Ohio Prosecuting Attorneys Association

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Senate Bill 180
Opponent Testimony
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Chairman Bacon, Vice-Chair Dolan, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to provide opponent testimony on Senate Bill 180. I would like to spend a few minutes addressing some specific areas of concern that we have with the bill and then respond to some of the arguments that are being put forth by proponents of the measure.

Our primary concern with Senate Bill 180 is the change to R.C. 2901.05 regarding the burden of production of evidence and the burden of proof for the affirmative defense of self-defense. An affirmative defense is "a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." The defendant bears some burden to produce evidence that they were in fact acting in self-defense. Under current law, the burden of proof for an affirmative defense is a preponderance of the evidence – that it is more likely than not that the person acted in self-defense. This is not a high burden. It reflects the experience of over 200 years of common law and was upheld by the U.S. Supreme Court in *Martin v. Ohio*, 480 U.S. 228 (1987). Under Senate Bill 180, once a defendant produces evidence that "tends to support" that an action was taken in self-defense, the burden shifts to the prosecution to prove beyond a reasonable doubt that it was not self-defense. Evidence that "tends to support" is not a recognized legal standard, could be virtually anything whether reasonable or not, and places virtually no burden on the defendant to show that his or her actions were justified. Requiring the prosecution to prove beyond a reasonable doubt that a person did not act in self-defense places an undue burden on the prosecution. It will inevitably lead to individuals who have committed very serious crimes walking away unpunished.

Our second concern with Senate Bill 180 is the elimination of the duty to retreat in areas outside the home or vehicle. We think the current policy that one should take advantage of an opportunity to retreat, when reasonable to do so, is a good policy that prevents needless confrontations and the unnecessary loss of life. Some of the proponents of repealing this provision apparently believe that the same standard for retreat applies to all, regardless of their age, gender, size, or physical condition. But the duty to retreat is only a reasonable duty to retreat that allows the court to consider factors like age, gender, size, or physical condition when determining whether actions taken in self-defense were reasonable. In other words, an elderly person or a person who is significantly smaller than his or her attacker, will not be held to the same standard as a younger, more equally sized person.

Finally, we are opposed to the changes to the penalties for the offense of carrying concealed weapons. By reducing the penalty for carrying a concealed handgun from a first degree misdemeanor to a minor misdemeanor, the bill makes the penalty for carrying a concealed handgun lower than the penalty for carrying another concealed weapon, like a knife. Moreover, the penalty is reduced even for individuals who do not have a concealed carry license. Law abiding individuals who have a legitimate reason to carry a concealed handgun or who have a concealed carry license are protected under current law and do not benefit from these changes. On the contrary, the change primarily benefits individuals who are not law abiding. The proposed change seriously weakens our laws on concealed carry to the benefit of individuals carrying illegally.

Now to address two of the arguments that are being put forth by proponents of this measure. The proponents argue that crime victims in Ohio who justifiably use deadly force in self-defense are somehow presumed guilty, that they must prove that they are innocent, and that in order to prove that they are innocent must waive their Fifth Amendment rights. These claims are patently untrue. Beyond seeking and obtaining an indictment from a grand jury, the prosecution, in every criminal case, must be able to prove guilt beyond a reasonable doubt in order to obtain a conviction. The very first sentence of R.C. 2901.05 itself, the statute under debate, very clearly states that "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution."

As to the Fifth Amendment argument, the amendment provides that "no person…in a criminal case shall be compelled to be a witness against himself…" There is nothing about the law of affirmative defense that compels a defendant to self-incriminate. If that were the case, all affirmative defenses, including the revised affirmative defense in Senate Bill 180, would be unconstitutional. By their very nature, affirmative defenses require a defendant to adduce supporting evidence that their actions were justified. Any person wishing to put forth any defense, however, must present evidence of that defense. Affirmative defenses exist for the benefit of defendants so it is puzzling to hear an argument against them be made in support of a defense oriented bill. What the proponent's argument amounts to then is that defendants in these cases should not have to put on a defense at all in order to be acquitted.

Ultimately, Senate Bill 180 rests on the idea that prosecutors are charging and obtaining convictions in cases where the use of force was justifiable. I simply do not believe this to be the case. During proponent testimony on the bill several weeks ago, one of the proponents stated that he has a lot of respect for prosecutors and their ability to do their job. He, of course was talking about their ability to get convictions in the face of the undue burdens placed on them by this bill, but I agree that we should have faith in our prosecutors' ability to do their job. That also means trusting them to make decisions about when it is and is not appropriate to charge someone with a crime in the first place. If a prosecutor abuses this discretion and the public loses that trust they are free to elect someone else. As such, Senate Bill 180 is unnecessary to address any legitimate concerns with self-defense in Ohio. Current law strikes the appropriate balance between promoting public safety, preventing needless confrontation and the loss of innocent lives, and protecting the rights of the accused.

We urge you to vote no on the bill. I would be happy to answer any questions you might have.