



Ohio Judicial Conference

The Voice of Ohio Judges

House Bill 381
Interested Party Testimony
House Criminal Justice Committee
June 10, 2020

Chair Lang, Vice Chair Plummer, Ranking Member Leland, and Members of the Committee:

The Criminal Law and Procedure Committee of the Ohio Judicial Conference has reviewed House Bill 381, which removes the duty to retreat as an element required to establish self-defense in Ohio. While the Judicial Conference takes no position on whether this duty should or should not be required, we do have serious concerns about the civil or criminal immunity and the pretrial process for determining immunity established in the bill.

A significant portion of this bill goes beyond expanding the availability of self-defense, changing it from an affirmative defense to immunity from civil and criminal prosecution. It no longer is a defense to be litigated at trial but, as proposed, now a presumed bar to prosecution or civil litigation. See proposed RC 2901.092 at lines 337 to 357. The implementation of this immunity has substantial judicial impact in the following respects.

Current law, as amended March 29, 2019, requires some evidence of self-defense be introduced, though not necessarily by the defense. There must now be some testimony that raises the issue. The proposed law, at R.C. 2901.092 (lines 343 to 351), requires law enforcement to do an evaluation of the elements of self-defense and not to arrest without finding probable cause that

self-defense does not apply. This may create a pretrial issue, similar to a Motion to Suppress, as to whether law enforcement met this requirement.

If there is an arrest, the proposed law, at RC 2901.05 (lines 119 to 145), allows self-defense to be raised by the accused, not by evidence, but by a notice filed with the clerk of courts. This notice creates a prima facie claim of self-defense, which the prosecution must rebut by clear and convincing evidence at a pretrial immunity hearing. This pretrial immunity hearing will require witnesses to disprove one or more of the remaining elements of self-defense: Not at fault, reasonable belief in imminent harm, or use of excessive force. The defense has no burden of going forward and no risk of non-persuasion. Only if the prosecution can disprove self-defense at this pretrial evidentiary hearing can the matter proceed to trial. At the trial, the prosecution would need not only to prove the elements of the offense, but again (this time probably to a jury rather than to a judge) to disprove one or more of the elements of self-defense. Unlike a Motion to Suppress pretrial resolution, the pretrial immunity hearing decision denying immunity is not final. Comparable provisions for civil immunity are found at RC 2307.061 (lines 86 to 109).

This immunity proposal should also be evaluated by the criteria of the Marsy's Law constitutional provisions. Such an immunity procedure doubles not only the courtroom time necessary to adjudicate issues, but also the number of appearances and possible continuances for witnesses who are necessary. Such imposition on witnesses certainly contradicts the spirit, if not the letter, of Marsy's Law. Will the victims have a right of interlocutory appeal if immunity is granted?

Additionally, there is an enhancement in the proposed law that has a separate policy decision beyond abolishing the duty to retreat. This is found in lines 321 to 336 regarding RC 2901.091. This language extends the justified use of deadly force beyond just defense of self or of another person from bodily harm, but also to prevent or halt the commission of a forcible felony. This would be triggered even without any fear of imminent physical harm to the actor, which is another traditional element of self-defense. As such, the provision has less in common with self-defense than it does with justifying private citizen law enforcement.

In closing, we would like to suggest that H.B. 381 be amended to remove the civil/criminal immunity aspect of the bill, and with it the pretrial procedure the bill establishes. Instead, simply remove the duty retreat from the element of the self-defense claim. This would leave intact your intent behind the bill, while

eliminating the burden placed on courts, prosecutors, and the defense in having to conduct a hearing first on immunity, followed by a trial on the underlying offense if unsuccessful on the immunity claim.

Thank you for considering the feedback of Ohio's judges. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Paul E Pfeifer". The signature is written in a cursive style with a large, prominent "P" at the beginning.

Paul E. Pfeifer
Executive Director