HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 169 Use or Threatened Use of Defensive Force
SPONSOR(S): Baxley and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 344

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	6 Y, 6 N	Keegan	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Florida law currently provides immunity from criminal prosecution and civil suits against a person who uses or threatens to use justified force to defend himself or herself, other people, or property. This is commonly referred to as the "Stand Your Ground" law. The Florida Supreme Court recently established the procedure for asserting a claim of immunity from criminal prosecution under Stand Your Ground, determining that the defendant bears the burden to prove by a preponderance of evidence his or her entitlement to Stand Your Ground immunity.

In contrast, the bill shifts the burden of proof from the defendant to the prosecution. Specifically, the bill provides that once a prima facie case of self-defense immunity from criminal prosecution has been raised, the burden of proof shall be on the prosecution to overcome the immunity.

The bill also permits a defendant to be reimbursed for specified expenses incurred in defending the criminal prosecution, not exceeding $200,000, when a motion to dismiss based on Stand Your Ground immunity from criminal prosecution is granted by the trial court. A defendant seeking reimbursement must:

- Submit a written request for reimbursement to the Justice Administrative Commission within six months of the issuance of the order granting the motion to dismiss; and
- Include with the reimbursement request an order from the court granting the motion to dismiss and documentation of any court costs or private attorney fees and related expenses.

The Justice Administrative Commission must review each request and make a determination within 30 days of receipt. Approved reimbursement requests shall be paid to the defendant from the operating trust fund of the state attorney who prosecuted the defendant within 60 days after receipt of the approved reimbursement request.

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have a negative indeterminate impact on the Department of Corrections (i.e., an unquantifiable reduction in the need for prison beds).

This bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Stand Your Ground

Florida

Section 776.032, F.S., provides immunity[1] from criminal prosecution and civil suits against a person who uses or threatens to use justified force to defend himself or herself, other people, or property, pursuant to ss. 776.012,[2] 776.013, or 776.031, F.S. This statute, commonly referred to as the "Stand Your Ground" law, was enacted in 2005.[3] Since its enactment, Florida courts have examined the available procedures for determining which cases are entitled to Stand Your Ground immunity.[4]

The Florida Supreme Court recently established the procedure for asserting a claim of immunity from criminal prosecution under Stand Your Ground.[5] A majority of the Court determined that the defendant bears the burden of proof, by a preponderance of the evidence,[6] to demonstrate that he or she is entitled to immunity at a pretrial evidentiary hearing.[7] Should the trial court rule against the defendant at the hearing, the case will proceed to trial, where the prosecutor bears the burden to prove beyond a reasonable doubt that the defendant is guilty of the crime with which he or she was charged.[8]

In reaching this conclusion, the Court reasoned that this procedure was appropriate because: Stand Your Ground immunity is not blanket immunity from prosecution, but rather, only intended for those who use justified force; no court in the country has required the prosecution to disprove beyond a reasonable doubt that the use of force by a defendant was justified; placing the burden of proof on the defendant is consistent with how other types of motions to dismiss are handled; and placing the burden on the state to prove beyond a reasonable doubt that a defendant is not entitled to immunity requires the state to establish the same degree of proof twice, which "would essentially result in two full-blown trials: one before the trial judge and then another before the jury."[9]

Other States

A number of other states have Stand Your Ground or similar self-defense statutes in place,[10] and some of these states provide an individual with immunity from criminal prosecution when the individual lawfully uses force pursuant to an applicable self-defense statute.[11] These states vary somewhat in the procedural processes that are used to determine when a case is entitled to immunity under a self-defense statute. For example, Colorado,[12] Georgia,[13] and South Carolina[14] all require that a defendant

[1] *Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008) (noting that this statute was clearly worded to create a true immunity rather than a mere affirmative defense).

[2] During the 2014 Legislative Session, CS/CS/HB 89 was passed and signed into law, creating a requirement that an individual invoking Stand Your Ground immunity must not have been engaged in criminal activity and was in a place where he or she had a right to be at the time he or she used or threatened to use deadly force. Chapter 2014-195, Laws of Fla.

[3] 2005 SB 436, Ch. 2005-27, Laws of Fla.

[4] *See e.g., Dennis v. State*, 51 So. 3d 456 (Fla. 2010); *Peterson*, 983 So. 2d at 27.

[5] *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

[6] A "preponderance of the evidence" is a requirement that more than 50% of the evidence points to something. CORNELL UNIVERSITY LAW SCHOOL, *Preponderance of the Evidence*, https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Nov. 10, 2015).

[7] *Bretherick*, 170 So. 3d at 768.

[8] *Peterson*, 983 So. 2d at 28.

[9] *Bretherick*, 170 So. 3d at 775-77.

[10] *See e.g.*, ALA. CODE §13A-3-23 (Alabama); COLO. REV. STAT. §18-1-704.5 (Colorado); GA. CODE ANN. §16-3-24.2 (Georgia); KAN. STAT. ANN. §21-5231 (Kansas); KY. REV. STAT. ANN. §503.085 (Kentucky); LA. REV. STAT. ANN. §14:19 (Louisiana); MICH. COMP. LAWS ANN. §780.972 (Michigan); MONT. CODE ANN. §45-3-110 (Montana); N.H. REV. STAT. ANN. §627:7 (New Hampshire); N.C. GEN. STAT. §14-51.3 (North Carolina); S.C. CODE ANN. §16-11-440 and 450 (South Carolina).

[11] *See e.g.*, ALA. CODE §13A-3-23 (Alabama); COLO. REV. STAT. §18-1-704.5 (Colorado); GA. CODE ANN. §16-3-24.2 (Georgia); KAN. STAT. ANN. §21-5231 (Kansas); KY. REV. STAT. ANN. §503.085 (Kentucky); S.C. CODE ANN. §16-11-440 and 450 (South Carolina).

[12] *State v. Guenther*, 740 P. 2d 972 (Colo. 1987).

[13] *Bunn v. State*, 667 S.E. 2d 605 (Ga. 2008).

asserting a right to immunity make a motion to the trial court and prove the necessary facts by a preponderance of the evidence at an evidentiary pretrial hearing. The courts in these three states all agreed that immunity is a more powerful right than any affirmative defense, and in order to be entitled to such a right, the defendant must bear the evidentiary burden at the pretrial hearing.[15]

Litigation in Kansas and Kentucky has resulted in procedures that differ from those used in Colorado, Georgia, and South Carolina. The Kentucky high court determined that the defendant is entitled to a pretrial evidentiary hearing when asserting a right to immunity;[16] however, the prosecution is only required to establish probable cause that the defendant was not entitled to immunity at such evidentiary hearing.[17] Should the prosecution meet the probable cause standard,[18] immunity is denied and the defendant is forced to stand trial.[19] Unlike Kentucky, Kansas declined to address a defendant's entitlement to a pretrial hearing,[20] but concluded that the prosecutor needed only to meet the probable cause standard already in use in Kentucky.[21] The Kansas Supreme Court relied partially on the language of the Kansas immunity statute[22] in coming to its decision, specifically noting that the language in the Kansas statute was distinct from the language used in Florida's immunity statute.[23]

Criminal Defenses in Florida

Motions to Dismiss

Most defenses may be raised prior to trial; however, some defenses must be raised prior to trial in order to be heard. The Florida Rules of Criminal Procedure provide the appropriate process for raising defenses prior to trial. Motions to dismiss usually must be made at or before arraignment.

> Except for objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time hereinabove provided shall be considered waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:
> (1) The defendant is charged with an offense for which the defendant has been pardoned.
> (2) The defendant is charged with an offense for which the defendant previously has been placed in jeopardy.
> (3) The defendant is charged with an offense for which the defendant previously has been granted immunity.
> (4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.[24]

Where a defendant files a motion to dismiss under Fla. R. Crim. P. 3.190(c)(4), and the State's sworn traverse[25] denies the material facts alleged in the motion to dismiss, an automatic denial of the motion to dismiss must follow.[26] This procedure exists because (c)(4) motions are meant to be granted only when there are no disputed material facts, and the motion addresses legal issues that are inappropriate for a jury to decide.[27]

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[14] *State v. Duncan*, 709 S.E. 2d 662, 665 (S.C. 2011).
[15] *See Bunn*, 284 667 S.E. 2d at 608; *Duncan*, 709 S.E. 2d at 665; *Guenther*, 740 P. 2d at 980.
[16] *Rodgers v. Commonwealth*, 285 S.W. 3d 740, 755 (Ky. 2009)
[17] *Id.*
[18] Probable cause for an arrest exists when the nature of the circumstances would lead a reasonable person to believe that the suspect is, was, or will be involved in committing a crime. *Terry v. Ohio*, 392 U.S. 1 (1968). Note that probable cause is the constitutionally mandated minimum evidentiary standard to arrest someone for any criminal offense. *Id.*
[19] *Rodgers*, 285 S.W. 3d at 755.
[20] *State v. Ultreras*, 295 P. 3d 1020 (Kan. 2013).
[21] *Id.* at 1030-32.
[22] The Kansas immunity statute provides that a "prosecutor may commence a criminal prosecution upon a determination of probable cause." KAN. STAT. ANN. §21-3219(c).
[23] *Ultreras*, 295 P. 3d at 1030-31.
[24] FLA. R. CRIM. P. 3.190(c).
[25] A traverse is a pleading filed with the court by the prosecutor to deny the defendant's allegations. FLA. R. CRIM. P. 3.190(d).
[26] *State v. Miller*, 159 So. 3d 184 (Fla. 5th DCA 2015).
[27] *Bretherick*, 170 So. 3d at 776.

The standard for the burden of proof at a motion to dismiss hearing varies depending on the motion that is filed. The defendant always carries the burden of proof for motions to dismiss based on double jeopardy or immunity grounds. Motions to dismiss an indictment for a violation of double jeopardy[28] require the defendant to prove by "convincing competent evidence" that double jeopardy has attached to the issue the defendant seeks to foreclose.[29] Similarly, when filing a motion to dismiss on immunity grounds,[30] the defendant has the burden of raising the immunity defense and "bringing forth sufficient facts to show her entitlement to it."[31] The Florida Supreme Court refers to this burden as a requirement that the defendant make an "affirmative showing" that immunity applies.[32]

A motion to dismiss for a violation of the statute of limitations differs from double jeopardy and immunity motions because the State has the burden of proving that the prosecution isn't barred by the statute of limitations.[33] Florida courts have not specifically defined the standard for the State's burden.[34] However, the Florida Supreme Court has held that a statute of limitations is to be construed liberally in favor of the defendant.[35]

Affirmative Defenses

Affirmative defenses are raised at trial and should not be resolved by a judgment of acquittal if there are any facts in dispute. Where facts are in dispute, the question of the affirmative defense should be submitted to the jury.[36] It is normally permissible for statutes to regulate the procedures for producing evidence and allocating the burden of persuasion for arguing affirmative defenses.[37] However, if a statute shifts the burden of persuasion to the defendant but does not create a true affirmative defense,[38] the statute is invalid as a violation of due process.[39]

A number of affirmative defenses simply require the defendant to establish a prima facie case for his or her defense at trial, and the burden then shifts to the prosecutor to rebut it.[40] For example, the affirmative defenses of insanity,[41] involuntary intoxication,[42] and justifiable use of force[43] require the

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[28] These motions should be filed pursuant to Fla. R. Crim. P. 3.190(c)(2).
[29] *Davis v. State*, 645 So. 2d 66, 67 (Fla. 1994); *State v. Short*, 513 So. 2d 679 (Fla. 2d DCA 1987); *U.S. v. Hogue*, 812 F. 2d 1568, 1578 (11th Cir. 1987).
[30] These motions should be filed pursuant to Fla. R. Crim. P. 3.190(c)(3).
[31] *State ex rel. Bateman v. O'Toole*, 203 So. 2d 527, 528 (Fla. 4th DCA 1967).
[32] *State ex rel. Marcus v. Pearson*, 68 So. 2d 400 (Fla. 1953).
[33] *State v. King*, 282 So. 2d 162 (Fla.1973); *Walker v. State*, 543 So. 2d 353 (Fla. 5th DCA 1989); *State v. Shamy*, 759 So. 2d 728 (Fla. 4th DCA 2000).
[34] The Florida Supreme Court acknowledges the State's burden in *King*, 282 So. 2d at 162, without defining the standard for the burden. The Second, Third, Fourth, and Fifth District Court likewise acknowledge the State's burden. *Neal v. State*, 697 So. 2d 903 (Fla. 2d DCA 1997); *Bonel v. State*, 651 So. 2d 774, 776 (Fla. 3d DCA 1995); *Soto v. State*, 982 So. 2d 1290 (Fla. 4th DCA 2008); *Wright v. State*, 600 So. 2d 1248 (Fla. 5th DCA 1992).
[35] *Mead v. State*, 101 So. 2d 373 (Fla. 1958); *Mitchell v. State*, 25 So. 2d 73, 123 (Fla. 1946).
[36] *Turner v. State*, 29 So. 3d 361, 364 (Fla. 4th DCA 2010); *Dias v. State*, 812 So. 2d 487 (Fla. 4th DCA 2002) (*citing to Scholl v. State*, 115 So. 43, 44 (1927); *Reimel v. State*, 532 So. 2d 16, 18 (Fla. 5th DCA 1988); and *Payton v. State*, 200 So. 2d 255 (Fla. 3d DCA 1967).
[37] *Herrera v. State*, 594 So. 2d 275 (Fla. 1992).
[38] "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" Cohen, 568 So. 2d at 51-52.
[39] *State v. Cohen*, 568 So. 2d 49 (Fla. 1990).
[40] The defense of alibi, which is not an affirmative defense, follows this same procedure. Once the defendant has presented enough evidence to create a reasonable doubt as to his guilt, the burden then shifts to the State to prove the defendant's guilt beyond a reasonable doubt. *Flowers v. State*, 12 So. 2d 772 (1943); *Dixon v. State*, 227 So. 2d 740 (Fla. 4th DCA 1969). Court rule requires the defendant to provide written notice of alibi defense ten or more days before trial, upon written demand by the prosecuting attorney. FLA. R. CRIM. P. 3.200.
[41] *Matevia v. State*, 564 So. 2d 585 (Fla. 2d DCA 1990) (*quoting Yohn v. State*, 476 So. 2d 123, 126 (Fla. 1985); *see Hall v. State*, 568 So. 2d 882, 884 (Fla. 1990).
[42] *Sluyter v. State*, 941 So. 2d 1178 (Fla. 2d DCA 2006) (*citing to Milburn v. State*, 742 So. 2d 362 (Fla. 2d DCA 1999).
[43] *Murray v. State*, 937 So. 2d 277, 279 (Fla. 4th DCA 2006); *Falwell v. State*, 88 So. 3d 970 (Fla. 5th DCA 2012); FLA. STD. CRIM. JURY INST. 3.6(g).

defendant to present evidence of these defenses sufficient to create reasonable doubt of guilt in the mind of the trier of fact.[44] The burden then shifts to the State to prove beyond a reasonable doubt that the affirmative defense does not apply.[45]

The affirmative defense for entrapment is unique because the requirements for raising the defense are provided by statute rather than court rule.[46] The defendant must prove *by a preponderance of the evidence* that an agent of the government induced the criminal act in question.[47] The defendant must then present some evidence that the defendant wasn't predisposed to the crime.[48] Once this evidence is presented, the burden shifts to the State to rebut this evidence beyond a reasonable doubt. The issue of entrapment must be submitted to the trier of fact, rather than decided by pretrial motion.[49]

Prosecutorial Immunity

The umbrella of judicial immunity protects prosecutors from civil liability for official acts in the same manner that it protects judges in the exercise of judicial acts.[50] The United States Supreme Court held that civil redress is inappropriate against prosecutors because such suits could cause a chilling effect on the honest exercise of prosecutorial authority, thereby creating a greater public disservice.[51] Immunity provides protection for prosecutors even when accused of suppressing evidence, knowingly using perjured testimony, or otherwise acting with malice.[52] However, duties that are performed by a prosecutor, but are not related to a traditional prosecutor's role (e.g., investigating a possible crime to determine if there is probable cause for arrest), are not protected by prosecutorial immunity.[53]

While prosecutorial immunity provides absolute protection from civil liability, the United States Supreme Court has clearly limited the boundaries of prosecutorial immunity in federal cases. Such immunity does not reach so far as to provide immunity for violations of federal criminal laws or codes of professional conduct.[54] Florida cases addressing issues related to prosecutorial immunity have only acknowledged the existence of such immunity in matters of civil liability.[55]

Effect of the Bill

The bill specifies in legislative intent that the State shall bear the burden of proof beyond a reasonable doubt in a criminal prosecution, and that the amendments to 776.032, F.S., shall apply retroactively to proceedings pending at the time the bill becomes law. The bill specifies that once a prima facie[56] case of self-defense immunity from criminal prosecution has been raised, the burden of proof shall be on the prosecution to overcome the immunity. The bill will not change the burden of proof for Stand Your Ground immunity hearings in civil litigation.

The bill permits a defendant to be reimbursed for court costs, reasonable private attorney fees, and related expenses incurred in defending the criminal prosecution, not exceeding $200,000, when a

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[44] A "trier of fact" is the judge or jury responsible for deciding factual issues in a trial. If there is no jury, the judge is the trier of fact. BURTON'S LEGAL THESAURUS, http://legal-dictionary.thefreedictionary.com/trier+of+fact (last visited Nov. 11, 2015).
[45] *Matevia*, 564 So. 2d at 585; *Sluyter*, 941 So. 2d at 1178; *Murray*, 937 So. 2d at 279; *Falwell*, 88 So. 3d at 970.
[46] s. 777.201, F.S.
[47] *Id*.
[48] I*d*.
[49] *Munoz v. State*, 629 So. 2d 90, 99 (Fla. 1993).
[50] *Office of the State Attorney v. Parrotino*, 628 So. 2d 1097 (Fla. 1993).
[51] *Imbler v. Pachtman*, 424 U.S. 409 (1976).
[52] *Imbler v. Pachtman*, 424 U.S. at 409; *Mueller v. The Florida Bar*, 390 So. 2d 449 (Fla. 4th DCA 1980); *Hansen v. State*, 503 So. 2d 1324 (Fla. 1st DCA 1987).
[53] *Swope v. Krischer*, 783 So. 2d 1164, 1168 (Fla. 4th DCA 2001).
[54] *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Imbler*, 424 U.S. 409 (1976).
[55] *See Amos v. State, Dept. of Legal Affairs*, 666 So. 2d 933 (Fla. 2d DCA 1995); *Hansen*, 503 So. 2d at 1324; *Parrotino*, 628 So. 2d at 1097.
[56] "Prima facie" is a Latin term meaning "at first sight" or "at first look." This refers to the standard of proof under which the party with the burden of proof need only present enough evidence to create a rebuttable presumption that the matter asserted is true. A prima facie standard of proof is relatively low. It is far less demanding than the preponderance of the evidence, clear and convincing evidence and beyond a reasonable doubt standards that are also commonly used. PRACTICAL LAW, *Prima Facie*, http://us.practicallaw.com/2-518-8779 (last visited Nov. 13, 2015).

motion to dismiss based on immunity from criminal prosecution is granted by the trial court. A defendant seeking reimbursement must:

- Submit a written request for reimbursement to the Justice Administrative Commission within six months of the issuance of the order granting the motion to dismiss; and
- Include with the reimbursement request an order from the court granting the motion to dismiss and documentation of any court costs or private attorney fees and related expenses.

The Justice Administrative Commission must review each request and make a determination within 30 days of receipt. Reimbursement requests shall be approved if the costs are supported by valid documentation and the requested private attorney fees and related expenses are reasonable and supported by valid documentation.

Approved reimbursement requests shall be paid to the defendant from the operating trust fund of the state attorney who prosecuted the defendant within 60 days of receipt of the approved reimbursement request.

The bill provides direction to the Division of Law Revision and Information to replace the phrase "this act" wherever it occurs in the amendments to s. 776.032, F.S., made by this act, with the chapter law number of the act, if it becomes law.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1. Amending s. 776.032, F.S., relating to immunity from criminal prosecution and civil action for justifiable use or threatened use of force.

Section 2. Providing directives to the Division of Law Revision and Information.

Section 3. Creating s. 939.061, F.S., relating to motion to dismiss; costs.

Section 4. Providing that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state government revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have a negative indeterminate impact on the Department of Corrections (i.e., an unquantifiable reduction in the need for prison beds).

If a defendant's case is dismissed pursuant to the bill, the prosecuting attorney's office could be required to reimburse the defendant for court costs, reasonable private attorney fees, and related expenses incurred in defending the criminal prosecution, not exceeding $200,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The concept of prosecutorial immunity is derived from the common law.[57] The courts may interpret the reimbursement provision in the bill to be a civil penalty, and thereby a violation of prosecutorial immunity. The Florida Supreme Court has held that a legislative waiver of prosecutorial immunity is a violation of the doctrine of the Separation of Powers, set forth in article II, Section 3 of the Florida Constitution.[58]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 17, 2015, the Criminal Justice Subcommittee adopted two amendments and reported the bill unfavorable. Together, the amendments:

- Removed a provision permitting specified defendants to receive reimbursement from the Office of the State Attorney for costs related to defending a criminal case.
- Revised the burden of proof in a Stand Your Ground immunity hearing to require the defendant to prove entitlement to immunity by a preponderance of evidence before the burden shifts to the prosecutor to disprove the defendant's entitlement to immunity.

[57] *Parrotino, 628 So. 2d at 1099.*
[58] *Id.* at 1098.