

SUBJECT: Justification for use of force or deadly force in self-defense

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Pena, Vaught, Riddle, Pierson, Talton

3 nays — Hodge, Mallory Caraway, Moreno

1 absent — Escobar

WITNESSES: (*On committee substitute:*)

For — Susan Buxton; Deanna Eggleston; Tara Mica, National Rifle Association; Jason Nassour, Keel & Nassour, LLP.; (*Registered, but did not testify:* James Dark, Texas State Rifle Association; Alice Tripp, Texas State Rifle Association)

Against — Bill Delmore, Harris County District Attorney's Office; Peter Johnson; Marsha McCartney, North Texas Brady Campaign to Prevent Gun Violence; Randall Sims, 47th District Attorney's Office

On — Scott Ozman, Texas Trial Lawyers Association

BACKGROUND: Penal Code, sec. 9.31 states that a person is justified in using force against another if the person reasonably believes the force is immediately necessary to protect the person against the other's use of unlawful force. The use of force against another is not justified:

- in response to verbal provocation alone;
- to resist an arrest or search that the actor knows is being made by a peace officer, with some exceptions;
- if the actor consented to the exact force used or attempted by the other;
- the actor provoked the other 's use of unlawful force, with some exceptions;
- if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was unlawfully carrying a weapon. In other words, another's unlawful possession of a weapon is not justification by itself for the use of deadly force.

Under Penal Code, sec. 9.32, use of deadly force against another is justified:

- if the person is justified in using force under sec. 9.31;
- if a reasonable person would not have retreated, except the retreat requirement does not apply if the one against whom the deadly force is used has committed the offense of unlawful entry in the person's habitation; and
- when and to the degree the person reasonably believes deadly force is immediately necessary to protect himself against the other's use or attempted use of deadly force or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Civil Practice and Remedies Code, sec. 83.001 provides a defendant with an affirmative defense to a civil action for damages for personal injury or death if the defendant, at the time the cause of action arose, was justified in using deadly force under section 9.32 of the Penal Code against a person who, at the time of the use of force, was unlawfully entering the habitation of the defendant.

DIGEST:

CSHB 284 would create a presumption of reasonableness for a person's belief that the use of force or deadly force to protect that person was immediately necessary. The belief would be presumed to be reasonable if the actor knew or had reason to believe that the person against whom force or deadly force was used:

- unlawfully and with force entered or was trying to enter that person's home, vehicle, or place of business or employment;
- unlawfully and with force removed or was trying to remove that person from the person's home, vehicle, or place of business or employment; or
- was committing or trying to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

CSHB 284 also would remove the duty of a person to make a reasonable effort to retreat from one against whom deadly force was used. If the person had a right to be present at the location where the force or deadly force was used, had not provoked the person against whom the force or

deadly force was used, and had not engaged in criminal activity at the time the force was used, the person's failure to retreat could not be considered in determining whether that person reasonably believed the use of force or deadly force was necessary.

The bill also would amend the Civil Practices and Remedies Code, sec. 83.001 to make a defendant who was justified in using force or deadly force under the Penal Code immune from civil liability for personal injury or death resulting from that use of force or deadly force.

The bill would take effect September 1, 2007, and would apply only to offenses or causes of action that occurred on or after that date.

**SUPPORTERS
SAY:**

CSHB 284 would shift the burden from the victim to the aggressor by granting victims, under certain circumstances, a presumption of reasonableness in their belief that the use of force or deadly force was immediately necessary. In addition, removing civil liability would allow victims to focus on defending themselves and their families instead of thinking about potential lawsuits.

The bill would expand the "castle doctrine" to cover not only the home but vehicles, work places, and businesses. This is necessary because in modern life people spend an increasingly large proportion of their time in these places and should enjoy the same protections and justifications for self-defense there that they enjoy at home.

Before 1973, Texas did not impose a duty to retreat. In 1973, the Legislature amended the Penal Code to permit the use of deadly force only if a reasonable person in the situation would not have retreated. The effect was to place on the victim the burden of retreating in the face of an impending attack unless a reasonable person would not have done so. This change reversed a longstanding practice of recognizing the right of people to stand their ground in the face of attack. Justice Oliver Wendell Holmes, in response to a question about whether a person should be expected to consider whether a reasonable person would flee a confrontation, once wrote that "detached reflection cannot be demanded in the presence of an uplifted knife." CSHB 284 would confirm this belief and return Texas law to this traditional understanding.

The presumption of reasonableness would not create an excuse for mayhem on the streets. Prosecutors could overcome the presumption if

they could show that the entry was lawful or that the victim was invited. Civil immunity is important because Texans who shoot intruders usually have to face at least a grand jury and possibly a trial. Legal expenses can easily mount up if the perpetrator or his survivors file a retaliatory civil suit. Civil immunity would prevent intruders or attackers from profiting from their crimes if a person's use of force or deadly force fit the criteria for reasonableness.

CSHB 284 also would address organized crime and gang activity by explicitly stating that the right to stand your ground does not extend to those engaged in criminal activity at the time the force is used. The duty to retreat also would remain in place for those who have provoked their attackers and for those who have no right to be present at the location where force is used. Because the duty to retreat would be eliminated only for people who were obeying the law at the time of the use of force or deadly force, the protections of the bill would extend only to those who truly deserve d them.

CSHB 284 also would align Texas with an increasing number of states that have lessened or replaced the duty to retreat since 2006, when Florida was the first in the recent trend. Besides Florida, 14 other states have passed similar legislation, including Alaska, Alabama, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, South Carolina, and South Dakota.

**OPPONENTS
SAY:**

CSHB 284 is a solution in search of a problem because current law already provides a good balance between a person's right to self-defense and the value of human life. The law dictates that if a reasonable person can retreat, that person should do so. Current law already allows people to resist deadly force with deadly force if they are unable to retreat. The rule that retreat should be used where possible avoids violence and conserves human life.

Under CSHB 284, if the person who used force or deadly force could prove that the person's home, vehicle or place of business was forcibly and illegally entered while it was occupied, then the belief that force was immediately necessary could be presumed to be reasonable. This would prevent a jury from considering reasonableness or proportionality, which could cause a miscarriage of justice as some thieves are intent only on committing property crimes, not on physically harming anyone. Texas

juries historically have done an excellent job of siding with property owners against home invaders, and thus no change in the law is necessary.

CSHB 284 could even encourage crime in some cases if gang members tried to use the right to stand their ground as an excuse to fire back at attackers. Eliminating the duty to retreat also could increase the number of people who used deadly force and then claimed it was justified under the provisions of the bill.

Not all states are changing their rules on self-defense. Legislation similar to CSHB 284 was defeated in Wyoming and Virginia, largely on the objections of law enforcement, who feel the duty to retreat saves lives.

OTHER
OPPONENTS
SAY:

CSHB 284 would not go far enough to protect victims. Florida has created an irrebutable presumption that anyone who forcibly and unlawfully enters a home or vehicle is intent on threatening lives of the people there. This establishes self-defense automatically and fully and allows citizens the freedom to defend themselves, their families, and their property without having to perform a mental evaluation of the legal and financial risks of doing so.

NOTES:

The committee substitute added that in order for the presumption of reasonableness to apply, the unlawful entry would have to have been with force and the home, car or place of employment would have to have been occupied at the time of unlawful entry. The original bill would have provided for attorneys fees and court costs in certain civil actions. The substitute removed those provisions and added the civil immunity from liability for personal injury or death resulting from the justified use of force or deadly force.

The companion bill, SB 378 by Wentworth, passed the Senate by 30-0 on March 13. As passed by the Senate, SB 378 includes two additional conditions for presuming reasonable a person's belief that use of force or deadly force was immediately necessary. The person could not have provoked the one against whom the force or deadly force was used, and the person could not have been otherwise engaged in criminal activity, other than a class C misdemeanor traffic offense. CSHB 284 includes those two similar conditions only for determining when a person using force or deadly force would not be required to retreat.

The House Criminal Jurisprudence Committee reported SB 378 favorably, without amendment, on March 14 by 5 ayes (Pena, Vaught, Riddle, Talton, Escobar), 1 nay (Mallory Caraway), 3 absent (Moreno, Hodge, Pierson), making it eligible to be considered in lieu of HB 284.