REVISED TESTIMONY **AGAINST** SB 215
Senate Veterans and Public Safety Committee
Submitted By: Andrea R. Yagoda, Private Citizen

Chairman, Hoagland, Vice Chair Johnson, Ranking Member Thomas and Members of the Committee: Thank you for allowing me to participate in this hearing today on SB 215. I am a private citizen and a resident of Ohio for the last 47 years, concerned about the safety of our community and how this bill affects the same. My name is Andrea Yagoda and I presently hold a conceal carry permit. If you believe in justice for all, this bill should offend you. If you believe that we are all equal in the eyes of the law this bill should offend you. If you believe that the rules which govern courts should be applied equitably and across the board on all cases that come before the court, this bill should offend you. If you believe that the State and its judiciary should not engage in any form of selective enforcement, this bill should offend you. This bill specifically carves out its own set of rules for anyone claiming self defense whether it be in a civil or a criminal case. It takes violent crimes to a new level of preferential treatment. Self Defense [1] now rises from an affirmative defense to immunity, a complete bar to civil actions and criminal prosecutions and effectively, provides an impenetrable wall of protection around individuals committing acts of violence claiming self defense. Even arrests [2], investigations and arguably grand jury proceedings must commence with the presumption of self defense. It is an extraordinary protection with nothing comparable in Ohio law.

[1] I am using self defense to encompass defense of self, others (which I assume includes defense of forcible felony), threat of force, etc.

[2] A police officer may not arrest before making a determination that self defense does not exist. RC 2901.092 (A)If an arrest is made and subsequently, the Defendant prevails on his/her immunity claim, is the officer who made the arrest subject to civil liability?

I would like to focus on the pre-trial immunity provision of this bill as there is inadequate time to personally testify on all aspects of this bill. [3]

SB 215 establishes immunity if one's use or threat of use of "reasonable force" is justified as defined by the bill; expands the circumstances under which self defense is presumed and provides for pre trial hearings to establish immunity which if found would bar criminal prosecution and civil liability.

Under SB 215 in the criminal arena, the Defendant has no obligation whatsoever to come forward with any evidence of self defense. S/he must only file a pre trial motion "claiming" that s/he acted in self defense. No sworn testimony, no affidavits, no witnesses, not even facts to establish the defense. The **MERE** filing of the motion "establishes a prima facie claim of self defense." [4] Once the motion is filed, which could be as simple as one sentence in the Memorandum In Support, a prima facie case is established. "The Defendant claims that s/he used reasonable force in self defense."(or reasonable deadly force, if applicable) That's it. That is all that is required to establish a prima facie case for that defense. But, at this pre trial hearing, the Defendant has no duty to present any evidence nor even facts in his/her motion. And even though "reasonable force" is defined in the bill as ***"use of force ..that a reasonable person would judge to be necessary to prevent injury or loss and can include deadly force if a person reasonable believes that using such force is necessary to avoid injury or risk to the person's life or injury…"*** Under this bill, the pre trial motion need not even allege

[3] I also wonder whether this pre trial procedure violates Ohio Constitution Article IV.05 "*The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right."*

[4] Prima facie" refers to ***evidence*** sufficient to prove the claim.

sufficient facts for a court to determine whether the force was reasonable because **once** filed it is prima facie evidence of the same.

This bill's pre trial procedure is more extreme than those of other states. The Florida Statute [5] has been interpreted to require that, at the very least, the Defendant must raise facts to establish a prima facie claim in his motion upon which the defense rests. After reviewing the motion, **the judge** then determines whether a prima facie case has been established by the Defendant in his motion, before the burden shifts to the State. Jefferson v. Florida, (12/28/18) 2D18-3646; Colorado requires the Defendant, at a pre trial hearing to prove immunity by a preponderance of the evidence. [6] Colorado v. Guenther, (1987) 740 P. 2d 971; Alabama requires the Defendant to prove immunity by a preponderance of the evidence. [7] In Georgia a Defendant must establish the claim by a preponderance of the evidence. Bunn v State, (2008) 667 SE 2d 605; South Carolina requires the Defendant to establish immunity by a preponderance of the evidence. State v. Duncan, (2011) 709 SE 2d 662; Kansas requires the prosecutor to merely show probable cause to believe the Defendant's use of force was not justified and the hearing **MUST** consist of evidence. State v. Hardy (2017) 347 P. 3d 30; Kentucky also requires the prosecutor to establish probable cause for unreasonable use of force but directs the court's attention to the evidence of record, including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Rodgers v Commonwealth, (2009) 285 SW 3d 740

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[5] Florida Code 776.032(4)

[6] "Preponderance of the evidence" is " the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value.

[7] Alabama Code 13A-3-23(5)(d)(2)

Pursuant to SB 215, the judge makes no finding as to whether the Defendant has recited facts sufficient to establish a prima facie case because the **MERE** filing of the motion establishes the same.

SB 215, shifts the burden to the State to disprove self defense beyond a reasonable doubt once the motion is filed. The problem in this scenario is that normally the Defendant testifies to establish self defense. Why? Because it is what s/he believed at the time s/he acted, his/her state of mind as it involves an excuse or **justification peculiarly within the knowledge of the accused**. S/he cannot be forced to testify at this hearing because of the Fifth Amendment protecting one from self incrimination so is not subject to cross examination.

So, I shoot my husband. No witnesses, just the two of us. I call 911 then I call a lawyer who tells me to remain silent when the police arrive. I say nothing. I am arrested and charged with murder. (which under this bill is unlikely as I am immune from arrest and from even being charged unless the police have probable cause to believe my actions were not justified. My attorney files a pre trial motion claiming I acted in self defense. A prima facie case is established and now the State must prove beyond a reasonable doubt that I did not act in self defense. I refuse to testify based on my Fifth Amendment right. Under this bill the court is required to grant the Motion and specifically state that I acted in self defense, if the State fails to satisfy its burden. Normally at a trial I would generally have to testify to establish this defense and be subject to cross examination. The jury would have to determine my credibility on this issue. But the Ohio legislature just gave me a free pass to kill my husband.

Keep in mind that even if I did allege facts in my motion, I am not subject to cross examination and the State would bear the burden of proof by clear and convincing evidence to disprove what was merely alleged in the motion. There are no penalties for perjury because my statements are not sworn. No "trier of facts" for an acquittal and bar to prosecution.

So, in effect, the State must prove its entire case at a pre trial motion hearing. And yet, if the State proves its case at the pre trial hearing, it must then try its case a second time before a jury and the Defendant gets to raise self defense and gets a second bite at the apple. And who pays for these two trials? We, the taxpayer. Nowhere in the Ohio Revised Code is any crime or defense treated in this matter. How do the sponsors of this bill justify this preferential treatment? Why do those who primarily use firearms, when claiming this defense, receive this very special gift that does not exist for any other Defendant accused of any other crime or any other defense?

Let's consider I have been charged with murder. I have filed a Notice of Alibi. Why is it that I do not establish a prima facie defense of alibi with the filing of the Motion. Why don't I get a pre trial hearing wherein the State is required to prove its case before the trial?

The civil arena for the claim of self defense in a tort action is just as bad. In a civil action a simple one line motion for a pre trial immunity hearing establishes a prima facie case for self defense [8]and then the Plaintiff has the burden of disproving the claim by "substantial evidence" which is not defined. In contrast, I am being sued for libel. Why

[8] This appears to conflict with OH Civ. R 7 which requires particularity of the grounds and relief sought since the statute states what must be included, ie, a mere allegation that one acted in self defense and the filing in itself establishes a prima facie defense.

don't I have the ability to file a one line motion that says "my statement was true and truth is a defense" and this serve to establish a prima facie case for truth?

Why isn't a Defendant claiming self defense held to the same standard as other civil cases and be required to file a Motion for Summary Judgment under Civ. R. 56 ? [9] Although not required, generally the moving party produces evidence. Civ. R. 56 refers to discovery and depositions. Why don't the normal Rules of Civil Procedure apply here? What rationale can there possibly be for chilling ones right to redress in the courts for harm or death to one or one's family member?

And what about the witnesses and victims who will now be required to appear at possibly two "trials" in both criminal and civil cases. This "double trial" will undoubtedly discourage witnesses from attending a second hearing. Does this legislative body have no regard for them? Drag victims, if they survive, through two hearings forcing them to relive their trauma not once but twice?

And what about the tactical advantages afforded Defendants under both these scenarios which no other civil or criminal Defendant enjoys? Discovery and construction of testimony at the expense of the taxpayer. The Defendant gets to see the trial play out before him/her in real time.

The Kentucky Supreme Court in Rodgers, *supra* recognized the tentative abuse and advantages to the defendant in rejecting such an approach:

First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to Miranda warnings

[9] Civ. R 56 provides for dismissal of actions or a finding of fact to which the parties are bound in trial if the court, after reviewing the "*evidence, stipulations*, finds that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. *"Further that reasonable minds can come to but one conclusion adverse against the party whom the motion is sought*".

prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial.

Why are violent Defendants afforded this pre trial hearing when no other Defendants are given this right? The use of force or threatened force is the only act which permits a Defendant to challenge the State's/Plaintiff's evidence twice and subject the witnesses and victims to be cross examined twice. With all other crimes/defenses under the code, the State is only required to prove its case once and Defendants in civil cases seek dismissals via Civ. R. 12 and 56.

A gift to the select few and/or an assault on victims of violent crime?

The proponent's arguments in favor of this pretrial immunity assert that the pretrial process discourages the filing of frivilous tort actions and lessens the prospects of prosecution. Every individual sued civilly or charged with a crime would love to discourage lawsuits lacking in merit and/or lessen the prospects of prosecutions. But why should only those claiming self defense be protected by the State of Ohio?

SB 215 is, in my opinion, a direct assault on the judiciary and the guarantee of justice for all.

Why are we waging war on victims of violent crime? Is this Bill really necessary?

I have had a permit since the early inception of the law providing for concealed carry permits. I obtained my permit as a result of what turned out to be a credible threat against my life. A client and I were threatened. No one, including myself, took it seriously until my client was shot and killed by the person making the threat. After that,

threats and conduct, made in my line of work, which appeared threatening to me were taken seriously. The woman who carried out the threat went to prison. I appeared, on my own behalf and on behalf of the victim's family to oppose release at every parole hearing. When release was imminent I sought my conceal carry permit to protect myself, my family and my home. Up until that time I had no experience with firearms of any kind but here I was a 50-year old woman preparing to defend herself with a firearm, if necessary. I would not have felt comfortable walking around with a firearm in plain view. In my mind, this would just be asking for trouble. Rambo, I am not and would never want to be. So a concealed carry permit was my only legal option.

Had SB 215 been in effect, at that time, I would have purchased a firearm and carried it with me. I would have told myself that I would get training and go to the shooting range to learn about my gun and to properly shoot it. But I know, even now, that life and work would have gotten in the way and the training and practice would not have happened as I would not have found the time.

The mandatory education and training were invaluable to me - not just to learn about the safety in handling a firearm but to build my confidence in the use of one.

Did I know that you should never point a gun at anyone? Yes. Did I know that in transferring a gun you lower the weapon towards the ground? Yes. But without the training would I have thought about that when handling the gun? No. After the training I did not have to think about it, it was automatic for me.

Did I know that if a firearm was fired with the safety on, normally it would not fire? Yes. But did I know that if fired with the safety on and then the safety taken off it could fire? No. I learned that in my mandatory training.

Did I know that a bullet discharged from a revolver could travel for a mile or greater? Absolutely not. Never even really thought about it until my mandatory training/education. I am pretty confident that I am not the only one. We hear stories about people celebrating by shooting guns in the air and falling blocks away hitting an innocent bystander. Obviously, they were not thinking about it either. It is common sense that in homes with children firearms should be stored securely where children do not have access but we have learned that common sense does not always prevail. I would hope that at age 50 I was more mature than the normal 21 year old and had more common sense than someone my junior and yet these were things I did not contemplate. Yet this legislative body is considering putting a concealed firearm in the hands of anyone 21 or older with limited exceptions.

My conceal carry education/training planted a seed. I cultivated that seed by continuing to practice safety and practice the handling and shooting my weapons at a range. I learned about my guns and how to use them. As a result, the training built up my confidence and skills. That would not have been the case without the mandatory training/education prescribed. I obtained my permit to protect myself. Without confidence that would not have been accomplished. In actuality, without that seed, far from being able to protect myself and my loved ones from harm, I would have been a danger to myself and others. A person lacking confidence in the handling of a firearm is a walking time bomb.

I have heard the argument that the law as is stands will not deter criminals from obtaining guns. Well, we have laws against murder, yet folks kill each other daily. We have laws prohibiting theft, but we still have thefts. Do we abandon laws based on the

argument that certain folks will not abide by them? No, we do not. I have no way of knowing how many folks out there have been deterred from carrying a concealed weapon because we have a permit process in place nor how many have been declined a permit due to a record check. What I do know, is that those who have permits have learned something about firearm safety and the handling of a firearm. SB 215 actually encourages people who have no experience with firearms to carry and conceal them. What could possibly be the rationale for this?

According to the Ohio Attorney General's report for 2020 there were 169,232 CHL issued in 2020. 96,892 of the licenses issued were first time applicants. 72,340 were renewals. 1,777 licenses were denied and 42 were granted permits although declared mentally incompetent, 35 of these permit holders were declared mentally incompetent after the license was issued and the remaining before the license was issued. In light of this fact to ensure the safety of the public, Mr. Yost states in his report " To ensure that the program runs as designed, my office partnered with the Ohio Department of Public Safety last year to forge a new path, and we now alert sheriffs when a court deems a license holder to be mentally incompetent. This means that a population not legally permitted to own a gun can no longer escape notice. " This safeguard will no longer be in place if this Bill is passed. It is comforting to know that at least

As a permit holder I cannot think of any reason why this body would delete the requirement that an individual approached by a law enforcement officer be required to advise said officer of the presence of a firearm . Every time a police officer stops a vehicle s/he is at risk. While an officer may never know what awaits him/her when s/he approaches a vehicle at least he is alerted, at present, that the occupant of the vehicle has

a carry conceal permit and that the occupant may have a weapon, one small measure to insure the safety of our law enforcement officers.

Some fear individuals will be charged for failing to give notice because, under certain circumstances, they forget. I can honestly say that no matter what happens with this bill, I will-automatically put my hands on the wheel and notify any officer of the presence of a firearm or absence thereof in my vehicle for my safety and that of the officer but I cannot guarantee others will do so.

Honestly, I do not understand the grave concern about this. Did you ever leave a grocery store and forget to pay for an item on the bottom of your cart? Every day citizens are involved in situations where they do something or fail to do something and lack the "intent" to commit crimes. Some officers exercise their discretion and do not charge, some do but it works its way through the system and most times the cases work out equitably. Did you hear about dozens or hundreds of cases to the contrary, during proponent testimony? In my quick review of the testimony presented I did not see any at all. We cannot indulge ourselves in every "what if" scenario.

The definition of "promptly notify" is not very difficult nor ambiguous.

In State v. Brown, 2006-Ohio-4174, 859 N.E.2d 1017, (Trumbull County, 11th Dist.), the defendant challenged former R.C. 2923.16(E)(3) now (E)(1) as unconstitutionally vague. Citing Black's Law Dictionary, the Eleventh District determined that to do something "promptly" is to do it "without delay and with reasonable speed." Therefore, a person of common intelligence would readily understand "promptly inform" as requiring the CHL holder to inform the officer about the firearm "as soon as possible" and found "promptly" was not ambiguous nor vague. In Brown, *supra*

[10]the defendant was stopped for speeding. After returning to his patrol car to check on defendant's record, the officer was advised Brown had a concealed carry license. When he returned to Brown's vehicle the officer asked Brown if he was carrying. A loaded firearm was found in an unlocked glove compartment and Brown was charged. The appellate court sustained the conviction holding that Brown had ample opportunity to advise the officer that he had a loaded weapon in the vehicle.

In State v. Griffin, (1st Dist Hamilton Conty, 2020) 2020-Ohio-3707 in holding that usage of the word "promptly" contained in ORC 28923.16 (E(1) was not vague the court stated:

> The critical question in all cases as to void for vagueness is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law. *City of Norwood v. Horney* (2006) , 2006-Ohio-3799. The void for vagueness doctrine does not require statutes to be drafted with scientific precision. *State v. Anderson* , 57 Ohio St.3d 168, 174, 566 N.E.2d 1224 (1991). When examining a statute for vagueness, it should be measured against three values: 1.) to provide fair warning to the ordinary citizen so their behavior may comport with the statute, 2.) to preclude arbitrary, capricious, and generally discriminatory enforcement by officials, and 3.) to ensure fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. *State v. Tanner* , 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984).

In Griffin, *supra* the defendant was stopped for excessive tinting of his car windows. When defendant pulled his wallet to show identification, the office thought he may have seen a concealed carry permit. He then asked if Griffin had such a license. Griffin answered in the affirmative. The officer then asked Griffin if he had a weapon in the car. Only then did Griffin disclose the weapon, however, another weapon was located in the vehicle which had not been disclosed until after the arrest. The appellate court upheld the conviction for failing to disclose both weapons promptly.

[10] At the time of Brown, it was illegal to carry a loaded firearm in an unlocked glovebox

In State v Lloyd, (2018 Warren County, 12th Dist) 2018-Ohio-4320, 121 NE 3d 840 the defendant was stopped for running a red light. He was then asked to exit the vehicle. The officer asked if he could do a pat down and then asked Lloyd if he had a weapon. At this point Lloyd did advise the officer that he had a weapon. The appellate court found that at any point from when defendant was stopped, gave his identification, or exited the vehicle he could have advised the officer of the weapon and his failure to do so was enough to sustain his conviction.

The duty to "promptly inform" is for officer safety, so that during an interaction between an officer and a CHL holder, the officer is aware that there is a loaded firearm in the vehicle. Brown, *supra*.

Further troubling about this bill is the fact that it extends conceal carry to all deadly weapons but only limits the prohibition against making contact with a loaded firearm when approached by law enforcement. It does not include in this prohibition, knives, and other weapons capable of inflicting death or adapted for such purpose. Further, it prohibits one from having contact only with a "loaded firearm". This is a tragedy waiting to happen. A law enforcement officer observing someone reaching for a firearm has no way of knowing if the weapon is loaded. When approached by a police officer an individual should be prohibited from coming in contact with any deadly weapon s/he has on his/her person or under his/her control which has defined by numerous courts in OMVI cases.

This bill requires all persons stopped by police to keep their hands in plain sight not just those carrying concealed deadly weapons. I remember when Republicans in this legislative body argued that the requirement that a CHL holder show their hands when

stopped by law enforcement was a burden. One of the examples given was that the individual could have been tending to unruly children. So now under this bill, we are requiring all citizens to do so. Perhaps a good thing but placing this provision in a carrying concealed weapons statute hardly gives Ohioans notice of this requirement. Who would know to look at this provision where it is located and thus understand this duty in order to comply.

Although none of us really know how we will react when and if forced to use deadly force with our adrenalin flowing, I am confident that I am better equipped to do so due to my mandatory training/education.

As a citizen, and voting constituent I ask this committee to vote no on this bill.

Thank you.

Andrea R. Yagoda