Testimony Opposing SB 383
Ohio Senate Committee on Government Oversight and Reform
Submitted By:
Andrea R. Yagoda

Chairman Coley, Vice Chair Huffman, Ranking Member Craig, and Members of the Committee, thank you for allowing me to present this testimony opposing SB 383. I am speaking to you today as a private citizen, a retired attorney and a conceal carry licensee.

Unlike many states Ohio has not legislatively defined "self defense" and therefore it is defined by common law and subsequent decisions interpreting the same.

In the past, the three elements **an accused** had to establish, by a preponderance of the evidence, to raise self defense were: (1) the slayer was not at fault in creating the situation giving rise to the affray, (2) the slayer had a bona fide belief that s/he was in imminent danger of death or great bodily harm and that his/her **only means of escape** from such danger was in the use of such force and (3) the slayer must not have violated any duty to retreat or avoid the danger. State v Robbins, (888) 58 Ohio St. 2d 74 @ para.2 .

However, effective March 29, 2019, the legislature shifted the burden of proof to the State and made it easier for those charged to avail themselves of the claim of self defense. Pursuant thereto, once there is evidence presented that tends to support a claim of self defense, the **burden shifts to the state to disprove self defense beyond a reasonable doubt**. Thus the **State must prove beyond a reasonable doubt** that an accused (1) was at fault in creating the situation giving rise to the affray, OR (2) did not have a bona fide belief that

s/he was in imminent danger of death or great bodily harm for which the use of deadly force was his/her only means of escape, OR (3) did violate a duty to retreat or avoid the danger. *See:* R.C. 2901.05(B)(1); State v. Carney 2020-Ohio-2691 (emphasis added)

Ms. Phelps' testimony incorrectly states, first, that to establish self defense one must prove that "retreat/escape is not possible." [1] The law does not require proof that retreat is impossible but rather whether it was unreasonable and unsafe to do so. State v. Williford, (1990) 49 Ohio St. 3d 247, 250; State v. Darby, 2011-Ohio-3816 Two, the accused does not have to prove anything, rather it is the State that has to prove beyond a reasonable doubt that retreat was a reasonable and a safe alternative not taken by the accused. [2]

Buckeye Firearms alleges "If you honestly believe you are about to die, it is cruel and absurd to expect you to attempt escape, delaying your own self-defense and putting your life in even greater danger." Contrary to this assertion, if one believes that s/he is about to die, there is no duty to retreat. The Ohio Jury Instructions on duty to retreat are as follows:

> The defendant had a duty to retreat if he/she (Use appropriate alternative[s])
>
> (A) was at fault in creating the situation giving rise to (describe the event in which the deadly force was used); OR

[1] The proponents tend to use the word escape. Retreat is defined as "an act of moving back or withdrawing" whereas escape is "breaking free". Merriam Webster Ohio only requires retreat if reasonable and safe.

[2] In State v Tolle, 2020-Ohio-935 the court held that a jury instruction on self defense is warranted if the evidence on self defense is sufficient to raise a question in the mind of a reasonable juror.

(B) **did not have reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of death or great bodily harm**; OR (emphasis added)

(C)had a reasonable means of escape from that danger other than by the use of deadly force. OJI CR 421.21

In her concurring opinion in State v Thomas, (1997) 77 Ohio St. 3d 323. Justice Stratton addresses the duty to retreat: “Had the defendant gotten around Flowers to the door of the small trailer, would her attempt to escape the altercation have increased the risk of *her* death? Would Flowers have become further enraged and tried to kill her? Under these circumstances, imposing a duty to retreat may have greatly increased the risk of a violent attack upon the defendant. “ Clearly then, in Ohio an individual has no duty to retreat if unsafe or unreasonable to do so and said individual may stand his/her ground and respond with deadly force if s/he reasonably fears for his/her life.

The other argument that proponents raise in support of this bill is that the jury cannot comprehend the situation and in response to questions, some referred to the “reasonable man” theory. Ohio has adopted a subjective test in determining the reasonableness of one’s actions in using deadly force when self defense is claimed. In State v. Thomas, (1983) 13 Ohio App. 3d 211, the Court in addressing self defense stated:

> The issue in this case involves the second element, and requires a distinction in the nature of the belief required between, on the one hand, a good faith belief that a particular defendant may actually have, and, on the other hand, a belief that a reasonable person in such circumstances would or should have. The law of Ohio clearly adopts the former test, rather than the latter. *State* v. *Sheets* (1926), 115 Ohio St. 308.

> "* * * it seems now to be finally determined that guilt is personal, and that the conduct of any individual is to be measured by that individual's equipment mentally and physically. He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would so do. A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer, and braver man might be. * * *." *Nelson* v. *State* (1932), 42 Ohio App. 252, 254. [3]

In Thomas, *supra* it was held that the testimony of defendant's psychiatrist should have been admitted at trial. "… it is not difficult to perceive that a paranoid personality, who viewed everything negatively, might interpret the danger presented by an advancing individual differently than an ordinary person would interpret such danger. To that extent, some of the testimony would be an aid to the jury in regard to the determination it was required to make regarding this particular defendant's mind. It was, therefore, relevant, …"

This conclusion was reaffirmed in State v Koss, (1990) 49 Ohio St. 3d 213 wherein the court held that expert testimony as to "Battered Woman Syndrome" is admissible and declared that "Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self defense. The defendant's state of mind is crucial to this defense." [4]

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[3] Some courts refer to this as a subjective-objective test. State v Thomas. (1997) 77 Ohio St. 3d 323,330, State v Smith 2004-Oho-6608 .

[4] In State v Smith, (1983) 10 Ohio App. 3d 99 it was held that the deceased's admission to defendant that he had killed a person, her personal knowledge of violent attacks by the deceased upon others, and her knowledge through hearsay that the deceased had committed an unprovoked act of violence upon another, were all evidence relevant to defendant's belief that she was in imminent danger of death or great bodily harm and were admissible to prove her state of mind.

The Koss, *supra* court approved the jury instructions given by the trial Court which were almost identical to the Standard Ohio Jury Instructions given in Self defense cases and which are as follows:

> In deciding whether the defendant had reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of (being killed) (receiving great bodily harm), you must put yourself in the position of the defendant, with his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of (insert name of [victim(s)]) and decide whether his/her acts and words caused the defendant to reasonably and honestly believe that the defendant was about to (be killed) (receive great bodily harm). OJI CR 421.21 (6)

Loudly and clearly Ohio demands that the trier of facts place themselves in the shoes of the accused and if evidence is presented of the psychological and physical changes that occur when one is faced with a threat it would be admitted. This should alleviate the fears of the proponents of this bill. Self defense is not determined by the trier of facts in a vacuum.

Inherent in self defense is that the use of deadly force was a necessity. Proposed ORC 2901.09 (C) prohibits the trier of fact from considering whether the use of force was "the only way to escape the danger" [5] as the trier of fact is prohibited from considering whether escape or retreat was a reasonable and safe option for the accused. The trier of fact must consider the conduct of the defendant to determine whether s/he acted reasonably under all the circumstances. If the defendant could have safely retreated but did not do so, a jury should be permitted to consider that fact in deciding whether the defendant honestly and reasonably believed s/he needed to use deadly force in self-

[5] State v Robbins, *supra*

defense. Under this bill whether s/he had a safe and reasonable alternative to walk away is irrelevant.

In Darby, *supra* two neighbors got into a verbal confrontation. The victim was in the street approaching the house of the defendant and then charged at her but never reached the stairs to the porch and was unarmed. Rather than re enter her home where the door was open, the Defendant drew a weapon and shot the victim. In concluding that there was no error in the finding that self defense was not proven the court held:

> Furthermore, under Ohio law, one is not entitled to use deadly force if he or she has available a reasonable means of retreat from the confrontation. Here, there was no testimony that appellant was unable to retreat through her front door in order to get away from Ms. Mankins. When asked if she was able to move, appellant only responded, "I don't know." (Tr. 237.) Although Ms. Mankins did challenge appellant to a fight, there was no evidence presented to indicate that Ms. Mankins had a weapon of any kind or that she implied she had a weapon.

Under this bill, defendant would have had no duty to take the few steps back and close her door to avoid the use of deadly force and the jury would be excluded from hearing and considering that evidence. Clearly, this ability to avoid deadly force should be considered in determining whether the threat was imminent.

Proponents of this bill reference "law abiding citizens" or "law abiding gun owners". What exactly is a "law abiding gun owner" as referenced by Ms. Phelps? Is it a citizen who has a conceal carry permit or an individual who generally abides by the law? Michael Drejka, a Florida resident was a law

abiding citizen [6] with a conceal carry permit when he shot Markeis McGlockton in the back after being shoved to the ground by Mr. McGlockton but after Mr. McGlockton was walking away. Drejka claimed he was acting in self defense as he feared Mr. McGlockton would return to attack him. The sheriff refused to charge Mr. Drejka calming that Drejka was "standing his ground." After video surfaced, Mr. Drejka was charged and subsequently convicted by a jury.
Then there is Travis MacMichael, the man who is charged with shooting and killing Ahmaud Arbery, another "law abiding gun owner." Authorities did not originally charge him either on various grounds like citizens' arrest and stand your ground.

The NRA in its testimony refers to the necessity of removing the duty to retreat to "prohibit civil lawsuits by criminals or relatives of criminals when they are injured or attacked." Neither Mr. MacMichael or Arbery would, under common parlance, be considered "criminals". We cannot assume that all individuals killed when someone claims self defense is a criminal. Nor can we assume that everyone who avails themselves of self defense is a law abiding citizen. One engaged in criminal activity can also avail themselves of self defense claims.

See: State v Turner, (2007) 171 Ohio App. 3d 82

> The letter from Turner's trial attorney supports Turner's argument that his attorney advised Turner that a claim of self-defense was unavailable to him because Turner was engaged in a drug deal when the shooting occurred. That bar is not imposed by *Melchior* or *Robbins.* That Turner was engaged in other criminal conduct when he caused the victim's death is immaterial, so long as his criminal conduct did not give rise to the affray and he was not the first aggressor. On this record, a claim of self-defense could have been available to Turner with respect to charges arising from

[6] At his sentencing it was disclosed he had no prior record.

McQuirt's death. *Also See*: State v Stevenson, 2018-Ohio-5140 Wherein Defendant therein also engaged in an illegal drug sale and had a weapon under disability. [7]

We cannot indulge ourselves with the fiction that those who we would generally consider “law abiding” do not carry concealed weapons on their person or in their cars without a conceal carry license nor that all of those that carry weapons whether concealed or in plain sight or those with conceal carry permit are as trained as Ms. Phelps or would react in the way we would hope when confronted with a situation wherein they have a choice to retreat or use deadly force. We cannot assume that all “law abiding” citizens armed with deadly weapons are not looking for a fight. We cannot institute laws premised on the illusion that all citizens may be as trained or responsible as the few that come in and testify. Those witnesses have testified that will always try to avoid or retreat so a change in the law has no consequence to them. But it does make it easier for those who are not like them. In the past year I have done quite a bit of research into self defense. Although I have not read every case in Ohio where this defense was raised, I have read many, and I can say that I have yet to find one where a total stranger aggressively approached another and the non aggressor acted in self defense and was charged, unless s/he kept shooting after the aggressor retreated and have found only one where the defense failed solely on duty to retreat. I mention this as this appears to be the common example generally given to this body.

[7] While the purpose in going to the residence to purchase illegal drugs, the defendants were invitees and therefore were where they had a right to legally be.

The good news for proponents of this bill, is that the law **as it currently exists** does not mandate that those who avail themselves of self defense prove anything, the State is required to disprove self defense beyond a reasonable doubt; that if the threat of death or bodily harm is imminent, there is no duty to retreat; that if it is not safe or reasonable, there is no duty to retreat; that the trier of fact is required to put themselves in the shoes of the accused to determine whether s/he acted in self defense and the courts allow an abundance of evidence to make sure the jury sees it from the standpoint of the accused; that even if the belief of imminent death or harm was a mistake, one is not deprived of the defense; that there are no statistics offered that either law enforcement or prosecutors abuse their discretion in prosecuting cases where self defense is claimed. The old saying “if it ain’t broken don’t fix it” should be applied to ORC 2901.09 (B) and (C) and ORC 2307.601 (B) and (C) and I would urge this Committee to reject SB 383.

Thank you.

Andrea R. Yagoda