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TESTIMONY ON GUN BILLS
BEFORE HOUSE JUDICIARY COMMITTEE
H-5154, H-5262, H-5437, H-5554, H-5730, AND H-6039
April 25, 2017

Article I, Section 22 of the Rhode Island Constitution declares: "The right of the people to keep and bear arms shall not be infringed." The R.I. Supreme Court has noted that this right is "subject to reasonable regulation by the state in exercising its police power." The ACLU of Rhode Island agrees. As a result, for example, we do not take issue with efforts to restrict the types of weapons available for purchase. At the same time, however, restrictions must be reasonable, and attempts to regulate the possession of firearms often implicate other constitutional rights, including rights to privacy and due process.

It is in that context that we offer brief comments on some of the bills being heard today.

H-5154, H-5262 and H-5554, MANDATORY SENTENCING

H-5154 would deny parole to any person convicted of a crime in which a firearm was used to commit the offense. H-5262 and H-5554, both Attorney General bills, would add mandatory minimum sentencing provisions to new criminal offenses. Leaving aside the question of the necessity of these new offenses in light of other criminal statutes, the ACLU urges opposition to all three of these proposed sentencing schemes. For good reason, it has been many years since the General Assembly has approved mandatory sentencing legislation for any crimes, and there is no reason to go down that path now.

Some years ago, a distinguished commission chaired by U.S. Supreme Court Justice Anthony Kennedy urged all jurisdictions in the country to "[r]epeal mandatory minimum sentence statutes." As the American Bar Association noted in supporting that recommendation:

> Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing.
>
> Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward …

The ABA went on to note the misleading nature of "mandatory" sentencing, something that many people often fail to understand or appreciate:

> Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, they tend to shift sentencing discretion away from courts to prosecutors. Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf

In short, mandatory sentences are ineffective, costly and eliminate individualized consideration of the offender and the circumstances of the offense. They should be rejected.

H-5437, IMITATION FIREARMS

This bill would make it a crime to alter in any way a so-called "imitation firearm" to make it look like an "operable firearm." While we appreciate the goal of this bill, we are deeply concerned about its potential consequences.

As worded, the bill applies to any alteration made to a fake firearm, regardless of the intent of the person or whether the alteration was done in any way to deceive anybody. The primary users of "imitation firearms" are likely to be young children, and they may also be ones most likely to "alter" such a "firearm" in a way that violates the law.

The special markings on toy guns serve an important purpose – and particularly are helpful in protecting children – but it would be a mistake to try to protect them from tragedies during police encounters by turning them into criminal defendants facing a possible year in prison. At a minimum, we urge the addition of a scienter requirement to the bill and proof that the change or alteration to the "firearm" was done for an unlawful or deceptive purpose.

H-5730 and H-6039, GUN PERMIT APPLICATIONS

H-5730 requires applicants for gun licenses to undergo a federal criminal record check. H-6039 establishes a more detailed gun application process and standards for qualifications. The ACLU wishes to raise a few specific concerns about these bills and offer some general comments about methods for ensuring fairness in the consideration of gun permit applications.

First, while H-5730 requires a national criminal record check for gun permit applicants, it does not provide any standards as to how the results of that background check will be used. In order to avoid a system that provides unbridled discretion to decision-makers, we believe some presumptive standards should be put in place regarding potentially disqualifying criminal offenses, in order to cabin the discretion of officials in deciding who is qualified for a gun permit. Without them, too much opportunity exists for arbitrary decision-making by the officials who review these applications in deciding whether a past criminal record disqualifies a person for a permit.

H-6039 provides a much more detailed set of procedures and standards for disqualifications. We wish to initially raise at least two specific concerns about the procedures established by H-6039.

First, the bill would give applicants who are denied a license only 15 days to appeal the decision to R.I. Superior Court. [Page 12, lines 19-23]. We believe this is an unduly short time to require a judicial appeal to be filed, especially since most applicants for permits will not have had an attorney involved in the proceedings leading up the denial.

Second, the bill would keep secret any Superior Court records of a permit denial appeal. [Page 12, line 31 – Page 13, line 1; Page 17, lines 4-7]. The ACLU opposes this effort to keep such court records secret. Judicial proceedings and records are, for many strong reasons, presumptively public, and we do not believe that any privacy interests implicated by gun permit denials outweigh the public's weighty interest in transparency in court proceedings. It is one thing to recognize privacy interests in the administrative application process (although even there much could be gained in learning how officials are applying the law), but quite another to shield from secrecy instances where the judicial process is being invoked for legal relief.

Finally, we wish to offer our own general comments about the broader issue of due process in the gun permit application process, something we have long supported. For a number of years, we have suggested addressing this issue by subjecting gun permit denials to the protections of the Administrative Procedures Act.

In *Mosby v. Devine*, the R.I. Supreme Court's seminal opinion on "the right to bear arms," the Court held that applicants for a concealed weapons permit have only minimal due process rights to contest denials of those applications by the Attorney General. The Court rejected arguments submitted by the ACLU and others that applicants should be able to

challenge denials under the state's Administrative Procedures Act, which provides detailed procedural rights to persons in "contested cases" against state agencies. Instead, the Court held that the APA did not apply and that applicants were not entitled to hearings on their applications.

The court did agree that applicants were entitled to certain minimal procedural rights, including the right to "know the evidence upon which the department based its decision and the rationale for the denial." But even then, the only recourse for aggrieved applicants was to file a discretionary petition for review with the Supreme Court, an expensive process with very little guarantee of being heard. Particularly because a constitutional right is implicated, we believe that more robust due process protections should be in place for applicants, and allowing aggrieved applicants to pursue appeals in accordance with the APA is a simple way of furthering that goal, and one that the ACLU of RI supports.

We appreciate the opportunity to submit testimony on these bills, and hope that our comments will prove helpful as legislators address this controversial issue.