

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1866

SPONSOR: Senator Webster

SUBJECT: Use of force by law enforcement officers or correctional officers

DATE: March 18, 1999

REVISED: 3/23/99 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gomez</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/1amendment</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

This bill specifies that “deadly force” shall not include the discharge of a firearm, loaded with a “less-lethal munition,” by a law enforcement officer or correctional officer during and within the scope of his or her official duties. The effect is to make express what is not currently stated in the deadly force definition.

This bill defines “less-lethal munition” to mean “a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person’s body.”

Finally, the bill creates an affirmative defense for a law enforcement officer or correctional officer or his or her employer in civil or criminal actions arising out of the use of any less-lethal munition in good faith during and within the scope of his or her official duties.

This bill takes effect on July 1, 1999.

This bill substantially amends the following sections of the Florida Statutes: 776.06.

## II. Present Situation:

Chapter 776, F.S., contains various provisions describing what constitutes the justifiable use of force under certain circumstances. Several sections specifically address use of force and deadly force by law enforcement officers or correctional officers.

*Use of force -- escapes.* Section 776.07, F.S., addresses the use of force to prevent escapes. This section states:

- ▶ a law enforcement officer or other person who has an arrested person in his or her custody is justified in the use of any force which he or she reasonably believes to be necessary to prevent the escape of the arrested person from custody, and

- ▶ a correctional officer or other law enforcement officer is justified in the use of force, *including deadly force*, which he or she reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

***Use of force -- arrests.*** Section 776.05, F.S., states that a law enforcement officer is justified in the use of *any* force, when:

- ▶ the officer reasonably believes the force to be necessary for self-defense or defense of another from bodily harm when making the arrest,
- ▶ necessarily committed in retaking escaped felons, or
- ▶ necessarily committed in arresting felons fleeing from justice.

However, the provision authorizing use of any force, when necessarily committed in arresting felons fleeing from justice, (s. 776.05(3), F.S.), is qualified. An officer may not use this provision as a defense in any civil action for damages brought for the wrongful use of deadly force, unless:

- ▶ the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and:
  - ▶ the officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or other, or,
  - ▶ the officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person.

The qualification in s. 776.05(3), F.S., is a codification of the United States Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the Court held that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable" under the Fourth Amendment. In *Garner*, a Tennessee statute authorized the use of any force necessary to arrest a fleeing suspect. The officer used this statute to defend against a federal civil suit brought against him for shooting an unarmed, apparently non dangerous felon. The Court found that the statute was unconstitutional as applied to these facts reasoning that the Fourth Amendment does not permit a police officer to seize "an unarmed, non dangerous suspect by shooting him dead." The Court stated, however, that where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

***Deadly force -- defined.*** Thus what constitutes "deadly force" is particularly important when determining whether an officer may use s. 776.05(3), F.S., as a defense in a civil action for wrongful death. As well, the "deadly force" definition is important when considering what type of force is appropriate in non-arrest situations which fall outside the authorization provided by s. 776.05., F.S.

Section 776.06, F.S., defines "deadly force" to mean force which is likely to cause death or great bodily harm and includes, but is not limited to:

- ▶ The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm, and
- ▶ The firing of a firearm at a vehicle in which the person to be arrested is riding.

This definition does not specify that lethal munition must be fired from the firearm. One might argue that “lethal munition” is implicit in the definition of deadly force, but it is not express, and no reported appellate cases have addressed this question. Moreover, whether “less-lethal munition” can cause great bodily harm for purposes of the “deadly force” definition could present a factual question in a case where an individual sustained wounds that were arguably life threatening.

***Firearm -- defined; less-lethal munition.***

Although not defined in ch. 776, firearm is defined in ch. 790, relating to weapons and firearms, as follows:

"Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

s. 790.001(6), F.S.

Various law enforcement and correctional agencies have acquired new technology designed to stun or temporarily incapacitate a person without penetrating the person's body. This weaponry is particularly useful in tactical situations *e.g.*, a hostage taking or a riot, where law enforcement may use nonlethal weapons such as stun guns or tear gas guns. Since the firearm definition does not specify that the projectile must be lethal, such weapons might be deemed firearms although not designed to cause death or great bodily harm.

### **III. Effect of Proposed Changes:**

This bill amends s. 776.06, F.S., which defines the term “deadly force.” The deadly force definition currently uses the term “the firing of a firearm,” but does not specify that the firearm must be fire lethal munition. This could raise the question of whether the firing of “less-lethal munition” would constitute “ the firing of a firearm” for purposes of the deadly force definition. Moreover, whether “less-lethal munition” can cause great bodily harm for purposes of the “deadly force” definition could present a factual question in a case where an individual sustained wounds that were arguably life threatening.

This bill specifies that “deadly force” shall not include the discharge of a firearm, loaded with a “less-lethal munition,” by a law enforcement officer or correctional officer during and within the scope of his or her official duties. The effect is to make express what is not currently stated in the deadly force definition.

The clarification provided in this bill is aimed at “less-lethal munition” discharged from a firearm, only. This leaves open the possibility, however unlikely, that a court might find that a “less-lethal” substance, *e.g.*, “pepper spray” was likely to cause great bodily harm.

This bill defines “less-lethal munition” to mean “a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person’s body.”

Finally, the bill creates an affirmative defense for a law enforcement officer or correctional officer or his or her employer in civil or criminal actions arising out of the use of any less-lethal munition in good faith during and within the scope of his or her official duties.

This bill takes effect on July 1, 1999.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

To the extent that this bill serves to deter a class of lawsuits against law enforcement officers, correctional officers or their employers, it would have a positive impact on state and local governments and the courts. However, given the limited scope of this bill it is unlikely that the impact would be significant.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Criminal Justice:

This amendment removes the phrase; “*employer* of a law enforcement officer or correctional officer” from the provision of the bill which creates an affirmative defense in civil or criminal actions arising out of the use of any less-lethal munition in good faith during and within the scope of an officer’s official duties. The amendment provides the affirmative defense only for a law enforcement officer or correctional officer, but not for his or her employer.

---

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

---