Ohio Prosecuting Attorneys Association

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House Bill 108
Opponent Testimony
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Chairman Thomas, Vice-Chair Mathews, Ranking Member Isaacsohn and members of the House Judiciary Committee, thank you for the opportunity to provide opponent testimony on House Bill 108 to establish a pretrial procedure regarding self-defense. Specifically, the bill allows a person who is accused of an offense, and who wishes to claim self-defense, to file a pretrial motion asserting self-defense. The filing of such a motion requires the court to hold a hearing at which evidence may be presented. If there is evidence presented that tends to support by a preponderance of the evidence that the accused person acted in self-defense, the court must grant the pretrial motion. The granting of the pretrial motion establishes a rebuttable presumption of self-defense.

From the point of view of our Association there are several significant issues with what is proposed.

Trial Within a Trial

Because this is an evidentiary hearing, the defense will be permitted to call witnesses. While this will presumably include calling the defendant and any other defense witnesses, it could also include the defense calling the state's witnesses. This will give the defense an early opportunity, prior to trial, to examine the state's witnesses, get them on the record, learn what they plan to say at trial, learn more about the state's theory of the case and trial strategy, and set themselves up for cross examination at trial. Moreover, because any defendant can avail himself or herself of the pretrial procedure and get a mandatory hearing, even defendants with no legitimate claim of self-defense will use this as an advance opportunity to call witnesses and learn what they plan to say. Many defendants will use this as a weapon against victims, putting additional strain and stress on victims, who could now be forced to face the offender and to testify two separate times. Finally, this is an opportunity for defendants to live test trial strategies. If they file one of these pretrial motions and the court ultimately denies the motion, the defendant hasn't lost anything. They can pursue a different theory at trial or they can pursue self-defense at trial, and they will now have the benefit of knowing what the State's strategy is and what the State's witnesses will say.

This type of pretrial discovery and gamesmanship should not be permitted.

Rebuttable Presumption

Once the defense has presented evidence that tends to support by a preponderance of the evidence that the defendant acted in self-defense, the legislation provides that there is a rebuttable presumption that the accused person acted in self-defense.

The concept of a rebuttable presumption is a remnant of old law before House Bill 228 (132nd G.A.) shifted the burden of proof to the prosecution to disprove self-defense beyond a reasonable doubt. When the state

has the burden of proof to disprove self-defense, as it does today, there simply is no rebuttable presumption. The purpose of the rebuttable presumption was to shift the burden of persuasion to the State, allowing the State to rebut the presumption of self-defense by a mere preponderance of the evidence. After House Bill 228, however, the State has the *heavier* burden of disproving one or more of the elements of self-defense beyond a reasonable doubt.

The statutory presumption is a presumption that the defendant acted in self-defense, which the State can rebut by a mere preponderance of the evidence by showing that, for whatever reason, one or more of the prongs related to self-defense were inapplicable. The State's overall beyond-reasonable-doubt burden presents *exactly* the same question, i.e., whether the jury is convinced beyond a reasonable doubt that one or more of the prongs of self-defense are inapplicable. When the State meets its beyond-reasonable-doubt burden, it also has necessarily met its preponderance burden on that same question.

The benefit of the rebuttable presumption, which imposes only a preponderance burden on the State, is swallowed by the stronger presumption of innocence and heavier beyond reasonable doubt standard. Instructing on the rebuttable presumption takes the jury on an unnecessary detour, making them analyze whether the presumption has arisen in the case and whether the State has rebutted the presumption by a preponderance, only then to tell them "never mind" and require them to determine whether the State has disproven self-defense beyond a reasonable doubt. When the court is instructing the jury on the beyond-reasonable-doubt burden, the defense has already achieved all that the rebuttable presumption could accomplish, making it unnecessary and redundant to take juries through a defunct rebuttable presumption analysis.

House Bill 108 doubles down on this flawed approach when what we should really be doing is removing the defunct rebuttable presumption language from current law.

The Burden of Production at Trial

All of this seems designed to alleviate the need for a defendant who claims self-defense to testify and produce evidence of self-defense at trial. But it is hard to see how this would work in practice. The State goes first at trial and we aren't going to put the defendant's evidence on for them. So the only evidence before the jury, other than what the defense might bring out on cross-examination, is going to be the State's evidence. The jury won't hear anything about the defense's presumptive claim of self-defense and won't have any evidence to support that claim. If the prosecution did want to try to rebut the presumption, how would we do this without the defense providing any evidence to rebut? Ultimately, all this will result in is a confusing jury instruction about rebuttable presumptions, the preponderance of evidence, and beyond a reasonable doubt.

If the idea is that the defense would waive jury and try the case to the judge if the pre-trial motion were granted then this is another example of the one-sided nature of this legislation. The defendant gets to test out what the judge thinks about the evidence before trial. If the judge agrees with them they can try the case to the judge. If the judge doesn't agree with them they can try the case to a jury and argue self-defense or some other theory. This sets the pretrial hearing up to be a mini-trial that will be time and resource intense only to have a second trial later on that will also be time and resource intense.

We are opposed to the legislation for these reasons and urge the defeat of the bill. I'd be happy to answer any questions.