Barry Law Review

Volume 27
Issue 1 *Barry Law Review Volume 27*

Article 5

5-16-2022

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## Abstract

Self-defense and Stand Your Ground laws are controversial subjects in today's world. On one side, some argue that these laws protect our Second Amendment right to bear arms, protect ourselves, and our loved ones without fear of criminal prosecution. On the other hand, opponents argue that Stand Your Ground laws encourage evermore violent acts and vigilantism. In the center is the controversy of applying the law. From the people who are disproportionately charged and tried to those that avoid prosecution, this country has become a heightened example of the problems with the current state of self-defense. From Zimmerman to the McMichaels, Stand Your Ground cases remain a polarizing issue in this country.

Stand Your Ground laws are instrumental in protecting the justified killer against prosecution, but a 2017 change to the immunity procedure presents a novel dilemma for prosecutors. As Stand Your Ground laws have become the majority view in this country, opponents have proposed alternatives, and activist groups have advocated for the abolition of self-defense immunity in the wake of an increase in gun violence. This article proposes a different solution, one that avoids the necessity of two full trials, better protects the innocent defendant, and brings self-defense claims in line with other defenses in criminal law.

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## INTRODUCTION

When someone is killed, who should have the duty of proving what happened, the killer or someone else? When threatened with great bodily harm, a person's right to self-defense has long been recognized under Florida law.[1]

The common law recognizes one's right to use deadly force to defend oneself or another when it is reasonably necessary to prevent imminent death or great bodily harm.[2] Under the common law, a person also has a duty to retreat where reasonably possible before one could use force to defend oneself or property.[3] Even the Bible provides guidance on instances where deadly force would be a justified use of self-defense.[4] The Florida Supreme Court recognized the common law duty to retreat, requiring a person to "retreat to the wall" or use every reasonable means within his or her power to avoid the danger, except a person claiming self-defense in his or her residence, which is known as the Castle Doctrine.[5] The Castle Doctrine, recognizing the heightened sense of privacy inside one's home, removes the duty to retreat before using force in instances where one is attacked inside their own home.[6] As a matter of public policy, we want people to defend themselves. But to what extent? How far should we, as a society, extend the common law protections of self-defense? A recent Florida Supreme Court decision presents an interesting scenario.

Mr. Ronald Bretherick ("Ronald") is driving with his family to Downtown Disney in Orlando, Florida, when he notices "a blue truck rapidly approaching them."[7] Mr. Dunning ("Dunning") is driving the blue truck, and he almost sideswipes the Brethericks as he passes in the right lane.[8] Dunning "stare[s] at them in a threatening manner" but makes no statements or gestures as he passes Ronald.[9] Dunning pulls in front of Ronald and comes to a complete stop without any traffic or other obstacle blocking his path.[10] Dunning gets out of his truck and approaches the Bretherick car.[11] In response, Ronald "h[olds] up a holstered handgun, and Dunning return[s] to his truck without another word."[12] Then Ronald's son, Jared Bretherick ("Bretherick"), gets out of the car and approaches Dunning's truck.[13] At this point, Bretherick points the handgun at Dunning and tells him to drive away or else he would shoot.[14] After a few tense moments, Bretherick returns to his vehicle and continues to hold Dunning at gunpoint from his truck until police

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[1] FLA. CONST. art. I, § 8(a) ("The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed.").
[2] Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999) ("Under [the] . . . common law, a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm.").
[3] *Id.* (explaining that one has a duty to retreat to the wall).
[4] *Exodus* 22:1–2 (explaining that when a homeowner kills a thief breaking and entering at night there is no blood guilt, but there is bloodguilt if done during the day).
[5] *Weiand*, 732 So. 2d at 1049, 1056.
[6] *Id.* at 1049.
[7] Bretherick v. State, 170 So. 3d 766, 769 (Fla. 2015).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 770.

arrive to diffuse the situation.[15] In this case, Dunning did not have a gun or other weapon and no one was killed, but what if someone had died?

Under current Florida law, the outcome-determinative question is not whether the defendant used or threatened to use deadly force but rather if the State can prove by clear and convincing evidence that the defendant did not act in self-defense.[16] The defendant has no duty to explain themselves,[17] and in fact, cannot be arrested, charged, or otherwise prosecuted unless the State can convince a judge that the defendant did not act in self-defense.[18]

Is this legislative decision to shift the burden of proof from the defendant to the State, as a matter of public policy, a positive change in society that accurately reflects the morality of the people? By expanding the common law Castle Doctrine to protect the justified use of deadly force from any criminal prosecution, this article argues that the legislature has exceeded the intent of protecting those that are justified in using deadly force, eliminated the original reasoning behind the doctrine, and created an illogical problem of proving the negative by requiring the State to prove that a person did not act in self-defense. However, this problem can be corrected by placing the burden back on the person who brings the defense while still honoring the protections given to people who use justifiable force.

Part I of this paper will address the legislative history and the process for raising a Stand Your Ground defense. Section A explains the process where one asserts immunity, and Section B discusses the expansion of the Stand Your Ground law in response to the 2014 George Zimmerman Trial. Part II will discuss the opposing views in the Florida Supreme Court from the *Bretherick v. State* decision; Section A will discuss the majority opinion's reasoning, while Section B will address Justice Canady's views in the dissent. Part III will analyze the 2017 amendment to the Stand Your Ground law and the new dilemma that prosecutors face. Section A will review the intent behind the 2017 amendment, and Section B will discuss the changes to the immunity process under the current Stand Your Ground law. Finally, Section C will present a case study on the prosecution dilemma that this amendment has created.

Part IV addresses the constitutional issues with the current law in Section A, and Section B will take a brief glimpse into the numbers behind gun violence and the racial and social impact that Stand Your Ground statutes have had in our country. Part V will review alternatives to our current procedure; Section A will discuss the immunity procedure used in Georgia, and Section B discusses the arguments for the abolition of Stand Your Ground immunity. Finally, Part VI discusses the procedure used in motions to suppress in Section A, and Section B discusses this article's proposal to adopt a similar procedure that reflects the spirit of the law while still providing immunity to qualified individuals.

## I. A LEGISLATIVE PROGRESSION TOWARDS PROTECTING THE DEFENDANT

[15] *Id.*
[16] FLA. STAT. § 776.032 (2017).
[17] U.S. CONST. amend. V, § 3, cl. 1 ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").
[18] § 776.032.

In 2005, the Florida Legislature passed Senate Bill 436, which contained the Stand Your Ground provisions, removing the duty to retreat before using deadly force in situations *where one had a right to be*.[19] The Stand Your Ground legislation actually amended two prior statutes and created two new statutes.[20] Section 776.031, the "defense of property statute," was amended removing the duty to retreat in "a place where he or she has a right to be."[21] In addition, § 776.012, the "self-defense statute," was amended to remove the duty to retreat "where one had a right to be" under the new law, § 776.013 or the "home protection statute."[22] The new home protection statute codified the common law Castle Doctrine stating that:

> A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm if the person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle . . . or to prevent the imminent commission of a forcible felony.[23]

The home-protection statute extended the Castle Doctrine by expanding the protection to any dwelling, residence, or vehicle where one had a "right to be" and created a presumption of reasonable fear to use deadly force in preventing the unlawful entry into the area or the removal of another person from the area against that person's will.[24] The legislature gave broad definitions to "dwelling," "residence," and "vehicle," extending the protection to temporary buildings, tents, and cargo containers.[25]

Finally, § 776.032, the "immunity statute," was created to prevent "arresting, detaining in custody, and charging or prosecuting" a person who lawfully acted under the self-defense, home protection, or defense of property statutes.[26] The immunity statute protects those who use justified force by prohibiting both the State and private parties from forcing him or her to face trial because of their actions.[27] Law enforcement could use "standard procedures for investigating the use of force . . . but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful."[28] This use of immunity is distinct from the common definition of immunity.[29] There are four general types of immunity at law:

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[19] 2005 Fla. Sess. Law Serv. 2005–27, sec. 1, § 776.013(3) (West).
[20] *See generally* 2005 Fla. Sess. Law Serv. 2005–27 (West).
[21] *Id.* at sec. 3, § 776.031.
[22] *Id.* at sec. 2, § 776.012.
[23] *Id.* at sec. 1, § 776.013; *see* FLA. STAT. § 776.08 (1995) ("'Forcible Felony' means treason; murder; . . . and any other felony which involves the use or threat of physical force or violence against any individual.").
[24] 2005 Fla. Sess. Law Serv. 2005–27, sec. 1, § 776.013 (West).
[25] *Id.*
[26] *Id.* at sec. 4, § 776.032(1).
[27] *Id.* (preventing the State and private parties from asserting criminal or civil actions against the person claiming immunity).
[28] *Id.* at sec. 4, § 776.032(2).
[29] *Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

> a) a promise not to prosecute for a crime in exchange for information or testimony in a criminal matter, granted by the prosecutors, a judge, a grand jury or an investigating legislative committee; b) public officials' protection from liability for their decisions (like a city manager or member of a public hospital board); c) governmental (or sovereign) immunity, which protects government agencies from lawsuits unless the government agreed to be sued; d) diplomatic immunity which excuses foreign ambassadors from most U.S. criminal laws.[30]

These statutes discussed *supra*, in addition to § 776.041(2),[31] the "initial aggressor statute," provide the possible claims for self-defense to criminal prosecution.[32] Under the initial aggressor statute, an aggressor who "[i]nitially provokes the use of force" generally may not invoke the Stand Your Ground defense.[33] The initial aggressor statute provides an exception for a good faith withdrawal by 1) stopping the use of force, 2) withdrawing from physical contact, 3) indicating to the other person that he or she desires to withdraw and end the conflict, and 4) the other person continues to pursue or resume the use of force.[34] The initial aggressor statute also provided an exception for situations where one had made every attempt to retreat and reasonably believed that the use of force was necessary to prevent great bodily harm or death to himself or herself or another.[35]

To justify deadly force, "the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of . . . [deadly force]."[36] A person must actually (subjectively) believe that the danger was real, and that belief must be one that the fact-finder views as objectively necessary.[37] The statutes discussed *supra* cover all conflicts between two people, as long as one of those people is not a member of law enforcement acting in their official capacity,[38] and provide the available defenses that one would raise under self-defense in a criminal proceeding.[39]

*A. How Does a Defendant Assert Immunity?*

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[30] *Immunity*, LEGAL DICTIONARY, https://dictionary.law.com/Default.aspx?selected=897 [https://perma.cc/9DKT-JGLP] (last visited Feb. 6, 2021).
[31] *See* FLA. STAT. § 776.041(2) (2014).
[32] This article will briefly discuss the social epidemic involving people of color, minors and the gun violence epidemic in Part IV, but will not address the legal analysis of juvenile proceedings.
[33] § 776.041(2).
[34] *Id.*
[35] *Id.*
[36] *See In re*: Standard Jury Instructions in Crim. Cases–Report 2019-01, 285 So. 3d 1248, 1254 (Fla. 2019).
[37] *Id.*
[38] *See* FLA. STAT. § 776.05 (2014) (explaining that law enforcement is justified in the use of any force to defend himself or another, arrest, or retake escaped felons); *see also* State v. Peraza, 259 So. 3d 728, 732 (Fla. 2018) (holding that law enforcement officers are eligible to assert immunity under s. 776.032 or s. 776.05).
[39] *See* FLA. STAT. § 776.032 ("A person who uses or threaten to use force as permitted in s. 776.012, s. 776013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution . . . .").

Under the 2005 Stand Your Ground laws, a defendant who acted in self-defense would file a Motion to Dismiss at or before the arraignment hearing.[40] The defendant would be moving to dismiss the count on the grounds that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant."[41] The trial court would then hold a pretrial evidentiary hearing to determine the matter.[42] The trial court is required to decide the matter by confronting and weighing not only the legal issue but must decide disputed issues of material fact in determining whether the defendant acted reasonably to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony.[43]

*B. Expanding the Zone of Protection: The 2014 Amendment*

In July of 2013, following the highly publicized George Zimmerman trial, the Florida Legislature began reviewing and then amended the Stand Your Ground Laws in 2014.[44] The 2014 amendment, House Bill 89, had two purposes: provide criminal and civil immunity under circumstances that would have been immune had force actually been used, and clarify that those who threaten to use deadly force would also be immune from criminal and civil proceedings.[45] This change added "or threatening to use" force to protect those who threatened to use deadly force under the immunity statute.[46]

Further, the legislature changed the home-protection statute by expanding the statute to all circumstances where a person is not engaged in criminal activity and is in any home, residence, or vehicle where he or she has a right to be.[47] These changes addressed the substantive law, but the procedural question of who should bear the burden of proof at the defendant's pretrial hearing for determining immunity was not decided.[48]

## II. TWO APPROACHES TO THE BURDEN OF PROOF: BRETHERICK V. STATE

When a person is put in a situation where they subjectively believe that their life is in danger and thus uses deadly force, should that person's Fifth Amendment right to remain silent be waived to raise self-defense under the Stand Your Ground law? Does the defense attorney have to lay out their entire case at the pretrial hearing, exposing their plan of attack to the prosecution? The Florida Supreme Court answered this question and provided two

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[40] *See* FLA. R. CRIM. P. 3.190(b) ("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.").
[41] *Id.* R. (c)(4).
[42] Govoni v. State, 67 So. 3d 1048, 1048 (Fla. 2011).
[43] *See* Peterson v. State, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008).
[44] *See generally* 2014 Fla. Sess. Law Serv. 2014-195 (West); Karl Etters, *Protesters Press for Changes in Stand Your Ground Law*, USA TODAY (Mar. 10, 2014), https://www.usatoday.com/story/news/nation/2014/03/10/stand-your-ground-protesters/6257543/ [https://perma.cc/7AQ5-E932].
[45] 2014 Fla. Sess. Law Serv. 2014-195 at sec. 6, § 776.032(1) (West).
[46] *Id.*
[47] *Id.* at sec. 4, § 776.013(3).
[48] *See* Bretherick v. State, 170 So. 3d 766, 768 (Fla. 2015) (deciding whether the defendant or State should bear the burden of proof at the pretrial hearing).

opposing rationales on whether the burden of proof should rest with the State or the defendant at the pretrial immunity hearing.[49]

*A. The Majority View: The Party Who Brings The Action Also Brings The Burden*

Statutory interpretation must begin by determining legislative intent.[50] The first step in determining legislative intent is to look at the actual statutory language because "the statute's text is the most reliable and authoritative expression" of the legislature's intent.[51] Because the legislature enacts statutes with an intent to make a change in the law, courts must avoid interpreting the law in a manner that would make sections of that law meaningless.[52] The court held that "the plain language of [the immunity statute] grants defendants a *substantive right* to assert immunity from prosecution and to avoid being subjected to a trial."[53] Accordingly, the grant of immunity must provide for greater protection than a probable cause determination previously provided before the Stand Your Ground laws were enacted.[54] Therefore, "the trial court must decide the matter by confronting and weighing only factual disputes" and "may not deny a motion simply because factual disputes exist."[55] Like the procedure for handling a question of statutory immunity, the statute did not address which party is to have the burden of proof.[56]

In applying the immunity statute, the trial "courts have imposed a similar burden for motions challenging the voluntariness of a confession."[57] The majority agreed and held that "the defendant bears the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing."[58] The court recognized several rationales in determining that the defendant should bear the burden: 1) the statute does not provide blanket immunity from prosecution, 2) no court has required the State to disprove a defense beyond a reasonable doubt at a pretrial hearing, 3) to require the State to disprove the defense beyond a reasonable doubt would result in two trials, 4) placing the burden on the defendant is consistent with other types of motions to dismiss, and 5) regular citizens are not held to the same standard as law enforcement when determining immunity, each of which is discussed below.[59]

First, the Florida Supreme Court feared that requiring the State to disprove immunity in every pretrial hearing would create a presumption of blanket immunity when using deadly force.[60] Because the legislature did not create a procedure for testing a defendant's immunity claim, courts must provide a solution that does not force the defendant into defending his rights through a full trial. Therefore, a pretrial hearing allows

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[49] *Id.*
[50] *Id.* at 772 (explaining that legislative intent guides statutory analysis).
[51] *Id.*
[52] *Id.* at 773.
[53] *Id.* at 772; *see* Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) ("[T]he existence of disputed issues of material fact did not warrant denial of a motion to dismiss [under the] immunity [statute].").
[54] *Bretherick*, 170 So. 3d at 773.
[55] *Id.*
[56] *Id.* at 775; *see* FLA STAT. § 776.032 (2014).
[57] *Bretherick*, 170 So. 3d at 774.
[58] *Id.* at 768; *see* People v. Guenther, 740 P.2d 971, 980 (Colo. 1987) (requiring the defendant to prove that immunity applies by a preponderance of the burden).
[59] *Bretherick*, 170 So. 3d at 775–78.
[60] *Id.*

a defendant to test their immunity claim while still preserving the right to assert self-defense at trial.[61] This allows a defendant who justifiably used deadly force to establish that they acted lawfully and are thus entitled to the immunity to avoid criminal prosecution and civil liability.[62]

Second, the majority argued that no court in this country has required the prosecution to have the burden of proof at a pretrial hearing, and the highest courts in three states—Colorado, Georgia, and South Carolina—agree with a procedure where the defendant must prove that he or she is entitled to immunity by a preponderance of the evidence.[63] Other states with Stand Your Ground laws—Kentucky and Kansas—held that "the prosecution had to establish only that there was *probable cause* that the defendant's use of force was not legally justified."[64]

Third, the majority found that placing the burden on the defendant was consistent with how other types of motions to dismiss are handed under Florida Rules of Criminal Procedure 3.190(b).[65] This result "is consistent with jurisprudence that requires the defendant, who is seeking the immunity, to bear the burden of proof by a preponderance of the evidence."[66] The case precedent also suggests that the immunity hearing should proceed accordingly.[67] The words "[d]efenses" and "defense" as used in the statutes are given a broad definition that allows for all possible defenses a defendant could make.[68] The phrase "may at any time be entertained by the court" clarifies that the four explicitly stated grounds listed in rule 3.190(c) may be brought at any time, but is not an exhaustive list.[69] In addition, the rule provides that "the court may receive evidence on any issue of fact necessary to the decision on the motion," expressly allowing for situations where a judge must resolve disputed issues of fact in addition to the legal question.[70] This allows a defendant to prove that they were justified in their actions without the need for a full criminal trial because a judge must decide factual issues at the pretrial hearing.[71] As a practical matter, the majority argued that defendants in similar transactional immunity hearings also bear the burden of proving immunity in a similar pretrial hearing.[72] Further, courts also use a similar process in deciding a motion to suppress evidence under an unlawful search allegation.[73]

"Fourth, to place the burden on the State to prove, beyond a reasonable doubt, that the defendant was not entitled to immunity would require the State to establish the same degree of proof twice—once pretrial and again at trial."[74] The result would be that the State would have to prosecute "two full-blown trials: one before the trial judge and then another

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[61] *Id.* at 775.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 776 (emphasis added).
[65] *Bretherick*, 170 So. 3d at 776.
[66] *Id.*
[67] *Bretherick*, 170 So. 3d at 776
[68] *Id.*
[69] *Id.*
[70] *Id.* at 777.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

before the jury."[75] The pretrial evidentiary hearing should not be treated the same as a full trial because the question is not whether the defendant committed the crime but whether they were justified in using self-defense.[76] In fact, the majority and the Colorado Supreme Court pointed out that, compared to the State, the defendant would be in a better position to explain what happened at the pretrial hearing when all of the facts have not been established and is incentivized to establish immunity.[77] The result of the two proceedings is not consistent: If the defendant loses at the pretrial hearing, he or she is free to raise the same defenses at trial before a jury.[78] The majority feared that, by forcing the State to bear the burden at the pretrial hearing, the defendant would be found immune in situations where the State did not possess all the evidence to refute the self-defense allegations.[79]

Finally, forcing the State to prove its case twice would not only encourage potentially meritless arguments but would cause undue expense and delay for the justice system.[80] In comparison, the defendant's right to a fair trial is not diminished, "as the State still has to prove its case and all of the elements of the crime beyond a reasonable doubt at trial."[81] The result would create "a process fraught with [the] potential for abuse."[82]

*B. Legislature's Intent is to Protect All Justified Uses of Force From Prosecution*

Justice Canady dissented with the majority because the essential nature of the factual question raised by the defendant is the same at the pretrial hearing and at trial: "whether the evidence establishes beyond a reasonable doubt that the defendant's conduct was not justified under the governing statutory standard."[83] When a defendant raises self-defense at trial, he or she can only be convicted "if the State proves beyond a reasonable doubt that the defense does not apply."[84] By placing the burden of proof on the defendant, "the majority's decision here guarantees that certain defendants who would be entitled to acquittal at trial will nonetheless be deprived of immunity from trial."[85]

Because Justice Canady believed that any fear of potential fraud or injustice should be addressed by the legislature, he reasoned that the fact that "it is easier for a defendant to prove entitlement to immunity" has no application at trial, and therefore should not have any basis at the pretrial evidentiary hearing.[86] In addition, the potential result of "'two full-blown trials'—by no means a specious concern—cannot justify curtailing the immunity from trial . . . for those individuals whose use of force or threat of force is legally justified under the governing statutory standard."[87] The legislature's intent was to protect all people

[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*; People v. Guenther, 740 P.2d 971, 981 (Colo. 1987).
[79] *Bretherick*, 170 So. 3d at 777.
[80] *Id.* at 777–78.
[81] *Id.* at 778.
[82] *Id.* at 777.
[83] *Id.* at 779 (Canady, J., dissenting).
[84] *Bretherick*, 170 So. 3d at 779 (Canady, J., dissenting) (citing Alexander v. State, 121 So. 3d 1185, 1188 (Fla. Dist. Ct. App. 2013); Leasure v. State, 105 So.3d 5, 13 (Fla. Dist. Ct. App. 2012); Montijo v. State, 61 So.3d 424, 427 (Fla. Dist. Ct. App. 2011)).
[85] *Bretherick*, 170 So. 3d at 780 (Canady, J., dissenting).
[86] *Id.*
[87] *Id.*

who use justifiable force from criminal or civil prosecution.[88] Further, practical problems raised by the Stand Your Ground law—such as undue expenses and clogging the legal system—should be considered and resolved by the legislature.[89]

## III. THE 2017 AMENDMENT TO THE BURDEN OF PROOF: JUSTICE CANADY'S VIEW

## IV.

In 2017, the Florida Legislature made another change to the Stand Your Ground Law to clarify the legislative intent when determining who holds the burden of proof at the pre-trial evidentiary hearing. Section 776.032(4) was added to provide clarity on the legislature's intent on who should bear the burden at a pretrial immunity hearing:

> In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).[90]

Effective July 1, 2017, the amended law shifted the burden of proof from requiring the defendant to prove that (1) he or she subjectively acted in self-defense to protect oneself or another's life and (2) their actions were objectively reasonable by the preponderance of the evidence, to require the state to prove that the defendant did not act in self-defense by clear-and-convincing evidence.[91] The legislature also amended the home defense statute.[92] The statute stated that a person has "no duty to retreat and has the right to stand his or her ground" in a dwelling or residence where they have a right to be.[93] Nondeadly force is allowed "to the extent that the person reasonably believes" is necessary to defend themselves or another against an "imminent use of unlawful force."[94] Deadly force is permissible if there is a reasonable belief that the force is necessary to "prevent imminent death or great bodily harm" their person, another person, or "to prevent the imminent commission of a forcible felony."[95] This change clarified the situations when a presumption of reasonable fear occurs, rather than relying on the self-defense and defense of property statutes.[96]

In its current state, the home defense statute creates the presumption that one is acting in justified self-defense against imminent unlawful force, or to prevent great bodily injury or death.[97] This presumption generally applies unless the other party has a

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[88] *Id.*
[89] *Id.*
[90] 2017 Fla. Sess. Law Serv. 2017-72, at sec. 1, § 776.032(4) (West).
[91] *Id.*
[92] *See generally* 2017 Fla. Sess. Law Serv. 2017-77 (West).
[93] *Id.* at sec. 1, § 776.013(1).
[94] *Id.* § (1)(a).
[95] *Id.* § (1)(b).
[96] *Id.* § (3).
[97] FLA. STAT. § 776.013(2).

right to be in the home[98] or is a lawful resident;[99] the person that is attempted to be removed is the child, grandchild or is in the lawful custody or under lawful guardianship; [100] the person asserting self-defense is engaged in criminal activity or is otherwise using the home to further criminal activity;[101] or the other person is a law enforcement officer acting in their official duty and identified themselves, or the person reasonably should have known that the party was a law enforcement officer.[102]

*A. The Legislative Intent for Amending the Law*

In 2017, the legislature passed these changes following Justice Canady's dissent in the 2015 *Bretherick v. State* decision.[103] The reasoning behind the shift is based on Justice Canady's argument that one who justifiably uses deadly force to defend oneself or another is completely immune from criminal prosecution, and thus the state must prove at a pre-trial hearing that the defendant did not act in self-defense.[104] The legislature adopted Justice Canady's view because they did not want to have one who would be later acquitted at trial to be denied immunity.[105]

The legislature amended the home defense statute to clarify when a person would have the right to use force.[106] By removing the language that "[a] person who is attacked" and replacing it with a reasonable standard for preventing death or great bodily harm, the legislature created broader protection for those who use or threaten to use deadly force because an individual does not have to be attacked, but only reasonably fear an attack.[107] The legislature also created ambiguous terms by not defining "imminent" or "raise a prima facie claim."[108] Legislative intent is determined by applying the languages' plain and ordinary meaning.[109] When the legislature's terms are not expressly defined, it is "appropriate to refer to dictionary definitions" to decide the plain and ordinary meaning.[110] "Imminent danger" means immediate danger that cannot be stopped by calling for aid or law enforcement.[111] To put it another way, there must be an immediate necessity to use force or no possible attempt of retreat or other conduct but to defend oneself.[112] A "claim" is defined as "a statement that [is] something yet to be proved" or "the assertion of an existing right."[113] "Prima facie" is defined as statements that are "sufficient to establish a

[98] Examples include owners, leasees, or titleholders. FLA. STAT. § 776.013(3)(a).
[99] The lawful resident does not apply if there is "an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person." *Id.* § (3)(a).
[100] *Id.* § (3)(b).
[101] *Id.* § (3)(c).
[102] *Id.* § (3)(d).
[103] THE PRO. STAFF OF THE COMM. ON JUDICIARY, BILL ANALYSIS & FISCAL IMPACT STATEMENT, CS/SB 128, 1st Sess., at 1 (Fla. 2017).
[104] *Id.*
[105] *Id.*
[106] 2017 Fla. Sess. Law Serv. 2017-77 at sec 1, § 776.013(1) (West).
[107] *Id.*
[108] §§ 776.013, .032 (2017).
[109] Bretherick v. State, 170 So. 3d 766, 772 (Fla. 2015).
[110] Jefferson v. State, 264 So. 3d 1019, 1026 (Fla. Dist. Ct. App. 2018).
[111] *Imminent Danger*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[112] *See* USE OF FORCE IN SELF-PROT., MODEL PENAL CODE § 3.04 (AM. L. INST. 2002).
[113] *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

fact or raise a presumption unless disproved or rebutted."[114] Further, the defendant need not present evidence at the pretrial hearing but may rely on the four corners of the motion to dismiss.[115]

*B. The Pretrial Procedure Under the 2017 Amendment*

Under the new law, a defendant is entitled to an immunity hearing in which the State bears the burden of proof by filing a motion that clearly states the reasons the defendant is immune and alleges the facts on which the immunity claim is based.[116] A defendant must make a prima facie case at the pretrial hearing,[117] showing that "he (1) was attacked in a place where he had a right to be, (2) was not engaged in any unlawful activity, and (3) reasonably believed it was necessary to use force to prevent death or great bodily harm."[118] A prima facie case must raise a presumption in favor of the defendant's argument if all assertions are taken as fact and is generally considered to be a low standard of proof, below even the preponderance of the evidence threshold.[119] If the court does not grant the motion for immunity, the motion and its contents are admissible at trial,[120] but a defendant is not required to testify at the pretrial hearing to raise a prima facie defense.[121] These changes create a unique problem for prosecutors. The purpose of these changes was to overrule the majority opinion in *Bretherick*.[122]

Under the new procedure, a defendant meets their prima facie showing in the motion to dismiss without the necessity to present any evidence at the pretrial hearing.[123] Then, the prosecutor, while gathering evidence and testimony to meet their burden faster than they would under another defense, must disprove the motion without cross-examining the defendant.[124] The prosecutor must make these determinations quickly or show good cause to request a continuance that may only be granted at the trial court's discretion.[125] Finally, the State must convince the judge that the defendant's version of events is implausible, and their version of events is highly and substantially more probable to leave the judge with a firm conviction that the defendant was not justified in using deadly force.[126]

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[114] *Prima Facie*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[115] *See Jefferson*, 264 So. 3d at 1026 (providing that a defendant must raise the claim instead of proving it with testimony or physical evidence).
[116] FLA. STAT. § 776.032 (2017).
[117] FLA. STAT. § 776.012 (2014).
[118] Williams v. State, 261 So. 3d 1248, 1252 (Fla. 2019).
[119] *Compare Prima Facie, supra* note 114, *with Preponderance of the Evidence,* BLACK'S LAW DICTIONARY (10th ed. 2014).
[120] Cruz v. State, 189 So. 3d 822, 827 (Fla. Dist. Ct. App. 2015).
[121] *Jefferson*, 264 So. 3d at 1028.
[122] THE PRO. STAFF OF THE COMM. ON JUDICIARY, BILL ANALYSIS AND FISCAL IMPACT STATEMENT, CS/SB 128, 1st Sess., at 1 (Fla. 2017).
[123] § 776.032(4); *see also* Bouie v. State, 292 So. 3d 471, 474 (Fla. Dist. Ct. App. 2020); *Jefferson*, 264 So. 3d at 1022.
[124] U.S. CONST. amend. V, § 3, cl. 1.
[125] FLA. R. CRIM. P. 3.190(f)(2).
[126] *See, e.g.*, Bouie v. State, 292 So. 3d 471, 481 (Fla. Dist. Ct. App. 2020) (quoting Merritt v. OLMHP, LLC, 112 So. 3d 559, 561 (Fla. Dist. Ct. App. 2013) ("The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."); Cummings v. State, 310 So. 3d 155, 159 (Fla. Dist. Ct. App. 2021).

This procedure creates the same burden on the prosecution that they face at trial: once the defendant establishes a prima facie case of self-defense, the State must overcome that defense, either by rebuttal or by inference.[127] The State must prove the negative twice: once at the evidentiary hearing by clear and convincing evidence and again at trial, beyond a reasonable doubt.[128] How can requiring two trials be in the best interests of the people, the victim, the defendant, and judicial efficiency?

*C. A Prosecutor's Dilemma in Deciding to Pursue a Case*

To highlight the prosecutor's dilemma in deciding whether to pursue a case for murder, consider the following hypothetical. The police receive a 911 call stating that a man was seen breaking and entering a house under construction.[129] The police receive a second 911 call from a man that claims he was attacked and, fearing for his life, shot and killed the suspect who was attempting to take his gun from him.[130] The man says that there had been several break-ins recently and was worried that people could be in danger.[131] The man claims that he saw the suspect entering construction areas, acting suspiciously, and was then seen running through the neighborhood.[132] The man says that he went with his son to make sure that no one was in trouble and brought their legally owned shotgun and revolver with them for protection.[133]

The man saw the suspect, stopped, and got out of the truck to ask him if there was anything wrong.[134] The man says that the suspect immediately ran at him, attempted to attack him, and take his gun from the man.[135] The man claims to have made several attempts to push the suspect away and fired one shot to try and stop the attack.[136] The suspect continued to pursue him, and the man fired another shot.[137] At this point the suspect fell, the man searched him for weapons, and called the police to report the attack.[138] The police went to investigate, but after hearing the man's claim of self-defense, they took pictures of the scene and interviewed the men who saw the attack.[139] The pictures show the

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[127] *See, e.g.*, Wilson v. State, 765 So. 2d 950, 951 (Fla. Dist. Ct. App. 2000); State v. Rivera, 719 So. 2d 335, 337 (Fla. Dist. Ct. App. 1998).
[128] Quaggin v. State, 752 So. 2d 19 (Fla. Dist. Ct. App. 2000) (explaining that there must be proof beyond a reasonable doubt that the defendant's use of deadly force was unreasonable).
[129] This is a hypothetical scenario based on the Ahmaud Arbery shooting. *Compare Public Release Incident Report for G20-11303*, GLYNN CTY. POLICE DEP'T (Feb. 23, 2020), https://int.nyt.com/data/documenthelper/6915-arbery-shooting/b52fa09cdc974b970b79/optimized/full.pdf, *with* Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/9TYN-VVE6].
[130] *Public Release Incident Report for G20-11303*, GLYNN CTY. POLICE DEP'T (Feb. 23, 2020), https://int.nyt.com/data/documenthelper/6915-arbery-shooting/b52fa09cdc974b970b79/optimized/full.pdf [https://perma.cc/57QY-W946].
[131] *Public Release Incident Report*, *supra* note 129.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

trucks parked on the side of the road, three fired shotgun shells, and two gunshot wounds on the victim's chest.[140] The victim did not have weapons, any items from the construction site, and nothing was missing from the construction site.[141] A neighbor said he saw the victim fleeing the scene of a crime and saw the event, corroborating the man's statements.[142] The neighbor's vehicle was also located at the scene.[143]

Was the victim the aggressor? Did the victim burglarize a home? Was the victim en route to commit a forcible felony by breaking into another home? Did the man act in self-defense? Without video evidence or other eyewitnesses, how could the man's self-defense claim be refuted? There were inconsistencies in the testimony, from the three shells to the language of the man's son, who said he was a [effing N-word].[144] Did the men have probable cause to make a citizen's arrest for a breach of the peace?

In our hypothetical, the prosecutor would be unable to charge the men with murder without probable cause, let alone bring a full criminal trial. If the prosecutor decides that there is probable cause, and a grand jury returns an indictment, then the man will file a motion to dismiss under the immunity statute. The man's statement meets the prima facie case for a Stand Your Ground defense,[145] the State cannot require the man to testify, and the other witnesses who were also there with the man may raise their Fifth Amendment right against self-incrimination. This hypothetical is almost identical to the situation that the Georgia Attorney General faced in the Ahmaud Arbery shooting, except there is no video footage here.[146] Video evidence tells a different story than the hypothetical presented above[147] and was integral in securing convictions of Travis McMichael, Greggory McMichael, and William Bryan,[148] but what would a prosecutor do without that video?

## V. CONSTITUTIONAL ISSUES AND SOCIAL ISSUES WITH STAND YOUR GROUND

The Stand Your Ground law enforces a constitutional right—namely, the right to bear arms in self-defense.[149] Florida has consistently honored this right as central to both

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *See generally* Pilar Melendez, *Travis McMichael Called Ahmaud Arbery the N-Word as He Lay Dying on the Ground: Witness*, DAILY BEAST (June 4, 2020), https://www.thedailybeast.com/travis-mcmichael-called-ahmaud-arbery-the-n-word-as-he-lay-dying-on-the-ground-witness-told-detective [https://perma.cc/PAU2-SLUJ]; *see also* Minyvonne Burke, *White Man Accused of Killing Ahmaud Arbery Allegedly Used Racial Slur After Shooting, Investigator Says*, NBC NEWS (June 4, 2020), https://www.nbcnews.com/news/us-news/white-man-accused-killing-ahmaud-arbery-allegedly-used-racial-slur-n1224696 [https://perma.cc/5NW8-TDVD]; Brakkton Booker, *White Defendant Allegedly Used Racial Slur After Killing Ahmaud Arbery*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/869938461/white-defendant-allegedly-used-racial-slur-after-killing-ahmaud-arbery [https://perma.cc/EN6H-PA8J].
[145] *See* FLA. STAT. § 776.032 (2017).
[146] Fausset, *supra* note 129.
[147] *Id.*
[148] Hannah Knowles, *Ahmaud Arbery's Killers Sentenced to Life in Prison, Two with No Possibility of Parole*, THE WASH. POST (Jan. 7, 2022), https://www.washingtonpost.com/nation/2022/01/07/ahmaud-arbery-murder-sentencing/ [https://perma.cc/U7BP-2XZT].
[149] *See* FLA. CONST. art. 1, § 8(a) ("The right of the people to keep and bear arms in defense of themselves . . . shall not be infringed."); District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

the United States Constitution and the Florida Constitution.[150] The right to self-defense in the protection of one's life is a basic human right.[151] Our justice system is also designed to protect the rights of crime victims.[152] How do we protect these conflicting rights between defendants and victims while still ensuring just proceedings?

There are other approaches to solve the immunity question without creating this dilemma of placing the burden on the State to prove the negative in other states and in precedent case law.[153] Studies regarding the defendants who have raised the Stand Your Ground defense at pretrial hearings show that a significant number of defendants who have been acquitted do not fit the paradigm of the innocent defender compelled by a deadly threat to use deadly force against another.[154] Both the media and the general public are under the misunderstanding that one may use deadly force to stop any attack in any place where one has a right to be without grasping the concept of what "imminent use of deadly force" means or what is "objectively reasonable."[155] There is also widespread confusion about what the Stand Your Ground law is and how it applies "among the legal actors charged with making decisions about whether to arrest, charge, and adjudicate cases involving claims of self-defense."[156] There is an argument that immunity hearings protect against the risk of unjust prosecution, but the current format also raises the risk that guilty defendants will go free because of the dilemma of disproving the defendant's motion to dismiss when no evidence has been submitted by the defendant.[157]

In *Simmons v. United States*, the Supreme Court of the United States held when a defendant must choose between two constitutional rights at a pretrial hearing, his testimony "may not thereafter be admitted against him at trial on the issue of guilt unless he makes

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[150] *See Heller*, 554 U.S. at 628; Weiand v. State, 732 So. 2d 1044, 1057 (Fla. 1999) ("[T]he right to fend off an unprovoked and deadly attack is nothing less than the right to life itself . . . .").

[151] *See* FLA. CONST. art. 1, § 2; THE FEDERALIST NO. 51 (James Madison) ("It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."); *see also* CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS 4–5 (1743) (explaining "natural law").

[152] FLA. CONST. art. 1, § 16(b) ("'[C]rime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants . . . .").

[153] *See generally* Bunn v. State, 667 S.E.2d 605 (Ga. 2008); People v. Guenther, 740 P.2d 971, 971 (Colo. 1987).

[154] *See* Susan Taylor Martin, *Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (Feb. 17, 2013), https://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133/#:~:text=Florida's%20%22stand%20your%20ground",gang%20members%20to%20walk%20free.&text=In%20the%20most%20comprehensive%20effort,"%20cases%20and%20their%20outcomes [https://perma.cc/H2YJ-6LM4].

[155] Elizabeth Elkin & Dakin Andone, *What You Need to Know About 'Stand Your Ground' Laws*, CNN (July 29, 2018, 12:03 AM), https://www.cnn.com/2018/07/29/us/stand-your-ground-law-explainer-trnd/index.html [https://perma.cc/364X-9YAJ].

[156] *Id.* (misstating the law that Stand Your Ground laws are no longer used as an affirmative defense).

[157] Cruz v. State, 189 So. 3d 822, 828 (Fla. Dist. Ct. App. 2015) (explaining that defendants choose to testify at the pretrial hearing voluntarily).

no objection."[158] The *Simmons* rule is normally used in Fourth Amendment motions to suppress[159] but has also been applied to double jeopardy hearings[160] and in pretrial hearings to determine other immunities.[161] Florida has taken a different view in pretrial immunity hearings and follows the general rule that a defendant's testimony at a prior proceeding is admissible against the defendant at trial, even if the defendant declines to testify at the later trial.[162]

Currently, a defendant is not required to testify at the pretrial hearing,[163] and defense attorneys are wary about putting their client's credibility at issue when their statements would be admissible against them at trial in the State's case-in-chief.[164] The defendant's statements would be admissible because there is not a constitutionally protected right to file a motion for dismissal, and a defendant making admissions in a motion to dismiss is not forced to choose between two constitutional rights.[165] In *Cruz v. State*, the Florida Fourth District Court of Appeals reasoned that there was not a conflict between the Second and Fifth Amendments but was a question of whether the defendant was actually exercising their Second Amendment right to self-defense.[166] The dual-edged sword, as it stands presently, puts the defendant at risk of his failed immunity claim from the pretrial hearing being presented at trial and the costs and difficulty of having two trials put on by the State without the ability to examine the defendant's credibility if he chooses to not testify. This dual-edged sword requires that both prosecutors and defense attorneys must treat this hearing as an initial trial because the burden of proof falls on the State, and the possibility of a failed immunity claim being admitted at trial would be a big nail in the coffin for a defendant's self-defense claim at the real trial.[167]

*A. Constitutional Issues with the Current Law*

Scholars and practitioners have also questioned the constitutionality of the 2017 amendment.[168] "Procedural law" is defined as the body of rules "which direct the course of [a] proceeding to bring parties into the court and the course of the court after they are brought in."[169] The rules of procedure show the course of litigation in determining the outcome of a case.[170] Procedural law is distinguished from the law of Evidence because Evidence law determines "what testimony is to be admitted and what rejected in each case,

[158] Simmons v. United States, 390 U.S. 377, 394 (1968).
[159] *Id.*; United States v. Salvucci, 448 U.S. 83, 89 (1980).
[160] United States v. Garcia, 721 F.2d 721, 723 (11th Cir. 1983).
[161] *See* Pedrero v. Wainwright, 590 F.2d 1383, 1387 (5th Cir. 1979) ("Had [the defendant] testified . . . in support of his insanity defense or his incompetency claim, that testimony could not have been admitted at trial over his objection.").
[162] *See Cruz*, 189 So. 3d at 828–29; *see also* State v. Billie, 881 So. 2d 637, 639 (Fla. Dist. Ct. App. 2004).
[163] U.S. CONST. amend. V, § 3, cl. 1.
[164] *Cruz*, 189 So. 3d at 826, 829; *see* State v. Palmore, 510 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1987).
[165] *Palmore*, 510 So. 2d at 1154.
[166] *Cruz*, 189 So. 3d at 829.
[167] *See id.* (describing the pretrial hearing as another trial).
[168] *See generally* Brief of Amicus Curiae League of Prosecutors-Florida in Support of Neither Party On the Issue of the Constitutionality of § 776.032(4), Florida Statutes (2017) and in Support of the Respondent On the Issue of the Retroactivity of § 776.032(4), Florida Statutes (2017), Love v. State, 286 So. 3d 177 (Fla. 2019) (No. SC18-747), 2018 WL 5478954.
[169] Kring v. Missouri, 107 U.S. 221, 232 (1883) (defining procedure).
[170] *Id.* ("[I]n defining practice . . . [t]he word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in . . . .").

and what is the weight to be given to the testimony admitted."[171] The Florida Supreme Court has also held the view that "procedural law concerns the means and methods to apply and enforce . . . duties and rights."[172]

*i. Separation of Powers*

There are some who argue that the 2017 amendment violates the separation of powers doctrine.[173] Article V of the Florida Constitution created the judicial branch and the office of the State Attorney and is thus a quasi-judicial officer.[174] State Attorneys are also quasi-executive officers and have exclusive authority to decide whether to prosecute a defendant.[175] By requiring a full trial of disproving the defendant's case at the pretrial hearing—albeit at a lower burden of proof—the legislature has removed the State's right to a jury trial.[176] This unilateral waiver of a jury trial by a pretrial motion to dismiss encroaches on the executive and judicial branches' authority.[177] As the prosecuting officer in criminal cases, the Assistant State Attorney ("ASA") is both a quasi-judicial and quasi-executive officer, and the legislature's invasion of the ASA's ability to accurately determine what happened when someone is killed violates Article II, § 3 of the Florida Constitution.[178]

*ii. Improper Delegation or Encroachment on Judicial Authority*

There are two general violations of the Separation of Powers Doctrine: 1) no branch may encroach upon the powers of another, and 2) no branch may delegate a constitutionally defined power to another branch.[179] All three branches are co-equal in authority and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches."[180] On the other hand, an improper delegation occurs when one branch delegates a power to another branch unless the delegation is 1) limited in scope, 2) contains clear guidelines, and 3) does not

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[171] *Id.*
[172] Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994) ("[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.").
[173] Brief of Amicus Curiae League of Prosecutors-Florida in Support of Neither Party On the Issue of the Constitutionality of § 776.032(4), Florida Statutes (2017) and in Support of the Respondent On the Issue of the Retroactivity of § 776.032(4), Florida Statutes (2017) at 3, Love v. State, 286 So. 3d 177 (Fla. 2019) (No. SC18-747), 2018 WL 5478954, at *3 ("The change in the burden of proof has the effect of allowing the defendant to determine whether he or she wants an initial try by a judge or a jury.").
[174] FLA. CONST. art. V, § 17 ("In each judicial circuit a state attorney shall be elected to a term of four years.").
[175] Young v. State, 699 So. 2d 624, 625 (Fla. 1997) ("[T]he decision to prosecute a defendant . . . is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court.").
[176] *See* FLA. R. CRIM. P. 3.260 ("A defendant may in writing waive a jury trial *with the consent of the state*.") (emphasis added); *see also* U.S. CONST. art. III, § 2, cl. 3 ("The [t]rial of all [c]rimes . . . shall be by jury.").
[177] *See* Off. of State Att'y v. Parrotino, 628 So. 2d 1097, 1099 (Fla. 1993) ("[T]he Legislature cannot take actions that undermine the independence of Florida's judicial and quasi-judicial offices.").
[178] FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").
[179] Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004).
[180] *Id.* at 330.

transfer a core function of any branch, those functions expressly stated in the Florida Constitution.[181]

Purely judicial acts are not subject The burden of proof clearly concerns the means and methods by which the court makes an immunity determination and is considered procedural in nature.[182] More importantly, this change to the immunity statute contradicts the Florida Constitution.[183] Although the legislature may repeal any Supreme Court ruling by a two-thirds vote, the legislature may not enact any laws relating to the practice and procedure of the courts without the Florida Supreme Court's approval.[184] Therefore, there is a question whether the Florida Legislature has encroached on the judicial branch's authority to determine the procedure in criminal cases.[185]

*B. Stand Your Ground Statistics: A Social and Racial Epidemic*

Any discussion on self-defense and Stand Your Ground laws must address, at least in passing, the social and racial ramifications associated with the law and its application. It is undisputed that the United States has a gun violence problem.[186] Thirty-eight thousand eight hundred twenty-six people die every year in the United States, or 11.7 deaths per 100,000 people.[187] In Florida alone, 2,752 people die from guns every year.[188] A report by Everytown For Gun Safety found that gun deaths have increased by 10% annually from 2010 to 2019, or an extra 604 deaths every year.[189] Gun violence also affects Floridian taxpayers, costing $8.8 billion on gun homicides, assaults, and shootings by police each year, $418 per Floridian.[190] Certain groups are more at risk: children, teenagers, and people of color.[191] Guns are the second-leading cause of death among children and teenagers in Florida, with two-thirds of those being homicides.[192] There have been 90 school shootings

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[181] *Id.* at 332-34.
[182] *See* Fuller v. State, 257 So. 3d 521, 535 (Fla. Dist. Ct. App. 2018) ("[T]he 2017 revision to the Stand Your Ground law did not create any new right of self-defense or immunity from prosecution . . . .").
[183] *In re* Clarification of Fla. Rule of Prac. & Proc., 281 So. 2d 204, 204 (Fla. 1973).
[184] *Id.* ("The legislature . . . has no constitutional authority to enact any law relating to practice and procedure."); *see* State v. Smith, 260 So. 2d 489, 490 (Fla. 1972) (explaining that an amendment to a rule of procedure is ineffective unless the court breathes life into the legislative act).
[185] *See* FLA. CONST. art. V, § 2(a) ("The supreme court shall adopt rules for the practice and procedure in all courts . . . .").
[186] *See* Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-income Countries, 2015*, SCIENCEDIRECT (June 2019), https://www.sciencedirect.com/science/article/abs/pii/S0091743519300659 [https://perma.cc/4CEB-RQA8].
[187] *See Gun Violence in the United States*, EVERYTOWN FOR GUN SAFETY (Jan. 2021), https://everystat.org/wp-content/uploads/2020/03/Gun-Violence-in-the-United-States-2.9.2021.pdf [https://perma.cc/NV4G-MTT5].
[188] *At a Glance Florida*, EVERYTOWN FOR GUN SAFETY (Feb. 12, 2022), https://www.everytown.org/state/florida/ [https://perma.cc/QLX6-WKUN].
[189] *How Does Gun Violence Impact the Communities You Care About?*, EVERYSTAT (Jan. 2022), https://everystat.org/?_gl=1*xbxwoi*_ga*MTUyNTEzMjI2OC4xNjQxNzczNTg0*_ga_LT0FWV3EK3*MTY0MTc3MzU5Mi4xLjEuMTY0MTc3NDA5Ni4w#Florida [https://perma.cc/XG2U-US4A].
[190] *Id.*
[191] *Id.*
[192] *Id.*

in Florida since 1970, third in the country over that time span.[193] The current state of gun laws in Florida does not provide greater protection for adults or children.

Just as tragic, black people are *seven* times more likely than white people to die by gun homicide.[194] This violent discrimination extends to police violence; black people are three times more likely to be shot and killed by police.[195] Studies have also shown that black people are discriminated against in the legal system when attempting to raise Stand Your Ground defenses, or at the very least are disproportionately affected.[196] White defendants are 250% more likely to be found justified in homicide prosecutions when the victim is a black person than a white person is charged with homicide against another white person; in Stand Your Ground states, that number jumps to 354%.[197] Another study showed that 73% of defendants who were charged with homicide with a black victim did not face any jail time compared to 59% that were charged with homicide with a white victim.[198] This study also found that Stand Your Ground claims were successful 34% of the time when the shooter was a white person and the victim was a black person, compared to 3% when the shooter is a black person, and the victim is white.[199] These numbers may be even more skewed because the statistics cannot account for the situations where police, or ASAs, choose not to pursue charges against someone claiming self-defense.[200] The disparaging treatment has not gone unnoticed: newspapers have commented on factually similar scenarios with two distinctions—race and outcome.[201] Despite these issues, Florida's Stand Your Ground Law remains in effect, but what alternative can we take?

## V. ALTERNATIVE APPROACHES TO SELF-DEFENSE

When looking at the dilemma that the State and defendants face–the constitutional, the racial, and the social issues–is there a better way? If a change is to be made, how should Florida proceed? Should we look to our sister states for guidance, or would we as a people be safer and more secure in our rights by reverting back to the common law application of self-defense?

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[193] *School Shootings by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/school-shootings-by-state [https://perma.cc/96ZT-8EUD] (last visited Mar. 14, 2022).
[194] *How Does Gun Violence Impact the Communities You Care About*?, *supra* note 189 (emphasis added).
[195] *Gun Violence by Police*, EVERYTOWN RSCH. & POL'Y (Feb. 21, 2022), https://everytownresearch.org/issue/gun-violence-by-police/?_ga=2.143531893.1552177280.1641774141-1525132268.1641773584 [https://perma.cc/XSY5-68PU].
[196] Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?*, PBS (July 31, 2012), https://www.pbs.org/wgbh/frontline/article/is-there-racial-bias-in-stand-your-ground-laws/ [https://perma.cc/R5PG-YRTD].
[197] *Id.*
[198] Sarah Iverson, *Beyond 'Stand Your Ground': Florida's Other Racial Profiling Practices*, AM. PROGRESS (Oct. 11, 2013), https://www.americanprogress.org/issues/race/reports/2013/10/11/76860/beyond-stand-your-ground-floridas-other-racial-profiling-practices/ [https://perma.cc/6SS4-CRQF].
[199] *Id.*
[200] *Id.*
[201] Susan Taylor Martin, *Race Plays Complex Role in Florida's 'Stand Your Ground' Law*, TAMPA BAY TIMES (Feb. 17, 2013), http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152 [https://perma.cc/XFF7-KZMZ] (discussing the effects of racial discrimination and the criminal justice system).

As a matter of policy, is it in the best interest of justice for one judge to determine both matters of law and fact in deciding whether a defendant is completely immune to any prosecution or civil suit? In today's divided America, would it not be fairer to give both the defendant and the State a choice of having a factfinder in these pretrial hearings? As of now, victims are unable to have their voices heard at a trial of their peers during the pretrial hearing and will be unable to bring civil suits against the defendant if the prosecution fails to meet their burden,[202] and ASAs that lack eyewitnesses will have difficulty proving that the defendant's story is not true under the current system. However, there are alternative options applied by other jurisdictions and in other defenses.[203]

*A. Option One: Adopting Georgia's Immunity Procedure*

One option is to consider adopting the procedure that Georgia currently applies. Georgia's self-defense statute is similar to Florida's self-defense statute.[204] Georgia has an immunity statute that protects defendants from criminal prosecution but does not prevent civil lawsuits for wrongful death.[205] However, Georgia is distinguishable from Florida by not allowing a defendant to raise the Stand Your Ground defense when the weapon is being illegally carried.[206] Unlike Florida, which allows defendants to use an "imminent" threat of death or great bodily harm to distinguish situations where a defendant may stand their ground despite breaking the law,[207] Georgia does not make this distinction.[208]

Georgia also uses a pretrial hearing to determine whether a defendant is immune from prosecution on the grounds of justifiable use of force.[209] Georgia requires that a trial court determine the matter of immunity in a pretrial hearing and cannot defer the issue to be determined at trial.[210] The Georgia Supreme Court reasons that "[a]s a potential bar to criminal proceedings which must be determined prior to a trial, immunity represents a far greater right than any encompassed by an affirmative defense, which may be asserted during trial but cannot stop a trial altogether."[211] Georgia also looked to Florida in determining what burden should be applied.[212]

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[202] FLA. STAT. § 776.032 (2017).
[203] *See generally* Bunn v. State, 667 S.E.2d 605 (Ga. 2008); People v. Guenther, 740 P.2d 971 (Colo. 1987).
[204] § 16-3-21(a) (2022) ("[A] person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury . . . .").
[205] *See id.* § 16-3-24.2 (2022) ("A person who uses threats or force . . . shall be immune from criminal prosecution . . . .").
[206] *Id.* ("[U]nless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person . . . .").
[207] Dooley v. State, 268 So. 3d 880, 886 (Fla. Dist. Ct. App. 2019) (holding in the Second District Court of Appeals that "Section 776.012(1) provides another means of obtaining immunity under § 776.032 . . . ."); Fields v. State, 281 So. 3d 573, 578 (Fla. Dist. Ct. App. 2019) (explaining that a defendant could receive a pretrial immunity hearing despite being a convicted felon in possession of a firearm in the Fifth District Court of Appeals); Hill v. State, 143 So. 3d 981, 985 (Fla. Dist. Ct. App. 2014) (analyzing immunity individually under §§ 776.012, 776.013, and 776.031 in the Fourth District Court of Appeals).
[208] GA. CODE ANN. § 16-3-24.2 (2022).
[209] *See* State v. Hall, 793 S.E.2d 522, 523 (Ga. Ct. App. 2016).
[210] Fair v. State, 664 S.E.2d 227, 230 (Ga. 2008) ("[W]hether a person is immune . . . must be determined by the trial court as a matter of law before the trial of that person commences.").
[211] Bunn v. State, 667 S.E.2d 605, 608 (Ga. 2008).
[212] *Id.* (looking at the burden of proof in Florida and Colorado).

Finally, Georgia acknowledges that placing the burden on the defendant is consistent with other defenses that would avoid trial altogether, such as insanity or incompetency.[213] Like Florida, Georgia also may pursue the affirmative defense at trial under the same statutory defenses that grant immunity.[214] Although not presently applied in immunity determinations, Georgia also provides a solution to the issue of one judge determining questions of fact and law in incompetency proceedings.[215] In incompetency proceedings, either the state or the accused may demand a special jury trial "to determine the accused's competency to stand trial."[216] By adopting the Georgia standard, Florida would place the burden of proof back on the defendant, consistent with other defenses.[217] However, adopting the Georgia solution would not answer all of the questions raised by Justice Canady in his *Bretherick* dissent.

*B. Option Two: Abolishing Stand Your Ground Immunity*

There are also those that propose abolishing the Stand Your Ground law completely, taking Florida back to the common law and pre-2005 jurisprudence.[218] This stance argues that the Stand Your Ground law makes communities more dangerous; increases gun violence; disproportionately affects people of color on both sides of the aisle, those allegedly acting in self-defense and those who become victims of alleged self-defense; and has created a new wild west—a world where vigilantism takes the place of law and order.[219] Representatives and activist groups, such as Moms Demand Action, have continuously demanded self-defense reform every year since the George Zimmerman trial in 2012, but they have not been considered by the legislature—the Self-Defense Restoration Act has failed in multiple years without a single committee hearing.[220]

Senator Shevrin Jones ("Senator Jones"), of West Park, has been at the forefront of this movement.[221] Senator Jones proposes the abolition of Stand Your Ground immunity

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[213] *See id.*; Hester v. State, 659 S.E.2d 600, 603 (Ga. 2008) (explaining that a special jury determines if a defendant has met their burden of proving incompetence by a preponderance of the evidence); Foster v. State, 656 S.E.2d 838, 840 (Ga. 2008) (explaining that a defendant claiming insanity must prove their burden by a preponderance of the evidence by a special jury prior to trial); *see also* GA. CODE ANN. § 17-7-131(2) (2022) ("A plea of guilty but mentally ill at the time of the crime . . . shall not be accepted . . . until the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill . . . .").
[214] *Bunn*, 667 S.E. at 608.
[215] GA. CODE ANN. § 17-7-130 (2022).
[216] *Id.* (allowing a defendant to have a bench trial to determine competency unless the state or the accused demands a special jury trial).
[217] *See* FLA. STAT. § 776.032 (2017); *see also* Hess v. Philip Morris USA, Inc., 175 So. 3d 687, 695 (Fla. 2015) (explaining that a statute of limitation is a legislative bar against litigation); Hough v. Menses, 95 So. 2d 410, 412 (Fla. 1957).
[218] Greg Allen, *Florida Lawmakers Debate to Repeal Infamous Stand Your Ground Law*, NPR (Feb. 4, 2021 4:30 PM), https://www.npr.org/2021/02/04/964172326/florida-lawmakers-debate-to-repeal-infamous-stand-your-ground-law [https://perma.cc/3WPL-JSQD].
[219] *Id.*
[220] *See* S.B. 1052, 123d Leg., 1st Reg. Sess. (Fla. 2021); *see also* Christine Stapleton, *Gun Bill Seeks to Repeal Florida's Stand Your Ground Law . . . Again*, THE PALM BEACH POST (Feb. 5, 2021), https://www.palmbeachpost.com/story/news/2021/02/05/gun-bill-seeks-repeal-floridas-stand-your-ground-law-again/4385722001/ [https://perma.cc/62WF-XJXE].
[221] S.B. 888, 123d Leg., 1st Reg. Sess. (Fla. 2021).

under § 776.032 and the right to use deadly force in any situation where one "has a right to be." Instead, Senator Jones proposes that Florida revert to the common law, breathing life into the duty to retreat to the wall.[222] Senate Bill 888 proposes that "a person *may not* use deadly force . . . if the person knows that he or she can avoid the necessity of using deadly force with complete safety by retreating."[223] In addition, Senator Jones' proposal would leave the expanded home-protection statute intact and would protect the right to possess concealed firearms or other weapons for self-defense in accordance with § 790.25(5).[224] However, if the past decade has been any indication, this movement faces a steep hill to climb, and this article proposes a solution that is more likely to please both sides of the political spectrum, ASAs and defense attorneys, and increase judicial efficiency.

## VI. A PROPOSAL FOR A BETTER SOLUTION

The immunity statute creates a unique procedure for determining the question of justified self-defense, distinct from other defenses that defendants raise in criminal trials. The immunity provided under the Florida law is not true immunity in the ordinary sense of the word because a judge determines whether the defendant is justified in using self-defense under the particular circumstances based on a statutory creation.[225] The immunity to avoid trial rests on the affirmative defense of justifiable self-defense.[226] The self-defense claim in immunity proceedings does not operate like other defenses, and my proposal seeks to bring a balance between both the majority and minority's concerns. My proposal is to create a procedure like those used in motions to suppress evidence unlawfully obtained under the Fourth Amendment pursuant to a warrantless search.[227]

### *A. The Procedure Under a Motion to Suppress Evidence*

The right to use self-defense to prevent death is a personal right, just as the right to prevent unreasonable searches and seizures is a personal right.[228] The founders believed that the Bill of Rights in the Constitution list some, but not all, of the personal rights of

[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] Amended Brief of the University of Miami School of Law Federal Appellate Clinic in Support of Neither Party on the Issue of the Constitutionality of Florida Statutes s 776.032 at 12, Love v. State, 286 So. 3d 177 (Fla. 2019) (No. SC18-747), 2018 WL 5825371 at *12 ("A person with true immunity is privileged to violate the law by virtue of her office, position, or status totally independent of the facts of the case.").
[226] FLA. STAT. § 776.032 (2022) ("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 . . . .").
[227] The burden of proof differs depending on whether a search was made pursuant to a warrant or not. *See* Kentucky v. King, 563 U.S. 452, 459 (2011) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable. . . ."); State v. Setzler, 667 So. 2d 343, 345 (Fla. Dist. Ct. App. 1995) ("When a search warrant has [been] issued, the defense has the burden of going forward, and the burden to establish grounds for suppression. In the absence of a warrant, however, the defense need only make an initial showing at the suppression hearing.").
[228] Simmons v. United States, 390 U.S. 389, 389 (1968) (explaining that "rights assured by the Fourth Amendment are personal rights").

private citizens.[229] Therefore, proceedings that seek to protect these rights, whether by statutory enactment or under the Constitution, should be resolved in a similar manner to ensure uniformity and provide for the best procedure to uphold the spirit of the law. To decide how this procedure should be applied in an immunity proceeding under Stand Your Ground, we should first look to the procedure used in motions to suppress evidence seized during an invalid search.

*i. Sufficiency of the Motion*

A defendant that wishes to suppress evidence obtained during an unlawful search and seizure must move to suppress the evidence, and the motion must "state clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based."[230] Before hearing any evidence on the matter, the judge determines the legal sufficiency of the motion before the defendant can submit evidence to support suppression.[231] If the motion to suppress is legally sufficient, a hearing is required[232] and denial of a legally sufficient motion without a hearing is reversible error as a denial of procedural due process.[233]

*ii. The Suppression Hearing*

By filing the motion to suppress, the defendant has the burden of making an initial showing that the search was invalid.[234] However, unlike in the pretrial immunity hearing, a defendant cannot simply rely on the four corners of the motion.[235] The defendant must first present evidence at the suppression hearing to both ownership of the contraband seized and the illegality of the search.[236]

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[229] THE FEDERALIST NO. 84 (Alexander Hamilton) (arguing that a bill of rights expressly states some of the immunities provided for citizens).
[230] FLA. R. CRIM. P. 3.190(g)(2).
[231] *Id.* R. (g)(3).
[232] *See., e.g.*, Franks v. Delaware, 438 U.S. 154, 155-56 (1978) ("[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."); Lambert v. State, 626 So. 2d 340, 341 (Fla. Dist. Ct. App. 1993) (reasoning in the Fourth District Court of Appeals that "[t]he law is now settled that a defendant in a criminal proceeding has the right, under the Fourth and Fourteenth Amendments, subsequent to the Ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant."); Mason v. State, 375 So. 2d 1125, 1128 (Fla. Dist. Ct. App. 1979) (First District Court of Appeals); T.C. v. State, 336 So. 2d 17, 18 (Fla. Dist. Ct. App. 1976) (Third District Court of Appeals).
[233] *See* Gadson v. State, 600 So. 2d 1287, 1288–89 (Fla. Dist. Ct. App. 1992) (determining that reviewing the motion and opposing memoranda is insufficient to satisfy the hearing requirement); FLA. R. CRIM. P. 3.190(h)(3).
[234] *See* Miles v. State, 953 So. 2d 778, 779 (Fla. Dist. Ct. App. 2007) ("The initial burden requires the defense to make some showing that a search occurred and was invalid.").
[235] *Id.*
[236] *See* Rakas v. Illinois, 439 U.S. 128, 129 (1978) (explaining that the defendant must testify to ownership of the items seized at the pretrial hearing); *see also* Williams v. State, 640 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 1994) ("The bare allegations set forth in the motion, unsupported by proof, are insufficient to sustain [the defendant's] initial burden.").

Second, the burden of proof starts with the defendant and then shifts to the State after the defendant makes an initial showing that the search was invalid.[237] The adult[238] defendant must prove the prima facie case by a preponderance of the evidence.[239] Once the defendant makes the initial showing, the burden then shifts to the State to prove by a preponderance that the search was not illegal.[240]

*iii. Hearsay in Suppression Hearings*

In determining what evidence can be admitted at the pretrial hearing, the court is not automatically barred from receiving hearsay evidence.[241] Unlike the Federal Rules of Evidence, Florida does not have a provision allowing a trial judge to recognize additional exceptions to the hearsay rule when there are sufficient circumstantial guarantees of reliability.[242] Rather, hearsay is admissible to determine whether the defendant consented to a search,[243] statements relied upon in establishing probable cause for a search warrant by informants,[244] or statements made by a dispatch officer to establish that the police officer acted with reasonable suspicion or probable cause.[245] These statements are excluded from the ban on hearsay as verbal acts, or words that have independent legal significance, rather than being used for the truth of the matter asserted.[246] The rule against hearsay is relaxed in these situations because the "reasonable cause necessary to support an arrest cannot

[237] State v. Lyons, 293 So. 2d 391, 394 (Fla. Dist. Ct. App. 1974) ("Two aspects of the rule would require, first of all, a pleading sufficient within itself to allege an unlawful search, and secondly, at the hearing, a [p]rima facie showing of invalidity.").
[238] The State must prove their burden by clear and convincing evidence when a minor is involved. *See* Saavedra v. State, 622 So. 2d 952, 956 (Fla. 1993) ("[T]he State must show by clear and convincing evidence from the totality of the circumstances that the minor gave free and voluntary consent.").
[239] Denehy v. State, 400 So. 2d 1216, 1217 (Fla. 1980) ("Under ordinary circumstances the . . . search must be established by preponderance of the evidence.").
[240] *See* Miles, 953 So. 2d at 779 ("When that prima facie showing is made, the burden shifts to the state to prove that the search is valid."); U.S. v. Matlock, 415 U.S. 164, 177 (1974) (explaining that the State must meet its burden by a preponderance of the evidence).
[241] *See Matlock*, 415 U.S. at 175; FLA. CONST. art. I, § 12 (creating a direct linkage to the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court); *but see* Parker v. State, 89 So. 3d 844, 859 (Fla. 2012) (finding that the hearsay was not admissible because "the evidence concern[ed] whether [the defendant], after having invoked his right to counsel on May 5, initiated contact with law enforcement on May 7."); State v. Bowers, 87 So. 3d 704, 709 (Fla. 2012) (holding that the fellow officer rule is not an exception to the hearsay rule because "another 'unknowing' officer cannot rely on the fellow officer rule simply because the officer finds out relevant information possessed by another officer 'after the fact'" (quoting State v. Peterson, 739 So. 2d 561, 568 (Fla. 1999))).
[242] FED. R. EVID. 708.
[243] Lara v. State, 464 So. 2d 1173, 1177 (Fla. Dist. Ct. App. 1985) (allowing hearsay despite the inability to cross-examine the declarant).
[244] *See, e.g.*, Jones v. United States, 362 U.S. 257, 269 (1960) ("If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant.").
[245] Taylor v. State, 845 So. 2d 301, 303 (Fla. Dist. Ct. App. 2003) (finding that hearsay evidence is admissible despit playing no role in establishing the elements of the offense at trial)
[246] *See* State v. Welker, 536 So. 2d 1017, 1020 (Fla. 1988); *see also* Deutsche Bank Nat. Trust Co. v. Alaqua Property, 190 So. 3d 662, 664-65 (Fla. Dist. Ct. App. 2016) (ruling that promissory notes are not hearsay for its independent legal significance); A.J. v. State, 677 So. 2d 935, 937 (Fla. Dist. Ct. App. 1996) ("Words of a contract, often characterized as verbal acts, are non hearsay because they have independent legal significance–the law attached duties and liability to their utterance.").

demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibl[y] perform their duties."[247] As the trier of fact and law, the trial judge must weigh and determine the credibility of all the evidence, including the testimony of police officers.[248]

*iv. Implication of a Failed Motion to Suppress*

If the judge does not grant the suppression of evidence, the defendant's testimony is not automatically admissible against him at trial.[249] Although the State may not use the defendant's testimony to prove his guilt, the State may use this evidence for impeachment purposes. Proponents for admitting the testimony argue that "the testimony was voluntarily given and relevant" and should be admissible like any other prior testimony or admission.[250] However, allowing the evidence automatically at trial creates a compulsion to testify to prevent giving up the benefit of potential exclusion.[251] The *Simmons* Court found that this coercion conflicted with two constitutional rights, the Fourth Amendment claim and the Fifth Amendment privilege against self-incrimination, and it is "intolerable that one constitutional right should have to be surrendered in order to assert another."[252] The exception for admitting testimony is made to prevent the defendant from changing his story at trial.[253]

*v. Appealing a Denied Motion to Suppress*

On review, the courts must apply a dual standard in reviewing a motion to suppress.[254] The appellate court must resolve the legal question under de novo review, "while factual decisions by the trial court are entitled to deference commensurate with the trial judge's superior vantage point for resolving factual disputes.[255] A trial judge's determination is presumed correct, and the district courts must interpret the evidence and reasonable inferences in the manner most favorable to sustaining the lower court's

[247] United States v. Heitner, 149 F.2d 105, 106 (2d. Cir. 1945) (quoting Justice Learned Hands reasoning for relaxing the rule against hearsay).
[248] Lewis v. State, 979 So. 2d 1197 (Fla. Dist. Ct. App. 2008).
[249] *See* Simmons v. U.S., 390 U.S. 394, 394 (1968) ("[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.").
[250] *Id.* at 390 (testimony is not admissible on the question of guilt).
[251] *Id.* at 393–94.
[252] *Id.* at 394.
[253] U.S. v. Kahan, 415 U.S. 239, 243 (1974) ("The protective shield of *Simmons* is not to be converted into a license for false representations . . . .").
[254] *See* State v. Setzler, 667 So. 2d 343, 344 (Fla. Dist. Ct. App. 1995).
[255] *Id.* at 344–45.

decision.[256] This standard of review is the same under the current Stand Your Ground procedure[257] and would remain the same under my proposal.

*B. Option Three: A Better Solution*

The court should apply a shifting standard at the pretrial immunity hearing involving a Stand Your Ground defense. The defendant would have the initial burden of proving that he acted in self-defense and could not rely on the four corners of the motion to dismiss. Instead, the defendant must present some evidence, whether by testimony, video, photograph, or otherwise, that shows that 1) he or she was in a place where he had a right to be, and 2) he or she was in reasonable fear of death or bodily harm before using deadly force. The defendant must meet this initial burden by a preponderance of the evidence, and then the burden would shift to the State to disprove the defendant's story.

The State would also have to disprove the defense by a preponderance of the evidence. The State may do so by cross-examining the defendant's witnesses or introducing their own evidence to show that either the defendant was the aggressor or otherwise did not act out of a justifiable fear of death or great bodily harm. The judge may allow hearsay evidence where, under the totality of the circumstances, there is reason to believe that the out-of-court statements are credible and relevant to the issue of justified self-defense as verbal acts and statements showing the effect on the listener-victim. The judge would weigh all the evidence under the totality of the circumstances in deciding whether the defendant used justifiable deadly force before granting or denying the motion to dismiss.

If the defendant's immunity claim fails, he or she may still raise the affirmative defense at trial, and the pretrial evidence may not be admitted on the issue of guilt. However, the defendant may not change his story at trial, and the State may use the evidence presented at the pretrial hearing to impeach the defendant or the defendant's witnesses at trial. The new dual-edged sword would still require the defense attorney to "show their hand" by requiring the defendant to maintain their story at both the pretrial hearing and at trial, while the State would still have the ultimate burden of disproving the defendant's story at the pretrial hearing. As Larry David once "quoted"[258] the great compromiser, Henry Clay: "A good compromise is when both parties are dissatisfied . . . ."[259] Unlike the common compromise myth, this solution would place the immunity burden where it should be, on the defendant, and allows them to tell their story without fear of a failed claim being used against them as substantive evidence at trial, and the prosecution benefits from the shifting burden, rather than fights blanket statements in a motion to dismiss.

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[256] Holden v. State, 877 So. 2d 800, 801 (Fla. Dist. Ct. App. 2004) ("A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling."); Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002) (requiring competent, substantial evidence).

[257] Derossett v. State, No. 5D19-0802, 2019 WL 5848991, at *6 (Fla. Dist. Ct. App. Nov. 7, 2019) ("Our standard of review of a trial court's denial of a pretrial motion claiming immunity under the Stand Your Ground statutes is the same as that which is applied to the denial of a motion to suppress.").

[258] This author could not find any reference to Henry Clay actually saying these words.

[259] Artin Vaqari, *The Myth of 'Win-Win' Negotiations in Purchasing*, PURCHASING INSIGHT (Aug. 24, 2015), https://purchasinginsight.com/the-myth-of-win-win-negotiations-in-purchasing/ [https://perma.cc/94NY-QT2D].

## CONCLUSION

My proposal attempts to resolve both the majority and minority's concerns in *Bretherick*. Although Justice Canady had a fear that some defendants who would ultimately be acquitted would not be able to enjoy immunity from trial, this fear is one that is consistent with all innocent defendants who are acquitted. We do not have a crystal ball to tell us what happened, and we must create a system that provides justice for both victims and justified defendants. By requiring the defendant to make an initial showing at the pretrial hearing, the defendant does not gain a presumption of blanket immunity for the State to disprove and must provide some evidence for the State to refute. The shifting burden would not require the State to have the sole burden on disproving an affirmative defense and is consistent with other motions to dismiss.

Further, the State would not have to meet the same burden twice and would be placed on an even field with the defendant on the issue of immunity by requiring the same burden of proof on both sides. By allowing the State to impeach a defendant at trial based on his pretrial testimony, the court would limit meritless claims because defense attorneys would need to think twice before revealing their hand before trial when alleging what happened. Allowing the State to impeach the defendant and his or her witnesses will prevent fraud by keeping the defendant honest throughout the proceedings, and a lower burden of proof will help alleviate the potential for two full-blown trials. We do not want vigilante justice, but we must protect those who use deadly force to protect themselves and others. The right to use self-defense is not inherently bad, but when it becomes impracticable to distinguish murder from justice, the law has gone too far. As Martin Luther King Jr. once said, "[L]aw and order exist for the purpose of establishing justice and that when they fail in this purpose, they become the dangerously structured dams that block the flow of social progress."[260]

[260] Martin Luther King, Jr., *Letter from a Birmingham Jail [King, Jr.]*, AFR. STUD. CTR. UNIV. OF PA. (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/6TEL-S43E].