

Testimony against SB383  
Senate Government Oversight and Reform Committee  
submitted by Douglas Rogers on December 7, 2020

Chair Colely, Vice Chair Huffman, Ranking Member Craig and other members of the Senate Oversight and Reform Committee.

Thank you for this opportunity to submit this testimony against HB796. The gun lobby appears to be the power behind the recent introduction of, and push for, HB796 in this lame duck session of the General Assembly. SB383 would:

- (1) be an unwarranted gift to the gun lobby, which do not want to have to think when they are carrying loaded firearms in public;
- (2) cause unnecessary gun deaths in Ohio; and
- (3) inflame racial tensions throughout Ohio.

SB383 and HB796 are being heard in committees chaired by lame duck legislators who will not have to answer to the public in a subsequent election if it passes and its consequences are then felt in Ohio. I do not question the good will of any Senator or Representative on the applicable committees - just their judgment on this dangerous bill if they vote for it.

In its November 20 editorial, the Columbus Dispatch accurately said pending gun legislation “would allow more guns in more places, make more killings legal and punish businesses that choose not to allow guns. Incredible.” The Dispatch also correctly 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.” Similarly, in his November 22 column in the Dispatch, Tom Suddes accurately wrote, “lame duck Republicans might soon send DeWine what can only be considered an insultingly broad expansion of Ohio’s gun laws.” Please consider:

**1. No proponent has identified a single court case resulting in injustice in Ohio under current law**

The few proponents in the Senate and House committees earlier this week uniformly admitted they had no knowledge of any Ohio case in which a court had applied a duty to retreat and which resulted in an injustice. Why in the world should the General Assembly reject the current law when (a) proponents have cited no court case resulting in injustice from the current law and (2) the law enforcement community/experts in Ohio oppose the legislation (see 3 below)?

In light of the lack of a single instance of injustice from current law and the opposition of law enforcement agencies to change, the only explanation for support of HB796 is the pressure from the gun lobby.

**2. SB383 (R.C.§2901.09(C)) would unfairly restrict prosecutors**

Indeed, SB383 would affirmatively cause injustices and unfairly handcuff prosecutions, because proposed R.C.§2901.09(C) provides that “A trier of fact shall not consider the possibility

of retreat as a factor in determining whether ... [the defendant] reasonably believed that the force was necessary to prevent injury, loss, or risk to the life or safety” of the defendant or another person.” Already the burden is on the prosecution to prove beyond a reasonable doubt that a defendant claiming self-defense did not act in self-defense (R.C. §2901.05(B)(1). Under proposed R.C. §2901.01(C), the prosecution could not introduce evidence of even “the possibility of retreat.” This would mean a court/jury could not determine whether the defendant was in imminent danger and had no avenue of escape - an essential element of self-defense for over 100 years (s33 4 below).

This would indeed 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.”

Ohio places great faith in its prosecutors to maintain law and order. To push through this legislation in lame duck without resolving the concerns of law enforcement - who would have to administer the law - is “incomprehensible,” as the Ohio Association of Chiefs of Police testified last week (see 3 below in more detail).

### **3. SB383 would apply to both criminals and lawful people and would encourage trigger happy shooters**

Proponents are mistaken when they assert that SB383/HB796 would cover only law-abiding citizens. In fact, SB383 would also apply to a convicted felon and mean that a person on parole for committing violent crimes would not have to retreat when he was legally in public and got into an argument.

Assume there is a peaceful protest on the block surrounding the Statehouse, with Antifa and Ohio Gun Owners (OGO) supporters present. All are openly and legally carrying loaded firearms - and they get into a vociferous argument. Shouldn’t both have an obligation to consider retreating and - depending on the situation - retreat? This legislation (R.C. §2901.09(B), however, would preclude any obligation to retreat ever and would promote shoot-outs.

With this legislation, Antifa members could shoot the OGO members, or vice versa, with impunity, because under proposed 2901.09(C) they claimed they “reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.” Indeed, a shoot-out of this nature occurred in another stand-your-ground/shoot who-makes-you-nervous state, Texas. <https://www.nytimes.com/2020/07/31/us/austin-protest-shooting-foster-perry.html> (the event in Texas did not involve an Antifa or OGO supporter); and <https://www.texastribune.org/2020/07/31/daniel-perry-austin-protest-garrett-foster/>.

Sometimes proponents of shoot-whomever-makes-you-nervous legislation claim that such legislation is needed, because “Gun owners are lawful people” (see December 3, 2019 testimony of Ohio Gun Owners Director Chris Dorr).” That reflects a false belief based on hope perhaps,

or some mythology, but not real life. After all, clearly Adam Lanza (the shooter at Sandy Hook), Dylann Roof (the shooter in Charleston) and Stephen Paddock (the shooter in Las Vegas) were gun owners, but were not lawful people at the time they killed their victims. Of course there are many lawful people with guns, but there are also some people with guns who from time to time break the law (just as some people without guns obey the law at times and at other times break laws). HB796 would apply to wonderful people and to criminals, and at least the criminals would do everything possible to take advantages of a law, such as SB383, that would give them incentive to shoot and silence a possible opposing witness.

#### **4. Ohio's limited duty to retreat in certain situations should continue**

The Law enforcement officials testifying this week opposed SB383/HB796, and its elimination of the limited duty to retreat in proposed 2901.09(B):

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).”

December 3, 2020: Louis Tobin, Executive Director, Ohio Prosecuting Attorneys Association, testifying against SB383/HB796: “Ohio prosecutors have been in the past and continue to oppose repealing the duty to retreat in areas outside the home or vehicle.... Current law helps to promote public safety and does so without diminishing a person's right to self-defense.”

How can a proponent support SB383 in light of this opposition?

Proponents mistakenly imply there is always a duty to retreat under current law. For over 40 years, however, 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). The third element only applies in those situations where there is a duty to retreat.

The Ohio Supreme Court held over one hundred years ago there was no duty to retreat when an individual was being assaulted and his life was in imminent danger. *Erwin v. State of Ohio*, 29 Ohio St. 186 (1876). The Ohio Supreme Court subsequently held that there also may be no duty to retreat in the case of domestic violence, because the “victims of such attacks have already ‘retreated to the wall’ many times over and therefore should not be required as victims of domestic violence to attempt to flee to safety before being able to claim the affirmative defense of self-defense” (self-defense was then an affirmative defense). See *State v. Thomas*, 77 Ohio St.3d 323, 328 (1997). There also is no duty to retreat in your home (*State v. Williford*, 49 Ohio St.3d 247, 250 (1990), citing an 1883 Ohio Supreme Court case, *State v. Peacock*, 40 Ohio St. 333 (1883)), and by statute that no duty to retreat was expanded to your car (R.C. §2901.0, 2008).

On the other hand, there can and should be a duty to retreat if one individual (call him Robbins) is the first aggressor in an affray against another individual (call him Jones), but then Jones gains the upper hand. In *State v. Robbins*, the Ohio Supreme Court affirmed the trial court's rejection of a plea of self-defense, because of Robbins' failure to retreat after initially being the aggressor. 58 Ohio St.2d 74, 81 (1979). The Supreme Court explained that Robbins "had many opportunities to retreat and avoid danger, which he failed to do," and the Supreme Court affirmed the conviction of Robbins for failure to retreat. *Id.* at 80-81.

Other Ohio courts have found a duty to retreat in situations where the defendant reasonably could have taken steps to retreat before the actual altercation had started, not once the individual was actively being attacked. See, e.g., *State v. Ellis*, 2012-Ohio-3586, ¶15 (Ohio App. 10 Dist. 2012)("a multitude of courts have found that a defendant is at fault in creating the situation or violated a duty to avoid danger or retreat when he chooses to confront the victim, chooses to knowingly go to a place where the victim will be or refuses to move in a direction away from the victim ... "); and *State v. Mathews*, 2002-Ohio-6619, ¶8 (Ohio App. 3 Dist. 2002)("the situation could have been avoided if Mathews had either not gone up to the other apartment or if he would have just left and returned to his own apartment").

SB383 would eliminate any duty to retreat in any situation (the third element of self-defense), including those set forth in the above two paragraphs, by providing that "a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence, if that person is in a place in which the person lawfully has a right to be" (proposed R.C. §2901.09(B), lines 106-115). This in turn could make it impossible for a court/jury to determine who was at fault (element 1 of self-defense)

Do the sponsors really want to overturn the law of *State v. Robbins* and the other cases cited above? If the answer is yes, stand up and say so.

SB383 would overturn *Robbins* and provide that in a bar after a football game, in the unfortunate event that OSU lost and students were upset, the students who gather, drink, argue, and get into a fight (all are legally at the bar) had no obligation to retreat and could instead shoot each other.

**5. SB383 does not require that a life be in danger, or even that there be imminent danger of great bodily harm, in order to use deadly force**

Proposed R.C. §2901.09(B) provides that "a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence." There is no statement or implication that the force must threaten any person's life or great bodily harm to that person. Also, proposed R.C. §2901.09(C) also refers to the defendant "reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety."

These provisions would allow the use of deadly force even if death or great bodily harm was not threatened. This 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. <https://www.judiciary.senate.gov/imo/media/doc/10-29-13SullivanTestimony.pdf> , p. 3, citing *United States v. Black*, 692 F.2d 314, 318 (4<sup>th</sup> Cir. 1982).

## **6. Limiting the defense to the subjective beliefs of the defendant would inevitably lead to a shoot-whomever-makes-you-nervous situation and racial bias in application**

Proponents apparently now claim SB383 is not a Stand-Your-Ground law, because it does not have those exact words in the bill. That is a superficial argument. Earlier this session the Director of Ohio Gun Owners testified in favor of SB237 and referred to it as a stand-your-ground bill, even though neither “stand” nor “stand your ground” appeared in the legislation.

Calling a wolf a sheep does not make the animal a sheep. Since SB383 would eliminate any duty to retreat and would prevent a jury from even considering avenues of escape to determine if the gun owner really faced an imminent threat, [HB796 is a stand-you-ground bill, and more accurately a shoot-whomever-makes-you-nervous bill.](#)

The Leadership Conference on Civil and Human Rights wrote in 2013, “Because of systemic and unconscious racial bias, “stand your ground” [SYG] laws increase the danger to which people of color are subjected, without offering adequate opportunity for redress.” <https://civilrights.org/resource/re-hearing-on-stand-your-ground-laws-civil-rights-and-public-safety-implications-of-the-expanded-use-of-deadly-force/> SYG laws “can only exacerbate the harm of gun violence in communities of color, particularly in urban areas where African Americans are far more likely to die from gun violence than whites. In fact, young black men die of gun homicide at a rate of eight times that of young white men.” *Id.*

The American Bar Association’s 2015 Task Force on Stand Your Ground Laws similarly discussed the polarizing effect of SYG. It found, “The application of Stand Your Ground laws is unpredictable, uneven, and results in racial disparities.” <https://www.issuelab.org/resources/22713/22713.pdf> . In the Task Force Report, Rev. Leonard Leach of the Mt. Hebron Missionary Baptist Church said that SYG “exacerbates the tension that already exists between persons and classes who are different from us and individuals with whom we have strained relationships.” *Id.* at 24. He continued, “It perpetuates a foolish bravado of those who feel a bold security when they have a gun in their hand, and it exonerates an arrogance and/or ignorance.” *Id.*

In July of 2020, the Giffords Law Center to Prevent Gun Violence issued a report that said, SYG “laws suffer from pervasive racial and gender bias in their application, deepening disparities in the legal system and disproportionately justifying the use of violence by people who are white and male against people who are not.”<sup>ii</sup> [https://www.splcenter.org/sites/default/files/\\_stand\\_your\\_ground\\_kills\\_-\\_how\\_these\\_nra-backed\\_laws\\_promote\\_racist\\_violence\\_1.pdf](https://www.splcenter.org/sites/default/files/_stand_your_ground_kills_-_how_these_nra-backed_laws_promote_racist_violence_1.pdf) It reported that “a white (civilian) shooter who kills a black victim is 350 percent more likely to be found to be justified than if the same shooter killed a white victim.” *Id.* at p. 5.

Also in this year, Ohio Chief Justice Maureen O’Connor discussed the problems of racial inequality in our country and said, “I don’t know that I’ll ever truly appreciate what the feelings

are, what the emotions are and the sense of loss that is built upon centuries of inequality in our country.” However, she added, “I can understand the outrage.”  
<https://www.dispatch.com/news/20200813/teary-chief-justice-talks-emotionally-about-rsqcenturies-of-inequalityrsquo-in-court-video?template=ampart> .

Most recently, the Commission of the City of Dayton passed a resolution recognizing the increase in firearm homicides resulting from stand your ground laws and the disproportionate effect stand your ground laws have had on communities of color.

If it passed SB383, the General Assembly would virtually slap people of color in the face and tell them that the “centuries of inequality in our country” will not end and that Ohio government does not care about equal justice. Passage would announce that in Ohio the ideal of equal justice for all is just a mirage and not for people of color.

I paste next URLs for reports evidencing some of the broad expert opposition nationally to such laws as SB383 and the additional gun violence that has been the result of such laws:

<https://scholars.org/contribution/why-stand-your-ground-laws-are-dangerous>

<https://www.govinfo.gov/content/pkg/CHRG-113shrg94124/pdf/CHRG-113shrg94124.pdf>

[https://www.americanbar.org/groups/diversity/racial\\_ethnic\\_justice/projects/SYG/](https://www.americanbar.org/groups/diversity/racial_ethnic_justice/projects/SYG/)

<https://www.nytimes.com/2015/05/04/opinion/stand-your-ground-makes-no-sense.html>

<https://www.nber.org/papers/w18187.pdf>

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

<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2582988>

<https://www.rand.org/research/gun-policy/methodology.html>

<https://www.rand.org/blog/2019/09/stand-your-ground-laws-increase-violence.html>.

[https://www.splcenter.org/sites/default/files/stand\\_your\\_ground\\_kills\\_-\\_how\\_these\\_nra-backed\\_laws\\_promote\\_racist\\_violence\\_1.pdf](https://www.splcenter.org/sites/default/files/stand_your_ground_kills_-_how_these_nra-backed_laws_promote_racist_violence_1.pdf)

## **7. Conclusion**

What is the rush? The rush must be to please the gun lobby during this short lame duck session, when some of the legislators may not be in the General Assembly next year and are instead looking forward to different jobs. Different sides on this issue in good faith believe their respective positions, but the gun lobby appear to address the issues as emotional ones without knowing or considering what the law actually is, why law enforcement agencies oppose such bills or the consequences of changing the law.

The General Assembly should either reject this legislation, or there should be a continuing open debate in the next session of the General Assembly before overruling over 40 years of Ohio law.

Thank you for your consideration of this letter, and please let me know if you have any questions.

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