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SORTING OUT THE SHOOTOUT: FLORIDA COURTS UNTANGLE THE "STAND YOUR GROUND LAW"

Lawrence J. Semento[*]

INTRODUCTION

In February 2008, Gabriel Mobley finished work at his pressure cleaning business and, after going home to shower and change, went to the office of his high school friend, Jose "Chico" Correa.[1] After working several hours at Chico's tax preparation business, Mobley joined Chico and his staff at a local Chili's to unwind.[2] Mobley drove his own car to the restaurant.[3] When he arrived, he removed the handgun he had been carrying and stowed it in the glove compartment.[4] Mobley had a concealed weapons permit, but left the gun in the car because he believed he could not carry it into a restaurant.[5] By the time Mobley entered the restaurant, several of Chico's female employees were sitting in a booth, so Mobley joined Chico and another male employee at the bar nearest the booth.[6]

After food and drinks were ordered, Mobley and Chico went outside to smoke.[7] They returned to the bar and ate, drank, and conversed.[8] Mobley and Chico then went outside to smoke a second time.[9] When they returned inside, they found two men, Jason Gonzalez and Rolando "Roly" Carrazana, talking with the female employees at the booth.[10] Chico believed that the women were uncomfortable, so he asked the men to leave.[11] A verbal altercation ensued, which ended when the men returned to their own table at the opposite end of the bar.[12] Overhearing the brief altercation, the restaurant manager asked the security guard to keep watch on Jason and Roly.[13]

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1. Mobley v. State, 132 So. 3d 1160, 1162 (Fla. Dist. Ct. App. 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Mobley*, 132 So. 3d at 1162.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Mobley*, 132 So. 3d at 1162.

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Mobley was not involved in the argument.[14] Instead, he acted as a peacekeeper, and went to Jason's and Roly's table to ask them to forget the petty incident.[15] He shook Jason's hand.[16] Mobley felt uncomfortable, however, when he later saw Roly staring at Chico's group with a mean look on his face.[17] Mobley decided to leave, but before doing so, went into the restroom with Chico where he expressed his concerns.[18] When exiting the restroom, Mobley saw Jason, with Roly outside, banging aggressively on the restaurant window and pointing at them.[19] Mobley suggested that once Jason and Roly left the area, they should all go home.[20] Mobley left Chili's about ten to fifteen minutes later, when it appeared that Jason and Roly were gone.[21]

Mobley, wearing a sleeveless t-shirt, went to his vehicle, which was parked near the front door.[22] At his vehicle, he put on a sweatshirt because it was cold.[23] He retrieved his handgun and placed it in a holster on his waist.[24] Within a minute after Mobley left the restaurant, Chico and one of his other employees walked out.[25] Mobley joined them and they walked to Chico's vehicle, which was parked nearby.[26] Mobley and Chico stepped onto the sidewalk and smoked cigarettes.[27] A few seconds after they stepped onto the sidewalk, Jason rapidly approached and delivered a vicious punch to Chico's face, which fractured his eye socket.[28] Jason danced back with fists raised, then quickly advanced toward Mobley.[29] Mobley reacted by raising his arm to fend off Jason.[30] As Jason stepped back, Roly came running toward Mobley and Chico from the back of the restaurant.[31] Roly neared Jason, who was only a few feet from Mobley and Chico.[32] Mobley feared a new attack, and saw Roly reach under his long, baggy shirt for what he believed to be a weapon.[33] Mobley drew his gun, and shot at Roly.[34] The shots hit both Roly and Jason.[35]

Jason turned to flee, but collapsed.[36] He died of a gunshot wound to the chest.[37] Roly, hit four times, fell near the entrance to the restaurant.[38] He later died from the

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1163.
18. *Id.*
19. *Mobley*, 132 So. 3d at 1163.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Mobley*, 132 So. 3d at 1163.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Mobley*, 132 So. 3d at 1163.
32. *Id.*
33. *Id.* at 1163–64.
34. *Id.* at 1164.
35. *Id.*
36. *Id.*

gunshot wounds.[39] Two knives were found on the ground near where Roly fell, but no weapon was located on his body.[40]

Gabriel Mobley's journey through the legal system would follow a significantly different path than those who traveled it before 2005. Amid some controversy, Florida became the first state to radically revamp its self-defense laws.[41] In 2005, Governor Jeb Bush signed into law Florida's "Stand Your Ground Law."[42] The smoldering controversy surrounding the enactment of the law burst ablaze when Trayvon Martin was killed.[43] The new legislation substantially changed existing self-defense laws, both substantively and procedurally.

Prior to 2005, Florida law permitted the use of deadly force in self-defense only if one reasonably believed that it was necessary to prevent imminent death or great bodily harm.[44] Even in those situations, a person must use reasonable means to avoid the danger, including retreat.[45] However, when a person claims self-defense in his or her own home, an exception to the common law duty to retreat applies.[46] This privilege of non-retreat from the home is known as the "castle doctrine."[47] Florida law allowed one charged with a crime involving force to raise self-defense as an affirmative defense at trial.[48] Whether a person is justified in the use of deadly force in self-defense is a question of fact to be decided by the jury.[49] If a defendant establishes a prima facie case of self-defense, then the burden shifts to the State to overcome the defense.[50] The State must prove beyond a reasonable doubt that the defendant did not act in self-defense.[51]

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37. *Mobley*, 132 So. 3d at 1164.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See, e.g.*, *Florida Legislation—The Controversy over Florida's New "Stand Your Ground" Law—FLA. STAT. § 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 351–53 (2005) [hereinafter *The Controversy*]; Jennifer Randolph, Comment, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 614 (2014) ("The Florida legislature was the first to pass a comprehensive update of its self-defense law . . . but it was most certainly not the last. . . . Since 2005, more than half of the states have enacted or considered similar legislation to Florida's statute.").
42. Zachary L. Weaver, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395 (2008) (noting that Jeb Bush signed the Florida's "Stand Your Ground" Law in 2005). In this article, the term "Stand Your Ground Law" is used to refer to the legislation that amended or modified Florida's self-defense laws, as codified in sections 776.012, 776.013, and 776.032, of the Florida Statutes. *See The Controversy*, *supra* note 41, at 352 n.173.
43. Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 271–73 (2012).
44. FLA. STAT. § 776.012 (2004) (amended 2014); *see* Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999).
45. *Weiand*, 732 So. 2d at 1049.
46. *Id.*
47. *Id.* at 1049–50 ("*[W]hen one is violently assaulted in his own house or immediately surrounding premises, he is not obliged to retreat but may stand his ground and use such force as prudence and caution would dictate as necessary to avoid death or great bodily harm*." (quoting Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965))).
48. *Weiand*, 732 So. 2d at 1049.
49. Hernandez v. State, 842 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 2003).
50. State v. Rivera, 719 So. 2d 335, 337 (Fla. Dist. Ct. App. 1998).
51. Brown v. State, 454 So. 2d 596, 598 (Fla. Dist. Ct. App. 1984).

The Stand Your Ground Law significantly changed Florida's self-defense laws. Most notably, it eliminated the duty to retreat in most instances.[52] It also established a presumption that force was used reasonably where a defendant is faced with an intruder in a home or occupied vehicle.[53] Further, it enlarged a person's right to avoid civil or criminal consequences for the use of force, including deadly force.[54] Perhaps this change is the most radical from prior self-defense law.

Since the enactment of these revisions to Florida's self-defense laws, Florida courts have undertaken the task of interpreting and implementing the statutes. There has been confusion as to the proper procedures to follow. "Despite section 776.032's broad temporal application, running from before arrest through trial, there is no legislative guidance as to the statute's implementation."[55] This article will review and analyze those cases, particularly focusing on issues concerning (1) immunity from prosecution in both civil and criminal cases; (2) pretrial immunity hearings; (3) unlawful activities precluding the defense; (4) self-defense jury instructions; and (5) appropriate procedures for appeal. Understanding the changes in Florida's self-defense laws is vitally important for law enforcement officers, defendants, prosecutors, defense counsel, and judges. This article is intended to provide a better understanding of the law as currently interpreted and implemented by the courts.

I. IMMUNITY FROM CRIMINAL PROSECUTION

An individual who uses justifiable force is immune from both civil action and criminal prosecution.[56] Section 776.032 provides that "[a] person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force . . . ."[57] As mentioned above, section 776.012, as revised in 2005, permits a person to use non-deadly force against another when the person reasonably believes it is necessary to defend against the use of unlawful force.[58] It allows the use of deadly force without a duty to retreat if a person reasonably believes that such force is necessary to prevent imminent death or great bodily harm or the commission of a forcible felony.[59] Section 776.013, as enacted in 2005, creates a presumption that a person held a reasonable fear of imminent peril of death or great bodily harm when using deadly force to defend

52. FLA. STAT. § 776.012(1), (2) (2013) (amended 2014).
53. FLA. STAT. § 776.013(1)(a) (2013) (amended 2014).
54. FLA. STAT. § 776.032(1) (2013) (amended 2014).
55. Horn v. State, 17 So. 3d 836, 838 (Fla. Dist. Ct. App. 2009). The court went on to say: "Thus far, two other district courts have examined the issues presented by the statute and have reached differing results regarding the proper procedures to follow." *Id.*
56. *Id.*
57. § 776.032(1).
58. FLA. STAT. § 776.012(1) (2013) (amended 2014).
59. *Id.* at (2).

against another while in a residence or vehicle.[60] The presumption does not apply in certain instances. For example, one who is engaged in a criminal activity may not avail himself of the presumption.[61] Section 776.013(3) expands the "castle doctrine"[62]:

> A person who is attacked in his or her dwelling, residence, or vehicle has no duty to retreat and has the right to stand his or her ground and use or threaten to use force, including deadly force, if he or she uses or threatens to use force in accordance with § 776.012(1) or (2) or § 776.031(1) or (2).[63]

Although the Stand Your Ground Law creates immunity, the proper procedures for one to seek the immunity are not specified. Since the enactment of the Law, Florida courts have considered this issue. The First District Court of Appeal of Florida was one of the first to do so.[64] In *Peterson v. State*, the defendant filed a motion to dismiss the information based on his claim of immunity from prosecution under the Stand Your Ground Law.[65] The State argued that the motion should have been filed as a motion to dismiss under Florida Rule of Criminal Procedure 3.190(c)(4).[66] Thus, the State asserted, any factual dispute would defeat the motion.[67] However, noting an absence of procedure for handling immunity claims in Florida, the First District followed the reasoning of the Supreme Court of Colorado,[68] and held that a defendant may raise the issue of statutory immunity pretrial and when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that immunity attaches.[69] The court noted that this is a similar burden placed on a defendant for motions challenging the voluntariness of confessions.[70] The Second,[71] Third,[72] and Fifth Districts followed *Peterson*.[73]

However, the Fourth District Court of Appeal of Florida reached a different result. In *Velasquez v. State*, the court found that when a motion to dismiss is used

60. FLA. STAT. § 776.013(1)(a) (2013) (amended 2014).
61. *Id.* at (2)(c).
62. "The privilege of nonretreat from the home, part of the 'castle doctrine,' has early common law origins." Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999) (footnote omitted) (citing State v. Bobbitt, 415 So. 2d 724, 725 (Fla. 1982); Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965); Pell v. State, 97 Fla. 650, 665 (1929); Danford v. State, 53 Fla. 4, 13 (1907); People v. Tomlins, 213 N.Y. 240, 240 (1914)).
63. FLA. STAT. § 776.013(3) (2013) (amended 2014).
64. *See* Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008).
65. *Id.*
66. *Id.* This is commonly called a "C-4 motion." *See, e.g.*, State v. Purvis, 560 So. 2d 1296, 1297 (Fla. Dist. Ct. App. 1990).
67. *Peterson*, 983 So. 2d at 29. A court is not permitted to make factual determinations in considering a "C-4 motion." Clark v. State, 993 So. 2d 1136, 1137 (Fla. Dist. Ct. App. 2008). *See generally* FLA. R. C. P. 3.190 (c)(4).
68. *Peterson*, 983 So. 2d at 29 (citing People v. Guenther, 740 P.2d 971, 981–82 (Colo. 1987).
69. *Id.*
70. *Id.*
71. Horn v. State, 17 So. 3d 838, 839 (Fla. Dist. Ct. App. 2009).
72. State v. Yaqubie, 51 So. 3d 474, 476 (Fla. Dist. Ct. App. 2010).
73. Gray v. State, 13 So. 3d 114, 115 (Fla. Dist. Ct. App. 2009).

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to seek immunity from prosecution, the rule of procedure provides the framework for the court to make its determination.[74] If there are factual issues, the motion to dismiss must be denied.[75]

The Supreme Court of Florida resolved this conflict in 2010.[76] The court in *Dennis v. State* framed the issue: "In this case we consider whether a trial court should conduct a pretrial evidentiary hearing and resolve issues of fact when ruling on a motion to dismiss asserting immunity from criminal prosecution pursuant to section 776.032, Florida Statutes (2006), commonly known as the 'Stand Your Ground' statute."[77] The court noted that Florida law has long recognized a defendant's right to assert by affirmative defense that the use of force was justified.[78] However, this statute grants defendants "a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force."[79] Following the reasoning of *Peterson*, the court concluded that when a defendant files a motion to dismiss on the basis of the statutory immunity, the trial court must conduct an evidentiary hearing and resolve any factual issues[80]:

> We conclude that where a criminal defendant files a motion to dismiss pursuant to section 776.032, the trial court should decide the factual question of the . . . statutory immunity. A motion to dismiss on the basis of section 776.032 immunity is not subject to the requirements of rule 3.190(c)(4) but instead should be treated as a motion filed pursuant to rule 3.190(b).[81]

Another procedural issue concerns the timing of the immunity hearing.[82] That issue was addressed in *Martinez v. State*.[83] Seven weeks prior to his second-degree murder trial, the defendant filed a motion to dismiss and a motion seeking immunity under the Stand Your Ground Law, and demanded a pretrial hearing.[84]

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74. Velasquez v. State, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009).
75. *Id.*
76. Dennis v. State, 51 So. 3d 456, 458 (Fla. 2010).
77. *Id.*
78. *Id.* at 462.
79. *Id.*
80. *Id.* at 464.
81. *Id.* Rule 3.190(b), *Florida Rules of Criminal Procedure*, provides: "All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense." FLA. R. CRIM. P. 3.190(b).
82. Velasquez v. State, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009).

> By defining "criminal prosecution" to include the arrest, detention, charging, or prosecution of the defendant, the statute allows for an immunity determination at any stage of the proceeding. . . . [T]he statute authorized the immunity determination to be made by law enforcement officers, prosecutors, judges, and juries. In enacting the statute, however, the legislature did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process.

Id.

83. Martinez v. State, 44 So. 3d 1219, 1220 (Fla. Dist. Ct. App. 2010).
84. *Id.*

Determining that there was insufficient time to hear the motions prior to trial, the lower court did not hold a pretrial hearing and decided to conduct the hearing during the trial.[85] The appellate court held that when a motion seeking immunity is filed well in advance of trial, the proper procedure is for the court to conduct an evidentiary hearing prior to the trial, and the failure to do so "operates to deprive a defendant of at least some measure of the 'true' immunity contemplated by legislature."[86]

In *Martinez*, the State offered what may be a very legitimate concern; a defendant could abuse the process by withholding a claim to immunity until such time as it may garner a procedural or substantive advantage.[87] However, the court found there was no evidence that the defendant had done so in this case.[88]

The courts have also addressed the issue of the burden of proof on a motion to dismiss filed under section 776.032.[89] In *Peterson v. State*, the court, noting the absence of procedures for implementation of the statute, held that it is the defendant's burden to prove entitlement to immunity from prosecution by a preponderance of the evidence.[90] Although not a dispositive issue in the case, by approving the procedures set out in *Peterson v. State*, the Supreme Court of Florida seems to agree.[91]

A recent case from the Fifth District Court of Appeal of Florida, *Bretherick v. State*, squarely addressed this issue.[92] There, the defendant believed he was threatened by another motorist on a busy highway.[93] When the other motorist stopped in front of his vehicle, the defendant pointed a firearm at the driver and held him at gunpoint.[94] The defendant was charged with aggravated assault.[95] He filed a motion to dismiss based on the self-defense immunity from prosecution.[96] After conducting a pretrial hearing, the trial court denied the motion.[97]

The defendant argued on appeal that the trial court improperly placed the burden on him.[98] Although affirming the denial of his motion, the appellate court addressed the burden of proof: "The issue of who bears the burden of proof may well be significant where the case is an extremely close one, or where only limited

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85. *Id.*
86. *Id.*
87. *Id.* at 1221.
88. *Id.*
89. *See, e.g.*, Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008). This is not to be confused with the burden of proof on an affirmative defense of self-defense. In that instance, it is well established that a defendant claiming self-defense bears the initial burden of presenting a prima facie case of self-defense. Once that is accomplished, the burden shifts to the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. Leasure v. State, 105 So. 3d 5, 13 (Fla. Dist. Ct. App. 2012). *See generally* FLA. STAT. § 776.032 (2013) (amended 2014).
90. *Peterson*, 983 So. 2d at 29.
91. Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).
92. Bretherick v. State,135 So. 3d 337, 339–40 (Fla. Dist. Ct. App. 2013).
93. *Id.* at 338.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Bretherick*, 135 So. 3d at 340.

evidence is presented for the trial court's consideration."[99] The court certified the following question to the Supreme Court of Florida: "ONCE THE DEFENSE SATISFIES THE INITIAL BURDEN OF RAISING THE ISSUE, DOES THE STATE HAVE THE BURDEN OF DISPROVING A DEFENDANT'S ENTITLEMENT TO SELF-DEFENSE IMMUNITY AT A PRETRIAL HEARING AS IT DOES AT TRIAL?"[100]

The Supreme Court of Florida has accepted jurisdiction.[101] A decision has not yet been rendered,[102] so it is undecided whether the State's burden in an immunity hearing is proof beyond a reasonable doubt, as it is at trial, or whether it has a lesser burden to overcome the defendant's obligation to present proof by a preponderance of the evidence.

Certainly, this is an important matter for the trial courts. Cases in which a defendant seeks immunity based on self-defense under the Stand Your Ground Law are usually factually complicated and disputed. *State v. Gallo* is a good example.[103]

"Mr. Barbour's unfortunate death resulted from events reminiscent of the 'Shootout at OK Corral,'" the opinion begins.[104] The appellate court recognized that the trial judge conducted an evidentiary pretrial hearing, "made determinations of credibility, weighed the numerous pieces of conflicting evidence, and set forth extensive factual findings in a nine-page written order."[105] In affirming the granting of the defendant's motion to dismiss, the court noted:

> The legislature's enactment of section 776.032 placed the burden of weighing the evidence in 'Stand Your Ground' cases squarely upon the trial judge's shoulders. In this case, that burden required the trial judge to make order out of the chaos that occurred in Sarasota on one fateful night in 2010.[106]

It is clear that a defendant who loses a pretrial motion to dismiss based on self-defense immunity is not precluded from raising the issue at trial.[107] In *Tover v. State*, the court stated that the denial of the defendant's pretrial motion was "without prejudice to [the defendant] raising the Stand Your Ground statutory

99. *Id.* at 341.

100. *Id.* For an excellent analysis of the issue, see Associate Judge Schumann's concurring opinion. He notes that other states that have modeled their self-defense immunity statutes based on Florida's have determined that the burden of proof at the pretrial stage rests with the state to show that the use of force in self-defense was unjustified. *Id.* at 342.

101. Bretherick v. State, No. SC13–2312, 2014 WL 1659779, at *1 (Fla. 2014).

102. *Id.* (On April 15, 2014 an opinion was rendered).

103. State v. Gallo, 76 So. 3d 407, 409 (Fla. Dist. Ct. App. 2011).

104. *Id.* at 408.

105. *Id.* at 409.

106. *Id.* For an interesting discussion of this issue, see Judge Salter's dissenting opinion in *Mobley v. State*. 132 So. 3d 1160, 1167 (Fla. Dist. Ct. App. 2014). Reasonable people considering the same facts can reach different legal conclusions. *See id.* In Mr. Mobley's case, Judge Salter in his dissent noted that four judges, hearing the same almost-undisputed evidence, "split evenly" on whether Mr. Mobley met the requirements for Stand Your Ground immunity from prosecution. *Id.*

107. Tover v. State, 106 So. 3d 958, 959 (Fla. Dist. Ct. App. 2013).

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defense at trial."[108] Likewise, the court in *Mederos v. State* noted the difference between a claim of immunity from prosecution and a self-defense claim at trial, and held that the denial of the pretrial motion did not preclude the defendant from submitting the matter to the jury as an affirmative defense.[109]

There are several lessons to be learned from these cases. It is prudent for a defendant to file a motion to dismiss the criminal information based on self-defense immunity at the earliest opportunity and request that the court set it for an evidentiary hearing.[110] The court should set aside ample time to conduct a full evidentiary hearing, and then make appropriate findings to support its ruling. The defendant should be prepared to prove by a preponderance of the evidence that immunity attaches.[111] Until resolved by the Supreme Court of Florida, the State's burden of proof is unclear, and the State should be prepared to put on sufficient evidence to overcome the defendant's burden of proof. [112] Finally, should the defendant fail to prove entitlement to immunity at a pretrial hearing, he or she should prepare to assert and prove self-defense at trial.[113]

II. IMMUNITY FROM CIVIL ACTION

Although Stand Your Ground issues are more often encountered in the criminal law arena, section 776.032 also grants self-defense immunity in civil actions.[114] As might be expected, there are few reported civil cases since the Law's enactment.[115]

In *Pages v. Seliman-Tapia*, an altercation ensued after an argument over the parking of a vehicle in a lot.[116] The plaintiffs filed a civil suit against the defendant for assault and battery. The defendant sought self-defense immunity from the action.[117] The trial court conducted a pretrial evidentiary hearing, and after considering the testimony of several witnesses, found that the defendant was entitled to immunity from the suit.[118] The court thereupon dismissed the action with prejudice.[119]

In another civil case, *Professional Roofing and Sales, Inc. v. Flemmings*, the plaintiff sued the defendant for assault and battery, alleging that the defendant had attacked him with a baseball bat at his place of employment.[120] The plaintiff also sued the alleged assailant's employer on theories of vicarious liability for negligence and negligent retention of a dangerous employee.[121] The defendant filed

108. *Id.*
109. Mederos v. State, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012).
110. *See* Martinez v. State, 44 So. 3d 1219, 1221 (Fla. Dist. Ct. App. 2010).
111. *See* Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008).
112. *See Mederos*, 102 So. 3d at 11.
113. *See Tover*, 106 So. 3d at 959.
114. FLA. STAT. § 776.032(1) (2013) (amended 2014).
115. *See* Pages v. Seliman-Tapia, 134 So. 3d 536 (Fla. Dist. Ct. App. 2014); Prof'l Roofing & Sales, Inc. v. Flemmings, 138 So. 3d 524 (Fla. Dist. Ct. App. 2014).
116. *Pages*, 134 So. 3d at 537–38.
117. *Id.* at 538.
118. *Id.*
119. *Id.*
120. *Prof'l Roofing & Sales*, 138 So. 3d at 526.
121. *Id.*

a motion to dismiss the suit based on self-defense immunity, and the trial court summarily denied the motion.[122] The court also denied a subsequent similar motion on the same grounds as successive, and suggested that it might be dealt with on a summary judgment motion.[123] Determining that a pretrial hearing was required, the appellate court remanded the matter for an evidentiary hearing on the motion to dismiss.[124]

In each of the foregoing cases, the defendant also faced criminal charges for the same episode.[125] In *Pages v. Seliman-Tapia*, the plaintiffs were husband and wife.[126] The defendant had been charged with felony battery for pushing the husband to the ground, and misdemeanor battery for bumping into the wife.[127] Pursuant to a negotiated plea, the defendant was adjudicated guilty of the misdemeanor, and the State entered a *nolle prosequi* of the felony charge.[128] The defendant never sought immunity from prosecution based on the Stand Your Ground Law in the criminal case.[129]

However, the defendant did so in *Professional Roofing and Sales*.[130] In that case, the State had charged the defendant with aggravated battery with a deadly weapon because he struck the victim with a baseball bat.[131] The defendant moved to dismiss the criminal action asserting that he was immune from prosecution because he used justifiable force to defend himself against the victim's imminent use of unlawful force.[132] After conducting an evidentiary hearing, the criminal court agreed and dismissed the charges.[133]

In his motion to dismiss the civil suit, which was based on the same underlying facts as the criminal action, the defendant argued that he was immune from the civil action under the Stand Your Ground Law because, on the same facts, the criminal court dismissed that action.[134] This motion was summarily denied by the civil court.[135]

The defendant made a compelling argument: the legal determination of immunity under the Stand Your Ground Law should only have to be made once, and under common law principles of *res judicata* and collateral estoppel, immunity should automatically apply in the subsequent civil case.[136] After analyzing the applicable law, the Third District Court of Appeal of Florida disagreed.[137]

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122. *Id.*
123. *Id.*
124. *Id.* at 527.
125. *See* Pages v. Seliman-Tapia, 134 So. 3d 536, 538 (Fla. Dist. Ct. App. 2014); *Prof'l Roofing & Sales*, 138 So. 3d at 526.
126. *Pages*, 134 So. 3d at 538.
127. *Id.*
128. *Id.*
129. *See id.*
130. *Prof'l Roofing & Sales*, 138 So. 3d at 526.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Prof'l Roofing & Sales*, 138 So. 3d at 526.
137. *Id.* at 527.

Four elements are required for *res judicata*, or claim preclusion, to apply: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made.[138] Collateral estoppel, also called issue preclusion, requires five elements: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceeding were identical; and (5) the issues were actually litigated in the prior proceeding.[139]

The Third District Court of Appeal of Florida found that the critical element missing as to both of these doctrines is mutuality of the parties.[140] Since the State of Florida is a party in the criminal case and not in the civil case, each case involved different parties.[141] "We also do not find that the Florida legislature modified or abrogated application of these common law doctrines when it conferred immunity from both civil and criminal actions under the Stand Your Ground Law."[142] Thus, a party seeking self-defense immunity in both a criminal and a civil case will likely have to litigate the issue twice.[143]

The courts have treated claims of immunity from civil action similarly to those seeking immunity from criminal prosecution.[144] The defendant should promptly file a motion to dismiss the action, and the court must conduct an evidentiary hearing. If there was a preceding criminal action, a ruling on a motion to dismiss the prosecution will be of no consequence in the civil action.

III. Unlawful Activity and Self-Defense Immunity

A significant issue addressed by the courts is whether someone involved in an unlawful activity can obtain immunity under the Stand Your Ground Law.[145] Since the enactment of the Stand Your Ground Law in 2005, this has been a debated topic in the appellate courts.[146] Further complicating the issue, the Florida Legislature recently amended the Stand Your Ground Law concerning the unlawful activity issue.[147]

Section 776.032 provides immunity from prosecution or civil action for "[a] person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 . . . ."[148] In *Brown v. State*, the court explained:

138. *Id.* (citing Topps v. State, 855 So. 2d 1253, 1255 (Fla. 2004)).
139. *Id.* (citing Porter v. Saddlebrook Resorts, Inc., 679 So. 2d 1212, 1214-15 (Fla. Dist. Ct. App. 1996)).
140. *Id.*
141. *Id.*
142. *Prof'l Roofing and Sales*, 138 So. 3d at 528.
143. *See id.*
144. *See* Pages v. Seliman-Tapia, 134 So. 3d 536 (Fla. Dist. Ct. App. 2014); *Prof'l Roofing & Sales*, 138 So. 3d at 524.
145. *See* Brown v. State, 135 So. 3d 1160, 1161 (Fla. Dist. Ct. App. 2014); Little v. State, 111 So. 3d 214, 216 (Fla. Dist. Ct. App. 2013); State v. Hill, 95 So. 3d 434, 434 (Fla. Dist. Ct. App. 2012).
146. *See Brown*, 135 So. 3d at 1161; *Little*, 111 So. 3d at 216; *Hill*, 95 So. 3d at 434.
147. FLA. STAT. § 776.012(1) (2013) (amended 2014).
148. FLA. STAT. § 776.032(1) (2013) (amended 2014).

> As the first line in the statute clearly sets out, there are three avenues by which a defendant's use of force may qualify for the statutory immunity from prosecution: that his or her use of force was permitted by section 776.012; by section 776.013; or by section 776.031. For all three avenues, the 2005 amendments/enactments abolished the duty to retreat if the other statutory justifications for use of force, including deadly force, were met. Of the three avenues for immunity, the use of force as permitted in section 776.013 is the only avenue limited to persons "not engaged in an unlawful activity."[149]

In *State v. Hill*, the defendant was charged with aggravated battery with a firearm and possession of a firearm by a convicted felon, together with other charges.[150] He filed a motion to dismiss the aggravated battery count asserting that he was immune from prosecution under the Stand Your Ground Law.[151] After conducting an evidentiary hearing and finding that he qualified, the trial court dismissed that charge.[152]

The appellate court, however, disagreed.[153] Determining that it was previously held that possession of a firearm by a convicted felon is an "unlawful activity" under the Stand Your Ground Law,[154] the court decided that the defendant could not obtain immunity by injuring his assailant with a firearm that he was not lawfully allowed to possess.[155] The opinion went on to note that it did not comment on the defendant's right to assert a justification defense.[156] At least one other court has held that possession of a firearm by a convicted felon is an unlawful activity under the Stand Your Ground Law.[157]

After the case was remanded to the trial court, Mr. Hill sought dismissal of the charges because of his immunity under section 713.012 rather than section 713.013, as he had claimed before.[158] The trial court, relying on the broad language of the appellate court's opinion, again denied the motion to dismiss, since Mr. Hill was engaged in an unlawful activity.[159] The appellate court found that Mr. Hill is not precluded from claiming the justifiable use of force under section 776.012(1), or from seeking immunity under section 776.032.[160]

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149. *Brown*, 135 So. 3d at 1161.
150. *Hill*, 95 So. 3d at 434.
151. *Id.*
152. *Id.* at 435.
153. *Id.*
154. *Id.* (citing Dorsey v. State, 74 So. 3d 521, 527 (Fla. Dist. Ct. App. 2011) (Although mentioned in the context of immunity in *Dorsey*, the unlawful activity issue in that case actually dealt with the appropriate self-defense jury instructions.)).
155. *Hill*, 95 So. 3d at 435.
156. *Id.*
157. Darling v. State, 81 So. 3d 574, 578–79 (Fla. Dist. Ct. App. 2012).
158. Hill v. State, 143 So. 3d 981, 983 (Fla. Dist. Ct. App. 2014).
159. *Id.*
160. *Id.* at 983–87.

The Second District Court of Appeal of Florida provided an in-depth analysis of the issue in *Little v. State*, but reached a different result.[161] Aaron Little and his friend were walking toward Little's girlfriend's home when they encountered a parked vehicle.[162] Demond Brooks jumped from the back seat of the car.[163] Little knew Brooks, but they were not friends.[164] Brooks suddenly pulled two handguns from his waistband, pointed them at Little, and said he was "going to make it rain."[165] Little ran behind his friend, and asked him to make Brooks stop.[166] Little then ran into the house.[167] Brooks followed Little but stopped on the front steps.[168] Brooks held the guns at his side and yelled for Little to come back out.[169] Little, who was frightened, pulled a handgun from his pocket and asked the homeowner to "get" Brooks.[170] She told Little to go outside because she did not want a gun in her house.[171] Her son, who was outside laughing with Brooks, came in and ordered Little to leave.[172]

Seeing no back door, Little eased his way out the front door holding his gun behind his back.[173] He passed Brooks on the steps.[174] Brooks made some comments, and Little urged him to calm down.[175] When Little was in the driveway, Brooks pointed his guns at Little.[176] Little raised his gun, closed his eyes, and fired several shots.[177] Brooks was hit and died.[178] At the time of the incident, Little was a convicted felon.[179]

In the criminal proceedings, Little filed a motion to dismiss on the basis that he was immune from prosecution under the Stand Your Ground Law.[180] In response, the State asserted two arguments: "(1) Little was not acting in self-defense because he reengaged Brooks after removing himself from the initial threat, and (2) Little was not entitled to immunity . . . because he was engaged in an unlawful activity as a felon in possession of a firearm."[181] After a pretrial hearing, the trial court denied the motion on the first ground.[182] The appellate court decided that the trial court had erred in reaching that conclusion because Little's use of deadly force was

161. Little v. State, 111 So. 3d 214, 216 (Fla. Dist. Ct. App. 2013).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *See id.*
167. *Little*, 111 So. 3d at 216.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 217.
172. *Id.*
173. *Little*, 111 So. 3d at 217.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Little*, 111 So. 3d at 219.
180. *Id.* at 217.
181. *Id.*
182. *Id.*

justified under the circumstances.[183] In the appeal, the State argued that the ruling of the trial court should be upheld under the "tipsy coachman" theory;[184] since Little was engaged in an unlawful activity, he was not entitled to immunity in any event.[185]

Construing section 776.032 to give effect to legislative intent, the court concluded that the plain meaning of the statute is for it to provide immunity to a person who qualifies under *either* section 776.012(1) or section 776.013(3); in other words, each section was intended to provide a separate basis for immunity under section 776.032(1).[186]

Thus, the court concluded that section 776.032(1) "provides for immunity from criminal prosecution for persons using force as permitted in section 776.012, section 776.013, *or* section 776.031."[187] Since Little was a felon in possession of a firearm, he did not qualify for immunity under section 776.013.[188] He did, however, seek immunity for his use of force under section 776.012(1), and his status as a felon in illegal possession of a handgun did not prohibit immunity under that section.[189]

The *Little* court noted that it could not find any prior cases addressing this issue, but it did consider *State v. Hill*, discussed above.[190] In *Hill*, the Fourth District Court of Appeal decided that the defendant's use of force did not qualify for immunity under section 776.013(3) because he was engaged in an unlawful activity—possession of a firearm by a convicted felon.[191] In *Little*, the Second District Court of Appeal noted that the Fourth District did not address whether the use of force by a person engaged in an illegal activity would qualify for immunity from prosecution under section 776.012(1).[192] The Second District certified a conflict with the Fourth District as to this issue and went on to certify the following

183. *Id.* at 218.

184. *Id.* (citing Johnson v. Allstate Ins. Co., 961 So. 2d 1113, 1115 (Fla. Dist. Ct. App. 2007)). The "tipsy coachman" rule, which says that even if a trial court's ruling is based on erroneous reasoning, the decision will be upheld if there is any basis in the record which would support the judgment, comes to Florida from Georgia through the

Supreme Court of Florida in *Carraway v. Amour & Co*. 156 So. 2d 494, 497 (Fla. 1963). "We are reminded of Goldsmith's [poem] RETALIATION:

> 'The pupil of impulse, it forc'd him along,
>
> His conduct still right, with his argument wrong;
>
> Still aiming at honour, yet fearing to roam,
>
> The coachman was tipsy, the chariot drove home.'"

Id. (citing Lee v. Porter, 63 Ga. 345, 346 (1879)).

185. *Little*, 111 So. 3d at 218–19.

186. *Id.* at 219 (emphasis added).

187. *Id.* at 221–22.

188. *Id.* at 222.

189. *Id.*

190. *Id.*

191. *Little*, 111 So. 3d at 222 (citing State v. Hill, 95 So. 3d 434, 435 (Fla. Dist. Ct. App. 2012)). However, as previously mentioned, the Fourth District is now in line with the Second District after the issue was again considered in Hill v. State, 143 So. 3d 981 (Fla. Dist. Ct. App. 2014).

192. *Id.*

question to the Supreme Court of Florida as one of great public importance: "IS A DEFENDANT WHO ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT HIS USE OF DEADLY FORCE IS PERMITTED IN SECTION 776.012(1), FLORIDA STATUTES (2009), ENTITLED TO IMMUNITY UNDER SECTION 776.032(1) EVEN THOUGH HE IS ENGAGED IN AN UNLAWFUL ACTIVITY AT THE TIME THAT HE USES THE DEADLY FORCE?"[193]

As of the writing of this article, the Supreme Court of Florida has not taken jurisdiction.

The Fourth District Court of Appeal again addressed this issue in *State v. Wonder*.[194] There, the defendant was charged with manslaughter for shooting an individual at a post office.[195] He moved to dismiss the information based on immunity from prosecution under sections 776.032 and 776.012.[196] After hearing the evidence, the trial court denied the motion to dismiss.[197] The State requested the trial judge to determine that the defendant was engaged in an illegal activity—possession of a firearm on post office property.[198] The trial court decided that it was not an unlawful activity.[199] When the defendant appealed the denial of his motion, the State again raised the issue.[200] The appellate court agreed with the defendant that a determination of that issue was unnecessary because his motion was filed under section 776.012, not section 776.013.[201] The court in *Wonder* noted that it had recently certified conflict with *Little v. State*[202] on this issue and in dicta, went on to say that it agreed with the analysis in *Little*.[203]

The issue of whether a person engaged in an unlawful activity can seek immunity was also addressed in *Pages v. Seliman-Tapia*, the civil action discussed above.[204] The court found that even if the defendant's guilty plea of misdemeanor battery established as a matter of law that he was engaged in a criminal activity at the time he used force, he sought immunity under both section 776.012 and section 776.013.[205] The court recognized that a person must establish that he is not engaged in an unlawful activity as a prerequisite to relief under section 776.013, but is not required to do so when seeking immunity under section 776.012.[206] Since the defendant sought immunity under both sections, he was only prohibited from

193. *Id.* at 222–23.
194. State v. Wonder, 128 So. 3d 867 (Fla. Dist. Ct. App. 2013), *overruled by* State v. Wonder, Nos. 4D12–4510, 4D12–4559, 2014 WL 3928449, at *1 (Fla. Dist. Ct. App. Aug. 13, 2014).
195. *Id.* at 868.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Wonder*, 128 So. 3d at 869.
201. *Id.*
202. *Id.* at 869 n.2.
203. *See id.* at 870.
204. *See* Pages v. Seliman-Tapia, 134 So. 3d 536, 539–40 (Fla. Dist. Ct. App. 2014).
205. *Id.* at 539.
206. *Id.*

obtaining immunity under section 776.013 and could seek immunity under section 776.012.[207]

As mentioned *supra*, the Florida legislature made significant changes to the Stand Your Ground Law as it pertains to immunity for those involved in unlawful activities.[208] Section 776.012 was amended by the inclusion of the following:

> A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.[209]

Thus, as discussed in the foregoing cases, where there was no exclusion from immunity for a person engaged in an unlawful activity under section 712.012, there is now.[210]

Interestingly, section 776.013 was also amended.[211] While section 776.013(3) previously limited the use of force to those "not engaged in an unlawful activity," that language was deleted from the statute.[212] As discusses in the cases above, that was considered to be the only avenue available for immunity for one who was engaged in an unlawful activity.

These amendments are discussed in both *State v. Wonder*[213] and *Hill v. State.*[214] The court in *Hill* notes that the legislature's inclusion of that language supports its conclusion that the statute did not intend to prohibit one engaged in an unlawful activity from seeking immunity from prosecution under section 776.032 when using justifiable force under section 776.012(1).[215]

These amendments to the Stand Your Ground Law are not likely to be applied retroactively. The legislature did not make any clear statement as to the retroactive or prospective application of the amendments.[216] Thus, those who were engaged in unlawful activities and seek immunity for incidents occurring prior to June 20, 2014 may receive different treatment from those whose incidents occurred thereafter.

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207. *See id.* at 539–40.
208. FLA. STAT. § 776.032(1) (2013) (amended 2014).
209. FLA. STAT. § 776.012(2) (2013) (amended 2014).
210. *Id.* The same change was made to FLA. STAT. § 776.031, with the same result.
211. FLA. STAT. § 776.013 (2013) (amended 2014).
212. *Id.*
213. State v. Wonder, Nos. 4D12–4510, 4D12–4559, 2014 WL 3928449 (Fla. Dist. Ct. App. Aug. 13, 2014)..
214. 143 So. 3d 981 (Fla. Dist. Ct. App. 2014).
215. *Id.* at 986.
216. "A general rule of statutory construction is that, in the absence of a clear legislative intent to the contrary, a law is presumed to act prospectively." State v. Kelly*,* 588 So. 2d 595, 597 (Fla. Dist. Ct. App. 1991). Two general exceptions apply: First, procedural statutes may be applied retroactively. Second, remedial statutes may receive retroactive application. *Id.* Perhaps an argument may be made that the recent statutory changes are remedial. Remedial statutes relate to remedies or modes of procedure, and do not create new or take away vested rights. City of Lakeland v. Cantinella*,* 129 So. 2d 133 (Fla. 1961). Given the treatment of these immunity issues by the Florida courts of appeal, that argument seems unlikely to prevail.

It will be interesting to see how the Supreme Court of Florida will address this issue, if indeed it does so. Certainly, the approach taken by the Second District Court of Appeal in *Little v. State*[217] seems well-reasoned. It is based on sound principles of statutory construction. The Third District, without mentioning *Little*, used the same analysis and reached the same result.[218] The Fourth District has also acknowledged the soundness of that reasoning.[219] Thus, it is likely that a person engaged in an unlawful activity at the time of the use of force for an incident occurring before the statutory amendments will be able to seek immunity from criminal prosecution or civil action if that immunity is sought under section 776.012, but not under section 776.013.[220] For an incident occurring after the effective date of the amendments, the opposite result is likely. In either instance, however, in filing a motion to dismiss, it is vital for a defendant to designate the particular statute he or she is using as a basis for immunity.[221]

Although the issue has not yet been clarified by the Supreme Court of Florida, the more persuasive authority demonstrates that a defendant who was involved in an unlawful activity at the time of the use of force in self-defense may still seek immunity from criminal prosecution or civil action, but only if he or she is not disqualified by the statute under which the immunity is sought. In filing a motion to dismiss, the defendant should clearly detail the particular statute that provides the basis for the immunity. Finally, even if the defendant is precluded from obtaining immunity because of an unlawful activity, the defendant may still assert a justification defense at trial.

VI. JURY INSTRUCTIONS

Another difficult issue confronting the courts since the enactment of the Stand Your Ground Law concerns jury instructions. Prior self-defense jury instructions include language concerning the duty to retreat.[222] Since the duty to retreat was virtually eliminated,[223] the use of the outdated jury instructions is problematic.[224]

Instructing the jury on the duty to retreat for offenses that occur after the effective date of the Stand Your Ground Law can be fundamental error, requiring

217. *See* Little v. State, 111 So. 3d 214, 218–22 (Fla. Dist. Ct. App. 2013).
218. *See Pages*, 134 So. 3d at 539–40.
219. *See* State v. Wonder, 128 So. 3d 867, 869–70 (Fla. Dist. Ct. App. 2013).
220. *See, e.g.*, *Pages*, 134 So. 3d at 539.
221. *See* Brown v. State, 135 So. 3d 1160, 1162 (Fla. Dist. Ct. App. 2014),

> In order to sufficiently raise a claim for immunity under section 776.032(1), the defendant must identify the particular statutory basis or avenue (section 776.012; 776.013; 776.031; or any combination thereof) upon which he or she relies to justify the force used. The potential for confusion in the absence of such specification is illustrated by the certified conflict and question of great public importance in the Second District's *Little* decision and the conflict with the Fourth District's *Hill* decision certified in *Bragdon v. State*.

Id. (citation omitted). *See generally* Bragdon v. State, 123 So. 3d 654 (Fla. Dist. Ct. App. 2013).
222. *See, e.g.*, Fla. Std. Jury Instr. (Crim.) 3.6(f) (2000).
223. *See* discussion, *supra* part I of this paper.
224. *See, e.g.*, Fla. Std. Jury Instr. (Crim.) 3.6(f) (2000).

reversal.[225] Even where defense counsel failed to object to the outdated duty to retreat instruction, courts have found that the given instruction is an incorrect statement of the law that negates the argument of self-defense, and is a fundamental error requiring a reversal of the conviction.[226]

The standard jury instruction concerning the justifiable use of deadly force applicable to criminal offenses occurring prior to October 1, 2005, the effective date of the new Stand Your Ground Law,[227] provided that

> [t]he defendant cannot justify the use of force likely to cause death or great bodily harm unless [he][she] used every reasonable means within [his] [her] power and consistent with [his][her] own safety to avoid the danger before resorting to that force.
>
> The fact that the defendant was wrongfully attacked cannot justify [his][her] use of force likely to cause death or great bodily harm if by retreating [he][she] could have avoided the need to use that force. However, if the defendant was placed in a position of imminent danger of death or great bodily harm, and it would have increased [his] [her] own danger to retreat, then [his][her] use of force likely to cause death or great bodily harm was justifiable.[228]

After the enactment of the Stand Your Ground Law, the standard jury instruction was modified, and in pertinent part now reads:

> If the defendant was not engaged in an unlawful activity and was attacked in any place where [he][she] had a right to be, [he][she] had no duty to retreat and had the right to stand [his][her] ground and meet force with force, including deadly force, if [he][she] reasonably believed that it was necessary to do so to prevent death or great bodily harm to [himself][herself] or to prevent the commission of a forcible felony.[229]

In *Floyd v. State*, a fight broke out during a party at the defendant's residence.[230] He armed himself with a rifle.[231] A gunfight ensued, and the defendant

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225. *See* Williams v. State*,* 982 So. 2d 1190, 1193–94 (Fla. Dist. Ct. App. 2008). Despite the defense attorney's failure to object at trial, the court determined that the given instruction was an incorrect statement of the law which negated the defendant's only defense, and was thus a fundamental error requiring reversal of his conviction. *Id.*

226. *See id.*; *see also* Richards v. State, 39 So. 3d 431, 433–34 (Fla. Dist. Ct. App. 2010). In determining whether jury instructions constitute fundamental error, a court must consider "the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel." Smith v. State, 76 So. 3d 379, 383 (Fla. Dist. Ct. App. 2011).

227. 2005 Fla. Sess. Law Serv. 436 (West).

228. *See* Fla. Std. Jury Instr. (Crim.) 3.6(f) (2000).

229. Fla. Std. Jury Instr. (Crim.) 3.6(f) (2006).

230. Floyd v. State, No. 1D11–4465, 2014 WL 4197377, at *1 (Fla. Dist. Ct. App. Aug. 26, 2014).

231. *Id.*

shot someone in the back, killing him.[232] The defendant asserted self-defense at trial, but was convicted of second degree murder.[233] He appealed.[234] The appellate court found that a conflicting jury instruction amounted to a fundamental error requiring reversal of his conviction.[235]

Prior to deliberations, the trial court gave the jury the following instruction:

> If the defendant was not engaged in any unlawful activity and was attacked in any place where he had a right to be, **he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force,** if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another, or to prevent the commission of a forceable [sic] felony.[236]
>
> However, **the use of deadly force is not justifiable if you find:**
>
> 1. Robert Franklin Floyd **initially provoked the use of force against himself, unless** [:]
>
> A. The force asserted toward the Defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm **and had exhausted every reasonable means to escape the danger other than using deadly force.**[237]

The defendant prevailed on his argument that one section of the jury instruction negated the other.[238] That constituted fundamental error, the court concluded, and his conviction was reversed.[239]

An issue with the jury instructions arose in *Dorsey v. State*.[240] There, a dispute at a high school keg party escalated into a fight, resulting in the deaths of two young men after being shot by the defendant.[241] He was charged with two counts of second degree murder, possession of a firearm by a convicted felon, and carrying a concealed weapon.[242] The defendant was tried and convicted of those charges.[243]

Although the defendant argued that the shooting was in self-defense, his counsel requested that the court not give the Stand Your Ground instruction based on section 776.013(3) because the defendant, a convicted felon, was engaged in an

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232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Floyd*, 2014 WL 419377 at *2 (alterations in original).
237. *Id.* at *1 (alternations in original).
238. *Id.* at *2.
239. *Id.* at *2–3.
240. Dorsey v. State, 74 So. 3d 521, 525 (Fla. Dist. Ct. App. 2011).
241. *Id.* at 522–23.
242. *Id.* at 522.
243. *Id.* at 522–23.

unlawful activity—possession of a concealed firearm—at the time of the incident.[244] The trial court declined and stated its intent to include the standard Stand Your Ground instruction.[245] The defendant's counsel then proposed that the court give the following special instruction:

> If you find that the defendant was engaging in an unlawful activity or was attacked in a place where he did not have the right to be then you must consider if the defendant had a duty to retreat. *If the defendant was placed in a position of imminent danger or death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable*.[246]

The emphasized portion of the requested instruction was taken from the pre-2005 standard jury instruction on the justifiable use of deadly force. [247] The court also declined to give that instruction.[248] The defendant was subsequently found guilty and convicted as charged.[249]

Noting that the courts in *Williams v. State*[250] and *Richards v. State*[251] found fundamental error when the jury was charged with the pre-2005 instruction on the justifiable use of deadly force after the enactment of section 776.013, the Fourth District Court of Appeal distinguished those cases.[252] Unlike those cases, there was an issue in this case as to whether the defendant was involved in an unlawful activity at the time of the incident.[253] The court found that the current standard jury instruction[254] does not inform the jury of the scope of the duty to retreat in circumstances where the person is engaged in an unlawful activity or is in a place where he or she had no right to be at the time of the attack.[255] The court went on to say that since the plain language of section 776.013(3) provides that the "no duty to retreat" rule applies only when one "is not engaged in an unlawful activity," the common law duty to retreat must still apply.[256] Suggesting that the trial court could have either not given the standard Stand Your Ground instruction, or given both that instruction and the special instruction requested by the defendant, the court reversed the defendant's conviction and remanded the case for a new trial.[257]

244. *Id.* at 525–26 (citing FLA. STAT. § 776.013(3) (2013) (amended 2014)).
245. *Id.* at 526.
246. *Dorsey*, 74 So. 3d at 526.
247. *Id.* (citing Fla. Std. Jury Instr. (Crim.) 3.6(f) (2004)).
248. *Id.*
249. *Id.* at 523.
250. Williams v. State, 982 So.2d 1190, 1194 (Fla. Dist. Ct. App. 2008).
251. Richards v. State, 39 So. 3d 431, 434 (Fla. Dist. Ct. App. 2010).
252. *Dorsey*, 74 So. 3d at 526–27.
253. *Id.*
254. Fla. Std. Jury Instr. (Crim.) 3.6(f) (2011).
255. *Dorsey*, 74 So. 3d at 527.
256. *Id.* (quoting FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014)).
257. *Id.* at 527–28.

The most recent case to consider this issue is *Hardison v. State*.[258] There, the defendant was a convicted felon in possession of a firearm and asserted at trial that he used deadly force in self-defense.[259] He was convicted of second-degree murder and challenged his conviction, asserting on appeal that the trial court committed fundamental error by using an improper jury instruction.[260] The trial court gave not only the current standard jury instruction on the justifiable use of deadly force, but added a special instruction requested by defense counsel which informed the jury that a convicted felon may lawfully possess a firearm in certain instances.[261]

The First District Court of Appeal provided a thoughtful analysis of the issue. It considered two cases that dealt with immunity from prosecution—*Little v. State*[262] and *State v. Wonder*.[263] Following the reasoning of those cases, the court noted that there is a difference between the language of section 776.012(1) and section 776.013(3):

> Section 776.013(3) applies when a person is (1) not engaged in an unlawful activity and (2) attacked outside the "castle" as long as (3) he or she has a right to be there. A person who does not meet these three requirements would look to section 776.012(1) to determine whether the use of deadly force was justified. . . .
>
> The requirements under sections 776.012(1) and 776.013(3) are not identical. A person proceeding under section 776.013(3) would have to prove that he or she reasonably believed the use of deadly force was "necessary…to prevent death or great bodily harm…or to prevent the commission of a forcible felony." Under section 776.012(1), a person would have to prove that he or she reasonably believed the use of deadly force was "necessary to prevent

258. Hardison v. State, 138 So. 3d 1130 (Fla. Dist. Ct. App. 2014).
259. *Id.* at 1134.
260. *Id.* at 1130.
261. *Id.* at 1134 (citing Marrero v. State, 516 So. 2d 1052, 1055 (Fla. Dist. Ct. App. 1987)). The instruction given at the defense's request stated:

> However, in certain circumstances, a convicted felon may lawfully possess a firearm. *Those circumstances are, one, the felon must be in present, imminent and impending peril of death or serious bodily injury, or reasonably believed himself or others to be in such danger;* two, the felon must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct. Three, the felon must not have any reasonable, legal alternative to possession [of] the firearm. Four, the firearm must be made available to the felon without preconceived design. And, five, the felon must give up possession of the firearm as soon as necessity or apparent necessity ends.

Id. This instruction is based on *Marrero v. State*, which sets forth the elements of the "necessity" or "justification defense" against a charge of possession of a firearm by a convicted felon. Marrero, 516 So. 2d at 1055.
262. *See Hardison*, 138 So. 3d at 1133 (citing Little v. State, 111 So. 3d 214 (Fla. Dist. Ct. App. 2013)).
263. *Id.* at 1134 (citing State v. Wonder, 128 So. 3d 867 (Fla. Dist. Ct. App. 2013), *overruled by* State v. Wonder, Nos. 4D12–4510, 4D12–4559, 2014 WL 3928449, at *1 (Fla. Dist. Ct. App. Aug. 13, 2014).

> *imminent* death or great bodily harm…or to prevent the *imminent* commission of a forcible felony."[264]

If the challenged instruction had not contained the portion requested by defense counsel, the appellate court indicated that it would tend to agree with the defendant and find fundamental error; however, when considered as a whole, the court found that the jury was properly instructed on the justifiable use of deadly force.[265] The court did say that "[t]hese decisions suggest that Standard Jury Instruction 3.6(f) could stand revision to clarify the circumstances under which the use of deadly force is justified. However, we make no such assertion today, and we decidedly do not hold that standard instruction is fundamentally flawed."[266]

Given the state of confusion involving proper jury instructions, particularly when the defendant was engaged in an unlawful activity at the time, criminal courts and counsel should exercise due care in charging the jury properly when Stand Your Ground self-defense is asserted. The jury should not be instructed on a duty to retreat if not required by the circumstances of the case. Trial courts should be cautious in using pre-2005 standard jury instructions when the use of deadly force in self-defense is an issue. Further, the current instructions should be modified.[267] The courts should also exercise caution in the use of proper jury instructions when a defendant is engaged in an unlawful activity at the time force was used in self-defense.

V. APPELLATE PROCEDURE

Another significant issue the courts have had to consider since the enactment of the Stand Your Ground Law concerns the proper procedure for perfecting an appeal.[268] Clearly, and as discussed above, a defendant may challenge an order denying a motion to dismiss based on immunity from criminal prosecution in a direct appeal upon a conviction.[269] However, challenges to these orders have also been made by other methods.[270]

In *Little v. State*, the defendant sought review of an order denying his motion to dismiss charges based on immunity by filing a petition for writ of certiorari.[271] The court treated the petition as a petition for writ of prohibition.[272] The court

264. *Id.* at 1133 (citing Little v. State, 111 So. 3d 214, 221 (Fla. Dist. Ct. App. 2013)) (alterations in original).
265. *Id.* at 1134–35.
266. *Id.*
267. The self-defense instructions 3.6(f) and (g) are currently under review by the Committee on Standard Jury Instructions in Criminal Cases.
268. *Little*, 111 So. 3d at 216 n.1 (citing Montanez v. State, 24 So. 3d 799, 801 (Fla. Dist. Ct. App. 2010)).
269. *See, e.g.*, *Montanez*, 24 So. 3d at 801.
270. *See, e.g.*, *Little*, 111 So. 3d at 216 n.1.
271. *Id.* at 216–17. A writ of certiorari under common law is a device by which an upper court can direct a lower tribunal to send up the record of a pending case so that it may review it for regularity, and it is an extraordinary remedy. Broward Cnty. v. G.B.V. Intern., Ltd., 787 So. 2d 838, 842 (Fla. 2001).
272. *Little*, 111 So. 3d at 216. A writ of prohibition is used to prevent a court from continuing to exercise jurisdiction it does not have, or to prevent a court from assuming jurisdiction over a case in which it legally cannot. A.D.W. v. State, 777 So. 2d 1101, 1103 (Fla. Dist. Ct. App. 2001).

acknowledged that it had previously entertained these challenges by way of petitions for certiorari, but it expressed concerns as to whether certiorari is the proper method for review of these orders given the available remedy of review on direct appeal of a subsequent conviction.[273] Recognizing that the Supreme Court of Florida has held that the appropriate method to review orders denying motions to dismiss criminal prosecutions based on immunity claims is by prohibition, the court concluded that "the better avenue for review is a petition for writ of prohibition. . . ."[274]

Most of the Florida district courts now agree that a petition for writ of prohibition is an appropriate method for obtaining review of a trial court's denial of a claim of immunity from prosecution.[275] Further, if the appellate court has reviewed the trial court's denial of a motion to dismiss by writ of prohibition, it is precluded by *res judicata* from again reviewing the same issue on direct appeal following a subsequent conviction.[276]

Although a defendant must appeal the denial of a motion to dismiss by a petition for writ of prohibition, it appears that if the State wishes to challenge an order on a motion to dismiss, it must do so by petition for writ of certiorari.[277] In *Wonder v. State*, the State petitioned for a writ of certiorari challenging the part of a trial court order determining that the defendant was not involved in a unlawful activity at the time of the shooting.[278] The appellate court denied the petition, but there was no indication in the opinion that the state had sought review by an improper method.[279]

In *Martinez v. State*, the trial court refused to hold a pretrial hearing on the defendant's motion to dismiss asserting immunity from prosecution because there was insufficient time prior to trial, and instead heard the motion during the trial.[280] The defendant filed a petition for writ of mandamus,[281] seeking to compel the trial court to conduct a pretrial hearing.[282] The appellate court agreed that the motion must be heard prior to trial and granted the petition for writ of mandamus.[283]

In summary, if a trial court refuses to hear a motion to dismiss based on immunity from prosecution under the Stand Your Ground Law, a petition for writ

273. *Little*, 111 So. 3d at 216, n.1 (citing *Montanez*, 24 So. 3d at 801).
274. *Id.* (citing Tsavaris v. Scruggs, 360 So. 2d 745, 747 (Fla. 1977)).
275. *See, e.g.*, Mederos v. State, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012); *Little*, 111 So. 3d at 216 n.1; Joseph v. State, 103 So. 3d 227, 229 (Fla. Dist. Ct. App. 2012); Bretherick v. State, 135 So. 3d 337, 339–40 (Fla. Dist. Ct. App. 2013). Further, the standard of review by the appellate court is mixed: the trial court's findings are presumed correct and may only be reversed when not supported by competent substantial evidence, while the trial court's legal conclusions are reviewed de novo. Mobley v. State, 132 So. 3d 1160, 1161–62 (Fla. Dist. Ct. App. 2014).
276. Rice v. State, 90 So. 3d 929, 931 (Fla. Dist. Ct. App. 2012).
277. State v. Caamano, 105 So. 3d 18, 20 (Fla. Dist. Ct. App. 2012).
278. State v. Wonder, Nos. 4D12–4510, 4D12–4559, 2014 WL 3928449, at *1 (Fla. Dist. Ct. App. Aug. 13, 2014).
279. *Id.*
280. Martinez v. State, 44 So. 3d 1219, 1220 (Fla. Dist. Ct. App. 2010).
281. *Id.* A writ of mandamus is a common law writ used to compel the performance of an official duty where an official has failed to undertake the duty. State *ex rel*. Buckwalter v. City of Lakeland, 150 So. 508, 511 (Fla. 1933).
282. *Martinez*, 44 So. 3d at 1220.
283. *Id.* at 1221.

of mandamus is the appropriate method of review in the appellate court.[284] If the trial court hears and denies the motion, the proper remedy for the defendant is to seek appellate review by a petition for writ of prohibition.[285] If the State desires to challenge such an order, it should do so by petition for writ of certiorari.[286] Finally, if a motion is denied and the defendant is convicted of the criminal charges, a defendant may challenge the denial of the motion together with the conviction by direct appeal.

CONCLUSION

Gabriel Mobley, introduced at the beginning of this article, traveled a different course through the legal system than those arrested prior to the enactment of the Stand Your Ground Law. As the case law demonstrates, the Stand Your Ground cases are usually factually convoluted and often difficult to unravel.[287] Law enforcement officers and prosecutors are required to analyze the facts and make arrests and charging decisions, while defense lawyers must review the facts and make strategy decisions. Judges are required to consider the facts and make significant decisions, while jurors must consider the facts to make ultimate decisions. Overlying all of this is the law itself, and knowledge of the procedural and substantive aspects of the Stand Your Ground Law is imperative for those involved in making these decisions.

Since the enactment of the Stand Your Ground Law, the courts have addressed areas of concern including the proper procedures for processing immunity claims in both criminal and civil actions,[288] the ability of one engaged in an unlawful activity to seek immunity,[289] appropriate self-defense jury instructions,[290] and the proper method to appeal immunity orders.[291] This is a work in progress, and the courts will continue to interpret the Stand Your Ground Law to provide those decision makers with more certainty for the Law's implementation and application.

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284. *Id.*

285. *See* Mederos v. State, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012); Little v. State, 111 So. 3d 214, 216 n.1 (Fla. Dist. Ct. App. 2013); Joseph v. State, 103 So. 3d 227, 229 (Fla. Dist. Ct. App. 2012); Bretherick v. State, 135 So. 3d 337, 339–40 (Fla. Dist. Ct. App. 2013).

286. State v. Caamano, 105 So. 3d 18, 20 (Fla. Dist. Ct. App. 2012).

287. *See, e.g.*, Horn v. State, 17 So. 3d 836 (Fla. Dist. Ct. App. 2009), *overruled by* State v. Egido, 113 So. 3d 88 (Fla. Dist. Ct. App. 2013).

288. *See, e.g.*, Dennis v. State, 51 So. 3d 456 (Fla. 2010); Peterson v. State, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008); Velasquez v. State, 9 So. 3d 22 (Fla Dist. Ct. App. 2009).

289. *See, e.g.*, Brown v. State, 135 So. 3d 1160 (Fla. Dist. Ct. App. 2014); *Little*, 111 So. 3d 214; State v. Wonder, 28 So. 3d 867 (Fla. Dist. Ct. App. 2013), *abrogated by* State v. Wonder, Nos. 4D12–4510, 4D12–4559, 2014 WL 3928449, at *1 (Fla. Dist. Ct. App. Aug. 13, 2014).

290. *See, e.g.*, Floyd v. State, No. 1D11–4465, 2014 WL 4197377, at *1 (Fla. Dist. Ct. App. Aug. 26, 2014); Dorsey v. State, 74 So. 3d 521 (Fla. Dist. Ct. App. 2011).

291. *See, e.g.*, *Little*, 111 So. 3d 214; *Wonder*, 28 So. 3d 867, abrogated by *Wonder,* 2014 WL 3928449, at *1; Martinez v. State, 44 So. 3d 1219 (Fla. Dist. Ct. App. 2010).