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HB 1319

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Bill/Resolution No. HB 1319

House Judiciary Committee

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Minutes:

Chairman DeKrey: We will open the hearing on HB 1319.

Rep. Todd Porter: I am the sponsor of this bill, and explained it. This bill deals with the duty to retreat. Currently in the Century Code, 12.1-05-07 that says it is an individual's duty to retreat. This bill strikes that duty to retreat. Basically it says that you can stand your ground and defend yourself if you or your family are threatened. The other portion of the bill in section 2, talks about the presumption of fear, death or serious bodily injury and puts into code those particular portions. The third section talks about the immunity from criminal prosecution in the use of justifiable force. Currently the way the law is now, if an individual uses deadly force to protect themselves or their family, they are at risk of being brought up on charges. The last instance that I was aware of, was an incident that happened over in Mandan, where a 54 year old man shot two men at a house while they were at a party. The Morton County State's Attorney filed charges against him, a class C felony. The case went all the way to the judge and the judge had to throw the charge out for self-defense. I think that when you look at this particular language in the bill, that it should be the exact opposite. The person who is defending himself should be innocent until proven guilty. Not guilty because they shot someone and then proven innocent. I think that this law changes that so that we're looking at

a situation of self-defense for that individual. The police and state's attorney still have their duty to do their investigation and show what happened in that situation. But the individual who is defending themselves also has the right to be free and not have the charges brought against him.

Rep. Dahl: In section 3, the blanket immunity, who decides what is justifiable or not.

Rep. Todd Porter: They are immune as long as it was justifiable. In subsection 2, they may use standard procedures for investigating the use of the force, but they may not arrest the individual unless it has been determined that there is probable cause that force was used unlawfully.

Rep. Griffin: Would this duty to retreat be removed from all circumstances.

Rep. Todd Porter: Yes, it would.

Rep. Koppelman: I see on the top of page 2 of the bill, it says that an individual does not have the duty to retreat if the individual is in a place where that individual has a right to be. That would imply that in some cases, where an individual would have the duty to retreat.

Rep. Todd Porter: It was my understanding in discussions with the AG's office that is probably a typo. I think we may need a subcommittee to clean up things that the AG's office has recommended and that is one of them.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Ron Carlisle: I am a sponsor. This bill is a citizen's version of Homeland Security.

Chairman DeKrey: Thank you. Further testimony in support.

Rick Jorgenson: (see attached testimony).

Rep. Onstad: On page 3, line 16 it talks about "defensive force", does that mean any kind of defense, shooting, using a 2x4, etc.

Rick Jorgenson: Yes, if you have a baseball bat handy and you smack somebody with it, that's deadly force. I don't think it has to be with a firearm or anything like that. Many people don't have a firearm at home.

Rep. Onstad: So you're saying that would be justifiable.

Rick Jorgenson: Yes, I believe so.

Rep. Onstad: On line 17, so if you use defensive force, "an unlawful and forcible entry". Can you just end it right there, so you're saying it's okay to shoot first and ask questions later.

Rick Jorgenson: Well, I think that the bill intends to set forth the conditions under which you can use deadly force. Those conditions are outlined in section 2, #1 here in the beginning, that an individual is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to that individual or another when using deadly force if: the individual against whom the defensive force was used was in the process of unlawfully and forcibly entering, the home or automobile. So in that circumstance, yes, you would assume that this individual, you have the reasonable assumption that he has broken into your home and he's going to continue with his forceful activity.

Rep. Klemin: On page 1, the language that was stricken, relates to the duty to retreat or try to cause the other person to retreat first. From the standpoint of someone in their home, your average citizen, I don't know if they understand that they've got some kind of duty to try and talk someone out of coming in or whatever. I really don't know how much time you have to think about this either under these circumstances. Would you care to comment on that.

Rick Jorgenson: My position on this is the same as you just brought out. That is, if you are confronted with this kind of a forceful entry, you don't have a lot of time to have a dialog with a person who is entering your home. I'm not saying you can't talk to them, but it's not likely to be a long discussion. You're going to be placed in a very stressful situation, none of us outside of

law enforcement have ever been trained for. It's quite scary. If the person is familiar with the law, they are really in a bind. There's supposed to back up or retreat in some manner. I don't know if they ever planned how to do that. I think in most instances, what you are going to find is an individual who's not familiar with the law, if he's in a position to confront his attacker, he's probably going to confront the attacker. The person who is not willing to do that, is still going to retreat, and hopefully be successful. To put the person who is able to defend himself, in a position where they have to move back or retreat before they defend themselves, puts that person at a disadvantage. I just don't think that's appropriate when this perpetrator has entered your home by force, and placing you as a defender in a position of having to retreat. Retreating is wrong.

Rep. Charging: On page 1, the original law states that the use of deadly force is not justified if it can be avoided. Then on the bottom on line 24, the part that was stricken says "no person is required to retreat from his dwelling or place of work unless he was the original aggressor or is assailed by a person.

Rick Jorgenson: My reading of this is as a layperson, I'm not an attorney or judge. But my concern is that if you read that, it says that no person is required to retreat from his home or place of work. That would mean that you would have to vacate your house. I don't think it's reasonable to give up our home to a person like this. If you place yourself in a situation like this and say you have two young children, you're at home, someone breaks into your home, are you going to be in a position to gather your children up and leave your home. I don't think we are. But the first portion up here does require that we retreat. It doesn't explain how we're supposed to do that, and I don't believe we are going to be in a position to gather up our children and leave our home. We're going to have to make a decision on defending ourselves. I think that should be an individual's decision. Some people could defend themselves with a

baseball bat, some people would run into a room and close the door, and hopefully lock the door and successfully weather the break-in. Other people may feel that they are unable to do that, if they move to their bedroom, what about your kids in the other bedroom. I think it is a tough situation when you're asked to retreat, or demanded to retreat. If the person did confront this individual, and you had two children at home, and you were at home and you confronted the individual and you used deadly force to stop them. You could still be charged because you didn't retreat, this individual or his family could bring a lawsuit against you and say you operated outside the law, and then you have to defend yourself. I think you would be successful under current law, but why should you have to do that. Why should you have to defend yourself in this circumstance where it's obviously reasonable that you defended yourself.

Chairman DeKrey: Thank you. Further testimony in support.

Darrin Dohns, NRA: I am here to testify in support (see attached testimony).

Rep. Koppelman: In the states where this has passed, in the 15 states, have you heard about any cases where it has been abused, where someone has claimed this right saying I was defending myself, but in fact they were the aggressor. Is that an issue.

Darrin Dohns: Yes, I believe that there were some cases where criminal on criminal and there was a shooting in FL and they made the defense, and in those cases the self-defense claim was dismissed and the person was prosecuted.

Rep. Koppelman: So you don't know of any case where you feel that a miscarriage of justice actually took place because the state had this law on the books.

Darrin Dohns: On the flip side, there is a miscarriage of justice on the individuals who are being falsely charged with murder.

Rep. Koppelman: I'm saying no one has successfully used this as a shield for violent crimes.

Darrin Dohns: Absolutely correct.

Rep. Dahl: How many states in which similar laws are passed have provided for the immunity section, all of them?

Darrin Dohns: I don't want to overstate it and say all, but certainly most, and possibly all. Most of the states have put the immunity clause in there. I know in ND statute, you already have some civil protection, meaning that if someone breaks into your house, you have civil immunity that they can't sue you if the self-defense claim is valid. This portion of the immunity would strengthen the civil portion, but then also address the criminal immunity as well. Most states contain an immunity provision. There are basically three things that this bill does, it creates the presumption, it extends it outside the home and it grants the immunity. Those are the three main components of most of the legislation that has passed.

Rep. Dahl: Has there been discussion about this being a big policy change.

Darrin Dohns: No, not necessarily, in case law, you have an entire process in place, but they rely on it when they get to the trial phase of it. This simply puts it in statute, so that you still have the state's attorney reviewing it on a case by case basis and decide whether or not to charge the person. Obviously, if it's clear cut whether you are in your home and somebody comes in with a sawed off shotgun and you shoot them in defense of yourself, and the police officers show up and they look at the evidence, and it's clear or have witnesses, yes then the police officer probably wouldn't even arrest them.

Rep. Klemin: I have a couple of questions. First of all, this creates a presumption; this is a rebuttal presumption, correct.

Darrin Dohns: Correct.

Rep. Klemin: Who has the burden on proof on this presumption.

Darrin Dohns: The presumption means that when breaks into your home, the presumption is in favor of the victim, the person who was defending themselves. So the prosecuting attorney needs to show that there is a reason to charge them, that there is a likelihood that they would be convicted based on the evidence that the person took the wrong action. The presumption is that the person breaking into your home is there to do no good and to harm you; rather than someone is coming in, maybe I should investigate and quiz them while they are here. So the presumption would be with the homeowner and the burden of proof would be on the prosecutor to show that there was criminal intent.

Rep. Klemin: Whereas under existing law, we have this as an affirmative defense where the homeowner, who's actually a victim, has to come forward and prove that he was acting reasonably. Is that correct.

Darrin Dohns: I would say that is absolutely true. Basically the presumption is on the victim to prove that I was acting in self-defense under current law.

Rep. Klemin: On this issue of the immunity part, from criminal prosecution and civil action, do I understand this correctly, that this immunity would be raised as a defense, but you still have to defend yourself, hire a lawyer to raise that defense in a civil action.

Darrin Dohns: Yes, that's true. The cases that we're seeing already, that have been in effect for a year, where these defenses have been raised, absolutely. You just don't get up and say I plead self-defense. That doesn't work. The legal system still goes through the mechanics of determining whether or not that person acted lawfully, in accordance with the new law.

Rep. Klemin: We could still examine whether the presumption should apply or whether immunity really should be given in this particular case.

Darrin Dohns: Correct.

Rep. Klemin: You said this extends outside the home and you were talking about carjacking, or the business.

Darrin Dohns: Those are the two obvious examples because it happens a lot. People's homes are burglarized and we've seen a problem with carjacking. A lot of times, the country has changed considerably in terms of the nature of crime. When a lot of case law was developing, obviously in the 1930 and 1940's people weren't being carjacked. A lot of time statute doesn't reflect that. But that's certainly what we're talking about. Your business, you're closing up late at night and you're being robbed, or you are with your wife and going to dinner and you're at a stop light and somebody sticks a gun through the window. If someone sticks a gun in your window and you pull out a gun and shoot them, you don't know if they were there just to take the car or do worse. You don't know what is in there mind.

Rep. Klemin: For instance, I have an RV. I'm concerned when I'm traveling across country, that you stop at some of these rest areas and I've heard of people breaking into your RV and running off with it with you inside of it. Would this extend also to that situation.

Darrin Dohns: I would say that the laws will work fine here, if you are in the restroom and someone is stealing your RV, unless you're in SD, you can't shoot at them if they are driving away. Under this law, basically if you're under attack, you can defend yourself and your RV. But you aren't allowing people to run after them and shoot them in the back. There hasn't really been a problem with this. I refer back to the concealed carry debate, where they said that this stuff was going to happen. If you talk to most of the instructors, they go through it over and over. They tell you when someone breaks in, you're supposed to tell them to get out of here. You are to do everything that you reasonably can; however, you can't always do that. If they are standing in front of you with a gun, you're not going to have a discussion with them and sometimes you need to act quickly. The bottom line is, whether it is a gun, baseball bat,

knife, people act responsibly. CO has a law which has been in effect since 1985 and there have only been five cases where this has applied. CO has more crime than ND and has only occurred five times. It just goes to show that people aren't just shooting people for no reason. If someone breaks into your home, your business, your vehicle, then this should be on the books to provide them with a defense.

Rep. Klemin: This is more like protecting the good guy for a change, instead of the bad guy.

Darrin Dohns: That's absolutely correct.

Rep. Griffin: There has been a lot of discussion about protecting yourself, your home, your business, do you believe under current ND law that you are justified using deadly force under the current statute.

Darrin Dohns: Under the current statute.

Rep. Griffin: Do you believe there is a duty to retreat from your home or workplace.

Darrin Dohns: The statute is very clear, there is a duty to retreat.

Rep. Griffin: Under subsection c, 12.1-05-07 says a person in possession or control of a dwelling or work place is licensed or privileged to be there they can use that force and protect that dwelling or workplace.

Darrin Dohns: But there is also a section in there that says you have to do everything in your power to resolve it, by making them leave.

Rep. Griffin: Could you point that out.

Darrin Dohns: I read the statute last night and I don't have it in front of me. Your question is if you are the person in the home and you're asking me if they have a duty to retreat. My understanding by this is that yes you do. If you have to take an action first, then if that action fails, then you don't.

Rep. Griffin: What portion of the statute is that it says you have to take an action first.

Darrin Dohns: It says the use of deadly force is not justified if it can be avoided. The very first sentence. So to avoid the defensive use, any prosecutor should say well you should run out the back door. So that, to me, is a duty to retreat.

Rep. Klemin: I think Rep. Griffin was referring to page 2, subsection c and it talks about when a person is in possession of a dwelling, place of work. But there it also says if the force is necessary to...so you have to make a decision there, is this force necessary or not. Would you comment on that.

Darrin Dohns: I read all of this language as it might not be saying the exact words, duty to retreat, but certainly all the language implies that if it's necessary. That means you have to decide whether it's necessary, if at all possible. The language is definitely a subtle implication that there is a duty to retreat.

Rep. Klemin: Not so subtle, because if you read from 2b, it's pretty expressed that you have to avoid it, by retreat or other conduct, I think when you read all of these sections together, that's what it's saying.

Rep. Dahl: That language implies that you have a duty to retreat.

Rep. Onstad: You referred to a case in Mandan. That person was charged because he shot someone. Then in reviewing the evidence they dismissed it because they figured it was self-defense. That's the way the current statute works. If this is adopted, how would that change.

Darrin Dohns: I think that it wouldn't change in terms of the normal review process. However, you probably wouldn't have a lot of prosecutors trying to still stick them with a felony assault charge. In other words, they would look at it, there wouldn't be ambiguity like there is now. They could possibly be charged with that. The review process is still there, it clarifies it and a lot of these cases where they want to charge people, that would probably disappear.

Rep. Onstad: You keep referring to a lot of these cases. Can you cite a current case.

Darrin Dohns: I would say that case is proof that the current system doesn't work. It's ambiguous. The county prosecutor wanted to charge them. Now what if the judge were in the same mindset as the prosecutor. That's why I referred to CO. Folks said we don't need it here. Along comes this case, one prosecutor, one judge. The law's ambiguous and they get charged. We are fortunate that the prosecutor and the judge disagreed in that case. Just the fact that they are disagreeing proves that the law is ambiguous.

Rep. Onstad: So if you go back to the original question, if this was in place, the person in Mandan wouldn't have been charged immediately, or he could have been charged later one.

Darrin Dohns: I would say that he wouldn't have been charged, probably not even arrested because in that case there were several witnesses, that said these guys had assaulted some people at a party, they assaulted him, he acted in self-defense. I think when police came, and law enforcement reviewed the history of the case, he probably wouldn't even have been arrested.

Rep. Onstad: He probably wouldn't or he probably could have. My question is, it always comes down to discretion of probably.

Darrin Dohns: That's what my argument is. We have these protections in case law and if they make sense in case law, why not codify it. That's the simple question that I am putting before the committee. If these have been found in case law, why not put them in statute. To me, statute is law. Yes, there is probably always going to be probably. Our judicial system from top to bottom isn't definitive, and that's a good thing because there should be some review. We're just simply stating that, in this legislation, that there are some presumptions that the presumption goes back to what Rep. Klemin is saying, all of a sudden now they have to prove that you acted irresponsibly and not that you have to prove that you were acting in self-defense. They have to prove that you weren't.

Rep. Onstad: Someone breaks into your home, what do you consider within reason.

Darrin Dohns: If someone breaks into my home, you can defend yourself. They are there to do you no good. They are breaking into your home.

Rep. Onstad: So the question is what is within reason to defend yourself. If they break into your home, does that give you a reason to shoot the person. What part of the defense or what can the person do. He broke into your home and he's running out again, what's within reason. I think he can do whatever he wants.

Darrin Dohns: You switched the scenario on me because in this portion you said he's running away. If he breaks into your home and runs away, no you can't shoot him. If he breaks into your home, you pull a gun, he's standing there, you have a gun, you're threatening him, and he's still standing there, I'm pretty sure that he means you harm. I would say that you would be absolutely justified in defending yourself.

Rep. Onstad: You're home and you have a gun on him, he doesn't have a gun on him, what's within reason. I'm afraid he might come after me. He made no attempt to come after me, it's between you and him.

Darrin Dohns: This goes to prove exactly what I'm saying. A guy breaks into your home, you have or have not a gun, and the guy is standing there in your home, he broke into your home, how do you know he doesn't have a gun. What if he's got one tucked in the back. What if he's got a knife. Law enforcement will tell you that if a guy is within 20 yards of you, he can stab you in a matter of seconds. When law enforcement are faced with these situations, they're told don't take any chances. This is your life, you are protecting your life. He broke into your home. He could have a gun, he could have a knife, he could certainly kill you. If a guy has broken into your home, he there's to do no good. You should be able to defend yourself. Now if you tell him to leave, and he goes out of the front door, you shouldn't be able

to shoot him. If you cock a shotgun, and he doesn't think you are there, and he hears a shotgun being cocked, and he runs out the door, you can't shoot him. Because we've seen this law in effect in several states, in all sorts of different scenarios like you are mentioning that have come up. We just haven't seen homeowners acting irresponsibly and shooting people in the back as they are running away. If they do, they are going to be charged, under current law and they would be charged under this.

Rep. Onstad: If an intruder breaks into your home, and you're there, he has a gun, and there are no other witnesses there, just me and him. I shoot you and then I say, hey he was coming after me, what's reasonable here. It's my word against the dead guy that I just shot.

Darrin Dohns: I think if you ask any North Dakotan if there is a guy laying in a living room with a gun, he broke into your home...

Rep. Onstad: I didn't say he had a gun, he was threatening me...

Darrin Dohns: I mean we can keep going over derivations and scenarios all day. The bottom line is law enforcement is going to review the situation. If someone breaks into your home, whether they have a gun or not, you don't always know that, what if it's in the middle of the night. He's standing there with his gun and do you shoot him or not. Why did the person break into your home. There are 10-15 questions that the homeowner has to ask himself. This law says that somebody shouldn't break into your home. If somebody breaks into your home, they are there to do you no good.

Rep. Onstad: I would agree with that. But you made a statement that it is still going to be presumed, law enforcement is still going to review the issue. We have a law in place that seems to work and in the Mandan case, why is it necessary that we have to change it.

Darrin Dohns: I guess we're disagreeing on what works and what doesn't work. I would say that the current system maybe isn't working because the county prosecutor wanted to charge

this guy and that's because the law is ambiguous. That's my whole argument. There seems to be a discrepancy between the case law and statute. This is simply to put those two in cohesion.

Rep. Delmore: You talked a lot about cars and homes and so on. As I read the top of page 2, an individual does not have the duty to retreat if the individual is in a place where that individual has a right to be. It could be a park, street, as long as I have the right to be there, if I feel scared, I have a weapon, and I think someone is after me, I can turn around and take care of the situation.

Darrin Dohns: That's correct.

Rep. Delmore: Breaking into the house is one thing, but I'm talking about being on the public street. Maybe I'm a nervous person anyway. I have a concealed weapons permit, and my weapon on me.

Darrin Dohns: We are talking about other places. For example, you are out in the woods camping, and you're in your tent, and somebody comes into your camp site and they are drunk, they've got a gun and they're threatening you and your family, that would be a case where it would be applicable where you can defend yourself.

Rep. Delmore: If I'm walking down the street, and I feel that way, and react that way, what if I shoot somebody else as well. Looking at public safety that comes with this too. There are reasons that we pass laws preventing people from bringing guns into schools; things like that for public protection. This just scares me that it opens some things up to that level.

Darrin Dohns: I'm looking at instances of responsibility and the implication is that people aren't walking around with six shooters on their hip down the street and just firing into crowds. We have the concealed carry permit process. The reason that people are walking around, driving around and have firearms, is in case there is a threat. If there is a threat to their life,

somebody sticks a knife to their throat and you are in the parking lot of the bank, or by the ATM in the middle of the night, you certainly should be able to protect and defend yourself. If someone is running away and you're firing into a crowd at the Wal-Mart, I guarantee you that you're going to be convicted. This law gives you no immunity from that.

Rep. Griffin: In Rep. Onstad's example, where you talk about someone breaking into the house, do you believe under current law that he would be justified in using self-defense if somebody broke into your house.

Darrin Dohns: Under current law, I would say that you probably would be vindicated under case law, however, it would depend on the prosecutor, and under the statute, it just isn't clear. I mean it says right in here, that there's a duty to retreat. So if the prosecutor feels that you could have retreated under the statute, they can still charge you.

Chairman DeKrey: Thank you. Further testimony in support of HB 1319. Testimony in opposition.

Ladd Erickson, McLean States Attorney: (see attached testimony). This is a complex matter. Any previous testimony that a defendant has some sort of duty to come into court and prove that they were acting in self-defense or had some other defense isn't correct. If you go through our jury instructions, you will see what they are told. If someone pulls a gun on you, you pull out a gun and shoot them and it turned out to be a plastic gun that was pulled on you, you have a defense under those circumstances under ND law. I'll be frank with the committee. What concerns me about this bill, is that it's not being driven by problems in ND. It's being driven by a national political agenda to go around to states, enact laws to go back to members to say that we're doing things with the money you give us. It seems to me, that when ND has, year in and year out, one of the lowest violent crime rate in the country, that the NRA should be taking our laws, the laws this committee enacts and going to other states with them and

having them enact ours, instead of the other way around. This bill creates a number of things that changes the doctrines of ND that for about 130 years, the work by this committee, our Supreme Court developed. This has become a well settled thing in self-defense here. Cases would come about, the Supreme Court would make a ruling, we would come back to the legislature and we'd refine the issue of when that would be self-defense. You have no duty to retreat from a house under ND law. Any testimony that we can get in trouble in our house by defending ourselves, is correct under ND law. The problem I have we have a current policy in ND that use of deadly force is not justified if it can be avoided. We shouldn't shoot people if we can avoid shooting people. That's being deleted here. That seems inherently ridiculous, and that is being replaced with language that the individual does not have a duty, if that individual is in a place where he has a right to be. You have a right to be in the House Judiciary Committee Room, you have a right to be out on the street. We currently have a much better policy than any state that would be looking at this, is that we should try to avoid shooting people if we can do that. The second thing, is the perception that, on page 4, paragraph 3, an individual unlawfully and by force enters or attempts to enter the dwelling, occupied building is presumed to be doing so with the intent to commit a felony crime of violence. We already have language like that in our current law. I will cite a case here, and this doesn't represent all kinds of cases, the Mandan case I think I remember what happened in that case. I met with the NRA lobbyist last week, and asked him why we need to make such a doctrine change in ND. What case in ND has violated the spirit of the law that needs to be clarified. There wasn't any. It was this other state thing, we should look at other states. Other states may self-defense as an affirmative defense where we don't. What appears to happen, is that some search comes up with an article about the Mandan case, which I believe it the one that involved a big ruckus at a party amongst a bunch of people moved back to where the

shooter ended up, at his house. The assailants that had previously been in this fight with, came over to get revenge. He pulls out a gun and starts shooting it around the trailer court. He was charged with reckless endangerment, endangering other people, not justified. Specific intent crime is reckless endangerment. Everybody's drunk and the prosecutor thought he endangered people in the trailer court by pulling the gun out and then charged with disorderly conduct for the actual assault before. The judge disagreed that you endangered other people, it has nothing to do with self-defense or problems with our current law. It's not a good example. The case I'll use, to show you how this will work to the detriment of ND, is a homicide in my county on October 17, 2005. I brought police reports with me. When people cite cases to you, ask them to follow up and get the police reports. They are all public records, so you can get actually what happened in full (reported on a case regarding two brothers). If someone broke into Rep. Klemin's house and self-defense was used, the law enforcement could probably determine that, they're not going to take him into custody, he's a respected in Bismarck and there's no reason, because he's not a flight risk. They might ask him to come and have his blood drawn for toxicology, but it's not necessarily going to be adverse. However, that's not the norm. The norm is that you have to get a handle on this. What has happened, it is usually a 24-36 hours, straight through venture to get to the bottom line of what happened during the shooting. What the NRA proposes is that we handcuff the police in doing that initial investigation. Because you're not going to be able to sort it out until the crime lab gets back to you. I find that inherently flawed because you cannot properly investigate with this type of language. I'm not here to discuss the civil liabilities as a state's attorney, because I don't get into that. It seems to me as a citizen, that is very flawed. These are two different systems. The tort system and the criminal system. There are different standards of proof. The right not to testify in a criminal case vs. the depositions that he had to go through in the civil case. All

those are different types of cases. The bill is meant to take the state's attorney to judgment. The judgment that I can't meet the burden of proof, because I have to prove beyond a reasonable doubt before I charge this in my mind, that there was no self-defense, no excuse, no reason for deadly force. I might think the guy was wrong, but I don't have the evidence to prove it, so I make a call that I'm not filing a charge. That now, somehow has prohibited or significantly hindered some citizens' right to pursue their civil remedies. I think when you start mixing the criminal burdens with the civil burdens you are inherently creating bad policy.

Chairman DeKrey: You are testifying as a single state's attorney or for the State's Attorney Association.

Ladd Erickson: The State's attorney are coming next.

Rep. Klemin: The example where somebody ran someone down and shot them in the back as they were running away, and fired several shots. That wouldn't be permitted under this bill, would it.

Ladd Erickson: Sure it would.

Rep. Klemin: You mean you would be able to run someone down and shoot them as they are running away.

Ladd Erickson: Absolutely, the guy is still claiming self-defense.

Rep. Klemin: Where are we talking about that.

Ladd Erickson: When you start deleting things like you should avoid using justified force, when you start deleting the doctrines, the use of force is not justified if you can leave. Having a false presumption in the law is ridiculous.

Rep. Klemin: False presumption.

Ladd Erickson: The facts, he's not there to commit a crime of violence. You're creating a legislative presumption without reviewing facts on the ground in this bill. That is what I call a false presumption. It's not justified under the facts.

Rep. Klemin: You said the language on page 4, lines 4-6, subsection 3, was some place else in the law already. Where is that in statute.

Ladd Erickson: On page 2, subsection c, and it is on the crossed out part on page 1, subparagraph 24, which said that no person is required to retreat from his dwelling or work place unless he is the original aggressor.

Rep. Klemin: This is just a reorganization, if you delete it one place in the bill and put it in another place in the bill. I thought you were talking about another statute not in this bill at all.

Ladd Erickson: There are other statutes that potentially could apply in these situations, duress, etc. No, that's here, we have no duty to retreat here in current law. My concern is that when we start opening up that it is any place is the place you have the right to be.

Rep. Klemin: You also said that this bill will interfere with police investigations.

Ladd Erickson: Yes.

Rep. Klemin: I'm looking at page 4, line 18, law enforcement agency may use standard procedures for investigating these reports. How does that interfere with the police investigation.

Ladd Erickson: Let's look at the mechanics of this. Law enforcement may use standard procedures for investigating use of force, but the agency may not arrest the individual for using force unless it determines that there is probable cause that the force that was used was unlawful. This is a determination that is being made out there. When people are drunk, you don't have ballistics, this is what you're asking. What do they mean by arrest. If you look at what they mean, lines 16 and 17, as used in this subsection, the term criminal prosecution

includes arresting, detaining in custody, and charging or prosecuting the defendant. Right now we have the 48 hour rule. We have to get people that we charge or detain, in front of a judge within 48 hours. That's the law. You can't as a prosecutor say, I'm going to make this a Guantanamo Bay thing here, and everybody is going to stay here. You have to get people in front of judges. But that initial 24 hours, in a situation like stated earlier, you've got to get the gunshots, etc. This bill says you can't make that initial detention, is what I was referring to.

Rep. Klemin: You said that the law currently does not require a person to retreat from his home, and it does say that on the bottom of page 1, what does retreat from his home mean or retreat within your dwelling, isn't that what line 15 language is talking about.

Ladd Erickson: I'm totally confident that the interpretation of that by the state's attorney, juries and judges is when you are in your home, you have no duty to retreat from a perpetrator.

Rep. Klemin: From the perpetrator.

Ladd Erickson: Right, if he comes into your home, you don't have to go to the next room. You can defend yourself. I've never understood that any other way, and I've never seen understood differently. You have no duty to retreat.

Rep. Klemin: But it says in language that is being struck, that the use of deadly force is not justified if it can be avoided by retreat or other conduct. You're saying that doesn't mean that there isn't a duty to retreat there.

Ladd Erickson: Because in a dwelling, in paragraph 2, that's exempted out from the duty of retreat.

Rep. Klemin: I'm trying to distinguish between from your dwelling as opposed to retreating within your dwelling and from your dwelling. If it wasn't meant to be different why did they use this other language before.

Ladd Erickson: I don't read it that way. I've never had this. I'm talking about if you read the whole thing in context, don't use deadly force unless it's justified, to the safety of the actor or others by retreat or other conduct. If you go through these different phrases and what they mean, you have no duty to retreat within your home. That's how you read that in concert. Even if it's mistaken, and that's one of the things that's missing here, if you were mistaken about the potential threat to you, the state still has to prove that your mistake was not excused. You still have this high burden.

Rep. Klemin: I understand you are reading it one way, and we've heard that some other people are reading it another way, so it is subject to more than one interpretation, isn't it.

Ladd Erickson: I'm aware of no one in ND that is reading it differently than I am.

Chairman DeKrey: Does this just kind of make your point though, that we're interpreting it the way we want to interpret it, but that's the not the way it's written, so isn't the point of this bill, is to write it the way we're doing it.

Ladd Erickson: No, I'm not saying that there isn't a word, I see they update individual from person and those kinds of things. An individual debate, but this big doctrinal shift that they're after here.

Rep. Wolf: We had a case in Ward County, in the mid 1990's, you were saying that this particular law is good and nobody is doing otherwise. In this particular incident, there was an individual in a home with a young daughter. A man was trying to enter his home, the homeowner shot the person trying to enter his home in self-defense. Ward County charged him with attempted murder. It went all the way to jury. Thank goodness he was found not guilty. Under our current law, that's why he was charged. Do you feel that's acceptable.

Ladd Erickson: I would have to talk to Ward County. I don't know.

Rep. Boehning: You bring this case up about the two guys getting a 15 year old girl drunk, the guy that comes in is a police officer, isn't his duty as a police officer to stop a crime, getting a 15 year old girl drunk is illegal to drink under age 21.

Ladd Erickson: He had been hired that morning to be a police officer. He was off duty. This was his niece. He wasn't working as a law enforcement officer.

Rep. Boehning: But isn't an off duty police officer still required to intervene if a crime is going on.

Ladd Erickson: I'm not debating that.

Chairman DeKrey: Thank you. Further testimony in opposition.

Aaron Birst, State's Attorney Association: We are in opposition to this bill. The NRA is asking for an expansion of the definition of self-defense. The State's Attorneys Association strongly objects to that change. In a nutshell, I agree with everything Ladd said earlier. This law would be easier to use as a shield for those in criminal activity, than it would to protect the person who is the innocent person. Now, granted there are those situations where an innocent person may be charged. But what I would argue is that is a success story that the case was dismissed. Yes, but did they have to go through the system, yes, but the system worked. Does it feel like it works if you're somebody who is wrongfully charged, maybe not. But the system works. Even under the new law, there is still a possibility of litigating this thing. We still have to define whether it's reasonable. Any law that you pass has to be litigated if there is a possibility that it's not defined. It's a little unclear to me why we even need to go down this road with this particular bill. I certainly understand where everybody is coming from, and everybody understands the issue here. I would just argue that this isn't needed here now.

Chairman DeKrey: How did you State's Attorneys arrive at your position. Did you poll all the state's attorneys.

Aaron Birst: The legislative committee and what happened is that the State's Attorneys association gets together twice a year and votes on legislative committee and then we take the policy positions.

Chairman DeKrey: I'm just asking because I got an e-mail from the Kidder County State's Attorney this morning, and he said he strongly supports it.

Aaron Birst: That can be.

Rep. Koppelman: Your comment earlier, saying the NRA wants this bill. I heard the NRA testify in favor of it. As I look at the bill, I notice that the people who signed onto the bill are elected officials from ND. I don't think it's a case of any organization coming to the state and saying we're put this into place and hope some states jump on this.

Aaron Birst: I certainly agree. Obviously there are states' attorneys that think it is probably a good idea too. This is obviously a strong issue, especially in a state like ND, what I would say what the fatal flaw in this bill, as Rep. Delmore points out, the definition of where you can use this force. The places where this happens the most are barroom brawls, fights in the bar parking lots, instead of in your homes. I can't tell you how many cases I've charged where it's two people in mutual combat; the prosecutor needs to prove that.

Rep. Koppelman: The prosecutor has to prove that's not the case. It seems to me that what the bill does, if I'm understanding it correctly, is that it shifts the burden of proof to the prosecutor to prove that.

Aaron Birst: The ultimate point of your question is, could they be litigated and would this help for somebody in that situation.

Rep. Koppelman: The point is, as I understand the bill, it just removes the presumption, of any time you have a deadly weapon in your hand, baseball bat or flyswatter and you use it to defend yourself that you're somehow guilty of a crime unless you can prove that you were

acting in self defense. As I understand the ways things are, this says that it is pretty evident that you are acting in self defense. If we find evidence to the contrary, we are going to charge you with something. But the law in ND, under this bill would presume that you are doing just that, and not take you through that legal system unless there is evidence to warrant that.

Aaron Birst: I understand what you're saying. I think the correct term would be you don't if you have some evidence of self defense, you don't have to prove that. The prosecutor still has to prove that.

Rep. Koppelman: You'd still be dragged through a trial, as happened in Ward County, and a citizen would be subjected to that; whereas the presumption, if the bill were law, would be that you are defending yourself, unless that state's attorney could bring evidence. I understand why your organization opposes the bill. I'm not usually on the opposite side of the states' attorney very often. I understand it's a greater burden, it potentially protects the citizen.

Aaron Birst: I certainly want to protect citizens; state's attorneys want to protect citizens; we just don't think that this offers anything new. The system works now.

Rep. Wolf: You're saying that in ND, a home invasion is a rare occurrence; it's more the barroom brawl. How would you feel if on page 2, lines 2-3, where it says that the individual does not have the duty to retreat if the individual is in a place where they have a right to be? As Rep. Delmore said that being in a park, how would you feel if that was removed and it was just limited to your home and your vehicle?

Aaron Birst: Because I'm here representing an organization, any changes to the bill I would certainly have to run by the organization. Personally if you're asking me, I think it makes the bill better, but it doesn't solve the issue. Again, if Ward or Morton County had that issue, where the prosecutor charged someone like that, personally would I have charged the case, and I don't know the facts, so I'm not trying to criticize here, but I wouldn't have charged that.

Did that person go to jail for 20 years, are they sitting in the penitentiary. No, the system worked.

Rep. Klemin: I'm still a little uncertain about the language on page 1, where it deletes the language on lines 15 and 16; it says the use of deadly force is not justified if it can be avoided by retreat. Do you think that creates a duty of retreat if deadly force is not justified?

Aaron Birst: Again, just personally, I've never interpreted that, that you have to go to a different room in your house.

Rep. Klemin: That wasn't my question. The question is, if you can avoid deadly force by retreat under this language, does that or does it not create a duty to retreat.

Aaron Birst: Again, I understand what you're saying, I'm simply reading where it says, #2 is current law, and no person is required to retreat from their dwelling. That stands by itself. I understand that we have to read these as a whole, but my interpretation has always been no person is required to retreat from their dwelling.

Rep. Klemin: From the dwelling, and I am reading within his dwelling. Of course, that says "from" which means immediate leaving. Going back to lines 15 and 16, maybe you're not going to be able to answer this question; it says deadly force is not justified if it can be avoided by retreat. What does that mean? Doesn't that create a duty to retreat if you can avoid deadly force by retreating?

Aaron Birst: Again, yes it does, with the exception of the home.

Rep. Klemin: That's all I wanted to know. Obviously, you are reading it differently now than Mr. Erickson did, so we do have an ambiguity here.

Aaron Birst: I don't believe so. You have a duty to retreat, that's in the law, but then there's the exception, except if you are in your dwelling and not within, what room you are in with your dwelling, is the large fence. I think this is what Ladd was saying too, but most prosecutors

would say that the dwelling, any place in the dwelling; you do not have to retreat from. Even though the sentence before says you have a duty to retreat in the dwelling, that's the exception to the general provision.

Rep. Klemin: In that line 24, it says no person is required to retreat from his dwelling, you're saying that also means that you have no duty to retreat from anyplace within your dwelling.

Aaron Birst: I understand what you're saying. Could we play word games with "from"? That's possible. You could litigate this.

Rep. Klemin: I guess what I'm saying is that these words, the way they are, do seem to create some ambiguity. If you can interpret it more than one way, then you have ambiguity, and it seems to me that the bill is trying to clarify that.

Aaron Birst: I would argue that there are certain things in the new proposed bill that has ambiguous language, if you get that specific, too.

Rep. Klemin: You may be correct about that. I think the point is taken that it seems to me that there is some ambiguity in our existing law.

Aaron Birst: As lawyers, there is probably ambiguity in just about every law.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1319.

Cynthia Feland, assistant to the State's Attorney in Burleigh County: I am here to speak in opposition to this bill. I think that sometimes when try to compare these things, we are getting some confusion involved. There are a couple of things that I think the committee understands the distinction. First of all, the State 100% here as we stand today, has absolutely responsibility to disprove that the person did not engage in self-defense. That burden is never on the defendant. The defendant doesn't even have to claim self-defense and the judge will still give the instruction that we have to disprove that the individual acted in self-defense. That's not what this bill does, and that's not where our concern comes from. Our

concerns come from, because you are changing the way the entire process is being conducted. Initially you may think it is semantics, but it's not if you look at how this is worded. When you look at it, changing the presumption, you're now saying that any person who uses self defense is presumed to have used that self defense in a justifiable fashion. That is very different than saying that you can claim it, and I have to disprove that there was self-defense. You're now creating a presumption. In the last line, as Rep. Dahl brought out, there is immunity from prosecution. So in essence, what you are now creating for prosecutors to do is I'm going to have to have a preliminary style hearing, some type of probable cause hearing and I'm going to have to disprove self defense before I can even start considering whether or not an individual can be charged with a crime. Let me tell you, that absolutely hinders my ability to prosecute and here's why. If I believe that a crime has been committed and I have probable cause to engage in that belief, before I file any type of felony charges, I can do something called the "State's attorney inquiry". That inquiry helps me to collect whatever evidence that I may need, in addition to search warrants I may be out requesting, in order to bring all that in and to make a decision. In this particular instance, I can't do this. I don't have, at this point, an ability to prosecute a person who has indicated that they've engaged in self defense. You've created a real investigative problem by making an assumption that all of these cases, that any time a person uses deadly force, it's going to be presumed that it is in self defense. You're going to hear a few horror stories, you're going to hear a few comments from people saying that this person was forced to go to trial and they shouldn't have. We heard a really brief summary and even Mr. Erickson, when he got up, he gave a brief summary. But here's the problem with all those summaries, that's what they are. You didn't have the whole police report in front of you. You didn't see everything that was in there and so you are taking a summary. You don't know what facts that prosecutor looked at and said, I've

got no choice. I've got to take this forward. This is one of those cases where, there's just too great a risk here. I need a jury of this person's peers to make that ultimate decision, and in some instances, the jury of peers, says with all the facts that we've heard, we don't think that this person was unjustified in what they did. We think they were justified in utilizing self defense. The problem that this is going to create, is that home invasions happen all the time. We don't always charge them out in burglary, because people aren't always entering with an intent to commit a crime. On a weekly basis, sometimes multiple times a week we get criminal trespass charges. Drunken people who don't know where they are going, who end up in the wrong house. As a homeowner, we have had tons of homeowners that I'm amazed at the restraint that they used. These homeowners will wake up and hear something, will walk downstairs and they will see someone rummaging around in their kitchen. They could be going for a knife, we don't really know. I guess those homeowners in all of those cases, would have been justified in using deadly force, but they don't. Some of them may ask a question, what are you doing, some of them may feel a little insecure, and I guess technically, using your example, they may decide that they are going to retreat, lock themselves in a bedroom, and call the cops. The cops show up and we find out that yes, this person had no lawful right to be in this residence. They did force entry into this residence, but they were confused as to where they were. They were intoxicated. This is creating a whole different scenario for people that are giving the presumption of exactly what we said before. Shoot first, and ask questions later. That isn't to say that if see somebody forcibly breaking into your house, with a weapon, that you've suddenly got to start having a dialog with them to make sure that they are intending to use this, no, you have to take each fact pattern on a case by case basis. It's not just a criminal trespass cases that cause some concerns. I want you to take a real strong look at some of the domestic cases we have. In domestic cases, not all women take all the abuse willingly, that is

inflicted upon them. Some women are fighters and some women put up quite a good defense. We've had cases where a woman, who was defending herself against her husband, picked up a knife. Now she's justified in being in there, he's justified in being in there and all of a sudden, the knife fight, somebody brings a gun and he shoots her. He was justified right, she was coming at him with a knife. So he can shoot her. He has no duty to retreat, even though he was the primary aggressor. What does this do. Is that really the state of things that you want to create in ND. Can you cite such extreme examples that we need this kind of law that creates all of these loopholes. You can make the argument, well you have to retreat within your residence, because if you look at this, it doesn't specifically say that you don't have to retreat within your residence, it just says that you don't have to retreat from your residence. If that's a concern, then what we do at these legislative bodies, we make those small adjustments and changes so that the law works. This law is written in a very general instance. It isn't written to just take into consideration home invasions, it's written to take into consideration any instance where you find yourself, or someone else, threatened with serious bodily injury or death and gives you the ability to use that deadly force. Be careful what you're playing with. Because when you look at these other states you've talked about, it says that 13 other states have recently enacted this, and that's great. I don't know what the other 13 states, what their laws specifically look like, I don't know how their entire criminal justice system is situated. I don't know if those prosecutors had the burden of establishing that there was not justifiable self defense that was used. What I do know is that there is new law, and that they haven't been in place a long time and we haven't seen the litigation and so we really don't know how they work. Based on over 130 years of case law, we know how ND law works. It works. We can look at the history and see that when we have found problems with this, we've made some fine tuning changes. There's nothing wrong with the law that we have. You're

going to do, with the law you're looking at, is create a whole litany of problems for prosecutors in looking at these cases on an individual basis, and in some cases, you're going to prevent us from being able to look at it at all. I don't think that is what you want to do.

Chairman DeKrey: Thank you. Further testimony in opposition.

John Olson, ND Peace Officers Association: We are opposed to HB 1319.

Chairman DeKrey: Thank you. Further testimony in opposition. I will appoint Rep. Wolf, Rep. Klemin and Rep. Koppelman to a subcommittee and they will take a look at this.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1319

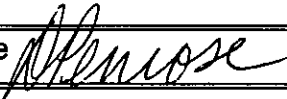
House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 2/5/07

Recorder Job Number: 2841

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1319.

Rep. Klemin: Explained the amendments. The subcommittee met on this bill and went through it and came up the amendments that are before you now. Basically, page 1 stays as is, except on page 1 line 1, replace "two" with "three"; page 2, lines 2 remove "an individual does not have the duty to retreat if"; page 2, remove line 3. Page 3 we adding place of work after dwelling wherever it appears. The way this applied was only to dwelling or occupied vehicle. We made it apply to dwelling, place of work, or vehicle and removed the word "occupied". Those are the changes on page 3. On page 4, we removed subsection 3, on lines 4-6 at the top; on page 4, line 9 in section 3 we are dividing that into two new sections. One section deals with civil action and one section deals with criminal actions. Section 3 as amended would only apply to civil liability. There would be immunity from civil liability if you are ...

Rep. Delmore: It is still limited to your auto, work place or your home.

Rep. Klemin: Yes. What we're doing on page 4, we're taking out all of the stuff that applies to criminal and so that section 3 only relates to civil liability. Then we added a new section 4, which relates to criminal actions, which does not provide for immunity from criminal

prosecution but it does set a standard of probable cause for arrest that the force used was not justified. So the arresting officer would have to make a probable cause determination right there on the spot.

Rep. Koppelman: I think there are a couple of things that are important. We did soften the bill a little bit. For example, in terms of how it originally read that they would have to have probable cause if the force was used was unlawful. We changed that to unjustified, which is a lower level of burden. Some of the testimony we heard indicated that there would have to be a probable cause hearing. This clarifies that that wouldn't be necessary. During the testimony about domestic violence, there is already an exclusion in the bill for that.

Chairman DeKrey: Is there a second on the Klemin amendments.

Rep. Koppelman: Seconded.

Rep. Griffin: Why was the word occupied removed from the vehicle. Wouldn't that allow for somebody who is breaking into your vehicle the ability to shoot them.

Rep. Wolf: We talked about it, let's say your vehicle is sitting in your driveway, somebody crawls into the back seat and lays there waiting for you to climb in, you climb in and they attack you, technically the vehicle wasn't occupied when they got in. If someone is stealing your car, you can't shoot them because you weren't threatened or in the car.

Rep. Klemin: You have to have a reasonable fear of imminent peril or serious bodily injury. So if somebody is sitting down in the back seat...

Rep. Wolf: Or your motor home, you're at a rest stop and they get into your motor home, it wasn't occupied when they got into it, you come in and there they are. That's why it was removed.

Rep. Onstad: Can you shoot them.

Rep. Wolf: Yes.

Rep. Klemin: When people fill up with gas and pay for it, and take off, and somebody in the meantime climbed into your back seat of your car.

Rep. Charging: I had a question, this is limiting it to only those three places, home, work or car. Work is pretty broad. That opens up everything.

Rep. Klemin: I think that narrowly defines your place of work.

Rep. Charging: If I'm a hunter, and I'm working as a hunting guide, it's my place of work. I've already got a gun.

Rep. Klemin: We're talking about someone breaking into your place of work. I think logically, you're not going to break into the great outdoors.

Rep. Kingsbury: So we've got a dwelling, so we've got a yard and fence, and you're out there in the garden, do you have to be in the house, if you're out in the yard, and it's your property, it's your domain, and you have a hedge all the way around. So that's ruled out.

Rep. Klemin: That's the current law read. You don't have to retreat from your dwelling.

Rep. Kingsbury: But it's your yard.

Rep. Klemin: It says dwelling or place of work. Dwelling is not defined in this bill. It is probably defined somewhere else.

Rep. Griffin: I think there is something confusing. Under current law, no matter if you were in on an unoccupied vehicle or in your yard, and somebody uses deadly force if you or is threatening you, you have the right to use deadly force back. Duty to retreat, if you feel you can retreat safely. I would like to see the word occupied put back in, because I think the way it is written right now, if I was sitting in my house safely, and I saw somebody break into my car, I would be justified in shooting. The way it reads, I don't think you have to be threatened, it just have to be unlawfully and in forcefully entering your car. Page 3, subsection 1.

Rep. Klemin: Well I think I can see your point. We were thinking of situations where it could be a problem of somebody climbing into an unoccupied vehicle and then laying in wait for you.

Rep. Griffin: I think that is covered under law as is.

Rep. Klemin: But all that existing language is deleted, so where would it be covered in our bill.

Rep. Griffin: On page 1, line 12.

Rep. Klemin: That would be covered, but it would not be presumed. That's the whole idea here, is the presumption.

Rep. Onstad: On page 4, paragraph 2, that's the new section 4. That's near the bottom. Law enforcement may use standard procedures. Aren't there standards of procedures used now.

Rep. Koppelman: I think what that refers to, is that if...the issue here is the presumption. It's saying that you are presumed to be acting in self defense unless law enforcement does an investigation and says, you went way beyond that and you weren't really defending yourself. Right now, the way the law is, you will probably get arrested if used deadly force. Then you have to go to court and try to prove your innocence. Self defense is a defense, what the bill does is that changes the presumption to say that, it's pretty clear that under these circumstances you acted in self defense. You're presumed to be defending yourself, unless and that's where this section comes in, unless law enforcement does a standard procedure for investigation and finds evidence that you were doing something else.

Rep. Onstad: You make the one statement that you would go to court. That's not necessarily true, he has to be charged before he has to go to court. So in the situation, the law enforcement goes through the procedures, they do not charge him, tell me how that's different in current law right now.

Rep. Koppelman: I think the difference is 1) you're probably not going to be arrested unless there is pretty good evidence that something went beyond self defense, 2) you're probably not going to be charged unless in their investigation it indicates that you're guilty of something other than self defense and relates to the example that Rep. Wolf talked about in Ward County, where the individual was acting in self defense, the court case eventually proved that, but before that happened, they had to be arrested, they were charged, they went to trial. They spent a lot of money, their reputation and business were ruined. They ended up having to leave the community because of all that anguish and they were just acting in self defense like our current law supposedly allows.

Rep. Onstad: The Ward County case was a little bit of a rub between two individuals, and a family member got involved and that kind of led to this thing.

Rep. Koppelman: I don't know the particulars.

Rep. Onstad: I don't necessarily agree that what we currently have...I understand the intent of what we're trying to do, but I still understand that if you read that section 4, the current intent is that if somebody uses deadly force it's going to have to be investigated. Yes, they might arrest somebody, but they're not going to charge them unless it's investigated. So the difference you're saying, is we'll investigate first, then charge them, if we pass it the way it is. Current law says that we arrest them first, then we investigate to determine what happened. You're saying that we will investigate it first before we arrest them. Is that what you're saying.

Rep. Klemin: I think you have to have some sort of investigation first, law enforcement just can't go down the street and arrest somebody who is walking by. They have to have a reason.

Rep. Onstad: That's current law, right. You just can't arrest someone just to arrest someone. So what are we proving here. My point is, are we making it better or worse.

Rep. Klemin: I think there is a little higher level in that we do require probable cause determination by that law enforcement agency.

Rep. Koppelman: I think it was really interesting during the hearing to hear the law enforcement folks why they are very supportive and state's attorneys talk about their perspective on this from the viewpoint of their world. Their perspective is this, in ND if you use deadly force to defend yourself, you're going to be okay. But what's probably going to happen, you're probably going to be arrested and probably going to be charged, but our system of justice will, at trial, you will assert self defense as a defense, that's going to stand up and you're going to be acquitted of the charges. That's their version of the system working. I would submit that's not the version of the system working for the average citizen. The average citizen says I'm defending myself and it's clear that I'm defending myself, I shouldn't have to go through all that, unless they have some evidence that says something different, and they want to charge me with a crime that's different. But just for defending yourself, you shouldn't have to go through the expense and anguish and all the rest of a criminal trial, etc. That's how I see the difference in these two bills.

Rep. Dahl: That's not something that they take lightly, but ethically they can't prosecute someone if they don't think that they can prove beyond a reasonable doubt. I don't think is something that is taken lightly.

Rep. Koppelman: I'm not saying that it was something that is taken lightly. I said that their version of the system working, is to have that charge brought and to charge what may be a crime, they may not feel that they have good evidence of a crime, the defense attorneys on the other hand, know it's their job to defend you. Most average citizens never got dragged into a criminal trial. That's a huge traumatic event.

Rep. Klemin: I think this doesn't mean that they can't be charged and go to trial. It just creates a rebuttal of presumption. The prosecution is going to have to refute that presumption for a person to be convicted. One other thing, on the word occupied, I don't know if I'm that committed to take that word out. I don't speak for the rest of the subcommittee.

Chairman DeKrey: Rep. Klemin moves on the Klemin amendment to remove the references to remove "occupied" on page 3, line 13 and page 2, lines 1 and 8.

Rep. Koppelman: Second.

Chairman DeKrey: We will take a voice vote. Motion carried. The rest of the amendments were seconded earlier. We will take a voice vote. Motion carried. We now have the bill before us as amended. What are the committee's wishes.

Rep. Koppelman: I move a Do Pass as amended.

Rep. Boehning: Second.

Chairman DeKrey: Is there any further discussion.

Rep. Onstad: With amendments, it is better than what it was. I'm just going to vote against it, although we say this is the intent, and that's the intent, the only reason why you're charged is, there must be something in there that isn't quite right. That person would be charged no matter what, if something isn't right in this situation. All we're doing here, is saying what comes first. I've got to believe that the investigation is going to come first before anybody is charged. They might detain somebody, which I think is what you're saying won't happen. We detain them, they investigate, and they charge them. If this gets passed, we don't detain them, we still investigate, and he still gets charged. I don't know what the difference is. I think we brought up a couple of situations and I'm going to vote against it.

Rep. Charging: I have the same feelings. We're looking at it from the viewpoint of the average citizen and we're not giving a great deal of thought to is the intent. How this is opening that door wider for them. Because now it is more difficult to prove.

Rep. Koppelman: I don't think we're changing that much, in regard to those issues. Because if you look at our current law, if you are in your place of work or in your home, you pretty much have this right already. The question that was raised in terms of current law about that, was whether you had to retreat from your dwelling or had to retreat within your dwelling. You don't have to retreat from it, it said in the law, but you might have to retreat within it. It's a question of whether you have to run to the bedroom before you shoot someone who is intruding in your home. I don't think really that there is much difference. What we're really changing is we're adding occupied vehicles and changing the presumption that Rep. Klemin spoke about. I think clearly that if this bill becomes law, people who are guilty of murder or manslaughter are still going to be convicted of those crimes. I think what it does is protect the average citizen. I'm a proponent of law and order. I'm a proponent of people being charged and convicted of crimes they commit. I'm also a proponent of the right to defend yourself, and all this bill does is make that clear.

Rep. Klemin: I think the biggest change we made in doing these amendments is taking out the immunity from criminal prosecution. That's not in there any more. Otherwise, I think it is a clarification of what we have, because there was definitely some ambiguity in that existing law that we are striking. So we should be better off.

Rep. Kretschmar: I think this is a better bill with the amendments than what was presented, but I don't think it's a good bill yet. I don't think we should eliminate all the language on page 1. They are good for our law. I don't think there was a lot of testimony that there was a serious problem in ND in these areas. I would rather that we keep the current law.

Chairman DeKrey: The clerk will call the roll on a Do Pass as amended.

6 YES 7 NO 1 ABSENT MOTION FAILS

Rep. Dahl: I move a Do Not Pass as amended.

Rep. Kingsbury: Second.

7 YES 6 NO 1 ABSENT DO NOT PASS AS AMENDED CARRIER: Rep. Griffin

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1319

Page 1, line 1, replace "two" with "three"

Page 2, line 2, remove "An individual does not have the duty to retreat if"

Page 2, remove line 3

Page 3, line 13, after "dwelling" insert ", place of work," and remove "occupied"

Page 3, line 14, after "dwelling" insert ", place of work,"

Page 3, line 15, remove "occupied"

Page 3, line 21, after "dwelling" insert ", place of work,"

Page 3, line 28, after "dwelling" insert ", place of work," and remove "occupied"

Page 3, line 30, after "dwelling" insert ", place of work,"

Page 4, remove lines 4 through 6

Page 4, line 9, remove "criminal prosecution and" and replace "action" with "liability"

Page 4, line 10, remove "justified in using"

Page 4, line 11, remove "force and is" and remove "criminal prosecution and"

Page 4, line 16, remove "As used in this subsection, the term "criminal prosecution" includes"

Page 4, remove lines 17 through 21

Page 4, line 22, replace "3." with "2."

Page 4, line 25, remove "prosecution or"

Page 4, after line 25, insert:

"SECTION 4. AMENDMENT. A new section to chapter 12.1-05 of the North Dakota Century Code is created and enacted as follows:

Arrest standard for use of force. A law enforcement agency may use standard procedures for investigating the use of force, but the agency may not arrest the individual for using force unless the agency determines that there is probable cause that the force that was used was not justified."

Renumber accordingly

House Amendments to HB 1319 (70476.0203) - Judiciary Committee 02/06/2007

Page 1, line 1, replace "two" with "three"

House Amendments to HB 1319 (70476.0203) - Judiciary Committee 02/06/2007

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House Amendments to HB 1319 (70476.0203) - Judiciary Committee 02/06/2007

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Renumber accordingly

Date: 2/5/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1319

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Koppelman Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore		✓
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging		✓	Rep. Onstad		✓
Rep. Dahl		✓	Rep. Wolf	✓	
Rep. Heller					
Rep. Kingsbury		✓			
Rep. Koppelman	✓				
Rep. Kretschmar		✓			

Total (Yes) 6 No 7

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Fails

Date: 2/5/07
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1319

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass as Amended

Motion Made By Rep. Wahl Seconded By Rep. Kingsbury

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin		✓	Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Meyer		✓
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf		✓
Rep. Heller					
Rep. Kingsbury	✓				
Rep. Koppelman		✓			
Rep. Kretschmar	✓				

Total (Yes) 7 No 6

Absent 1

Floor Assignment Rep. Griffin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1319: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1319 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "two" with "three"

Page 2, line 2, remove "An individual does not have the duty to retreat if"

Page 2, remove line 3

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Renumber accordingly

2007 SENATE NATURAL RESOURCES

HB 1319

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1319

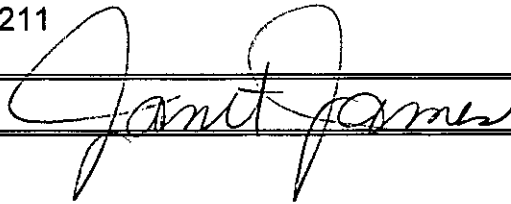
Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: March 16, 2007

Recorder Job Number: # 5211

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee opened the hearing on HB 1319 relating to the use of and liability for deadly force,

All member of the committee were present except Senator Herbert Urlacher.

Senator Lyson explained to those present the ground rules of the hearing giving supporting and opposing testimony each an hour.

Representative Lawrence Klemin of District 47 cosponsor of HB 1319 introduced the bill (see attachment #1a) He also presented to the committee a copy of proposed amendments (see attachment 1b), an engrossed version of HB 1319 if the amendments are adopted (see attachment 1c) and an e-mail from the Steele County State's Attorney in support of HB 1319 if amended as proposed (see attachment 1d).

Senator Joel Heitkamp: what is the genesis o f the bill? Why have this bill when this is already in code.

Representative Klemin: presumption is not already in code as well as the immunity from civil liability. What is in code are the duty to retreat, which is clarified in the bill and the exception that needed to be clarified.

Senator Heitkamp: can you site a civil case as an example of how the court went wrong. Is there a case out there that inspired this bill?

Representative Klemin: cannot site a specific case, but has read of cases in the past where there has been civil lawsuits brought against a home owner protecting themselves in their own home.

Representative Ron Carlisle of District 30 cosponsor of HB 1319 testified in support stating this was a citizens' version of homeland security because he home was broken into. He returned to his home three hours after the intruder and immediately entered the house. If he had had a confrontation, he would have done what he would had to do including using his weapons. That is why his on the bill because a homeowner should be able to protect themselves in a certain situation.

Senator Ray Holmberg of District 17 cosponsor of HB 1319 testified stating he chaired the committee in 1985 that wrote the weapons law of the state of North Dakota. These same issues were discussed then and it was very difficult to create the law due to incorrect and incomplete information. He has not reviewed the amendment, but the sense is they are heading in the right direction.

Senator Heitkamp: in describing Representative Carlisle situation, do you believe he would have the authority with this bill to act in protecting his property.

Senator Ray Holmberg: was not sure, but hoped so.

Representative Todd Porter of District 34 prime sponsor of HB 1319 testified thanking the sponsors, the chairman of the committee as well as the state's attorneys for all their efforts in creating the amendments and making the bill better that when came out of the house. He

further encouraged adoption of the amendments as they were proposed.

Representative Duane DeKrey of District 14 testified in support of HB 1319 presenting written testimony in support of HB 1319 as amended of Kidder County State's Attorney Jerod Tufte (see attachment # 2).

Darin Goens representing the North Dakota Chapter of the National Rifle Association testified in support of HB 1319 (see attachment # 3).

Senator Heitkamp: is this an initiative that is being introduced nation wide by the NRA.

Darin Goens: the bill was brought before him by two North Dakota legislatures and members who have seen the bill in other states and asked if this was going to be introduced this session.

Senator Heitkamp: the amendments clarify what is already in code and is this what the NRA wants, is it enough.

Darin Goens: agrees with the engrossed version of the bill.

Roger Kaseman, Linton, North Dakota testified in support of HB 1319 stating he graduated from the North Dakota Law Enforcement Academy. He quantified his expertise by presented his personal experiences in law enforcement regarding homicide and death investigations doubting any other law enforcement officer in the state has as much experience as he. The present law is flawed and ambiguous but the biggest problem is the burden of proof issue which should rest with the state. The present law places the burden of proof on the citizen to justify the use of deadly force. Arguments against the bill will come from law enforcement personnel so ask them a single question of how good they are at building a case. It is simple, with a body that has meet its demise at the hand of another and there is a claim of self defense, a careful collection of evidence and statements plus a careful back ground check of both the person making the claim and the dead will tell you a story. This evidence will either support or rebut the claim of self defense. The issue of immunity of civil suit can result from three possible outcomes. He continued that whether taking a life in the line of duty or as self

defense even if justified, your life will never be the same. He told the committee that a self defense claim is an investigator's dream because the shooter has to admit to killing someone. The flaw in the law as it is written, it is a challenge for law enforcement because there are too many loopholes that allow sloppy police work.

Representative Don Dietrich of District 42 testified in support of HB 1319 stating he has been for 30 years a NRA Home Defense, North Dakota Conceal to Carry, and a National Sporting Shotgun certified instructor. There is no time when confronted by a criminal and if a victim chooses to stand their ground and fight, the decision will not be second guessed by the state. The ability to protect yourself, your children or spouse from harm is important whether in the home, car or place of business, although as amended the bill is in regards to the home protection. HB 1319 is a simple defense bill that states if a criminal breaks into your home, you may presume he is there to do bodily harm and may use any force necessary against him. It also removes the duty to retreat if attacked in your home. HB 1319 provides protection from criminal prosecution and civil litigation for those who defend themselves from criminal attack. He further stated the bill has been passed in one state and is being considered in seven other states.

Richard Jorgenson, Devil's Lake, North Dakota testified in support of HB 1319 (see attachment # 4). He further stated he is not as favorable of the bill with the proposed amendments. He has a problem with the language of retreat which cannot be done successfully in many cases. It is also hard for the state to put a burden on someone when they are not there. Many times victims are not prepared to face danger and we as North Dakotans are more tentative in our efforts to defend ourselves.

Aaron Birst testified on his own behalf in support of HB1319 as amended. He thanked the legislators who worked hard to create the amendments. He believes there is an agreement;

however it is getting hard to carry out the agreement with some of the comments made. He further stated he has worked with very good law enforcement and prosecutors and they do not do sloppy work and that is why North Dakota does not have a problem.

Senator Lyson asked for opposing testimony of HB1319.

Peter Welte, State's Attorney in Grand Forks, North Dakota and President of the North Dakota State's Attorney Association testified in opposition to HB 1319 stating he is a gun owner. He and his organization are opposed to the bill in its original form. Those who have tried shooting cases are unanimous in their assessment of the bill based on the premise that the bill in its original form promotes offensive shooting in situations where shootings previously would not happen. Under the present law, Representative Carlisle would have perfectly justified in defending himself and not a single thing in HB 1319 changes that. People are not being dragged into court for protecting themselves. He and his organization support the amendments to HB 1319.

Senator Lyson; for clarification do and your organization support the bill with the amendments.

Peter Welte: if the amendments are adopted they will support the bill.

John Olson representing the Peace Officers Association testified in opposition to HB 1319 listed all the groups of peace officers in the association and that the state has had for years laws on the books and there have not been any problems. They are opposed to the bill as it is written although the amendments make the bill more acceptable. There is consensus among state's attorneys and peace officers that we are not forecasting gigantic problems if the amendments are adopted but cannot guarantee that. He read the law passed at statehood regarding force to protect that is still in code today. We have the right to protect ourselves and juries understand that even though they are instructed with all the provisions. Although he

does not object to the amendments, he is comfortable with changing the law. Lawyers complicate things that can become issues like if I am in a tent will I not be covered because it is not listed in the bill. I think it will continue in North Dakota that our law enforcement and persecutors will do a good job in North Dakota.

Senator Lyson: with all the hours put into this bill and the amendments are adopted, will the peace officers still oppose the bill.

John Olson: we will not oppose the bill. Our position is very clear, the current bill is bad for law enforcement and presuming the amendments are adopted they will not oppose the bill, but are uncomfortable with any change with North Dakota law. He cannot forecast the consequences of the bill.

Ladd Erickson, McLean County State's Attorney testified in opposition to HB 1319 thanking all those who worked hard on trying to get the bill right. He presented a copy of jury instructions to the committee (see attachment # 5). Consider how juries need to work through the process by following the law. Misconception about HB 1319 is that it is needed when we already have this law. The amendments repair some errors and a careful look should be made to sure juries are not faced with conflict of laws.

Cynthia Feland, Burleigh County Assistant State's Attorney testified in opposition to HB 1319 (see attachment # 6). She further stated that under current North Dakota law citizens have the right to defend themselves. The opposition to the bill is the unintended consequences. She commended those who worked hard on the amendments and how the bill in its original form did a lot more than anyone intended. The amendments are an effort to not put our juries into deadlock allowing guilty parties not to be prosecuted. She presented history of a case

happening in Bismarck and one of the arguments in that case was self defense. The amendments remove much of the danger that are within the original bill, but suggested further

modifications that would ensure a jury would not be in a situation where they are not going to be able reach a just conclusion. Referring to the engrossed bill in Section 2, Subsection 1 under letter A, the last part would read "or had unlawfully or forcibly entered "and remained within' a dwelling". This ensures that it is truly a person who is being confronted. The second modification is to request that under Section 2, Subsection 3 the presumptions in section 1 does not apply if the court finds if any of the following have occurred. This makes it very clear that the a, b, c. d listing are in the alternative and not inclusive. That will make it very clean and there will not be any issue when it comes time to implement these in a jury instruction setting.

Senator Heitkamp: are the supporters of the bill in favor of the additional amendments she is proposing.

Cynthia Feland: these additional amendments were mentioned this morning and they did not indicate they had a problem with them.

Senator Heitkamp: you complemented the supporters of the bill and the amendments make HB1319 a better bill and bring it back to where they are in law. The bill did pass the house and many were in opposition to the bill looking like they were in opposition to guns, why weren't these amendments on the house side.

Cynthia Feland: the final drafts of these amendments were finished this morning and this has been an on going battle since it passed the house. It is apparent to the state's attorney and law enforcement that the bill in its original form is a horrific bill that weakens the law. Everyone looked at the bill to protect the home owner and did not look at the consequences before realizing the recompressions of what the language will do. Supporting the amendments make the bill something they can work with.

Tom Trenbeath, Chief Deputy Attorney General of the State of North Dakota testified on behalf of the Attorney General Wayne Stenehjem presenting written testimony (see attachment # 7).

Senator Constance Triplett: has the attorney general reviewed the amendments

Tom Trenbeath: although the office had a hand in the amendments it has not seen the finished product.

Grant Benjamin representing the North Dakota Fraternal Order of Police testified in opposition to HB 1319 as it stands however they do not oppose the bill if the proposed amendments are adopted.

Alan Austad representing the North Dakota Trial Lawyers Association testified in opposition to HB 1319 and had asked Jeff Weikum to address the committee.

Jeffrey Weikum representing the North Dakota Trial Lawyers Association testified in opposition to HB 1319 in its origin form and as engrossed (see attachment # 8). They would support the bill if section 3 was removed.

Senator Lyson: can you fix section 3.

Jeffrey Weikum: section 3 is already, the problem without removing immunity it cannot be fixed.

Senator Ben Tollefson: being interested in his constituents and having heard more on this bill an any other, how would you suggest them understand what their rights are under the existing law.

Jeffrey Weikum: compare the modified the comparative faults statute to include some reference to the chapter in the criminal code which indicates a specific fault identifier under the that statute. This is one of the things a jury can consider if someone used lawful self defense as provided by that chapter. Use it as it is now.

Christopher Dodson representing the North Dakota Catholic Conference testified in opposition to HB 1319 (see attachment #9). They are neutral on the proposed amendments as he had just received them and has not reviewed them.

Roza Larson, Assistant State's Attorney for Ward County testified to clarify the shooting incident that occurred in Minot. HB 1319 if passed with the proposed amendment would not have stopped the situation or the arrest of the individual.

Verle Reinicke testified in opposition of HB 1319 by offering a different perspective. He gave his personal feelings regarding violence and his response to it. He does not know a lot of people this bill effects because they do not own fire arms to protect themselves. He referred to the parts of the brain controlling natural instinct and how the events of 911 have affected our lives. Owning guns for hunting and protection are two different things and should not be argued in a more nuance way.

Lexis Duxbury testified in opposition to HB 1319 stating the thing that captured the essence of the bill is it allows people to go on the offensive. She further stated a lot of zeal was put into the bill without consideration of its effects. Even the with the amendments the effect of the bill cannot be predicted and on that basis she is not in support of the amended version, even though they make the bill better. The sponsors of the bill, the house committee and the house all erred regarding this bill. She further presented her personal stories of violence and agrees with the concept lives are changed by anyone who has taken a life.

Senator Layton Freborg: requested the pastor Reinicke to take the podium and stated that he did not think what they each believe is so far apart but does not understand that if the general population ceased to resist violence that violence would cease to exist.

Verle Reinicke; he would not put it into absolute terms and does not know what would happen but from where he comes from, he has to do what he can to reduce the impulse to violence. He has only words and that is all he can ever be about.

Senator Lyson asked for testimony in a neutral position to HB 1319 and hearing none closed the hearing.

Written testimony by Lieutenant **Dan Strandberg** of the Minot Police Department expressing his concern regarding HB 1319 was distributed in the committee (See attachment # 10)

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1319

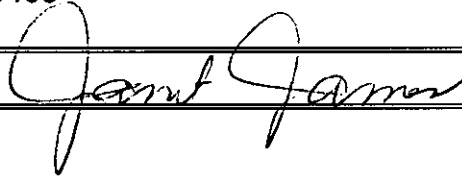
Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: March 21, 2007

Recorder Job Number: # 5403

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee opened committee work on HB 1319 and reminded all present, no additional testimony allowed but might ask those present for clarification.

All members of the committee were present except **Senator Jim Pomeroy**.

Senator Joel Heitkamp; are the amendments being distributed, Representative Klemin's amendments or are they further amendments.

Senator Lyson: these are Representative Klemin's plus those suggested by the State's Attorney.

Senator Heitkamp made a motion to adopt the amendments .0309 as presented.

Senator Constance Triplett second the motion.

Cynthia Feland: stated she had an opportunity to review the amendments and they include all the results of the discussions on amendments last week.

Senator Lyson explained his name was at the top of the proposed amendment because he wanted to see an engrossed version of the amendments.

Senator Heitkamp: because there were two sides to this bill he would like to hear from the representative of the NRA and their response to the amendments.

Darin Goens representing the National Rifle Association reiterated the organization are okay with the amendments as proposed at the hearing and although have not seen in written form those proposed by the state's attorney are okay with the concept.

Senator Heitkamp: so the only people that will not be happy with the amendments and the bill are the trial lawyers as they are the one's that wanted the clause removed that took away that right. That is in Section 3 of the bill. The emphasis of the bill is to set clear in code what the rights are and the amendments in many ways just do what is already in code. He would like to get a sense from the committee regarding section 3 and refers to the civil liability. If there is an assumption that you did violate law, why are we granting immunity, it that wise?

Senator Lyson: the immunity at this point is only toward the attacker. That is the only immunity left in the bill.

Senator Heitkamp: so if the shooter makes a mistake or does not follow the current law, or what we are putting in place here, there is no immunity granted. I think that is important.

Senator Lyson: my understanding through the rest of - there is some immunity with the presumption,

Senator Heitkamp: asked to ask the intern for legal advice.

Intern; stated that in his position he is not allowed to do that.

Cynthia Feland; asked for time to review the new amendment.

Rod Pagel : speaking on behalf of the trial lawyers, the trial lawyers do have a problem with section 3 portion of the bill. Yes it grants immunity to those person who follow the guidelines of the bill, the concern of the trial lawyers is the bill grants a broad discretion to use it in situations in which it should be presented to the jury as to whether it was a reasonable situation or not.

If there is no threat the immunity would still carry over and be granted.

Senator Lyson: it has been amended.

Senator Heitkamp: presented a scenario of drunken person entering a home and being shooting. Is there immunity?

Cynthia Feland: to answer that question, no he could not be civilly sued. There has been some small modifications, but the amendments create a civil liability that would not be charged or acquitted under criminal statute. So we are doing is exactly what we never try to do in criminal law is to tie a person's ability to file a civil law suit that deals things like preponderance of the evidence, which is much less than to prove beyond a reasonable doubt. Unfortunately, while in those situations it may be appropriate not to charge the person criminally; with these amendments it allows this individual or his family or estate to file charges. This eliminates any civil recourse. There is nothing in criminal code that ties criminal and immunity policy.

Senator Lyson: there is a lot hours put into this bill and it is not the greatest piece of work, but right now he can vote for it.

Senator Heitkamp: if the immunity was out, would you vote for it.

Senator Lyson: gave a situation where no one will gain anything from a civil suit except the lawyers. Also think about where we live and our attitude about taking life.

Senator Ben Tollefson: the immunity issue is the concern related by e-mail and other communications as people want to be able to defend themselves and families and not be liable. However, the immunity is already there in existing law.

Senator Lyson: the first bill we had gave immunity to anyone. We took that out and now it is toward only the attacker.

Senator Triplett: for that to be accurate we need to adopt the amendments.

Senator Ben Tollefson: would we need this if the people understood their rights in current law.

Senator Heitkamp: no, that is why the amendments are good and he will support them. He brings up the immunity issue because others feel this has not been focused on and should be discussed.

Roll call vote #1 for adoption of the amendments as presented on HB 1319 was taken by voice vote indicating 6 Yeas, 0 Nays and 1 absent.

Senator Ben Tollefson made a motion for a Do Pass as Amended of HB 1319.

Senator Constance Triplett second the motion.

Roll call vote # 2 for a Do Pass as amended was taken indicating 6 Yeas, 0 Nays and 1 absent.

Senator Stanley Lyson will carry HB 1319.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1319

Page 1, line 1, replace "three" with "two"

Page 1, line 15, remove the overstrike over "~~The use of~~"

Page 1, remove the overstrike over lines 16 and 17

Page 1, line 18, remove the overstrike over "~~freedom of the person menaced.~~", after the second "~~person~~" insert "An individual", remove the overstrike over "~~seeking to protect~~", and after "~~someone else~~" insert "another individual"

Page 1, line 19, remove the overstrike over "~~must, before using deadly force, try to cause~~", after "~~person~~" insert "the other individual", and remove the overstrike over "~~to retreat, or~~"

Page 1, remove the overstrike over line 20

Page 1, line 21, remove the overstrike over "~~obtained thereby.~~", after "a" insert "However, the duty to retreat or avoid force does not apply under the following circumstances: (1) A", and remove the overstrike over "~~public servant justified in using force in the~~"

Page 1, line 22, remove the overstrike over "~~performance of~~", after the first "~~his~~" insert "the public servant's", remove the overstrike over "~~duties or~~", after "~~person~~" insert "an individual", and remove the overstrike over "~~justified in using force in~~", and after "~~assistance~~" insert "assisting the public servant"

Page 1, line 23, remove the overstrike over "~~need not desist from~~", after "~~his~~" insert "the public servant's or individual's", and remove the overstrike over "~~efforts because of resistance or threatened~~"

Page 1, line 24, remove the overstrike over "~~resistance by or on behalf of the~~", after "~~person~~" insert "other individual", remove the overstrike over "~~against whom~~", after "~~his~~" insert "the public servant's or individual's", and remove the overstrike over "~~action is directed;~~"

Page 2, line 1, remove the overstrike over "~~and~~", after "~~person~~" insert "(2) An individual", remove the overstrike over "~~is~~" and insert immediately thereafter "not", remove the overstrike over "~~required to retreat~~" and insert immediately thereafter "within or", remove the overstrike over "~~from~~", after "~~his~~" insert "that individual's", and remove the overstrike over "~~dwelling or place of work~~" and insert immediately thereafter "or from an occupied motor home or travel trailer as defined in section 39-01-01."

Page 2, line 2, remove the overstrike over "~~unless~~", after the first "~~he~~" insert "the individual", remove the overstrike over "~~was the original aggressor or is assailed by~~", after "~~person~~" insert "another individual", remove the overstrike over "~~who~~", after the second "~~he~~" insert "the individual", and remove the overstrike over "~~knows~~"

Page 2, line 3, remove the overstrike over "~~also dwells or works there~~" and insert immediately thereafter "or who is lawfully in the motor home or travel trailer" and remove the overstrike over the overstruck period

Page 2, line 5, overstrike "a" and replace "vehicle" with "an occupied motor home or travel trailer as defined in section 39-01-01"

Page 2, line 8, replace "vehicle" with "occupied motor home or travel trailer"

Page 3, line 12, replace "defensive" with "deadly"

Page 3, line 14, replace "vehicle" with "motor home or travel trailer as defined in section 39-01-01"

Page 3, line 16, replace "vehicle" with "motor home or travel trailer as defined in section 39-01-01"

Page 3, line 17, replace "defensive" with "deadly"

Page 3, after line 19, insert:

"2. The presumption in subsection 1 may be rebutted by proof beyond a reasonable doubt that the individual who used the deadly force did not have a reasonable fear of imminent peril of death or serious bodily injury to that individual or another."

Page 3, line 20, replace "2." with "3.", after "presumption" insert "in subsection 1", and after "if" insert "the court finds that"

Page 3, line 21, replace "defensive" with "deadly"

Page 3, line 22, replace "vehicle" with "occupied motor home or travel trailer as defined in section 39-01-01"

Page 3, line 23, replace "an injunction for protection from" with "a temporary or permanent"

Page 3, line 24, replace "or a written pretrial supervision" with "protection" and after "order" insert "or any other order"

Page 3, line 26, after "individual" insert "removed or"

Page 3, line 28, replace "defensive" with "deadly"

Page 3, line 29, replace "defensive" with "deadly" and replace "an unlawful activity" with "the commission of a crime"

Page 3, line 30, replace "vehicle" with "motor home or travel trailer as defined in section 39-01-01" and replace "an unlawful" with "the commission of a crime"

Page 3, line 31, remove "activity"

Page 4, line 1, replace "defensive" with "deadly"

Page 4, line 2, replace "vehicle" with "occupied motor home or travel trailer as defined in section 39-01-01"

Page 4, line 3, after "identification" insert ", if required,"

Page 4, line 4, after "law" insert "or warrant from a court," and after the first "or" insert "if"

Page 4, line 11, replace "unless" with "to" and after "used" insert "or to that individual's estate unless that individual"

Page 4, line 13, after "identification" insert ", if required,", after "law" insert "or warrant from a court,", and after "or" insert "if"

Page 4, line 16, replace the first underscored comma with "and" and replace ", compensation for" with "and disbursements"

Page 4, line 17, remove "loss of income, and all expenses"

Page 4, remove lines 20 through 25

Renumber accordingly

March 20, 2007

93
3-21-07
1.43

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1319

Page 1, line 1, replace "three" with "two"

Page 1, replace lines 13 through 24 with:

- "b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the ~~person~~ individual menaced. ~~A person~~ An individual seeking to protect ~~someone else~~ another individual must, before using deadly force, try to cause ~~that person~~ the other individual to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby. ~~But, (1) a~~ However, the duty to retreat or avoid force does not apply under the following circumstances:
- (1) A public servant justified in using force in the performance of his the public servant's duties or a person an individual justified in using force in his assistance assisting the public servant need not desist from his the public servant's or individual's efforts because of resistance or threatened resistance by or on behalf of the person other individual against whom he the public servant's or individual's action is directed; and (2) no person
- (2) An individual is not required to retreat within or from his that individual's dwelling or place of work or from an occupied motor home or travel trailer as defined in section 39-01-01, unless he the individual was the original aggressor or is assailed by a person another individual who he the individual knows also dwells or works there or who is lawfully in the motor home or travel trailer."

Page 2, remove lines 1 through 3

Page 2, line 5, overstrike "a" and replace "vehicle" with "an occupied motor home or travel trailer as defined in section 39-01-01"

Page 2, line 8, replace "vehicle" with "occupied motor home or travel trailer"

Page 3, line 12, replace "defensive" with "deadly"

Page 3, line 13, after "entered" insert "and remains within"

Page 3, line 14, replace "vehicle" with "motor home or travel trailer as defined in section 39-01-01"

Page 3, line 16, replace "vehicle" with "motor home or travel trailer as defined in section 39-01-01"

Page 3, line 17, replace "defensive" with "deadly"

Page 3, after line 19, insert:

"2. The presumption in subsection 1 may be rebutted by proof beyond a reasonable doubt that the individual who used the deadly force did not have a reasonable fear of imminent peril of death or serious bodily injury to that individual or another."

Page 3, line 20, replace "2." with "3.", after "presumption" insert "in subsection 1", and after "if" insert "the court finds that any of the following have occurred"

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Page 4, line 17, remove "loss of income, and all expenses"

Page 4, remove lines 20 through 25

Renumber accordingly

3063

Roll Call Vote #: /

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1319

Senate Natural Resources Committee

☐ **Check here for Conference Committee**

Legislative Council Amendment Number

Action Taken adust 0309

Motion Made By Dutham Seconded By Wislott

[illegible]

Total (Yes) 10 No 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1319, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1319 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "three" with "two"

Page 1, replace lines 13 through 24 with:

"b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the ~~person~~ individual menaced. ~~A person~~ An individual seeking to protect ~~someone else~~ another individual must, before using deadly force, try to cause ~~that person~~ the other individual to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby. ~~But, (1) a~~ However, the duty to retreat or avoid force does not apply under the following circumstances:

- (1) A public servant justified in using force in the performance of his the public servant's duties or a person an individual justified in using force in his assistance assisting the public servant need not desist from his the public servant's or individual's efforts because of resistance or threatened resistance by or on behalf of the person other individual against whom his the public servant's or individual's action is directed; and (2) no person
- (2) An individual is not required to retreat within or from his that individual's dwelling or place of work or from an occupied motor home or travel trailer as defined in section 39-01-01, unless he the individual was the original aggressor or is assailed by a person another individual who he the individual knows also dwells or works there or who is lawfully in the motor home or travel trailer."

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Page 2, line 5, overstrike "a" and replace "vehicle" with "an occupied motor home or travel trailer as defined in section 39-01-01"

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Page 4, line 17, remove "loss of income, and all expenses"

Page 4, remove lines 20 through 25

Renumber accordingly

2007 TESTIMONY

HB 1319

Richard E. Jorgenson
4931 81st Ave. NE
Devils Lake, ND 58301

I am a lifelong citizen of North Dakota born in Devils Lake on June 9, 2006.

I am married and have 3 grown children and a soon to be 2 year old Labrador retriever.

I own and operate Winston Noble Adjustment, Inc. in Devils Lake and have adjusted insurance claims for over 30 years now.

I am a North Dakota volunteer Hunter Education instructor and a volunteer 4-H youth instructor in rifle and muzzle loading firearms.

I have been active in the shooting sports with rifle and pistol for over 30 years and have been honored with induction into the North Dakota Marksmanship Hall of Fame.

I currently serve as executive officer and newsletter editor for the North Dakota Shooting Sports Association. I also serve as treasurer of our Lake Region Shooting Sports Association.

I have discussed the need to change the North Dakota law regarding the use of lethal force in self defense at meetings of the North Dakota Shooting Sports Association and of the Lake Region Shooting Sports Association. Both organizations strongly endorse the changes made in HB 1319.

Reinforcing the Right to Self Defense

The changes proposed in House Bill 1319 strongly reinforce the individual right to self defense in the State of North Dakota, and this is a thing. The bill addresses three very important points.

First: House Bill 1319 clearly sets forth the reasonable presumption that an individual who unlawfully and forcibly enters a home or vehicle has placed the lawful occupant of that home or vehicle in fear of serious bodily injury or death.

Second: Under current law, you as the occupant of your home or vehicle are required to attempt retreat from the criminal before using any force including deadly force to protect yourself or your family.

It is unreasonable to expect our citizens to wait or retreat before taking action to protect themselves from a person who has broken into their home or automobile. That criminal has already demonstrated his willingness to break in or enter without invitation and it is reasonable to presume that he is willing to commit further violence. Many of the victims of this type of violence are elderly or otherwise not in the best shape to move in retreat. It is certainly not a good idea to turn your back on someone who is clearly violent. On the other hand, walking backward is risky as well. Once you have the means to defend yourself, retreat may simply reduce your options. The choice to retreat should be left to the victim and not mandated by law.

Third: House Bill 1319 will shield the citizens of North Dakota who defend themselves against civil lawsuits brought by burglars, robbers, and those who would commit violence.

Under North Dakota's current law, a violent criminal or his family may present a civil action against that person who used force to prevent the criminal from accomplishing his intent. The defense costs can be extremely high both in dollars and cents and in the continued emotional stress for the victim. Certainly, the person who defends himself or family should not have to continue that defense in court where we all know that unforeseen verdicts are always possible. House bill 1319 clearly states that North Dakota citizens are immune from criminal prosecution and civil action, when they justifiably use force to protect themselves or their families.

I am here to encourage you to vote in favor of this bill and ask you to do everything you can to promote its passage.

Rick Jorgenson

Bismarck, North Dakota - News

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Friday, Ja


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Wounded men face charges

By KATIE BROWN

Bismarck Tribune

The 58-year-old man who shot two men at a house in Mandan early Tuesday will not face charges. The two victims of the shooting will.

District Judge Donald Jorgensen determined there was no probable cause for filing a complaint against Larry McCorkell, who fired the shots.

Morton County Assistant State's Attorney Brian Grosinger said Jorgensen's decision was based on witnesses saying McCorkell shot out of self-defense. Grosinger recommended charging McCorkell with one count of reckless endangerment, a Class C felony.

McCorkell shot two Bismarck men when they assaulted him at a party shortly after midnight Tuesday, Mandan Police Chief Dennis Rohr said. Steven Bernie, 20, was wounded in his leg and Christopher Stone, 28, was wounded in his stomach.

On Wednesday, Bernie was charged with two counts of simple assault and one count of disorderly conduct, all Class B misdemeanors. Stone was charged with three counts of simple assault and one count of disorderly conduct, also Class B misdemeanors. The multiple charges are from Bernie and Stone assaulting other people at the party before the shooting.

Bernie and Stone will be summoned to court on the charges when they are released from the hospital.

Rohr said McCorkell was released from the hospital Tuesday evening after being admitted for a condition unrelated to the disturbance.


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that you like?

Rohr said Mandan police have finished their investigation of the shooting.

"We have ample evidence and several witnesses with consistent stories," he said.

(Reach reporter Katie Brown at 250-8225 or katie.brown@bismarcktribune.com.)

 Comments

Add Your Own Comments

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Tuesday, January 30, 2007

Members of the House Judiciary Committee:

Today I would respectfully ask you to support House Bill 1319 and enable North Dakota to join the 15 states that have already adopted Castle Doctrine. This important self-defense legislation puts the presumption of the law on the side of law-abiding citizens, not criminals.

North Dakotans have a right to protect their lives when faced by threatening criminals. Citizens should be not bound by a "duty to retreat" when a criminal presents a threat of great bodily harm or death. Rather, these innocent victims should be able to "stand their ground." And yet, this simple concept is not present in the Century Code, and the law remains ambiguous. Although *case law* has afforded crime victims latitude when force has been used, citizens should have assurances in statute that their actions are justified. When faced with a split second, life-and-death decision, innocent citizens should not have to worry about whether they will be prosecuted for simply defending their lives. Lengthy hesitation could cost them their life and a "duty to retreat" becomes a "duty to die."

It is important to remember that this legislation does not impair a prosecutor's ability to charge someone who violates the law. In fact, states that have enacted similar legislation have found the law is working. Self-defense claims are still evaluated on a case-by-case basis, and if someone acts irresponsibly they are charged and prosecuted. This legislation clearly spells out the conditions that must be met before the application of deadly force can be used.

House Bill 1319 clarifies state statute with respect to the duty to retreat and ensures crime victims aren't at the mercy of an individual judge.

This legislature has made North Dakota one of 48 states that have a concealed carry permit process. While opponents will make some outrageous claims and place derogatory labels on this bill, (the same doomsday predictions they made during the concealed carry debate), law-abiding gun owners have consistently proven they are responsible and act lawfully. Citizens who choose to carry a gun for protection choose to do so because they realize criminals attack people in places other than their homes, and victims should be afforded the ability to protect themselves in their businesses, in their vehicles, or any other place where they have a right to be.

In many of the states that have adopted Castle Doctrine, the bills have passed overwhelmingly -- a representative example being the Michigan House vote of 91-15. That is because of the tremendous grassroots support for this legislation. If you ask constituents in your district about this issue, they will clearly tell you that it is common sense that a victim should be able to use deadly force to repel an attack on his/her life.

North Dakota is fortunate to have a low crime rate compared to many states. That doesn't mean crime doesn't happen here. Rural residents understand this, and they also understand that a quick police response isn't always an option. What about a criminal breaking into a farmhouse that is miles from the nearest town?

Our North Dakota members have made their voice heard. Last year, when the North Dakota legislature was not convening regularly, our members were calling me, asking if legislators would be introducing this bill in 2007. I personally talked to dozens of North Dakotans who said we need to enact these sensible protections. Today you have that opportunity, and I would ask that you vote for House Bill 1319.

Darin Goens
ND NRA lobbyist

Ladd Erickson

1 7. Larry Clark does not have a defense of excuse.

2 If you do not find that the State has proved each element of the simple assault offense
3 beyond a reasonable doubt, it is your duty to find Larry Clark not guilty of simple assault.

4 **Reckless Endangerment**

5 The prosecution satisfies its burden of proof only if the evidence shows beyond a
6 reasonable doubt the following essential elements of the offense charged:

- 7 1. On or about June 28, 2002;
8 2. In McLean County;
9 3. The defendant, Larry Clark;
10 4. Recklessly;
11 5. Created a substantial risk of serious bodily injury to Shelby Clark.

12 **SELF-DEFENSE**

13 A person is justified in using force on another person to defend himself against danger
14 of imminent unlawful bodily injury by such other person. A person is not justified in using more
15 force than is necessary and appropriate under the circumstances.

16 The defendant's conduct is to be judged by what the defendant in good faith believed
17 and had reasonable grounds to believe was necessary to avoid apprehended death or great
18 bodily injury.

19 **EXCUSE**

20 The defendant's conduct is excused if he believes the facts are such that his conduct is
21 necessary and appropriate for any of the purposes which would establish self-defense, even
22 though his belief is mistaken. However, if the defendant's belief is recklessly held, his conduct
23 is not excused.

24 **DEFENSES -- BURDEN OF PROOF**

25 The State must prove, beyond a reasonable doubt, that the defendant was not acting in
26 self-defense and that his conduct was not excused.

27 **DEFINITIONS**

28 A person engages in conduct *willfully* if he engages in the conduct intentionally,

Klemin, Lawrence R.

From: Charles A. Stock [cas@crookstonlaw.com]
Sent: Tuesday, March 13, 2007 2:11 PM
To: Klemin, Lawrence R.
Subject: RE: HB 1319 Castle Doctrine Bill

Dear Rep Klemin: I have reviewed the suggested revisions and the Bill now appears even more acceptable than before. As the State's Attorney for Steele County and the Assistant State's Attorney for Griggs County (chief prosecutor), I support this bill without hesitation. I believe the horror stories (or possible horror stories, if you will) being presented by the Bill opponents have an extremely remote chance of happening, while the incidents the bill is meant to address have a very real chance of happening.

Unfortunately, I can not be present in Bismarck for the hearing on this Bill, but I have no objection to you presenting my views/thoughts on the Bill, as outlined above, to the hearing panel. Thank you for your hard work on a very good bill for the citizens of North Dakota.

Charles A. Stock
621 1st Street NW
Hillsboro, ND 58045
701-636-2333

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House Bill No. 1319
Testimony of Rep. Lawrence R. Klemin
Senate Natural Resources Committee
March 16, 2007

If a thief be found breaking open a house or undermining it, and be wounded so as to die: he that slew him shall not be guilty of blood.

-- Exodus 22:2

Mr. Chairman and members of the committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here to testify in support of House Bill 1319 and to offer proposed amendments to the bill for you to consider. The amendments are included with my testimony. Also included for your ease of reference is a draft of the bill which shows how it would look if the proposed amendments are adopted by this committee.

These amendments are intended to take into consideration the concerns of law enforcement and prosecutors on the content of the bill, while maintaining the primary intent of the bill that a person is **presumed** to have acted appropriately in the use of deadly force to protect himself and his family from an intruder in his home or place of work, unless the facts clearly show otherwise. A person who defends himself and his family against an intruder should not be forced to undergo the stress and expense of further defending himself in a criminal trial brought by the State, unless there are good and valid reasons. The **homeowner** is the victim in this situation, not the intruder who may have been injured or killed by the homeowner. A homeowner who defends himself and his family should not be a victim twice -- first by an intruder and then by the State. My testimony on this bill includes the amendments that are proposed for your consideration.

A. The bill clarifies the general rule under existing law on the use of force and the duty to retreat.

Section 1 of the bill amends Section 12.1-05-07 of the North Dakota Century Code. The general rule under existing law on the use of force is stated at the beginning of the bill in subsection 1 of section 12.1-05-07 as follows:

An individual is not justified in using more force than is necessary and appropriate under the circumstances.

This general rule applies when interpreting the rest of the bill relating to the use of deadly force and must be consistently applied. The bill must also take into consideration the rest of Chapter 12.1-05, relating to justification, excuse, and affirmative defenses.

The bill seeks to clarify existing law on the use of deadly force through a common sense approach, because its use is always viewed in hindsight when determining whether the use of deadly force was justified in a particular situation. Most, if not all, people are not going to be aware of the intricacies of the North Dakota statute on the use of deadly force, the duty to retreat, and the rules relating to self-defense when a dangerous situation arises where deadly force might be necessary. They are not going to have the luxury of time to ponder on whether what they are doing is right or not under the law. The typical person is not trained in how to react to violence and may be extremely stressed and frightened, particularly at night, at home, in the dark, when confronting an intruder or when protecting his family. Therefore, what he does in defense in reacting to an intruder is instinctive and in response to a potentially deadly situation. We need to keep this in mind when evaluating his conduct after the fact.

This bill amends Section 12.1-05-07, relating to limits on the use of force and deadly force. Under existing law in Section 12.1-05-07(2)(b), deadly force is justified when it is used in lawful self-defense or in the lawful defense of others if necessary to protect oneself or another person from death, serious bodily injury, or the commission of a felony involving violence. Existing law also provides in Section 12.1-05-03, relating to self-defense, that a person is not justified in using force if he intentionally provokes unlawful action by another person or if he has entered into mutual combat with another person or is the initial aggressor. Section 12.1-05-03 is not being amended by this bill.

Section 12.1-05-07 also currently states that the use of deadly force is not justified if it can be safely avoided by retreating. This requirement constitutes a duty to retreat according to the North Dakota Supreme Court. *State v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983). This section also provides that if you are seeking to protect another person, you must try to talk the intruder into retreating, if it can be done safely. The amendments that I have handed out retain these requirements in the law, as you can see from the draft of the bill as amended. The North Dakota Supreme Court has also recognized that the duty to retreat is not without exceptions. Those exceptions are listed in the statute. The first amendment to this statute specifically states and affirms that the duty to retreat or to avoid force does not apply under those exceptions. This is a clarification in the statute that is consistent with the Supreme Court decision. There are several exceptions currently listed in the law, but the one we are primarily concerned about in House Bill 1319 involves the defense of oneself or one's family while at home or at work.

The second amendment to the statute clarifies that there is no duty to retreat "within" or "from" a person's dwelling or place of work and therefore eliminates a potential ambiguity. The next amendment adds that the exception to the duty to retreat extends also to temporary "dwellings" such as a motor home or travel trailer. The definition of "travel trailer" is inclusive of fifth wheel campers, as well as other camping trailers. An RV is the functional equivalent of the dwelling under this bill. The other amendments to this section are those routinely added by Legislative Council for form and style.

B. The bill creates a common sense presumption for the benefit of our citizens that is consistent with the use of self-defense.

Section 2 of the bill is the heart of the bill. This new section to chapter 12.1-05 creates a presumption that is not now in the statutes or in the case law. Under subsection 1, an individual is **presumed** to have held a reasonable fear of death or serious bodily injury to himself or another when using deadly force against another individual under certain specific situations:

If the individual against whom the deadly force was used was in the process of unlawfully and forcibly entering the dwelling, place of work, or occupied RV;

If the individual had already unlawfully and forcibly entered the dwelling, place of work, or occupied RV;

If the individual had removed or was attempting to remove another individual from the dwelling, place of work or occupied RV, such as in a kidnapping situation; or

If the person who uses deadly force knew or had reason to believe that an unlawful or forcible entry was occurring or had occurred.

Subsection 2 provides that the presumption in subsection 1 may be rebutted by proof beyond a reasonable doubt that the individual who used the deadly force did not have a reasonable fear of death or serious bodily injury. This standard of proof is consistent with the criminal jury instruction which requires the State to prove, beyond a reasonable doubt, that the defendant was not acting in self-defense. The jury instruction, however, is not explicitly stated in the statutes.

Subsection 3, as amended, provides that the presumption in subsection 1 does not apply if the court finds:

That the individual against whom deadly force was used had a right to be in the dwelling, place of work, or RV;

That the individual who was being removed was the child or grandchild or was otherwise in the lawful custody or guardianship of the individual against whom the deadly force was used;

That the individual who used deadly force was engaged in the commission of a crime or was using the dwelling, place of work or RV to further the commission of a crime (such as a drug dealer, meth lab or other crime); or

That the individual against whom the deadly force was used was a law

enforcement officer who was entering in the line of duty with a warrant, whether announced or not announced under a "no knock" warrant.

Therefore, if the court makes a preliminary finding that one of the situations in subsection 3 applies based on the facts of the case, the jury will not be instructed on the presumption.

This presumption is a straight-forward common sense approach to the use of self-defense and should be easily understood by law enforcement, prosecutors, and the public. If there isn't a clear case against a homeowner who used deadly force to defend himself and his family against an intruder, there should not be probable cause to arrest him and no reason to put that homeowner through the further stress and expense of defending himself in a criminal trial.

C. The bill creates immunity from civil liability to the intruder for the justifiable use of force.

Section 3 of the bill creates a new section in Chapter 12.1 05, relating to immunity from civil liability to the intruder, or the intruder's estate if the intruder is deceased, for the justifiable use of force. This new section also provides for the award of reasonable attorney's fees and court costs if the court finds that the defendant (homeowner) in the civil suit is immune from civil liability. This is an important feature of the bill and is necessary because of the lower burden of proof in a civil lawsuit – preponderance of the evidence versus proof beyond a reasonable doubt. We believe that it is inappropriate to have a situation where the use of force was justified under the criminal code, but the homeowner could still be sued in a civil case by the intruder for damages because of the intruder's injury or death. The homeowner would then have to hire an attorney to defend the civil lawsuit. Homeowner's insurance and other types of personal liability insurance would not normally require an insurance company to provide a defense for the homeowner in this situation, so he would be on his own.

This new section on immunity from civil liability is being placed in the same chapter of the criminal code as the sections on self-defense and the use of force so that it can be easily located.

The amendments that I handed out remove what was Section 4 of the bill relating to the requirement of probable cause to arrest, because probable cause to believe an offense has been committed is already the requirement for an arrest. *State v. Woinarowicz*, 2006 N.D. 179, P28.

Mr. Chairman and members of the committee, I urge your support for a "do pass" recommendation on this bill with the proposed amendments..

ENGROSSED HOUSE BILL NO.1319

A BILL for an Act to create and enact two new sections to chapter 12.1-05 of the North Dakota Century Code, relating to the use of and liability for deadly force; and to amend and reenact section 12.1-05-07 of the North Dakota Century Code, relating to the use of deadly force.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 12.1-05-07 of the North Dakota Century Code is amended and reenacted as follows:

1. ~~A person~~ An individual is not justified in using more force than is necessary and appropriate under the circumstances.
2. Deadly force is justified in the following instances:
 - a. When it is expressly authorized by law or occurs in the lawful conduct of war.
 - b. When used in lawful self-defense, or in lawful defense of others, if such the force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the person menaced. ~~A person~~ An individual seeking to protect ~~someone else~~ another individual must, before using deadly force, try to cause ~~that person~~ the other individual to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby. ~~But, (1) a~~ However, the duty to retreat or avoid force does not apply under the following circumstances:
 - (1) A public servant justified in using force in the performance of his the public servant's duties or a person individual justified in using force in his assistance assisting the public servant need not desist from his the public servant's or individual's efforts because of resistance or threatened resistance by or on behalf of the person other individual against whom his the public servant's or individual's action is directed; and (2) no person
 - (2) An individual is not required to retreat within or from his that individual's dwelling or place of work or from an occupied motor home or travel trailer as defined in section 39-01-01 unless he the individual was the original aggressor or is assailed by a person another individual who he the individual knows also dwells or works there or who is lawfully in the motor home or travel trailer.
 - c. When used by ~~a person~~ an individual in possession or control of a dwelling or place of work, or ~~a person~~ an occupied motor home or travel trailer as defined in section 39-01-01, or by an individual who is licensed or privileged to be there, if ~~such the~~ the force is necessary to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling or place of work, or occupied motor home or travel trailer, and the use of force other than deadly force for ~~such these~~ these purposes would expose anyone any individual to substantial danger of serious bodily injury.
 - d. When used by a public servant authorized to effect arrests or prevent escapes, if ~~such the~~ the force is necessary to effect an arrest or to prevent the escape from custody of ~~a person~~ an individual who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly

weapon, or has otherwise indicated that ~~he~~ the individual is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay.

e. When used by a guard or other public servant, if ~~such~~ the force is necessary to prevent the escape of a prisoner from a detention facility, unless ~~he~~ the guard or public servant knows that the prisoner is not ~~such a person~~ an individual as described in subdivision d. A detention facility is any place used for the confinement, pursuant to a court order, of ~~a person~~ (1) an individual charged with or convicted of an offense; ~~or (2)~~ (2) charged with being or adjudicated a juvenile delinquent; ~~or (3)~~ (3) held for extradition; ~~or (4)~~ (4) otherwise confined pursuant to under court order.

f. When used by a duly licensed physician, or ~~a person~~ an individual acting at his ~~the physician's~~ direction, if ~~such~~ the force is necessary to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered ~~(1)~~ (1) in an emergency; ~~(2)~~ (2) with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his ~~the patient's~~ parent, guardian, or other person entrusted with his ~~the patient's~~ care and supervision; or ~~(3)~~ (3) by order of a court of competent jurisdiction.

g. When used by ~~a person~~ an individual who is directed or authorized by a public servant, and who does not know that, ~~if such is the case,~~ the public servant is himself not authorized to use deadly force under the circumstances.

SECTION 2. A new section to chapter 12.1-05 of the North Dakota Century Code is created and enacted as follows:

Use of deadly force - Presumption of fear of death or serious bodily injury.

1. An individual is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to that individual or another when using deadly force if:

a. The individual against whom the deadly force was used was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered a dwelling, place of work, or occupied motor home or travel trailer as defined in section 39-01-01, or if the individual had removed or was attempting to remove another against that individual's will from the dwelling, place of work, or occupied motor home or travel trailer as defined in section 39-01-01; and

b. The individual who uses deadly force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

2. The presumption in subsection 1 may be rebutted by proof beyond a reasonable doubt that the individual who used the deadly force did not have a reasonable fear of imminent peril of death or serious bodily injury to that individual or another.

3. The presumption in subsection 1 does not apply if the court finds that:

a. The individual against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, place of work, or occupied motor home or travel trailer as defined in section 39-01-01, including an owner, lessee, or titleholder, and there is not a temporary or permanent domestic violence or protection order or any other order of no contact against that individual;

b. The individual removed or sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the individual against whom the deadly force is used;

- c. The individual who uses deadly force is engaged in the commission of a crime or is using the dwelling, place of work, or occupied motor home or travel trailer as defined in section 39-01-01 to further the commission of a crime; or
- d. The individual against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, place of work, or occupied motor home or travel trailer as defined in section 39-01-01 in the performance of official duties and the officer provided identification, if required, in accordance with any applicable law or warrant from a court, or if the individual using force knew or reasonably should have known that the individual entering or attempting to enter was a law enforcement officer.

SECTION 3. A new section to chapter 12.1-05 of the North Dakota Century Code is created and enacted as follows:

Immunity from civil liability for justifiable use of force.

1. An individual who uses force as permitted under this chapter is immune from civil liability for the use of the force to the individual against whom force was used or to that individual's estate unless that individual is a law enforcement officer who was acting in the performance of official duties and the officer provided identification, if required, in accordance with any applicable law or warrant from a court, or if the individual using force knew or reasonably should have known that the individual was a law enforcement officer.
2. The court shall award reasonable attorney's fees and court costs and disbursements incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from civil liability as provided in subsection 1.



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Attachment #2

Date: 15 March 2007
To: North Dakota Senate Natural Resources Committee
From: Jerod Tufte, Kidder County State's Attorney
Re: HB1319 and Representative Klemin's Amendments to the same

I am Jerod Tufte, Kidder County State's Attorney, and I support HB1319.

The general rule regarding use of defensive force in North Dakota is set out in Section 12.1-05-07, which states that one "is not justified in using more force than is necessary and appropriate under the circumstances." This general rule would remain unchanged under HB1319. Assertions by opponents of the bill stating that the bill would make deadly force "the first option as opposed to the last" or that it would delete the concept that deadly force must be used only when necessary are simply inaccurate. [Feb. 23, 2007 ND State's Attorneys Ass'n Memo, Sections 2 and 3] Under current law, under HB1319 as amended and passed by the House, and under Rep. Klemin's proposed amendments, any use of deadly force in self defense would be justified if and only if it was "necessary" to prevent death, serious bodily injury, or a violent felony. N.D.C.C. § 12.1-05-07(2)(b) & (c).

Our present law requires a person to retreat when confronted by an attacker in his yard, outbuildings, or vehicle even if that person fears death or serious bodily injury will result from the attack if retreat would allow that person to avoid using deadly force "with safety to the actor and others." As passed by the House, the right of a person to stay where he is, so long as he has a right to be there, is placed at the forefront. I support this principle.

Under the amendments proposed by Rep. Klemin, the bill remains an improvement over existing law insofar as it clarifies that occupied motor homes and camping vehicles are dwellings from which one need not retreat in the face of a violent attack. In other respects, it would leave the duty to retreat as it is today.

HB1319 also seeks to reduce second-guessing by prosecutors and juries about how necessary was a person's use of deadly force in self defense by creating a presumption of reasonable fear of death or serious bodily injury by a person using deadly force in response to another person's unlawful and forcible entry into a dwelling or work place. Because the prosecution already has to have proof beyond a reasonable doubt that there was no self defense, a properly instructed jury should have no trouble disregarding the presumption if such proof beyond a reasonable doubt has been presented.

To the extent that there was any reasonable doubt as to whether the presumption created in HB1319 was conclusive or rebuttable, Rep. Klemin's amendment appropriately clarifies that the presumption is not conclusive as has been suggested by the bill's critics.

Finally, I support Rep. Klemin's amendment to HB1319 in that it addresses concerns raised by law enforcement regarding execution of warrants. As amended, the bill makes clear that no presumption would apply in favor of a person using deadly force against a law enforcement

officer who enters a dwelling or workplace in accordance with official duties and in compliance with law or pursuant to a warrant. As passed by the House, the bill would not allow the presumption in favor of someone engaged in unlawful activity in the dwelling or workplace entered, but the amendment goes further in that no one, whether involved in unlawful activity or not, is entitled to the presumption as against a law enforcement officer acting in accordance with law or warrant.

HB1319 is a good bill that seeks to provide further protection to the citizens of North Dakota when and if they must respond to force with force. As a prosecutor, I want every tool I can get to help me obtain convictions against people I am convinced are guilty of crimes. As a citizen, I want substantial protection of my civil liberties, including my right of self defense, even if these protections may sometimes make it harder to convict the guilty.

Thank you for your thoughtful consideration of this bill.

Jerod E. Tufte
Kidder County State's Attorney

Today I would respectfully ask you to support House Bill 1319. This important self-defense legislation puts the presumption of the law on the side of law-abiding citizens, not criminals.

North Dakotans have a right to protect their lives and should be not bound by a "duty to retreat" when a criminal presents a threat of great bodily harm or death. North Dakota statute currently imposes such a duty to. Although *case law* has afforded crime victims latitude when deadly force has been used, citizens should have assurances in statute that their actions are justified.

It is important to remember that this legislation does not impair a prosecutor's ability to charge someone who violates the law. If you use deadly force and it is not in self-defense, you WILL be prosecuted. Remember the same opponents to this bill were crying "blood in the streets" during the concealed carry debate. Those claims never came to fruition and neither will these sensationalized claims. That is because law-abiding gun owners have consistently proven they are responsible and act lawfully.

If you ask constituents in your district about this issue, they will clearly tell you that it is common sense that a victim should be able to use deadly force to repel an attack on his/her life. In fact, the Fargo Forum conducted a poll shortly after the first House Judiciary Committee hearing and about 72 percent of over 2200 respondents supported self defense.

North Dakota is fortunate to have a low crime rate compared to many states. That doesn't mean crime doesn't happen here. Rural residents understand this, and they also understand that calling 911 and a quick police response isn't always an option.

Our North Dakota members have made their voice heard. Last year, when the North Dakota legislature was not convening regularly, our members were calling, asking if this bill would be introduced in 2007. We gauged support among lawmakers by including this question on our NRA election survey, and overwhelmingly, legislators in ND committed favorably to such a bill.

When faced with a split second, life-and-death decision, innocent citizens should not have to worry about whether they will be prosecuted for simply defending their lives. Consider the unfortunate case in Waseca, MN recently. Tracy Kruger and his son Alec were shot to death in the middle of the night by an intruder who took the farmer's shotgun from him as he hesitated. His wife Hilary was critically wounded. If Mr. Kruger would have acted sooner, he and his family may have been spared. Unfortunately, Minnesota's Castle Doctrine bill is on the backburner in St. Paul, and this becomes one more tragic tale of how coddling criminals costs innocent lives. Let's make sure this doesn't happen in North Dakota.

Darin Goens
ND NRA lobbyist

Richard E. Jorgenson
4931 81st Ave. NE
Devils Lake, ND 58301

I am a lifelong citizen of North Dakota born in Devils Lake on June 9, 1950.

I am married and have 3 grown children and a 2 year old Labrador retriever.

I own and operate Winston Noble Adjustment, Inc. in Devils Lake and have been employed as an independent insurance claims adjuster in North Dakota for over 30 years now.

I am a North Dakota volunteer Hunter Education instructor and a volunteer 4-H youth instructor in rifle and muzzle loading firearms.

I have been an active competitive shooter in the shooting sports with rifle and pistol for over 30 years and have been honored with induction into the North Dakota Marksmanship Hall of Fame.

I currently serve as executive officer and newsletter editor for the North Dakota Shooting Sports Association. I also serve as treasurer of our Lake Region Shooting Sports Association in Devils Lake.

I have discussed the need to change the North Dakota law regarding the use of lethal force in self defense at executive board and general membership meetings of the North Dakota Shooting Sports Association and of the Lake Region Shooting Sports Association. Both organizations strongly endorse the changes made to North Dakota law by HB 1319 as you have it in front of you.

Reinforcing the Right to Self Defense

The changes proposed in House Bill 1319 strongly reinforce the individual right to self defense in the State of North Dakota, and this is a good thing. The bill addresses three very important points.

First: House Bill 1319 clearly sets forth the reasonable presumption that an individual who unlawfully and forcibly enters a home or vehicle has placed the lawful occupant of that home or vehicle in fear of serious bodily injury or death.

Second: Under current law, you as the occupant of your home or vehicle are required to attempt retreat from the criminal before using any force including deadly force to protect yourself or your family.

It is unreasonable to expect our citizens to wait or retreat before taking action to protect themselves from a person who has broken into their home or automobile. That criminal has already demonstrated his willingness to break in or enter without invitation and it is reasonable to presume that he is willing to commit further violence. Many of the victims of this type of violence are elderly or otherwise not in the best shape to move in retreat. It is certainly not a good idea to turn your back on someone who is clearly violent. On the other hand, walking backward is risky as well. Once you have the means to defend yourself, retreat may simply reduce your options. The choice to retreat should be left to the victim and not mandated by law.

Third: House Bill 1319 will shield the citizens of North Dakota who defend themselves against civil lawsuits brought by burglars, robbers, and those who would commit violence.

Under North Dakota's current law, a violent criminal or his family may present a civil action against that person who used force to prevent the criminal from accomplishing his intent. The defense costs can be extremely high both in dollars and cents and in the continued emotional stress for the victim. Certainly, the person who defends himself or family is a victim who should not have to continue that defense in court where we all know that unforeseen verdicts are always possible. House Bill 1319 provides that North Dakota citizens will be immune from civil action, when they justifiably use force to protect themselves or their families.

I am here to encourage you to vote in favor of this bill and ask you to do everything you can to promote its passage.

Rick Jorgenson

In the March 13, 2007 edition of the Grand Forks Herald, Peter Welte, the States Attorney for Grand Forks County and President of the North Dakota State Attorney's Association expresses his opinions about House Bill 1319.

I strongly disagree with Mr. Welte's comments. Many of them are derogatory in nature directed toward our state's legislators and our state's citizens. Mr. Welte says that "In North Dakota, we deserve better from our legislators." I am not a North Dakota State Legislator. However, I resent his implication that our legislators are being lead around by special interest groups from outside North Dakota. Personally, it has been my experience that our North Dakota legislators are very good representatives of the good citizens of North Dakota. Our legislators are generally independent thinkers and do their best for the people who elected them.

Mr. Welte goes on to say that he feels that passage of House Bill 1319 will naturally result in more shootings. He states that House Bill 1319 removes the duty to retreat from certain deadly force situations and that this will result in more shootings. He offers no evidence to support this contention and is implying that the citizens of North Dakota will change their behavior and somehow become trigger happy if the provisions of House Bill 1319 become law. Again, I resent his implication that we are going to use deadly force to defend ourselves when such force is not necessary.

I believe that the people of North Dakota will exercise their right to self defense just exactly as they have in the past regardless of the passage of House Bill 1319. However House Bill 1319 will change the way that the state reacts to an individual citizen's use of deadly force in self defense. I believe that the changes offered in House Bill 1319 significantly improve the State of North Dakota's support of its citizens in their use of deadly force to defend themselves and their families.

Mr. Welte states that North Dakota has the lowest rate of violent crime in the nation and goes on to say that North Dakota is the safest state in the nation because of the good laws that are in place. He goes on to express the opinion that the passage of House Bill 1319 will somehow make North Dakota's citizens less safe. It is difficult to understand his reasoning. In fact, his comments disagree with those expressed by Grand Forks Captain Kerwin Kjelstrom in the recent article of March 8, 2007 also in the Grand Forks Herald. In that article, Captain Kjelstrom attributes the low crime rate in Grand Forks, ND to the character of the citizens in Grand Forks. He says that, "Grand Forks is a very, very safe city because people help each other, watch out for each other and report the things that they see."

I agree with Captain Kjelstrom that the reason North Dakota is the safest place in the United States is because of the good independent minded citizens in North Dakota rather than the laws on our books.

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Further, that article in the Grand Forks Herald clearly states that the violent crimes of rape and robbery have significantly increased in Grand Forks with the statistical increase in rape at 62% in 2006 over 2005. There is an even greater increase in robbery at 75% in 2006 over those robberies reported in 2005.

Those crimes of rape and robbery are committed directly by a criminal on the person of one of our North Dakota citizens. These are exactly the types of violent crime that House Bill 1319 is intended to address. I believe there is a clear need for a change in the law and again strongly disagree with the positions taken by Mr. Welte.

North Dakota needs to support its citizens in their efforts to defend themselves, and the changes made in House Bill 1319 improve the State's support for our citizen's right to self defense.

March 14, 2007

Richard E. Jorgenson

The State of North Dakota has recognized that its citizens have the right to act with deadly force in self defense. Thus, it seems obvious that the State must clearly support its citizens who are confronted with the horrible need to use deadly force in their own defense or in defense of others.

The State has no business imposing any duty to retreat on a citizen of North Dakota who is forced to act with deadly force in his own defense or to defend his family. Such a requirement to retreat is effectively unenforceable and works to no one's benefit.

The person confronted with the need to act with deadly force in his own defense or in defense of his family is the only person who can make any decision about retreat. That decision about retreat has to be based on the individual circumstances not a duty imposed by law. If retreat is possible, our citizens will take the opportunity to retreat. We do not want to kill anyone, and HB 1319 is not going to change our behavior.

Those States Attorneys and law enforcement personnel who have offered testimony that they feel our North Dakota citizens will somehow become callous and act with deadly force in circumstances where it is not warranted have given little regard to the generous nature of our citizens.

I am personally angered by their attitude that the passage of House Bill 1319 will somehow make our citizens use deadly force with a callous or even deliberate disregard for the lives of others. The North Dakota Fraternal Order of Police has implied that the passage of HB 1319 will cause our citizens to shoot a suspect in the back as he is running away from a crime scene. This shows no respect for our State's citizens who have generously shown great restraint when confronted by home invaders in the past.

I think it is a great mistake to think that the passage of HB 1319 will change the way North Dakota's citizens will act in any circumstance requiring self defense. Our citizens will continue to be just as generous as they have in the past.

Rather, I believe that passage of HB 1319 simply removes the ambiguity in the current state law and finally codifies the State of North Dakota's support of its citizens who are confronted with the horrible need to use lethal force in defense of their own life or the lives of their family or fellow citizens. The passage of HB 1319 is important to support the right of self defense in North Dakota.

The State does not need to continue second guessing the actions taken by its citizens in self defense by continuing to impose the vaguely defined duty to retreat that is written in the current law.

Again, I believe that we should all expect the State law to support any of our citizens who find it necessary to use deadly force in defense of themselves or their family. Almost none of us live close to a law enforcement officer who could act in our defense. Our North Dakota citizens must be self-sufficient, and it is in the best interest of North Dakota that our laws support that self-sufficiency rather than second guessing the citizen who must use deadly force in self defense.

Rick Jorgenson, 4931 81st Ave., Devils Lake, ND 58301 --- Telephone -- 701-662-4760.

MURDER

A person who intentionally or knowingly causes the death of another human being is guilty of murder.

ESSENTIAL ELEMENTS OF OFFENSE

The State's burden of proof is satisfied if the evidence shows beyond a reasonable doubt the following essential elements:

- 1) On or about March 1st, 2007, in McLean County, North Dakota, the Defendant John Doe, caused the death of [], a human being; and
- 2) The Defendant intentional or knowingly caused the death of []; and
- 3) The Defendant does not have defense of self-defense; and
- 4) The Defendant does not have a defense of excuse.

SELF-DEFENSE - DEFINED

A person is justified in using force on another person to defend himself against danger of imminent unlawful bodily injury by such other person. A person is not justified in using more force than is necessary and appropriate under the circumstances.

The defendant's conduct is to be judged by what the defendant in good faith believed and had reasonable grounds to believe was necessary to avoid apprehended death or great bodily injury.

EXCUSE

The defendant's conduct is excused if he believes the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish self-defense, even though his believe is mistaken. However, if the defendant's belief is recklessly held, his conduct is not excused.

DEFENSES - BURDEN OF PROOF

The State must prove, beyond a reasonable doubt, that the defendant was not acting in self-defense and that his conduct was not excused.

DEADLY FORCE

1. A person is not justified in using more force than is necessary and appropriate under the circumstances.

2. Deadly force is justified in the following instances:

a) When it is expressly authorized by law or occurs in the lawful conduct of war.

b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the person menaced. A person seeking to protect someone else must, before using deadly force, try to cause that person to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby. But, (1) a public servant justified in using force in the performance of his duties or a person justified in using force in his assistance need not desist from his efforts because of resistance or threatened resistance by or on behalf of the person against whom his action is directed; and (2) no person is required to retreat from his dwelling or place of work unless he was the original aggressor or is assailed by a person who he knows also dwells or works there.

c. When used by a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be there, if such force is necessary to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling or place of work, and the use of force other than deadly force for such purposes would expose anyone to substantial danger of serious bodily injury.

Use of deadly force - Presumption of fear of death or serious bodily injury.

1. An individual is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to that individual or another when using deadly force if:
 - a. The individual against whom the defensive force was used was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered a dwelling, place of work, or occupied vehicle, or if the individual had removed or was attempting to remove another against that individual's will from the dwelling, place of work, or occupied vehicle; and
 - b. The individual who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
2. The presumption does not apply if:
 - a. The individual against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, place of work, or vehicle, including an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that individual;
 - b. The individual sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the individual against whom the defensive force is used;
 - c. The individual who uses defensive force is engaged in an unlawful activity or is using the dwelling, place of work, or occupied vehicle to further an unlawful activity; or
 - d. The individual against whom the defensive force is used is a law enforcement officer who enters or attempts to enter a dwelling, place of work, or vehicle in the performance of official duties and the officer provided identification in accordance with any applicable law or the individual using force knew or reasonably should have known that the individual entering or attempting to enter was a law enforcement officer.

BURLEIGH COUNTY STATE'S ATTORNEY

RICHARD J. RIHA
STATE'S ATTORNEY

ASSISTANT STATE'S ATTORNEYS:
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TYRONE J. TURNER
JUSTIN J. SCHWARZ

Mr. Chairman, members of the Senate Natural Resources Committee, my name is Cynthia Feland. I am an assistant with the Burleigh County State's Attorney's office. I stand before you in opposition to House Bill 1319.

The only real test of our laws is their effect in the real world. Our current law has been a practical compromise between a number of competing interests in life. It is a balance between the state's interest in allowing citizens to protect themselves and their loved ones, and its interest in minimizing violence, ranging from vigilantism to a too-quick trigger finger. The law has clearly been working. No one has come forward to indicate situations where the current law has created a grave miscarriage of justice.

Under current law, a citizen has the right to use deadly force in defense of themselves or their loved ones. If that use of force is challenged, it is the State, not the person using deadly force, that has the burden of proving beyond a reasonable doubt that the deadly force used was not in self defense.

Yet the proponents of HB1319 seek to change a law that isn't broken; to expand the law so that the test for self-defense covers far more circumstances and locations than the armed home intruder scenarios. All in all, the room for error under the provisions of this bill are much larger.

My concern with the provisions of HB 1319 is that it will likely lead to a number of ugly real-world side effects and unintended consequences. HB1319 sends a very confusing message to the citizens of North Dakota about when they can use lethal force with impunity.

While the amendments proposed by the bills supports to Section one and the deletion of Section 4, eliminates some of the dangerous portion of this bill, I am still greatly concerned about the offensive killing sanctioned by the presumption language in section 2. While section 2 provides defendants with the ability to request a jury instruction, we need to make sure the presumption language makes it clear that the presumption is rebuttable and that it does not confuse or prohibit the jury from reaching a logical and just conclusion. We need to work on the presumptions section to ensure that we do not let criminals hide behind a law that was intended to protect our law abiding citizens.

To further emphasize the dangers of HB1319 are real and not mere hypothetical fears, I have attached a copy of the memo and attachments previously distributed by the North Dakota State's Attorney's Association and the North Dakota Fraternal Order of Police to members of the Senate outlining in detail the problems encountered by other jurisdictions that have adopted provisions like those proposed in HB1319.

Attachment # 27



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226

March 16, 2007

Senate Natural Resources Committee
Sen. Stan Lyson, Chairman

Re: HB 1319

Mr. Chairman and Senators:

I appreciate the opportunity to offer information regarding North Dakota's statutes regarding the use of deadly force. HB1319, as introduced, caused great concern for our state's peace officers and prosecutors, and I share those concerns. The bill was considerably amended in the House, but those amendments have not completely alleviated those worries.

The perceived need for this bill may stem from a misunderstanding of our current laws. Most of the discussion seems to center on the question of whether a person is justified in using deadly force to protect his or her home and workplace. It is important to underline, and for the public to fully understand, that the current statutes in North Dakota have never, since their enactment, prohibited the use of force, even deadly force, to protect our homes and workplaces. NDCC 12.1-05-07 makes it clear that deadly force is lawful to protect our homes to prevent commission of arson, burglary, robbery or any other felony involving violence. I am aware of no case where a law abiding North Dakotan has been prosecuted criminally, or sued civilly, for exercising that important right. There is no duty to retreat from the home or places of work in those cases.

I know that the various interested parties to this legislation have been discussing amendments to the bill to put it into a form that will be acceptable to all. My office has been offering assistance to craft appropriate amendments. While I have not seen the final draft of those amendments, my understanding is that all sides have either reached an agreement on the bill, or are very close to doing so.

If the final amended version of the bill further amplifies the current statutory arrangement, then I recommend it to you for passage. We need to assure our citizens that they are perfectly justified in protecting themselves and their loved ones, while at the same time making certain that our statutes do not provide a safe haven to those who would recklessly use the law to excuse irresponsible behavior. If there is further assistance my staff or I can offer as you work on this bill, please do not hesitate to let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wayne Stenehjem", written over a horizontal line.

Wayne Stenehjem
Attorney General

JUSTIFIABLE USE OF FORCE
(WHEN CAN I USE FORCE?)

CURRENT LAW

ENGROSSED HB NO. 1319

Self-defense – 12.1-05-03

To defend against danger of imminent unlawful bodily injury, sexual assault, or detention by another person.

Unchanged

Not lawful if:
resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted.

Unchanged

intentional provocation of unlawful action by another person to cause bodily injury or death to such other person.

Unchanged

entered into mutual combat with another person or is the initial aggressor unless resisting force which is clearly excessive in the circumstances.

Unchanged

Defense of Others – 12.1-05-04

May defend another person if:

the person defended would be justified in defending himself and the person coming to the defense has not, by provocation or otherwise, forfeited the right of self-defense.

Unchanged

Defense of Premises and Property – 12.1-05-06

To prevent or terminate an unlawful entry or other trespass in or upon premises;

or

to prevent an unlawful carrying away or damaging of property.

Unchanged

But, the person using such force must first request the person against whom such force is to be used to desist from the unlawful

conduct except that a request is not necessary if:
it would be useless or dangerous to make
the request;

or

substantial damage would be done to the
property sought to be protected before the
request could effectively be made.

Unchanged

LIMITS ON THE USE OF FORCE (HOW MUCH FORCE CAN I USE?)

May only use force that is necessary and
appropriate under the circumstances.
(applies to both non-deadly and deadly force)-
12.1-05-07(1)

Unchanged

Deadly force may be used in limited
circumstances- 12.1-05-07(2)

12.1-05-07(2)(b)

In lawful self-defense, or in lawful defense
of others, if deadly force is necessary to
protect the person using the force or
anyone else against death, serious bodily
injury, or the commission of a felony
involving violence.

Unchanged

Duty to avoid use of deadly force by
retreat or other conduct involving minimal
interference with the freedom of the
person menaced if it can be done with
safety to the person using deadly force
and others.

Removed

No duty to retreat or avoid the use of
deadly force by:

a public servant justified in using
force in the performance of his
duties, or a person justified in using
force in assisting the public servant,
need not desist from his efforts because
of resistance or threatened resistance
by or on behalf of the person against
whom the force is directed;

Removed

a person from his dwelling or place of work unless the person using deadly force was the original aggressor or is attacked by a person who he knows also dwells or works there.

Removed

12.1-05-07(2)(c)

By a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be there, if:

deadly force is necessary to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling or place of work;

and,

the use of force other than deadly force for such purposes would expose anyone to substantial danger of serious bodily injury.

Amended to add
a "vehicle" to a
"dwelling or place of
work" where deadly
force may be used –
otherwise unchanged

**Summary of the Testimony
Jeffrey S. Weikum
On Behalf of the North Dakota Trial Lawyers
In Opposition to House Bill No. 1319**

I am not anti-gun

- I own and use many firearms
 - My personal firearms include hand guns and an assault rifle
- My wife and I are avid hunters
- I grew up hunting and using firearms – my 92 year old grandfather still hunts deer

I am not opposed to the use of deadly force

- I have absolutely no problem using my firearms and deadly force to defend my home and family, but my use of that force must be reasonable and I must be accountable for my decision to use that force

HB 1319 contains an extraordinary change from current law – the inclusion of a presumption and that is why HB1319 will have an unintended results

- The only fact necessary to trigger an individual's right to shoot to kill is someone being in a house where they are not supposed to be – unfortunately that doesn't mean it's the bad guys.
- Individuals who are confused, ill, infirm, or children who inadvertently enter the wrong residence are at risk of death with no accountability
- The current law does not allow us to shoot at shadows - the new law will
- Think of the entire spectrum of people you know – it's a wide spectrum. Now think of meeting them inadvertently because you are confused or ill and stumble into their home, in the dark – their actions in using deadly force must be tempered with reason but HB1319 does not require review

Modified comparative fault found at N.D.C.C. § 32.03.2-02, appropriately addresses the area of civil liability. (A copy is attached.)

- Modified comparative fault is the current standard used by courts in civil cases to determine if people acted appropriately
- This system of comparative fault is fair and works
- North Dakotans are not bringing frivolous shooting claims. There are remedies already in place for bringing frivolous lawsuits.

House Bill No. 1319 is likely unconstitutional as proposed in as much as it grants immunity.

- The granting of immunity from civil liability for the use of deadly force as provided in HB 1319 is in violation of the Fourteenth Amendment of the

Constitution which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The ability to bring a claim for damage resulting from an injury or death is a fundamental right and the review of a statute abridging the same will be conducted under the strict scrutiny standard. Under that standard the government has the burden of showing this law is necessary to achieve a compelling and overriding governmental interest.

- In North Dakota, the current law allows home owners to use deadly force, but its use and appropriateness is judged on a reasonable person standard. There is nothing indication to indicate that our current law based upon modified comparative fault has not worked. There is arguably no government interest being addressed with this legislation.

I would respectfully request that vote against HB 1319.

NDCC, 32-03.2-02

NORTH DAKOTA CENTURY CODE

TITLE 32. JUDICIAL REMEDIES

CHAPTER 32-03.2. COMPARATIVE FAULT, DAMAGES, COLLATERAL SOURCE PAYMENTS AND PERIODIC PAYMENTS.

32-03.2-02 Modified comparative fault.

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

Source: S.L. 1987, ch. 404, § 2; 1993, ch. 324, § 2.

To: Senate Natural Resources Committee
From: Christopher T. Dodson, Executive Director
Subject: House Bill 1319 (Use of Deadly Force)
Date: March 16, 2007

When and how much force an individual can use against another is ultimately a moral issue. Each lawmaker must evaluate House Bill 1319 according to whether it moves us closer to or further from fundamental moral principles found in Sacred Scripture and knowable by reason that have served as a foundation of civil society for thousands of years.

The Bible presents the precept "You shall not kill" as a divine commandment. Those of different faiths or no faith accept the same injunction because the value of all human life. From this precept comes a fundamental principle: No one can claim the right to deliberately kill an innocent human being.

Yet the injunction against killing is rooted in the recognition that all human life is sacred or that all human life has value because of the inherent dignity of every human person. For that reason, a second fundamental principle developed: the determination of guilt and the authority to punish is limited to duly appointed public authorities.

These two principles have guided the development of law in Western society for thousands of years, almost always with the recognition that they are rooted in the unchanging and absolute commandment, "You shall not kill."

Yet from the beginning, faced with the many and often tragic cases that occur in the life of individuals and society, we have sought a fuller and deeper understanding of what the commandment prohibits and prescribes, particularly in the case of self-defense.

Thomas Aquinas provides the most accepted and definitive treatment of the subject. Aquinas restated the fundamental principle that it is never permissible for a *private* individual to intentionally kill a person. This injunction applies even in cases of self-defense. A person can, however, use *moderate* force to repel an aggressor when it is *necessary* to do so in order to protect oneself or someone for whom the person is responsible. If the use of force meets these conditions, and the aggressor dies as a result, the person is not guilty of murder. The death of the aggressor in such a situation is a double effect. In other words, the death is an unintended result.

Through the centuries, courts and lawmakers incorporated these principles into law. For example, the "duty to retreat" in English common law finds its basis in the necessity requirement, since the use of deadly force could not be viewed as *necessary* if the person could escape.



Representing the Diocese of Fargo
 and the Diocese of Bismarck

Christopher T. Dodson
 Executive Director and
 General Counsel

Eventually, some jurisdictions, including North Dakota, adopted the "Castle Doctrine," which removed the duty to retreat in a person's dwelling or work place. The Castle Doctrine does not necessarily contradict the fundamental principles since it is based on several presumptions applicable 500 years ago. Indeed, something like the Castle Doctrine appears in Exodus 22:1. It states: "If a thief is caught in the act of housebreaking and beaten to death, there is no bloodguilt involved." The next verse, however, states: "But if after sunrise he is thus beaten, there is bloodguilt." In other words, killing an intruder at night was permissible, but killing an intruder during the day was not. Why the difference? Scholars have noted that a person had options in daylight which he or she would not have in the small, lightless, dwellings of that time. So long as options other than deadly force were available, killing was not permitted.

The instructions in Exodus are helpful to us today. The passage in Exodus presumes that fear of imminent death was reasonable in the case of a night break-in because of the existence of conditions, unique to that time, that did not allow retreat, use of moderate force, or determination of the aggressor's intent. The presumption was not based on the mere fact that the trespass occurred in the home.

Again, the ultimate question is whether House Bill 1319 moves us closer to or further from these fundamental moral principles. We conclude that adoption of the bill would move us away from these precepts for several reasons:

- Deletion of the clause: "The use of deadly force is not justified if it can be avoided" removes the normative standard principle upon which a society should rest;
- Removal of the duty to retreat: (1) eliminates one of the key methods for determining whether the use of force was actually necessary, and (2) diminishes, if not ignores, the fundamental principle that all persons have a moral obligation to try not to use deadly force; and
- The creation of a broad presumption of fear in Section 2: (1) justifies the use of deadly force even when the person's acts were not, in fact, reasonable, (2) subtly shifts the determination of a transgressor's guilt or innocence away from the duly appointed legal authorities and to the private individual; (3) creates presumptions based on place and circumstances that bear no actual relationship to whether force is necessary; and (4) sanctions a shift in culture from one expecting prudence and respect for life to one of fear and acceptance of violence.

We urge a "Do Not Pass" recommendation on House Bill 1319.

City of Minot

Police Department

Attachment #10

Lieutenant Dan Strandberg
Minot Police Department
515, 2nd Ave SW
Minot ND 58701
Telephone: 701-857-4717
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03-16-07

Chairman Lyson and member of the committee

I am offering this testimony to express some concerns that I have regarding House bill 1319. This bill deals with the use of Deadly Force. I think that this proposed piece of legislation is dangerous to the people of this state.

The first matter that needs to be addressed is the reason why this bill was initiated. Is there a problem with homeowners being prosecuted when they are using force to protect themselves, or others in their home; or anywhere else for that matter? If there is I am not aware of it.

Another issue that I would like to address is section 1, sub-section 2. b that deals with the duty to retreat and the avoidance of deadly force. The proposed changes would do away with the duty to retreat from anywhere an individual has the right to be. If this were passed then there would not be any duty to retreat, if possible, in any public place. An individual also would not have the duty to retreat if they were in a place that was not open to the public, but was invited.

I think that doing away with the duty to retreat changes the whole perspective on this issue away from the matter of defense to one that is closer to offensive in nature. After all from a defensive standpoint retreat is often the best tactic. I speak to this topic from the standpoint of a person who has been faced with the use of force throughout my 21-year career. I have generally found retreat and possible de-escalation, whenever possible, to be an effective approach in these situations. I think that we as a society have a responsibility to discourage the use of violence and think that this bill has the opposite effect.

I also have concerns with the addition of section 2 to 12.1-05-07. This section adds the presumption of fear of death or bodily injury to the use of deadly force statute. This change would give the presumption of fear of death or serious bodily injury to anyone using deadly force when another is unlawfully and forcibly entering a dwelling, place of work or occupied vehicle, or had unlawfully and forcibly entered a dwelling, place of work or occupied vehicle, or if the individual had removed or was attempting to remove another against that individual's will from a dwelling or occupied vehicle.

According to the NDCC "Force" means physical action. If a person used any physical action to gain entry to a dwelling, place of work or occupied vehicle the presumption of fear of death or serious bodily injury would apply and deadly force would be acceptable.

★ The Magic City ★

City of Minot

Police Department

Attachment #10

The consequences of this would be that a homeowner would be justified in using deadly force against a trespasser that did not pose a threat to anyone.

An additional problem with the presumption is the use of the term “, or had unlawfully and forcibly entered a dwelling, place of work or occupied vehicle.” This means that if a person was in a place unlawfully and was leaving or had already left a person who was lawfully in the place would be justified in using deadly force.

This presumption also will make conducting a proper investigation of such cases more difficult. In order for law enforcement to be in a residence and search for evidence either consent, or a search warrant is required; barring any exigent circumstances. A search warrant can only be obtained if there is probable cause that evidence of a crime is at a particular location. With the presumption in place it would be very difficult to show that a crime was committed if deadly force was used in a dwelling, place of work or occupied vehicle. This would make it difficult if not impossible to conduct a search of such a scene. This in turn would make it difficult to investigate these incidents.

The term “place of work” also is problematic. Is a farmer’s field a place of work? A construction site? How about a roadway? This is probably not the intent of this change, but the way that it is written an argument can be made that these locations would also be included in the presumption.

The next issue is in section three, the immunity from civil liability for justifiable use of force. This would be similar to the federal law that is not permitting the lawsuits in the CP Rail Minot derailment to go forward. It is best for the merit of cases in such situations to be decided on by an appropriate authority using the facts surrounding them.

This bill, if passed, would create opportunities for people to justify using deadly force when they would not be justified today. There are people who would take advantage of these changes in the statutes and place themselves in a situation where they could excuse their lethal actions.

The present law in North Dakota allows for the justifiable use of force. The Century code allows for a person to use force in defense of themselves or another when there is imminent danger of bodily injury, sexual assault, or detention by such other person. Force can also be used to protect property and premises. This seems to be reasonable; a person can use force when it is necessary.

Deadly force can be used when necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. Retreat is only necessary when can be safely done. A person does not have the duty to retreat in their home or place of work. This again seems to be reasonable. A person can take a life to save a life.

Another problem that I see with this bill is the addition of section 4; which changes the arrest standard for the use of force. At time the arrest standard for the use of force is the same for any other crime; probable cause that a crime happened and the suspect committed the crime. This bill would also require that a law enforcement agency determine that

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pages(s)
missing