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## CRIMES AND OFFENSES Defenses to Criminal Prosecutions: Provide That Person Who Is Attacked Has No Duty to Retreat; Provide Immunity from Prosecution

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## CRIMES AND OFFENSES

### ***Defenses to Criminal Prosecutions: Provide That Person Who Is Attacked Has No Duty to Retreat; Provide Immunity from Prosecution***

CODE SECTION:	O.C.G.A §§ 16-3-2 (amended), § 51-11-1 (amended)
BILL NUMBER:	SB 396
ACT NUMBER:	599
GEORGIA LAWS:	2006 Ga. Laws 477
SUMMARY:	The Act clarifies and amends Georgia law regarding the justifiable use of deadly force and the duty to retreat. Its purposes are to extend the protections of the castle doctrine beyond one's home, vehicle and business to anywhere one has the legal right to be; to codify explicitly Georgia's position on the duty to retreat; and to protect those standing their ground from criminal prosecution and civil liability.
EFFECTIVE DATE:	July 1, 2006

#### *History*

A typical retreat rule, or duty to retreat, holds that the victim of a murderous assault must choose a safe retreat instead of resorting to deadly force in self-defense, unless (1) the victim is at home or in his or her place of business (the so-called *castle doctrine*), or (2) the assailant is a person whom the victim is trying to arrest.<sup>1</sup> The rationale for this doctrine is that a human life, even that of an aggressor, is more important than the dignity or property interest of the other party in standing his or her ground.<sup>2</sup>

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1. BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis in original).

2. *Id.* (quoting George E. Dix, *Justification: Self-Defense*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 946, 948-49 (Sanford H. Kadish ed., 1983)).

*The Duty to Retreat in Georgia*

Prior to 2006, Georgia statutory law did not explicitly impose a duty to retreat on victims of attack who took the life of their assailant.<sup>3</sup> The Georgia Code required aggressors and persons involved in combat by consent to show that they withdrew from the encounter and effectively communicated to the other person their intent so to do.<sup>4</sup> However, persons who had taken no part in the instigation of a violent or potentially violent encounter had no duty to retreat under Georgia Code, even when away from their homes.<sup>5</sup> Code section 16-3-21 stated that “a victim of an attack is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.”<sup>6</sup> While there was no statutory duty to retreat in Georgia, and thus no requirement for a codified castle doctrine excepting a residence,<sup>7</sup> the Code nevertheless eliminated the requirement that force be met with no greater than equal force when acting in defense of a habitation.<sup>8</sup>

If the person claiming the affirmative defense of justification was not the aggressor, Georgia courts did not imply a duty to retreat where the Code was silent.<sup>9</sup> In 1898, the Georgia Supreme Court outlined the rule for victims of attack, holding that there is no duty to retreat “if the circumstances are sufficient to excite the fears of a reasonable man that a felonious assault is about to be made upon him, and the slayer, who is free from blame, acts under the influence of such fears.”<sup>10</sup> Since then, Georgia courts have confirmed the absence

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3. See generally 2001 Ga. Laws 1247 (formerly found at O.C.G.A. § 16-3-21(a) (Supp. 2005)).

4. 1968 Ga. Laws 1272, 1273 (formerly found at O.C.G.A. § 16-3-21(b) (Supp. 2005)).

5. 2001 Ga. Laws 1247, 1248 (formerly found at O.C.G.A. § 16-3-21(a) (Supp. 2005)).

6. *Id.*

7. See *id.*

8. See, e.g., 2001 Ga. Laws 1247, 1248 (formerly found at O.C.G.A. 16-3-23(2) (Supp. 2005)) (stating a person may use deadly force to defend entry into his or her habitation if it is used against someone who is not a member of the family or household and who has unlawfully and forcibly entered the residence when the person knew or had reason to believe that the entry had occurred).

9. See, e.g., *Dukes v. State*, 568 S.E.2d 151, 152-53 (Ga. Ct. App. 2002) (quoting *Johnson v. State*, 315 S.E.2d 871, 872 (Ga. 1984)); *Ellis v. State*, 539 S.E.2d 184, 185 (Ga. Ct. App. 2000).

10. *Glover v. State*, 31 S.E. 584, 584-85 (Ga. 1898).

of any duty to retreat on the part of the victim,<sup>11</sup> and found reversible error where the trial court charged such a duty.<sup>12</sup>

Generally, Georgia's civil defenses of justification and authorization have been modeled on the state's criminal law.<sup>13</sup> However, Code section 51-11-9 expressly provided for civil immunity for persons justifiably threatening or using force in defense of a habitation.<sup>14</sup>

### *Inspiration for the Act*

In 2005, the Florida legislature created Florida Code sections 776.013<sup>15</sup> and 776.032<sup>16</sup> and amended section 776.012.<sup>17</sup> Prior to 2005, Florida's self-defense statutes resembled those of Georgia.<sup>18</sup> However, Florida courts imposed a common law duty on victims of attack to use every reasonable means to avoid the danger, including retreat, prior to using deadly force, except when in their own homes.<sup>19</sup> Thus, in order to fortify Florida's self-defense laws, the new statutes contained explicit provisions on no duty to retreat<sup>20</sup> and immunity from criminal prosecution and civil liability.<sup>21</sup>

Senator Greg Goggans of the 7th District of Georgia had watched with great interest the passage of Florida's law, dubbed the Castle Doctrine Law.<sup>22</sup> He introduced SB 396 to the Georgia Senate because he wished to extend the protection of Georgia law beyond one's home, vehicle, and business to anywhere one has the legal right to be; to codify explicitly Georgia's position on the duty to retreat; and to

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11. See *Johnson v. State*, 315 S.E.2d 871, 872 (Ga. 1984).

12. See *Scott v. State*, 234 S.E.2d 685, 687 (Ga. Ct. App. 1977).

13. See *McNeil v. Parker*, 315 S.E.2d 270, 271 (Ga. Ct. App. 1984).

14. 1986 Ga. Laws 515, 515-16 (formerly found at O.C.G.A. § 51-11-9 (Supp. 2005)).

15. FLA. STAT. § 776.013 (2006).

16. FLA. STAT. § 776.032 (2006).

17. FLA. STAT. § 776.012 (2006).

18. Compare, e.g., 2001 Ga. Laws 1247 (formerly found at O.C.G.A. 16-3-21(a) (Supp. 2005)) with FLA. STAT. § 776.012 (2004) (repealed Oct. 1, 2005).

19. *State v. James*, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003).

20. See *id.*

21. See FLA. STAT. § 776.032 (2006).

22. Video Recording of Senate Proceedings, Mar. 2, 2006 (remarks by Sen. Greg Goggans at 1:19), <http://mediar1.gpb.org/ramgen/leg/2006/sv030206-2.rm?usehostname> [hereinafter Senate Debate Video].

protect those standing their ground from criminal prosecution and civil liability.<sup>23</sup>

### *Bill Tracking of SB 396*

#### *Consideration and Passage by the Senate*

Senators Greg Goggans, Eric Johnson, Tommie Williams, Jim Whitehead, and Renee Unterman of the 7th, 1st, 19th, 24th, and 45th districts, respectively, and others sponsored SB 396.<sup>24</sup> On January 10, 2006, the Senate first read the bill and referred it to the Senate Judiciary Committee.<sup>25</sup> The Committee offered an initial substitute to the bill as introduced on February 1, 2006.<sup>26</sup> This first substitute added the purpose “to amend Article 1 of Chapter 11 of Title 51 of the Official Code of Georgia Annotated, relating to general provisions relative to defense to tort actions, so as to provide for civil immunity,”<sup>27</sup> in addition to a section providing for immunity from civil liability for threat or use of force in defense of habitation.<sup>28</sup>

On February 2, 2006, the Senate read the bill for the second time.<sup>29</sup> The Senate recommitted SB 396 to the Senate Committee on Judiciary on February 23, 2006.<sup>30</sup> The Committee favorably reported the bill on February 28, 2006, proposing a second substitute.<sup>31</sup>

The Committee proposed removing section 1 references to “a person not engaged in a criminal activity,” “who is attacked” and “in a place where he or she has a right to be” and replacing the language with references to specific Code sections.<sup>32</sup> Members of the Committee were concerned that such terms would need to be defined by the courts and could ultimately limit the common law absence of a

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23. Senate Debate Video, *supra* note 22 (remarks by Sen. Goggans at 1:22-24).

24. See SB 396, as introduced, 2006 Ga. Gen. Assem.

25. See State of Georgia Final Composite Status Sheet, SB 396, Jan. 10, 2006 (Mar. 30, 2006).

26. See State of Georgia Final Composite Status Sheet, SB 396, Feb. 1, 2006 (Mar. 30, 2006).

27. SB 396 (SCS 06 LC 35 0089S), 2006 Ga. Gen. Assem.

28. *Id.*

29. See State of Georgia Final Composite Status Sheet, SB 396, Feb. 2, 2006 (Mar. 30, 2006).

30. See State of Georgia Final Composite Status Sheet, SB 396, Feb. 22, 2006 (Mar. 30, 2006).

31. See State of Georgia Final Composite Status Sheet, SB 396, Feb. 28, 2006 (Mar. 30, 2006); SB 396 (SCS 06 LC 29 2287S), 2006 Ga. Gen. Assem.

32. Compare SB 396 (SCS 06 LC 29 2287S), 2006 Ga. Gen. Assem., with SB 396 (SCS 06 LC 35 0089S), 2006 Ga. Gen. Assem.

duty to retreat.<sup>33</sup> The Committee also wanted to ensure that the Act would encompass all elements of the other Code sections, such as the justifiable use of force to prevent a forcible felony.<sup>34</sup>

The substitute featured altered wording of section 2 from “unless any deadly force used by such person utilizes a weapon the carrying or possession of which is unlawful” to “unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful.”<sup>35</sup>

The Committee also proposed changing the wording of section 3 from “shall not be held liable in any civil action” to “shall not be held liable to the person against whom the use of force was justified or to any person acting as an accomplice or an assistant to such person in any civil action.”<sup>36</sup> Members of the Committee wanted to ensure a cause of action for innocent bystanders injured by a victim’s unreasonably dangerous response to a reasonable threat on his or her life.<sup>37</sup> On March 2, 2006, the Senate adopted the second Committee substitute, and passed SB 396 by a vote of 40 to 13.<sup>38</sup>

### *Consideration and Passage by the House*

The Georgia House of Representatives first read SB 396 on March 6, 2006.<sup>39</sup> The House read the bill a second time on March 8, 2006 and committed it to the House Committee on Judiciary Non-Civil.<sup>40</sup> On March 22, 2006 the Committee favorably reported SB 396 with no substitutes or amendments.<sup>41</sup> The House read the bill for a third time on March 24, 2006 and adopted it that day by a vote of 115 in

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33. Telephone interview with Sen. Preston W. Smith, Senate Dist. No. 52 (Apr. 17, 2006) [hereinafter Smith Interview].

34. *Id.*; see 2001 Ga. Laws 1247, 1248 (formerly found at O.C.G.A. § 16-3-21(a) (2005 Supp.)).

35. See SB 396 (SCS 06 LC 29 2287S), 2006 Ga. Gen. Assem.

36. See SB 396 (SCS 06 LC 29 2287S), 2006 Ga. Gen. Assem.

37. Smith Interview, *supra* note 33.

38. See State of Georgia Final Composite Status Sheet, SB 396, Mar. 2, 2006 (Mar. 30, 2006); Georgia Senate Voting Record, SB 396 (Mar. 2, 2006).

39. See State of Georgia Final Composite Status Sheet, SB 396, Mar. 6, 2006 (Mar. 30, 2006).

40. See State of Georgia Final Composite Status Sheet, SB 396, Mar. 8, 2006 (Mar. 30, 2006).

41. See State of Georgia Final Composite Status Sheet, SB 396, Mar. 22, 2006 (Mar. 30, 2006).

favor to 42 against.<sup>42</sup> The Senate sent SB 396 to Governor Perdue on April 4, 2006.<sup>43</sup>

### *The Act*

The Act adds Code section 16-3-23.1 providing that a person who uses force in defense of self or others, in defense of a habitation or in defense of property other than a habitation, has no duty to retreat.<sup>44</sup>

The Act amends Code section 16-3-24.2 relating to immunity from prosecution and exception to include Code section 16-3-23.1.<sup>45</sup>

The Act amends Code section 51-11-9 relating to immunity from civil liability for threat or use of force in defense of habitation to include threats or use of force in defense of self or others and threats or use of force in defense of property other than a habitation and to provide civil immunity only from suits brought by the person against whom the force was justified or their assistants or accomplices.<sup>46</sup>

### *Analysis*

#### *Application of the Act*

By its text, the Act protects those who threaten or use deadly force in the reasonable belief that such force is necessary to prevent the use of deadly force against them or another, those who act in defense of a habitation and those who act to defend property other than a habitation.<sup>47</sup> Those who employ a weapon in their possession unlawfully to threaten or use deadly force lose the Act's protection from criminal prosecution.<sup>48</sup> The Act makes no mention of proper treatment for those who defend themselves with a weapon in their possession unlawfully, including those not permitted to carry a

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42. See State of Georgia Final Composite Status Sheet, SB 396, Mar. 24, 2006 (Mar. 30, 2006); Georgia House of Representatives Voting Record, SB 396 (Mar. 24, 2006).

43. See State of Georgia Final Composite Status Sheet, SB 396, Apr. 4, 2006 (Mar. 30, 2006).

44. O.C.G.A. § 16-3-23.1 (Supp. 2006).

45. O.C.G.A. § 16-3-24.2 (Supp. 2006).

46. O.C.G.A. § 51-11-9 (Supp. 2006).

47. See O.C.G.A. § 16-3-21 (Supp. 2006); O.C.G.A. § 16-3-23.1 (Supp. 2006); O.C.G.A. § 16-3-24.2 (Supp. 2006); O.C.G.A. § 51-11-9 (Supp. 2006).

48. See O.C.G.A. § 16-3-24.2 (Supp. 2006).

weapon but who are able to obtain one during an attack.<sup>49</sup> Whether the Act creates a duty to retreat for such people, or whether it removes entirely the defense of justification will be for the courts to decide.<sup>50</sup>

As introduced in the Senate, SB 396 required a person claiming its protection be in a place he or she had a right to be.<sup>51</sup> While the Senate Judiciary Committee removed the language,<sup>52</sup> the bill's sponsor continued to refer to this requirement.<sup>53</sup> Whether the Act creates a duty to retreat for trespassers, even if they are unintentional trespassers, or precludes any type of justification defense also will be left to Georgia's courts.<sup>54</sup>

The Act provides that there is no duty to retreat for those defending property other than a habitation.<sup>55</sup> However, it was not the intention of Senators Goggans or Smith to provide immunity from criminal prosecution and civil liability for individuals who take a life merely in order to prevent the taking of personal property.<sup>56</sup> To qualify for the Act's protection, a person using threats or force to defend property other than a habitation must also be responding to a threat to the occupants of a habitation, a deadly threat to him or herself or another, or to prevent the commission of a forcible felony.<sup>57</sup> This leaves redundant references to property other than a habitation.<sup>58</sup>

### *Criticism of the Act*

A number of critics of the Act, in addition to some proponents and political commentators, understood that the Act broke new ground by removing an established duty to retreat for victims of attack when

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49. *See id.*

50. Smith Interview, *supra* note 33.

51. *See* SB 396, as introduced, 2006 Ga. Gen. Assem.

52. *See* SB 396 (SCS 06 LC 29 2287S), 2006 Ga. Gen. Assem.

53. Senate Debate Video, *supra* note 22 (remarks by Sen. Goggans at 1:23).

54. Smith Interview, *supra* note 33.

55. *See* O.C.G.A. § 16-3-23.1 (Supp. 2006).

56. *See* Senate Debate Video, *supra* note 22 (remarks by Sen. Goggans at 1:46); Smith Interview, *supra* note 33.

57. *See* Senate Debate Video, *supra* note 22 (remarks by Sen. Goggans at 1:46); Smith Interview, *supra* note 33.

58. Smith Interview, *supra* note 33.



they are not in their own homes, vehicles or place of business.<sup>59</sup> Critics were concerned that Georgia's law on justification was already sufficiently protective of victims, and that the Act would lead to vigilantism.<sup>60</sup> Without the benefit of specialized training, members of the public will be at liberty to make decisions in the heat of the moment that could lead to unnecessary loss of life.<sup>61</sup> Even if Georgia common law did not impose a duty to retreat, the codification of this rule may limit the discretion of our judges to act in the interest of justice.<sup>62</sup> Law-abiding citizens already enjoyed sufficient protection under Georgia law and the Act will "do nothing except make it more difficult to prosecute the overly trigger-happy among us."<sup>63</sup>

No African-American Senator voted in favor of SB 396.<sup>64</sup> Critics were concerned that the Act's reliance on a victim's reasonable perception will lead to the unnecessary use of lethal force, especially when the alleged aggressor is of a different race, and that jurors will be sympathetic to that perception where they share a common race with the victim.<sup>65</sup>

### *Impact of the Act*

In sum, the effect of the Act on Georgia law was to codify Georgia's common law absence of a duty to retreat in the face of force, in defense of habitation or to prevent a forcible felony, and to clarify the extent to which a person reasonably employing force in such circumstances would be protected from civil liability.<sup>66</sup>

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59. See Senate Debate Video, *supra* note 22 (remarks by Sen. Greg Goggans at 1:22, :23); Telephone interview with Sen. Emanuel D. Jones, Senate District No. 10 (Apr. 20, 2006) [hereinafter Jones Interview]; Sonji Jacobs, *Bill Gives Citizens More Latitude to Defend Themselves*, ATLANTA J.-CONST., Mar. 3, 2006, at A1; Denis O'Hayer, *11Alive.com Politics Blog: Week 7, Thursday March 2, 2006*, [http://www.11alive.com/news/usnews\\_article.aspx?storyid=76782](http://www.11alive.com/news/usnews_article.aspx?storyid=76782).

60. Jones Interview, *supra* note 59; Telephone interview with Sen. Steen Miles, Senate District No. 43 (Apr. 20, 2006) [hereinafter Miles Interview].

61. Senate Debate Video, *supra* note 22 (remarks by Sen. Miles at 1:52, :53); Miles Interview, *supra* note 60.

62. Jones Interview, *supra* note 59.

63. Jay Bookman, *Gun Bills Send Wrong Message of Deadly Force*, ATLANTA J.-CONST., Jan. 26, 2006, at A19.

64. O'Hayer, *supra* note 59.

65. Senate Debate Video, *supra* note 22 (remarks by Sen. Steve Thompson at 1:57); Jones Interview, *supra* note 59.

66. See Senate Debate Video, *supra* note 22 (remarks by Sen. Judson Hill at 1:43, :44).

Proponents suggest that these changes will give the state's law-abiding citizens the freedom to protect themselves and their loved ones,<sup>67</sup> while critics fear it will lead to a dangerous arena of knee-jerk reaction and Wild West vigilante justice.<sup>68</sup> In reality, any impact may be more muted, as these changes amount to little more than a partial codification of Georgia's common law.<sup>69</sup>

*Daniel J. Merrett*

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67. See Senate Debate Video, *supra* note 22 (remarks by Sen. Goggans at 1:26).

68. See Miles Interview, *supra* note 60; Patrik Jonsson, *Is Self-Defense Law Vigilante Justice?*, CHRISTIAN SCI. MONITOR, Feb. 14, 2006, available at <http://www.csmonitor.com/2006/0224/p02s01-usju.html>.

69. See Senate Debate Video, *supra* note 22 (remarks by Sen. Hill at 1:43, :44).