

6-8-2015

# Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws

Benjamin M. Boylston

Follow this and additional works at: <https://lawpublications.barry.edu/barryrev>



Part of the [Jurisprudence Commons](#), and the [Other Law Commons](#)

---

### Recommended Citation

Boylston, Benjamin M. (2015) "Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws," *Barry Law Review*: Vol. 20 : Iss. 1 , Article 2.

Available at: <https://lawpublications.barry.edu/barryrev/vol20/iss1/2>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized editor of Digital Commons @ Barry Law.

## IMMUNE DISORDER: UNCERTAINTY REGARDING THE APPLICATION OF "STAND YOUR GROUND" LAWS

*Benjamin M. Boylston\**

On August 1, 2010,<sup>1</sup> a woman named Marissa Alexander was arrested in Jacksonville, Florida, and ultimately charged with three counts of aggravated assault with a firearm.<sup>2</sup> What happened on that day remains hotly disputed.

Ms. Alexander maintains that, while she was in the bathroom at a home she shared with her husband, Rico Gray, Mr. Gray went through her phone and discovered text messages she had received from another man.<sup>3</sup> Mr. Gray became incensed and strangled Ms. Alexander, but she was able to free herself and retreat to the garage.<sup>4</sup> Ms. Alexander then realized that she did not have her car keys and would not be able to escape through the garage door because it was stuck.<sup>5</sup> Instead, she armed herself with a gun she lawfully kept in the garage and re-entered the home.<sup>6</sup> When Mr. Gray saw the gun, he threatened to kill her.<sup>7</sup> At that point, fearing for her life, Ms. Alexander fired a "warning shot" into the wall of the house and left.<sup>8</sup>

The story as told by Fourth Judicial Circuit State Attorney Angela Corey is significantly different.<sup>9</sup> According to an email and accompanying information her office sent to state legislators, Ms. Corey believes that the couple argued over text messages Mr. Gray found on Ms. Alexander's phone.<sup>10</sup> Mr. Gray told his children that they would be leaving the home, at which point Ms. Alexander exclaimed, "I've got something for your ass."<sup>11</sup> Ms. Alexander then retrieved a gun from the

---

\* Founding partner, Stuart, Mount, Bleakley, & Boylston, P.A., a regional Central Florida law firm specializing in criminal defense with offices in Daytona, Eatonville, Orlando and Tavares. Mr. Boylston received his B.A. from the University of Michigan at Ann Arbor and his J.D. from Florida State University College of Law. The author would like to thank Patrick J. Cassidy, J.D. candidate 2017, University of Florida Levin College of Law, for his invaluable assistance in the preparation of this article.

1. Information, *State v. Alexander*, No. 162010CF008579, 2010 WL 10074375, at \*1 (Fla. Cir. Ct. Aug. 26, 2010).

2. *Id.*

3. *AC360: Marissa Alexander Speaks with Gary Tuchman "This Is My Life I'm Fighting for"*, CNN (July 17, 2013, 11:28 PM), <http://cnnpressroom.blogs.cnn.com/2013/07/17/ac360-video-marissa-alexander-speaks-with-garytuchmancnn-this-is-my-life-im-fighting-for/> [hereinafter *AC360*].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Compare AC360, supra* note 3, with E-mail from Angela Corey, Florida Assistant State Attorney, to the Northeast Florida legislative delegation (Mar. 12, 2014, 12:05 PM), available at <http://www.news4jax.com/blob/view/-/25044144/data/2/-/sb8w7q/-/marissa-alexander-doc-pdf.pdf> [hereinafter E-mail].

10. *Id.*

11. *Id.*

glove compartment of her car and returned to the living room.<sup>12</sup> When Mr. Gray saw his wife place a bullet in the gun's chamber, he yelled "no" and attempted to scoop up his small children.<sup>13</sup> Ms. Alexander proceeded to shoot the wall, at head level, after which Mr. Gray and his children fled the house.<sup>14</sup>

Ms. Alexander's attorney filed a motion for determination of immunity from prosecution and a motion to dismiss on May 24, 2011.<sup>15</sup> A hearing was held at which several witnesses testified, including Ms. Alexander and Mr. Gray.<sup>16</sup> The trial court denied the motion for determination of immunity from prosecution, ruling that "[a]fter weighing the credibility of all witnesses and other evidence, this Court finds that the Defendant has not proved by a preponderance of the evidence that she was justified in using deadly force in the defense of self."<sup>17</sup> Ms. Alexander proceeded to a jury trial and was convicted, receiving a mandatory twenty-year sentence under Florida's "10-20-Life" law.<sup>18</sup> The verdict and sentence were ultimately reversed on appeal due to erroneous jury instructions, and Ms. Alexander is scheduled to be re-tried.<sup>19</sup>

Florida's "Stand Your Ground" statutes do not specifically provide that such a pretrial immunity hearing should be held, or, for that matter, give any real guidance as to how it should be implemented procedurally.<sup>20</sup> Why did Marissa Alexander's attorney file a motion for a pretrial determination of immunity, and why did the judge apply the legal standard that she did to the motion? Had the burden of proof Ms. Alexander was required to meet been different—or if the burden, whatever it was, had instead rested with the State—the hearing might well have turned out differently, and Ms. Alexander might not be in legal jeopardy today.<sup>21</sup>

This article will examine how the law of "Stand Your Ground" immunity developed in Florida, and how other states have subsequently treated statutes similar to Florida's. It will suggest that the statute's vagueness on the topic of immunity has put courts in a difficult position, and that the traditional tools of statutory construction are inadequate to meet this challenge. It will finally propose changes to the law that will better effectuate its intent.

## I. THE FLORIDA "STAND YOUR GROUND" LAW: WHAT DOES IT MEAN?

Prior to 2005, Florida law provided that a person could use deadly force in self-defense if he reasonably believed that such force was necessary to prevent

12. *Id.*

13. *Id.*

14. *Id.*

15. Order Denying Defendant's Motion for Determination of Immunity from Prosecution and Motion to Dismiss, *State v. Alexander*, No. 16-2010-CF-8579, 2011 WL 11709351, at \*1 (Fla. Cir. Ct. Aug. 17, 2011).

16. *Id.*

17. *Id.* at \*5.

18. Larry Hannan, *Marissa Alexander's Sentence Could Triple in "Warning-Shot" Case*, TIMES-UNION/JACKSONVILLE.COM (Mar. 1, 2014, 7:23 PM), <http://jacksonville.com/news/crime/2014-03-01/story/marissa-alexander-sentence-could-triple-warning-shot-case>.

19. *Id.*

20. FLA. STAT. § 776.032 (2013) (amended 2014).

21. *See Alexander v. State*, 121 So. 3d 1185, 1188 (Fla. Dist. Ct. App. 2013).

imminent death or great bodily harm; however, he was first obligated to use every available, reasonable means to escape the danger, including retreat.<sup>22</sup> This duty to retreat emanated from the common law, rather than from statutory law.<sup>23</sup> An exception to this requirement was the so-called "castle doctrine," also a product of the common law, in which a person in his home had no such duty to retreat before resorting to deadly force in self-defense.<sup>24</sup>

By enacting what came to be known as the "Stand Your Ground" law in 2005, the Florida Legislature fundamentally changed this previous framework of self-defense in three important ways.<sup>25</sup> First, the law established a presumption that a person using deadly force was in reasonable fear of death or great bodily harm if he believed the person against whom the force was used had unlawfully entered a home or vehicle, and the person against whom force had been used had actually unlawfully entered the home or vehicle.<sup>26</sup> Second, and perhaps most famously, it decreed:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be, has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.<sup>27</sup>

This provision had the effect of expanding the common law "castle doctrine" beyond the home to any place a law-abiding person happens to be located.<sup>28</sup> In 2014, this section was amended to read that a person attacked "in his or her dwelling, residence or vehicle" (instead of wherever he is rightfully located) has no duty to retreat and may act in self-defense<sup>29</sup>. Third, it created immunity from criminal prosecution and civil action for a person's justifiable use of force.<sup>30</sup> Subsection (1) reads as follows:

A person who uses 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 of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As

22. *Weiland v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

23. *Id.*

24. *Id.*

25. *See* Fla. Staff An., S.B. 436 (Feb. 25, 2005).

26. FLA. STAT. § 776.013(1)(a) (2013) (amended 2014).

27. FLA. STAT. § 776.013(3) (2013) (amended 2014).

28. Fla. Staff An., *supra* note 25, at 6; Fla. Staff An., S.B. 436 at 6 (Feb. 25, 2005).

29. Fla. Laws ch. 2014-195.

30. *Id.*

used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.<sup>31</sup>

The statute further provides that a law enforcement agency may not arrest the person using force unless there is probable cause that this use of force was unlawful.<sup>32</sup>

## II. FLORIDA COURTS STRUGGLE TO APPLY “STAND YOUR GROUND” IMMUNITY

Almost immediately, Florida courts struggled with the implications of section 776.031’s immunity provision, with two competing interpretations of the statute emerging.<sup>33</sup> In 2008, the First District Court of Appeal in *Peterson v. State* ruled that a defendant’s motion to dismiss based upon “Stand Your Ground” immunity requires a pretrial evidentiary hearing, at which the trial court’s role is to weigh any factual disputes and decide whether the defendant has demonstrated by a preponderance of the evidence that he is immune from prosecution.<sup>34</sup> The court noted that there is no procedure defined in the statute for addressing the immunity issue.<sup>35</sup> In its interpretation of the statute, the court drew heavily—in fact, almost exclusively—upon a decision from the state of Colorado regarding a strikingly similar law in that state.<sup>36</sup> Because the evolution of Florida law owes so much to this decision, it merits examination.

In 1987, the Supreme Court of Colorado decided *People v. Guenther*, in which it reviewed a trial court’s dismissal of criminal charges pursuant to a claim of statutory immunity.<sup>37</sup> At issue was a 1985 state statute which provided as follows, with respect to those using any degree of force against burglars to their home:

Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force. . . . Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.<sup>38</sup>

31. FLA. STAT. § 776.032(1) (2013) (amended 2014).

32. *Id.* at (2).

33. See FLA. STAT. § 776.031 (2013) (amended 2014); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008); *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987). *But see Velasquez v. State*, 9 So. 3d 22–23 (Fla. Dist. Ct. App. 2009).

34. *Peterson*, 983 So. 2d at 29; accord *Guenther*, 740 P.2d at 976.

35. *Peterson*, 983 So. 2d at 29.

36. *Id.*; see also *Guenther*, 740 P.2d at 980.

37. *Id.* at 971.

38. COLO. REV. STAT. § 18-1-704.5(3)–(4) (West 1985).

The court ruled, as would the First District Court of Appeal of Florida over twenty years later, that this statute entitles a defendant moving for pretrial immunity to an evidentiary hearing.<sup>39</sup> Also, they ruled that the trial court is to decide whether the defendant has met the burden of showing, by a preponderance of the evidence, that he is immune from prosecution.<sup>40</sup> The *Guenther* court rejected arguments by the State that the law merely provides an affirmative defense to be decided by a jury at the conclusion of a trial and not by the court at a pretrial motion to dismiss.<sup>41</sup> The court noted that the immunity language of the statute was distinct from that of other statutes (variously reading that a defendant is "not responsible," "justified," or "may not be convicted") that clearly created affirmative defenses.<sup>42</sup> In the court's view, because the legislature's chosen language implied a bar to prosecution, dismissal was appropriate via a pretrial motion to dismiss.<sup>43</sup>

The *Guenther* court proceeded to rule that it was reasonable to place the burden of proof on the defendant to show entitlement to immunity.<sup>44</sup> This was due to the extraordinary degree of protection afforded to a criminal defendant by the statute; the fact that the defendant carries the burden at other motions to dismiss; and that the defendant presumably has a greater understanding of the circumstances of the case than the prosecution typically would.<sup>45</sup> The court further reasoned that this burden should be a preponderance of the evidence, as opposed to a beyond-a-reasonable-doubt standard, because this was the defendant's burden at certain other analogous pretrial motions and the court did not believe the legislature intended a defendant to carry the enhanced burden that a beyond-a-reasonable-doubt standard would entail.<sup>46</sup>

It is important to note that the statute being interpreted in *Guenther* was not a "Stand Your Ground" statute, at least as it is commonly understood.<sup>47</sup> Rather, this statute applies to situations in which a person is acting within his home, making the statute a variation of the castle doctrine.<sup>48</sup> What differentiates the statute from the traditional castle doctrine and makes the statute especially relevant to a "Stand Your Ground" statute is the addition of an immunity provision.<sup>49</sup>

In 2009, the Fourth District Court of Appeal of Florida came to a very different conclusion than the Supreme Court of Colorado and First District Court of Appeal

39. *Guenther*, 740 P.2d at 976; see also *Peterson*, 983 So. 2d at 29.

40. *Guenther*, 740 P.2d at 980.

41. *Id.* at 976.

42. *Id.* at 975–76.

43. *Id.* at 976.

44. *Id.* at 980.

45. *Id.*

46. *Guenther*, 740 P.2d at 980–81.

47. Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder"*, 34 AM. J. TRIAL ADVOC. 105, 126 (2010); see COLO. REV. STAT. § 18-1-704.5 (West 1985); *Guenther*, 740 P.2d at 979.

48. Megale, *supra* note 46; see COLO. REV. STAT. § 18-1-704.5(1) (West 1985); *Guenther*, 740 P.2d at 980–81.

49. Megale, *supra* note 46, at 113; see COLO. REV. STAT. § 18-1-704.5(3)–(4) (West 1985); *Guenther*, 740 P.2d at 976.

of Florida.<sup>50</sup> In *Velasquez v. State*,<sup>51</sup> while recognizing the “efficacy” of the procedure set out in *Guenther* and *Peterson*, the court declined to follow these precedents.<sup>52</sup> Instead, it determined that pretrial immunity motions are governed by Florida Rule of Criminal Procedure 3.190(c)(4).<sup>53</sup> Under this rule, the court should dismiss a case when there “are no material disputed facts and the undisputed material facts do not establish a prima facie case of guilt against the defendant.”<sup>54</sup> Such a motion “shall be denied if the state files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss.”<sup>55</sup> In light of this interpretation, the *Velasquez* court held that it would be inappropriate for a trial court to decide factual disputes at a pretrial motion to dismiss—if factual disputes existed at all, the motion should be denied.<sup>56</sup> The court certified conflict with *Peterson* in a subsequent case, inviting review by the Supreme Court of Florida.<sup>57</sup>

That review occurred in 2010’s *Dennis v. State*.<sup>58</sup> The Supreme Court of Florida sided with the First District Court of Appeal and its reasoning in *Peterson*, holding that a defendant is entitled to a pretrial hearing at which the trial court resolves factual disputes.<sup>59</sup> The Supreme Court of Florida rejected the *Velasquez* holding that “Stand Your Ground” immunity can be granted only through a Rule 3.190(c)(4) motion to dismiss, because the plain meaning of the statute does not limit immunity to situations in which material facts are undisputed.<sup>60</sup> A motion to dismiss is instead properly heard through Rule 3.190(b), under which, in a variety of contexts, courts are permitted to resolve factual disputes.<sup>61</sup> The *Dennis* court went on to reject the State’s argument that a pretrial immunity hearing merely tests the existence of probable cause (recall that the law makes this the standard by which law enforcement must be convinced that the force used was unlawful before it can make an arrest).<sup>62</sup> The court noted that since the law already provides a non-adversarial probable cause determination upon arrest, limiting a determination of immunity to probable cause would render the very concept of immunity superfluous.<sup>63</sup> Therefore, the statute must be interpreted in such a way so as to give the defendant added protection.<sup>64</sup>

50. Megale, *supra* note 46, at 123–24.

51. 9 So. 3d 22 (Fla. Dist. Ct. App. 2009).

52. *Id.* at 24. *But see* *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2009); *Guenther*, 740 P.2d at 976.

53. *Velasquez*, 9 So. 3d at 23–24.

54. FLA. R. CRIM. P. 3.190(c)(4).

55. *Id.* at (d).

56. *Velasquez*, 9 So. 3d at 24.

57. *Dennis v. State*, 17 So. 3d 305 (Fla. Dist. Ct. App. 2009); *see* Megale, *supra* note 46, at 124.

58. 51 So. 3d 456 (Fla. 2010).

59. *Id.* at 463–64; *see also* *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2009).

60. *Dennis*, 51 So. 3d at 464; *see also* FLA. R. CRIM. P. 3.190(c)(4). *But see* *Velasquez*, 9 So. 3d at 24.

61. *Dennis*, 51 So. 3d at 464; *see also* FLA. R. CRIM. P. 3.190(b).

62. *Dennis*, 51 So. 3d at 463; FLA. STAT. § 776.032 (2013) (amended 2014).

63. *Dennis*, 51 So. 3d at 463.

64. *Id.*

*Dennis* held that “the procedure set out by the First District in *Peterson* best effectuates the intent of the legislature.”<sup>65</sup> The law in question, however, was sufficiently opaque that two district courts of appeal interpreted it in radically different ways, requiring intervention from the Supreme Court of Florida.<sup>66</sup> The aftermath was the imposition of a procedure heavily influenced by one created twenty years before, in a different state, relating to a different statute (which was itself out of necessity based on speculation as to what exactly was intended by the Colorado Legislature).<sup>67</sup> Other states have similarly struggled to implement “Stand Your Ground”-style immunity provisions.<sup>68</sup>

### III. OTHER STATES ADDRESS THEIR CRIMINAL IMMUNITY PROVISIONS

After Florida’s passage of its “Stand Your Ground” laws, numerous states followed suit.<sup>69</sup> However, only a handful of these states—Alabama, Kansas, Kentucky, Georgia, Oklahoma, South Carolina, and North Carolina—have emulated Florida’s criminal immunity provision.<sup>70</sup> None of these laws explicitly create a procedure for courts to determine whether, and under what circumstances, a person using deadly force is immune from prosecution.<sup>71</sup>

This question of how immunity provisions should be understood and applied has posed difficulties for several of these states, as it did in Florida.<sup>72</sup> In 2011, the Supreme Court of South Carolina held—relying on, and mirroring, the result in *Dennis* and *Peterson* from Florida—that a defendant claiming immunity under South Carolina’s “Stand Your Ground” law is entitled to a pretrial immunity hearing, at which the standard of proof is a preponderance of the evidence.<sup>73</sup> However, the court did not state explicitly which party bears the burden of persuasion at such a hearing (although it is fair to assume it would be the defendant, given the court’s reliance on the Florida cases reaching that

65. *Id.*

66. *See id.* at 458.

67. *See id.* at 464; *see* *People v. Guenther*, 740 P.2d 971, 979 (Colo. 1987); *accord* COLO. REV. STAT. § 18-1-704.5(3) (West 1985).

68. *See, e.g.*, *State v. Ultreras*, 295 P.3d 1020 (Kan. 2013); *State v. Duncan*, 709 S.E.2d 662 (S.C. 2011).

69. Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, South Carolina, South Dakota, Missouri, North Dakota, Tennessee, Texas, Ohio, West Virginia, Wyoming, Montana, New Hampshire, Nevada, North Carolina, Pennsylvania, and Wisconsin. “*Stand Your Ground*” Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force Before the S. Comm. of the Judiciary*, 113th Cong. 4–5 (2013) (written testimony of Ronald Sullivan Jr., Professor of Law at Harvard Law School).

70. *See, e.g.*, ALA. CODE § 13A-3-23 (2014); KAN. STAT. § 21-5231 (2014); KY. REV. STAT. § 503.085 (West 2014); GA. CODE § 16-3-24.2 (2014); OKLA. STAT. tit. 21, § 1289.25 (2014); S.C. CODE § 16-11-450 (2013); N.C. GEN. STAT. § 14-51.3 (2013).

71. ALA. CODE § 13A-3-23 (2014); KAN. STAT. § 21-5231 (2014); KY. REV. STAT. § 503.085 (West 2014); GA. CODE § 16-3-24.2 (2014); OKLA. STAT. tit. 21, § 1289.25 (2014); S.C. CODE § 16-11-450 (2013); N.C. GEN. STAT. § 14-51.3 (2013).

72. *See, e.g.*, *State v. Curry*, 752 S.E.2d 263, 266 (S.C. 2013); *Thompson v. State*, 702 S.E.2d 198, 210 (Ga. 2010); *Jackson v. State*, 993 So. 2d 45, 47 (Ala. Crim. App. 2007); *State v. Anderson*, 972 P.2d 32, 34–35 (Okla. Crim. App. 1998).

73. *State v. Duncan*, 709 S.E.2d 662, 665 (S.C. 2011).

conclusion).<sup>74</sup> At least one Alabama court has done the same: in 2010, a trial court dismissed a murder case pursuant to a pretrial immunity hearing, ruling that the “defendant having met its [sic] burden of proving by a preponderance of the evidence that he is entitled to the immunity provisions of Alabama Code 13A-3-23 (d) and (e), his motion to dismiss on the issue of immunity is hereby granted and the indictment is hereby dismissed.”<sup>75</sup>

The Supreme Courts of Kentucky and Kansas have arrived at very different conclusions.<sup>76</sup> Like Florida, the “Stand Your Ground” statutes in these states refer to a probable-cause standard; the Kentucky law is virtually identical to Florida’s, and similarly provides that a law enforcement agency may not arrest a person unless there is probable cause to believe the self-defense was unlawful.<sup>77</sup> While the Supreme Court of Florida in *Dennis* found this language inadequate to provide the burden of proof at a pretrial immunity hearing, the Supreme Court of Kentucky (lamenting that the trial court’s confusion on this subject was understandable in light of the statute’s lack of guidance) found this language dispositive.<sup>78</sup> The Supreme Court of Kentucky held that, because probable cause is the only standard referred to by the statute, probable cause remains the burden of proof at pretrial immunity hearings.<sup>79</sup> However, the court ruled that the State, not the defendant, bears this burden.<sup>80</sup> The court rejected calls for a Florida-style preponderance-of-the-evidence standard, reasoning that the language of the statute did not support it.<sup>81</sup>

In 2013, the Supreme Court of Kansas surveyed the decisions described above in construing the Kansas “Stand Your Ground” law.<sup>82</sup> In what seems to have become a recurring theme in this area, the court expressed disappointment that the immunity statute provided so little procedural guidance.<sup>83</sup> While holding (like every other court to have addressed the issue) that a defendant is entitled to a pretrial immunity hearing, the court ultimately charted a course similar to that of Kentucky, and determined that the State has the burden to establish that there is probable cause to show that the force used was unjustified.<sup>84</sup>

The determining factor in the Supreme Court of Kansas’s decision was an additional section of the Kansas law providing that the prosecutor “may commence a criminal prosecution upon a determination of probable cause.”<sup>85</sup> The court

74. *Id.*

75. David Atchison, *Case Dismissed Against Son in Father’s Death*, THE ANNISTON STAR (Sept. 15, 2010), [http://www.annistonstar.com/the\\_daily\\_home/dh\\_news/article\\_3477b941-5c33-5e49-84ed-af921ec51be7.html?mode=jqm](http://www.annistonstar.com/the_daily_home/dh_news/article_3477b941-5c33-5e49-84ed-af921ec51be7.html?mode=jqm).

76. *See, e.g.*, *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009); *State v. Ultreras*, 295 P.3d 1020, 1039 (Kan. 2013).

77. KY. REV. STAT. § 503.085 (West 2014).

78. *See Rodgers*, 285 S.W.3d at 755.

79. *Id.* at 756.

80. *Id.* at 755.

81. *Id.* at 754.

82. *State v. Ultreras*, 295 P.3d 1020, 1027–31 (Kan. 2013).

83. *Id.* at 1030.

84. *Id.* at 1031.

85. *Id.* at 1026.

asserted that the imposition of a probable cause burden at an immunity hearing is appropriate in Kansas, as it may not have been under Florida law, for two reasons.<sup>86</sup> First, because the Kansas statute explicitly gives probable cause as the standard for initiating a prosecution—as opposed to merely before making an arrest—there was no reason for it to impose a different burden for an immunity hearing.<sup>87</sup> The Supreme Court of Kansas alleged that the Florida court was required to impose a different burden in order to make the immunity statute it was interpreting meaningful.<sup>88</sup> Second, the court held that a probable-cause standard for immunity from prosecution under the “Stand Your Ground” statute meaningfully adds to the procedure already employed by the Kansas court system in determining, at the time of arrest, whether there was probable cause to believe a crime was committed, and whether the defendant committed the crime.<sup>89</sup> This is so, according to the court, because the immunity hearing adds an additional procedure: the courts must now determine whether there was probable cause to believe that the deadly force used was unjustified.<sup>90</sup> Consequently, the imposition of a probable-cause standard at an immunity hearing is not superfluous.<sup>91</sup>

#### IV. WHY DO DIFFERING INTERPRETATIONS OF IMMUNITY MATTER?

As has been discussed, Florida began a trend in 2005 of “Stand Your Ground” legislation, which was subsequently adopted by numerous states.<sup>92</sup> These laws tend to have more similarities than differences and in many cases are identical.<sup>93</sup> These

86. *Id.* at 1031.

87. *Id.*

88. *Ultreras*, 295 P.3d at 1031.

89. *Id.*

90. *Id.*

91. *Id.* While recognizing the difficulty of the task the court was facing, this reasoning is tenuous on both counts. *See Megale*, *supra* note 46, at 129–30. It first conflates the standard, provided in the statute, for a prosecutor to *initiate* a criminal prosecution with the standard for deciding the ultimate legal question, to be determined by a court, for whether someone is legally justified in the use of deadly force. *See id.* at 130–31. The plain meaning of the text applies a probable cause standard to the former question, but not necessarily the latter. *See id.* Second, with respect to the procedure already employed upon arrest, there is no meaningful difference between whether a crime has been committed and whether a defendant was justified in the use of force. *See id.* If the defendant was justified in using force then no crime was committed. One cannot adequately address the first issue without inquiry into the second. *See id.*

92. *See Sullivan*, *supra* note 68.

93. *See Ryan Sibley*, *10 States Copied Florida’s “Stand Your Ground” Law*, SUNLIGHT FOUNDATION (Mar. 28, 2012), <http://sunlightfoundation.com/blog/2012/03/28/10-states-copied-floridas-stand-your-ground-law/>.

After Florida passed its law, the American Legislative Exchange Council (ALEC) adopted its legislative language as one of the model bills it proposes to legislators across the country on behalf of its member associations, in this case the NRA. A Sunlight Foundation analysis using automated textual analysis found that not only are the laws similar, but at least 10 of the states based their legislation on nearly identical bills to the one Florida passed and ALEC adopted.

....

The analysis was able to detect striking similarities and identical phrases across multiple bills, including the phrase, “[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 ....” which is

similarities are themselves telling as to the common intentions of various state legislatures adopting these statutes; and in some cases, legislatures have explicitly given nearly identical rationales for the passage of the laws.<sup>94</sup> With respect to the immunity provisions that several of the “Stand Your Ground” states have chosen to enact, the statutes are likewise similar in that (as courts have repeatedly noted) they give no guidance at all as to how immunity should be determined as a procedural matter.<sup>95</sup> This being the case, it would stand to reason that the various states’ laws would be interpreted in a way such that their effects are substantially similar. That this has not happened (as addressed above) is a problem.<sup>96</sup>

There is consensus that “Stand Your Ground” statutory immunity is not an affirmative defense, but rather a true immunity to be raised pretrial.<sup>97</sup> This understanding seems to be the right one, for two reasons. First is the unanimity of opinion from courts that have addressed the subject that a pretrial hearing to determine immunity is appropriate.<sup>98</sup> Second, the language of the laws themselves makes clear that the principle of a pretrial immunity hearing is legally sound on its merits.<sup>99</sup> As the court stated in *Rodgers v. Commonwealth*, by enacting an immunity provision, the legislature “has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well.”<sup>100</sup> In every state, the creation through case law of a pretrial immunity hearing does seem to best effectuate legislative intent.<sup>101</sup>

---

just one of the provisions of the law that is intended to protect people who may have killed another person from being arrested or prosecuted.

*Id.*

94. *E.g.*, S.B. 436, 107th Reg. Sess. (Fla. 2005); 2005 Fla. Laws ch. 27; H.B. 4301, 116th Gen. Assemb., Reg. Sess. (S.C. 2005). By way of example, the preambles to both the Florida and South Carolina “Stand Your Ground” bills (Chapter 2005-27, Laws of Florida and South Carolina Bill 4301) contain substantially identical language to the effect that the legislatures find that it is proper for law abiding people to protect themselves, their families and others and to be immune from prosecution in so doing; that their respective state constitutions guarantee the right to bear arms; that persons residing or visiting the state have a right to expect to be unmolested in their homes and vehicles; and that no person or crime victim should be required to surrender his safety to a criminal or needlessly retreat. *Id.*

95. *See, e.g.*, *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2009); *see also* ALA. CODE § 13A-3-23 (2014); KAN. STAT. § 21-5231 (2014); KY. REV. STAT. § 503.085 (West 2014); GA. CODE § 16-3-24.2 (2014); OKLA. STAT. tit. 21, § 1289.25 (2014); S.C. CODE § 16-11-450 (2013); N.C. GEN. STAT. § 14-51.3 (2013).

96. *See, e.g.*, *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009); *State v. Ultreras*, 295 P.3d 1020, 1039 (Kan. 2013).

97. *See, e.g.*, *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2009).

98. *See, e.g.*, *Guenther*, 740 P.2d at 976; *Dennis v. State*, 17 So. 3d 305, 306 (Fla. Dist. Ct. App. 2009).

99. *See, e.g.*, *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010); *Mederos v. State*, 102 So. 3d 7, 9 (Fla. Dist. Ct. App. 2012); *Hair v. State*, 17 So. 3d 804, 805 (Fla. Dist. Ct. App. 2009).

100. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky. 2009).

101. *See, e.g.*, *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *Dennis*, 51 So. 3d 456.

As discussed above, the form this immunity hearing is to take varies in important ways.<sup>102</sup> Some courts (Florida, South Carolina, and perhaps Alabama) impose a preponderance-of-the-evidence standard on the defendant,<sup>103</sup> others (such as Kansas and Kentucky) place a probable-cause burden on the prosecution.<sup>104</sup> This difference is more than an abstraction and has very practical implications for a person claiming immunity under these statutes.

“Preponderance of the evidence” means:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.<sup>105</sup>

In other words, it is “evidence that more likely than not tends to prove a certain proposition.”<sup>106</sup>

“Probable cause,” on the other hand, means a “reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime.”<sup>107</sup> The Supreme Court of the United States in *Illinois v. Gates* stated that probable cause:

requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands.<sup>108</sup>

The court also contrasted the concepts of probable cause (required for a magistrate to issue a warrant) and preponderance of the evidence: “the *quanta* of proof appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt

102. See, e.g., *State v. Curry*, 752 S.E.2d 263, 266 (S.C. 2013); *Thompson v. State*, 702 S.E.2d 198, 201 (Ga. 2010); *Jackson v. State*, 993 So. 2d 45, 47 (Ala. Crim. App. 2007); *State v. Anderson*, 972 P.2d 32, 34–35 (Okla. Crim. App. 1998).

103. See *State v. Duncan*, 709 S.E.2d 662, 665 (S.C. 2011); *Dennis v. State*, 51 So. 3d 456, 459–60 (Fla. 2010); *Atchison*, *supra* note 74.

104. See *State v. Ultreras*, 295 P.3d 1020, 1027 (Kan. 2013); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754–55 (Ky. 2009).

105. BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

106. 24 FLA. JUR. 2D *Evidence and Witnesses* § 520 (2014).

107. BLACK’S LAW DICTIONARY 1321 (9th ed. 2009).

108. 462 U.S. 213 at n.13 (1983).

or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision."<sup>109</sup>

It is clear, then, that probable cause is both significantly less formal and rigorous than a preponderance-of-the-evidence standard.<sup>110</sup> It is not difficult to imagine that a defendant, such as Marissa Alexander, could be found immune from prosecution in one state but not another, based solely upon which immunity standard is imposed and which party has the burden of proof. As one court has observed, in the context of "Stand Your Ground" immunity from prosecution, "[t]he issue of who bears the burden of proof may well be significant where the case is an extremely close one, or where only limited evidence is presented for the trial court's consideration."<sup>111</sup>

It is unlikely that statutes with strikingly similar language, enacted within a few years of each other to address the same perceived problem, could plausibly be intended to result in such different outcomes. Unfortunately, the failure of legislatures to specify the procedure by which "Stand Your Ground" immunity should be applied has resulted in courts being forced to craft a solution using the statutory construction tools available to them.<sup>112</sup> These have proven to be inadequate for the challenge at hand: as previously discussed, courts have arrived at very different results based upon the existence—or nonexistence—of statutory provisions that were unlikely to have been drafted with such differing results in mind.<sup>113</sup>

#### V. ADDITIONAL PROBLEMS CREATED BY THE FLORIDA "STAND YOUR GROUND" LAW'S LACK OF PROCEDURAL DIRECTION

The problems caused by judicially created immunity procedures have the potential to go beyond uncertainties about the standard and burden of proof, as an example from Florida illustrates.<sup>114</sup> Recall that the Supreme Court of Florida, in *Dennis*, held that the appropriate procedural vehicle for motions to dismiss pursuant to the "Stand Your Ground" statute is Rule 3.190(b) and not Rule 3.190(c)(4).<sup>115</sup> This distinction had the effect of allowing trial judges to weigh factual disputes arising at an immunity hearing, rather than simply dismissing the motion because a factual dispute existed (as is required by Rule 3.190(c)(4) motions).<sup>116</sup> However, all motions to dismiss pursuant to Rule 3.190 must be filed at or before arraignment, with certain exceptions, including the aforementioned

109. *Id.* at 235.

110. *See, e.g., id.*; *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

111. *Bretherick v. State*, 135 So. 3d 337, 341 (Fla. Dist. Ct. App. 2013).

112. *See, e.g., Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009); *Dennis v. State*, 17 So. 3d 305, 306 (Fla. Dist. Ct. App. 2009).

113. *See, e.g., State v. Ultreras*, 295 P.3d 1020, 1023, 1025 (Kan. 2013); *Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010).

114. *See id.*

115. *Id.* at 464.

116. *Id.*

Rule 3.190(c)(4) motions in which there are no undisputed facts and those facts do not establish a *prima facie* case of guilt.<sup>117</sup> The motion is otherwise waived unless the court, in its discretion, allows it to be filed and heard at a later date.<sup>118</sup>

The problematic implications of shoehorning "Stand Your Ground" motions to dismiss into a Rule 3.190(b) motion should be obvious to anyone familiar with the way Florida's criminal justice system functions: public defenders are often not appointed until the arraignment date itself, at which defendants fill out affidavits of indigency and are found by the arraignment judge to be indigent.<sup>119</sup> A public defender appointed at arraignment will, of course, be unprepared (as any attorney would be in such a situation) to immediately file a complex motion to dismiss.<sup>120</sup> Furthermore, even in situations in which public defenders are appointed at the time of the initial appearance following an arrest but before arraignment, given the well-documented, excessive workloads they face, it is very likely these attorneys will not have a chance to fully investigate the case before the arraignment occurs.<sup>121</sup> These issues are not limited to public defenders: given that arraignment usually occurs at an early stage of a case, a privately retained attorney is often not retained until after arraignment has passed, and with it the entitlement to file a "Stand Your Ground" motion to dismiss.<sup>122</sup>

In practice, nearly all judges will use the discretion granted to them under the rule and allow "Stand Your Ground" motions to dismiss to be filed and heard after arraignment; in fact, if courts deny such motions because they are untimely under the rule, appellate courts may find this to be an abuse of discretion.<sup>123</sup> This situation

117. FLA. R. CRIM. P. 3.190(c). Rule 3.190(c) states that the other motions to dismiss that can be filed and heard at any time relate to charges for which the defendant has been pardoned; has been previously placed in jeopardy; or which the defendant has *previously* been granted immunity. *Id.* It is unlikely that a motion to find the defendant immune for the first time, as a "Stand Your Ground" motion seeks to do, could plausibly be held to fall within this last category.

118. *Id.*

119. *See, e.g., Misdemeanor Cases*, POLK COUNTY CLERK OF COURTS, <http://www.polkcountyclerk.net/Misdemeanor-Cases/> (last visited Oct. 3, 2014). "At your arraignment, you will have an opportunity to complete an Affidavit of Indigent Status form, and request the appointment of a public defender." *Id.*; *see also FAQ*, 5TH CIRCUIT PUBLIC DEFENDER, <http://www.pdo5.org/faq> (last visited Oct. 3, 2014). "If the Public Defender has not been appointed prior to the arraignment date the accused MUST ATTEND THE ARRAIGNMENT. At that time the judge will determine if the accused qualifies or not for the services of the Public Defender." *Id.* Such procedures are common in every circuit with which the author is familiar.

120. *See generally* J.T.W., Annotation, *Brevity of Time Between Assignment of Counsel and Trial as Affecting Question Whether Accused Is Denied Right to Assistance of Counsel*, 84 A.L.R. 544 (Originally published in 1933) (discussing the general rule that a reasonable time for the preparation of a defendant's case must be allowed between the time of assignment of counsel by the court and the date of trial).

121. *See* Public Defender v. State, 115 So. 3d 261, 270 (Fla. 2013).

122. *See* FLA. R. CRIM. P. 3.190(c) (providing that a motion to dismiss under 3.190(b) must be submitted either before or at arraignment); *see also* Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010) (holding that Florida Rule of Criminal Procedure 3.190(b) is the appropriate procedure for bringing a motion to dismiss based on Stand Your Ground immunity).

123. It could be argued that a motion to dismiss must be raised at or before arraignment. *See id.* However, it has been recognized that jurisdictional issues may be raised at any time, and that the proper procedure for challenging a court's denial of a motion to dismiss based on "Stand Your Ground" immunity is to file a writ of prohibition. 15 FLA. JUR. 2D *Criminal Law—Procedure* § 1468; *see* Mederos v. State, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012). A writ of prohibition is proper because such an issue involves the determination of whether the lower court has continuing jurisdiction over the defendant. Little v. State, 111 So. 3d 214, 216 (Fla. Dist. Ct. App. 2013).

has yet to be addressed by a Florida appellate court.<sup>124</sup> However, the fact that “Stand Your Ground” motions to dismiss must be filed under a rule with such an unrealistic timeframe is indicative of the poor fit existing law provides such motions. It seems highly unlikely that the legislature intended “Stand Your Ground” immunity to apply to citizens defending themselves only when a court, in its discretion, chooses to hear the motion. At least theoretically, though, this is exactly what the legislature did by not providing an independent procedure for adjudicating immunity under the statute it passed, thereby forcing courts to create a procedure from the laws pertaining to motions to dismiss that are already on the books.

## VI. THE SOLUTION

As the several courts who have addressed the issue have observed, the various “Stand Your Ground” laws provide little guidance as to how these laws should be implemented procedurally with respect to immunity from prosecution.<sup>125</sup> This has led the courts to use tools of statutory construction to divine what the legislature intended—with sometimes radically different outcomes despite substantially similar statutes.<sup>126</sup> The Florida Legislature can, and should, fix the problem in this state by amending the law expressly to provide a procedure that courts are to follow, including the appropriate burden (or burdens) of proof. In determining what that burden should be, the legislature should be mindful that neither the solution adopted by Kansas and Kentucky (a probable cause burden on the state),<sup>127</sup> nor those adopted by Florida and other states (a preponderance of the evidence burden on the defendant)<sup>128</sup> are perfect—both have advantages and disadvantages.

The path Kansas and Kentucky have taken is consistent with the fundamental principle of our justice system that a person is presumed not guilty, and the State has the burden of proving otherwise.<sup>129</sup> On the other hand, a probable-cause standard is far too easily met by the State and merely replicates a determination of probable cause that will already have been made twice: first by the police in making an arrest or seeking an arrest warrant, and then by a judge or magistrate either in signing the arrest warrant or making a probable cause determination shortly after the defendant’s warrantless arrest.<sup>130</sup>

124. See, e.g., sources cited *supra* note 122. Although courts in Florida have come close to deciding the issue, they have not directly addressed the issue of denying a motion to dismiss based on untimeliness, and thus an inference must be raised as outlined above. See, e.g., sources cited *supra* note 122; see also *Dennis v. State*, 51 So. 3d 456 (Fla. 2010). The only issue that the Florida appellate courts have addressed in the denial of a motion to dismiss based on “Stand Your Ground” is the need for courts to hold an evidentiary hearing; they have yet to address the issue of denial for untimeliness. See, e.g., *id.*

125. *State v. Ultreras*, 295 P.3d 1020, 1030 (Kan. 2013).

126. See generally *id.* at 1027–30 (providing an extensive and detailed overview of how courts in other states, including Florida, have used tools of statutory construction to come to different results on the issue, despite similar statutes).

127. *Id.* at 1031; *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009); see also KAN. STAT. § 21-5231 (2010); KY. REV. STAT. § 503.085 (West 2006).

128. See *Dennis v. State*, 51 So. 3d 456, 460, 463 (Fla. 2010).

129. See *Ultreras*, 295 P.3d at 1031; *Rodgers*, 285 S.W.3d at 754.

130. See FLA. R. CRIM. P. 3.133(a)(1), (3)–(4), (b)(5).

The preponderance burden of proof that has been adopted by Florida could be described as a "Goldilocks" solution.<sup>131</sup> It is more rigorous than (and different from) the probable cause determination that was made at the outset of the case, but less rigorous than (and also different from) the reasonable-doubt standard employed at trial.<sup>132</sup> In essence, a preponderance standard at the pretrial immunity stage provides a sensible, appealing, and escalating scale of proof in the context of a criminal prosecution: probable cause for the arrest and charging of the defendant; a preponderance of the evidence for pretrial immunity; and reasonable doubt for conviction of the crime.

Placing this burden on the defendant, as Florida's approach currently does, has some precedent in Florida law.<sup>133</sup> The closest analogue to "Stand Your Ground" immunity from prosecution is the concept of "transactional immunity."<sup>134</sup> Until its amendment in 1982,<sup>135</sup> Florida Statute, section 914.04 and its predecessor statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may . . . testify or produce evidence" that he was compelled by the prosecutor or court to give over a claim of Fifth Amendment privilege.<sup>136</sup> This blanket immunity from prosecution was known as transactional immunity.<sup>137</sup> Courts historically placed the burden of asserting and proving a claim of transactional immunity on the defendant.<sup>138</sup>

This is not dispositive, however, because while transactional immunity and "Stand Your Ground" immunity have similar effects, the reasons for their existence are very different. The former was created to aid the State in the prosecution of crimes and to circumvent the privilege against self-incrimination that might be invoked by a criminal,<sup>139</sup> but "Stand Your Ground" immunity was created to secure

131. See *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2832 (2011) (Kagan, J., dissenting). Judge Kagan coined the term "Goldilocks solution" in describing the amount of money needed to fund an election campaign—"not too large, not too small, but just right." *Id.*

132. To understand the differences in the burden-of-proof standards, compare the definition of "preponderance of the evidence" with the definitions of "probable cause" and "reasonable doubt." BLACK'S LAW DICTIONARY 1301, 1321, 1380 (9th ed. 2009).

133. See *Richards v. State*, 197 So. 772, 775 (Fla. 1940).

134. See also *Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010). Compare FLA. STAT. § 776.032 (2013) (amended 2014) with FLA. STAT. § 914.04 (1997).

135. 1982 Fla. Laws ch. 393, § 1.

136. FLA. STAT. § 914.04 (1997).

137. This concept should be distinguished from "use immunity," for which section 914.04 still provides to this day:

[I]t is important to note the distinction between use immunity, which the trial court ordered, and transactional immunity, which it did not. The former simply forbids the testimony given under the immunity grant to be used against the witness in any criminal prosecution of him; the latter provides the witness with immunity from prosecution for the matter concerning which his testimony was elicited.

*State v. Harris*, 425 So. 2d 118, 119 (Fla. Dist. Ct. App. 1982) (citing *State ex rel Hough v. Popper*, 287 So. 2d 282 (Fla. 1973); *Alford v. Cornelius*, 380 So. 2d. 1183 (Fla. Dist. Ct. App. 1980); *State v. Toogood*, 349 So. 2d 1203 (Fla. Dist. Ct. App. 1977)).

138. See *Richards v. State*, 197 So. 772, 775 (Fla. 1940).

139. See *Tsavaris v. Scruggs*, 360 So. 2d 745, 749 (Fla. 1977) ("In construing Section 914.04, Florida Statutes (1975), it is important to bear in mind 'the very purpose for its enactment . . . [is] to aid the state in the

fundamental rights for the law-abiding individual citizen.<sup>140</sup> For this reason, placing the burden of proving “Stand Your Ground” immunity completely on the defendant seems inconsistent with the Florida Legislature’s stated objectives of providing maximum protection to those acting in defense of themselves or others.<sup>141</sup>

Instead, the legislature should be guided by the procedure employed when a defendant claims self-defense at trial. When:

[s]elf-defense is asserted, a defendant has the burden of producing enough evidence to establish a prima facie case demonstrating the justifiable use of force. Once a defendant makes a prima facie showing of self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.<sup>142</sup>

The legislature should provide that a hearing to determine “Stand Your Ground” immunity mirrors this procedure, but that the State need only establish by a preponderance of the evidence that force was unjustified under the law, rather than beyond a reasonable doubt, as it must at trial. This solution would strike the best balance between the traditional burden placed on the defendant in seeking immunity and the legislature’s declared policy objective of providing maximum protection for those acting in lawful self-defense. The Supreme Court of Florida should contribute to this clarification of the procedure by amending Rule 3.190 to provide an independent pathway for “Stand Your Ground” immunity motions to be heard apart from the current categories that the rule provides, making clear that such a motion can be heard at any time.

This proposed legislative action calls for the legislature to involve itself with the procedure courts are to follow, which might raise concerns that the legislature is violating the Florida Constitution’s separation of powers provision.<sup>143</sup> Article II, section 3 provides that 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

---

prosecution of crimes.’ Immunity statutes are mechanisms for securing witnesses’ self-incriminating testimony in the prosecution of third parties.” (quoting in part *State v. Schell*, 222 So. 2d 757, 758 (Fla. Dist. Ct. App. 1969)).

140. See 2005 Fla. Laws ch. 27.

141. *Id.* (the bill creating the Florida “Stand Your Ground” law):

[T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from attackers and others without fear of prosecution or civil action for acting in defense of themselves or others . . . no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack . . .

*Id.*; see also FLA. STAT. § 790.25(1), (4), (5) (2006); FLA. STAT. § 790.251(3) (2008) (reflecting the state’s legislative policy that citizens have the right to bear arms for self-defense and other lawful purposes, and that these statutes in general should be “liberally construed” in favor of such purposes).

142. *Fields v. State*, 988 So. 2d 1185, 1188 (Fla. Dist. Ct. App. 2008) (citing *Fowler v. State*, 921 So. 2d 708, 711 (Fla. Dist. Ct. App. 2006)).

143. See FLA. CONST. art. 2, § 3.

expressly provided herein.”<sup>144</sup> “Generally, the legislature has the [sole] power to enact substantive law, while the [Supreme] Court [of Florida] has the [sole] power to enact procedural law.”<sup>145</sup> A well-established exception to this general rule, however, is when a statute creates a substantive right, the procedural provisions of the legislation that are necessary to the implementation of that right are considered constitutional.<sup>146</sup> Because the “Stand Your Ground” law unquestionably creates a substantive right to immunity from prosecution under certain circumstances, the legislature has the power to enact procedures to carry it out.<sup>147</sup> The legislature should exercise this power—as should other state legislatures that have chosen to follow Florida’s lead in creating “Stand Your Ground” immunity.

Defendants, such as Marissa Alexander, deserve to have the question of whether they are entitled to immunity from prosecution under the “Stand Your Ground” law adjudicated in a clear and logical fashion. This is not currently the case. Modifying the law is therefore necessary to achieve its stated goal: that those acting in lawful self-defense fear neither the criminal who was threatening them, nor the government that determines their guilt.<sup>148</sup>

#### ADDENDUM

After the writing of this article, the Florida Legislature acted to amend Florida Statutes 776.012, 776.013, 776.032, and 776.033. Among other changes, these amendments permit the threatened use of force under circumstances in which the actual use of force would have been justified (presumably a nod to the firing of warning shots). They also clarify the circumstances under which the presumption of reasonable fear does not apply, from someone claiming self-defense being engaged in “unlawful activity” at the time he used force, to being engaged in the less vague “criminal activity” at the time he used force. The legislature clearly took note of some of the problems inherent in George Zimmerman and Marissa Alexander’s cases, but these newest iterations of Florida’s “Stand Your Ground” laws appear to be more reactionary poultices than meaningful attempts to address the laws’ shortcomings. While these changes may be a minor victory for those seeking to be safe in their homes and daily lives, they do not even begin to address the issues of burden of proof and the appropriate procedure for courts to adjudicate self-defense immunity claims. The laws will remain deeply flawed until such systemic problems are solved.

144. *Id.*

145. *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000).

146. *See Caple v. Tuttle’s Design-Build Inc.*, 753 So. 2d 49, 54 (Fla. 2000); *Smith v. Dep’t. of Ins.*, 507 So. 2d 1080, 1092 (Fla. 1987).

147. *See also* FLA. STAT. § 776.032; FLA. STAT. § 776.012. *Cf. Caple*, 753 So. 2d at 54; *Smith*, 507 So. 2d at 1092.

148. 2005 Fla. Laws ch. 27.