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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC13-2312

Lower Tribunal: 5D12-3840
2011-CF-004788

JARED BRETHERICK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

_____/

AMICUS CURIAE FLORIDA CARRY, INC.'S BRIEF IN SUPPORT OF APPELLANT

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Interest of *Amicus Curiae*

Amicus Curiae, Florida Carry, Inc., is a grassroots organization that seeks to protect the rights of law abiding Floridians and visitors to our state, to possess and use firearms and other weapons for lawful purposes including recreation and self-defense. These goals are accomplished through education, legislative initiatives, and litigation. This case, while a criminal case, will have a direct impact on law abiding Floridians who find themselves forced to exercise their fundamental right of defense of oneself or others.

Summary of Argument

The Lower Tribunals' placing the burden of proof on the defendant at an a pretrial evidentiary hearing regarding immunity under the justifiable use of force is a violation of both the United States and Florida Constitutions in word and spirit. The burden shifting and concomitant compelled testimony by the accused constitute Due Process violations.

To adhere to this procedure is to treat "immunity" and "affirmative defense" as if they are interchangeable despite clear legislative intent and the Canons of Statutory Construction showing that the applicable statute is most assuredly an immunity statute, logically placing the burden upon the State to show authority to prosecute.

To properly return the burden to the State would not only comply with the United States and Florida Constitutions, but would also adhere to rulings and

precedent set by this Court and the United States Supreme Court as well as upholding the true meaning of "immunity."

Argument

The current approved procedure for a pretrial hearing to determine a defendant's statutory immunity under Fla. Stat. §776.032 places the burden of proof upon the defendant to show by a preponderance of the evidence that he or she is entitled to the protections afforded by Fla. Stat. §776.032.[1] *Amicus*, Florida Carry, Inc., contends that this standard disregards significant precedential and Constitutional protections and must be overturned in favor of correctly placing the burden upon the State to show why immunity should not attach per the statute.

I. Placing the burden upon the Defendant violates Constitutional word and spirit.

Both the United States and the Florida Constitutions address several protections in relation to the issues in this case. The 5th Amendment of the United States Constitution (as incorporated by the 14th Amendment) guarantees not only protection against self-incrimination but also the right to due process. Article 1, Section 2 of the Florida Constitution, Declaration of Rights, affirms that the

[1] "[W]e hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that immunity attaches." *Dennis v. State*, 51 So. 3d 456, 460 (Fla. 2010) (quoting *Peterson v. State*, 983 So. 2d 27, 29 (Fla.1st DCA 2008)).

defense of life, liberty, and the protection of property, *inter alia*, are inalienable rights bestowed upon all natural persons. "It is settled law that each of the personal liberties enumerated in the Declaration of rights of the Florida Constitution is a fundamental right." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004). "Where actions by the state abridge some fundamental right…, the strict scrutiny standard should be applied." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997). "[T]he action of the state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Id*. at 15. It must be considered that the adherence to judicial precedent requiring the defendant to bear the burden of proving the exercise of his fundamental right to defense of life is coequal to a legislative enactment requiring a person to justify any other fundamental right. Undoubtedly, the latter would be quickly struck down as unconstitutional.

In strict scrutiny cases, there must be a narrowly tailored, compelling governmental interest which the state purports to accomplish. There is no relevant difference between a "strict scrutiny" test and the "no alternative method of correcting the problem" test. *Mitchell v. Moore*, 786 So. 2d 521, 528 (Fla. 2001).

Even if a state action satisfies the "compelling interest" prong, it can still fail a challenge via the "no alternative method of correcting the problem" test. *Id*. The alternative method in this matter is obvious – shift the burden back to the state. Without returning the burden to the state, the due process issues discussed below quickly fall.

There can remain no question as to the imperative handed down by the Supreme Court in stating, "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime with which he is charged*." *In re Winship*, 397 U.S. 358, 364 (1970). (Emphasis added.)

To require a defendant to prove that immunity under Fla. Stat. §776.032 applies by a preponderance of the evidence standard, or face the risk of conviction, turns the Court's stern and explicit statement in *Winship* on its head by removing the State's burden to prove the non-existence of justification, a fact necessary to constitute the crime with which charged.[2] In pretrial matters, the practical effect is the presumption of an element of the charged offense – the non-existence of justification – that the defendant must then rebut. Fla. Stat. §776.032 could not exist, but for the justification element in the associated sections. It is a necessary

[2] Both Fla. Stat. §776.012 and §776.031 contain language for justification as an exclusionary element of the criminal use of deadly force.

fact to prove that Fla. Stat. §776.032 does not apply before questions regarding any other criminal matters regarding the use of force can be reached. *Amicus* does not contend that a pretrial reasonable doubt standard is proper; however, the burden and standard similar to that of an adversary preliminary hearing in Fla. R. Cr. P. 3.133(b)(3) is indeed appropriate.[3] A "clear and convincing" standard bore by the state is neither unreasonable nor unfamiliar. Holding otherwise is an affront to both the word and spirit of Due Process protections.

II. "Immunity" and "Affirmative Defense" are not interchangeable.

It is the position of *Amicus* that requiring a defendant to prove by a preponderance of the evidence standard that his or her actions were justified has contorted the legislatively mandated immunity into a judicially invented affirmative defense. "An 'affirmative defense' does not concern itself with the elements of the offense at all; it concedes them." *State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990). *Cohen* further discusses that when a supposed "affirmative defense" does not concede the offense but negates it by requiring proof by the defendant that the conduct consisted solely of lawful conduct, it is not a genuine affirmative defense. *Id.* at 52. This creates a problem as one cannot concede the

[3] Rule 3.133(b)(3) reads in part; "At the conclusion of the testimony for the prosecution, the defendant who so elects shall be sworn and testify in his or her own behalf, and in such cases the defendant shall be warned in advance of testifying that anything he or she may say can be used against him or her at a subsequent trial."

offense of aggravated assault (the Bretherick charge) as it relates to immunity under §776.032(1): Fla. Stat. §784.021(1) defines aggravated assault as an "assault," *inter alia,* which renders an assault an essential element of aggravated assault. Further, Fla. Stat. §784.011(1) defines assault as "an intentional, unlawful threat," *inter alia*. To treat §776.032(1) as an affirmative defense the way the courts have it currently structured, results in an inescapable logical inconsistency that one would have to concede his actions were unlawful in order to prove they were lawful.

III. The Canons of Statutory Construction confirm that Fla. Stat. §776.032 is indeed an immunity statute.

The first rule of statutory construction is that the plain meaning of language controls. If the words of a statute are clear and unambiguous, the court need not inquire further. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). "Immunity" is clearly and commonly defined as an exemption from a liability. *Black's Law Dictionary* 600 (Abridged 7th ed. 2000). Additionally, the language of the statute itself states that the immunity includes "arresting, detaining in custody, and charging or prosecuting the defendant."

Next, the Court should look to legislative intent.[4] "In determining legislative intent, we must give due weight and effect to the title of [the applicable statute], which was placed at the beginning of the section by the legislature itself. The title is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent." *State v.Webb*, 398 So. 2d 820, 824-25 (Fla. 1981). The full title of Fla. Stat. §776.032 reads "*Immunity* from criminal prosecution and civil action for justifiable use of force." (Emphasis added.) "The wording selected by our Legislature makes clear that it intended to establish a true immunity and not merely an affirmative defense." *Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008). Further, "the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others…" Ch. 2005-27, at 200, Laws of Fla. This interpretation was confirmed in *Horn v. State*, 17 So. 2d 836, 839 (Fla. 2nd DCA 2009), when the court stated, "[O]ur legislature intended to create immunity from prosecution rather than an affirmative defense."

When looking across the body of criminal statutes, it is apparent that the Legislature has chosen to address immunities and affirmative defenses with starkly

[4] "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided[.]" *State v.Webb*, 398 So. 2d 820, 824 (Fla. 1981).

different language. "[W]here Congress includes a particular language in one section of a statute but omits in in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). As stated above, the immunity from criminal prosecution in Fla. Stat. §776.032 is specifically defined as a prohibition against "arresting, detaining in custody, and charging or prosecuting the defendant." Conversely, we can see that the legislature makes specific provisions for affirmative defenses and burdens of proof which are clearly absent in §776.032. For example, in Fla. Stat. §775.027 (Insanity Defense), Section 1 clearly addresses how insanity is to be used as an affirmative defense by listing the require elements of the defense and, in Section 2, details the burden of proof for the affirmative defense of insanity (clear and convincing evidence). In the statute concerning entrapment, Fla. Stat. §777.201, Section 2 reads, "A person prosecuted for a crime shall be acquitted if the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of entrapment."

Taken as a whole, the plain meaning of the language, the explicit statement of legislative intent, and the fact that there is no corresponding language in §776.032 related to any use as an affirmative defense or burden of proof, it is apparent that §776.032 is a pure immunity statute and, as such, the burden would

be on the State to show that immunity does not attach rather than any burden at all upon the defendant once the immunity is claimed.

Additionally, the Florida Legislature has codified the "Rule of Lenity" in Fla. Stat. §775.021(1) requiring that the provisions of the criminal code "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Assuming *arguendo*, that the rules and interpretations above left doubt as to the meaning or intent of the statute, to resolve any conflict by placing the burden of proof on the defendant would be inconsistent with §775.021(1).

IV. Compelled testimony as a Due Process violation.

"It is indisputable that there are many offenses "of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar v. United States*, 406 U.S. 411, 446 (1972). Because of the nature of the evidence required in order for a defendant to prevail under the current "Stand Your Ground" hearing/Motion to Dismiss scheme, the defendant is oftentimes the only one who can provide the required evidence to sufficiently determine if he had met the "reasonable belief" element in order to have immunity attach pursuant to §776.032. This results in an impermissible coercion to testify. The defendant is left with no choice other than to testify at the hearing or fail to meet his burden. This is a *de facto* coercion to testify. "Governments, state and federal, are thus

constitutionally compelled to establish guilt by evidence independently and freely secured, and may not be [sic] coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 387 U.S. 1, 8 (1964). Every defendant has the right to "remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty… for such silence." *Id.*

There are many federal immunity statutes, and every state has enacted some form of legislation that protects against self-incrimination. *Kastigar* at 447. Superior to all is the 5th Amendment (as incorporated by the 14th Amendment which prohibits compelling an individual, in any criminal case, to be a witness against himself. The United States Supreme Court has clarified that this extends not only to use towards a conviction, but to use in any criminal action. "The protection does not merely encompass evidence which may lead to criminal conviction… [but also to] evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Maness v. Meyers*, 419 U.S. 449, 461 (1975).

The landmark case in this area, *Kastigar*, recognized this self-incrimination issue by holding that only a grant of immunity commensurate with the scope of the 5th Amendment privilege is sufficient to compel testimony over a claim of privilege. This protection extends not only to the specific evidence supplied in the compelled testimony, but also to its derivative use. Hence, the well-known

"*Kastigar* Hearing" where the prosecution has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar* at 460.

The compelling of testimony by the defendant, in order to attempt to prove by a preponderance of the evidence that immunity attaches under §776.032, throws the 5th Amendment and *Kastigar* protections into a never-ending loop: One is compelled to testify in order to obtain immunity; however, one cannot be compelled to testify until immunized.

Surely, this conundrum has never been the Court's goal or intent.

V. Shifting the burden of proof is a Due Process violation.

To place any burden upon a defendant in a "Stand Your Ground" hearing/Motion to Dismiss, impermissibly shifts the burden of proof away from the State to show that immunity doesn't attach. Per the applicable statutes in Chapter 776, the lack of justification is an essential element of the crime. "Due process requires the state to prove an accused guilty of all essential elements of a crime beyond a reasonable doubt." *Wright v. State*, 920 So. 2d 21, 24 (Fla. 4th DCA 2005). It "remains impermissible to shift the burden of proof of an element of the offense to the defendant." *Cohen* at 51. It is unreasonable to construe these concise statements as excluding the State from the burden of proving the most basic of elements – that a defendant is subject to prosecution.

Contrast the current scheme to when self-defense is asserted at trial (unlike a "Stand Your Ground hearing/Motion to Dismiss). The defendant has the burden of producing merely enough evidence to establish a *prima facie* case of demonstrating the justifiable use of force. It is then incumbent upon the State to refute this evidence beyond a reasonable doubt. It does not follow that the defendant would actually have a greater (or, any) burden to prove that the State does not have the legal right to prosecute in the pretrial stages.

No other constitutionally protected activity requires the defendant to prove that they were lawfully acting under a fundamental right in order to avoid prosecution. In other contexts, it would be universally considered absurd. One cannot imagine this Court requiring a political commentator to prove pretrial that he was allowed to speak, a priest proving that he was allowed to take confession, or a voter proving that he was allowed to sign a petition on a ballot measure. There is no shortage of valid and equally abhorrent comparisons.

VI. The United States Supreme Court has already decided a close parallel to this issue. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Prior to *Mullaney*, a Maine law required a defendant to establish by a preponderance of the evidence that he acted in heat of passion on sudden provocation in order to reduce a murder conviction to manslaughter. *Amicus* finds this and its reasoning analogous to the Florida defendant carrying the burden between immunity and prosecution.

The Court acknowledged that the types of facts required to make such a showing are peculiarly within the knowledge of the defendant, but that does not present a unique hardship on the prosecution which would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability. *Mullaney* at 702. Based on this, the Court ruled that placing the burden on the defendant when there is such a wide variance of potential penalty is an intolerable result. *Id*. at 703.

Granted, this case may be distinguished between pre-trial motions and the trial itself, but the turning point in *Mullaney* was the difference between exposure to a 20 year maximum sentence and a life sentence. What the *Mullaney* Court found to be of significance requiring such Due Process protections pales when compared to the consequences in the instant matter which may result in a difference ranging from *immunity from prosecution* versus a potential life/death sentence.

Conclusion

In writing the opinion for *Coffin v. United States*, 156 U.S. 432 (1895), Justice Edward Douglass White, Jr. offered the following quote:

> Let all accusers understand that they are not to prefer charges unless they can be proved by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.

Sadly, despite Constitutional protections and an unambiguous statute to the contrary, the current scheme ignores this wisdom. Florida Carry asks this Court to recognize basic Due Process provisions and the intent of the legislature by correctly placing the burden of proof on the State to show that immunity does not attach rather than further burdening a defendant who has (presumptively lawfully) acted in defense of himself or others. Furthermore, this Court should make a strong and clear statement via procedural processes that Fla. Stat. §776.032 is a true immunity statute and not merely an affirmative defense to the use of force.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished on this 23rd day of June, 2014 via electronic service to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210 Fla. R. App. P.

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