



# Office of the Ohio Public Defender

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*Timothy Young, State Public Defender*

## **Testimony in Opposition of HB383 Modify penalties for certain weapons offense House Government Oversight Committee**

Chairman Wilken, Vice Chair Swearingen, Ranking Member Brown, and members of the Government Oversight Committee. I am Brian Skinner and I am here on behalf of the Office of the Ohio Public Defender. Thank you for the opportunity to provide opposition testimony regarding House Bill 383.

The Office of the Ohio Public Defender (OPD) shares the same goal as this committee and all Ohioans, to make Ohio as safe as possible. However, the OPD does not believe the provisions of HB 383 will increase public safety. That's because the rationale for the legislation is flawed and will be very costly for Ohio taxpayers.

According to the bill's sponsor, the goal of HB383 is the reduction in violent crime by incarcerating individuals convicted for the possession of a gun while under disability for longer periods of time. Rather than proscribing or punishing harmful acts, the bill is an attempt to avert the possibility of harm.

The flaw in the bill's logic is the assumption that all felons are predisposed to commit violent crime. We know this isn't true.

Let me explain. Statistics show that an ex-felon's previous criminal conduct, whether violent or not, does not accurately predict an increased risk of future violent activity. And the bill does not distinguish between persons who are likely to commit a crime using a firearm from those who are in the possession of a firearm to protect themselves and deter violence.

Consequently, the likely result is the incarceration of persons who are not a threat to the public safety at an enormous cost to Ohio taxpayers.

In fact, we know, and the bill's sponsor acknowledges<sup>1</sup>, that actual harm will occur in only a fraction of the instances in which an ex-felon would be subject to punishment for unlawfully possessing a firearm. Thus, most ex-felons are not committing violent crimes, but nevertheless will be subject to the proposed increases contained in the bill.

This logic is further complicated by the fact that ex-felons convicted of unlawful possession of a firearm have demonstrated that they are not deterred by the potential for punishment which this bill proposes to increase.

Indeed, it is also likely that those who pose the greatest risk of gun violence are probably those who will go to the greatest lengths to circumvent the law and obtain a gun despite whatever the potential penalty.<sup>2</sup>

Additionally, please consider that most offenders reach a point when they age out of likely criminal behavior.<sup>3</sup> Studies show that most people have aged out of crime by their 30s and 40s<sup>4</sup> and the average criminal career is only five – ten years long.<sup>5</sup> In fact, empirical

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<sup>1</sup> Sponsor testimony by State Representative Kyle Koehler pg. 1. ("The bottom line: there are a small number of repeat offenders committing violent crimes in each of our communities.")

<sup>2</sup> See, e.g., Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 476 (2004) ("Perhaps the most worrisome feature of statutory schemes to prohibit gun or drug possession is the willingness to use the criminal law to prevent the risk of harm, even though that harm would materialize in only a tiny fraction of the cases in which persons are subject to punishment. The net of criminal liability is deliberately cast far and wide to catch enormous numbers of offenders, fully aware that only a small percentage of those who are punished would ever have caused the harm to be prevented.")

<sup>3</sup> Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, The Atlantic, April 15, 2016, <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/>; citing, *The Growth of Incarceration in United States, Exploring Causes and Consequences*, Committee on Law and Justice, National Research Council of the National Academies.

<sup>4</sup> German Lopez, *The case for capping all prison sentences at 20 years*, Vox, February 12, 2019, <https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration>.

<sup>5</sup> Dana Goldstein, *Too Old to Commit Crime?* The Marshall Project, March 20, 2015, <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.



evidence proves that longer prison sentences may actually increase criminal behavior because prison conditions “make inmates more likely to reoffend.”<sup>6</sup> Longer sentences force inmates to “miss big life opportunities for legitimate careers”, and force inmates to form ties with others in the criminal world.<sup>7</sup>

It is also important to recognize the significant challenges facing ex-felons upon their release from incarceration. Studies find that felony imprisonment results in social stigma, the erosion of job skills, and disqualification from stable government and union jobs. But those recidivism studies often do not untangle the complex web of social and economic factors that connect living in impoverished, high-crime neighborhoods with both initial criminal activity and recidivism.<sup>8</sup>

We know that ex-felons often experience lower wages, slower wage growth, and, most importantly, greater unemployment. Additionally, imprisonment is related to poor employment continuity for many years after release.<sup>9</sup>

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<sup>6</sup> German Lopez, *The case for capping all prison sentences at 20 years*, Vox, February 12, 2019, <https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration>.

<sup>7</sup> Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, The Atlantic, April 15, 2016, <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/>.

<sup>8</sup> John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1050–51 (2009) (citing BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 116, 120–21, 123, 127, 412–13 (Russell Sage 2006); Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 412 (2001); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 32–35 (Chicago 2007); Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863, 864 (2006) (finding “no substantial evidence of a negative effect of incarceration length on employment or earnings”).

<sup>9</sup> John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1050–51 (2009) (citing BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 116, 120–21, 123, 127, 412–13 (Russell Sage 2006); Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 412 (2001); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 32–35 (Chicago 2007); Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863, 864 (2006) (finding “no substantial evidence of a negative effect of incarceration length on employment or earnings”).



Because of these economic limitations,<sup>10</sup> ex-felons often reside largely in high-crime areas and experience more frequent instances of violence.<sup>11</sup> Therefore, ex-felons have a strong self-preservation motivation to possess firearms. Because ex-felons are increasingly concentrated in poor neighborhoods,<sup>12</sup> they face higher instances of both violent and nonviolent crime. People who live in lower-income neighborhoods are not only more likely to have run-ins with law enforcement officers, but they are also more likely to need protection in the absence of law enforcement officers.

Unfortunately, law enforcement cannot always keep violent crime from occurring in these neighborhoods, and residents who are concerned about their safety or the safekeeping of their property have reasons to take protective measures of their own.<sup>13</sup> Alternative protective measures, like guard dogs, installing a burglar alarm, or moving to a neighborhood with a lower

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<sup>10</sup> See JOHN SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, EXOFFENDERS AND THE LABOR MARKET (2010).

<sup>11</sup> See Christy A. Visher & Jeremy Travis, Transitions from Prison to Community: Understanding Individual Pathways, 29 ANN. R. SOC. 89, 102 (2003) (“Other research has shown that returning prisoners are increasingly concentrated in our nation’s central cities and within them, in a relatively small number of neighborhoods that often are characterized by severe poverty, social disorganization, and high crime rates.”) (citing JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE, URBAN INSTITUTE (2001), available at [http://www.urban.org/research/publication/prisoner-reentry-perspective/view/full\\_report](http://www.urban.org/research/publication/prisoner-reentry-perspective/view/full_report); Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization, 20 JUST. Q. 33 (2003); PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003)).

<sup>12</sup> See generally Jeffrey Fagan & Valerie West, Incarceration and the Economic Fortunes of Urban Neighborhoods, in ECONOMICS AND YOUTH VIOLENCE: CRIME, DISADVANTAGE, AND COMMUNITY 207 (Richard Rosenthal et al. eds., 2013), discussing and citing research that reveals the clustered factors associated with crime and incarceration and “the reciprocal effects of crime, incarceration, and neighborhood social and economic disadvantage.”

<sup>13</sup> See Douglas N. Husak, Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction, 23 L. & PHIL 437, 482 (2004) (“Guns often are a viable means of protection from these threats. Victims who use a gun to resist robbery or assault are less likely to be injured than those who use other means of self-protection or do not resist at all—even when the unlawful aggressor is armed. Moreover, gun ownership reduces the likelihood of being victimized in the first place. Convicted felons admit a fear of armed victims, and make efforts to try to avoid them. No one pretends that more effective law enforcement can significantly alter these facts in the foreseeable future. As long as the state is unable to protect innocent victims, the case for allowing gun ownership for purposes of self-protection becomes more plausible.”) (citing GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 171 (New York: Aldine De Gruyter, 1997); JAMES WRIGHT AND PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 149 (Hathorne, N.Y.: Aldine de Gruyter, 1986)).



rate of crime, are more expensive than keeping a firearm. Indeed, it is often asserted that private individuals undertaking to protect themselves by possessing firearms do good for society by deterring or preventing crime.

And this right to protect oneself from violence is enshrined in the second amendment to the U.S. Constitution and Article I, § 4 of the Ohio Constitution. The Supreme Court of Ohio held that Article I, § 4 of the Ohio Constitution “secures to every person a fundamental individual right to bear arms for ‘their defense and security.’”<sup>14</sup> Second amendment advocates have long argued that private individuals undertaking to protect themselves by possessing firearms do good for society by deterring or preventing crime.

It is also worth noting that, almost all federal circuit courts, including the sixth circuit, have accepted, or at least acknowledged, the existence of justification defenses to prosecutions under the federal felon-in-possession statute, 18 U.S.C. § 922.101.<sup>15</sup> This implies that, at least in some circumstances when necessity or duress is great,<sup>16</sup> the need of an

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<sup>14</sup> *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993)

<sup>15</sup> All but the Seventh and Eighth Circuits have allowed a justification defense. See *United States v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (collecting cases). The Eighth Circuit has suggested that it would follow the elements used by the Fifth Circuit in an appropriate case. *United States v. Poe*, 442 F.3d 1101, 1103 (8th Cir. 2006). see also, e.g., *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994); *United States v. Paolello*, 951 F.2d 537 (3d Cir. 1991); *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995), cert. denied 515 U.S. 1126 (1995); *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982); *United States v. Singleton* (6th Cir. 1990), 902 F.2d 471, cert. denied 498 U.S. 872 (1990); *United States v. Sahakian*, 965 F.2d 740 (9th Cir. 1992); *United States v. Rice*, 214 F.3d 1295 (11th Cir. 2000); see also *United States v. Poe*, 442 F.3d 1101 (8th Cir. 2006) (indicating that, although Eighth Circuit has never recognized justification as defense to violation of 18 USC § 922(g), if such defense were available, it would follow the Fifth Circuit’s articulation of elements of defense).

<sup>16</sup> “Traditionally, in order for the necessity defense to apply, the coercion must have had its source in the physical forces of nature. The duress defense was applicable when the defendant’s acts were coerced by a human force. This distinction served to separate the two similar defenses. But modern courts have tended to blur the distinction between duress and necessity.” *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (citing WAYNE LAFAYE & AUSTIN SCOTT, HANDBOOK ON CRIMINAL LAW § 50, at 383 (1972)). Available only in “rare situations,” the defense contains five conjunctive requirements: The defendant must have (1) reasonably feared death or serious injury from an imminent threat, (2) not recklessly placed himself in the path of that threat, (3) had no reasonable alternative to possession, (4) reasonably believed that possession would avert the threat and (5) maintained possession only as long as necessary to avoid the threat. See [Singleton](#), 902 F.2d at 472-73.



individual to possess a firearm can outweigh the government purpose of promoting public safety.<sup>17</sup>

In short, not all ex-felons in the possession of a firearm intend to commit a violent crime, instead the experience of ex-felons as victims of violent crime often result in ex-felons possessing firearms to protect themselves and deter violence. A right enshrined in both the federal and state constitutions.

Finally, because this legislation will result in significant increases in length of sentences, it will come with a hefty fiscal cost. The bill increases the penalties for the offense of having a Weapon Under disability from a felony of the third degree to a felony of the second degree, and when this violation is related to a past conviction of a “felony of violence”, the penalty is increased to a second-degree felony for a first offense and a first-degree felony for a repeated offense.

According to the Legislative Service Commission (LSC) Fiscal Note for this bill, for the calendar years 2016 through 2020, 4,043 offenders were sentenced to Department of Rehabilitation and Correction (DRC) for whom their *primary offense* was “having weapons while under disability,” -- an average of 809 offenders per year.

The average time served for first- and second-degree felonies was 8.4 years and 4.38 years, respectively. Individuals with an F2 serve on average, 2.71 years longer in prison than individuals serving a sentence for an F3. According to the LSC, for the fiscal year 2021, DRC reported an average annual cost per inmate of \$35,405. This suggests that, for each offender affected by the bill’s increased penalties, DRC could incur additional estimated costs of up to

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<sup>17</sup> See, e.g., *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (“We do not believe that Congress intended to make exfelons helpless targets for assassins. The right to defend oneself from a deadly attack is fundamental.”)



between \$95,948 and \$238,276 to incarcerate that offender for approximately three to seven more years.

However, LSC's analysis likely underestimates the cost of these changes to Ohio law. LSC used the DRC commitment reports to calculate the fiscal impact, but the commitment reports only list the most serious offense a person is committed for; not a breakdown of all offenses that resulted in commitment. Consequently, OPD suspects that there are more individuals incarcerated for these offenses than LSC anticipates because some individual may be incarcerated for these offenses even though it may not be the most serious offenses for which they are incarcerated.

In conclusion, locking up individuals for the sole purpose of keeping them away from firearms is simply not good public policy. It will not make Ohioans safer, and it will only result in a bigger bill for Ohio's taxpayers.

Thank you for the opportunity to testify today before your committee. I am happy to answer questions.

