



Ohio Prosecuting Attorneys Association

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Chairman Manning, Vice-Chair McColley, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to offer testimony on the parts of Senate Bill 288 that include the recommendations of the Ohio Criminal Justice Recodification Committee.

The Criminal Justice Recodification Committee was created in House Bill 483 (Mid-Biennial Review) in the 130th General Assembly. Their charge in that Act was “to study the existing criminal statutes of this state, with the goal of enhancing public safety and the administration of criminal justice in Ohio by eliminating duplication in those statutes, aligning those statutes with the purpose of defining a culpable mental state for all crimes, removing or revising crimes in those statutes for which no culpable mental state is provided, and other appropriate measures.” The Act further directed the Committee to “use the results of its study to develop and recommend to the General Assembly a comprehensive plan for revising the state’s Criminal Code *that is consistent with those specified goals of the study.*”

Overall, the goal of the statutory directive could be understood to be to shorten Title 29 and to provide more clarity in it by reducing duplication. The Recodification Committee proceeded to make a variety of recommendations that went beyond the scope of this charge, that were not consistent with the specified goals, and that in fact diminished public safety. It did this most notably by significantly reducing criminal liability for a variety of crimes with a focus on reducing prison populations. Because of this, there were not many areas of the Recodification Committee recommendations that were unanimous.

Which brings me to the concerns that we have with the Recodification portions of Senate Bill 288. I recognize the difficulty of going back through what was a 4000-page rewrite of Title 29 and trying to figure out what was unanimous and what wasn’t five years later. Some controversial ideas from Recodification have been included in Senate Bill 288. These ideas go beyond addressing collateral sanctions for people. Some directly reduce criminal liability, even for violent offenses. Others, rather than bringing clarity to Title 29, create confusion that will lead to years and years of new litigation. I’ve attached a bullet point list of many of the Recodification ideas that are now in SB 288 and that we find to be controversial to some degree or another. Because of the pervasiveness of our concerns with the Recodification proposals, rather than going through all of these I’d like to focus on several of the most controversial ideas that I think best highlight the reduced criminal liability and confusion that would be created by their enactment.

Aggravated Rape

The bill creates a new “aggravated rape” statute that provides that “[n]o person who is eighteen years of age or older shall knowingly engage in sexual conduct with any person who is less than thirteen years of age” and

that “[n]o person who is fourteen years of age or older shall knowingly engage in sexual conduct with any person who is less than ten years of age.”

Currently, rape of a child under thirteen is a strict liability offense, placing the onus, responsibility and risk where it should be, on the adult perpetrator. The inclusion of the mens rea of knowingly in this new statute arguably places the burden on the state to prove that the defendant knew the child was under 13. It also arguably places the burden on the state to prove that the sexual conduct itself took place knowingly rather than recklessly or negligently. It allows child rapists to plead ignorance. This reduces criminal liability for the crime of child rape and jeopardizes the safety of children in Ohio. Whether this is the intent or not, this is exemplary of the type of dangerous confusion created by the Recodification proposals.

Aggravated Robbery and Robbery

The bill amends our aggravated robbery and robbery statutes in a couple of significant ways. First, the bill removes attempts to inflict serious physical harm from the aggravated robbery statute and attempts to inflict physical harm from the robbery statute. It also removes attempts to remove a deadly weapon from a law enforcement officer from the concept of aggravated robbery. And finally it inserts a mens rea of knowingly into what is currently a strict liability statute.

This seeks to require that violent offenders receive serious punishment only when they are successful at causing serious physical harm or physical harm. This has never been the law in Ohio and a person acting with the necessary culpability for certain serious criminal acts like aggravated robbery, robbery, aggravated burglary, and burglary should be held accountable for the danger they have created to people regardless of whether harm actually results. These changes fail to recognize the danger to and impact on people who are the victims of these acts and they create a greater likelihood that violent criminal defendants will escape punishment.

Aggravated Burglary and Burglary

The bill amends our aggravated burglary and burglary statutes to prohibit knowingly trespassing in a “habitation” with intent to commit a crime. For aggravated burglary the person will now have to actually inflict physical harm or have control of a deadly weapon or dangerous ordnance.

By replacing the concept of trespassing in any “occupied structure,” which broadly includes any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, with trespassing in a “habitation,” which narrowly includes only “dwellings,” this change substantially reduces criminal liability for people who break into businesses in order to commit crimes while inside. What today is an F1, F2, or F3 burglary of a business becomes an F3, F4, or F5 breaking and entering under Senate Bill 288. As with the changes to aggravated robbery and robbery, these changes require the actual infliction of physical harm, reducing the punishment for burglary when the violent offender is not successful at causing physical harm.

The change fails to recognize the danger to business patrons, employees, and owners, diminishes public safety, and disregards the impact that trespassing in businesses and other places with the intent to commit crimes therein has on our communities.

Theft and Fraud

The bill amends a variety of theft and fraud offenses with a wholesale removal of enhanced penalties for theft and fraud involving vulnerable victims like the elderly and disabled. It also raises the threshold for felony theft to \$2500.

Our Association typically does support the creation of special classes of victims. We have regularly opposed legislation to increase assault to a felony based on the victim's status in a certain profession. We have done the same with proposals regarding menacing and aggravated menacing. The only exceptions we have made are for law enforcement officers who place themselves in harms way for the protection of everyone else, and for particularly vulnerable victims like the elderly, disabled, and children. The changes to Chapter 2913 undo the special protections that we have created for these victims who are more likely to be victimized and more likely to suffer greater harm. A similar argument applies to raising the threshold for felony theft to \$2500, a change that will disproportionately impact poorer victims who have less at their disposal and will be more negatively impacted by this change.

Prior Calculation and Design

The bill defines the term "prior calculation and design" as something that "means more than mere purpose. It is the process of an actor's advance reasoning to formulate the purpose to cause the death of another or the unlawful termination of another's pregnancy. No particular amount of time or consideration to act must be given, but sufficient time must elapse for the planning of the death of another or the unlawful termination of another's pregnancy. Acting on the spur of the moment or after momentary consideration is not sufficient. The surrounding circumstances must show a calculated plan to cause the death of another or the unlawful termination of another's pregnancy and a studied consideration of the method and the means or instrument with which to do so."

This arguably makes it more difficult to prove prior calculation and design reducing criminal liability for aggravated murderers. Parts of the definition are consistent with the caselaw but the new definition introduces a couple of vague concepts (e.g. the need to show a "process of"...advance reasoning and the studied consideration of the method and the means or instrument) that we believe are not reflective of the caselaw, that could be viewed as legislatively overruling some of the existing caselaw, and that will lead to lots of new litigation surrounding aggravated murder.

Allied Offenses of Similar Import/Merger

The law provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one. When multiple offenses merge, the prosecutor can select which offense to proceed to sentencing on.

The current test for whether offenses merge comes from a case called *State v. Ruff*, 143 Ohio St.3d 114, which said first that two or more offenses of dissimilar import exist when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable. *Ruff* also said that a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

Senate Bill 288 largely codifies this decision. But it also inserts into the concept of merger that multiple offenses merge if, among other things, they “were committed by conduct so connected in time and place as to constitute *a single event*.”

This idea of merger based on whether the conduct constitutes a “single event” is a novel idea that to our knowledge is based on no caselaw here in Ohio and it changes Ohio law from a “same conduct” test, which focuses on the actus reus, to a “single event” test that may substantially expand the test for merger. As a matter of policy we don’t think a criminal defendant should be rewarded with a single event discount by contending that he committed a number of crimes in a short amount of time. Sticking with the theme of creating confusion and a lack of clarity, this one change will create years and years of litigation over what constitutes a “single event” and this is just one sentence in an 1800 page bill.

Conclusion

There are more examples of ways that the recodification committee recommendations will undermine public safety and disregard the impact of crime on innocent victims through either the reduction of criminal liability or the unnecessary creation of confusion in our criminal law.

These changes along with the changes listed below simply aren’t unanimous recommendations from the Recodification Committee. They are controversial changes to our criminal code that in the opinion of our Association will create a substantial windfall for the people who commit crimes and do that at the expense of everyone else at a time of already rising crime and growing concern about rising crime. We urge you to remove the Recodification proposals in their entirety from Senate Bill 288.

Thank you again for the opportunity to testify. I would be happy to answer any questions.

Other Recodification Provisions that Reduce Criminal Liability or Create Confusion

Chapter 2901 – General Provisions

- Changes the definition of “affirmative defense,” in response to the Supreme Court of Ohio’s decision in *State v. Nucklos*, 121 Ohio St.3d 332, in a way that will lead to unnecessary litigation over what a defendant “can fairly be required to adduce supporting evidence of” and over other statutory issues like provocation or leaving a kidnapping victim in a safe place unharmed that can be considered affirmative defenses but that would not meet the bill’s definition. R.C. 2901.05.
- Unnecessarily restricts the use and consideration of prior juvenile adjudications in adult criminal proceedings. These adjudications can be properly considered when an adult defendant has a weapons disability for a juvenile adjudication, as a predicate for the now adult offender’s sex-offender registration, and as a sentencing factor. R.C. 2901.08.

Chapter 2909 – Arson and Related Offenses

- Reduces criminal liability for arson by increasing the amount of damages a person must cause to be charged with felony arson. More arson offenses will be prosecuted as misdemeanors. R.C. 2909.03.
- Reduces criminal liability for vandalism by increasing the amount of damages a person must cause to be charged with felony vandalism. R.C. 2909.05.
- Reduces criminal liability for discharging a laser into the cockpit of an aircraft. R.C. 2909.081.
- Potentially reduces criminal liability for terrorism by providing for parole eligibility for terrorists convicted of murder or a first degree felony. R.C. 2909.24.
- Repeals current criminal prohibitions against the possession, use, and manufacture of explosive devices. R.C. 2909.26.
- Repeals current criminal prohibitions against the illegal assembly or possession of chemicals or substances for the manufacture of an explosive device. R.C. 2909.28.

Chapter 2911 – Robbery, Burglary, Trespass, and Safecracking

- Reduces criminal liability for aggravated robbery by adding a mens rea of knowingly to what is currently a strict liability offense. Strict liability remains appropriate because of the heightened potential for harm during an aggravated robbery. R.C. 2911.01.
- Reduces criminal liability for aggravated robbery by requiring the actual infliction of serious physical harm in order to complete an aggravated robbery. Currently the attempt to inflict the harm is enough. R.C. 2911.01.
- Reduces criminal liability for robbery by removing attempts to inflict physical harm from the robbery statute requiring the actual infliction of physical harm. Net effect is that this reduces the punishment for attempting or threatening to inflict harm during the commission of a theft offense. R.C. 2911.02.
- Reduces criminal liability for aggravated burglary by removing trespassing in a business, or other occupied structure, with the purpose to commit a criminal offense. R.C. 2911.03.
- Reduces criminal liability for aggravated burglary by requiring the actual infliction of physical harm for the person to complete an aggravated burglary. Currently the attempt to inflict harm is enough. R.C. 2911.03.
- Reduces criminal liability for burglary by removing trespassing in a business, or other occupied structure, with the purpose to commit a criminal offense. R.C. 2911.12.
- Reduces criminal liability for some forms of trespass. R.C. 2911.06.
- Reduces criminal liability for breaking into a “strongbox” by removing it from the offense of safecracking. This is despite the fact that people and businesses are just as likely to keep valuables or cash in a strongbox. R.C. 2911.07.

Chapter 2913 – Theft and Fraud

- Reduces criminal liability for theft by making theft up to \$2500 a misdemeanor. R.C. 2913.02.
- Reduces criminal liability for unauthorized use of a motor vehicle. R.C. 2913.03.

- Reduces criminal liability for unauthorized use of property. Particularly for elderly and disabled victims. R.C. 2913.04.
- Reduces criminal liability for attempts to gain access to the law enforcement automated database system from the prohibition on unauthorized use of property. R.C. 2913.04.
- Reduces criminal liability for telecommunications fraud. Particularly for elderly and disabled victims. R.C. 2913.05.
- Reduces criminal liability for passing bad checks. Particularly for elderly and disabled victims. R.C. 2913.11.
- Reduces criminal liability for forgery. Particularly for elderly and disabled victims. R.C. 2913.31.
- Reduces criminal liability for Medicaid fraud by making fraud up to \$2500 a misdemeanor. R.C. 2913.40.
- Reduces criminal liability for Medicaid eligibility fraud by making fraud up to \$2500 a misdemeanor. R.C. 2913.41.
- Reduces criminal liability for illegal use of SNAP benefits or WIC program benefits. R.C. 2913.46.
- Reduces criminal liability for insurance fraud by making fraud up to \$2500 a misdemeanor and removes prohibitions on aiding and abetting insurance fraud. R.C. 2913.47.
- Reduces criminal liability for workers compensation fraud by making fraud up to \$2500 a misdemeanor. R.C. 2913.48.
- Reduces criminal liability for identify fraud when the victim is elderly, disabled, or an active duty service member. R.C. 2913.49.
- Reduces criminal liability for receiving stolen property up to \$2500 a misdemeanor. R.C. 2913.51.

Chapter 2917 – Offenses Against the Public Peace

- Reduces criminal liability for inciting to commit violence by requiring that the conduct actually result in the commission of an offense of violence. This allows people to try to get others to commit violence with no consequences unless the violence actually occurs. R.C. 2917.01.
- Introduces confusion into prosecutions for riot and aggravated riot by requiring that the person “actively” participate in the disorderly conduct that leads to the riot. This is redundant with complicity and will lead to unnecessary litigation. R.C. 2917.02 and 2917.03.
- Reduces criminal liability for disrupting a lawful meeting, procession, or gathering. R.C. 2917.12.
- Reduces criminal liability for some forms of telecommunications harassment by making harassment that results in harm up to \$2500 a misdemeanor. R.C. 2917.21.
- Reduces criminal liability for inducing panic even when the violation pertains to the threatened or actual use of a chemical weapon, biological weapon, or radiological or nuclear weapon. R.C. 2917.31.

Chapter 2921 – Offenses Against Justice and Public Administration

- Reduces criminal liability for intimidating public servants, party officials, attorneys or witnesses by removing attempts. R.C. 2921.03.
- Reduces criminal liability for some perjury by tying the degree of perjury to the degree of the charges underlying the offense. This denigrates the sanctity of the judicial system and the oath a person takes as a witness. R.C. 2921.11.
- Reduces criminal liability for tampering with evidence by reducing the penalty from an F3 to an F5 unless the evidence was substantially altered (F4) or destroyed, concealed, or made completely unavailable (F3). R.C. 2921.12.
- Reduces criminal liability for resisting arrest by changing the mens rea from recklessly to knowingly, providing criminals a better chance at escaping responsibility. R.C. 2921.33.
- Reduces criminal liability for failure to comply by disallowing consideration of whether the offender failed to stop for traffic lights or stop signs in determining the seriousness of their conduct. Makes the license suspension permissive rather than mandatory. R.C. 2921.331.
- Reduces criminal liability for escaping from supervised release by removing escaping from supervised release from the escape statute making it easier for criminals who are on parole or post-release control to avoid their supervision. R.C. 2921.34.
- Reduces criminal liability for attempts to convey deadly weapons and drugs into prisons rewarding people for their own failure. R.C. 2921.36.

- Reduces criminal liability for attempting to harass another with a bodily substance such as blood, urine, semen, or feces, rewarding people for failing to make contact with their victim when throwing or expelling the substance. This most often applies to corrections officers at work. R.C. 2921.38.
- Reduces criminal liability for attempting to deprive a person of their civil rights. R.C. 2921.45.

Chapter 2923 – Conspiracy, Attempt, and Complicity

- Reduces criminal liability for conspiracy by removing from the crime of conspiracy abduction, certain compelling prostitution offenses, promoting prostitution, arson, some robberies, some burglaries, some forms of corrupting another with drugs, some drug trafficking offenses, and some unauthorized use of a motor vehicle offenses. The bill makes it easier for people to conspire to commit these crimes. R.C. 2923.01.
- Further reduces criminal liability for conspiracy by completely eliminates the form of conspiracy that involves aiding in planning the commission of the underlying offense. R.C. 2923.01.
- Further reduces criminal liability for conspiracy by allowing a person to escape responsibility for conspiring to commit a crime if they abandon the conspiracy at any stage before the conspiracy is completed. Currently they must abandon it prior to the commission or attempt to commit any crime that is the object of the conspiracy. R.C. 2923.01.
- Reduces criminal liability for complicity by removing causing an innocent or irresponsible person to commit an offense from the crime of complicity. R.C. 2923.03.