

# WITNESS INFORMATION FORM

Please complete the Witness Information Form before testifying:

Date: 6-2-2020

Name: Andrea R. Jagoda

Are you representing: Yourself  Organization

Organization (If Applicable): \_\_\_\_\_

Position/Title: \_\_\_\_\_

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Do you wish to be added to the committee notice email distribution list? Yes  No

Business before the committee

Legislation (Bill/Resolution Number): HB 381

Specific Issue: stand your ground

Are you testifying as a: Proponent  Opponent  Interested Party

Will you have a written statement, visual aids, or other material to distribute? Yes  
No

(If yes, please send an electronic version of the documents, if possible, to the Chair's office prior to committee. You may also submit hard copies to the Chair's staff prior to committee.)

How much time will your testimony require? 10-15 min

Please provide a brief statement on your position: app I oppose "stand your ground" on many levels but will limit my objections to the unprecedented favorable treatment afforded individuals who harm or kill others with firearms.  
(10 pages including witness form)

Testimony Opposing House Bill 381  
Criminal Justice Committee  
Submitted by:  
Andrea R. Yagoda

Chair Lang, Vice Chair Plummer, Ranking Member Leland, and members of the committee, thank you for allowing me to present this testimony in opposition to HB 381. I am speaking to you today as a private citizen, a retired criminal defense and domestic relations lawyer and a conceal carry permit holder.

Regardless of your stance on the principle of "Stand Your Ground", HB 381 should offend you. If you believe in justice for all, this bill should offend you. If you believe that we are all equal in the eyes of the law this bill should offend you. If you believe that the rules which govern courts should be applied equitably and across the board on all cases that come before the court, this bill should offend you. If you believe that the State and its judiciary should not engage in any form of selective enforcement, this bill should offend you. This bill specifically carves out its own set of rules for anyone claiming self defense whether it be in a civil or a criminal case. It takes violent crimes to a new level of preferential treatment. Self Defense <sup>1</sup> now rises from an affirmative defense to immunity, a complete bar to civil actions and criminal prosecutions and effectively, provides an impenetrable wall of protection around individuals committing acts of violence claiming self defense. Even arrests <sup>2</sup>, investigations and arguably grand jury

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<sup>1</sup> I am using self defense to encompass defense of self, others (which I assume includes defense of forcible felony), threat of force, etc.

<sup>2</sup> A police officer may not arrest before making a determination that self defense does not exist. RC 2901.092 (A) If an arrest is made and subsequently, the Defendant prevails on his/her immunity claim, is the officer who made the arrest subject to civil liability?

proceedings must commence with the presumption of self defense. It is an extraordinary protection with nothing comparable in Ohio law.

You will hear many arguments for and against this bill, the statistics surrounding “Stand Your Ground” and the effects it has had on communities and I will rely on others for that argument as I would like to focus on the procedural aspects of this bill. <sup>3</sup>

HB 381 deletes the common law “duty to retreat”; establishes immunity if one’s use or threat of use of “reasonable force” is justified as defined by the bill; expands the circumstances under which self defense is presumed and provides for pre trial hearings to establish immunity which if found would bar criminal prosecution and civil liability.

Under HB 381 in the criminal arena, the Defendant has no obligation whatsoever to come forward with any evidence of self defense. S/he must only file a pre trial motion “claiming” that s/he acted in self defense. No sworn testimony, no affidavits, no witnesses, not even facts to establish the defense. The MERE filing of the motion “establishes a prima facie claim of self defense.” <sup>4</sup> (2901.05(B)) Once the motion is filed, which could be as simple as one sentence in the Memorandum In Support. “The Defendant claims that s/he used reasonable force in self defense.”(or reasonable deadly force, if applicable) That’s it. That is all that is required to establish a prima facie case for that defense. But, at this pre trial hearing, the Defendant has no duty to present any

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<sup>3</sup> I also wonder whether this pre trial procedure violates Ohio Constitution Article IV.05 “The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.”

<sup>4</sup> Prima facie” refers to **evidence** sufficient to prove the claim.

evidence nor even facts in his/her motion. And even though “reasonable force” is defined in the bill as ***“use of force ..that a reasonable person would judge to be necessary to prevent injury or loss and can include deadly force if a person reasonable believes that using such force is necessary to avoid injury or risk to the person’s life or injury...”*** (2307.601 (4); 2901.09 (2)) under this bill, the pre trial motion need not even allege sufficient facts for a court to determine whether the force was reasonable because **once** filed it is prima facie evidence of the same.

This bill’s “Stand Your Ground” pre trial procedure is more extreme than those of other states.

The Florida Statute <sup>5</sup> has been interpreted to require that, at the very least, the Defendant must raise facts to establish a prima facie claim in his motion upon which the defense rests. After reviewing the motion, **the judge** then determines whether a prima facie case has been established by the Defendant in his motion, before the burden shifts to the State. Jefferson v. Florida, (12/28/18) 2D18-3646; Colorado requires the Defendant, at a pre trial hearing to prove immunity by a preponderance of the evidence. <sup>6</sup> Colorado v. Guenther, (1987) 740 P. 2d 971; Alabama requires the Defendant to prove immunity by a preponderance of the evidence. <sup>7</sup> In Georgia a Defendant must establish the claim by a preponderance of the evidence. Bunn v State, (2008) 667 SE 2d 605; South Carolina requires the Defendant to establish immunity by a preponderance of the evidence. State

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<sup>5</sup> Florida Code 776.032(4)

<sup>6</sup> “Preponderance of the evidence” is “ the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value.

<sup>7</sup> Alabama Code 13A-3-23(5)(d)(2)

v. Duncan, (2011) 709 SE 2d 662; Kansas requires the prosecutor to merely show probable cause to believe the Defendant's use of force was not justified and the hearing **MUST** consist of evidence. State v. Hardy (2017) 347 P. 3d 30; Kentucky also requires the prosecutor to establish probable cause for unreasonable use of force but directs the court's attention to the evidence of record, including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Rodgers v Commonwealth, (2009) 285 SW 3d 740

Pursuant to HB 381, the judge makes no finding as to whether the Defendant has recited facts sufficient to establish a prima facie case because the **MERE** filing of the motion establishes the same.

HB 381, shifts the burden to the State to disprove self defense by "clear and convincing evidence"<sup>8</sup> once the motion is filed. The problem in this scenario is that normally the Defendant testifies to establish self defense. Why? Because it is what s/he believed at the time s/he acted, his/her state of mind as it involves an excuse or **justification peculiarly within the knowledge of the accused**. S/he cannot be forced to testify at this hearing because of the Fifth Amendment protecting one from self incrimination so is not subject to cross examination.

So, I shoot my husband. No witnesses, just the two of us. I call 911 then I call a lawyer who tells me to remain silent when the police arrive. I say nothing. I am arrested and charged with murder. (which under this bill is unlikely as I am immune from arrest and from even being charged unless the police have

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<sup>8</sup> "Clear and convincing evidence" is defined as that "which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established."

probable cause to believe my actions were not justified RC 2901.092(B)) My attorney files a pre trial motion claiming I acted in self defense. A prima facie case is established and now the State must prove by clear and convincing evidence that I did not act in self defense. I refuse to testify based on my Fifth Amendment right. Under this bill the court is required to grant the Motion and specifically state that I acted in self defense, if the State fails to satisfy its burden. Normally at a trial I would generally have to testify to establish this defense and be subject to cross examination. The jury would have to determine my credibility on this issue. But the Ohio legislature just gave me a free pass to kill my husband.

Keep in mind that even if I did allege facts in my motion, I am not subject to cross examination and the State would bear the burden of proof by clear and convincing evidence to disprove what was merely alleged in the motion. There are no penalties for perjury because my statements are not sworn. No “trier of facts” for an acquittal and bar to prosecution.

So, in effect, the State must prove its entire case at a pre trial motion hearing. And yet, if the State proves its case at the pre trial hearing, it must then try its case a second time before a jury and the Defendant gets to raise self defense and gets a second bite at the apple. And who pays for these two trials? We, the taxpayer. Nowhere in the Ohio Revised Code is any crime or defense treated in this matter. How do the sponsors of this bill justify this preferential treatment? Why do those who primarily use firearms, when claiming this defense,

receive this very special gift that does not exist for any other Defendant accused of any other crime or any other defense?

Let's consider I have been charged with murder. I have filed a Notice of Alibi. Why is it that I do not establish a prima facie defense of alibi with the filing of the Motion. Why don't I get a pre trial hearing wherein the State is required to prove its case before the trial?

The civil arena for the claim of self defense in a tort action is just as bad. In a civil action a simple one line motion for a pre trial immunity hearing establishes a prima facie case for self defense <sup>9</sup>and then the Plaintiff has the burden of disproving the claim by "substantial evidence" which is not defined. (2901.09 F(2)) In contrast, I am being sued for libel. Why don't I have the ability to file a one line motion that says "my statement was true and truth is a defense" and this serve to establish a prima facie case for truth?

Why isn't a Defendant claiming self defense held to the same standard as other civil cases and be required to file a Motion for Summary Judgment under Civ. R. 56 ? <sup>10</sup> Although not required, generally the moving party produces evidence. Civ. R. 56 refers to discovery and depositions. Why don't the normal Rules of Civil Procedure apply here? What rationale can there possibly be for chilling ones right to redress in the courts for harm or death to one or one's family member?

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<sup>9</sup> This appears to conflict with OH Civ. R 7 which requires particularity of the grounds and relief sought since the statute states what must be included, ie, a mere allegation that one acted in self defense and the filing in itself establishes a prima facie defense.

<sup>10</sup> Civ. R 56 provides for dismissal of actions or a finding of fact to which the parties are bound in trial if the court, after reviewing the "evidence, stipulations, finds that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. "Further that reasonable minds can come to but one conclusion adverse against the party whom the motion is sought".

And, if the Defendant was mistaken, he is not liable criminally or civilly. (RC 2901.09(B)(5)) So if the Defendant observes me forcing a child out of a car, he shoots me but what he did not know is that the child was locked in the car on a very hot day and I was trying to protect the child from heat exhaustion. I sue him, he claims defense of another in his pre trial motion, which, by the very filing, establishes a prima facie claim. I now have to disprove his claim via “substantial evidence” but the statute provides that he cannot be sued if he was mistaken in his belief that I was committing a forcible crime ie, kidnapping.

As if this procedure is not bad enough, this bill provides for **mandated** attorney fees, court costs, expenses, and compensation for loss of income (presumably this means lost income for having to come to court which is NOT provided for anywhere in Ohio law not even for witnesses nor jurors). If the Defendant loses his Motion or the civil case he has no **mandated** responsibility to reimburse the Plaintiff for attorney fees, court costs, expenses, loss of income. Why? Because the bill is meant to chill the right of redress against an individual who claims self defense, they are the select few that this bill chooses to protect.

If I succeed on the case against me addressed above for libel why is there no provision that I am automatically awarded attorney fees, court costs, expenses and compensation for loss of income?

And what about the witnesses and victims who will now be required to appear at possibly two “trials” in both criminal and civil cases. This “double trial” will undoubtedly discourage witnesses from attending a second hearing. Does



this legislative body have no regard for them? Drag victims, if they survive, through two hearings forcing them to relive their trauma not once but twice?

And what about the tactical advantages afforded Defendants under both these scenarios which no other civil or criminal Defendant enjoys? Discovery and construction of testimony at the expense of the taxpayer. The Defendant gets to see the trial play out before him/her in real time.

The Kentucky Supreme Court in Rodgers, *supra* recognized the tentative abuse and advantages to the defendant in rejecting such an approach:

*First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to Miranda warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial.*

Why are violent Defendants afforded this pre trial hearing when no other Defendants are given this right? The use of force or threatened force is the only act which permits a Defendant to challenge the State's/Plaintiff's evidence twice and subject the witnesses and victims to be cross examined twice. With all other crimes/defenses under the code, the State is only required to prove its case once and Defendants in civil cases seek dismissals via Civ. R. 12 and 56.

A gift to the select few and/or an assault on victims of violent crime?

The proponent's arguments in favor of this pretrial immunity assert that the pretrial process discourages the filing of frivolous tort actions and lessens the prospects of prosecution. Every individual sued civilly or charged with a crime

would love to discourage lawsuits lacking in merit and/or lessen the prospects of prosecutions. But why should only those claiming self defense be protected by the State of Ohio?

HB 381 is, in my opinion, a direct assault on the judiciary and the guarantee of justice for all.

Why are we waging war on victims of violent crime? Is this Bill really necessary?

I ask the Committee to reject this Bill.

Andrea R. Yagoda