recent case law and development of the status of self-defense strongly suggest that shifting the burden to a defendant in this manner is unconstitutional. Ohio’s burden shifting rule effectively changes the standard of proof necessary for the government to secure a conviction in self-defense cases. Furthermore, Ohio’s current rule severely curtails the protections provided by the Fifth Amendment. Sub. H.B. No. 228 provides the necessary changes to ensure those accused of a crime in Ohio receive a fair and just trial. Where there is evidence presented that tends to show a defendant acted in self-defense, this Bill would place the burden back on the prosecution, where it rightly belongs, by requiring the prosecution to disprove at least one element of Ohio’s self-defense, beyond a reasonable doubt.

Ohio is currently the only state in America that requires a defendant in a criminal trial to prove that she acted in self-defense by the preponderance of the evidence. Under federal law and in the great majority of states, as long as there is some evidence to support a claim of self-defense, the government bears the burden of disproving self-defense beyond a reasonable doubt. Ohio's requirement that the defendant prove self-defense is often referred to in legal parlance as "burden shifting."

Currently in Ohio, where deadly force is used, self-defense is a legally justifiable and complete defense where the defendant proves: (1) that he was not at fault in creating the situation; (2) that he had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of deadly force; and (3) that he did not violate any duty to escape to avoid the danger.

When faced with a true threat that puts your life at imminent risk, we, as a society, expect that you, as a lawful citizen, will defend yourself, even if such defense includes deadly force. That expectation, and even encouragement, extends from self-defense to defense of another. In fact, persons who defend the life of another, which in many instances includes putting their own life in danger, are often labeled as heroes. Self-defense is a natural right that cannot be given or taken away—it is an inherent right by the simple virtue of being alive.

Burden shifting causes several inherent problems that fly in the face of our notion of justice and liberty in this country. Most notably, burden shifting under Ohio's holdout rule changes the standard of proof upon which innocence or guilt hinges in self-defense matters. This change is a due process concern of the highest order and should not be ignored.

The problem with Ohio's current burden shifting rule is that a defendant in a self-defense case is necessarily affirming the existence of all or most of the elements necessary for the government to prove an assault or homicide. In a practical sense, when an affirmative defense is asserted, the prosecution can rest on its laurels because it need not go to any great lengths to prove the elements of the crime as charged. In Ohio, once there is some evidence that tends to show a defendant acted in self-defense (the burden of going forward), she then is entitled to have a jury instruction on self-defense. Even though she is entitled to the jury instruction on self-defense, the defendant under Ohio's rule is required to prove that she acted in self-defense by a preponderance of the evidence (the burden of persuasion). A preponderance of the evidence is also known as the greater weight of the evidence, i.e. anything more than half.

In this way, as a jury deliberates and weighs the evidence in a criminal trial, if the scales tip ever so slightly in favor of the prosecution on the issue of self-defense, the jury must convict, so long as the burden of the other elements of the crime proper have been met. That means even if the jury finds the weight of the evidence on the issue of self-defense is 50/50, for and against, the jury is required to find the defendant guilty. Thus, what has occurred in this instance is that proof beyond a reasonable doubt is replaced with a preponderance of the evidence. Recall that

self-defense is a complete justification to criminal conduct. In this way, the yardstick by which we measure guilt or innocence has changed. Gone is proof beyond a reasonable doubt. By proxy, the government has essentially convicted an Ohio citizen by a lower standard of proof. To say otherwise is to engage in a cat-and-mouse game of semantics and procedure leaving a defendant stripped of substantive rights.

Sub H.B. No. 228 solves the inherent problems of shifting the burden of persuasion to a defendant asserting self-defense in criminal trials. Under this Bill, as long as there is some evidence presented which tends to show the defendant acted in self-defense, the government would have to disprove at least one element of Ohio's version of self-defense beyond a reasonable doubt. The government would not be required to disprove all elements of self-defense. The language in this Bill adequately balances the State's interests while providing the necessary safeguards to protect the rights of our citizens in the State of Ohio.

## **II. Duty to Retreat, R.C. 2901.09 (Lines 616-671)**

Currently, in Ohio, there is no duty to retreat in one's home, business, or personal vehicle, but there is a duty to retreat in other places, even if you have a lawful right to be in those places. The duty to retreat is incorporated into the elements of Ohio's version of self-defense and requires that persons under attack must retreat if such retreat can be reasonably accomplished. The concept of a duty to retreat was actually carried over from English common law dating back to the 1600s when they were still using swords and battle axes as weaponry.

This Bill is not about "stand your ground" and all of the connotations associated with that phrase. This Bill is about eliminating a certain duty while under attack. This Bill does not change the fact that an individual using self-defense must not be at fault in creating the situation and must have reasonable grounds to believe, and an honest belief, that he or she is in immediate danger of death or great bodily harm. Thus, the substantive requirements of self-defense remain.

When an individual is faced with the grave prospect of a deadly force encounter, the government has no right in mandating duties of retreat. Unlike medieval England, deadly force encounters in modern times occur in fractions of a second. To impose a duty to retreat on a person when her life is in imminent peril is the very definition of government overreach. The victim of an attack, acting in self-defense, should be in control of her own destiny and the means with which she chooses to defend her life.

This Bill would change the requirements of the duty to retreat by providing that an individual has not duty to retreat in a place in which that person has a lawful right to be.

## **III. Subsidized Rental Properties, R.C. 5321.13 (Lines 2349-2406)**

This Bill provides language that would prevent a landlord of subsidized housing from imposing a restriction on the lawful ownership, use, or possession of a firearm or ammunition within a

tenant's specific dwelling unit. The concept of this law is to prohibit individuals who place burdens on constitutional rights, guaranteed by the government, from taking monies and profiting from that government. These line items still allow for reasonable restrictions in tenant common areas and require a tenant to use reasonable care in storing firearms or ammunition. The logic of these provisions is self-evident and absolutely necessary to deter circumvention of constitutionally protected rights with the otherwise apparent blessing of the government.

#### **IV. Definition of a "Sawed-off Firearm," R.C. 2923.11 (Lines 701-710)**

R.C. 2923.11(F) provides that a "Sawed-off firearm means a shotgun with a barrel less than eighteen inches long, or a rifle with a barrel less than sixteen inches long, or a shotgun or rifle less than twenty-six inches long overall."

The Mossberg Shockwave has a barrel length of 14". Accordingly, with a barrel of less than 16" long, it is considered a "Sawed-off firearm" under Ohio Law. In Ohio, there is no barrel length exception, even with an overall length of 26" or greater, as Ohio does not recognize the Bureau of Alcohol, Tobacco, Firearms, and Explosive's ("BATFE") definition of a "Non-Regulated Shotgun" related to the manufacture and sale of Pistol Grip Only ("PGO") shotguns.

Following BATFE regulations, if, at the factory during the manufacturing process, a brand-new receiver is fitted with a pistol grip first instead of a shoulder stock, it's considered a PGO shotgun. Due to the manufacturing process used to build the gun, it doesn't fall under the purview of NFA regulations. Instead, the definitions that apply are found in the Gun Control Act of 1968 ("GCA"). Under these regulations, the Shockwave is legally considered a "firearm," not a sawed-off-firearm.

According to the GCA, if the overall length of that firearm, with the pistol grip and barrel installed, is greater than 26", then the barrel can legally be shorter than 18". In the case of the 14" barrel Mossberg 590 Shockwave, the Raptor bird's head grip gives the gun an overall length of 26.32". That makes it a firearm. Although the BATFE recognizes it as a "legal" shotgun, under the Ohio Revised Code, it does not meet the requirements.

This Bill provides language that mirrors federal law and provides a more uniform and useful definition of a "sawed-off firearm," while at the same time not circumventing the actual intent of the law itself.

#### **V. Modification of Penalties for Carrying Concealed Weapons, R.C. 2923.12 (Lines 865-1139)**

The criminal penalties associated with carrying concealed weapons in Ohio are over inclusive and disproportionate in effect while not providing any practical deterrence. Deterrence is a central pillar of criminal punishment. Retribution, rehabilitation, and incapacitation are the other main pillars. When laws are created, there must be a balance struck between the rights of our

people and the needs of the state to give effect to criminal punishment. The balance of individual rights and state needs must be placed on the scales and weighed with prudence.

The right to bear arms has substantial weight because it is a fundamental right. Furthermore, approximately 13 of our 50 states have constitutional carry that allow individuals to carry a concealed handgun without a permit. Currently in Ohio, if you don't have a concealed handgun license (“CHL”) and you carry a concealed weapon, it is a felony of the fourth degree under R.C. 2923.12(A). Accordingly, if I'm visiting Belmont County, Ohio, and decide to stop in Wheeling, West Virginia, for lunch, I can carry a handgun concealed without a permit and not commit a crime. When I cross over the river back to Ohio, however, carrying that same handgun concealed is a felony. When examining this law, one simple fact cannot be stressed enough—felonies should be reserved for our most serious crimes. Consider the absurdity that a quarter of our sister states deem concealed carry as a right guaranteed by a constitutional provision, while Ohio considers it the worst type of crime, i.e. a felony.

Individuals who we have determined pose a risk to the public are already prohibited from possessing firearms and ammunition under federal law, 18 USC 922, and under Ohio's R.C. 2923.13. These individuals cannot possess any firearm whether said firearm is concealed or in plain-sight. In this way, the risk of dangerous individuals carrying firearms is already addressed in other sections of the law. Thus, there is no need for the harsh penalties associated with carrying concealed weapons in this section of the code because deterrence is provided for in more appropriate places.

On the other hand, consider the scenario of the law-abiding, shooting sports enthusiast who, without a CHL, goes to a shooting range for marksmanship practice. He finishes at the range and gets ready to leave. Somehow he makes an honest mistake and forgets that he has a loaded magazine in his backpack which also contains his gun. He places the backpack in the backseat of his car and drives off. This honest citizen has just committed a felony of the fourth degree, punishable by up to eighteen months in prison.

In conclusion, the conduct prohibited under the current version of R.C. 2923.12 can easily or mistakenly be violated by law-abiding, honest individuals in certain circumstances; the law is therefore inescapably over-inclusive and disproportionate in seriousness. This Bill corrects the above mentioned problems by making modifications to penalties associated with carrying concealed weapons.

/s/ Ronald J. Lemieux, Esq.

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Legislative Committee

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