

Statement/Testimony against proposed Sub.S.B. 796
House Civil Justice Committee
December 14, 2020
Douglas Rogers

I appreciate very much the opportunity to review what may be the proposed Sub.S.B.796 and set forth in this email reasons why I think that the Civil Justice Committee should reject such proposal. Of course, it is difficult to know if Su.S.B.796 is going to be submitted on Wednesday, since there have been reports that something else may be offered instead. It is impossible for opponents to stand-your-ground/shoot-whoever-makes-you-nervous legislation to adequately prepare testimony if other amendments are offered and there is no chance to consider them.

I believe another attorney, Andrea Yagoda, will submit objections to other parts of Sub. S.B. 796 that I do not address here in as much detail. However, I agree that proposed R.C. 2307.61 would create an unjustified two-tier civil justice system favoring gun owners and discriminating against victims of gun shots.

By way of background, as an associate with Vorys, Sater, Seymour and Pease in Columbus, I assisted then Republican Senator David Hobson in drafting legislation modifying the existing statute that had created the Ohio Legal Rights Service. Subsequently, as a partner in the Vorys firm, I assisted in the drafting of legislation for a government agency and successfully argued in the Ohio Supreme Court that the statute was constitutional.

Drafting legislation is a difficult task and must be done carefully with an understanding of the consequences in all different scenarios. Such thought has not been put into this possible legislation and appears to be the hurried attempt by the gun lobby to save proposed legislation that would be dangerous to Ohioans, particularly to Ohioans of color.

Ohio common law on self-defense

For over 40 years, Ohio common law has been that “self-defense has three elements: (1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Thomas*, 77 Ohio St.3d 323, 326 (1997). There is no reason for a hurried change to this long-standing common law principle in the rush of this lame duck session.

Unwarranted elimination of duty to retreat

Proposed 2901.09(B)

The substantive change to this section from what used to be 2901.09(B) in HB796 is the requirement that in addition to being in a place the gun owner had a right to be, the gun owner has no duty to retreat is he/she “also had a reasonable fear of imminent physical harm to the person or to the other person.” Legislators should be very careful about rapidly changing in this lame duck session what has for years been the common law of self-defense in Ohio and have not thought about the consequences of the change of over 40 years of Ohio common law.

This is especially true, because the consequences of the changes are difficult to imagine/plot out quickly, and there has been no evidence presented of any injustice:

- **2901.09(B) would generally eliminate the 3rd element of self-defense and would be an unjust rejection of *State v. Thomas*.** In its November 20 editorial, the Columbus Dispatch accurately said that in a “civilized society,” laws such as SB383 “are dangerous because they remove the ‘duty to retreat’ – the expectation that lethal force must be the last resort.” Even more recently, on December 3, 2020, Chief Bruce Pijanowski, Ohio Association of Chiefs of Police, testifying against SB383/HB796: “It is incomprehensible to us ... that our state legislature is going to consider allowing private citizens to engage in the use of deadly force for protection of self and property when that force can be avoided by retreating (translation: de-escalation).”

- The standard for self-defense in the SubBill is (a) the person must be in the place legally and (b) the person has a “reasonable fear of imminent physical harm to the person or to the other person.” **The courts could interpret 2901.09(B) to eliminate the requirement in Ohio under the first element of self-defense in *Thomas* that defendant was not at fault in creating the violent situation, because he/she did not retreat.** This would be a rejection of such cases as *State v. Robbins*, in which the Ohio Supreme Court affirmed the trial court’s denial of a plea of self-defense, because of Robbins’ failure to retreat after initially being the aggressor. 58 Ohio St.2d 74, 81 (1979). 2901.09(B) does not provide any situation when retreat might be required.

- **2901.09(B) would also eliminate part of the second element of Ohio’s common law self-defense requirement that “defendant had a bona fide belief that ... her only means of escape was the use of force.”** *State v. Thomas at 326*. There is no basis for such elimination. The Columbus Dispatch correctly said that in a “civilized society,” laws such as Sub.S.B. 796 “are dangerous because they remove the ‘duty to retreat’ – the expectation that lethal force must be the last resort.”

- **2901.09(B) simply requires a fear of imminent physical harm instead of fear of death or great bodily harm, which has been the standard in Ohio for years.** *State v. Thomas*, 77 Ohio.3d 323 (1997). This change would conflict with the proportionality requirement recognized throughout the United States that deadly force can only be used in self-defense – by someone who is not a law enforcement officer - if the defendant reasonably believes that death or great bodily harm is threatened (and not, for instance, if the only threat was to a broken toe). <https://www.judiciary.senate.gov/imo/media/doc/10-29-13SullivanTestimony.pdf> , p. 3, citing *United States v. Black*, 692 F.2d 314, 318 (4th Cir. 1982).

Handcuffing the prosecution in 2901.09(C)

The substantive change to this section, from what used to be 2901.09(C) in HB796, is the requirement that in addition to being in a place the gun owner has a right to be, the gun owner must “also had a reasonable fear of imminent physical harm to the person or to the other person.” As with proposed 2901.09(B), **2901.09(C) disregards the second half of the second element of**

self-defense by focusing only on imminent danger, disregarding danger of death or great bodily harm and not considering whether shooting was the "only means of escape."

Since the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, the prosecution could not even present evidence showing that the defendant had a reasonable method of retreat and that there was no imminent danger – giving a free hand to trigger-happy gun owners. Indeed, **(C) would unfairly handcuff prosecutors**, as the **Executive Director of the Ohio Prosecuting Attorneys Association, Louis Tobin**, testified: **“There is no way for a jury to determine whether a person who used force in self-defense reasonably believed that force was necessary if the jury can’t also consider whether it was possible for the person to safely retreat from the situation....Current law helps to promote public safety and does so without diminishing a person’s right to self-defense.”**

Combined Effect of 2901.09(B) and (C)

By focusing on the subjective beliefs of the gun owner and eliminating the objective consideration of possible escape, 2901.09(B) and (C) would cede the determinations of fact to the individual biases of a gun owner and jurors and would have a discriminatory application against racial minorities, as the experts and statistics show:

<https://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133/#:~:text=Jeb%20Bush%20signed%20into%20law,a%20forcible%20felony%20like%20robbery> .

<https://www.issuelab.org/resources/22713/22713.pdf>.

<https://www.sciencedirect.com/science/article/abs/pii/S0277953615300642>

<https://psychology.columbia.edu/sites/default/files/2017-04/1-s2.0-S0277953615301489-main.pdf>.[https://www.apa.org/monitor/2015/05/upfront-stand-ground#:~:text=Psychologists%20laud%20ABA's%20move%20to%20oppose%20Stand%20Your%20Ground%20laws,-May%202015%2C%20Vol&text=The%20American%20Bar%20Association's%20\(ABA's,according%20to%20psychologist%20James%20M](https://www.apa.org/monitor/2015/05/upfront-stand-ground#:~:text=Psychologists%20laud%20ABA's%20move%20to%20oppose%20Stand%20Your%20Ground%20laws,-May%202015%2C%20Vol&text=The%20American%20Bar%20Association's%20(ABA's,according%20to%20psychologist%20James%20M)

[https://www.apa.org/monitor/2015/05/upfront-stand-ground#:~:text=Psychologists%20laud%20ABA's%20move%20to%20oppose%20Stand%20Your%20Ground%20laws,-May%202015%2C%20Vol&text=The%20American%20Bar%20Association's%20\(ABA's,according%20to%20psychologist%20James%20M](https://www.apa.org/monitor/2015/05/upfront-stand-ground#:~:text=Psychologists%20laud%20ABA's%20move%20to%20oppose%20Stand%20Your%20Ground%20laws,-May%202015%2C%20Vol&text=The%20American%20Bar%20Association's%20(ABA's,according%20to%20psychologist%20James%20M)

Thank you very much, and please let me know if you have any questions.

Doug Rogers