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IN THE SUPREME COURT OF FLORIDA

JARED BRETHERICK,

Petitioner,

v. CASE NO. SC13-2312

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions/corrections to the Petitioner's Statement of Facts:

Petitioner was charged by information with one count of aggravated assault with a firearm. (R. 8). He filed a motion to dismiss this charge, arguing that he was immune from criminal prosecution based upon the use of justifiable force in defense of himself and others under Florida's "Stand Your Ground" law. (R. 14-18).

An evidentiary hearing was held on the motion to dismiss, during which the two sides presented testimony from two independent witnesses, the victim, the Petitioner's family, and the Petitioner himself. (R. 157-295). After considering written and oral arguments from the parties, the trial court entered a lengthy order denying the motion. (R. 113-117). In this order, the court made the following factual findings:

> The Defendant and his family were traveling westbound of West Irlo Bronson Memorial Highway (also called "192") approaching Vineland Road (also called "535"). 192 is a 6 lane divided highway in the area where this incident occurred. Ronald Bretherick, the Defendant's father, was driving and his mother, Deborah Bretherick, was in the front passenger seat. The Defendant was in the rear seat behind his mother and his sister, Anna Bretherick, was in the rear seat behind the driver. As they were nearing 535, Ronald noticed a blue pick up truck rapidly approaching them in his rear view mirror. The truck almost side-swiped them as it passed in the right lane. Both the

Defendant and Deborah observed (the alleged victim) Mr. Dunning's face as his car passed them. Dunning's truck ended up in the middle lane directly in front of the Defendant's vehicle and slammed on its brakes. It came to a complete stop. There was no traffic or impediments in front of Dunning's truck requiring it to stop. Ronald stopped their car approximately one to two car lengths behind Dunning's truck. At some point, Dunning's backup lights came on and his truck rolled back approximately one to 1.5 feet toward the Bretherick's vehicle. Dunning got out of his truck and started to approached [sic] the Brethericks' truck. As he approached, Ronald held up a handgun that was still in the holster and Dunning retreated to his truck without uttering a word. After Dunning got back into his truck, the Defendant got out of the rear passenger's door and approached Dunning's car while pointing a handgun toward the driver's window. The Defendant came within a few feet of the driver's window and told Dunning to move his truck and that he had a gun. Dunning understood the Defendant to mean that if he moved the truck he would get shot. Dunning did not move his vehicle and called 911 as soon as the Defendant retreated. The Defendant returned to his family's truck and took up various positions in and around the truck while pointing the gun at Dunning. The Defendant told his family that Dunning had a gun. Anna and Deborah exited the truck and took refuge in the ditch on the north side of 192 near JoAnn's Fabrics. At some point during the altercation, Ronald called 911, along with other witnesses, to relay their observations and thoughts to the emergency operators. The police eventually arrived and diffused the volatile encounter.

[FN1] Both the Defendant and Deborah described his look as crazed, that he lacked emotion, and that he stared at them in a threatening manner. However, it should be noted that no threatening statements or gestures were made by Dunning.

[FN 2] It should be noted that Dunning was not in possession of a gun and no one ever observed him with a gun.

> [FN 3] At this point in the incident, the Defendant did not see Dunning with a gun and had no reason to believe he had a gun. Two lay witnesses observed the Defendant on the driver's side of Dunning's car while pointing a gun at the driver (Dunning). The Defendant testified to self-serving statements that are not believable concerning his possession of the gun and his family members were too distraught during the incident to make reliable observations. This Court firmly believes that the Defendant had the gun pointed at Dunning while he was sitting in the driver's side seat during the entire incident from the moment he approached Dunning's truck to speak to him.
>
> [FN 4] This Court believes the Defendant told Dunning that he would shoot him if he did not leave and that Dunning misunderstood what as said; instead believing the Defendant said, "If you move, I will shoot you." This slight but critical misunderstanding explains everyone's subsequent actions.
>
> [FN 5] It must be emphasized that no one observed Dunning with a gun. The Defendant testified that Dunning told him to shoot because he also had a gun. This statement was allegedly made by Dunning after the Defendant told him to move his truck. This Court does not believe Dunning ever uttered this statement since it does not make sense in the totality of the circumstances. The Defendant may have personally believed Dunning had a gun but it was an unreasonable belief at best.
>
> [FN 6] Much of the live testimony by the various witnesses was corroborated by the 911 recordings.

(R. 113-115).

After citing the applicable law, the trial court then made the following conclusions:

> This Court finds that the actions of Derek Dunning did not rise to the level of a forcible felony (Aggravated Assault or False Imprisonment) [FN 8] as defined in section 776.08 Fla. Stat. At best, Mr. Dunning's

driving pattern was reckless and his threatening act of getting out of his truck and approaching the Defendant's vehicle was an assault. It would have been reasonable, under the circumstances in this case, for anyone [sic] of the Brethericks to use non-deadly force as Mr. Dunning exited his vehicle, in the middle lane of a divided 6 lane highway, and approached their vehicle. The use of non-deadly force could have included brandishing a firearm to repel the imminent threat of unlawful force facing them at that moment. The Defendant must prove by a preponderance of the evidence that the threat was imminent and his fear was reasonable. However, the facts of this case show just the opposite; that Dunning retreated to his truck when he saw Ronald hold up the holstered handgun. The threat was no longer imminent, and in fact, the possible volatile situation had been diffused. The Defendant's subjective fear [FN 9] was no longer reasonable.

[FN 8] The Defendant invites this Court to find that either the act of Dunning's truck "rolling" back ½ foot toward their truck or the act of Dunning's truck almost sideswiping their vehicle rises to the level of an aggravated assault. This Court declines to make that finding. Every unexpected movement of a vehicle could rise to the level of an aggravated assault under that reasoning. Additionally, this Court finds that the Defendant and his family were not confined to their vehicle that rises to the level of False Imprisonment. Both Anna and Deborah Bretherick got out of the truck and walked to the side of the road without incident and their vehicle was, at best, temporarily stuck in traffic.

[FN 9] The Defendant tried to justify his fear by relying on the theory of the fear of the unknown. He testified that he did not know if there were other occupants in Mr. Dunning's vehicle, whether he possessed a gun, or whether he was planning a surprise attack. The Defendant actually put himself in greater danger by exiting his vehicle and approaching Dunning's truck.

(R. 116).

Petitioner timely sought review of this decision by filing a petition for writ of prohibition in the Fifth District Court of Appeal, arguing that the trial court erred in denying his claim of immunity. The appellate court affirmed the trial court's ruling, finding it supported by competent substantial evidence in the record. Bretherick v. State, 135 So. 3d 337, 340 (Fla. 5th DCA 2013).

However, the court noted that the burden of proof can be a critical issue where the case is extremely close or where only limited evidence is presented at the preliminary hearing. Accordingly, the court certified the following as a question of great public importance:

> ONCE THE DEFENSE SATISFIES THE INITIAL BURDEN OF RAISING THE ISSUE, DOES THE STATE HAVE THE BURDEN OF DISPROVING A DEFENDANT'S ENTITLEMENT TO SELF-DEFENSE IMMUNITY AT A PRETRIAL HEARING AS IT DOES AT TRIAL?

Id. at 341.

SUMMARY OF ARGUMENT

The trial court applied the correct burden of proof in evaluating the Petitioner's pretrial claim of immunity from prosecution under the Stand Your Ground law, following binding precedent from this Court and all the district courts. Petitioner has offered no basis for this Court to revisit that precedent, which has proven to be workable in the lower courts and based on sound legal reasoning consistent with legislative intent and decisions of other states and in other contexts. The certified question should be answered in the negative.

ARGUMENT

THE TRIAL COURT APPLIED THE CORRECT STANDARD IN REQUIRING THE PARTY CLAIMING IMMUNITY TO PROVE ENTITLEMENT TO SUCH IMMUNITY, AND THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The certified question asks this Court to determine which party has the burden of proof at a pretrial hearing where the defendant is claiming immunity under Florida's "Stand Your Ground" statute. This Court has already decided this issue, and Petitioner has shown no reason for this Court to reconsider that decision.

The issue is one of legislative intent. In enacting the "Stand Your Ground" statute, the Legislature found 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. But while the Legislature provided standards for determining when the immunity applied, it did not explicitly provide the procedures for handling immunity claims. As a result, and after examining the statute and its history, this Court established procedures that "best effectuate[] the intent of the Legislature." Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).

To effectuate the legislative intent, this Court held 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 the immunity attaches." Id. at 460 (quoting Peterson v. State, 983 So. 2d 27 (Fla. 1st DCA 2008)). Therefore, this Court has already decided the issue presented here, holding that the burden of proof at the pretrial hearing falls on the Defendant.

Since Dennis, the Legislature has done nothing to suggest that this Court's decision was incorrect, or that the procedure this Court approved was inconsistent with legislative intent. Accordingly, unless and until the Legislature determines otherwise, this Court should maintain the procedures it established in Dennis, and it should answer the certified question in the negative.

Dennis

In 2008, the First District Court of Appeal was asked to decide how to apply the recently enacted Stand Your Ground law – section 776.032, Florida Statutes. Peterson v. State, 983 So. 2d 27 (Fla. 1st DCA 2008). Specifically, the court was faced with the task of determining the proper treatment of motions to dismiss based on the immunity portion of the statute. Id. at

28-29. The State suggested that such motions should be resolved under rule 3.190(c)(4), with any disputed facts defeating a claim of statutory immunity and requiring that the matter be resolved by a jury. Id.

Rejecting this argument, the district court conducted an extensive analysis of the plain language of the statute and the Legislature's intent in enacting the statute, quoting from the preamble to the substantive legislation and noting that the statute was clearly intended to "establish a true immunity and not merely an affirmative defense." Id. at 29.

Given the absence of any statutory procedure for handling such a claim, the court turned to a decision analyzing a similar immunity statute in Colorado – People v. Guenther, 740 P.2d 971 (Colo. 1987). Peterson, 983 So. 2d at 29. The court ultimately concluded, as had the Guenther court, that a defendant raising immunity has the burden to establish the factual prerequisites of such a claim by a preponderance of the evidence – the same burden imposed where a criminal defendant seeks other forms of affirmative relief, such as postconviction motions and motions to suppress a confession. Id.

Two years later, this Court rendered its own decision on this matter, resolving a conflict between the Fourth District

Court of Appeal, which had adopted the (c)(4) procedure favored by the State, and the First District Court of Appeal, which had adopted the procedure discussed above. See Dennis v. State, 51 So. 3d 456 (Fla. 2010).

The defendant in Dennis asked this Court to require an evidentiary hearing to evaluate an immunity claim under the statute, while the State asked this Court to evaluate such claims under rule 3.190(c)(4) and require only a showing that there was probable cause to believe that the defendant's use of force was unlawful. Id. at 460.

In considering these arguments, this Court conducted an extensive analysis of the statutory language, the intent of the Legislature, and the applicable procedural rules. Id. at 460-63. This Court ultimately concluded that the First District Court of Appeal had correctly resolved the procedural issues in its 2008 opinion in Peterson, finding that this procedure "best effectuates the intent of the Legislature." Dennis, 51 So. 3d at 464.

This procedure has been followed in Florida ever since. All five district courts of appeal have expressly, and uniformly, reiterated the burden of proof set out in Peterson and Dennis – at the pretrial hearing, the defendant must show he

is entitled to immunity by a preponderance of the evidence. See, e.g., Little v. State, 111 So. 3d 214, 218 (Fla. 2d DCA 2013); Joseph v. State, 103 So. 3d 227, 230 (Fla. 4th DCA 2012); Darling v. State, 81 So. 3d 574, 577 (Fla. 3d DCA), rev. denied, 107 So. 3d 403 (Fla. 2012); Hair v. State, 17 So. 3d 804, 805 (Fla. 1st DCA 2009), rev. denied, 60 So. 3d 1055 (Fla. 2011); Gray v. State, 13 So. 3d 114, 115 (Fla. 5th DCA 2009) (pre-Dennis, expressly rejecting defendant's argument that State should have burden of proof at immunity hearing).

The Dennis procedure is used in evaluating immunity in civil actions as well. See, e.g., Professional Roofing and Sales, Inc. v. Flemmings, 138 So. 3d 524, 530 (Fla. 3d DCA 2014); Pages v. Seliman-Tapia, 134 So. 3d 536, 537 (Fla. 3d DCA 2014).

The lower court's opinion here has, for the first time, questioned the wisdom of the Dennis procedure. Bretherick, 135 So. 3d at 341-43 (Schumann, J., concurring). The State submits that this judge's concerns are unfounded and form no basis for this Court to revisit its decision in Dennis.

Stare Decisis

This Court has repeatedly stated that the doctrine of stare decisis "is grounded on the need for stability in the law and

has been a fundamental tenet of Anglo-American jurisprudence for centuries . . . adopted and codified by the Florida Legislature in 1829 [and] . . . memorialized by this Court nearly a century and a half ago." North Fla. Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612, 637-638 (Fla. 2003) (rejecting argument that precedent should be receded from because it was originally decided incorrectly). See also State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004) ("As an institution cloaked with public legitimacy, this Court cannot recede from its own controlling precedent when the only change has been the membership of the Court."); State v. Gray, 654 So. 2d 552, 554 (Fla. 1995) ("Stare decisis provides stability to the law and to the society governed by that law.").

When asked to recede from precedent, then, this Court must consider: (1) whether the prior decision proved to be unworkable in practice; (2) whether a reversal would cause an injustice or disruption in the stability of the law; and (3) whether the factual premises underlying the original decision have "changed so drastically as to leave the decision's central holding utterly without legal justification." North Fla. Women's Health, 866 So. 2d at 637.

Only if the answers to these questions are sufficient to

overcome the strong presumption in favor of stare decisis should this Court reverse itself. Id. at 637-38. Compare Strand v. Escambia County, 992 So. 2d 150, 159-60 (Fla. 2008) (refusing to recede from case where there had been widespread reliance by numerous parties and no changes had occurred to affect the earlier decision) with Valdes v. State, 3 So. 3d 1067, 1076-77 (Fla. 2009) (receding from "same evil" test for double jeopardy where that test had proven unworkable and confusing in practice and was contrary to plain meaning of statute).

Here, this Court's decision in Dennis has not proven unworkable in practice, but has been applied consistently throughout the state, as discussed above, in both civil and criminal proceedings. It has also been followed in other states construing their own versions of Stand Your Ground immunity statutes. See State v. Duncan, 709 S.E. 2d 662, 665 (S.C. 2011); Bunn v. State, 667 S.E. 2d 605, 608 (Ga. 2008). Changing the law at this point could call into question the validity of numerous convictions where self defense was at issue and disrupt a process now relatively well-honed in the trial courts.

Further, nothing has changed since Peterson and Dennis were decided. The Stand Your Ground statute has remained the same, except as noted below, and the Legislature has in no way sought

to overturn this Court's precedent or set up a different procedural mechanism for applying this law.

The Legislature's silence on this issue speaks volumes. This Court has stated that stare decisis has "special force" where the legislative branch has relied upon or acquiesced in the ruling in the prior case. Malu v. Security Nat'l Ins. Co., 898 So. 2d 69, 75-76 (Fla. 2005). As Justice Black explained long ago:

> [W]hen this Court first interprets a statute, then the statute becomes what this court has said it is.... When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.

Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) (quoted with approval in Malu).

Moreover, this Court has stated that "the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law [and] . . . is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version." Essex Ins. Co. v. Zota, 985 So. 2d 1036, 1043 (Fla. 2008) (quotations omitted).

Here, the statute granting immunity from prosecution was amended in the last legislative session, well after this Court's decision in Dennis. Ch. 2014-195, § 6, Laws of Fla. Yet no new procedure for adjudicating immunity was added to the statute, nor was any burden placed on the prosecution at a pretrial hearing, as Petitioner seeks. Instead, this proposed idea died in the Senate Judiciary Committee. See Fla. CS for CS for SB 130, § 3 (2014) (proposed amendment to Fla. Stat. § 776.032(2)). Given the Legislature's silence on this issue, this Court must presume that it has accepted the Dennis procedure as correctly reflecting its intent.

In short, then, the Petitioner has failed to supply any reason for this Court to revisit its decision in Dennis, save for the fact that he disagrees with the Court's resolution of the issue in that case. This is insufficient to overcome the strong presumption in favor of stare decisis.

Dennis was correctly decided

Petitioner argues that this Court's decision in Dennis fails to honor the language of the Stand Your Ground statute and ignores the Legislature's intent in enacting the statute. To the contrary, this Court explicitly based its conclusion on exactly these factors, as did the court in Peterson. Dennis, 51

So. 3d at 460-63; Peterson, 983 So. 2d at 29. This Court did not simply dismiss the Legislature's intent to create a right of self defense that goes beyond an affirmative defense, but honored that intent by setting up a procedure that allows defendants to avoid criminal prosecution in those cases where they acted in accord with the requirements of the statute.

Contrary to Petitioner's argument, the Legislature did not give to every person in Florida a blanket immunity from criminal prosecution, but instead gave immunity to those *who use force as permitted by statute*. § 776.032(1), Fla. Stat. In other words, the immunity applies only if certain factual elements are established.

This is no different than immunity from prosecution because of, for example, a double jeopardy bar – prosecution is precluded *if the factual circumstances are established supporting such a bar*. Petitioner cannot simply ignore this important link:

> [The Defendant] mistakenly believes that under [Peterson and Guenther] he would automatically enjoy immunity as a matter of law. The two cases do nothing of the kind. The Oklahoma [Stand Your Ground law] identifies circumstances in which a defendant might enjoy immunity. **But a defendant must obviously show facts triggering the statutory immunity. Otherwise, a defendant could enjoy statutory immunity simply by an incantation of the state law, without the need for any evidence that would render the statute applicable.** Peterson and Guenther, of course, do not suggest such

a fanciful procedure.

Parker v. Rudek, 2010 WL 5661429, *3 (W.D. Okla. Dec. 30, 2010) (footnotes omitted) (emphasis added), report adopted, 2011 WL 308369 (W.D. Okla. Jan. 27, 2011). See also State v. Curry, 752 S.E. 2d 263, 266 (S.C. 2013) (Stand Your Ground statute provides immunity *if* person acts in conformity with statutory requirements).

The Petitioner argues that immunity under section 1983 claims is analogous to immunity under the Stand Your Ground statute. Even in 1983 cases, however, individuals seeking such immunity must establish that they were acting in a role that qualified them for immunity at the time of the incident. See, e.g., Gentile v. Bauder, 718 So. 2d 781, 784 (Fla. 1998) (government official claiming qualified immunity has initial burden of demonstrating that he was acting within his discretionary authority).

Further, 1983 immunity claims require a two step analysis on two dissimilar issues. First, the officials must show that they were acting within their discretionary authority at the time of the incident. Once that burden is satisfied, the party opposing immunity must show that the officials lacked good faith. See, e.g., Brown v. Jenne, 122 So. 3d 881, 885 (Fla. 4th

DCA 2012). Each party has a burden on two very different factual issues.

In the Stand Your Ground setting, on the other hand, there is only one factual question – whether the totality of the facts allowed the defendant to resort to deadly force, under the parameters set by the statute. The defendant says yes; the State says no. But they are both presenting their positions on the same thing, as opposed to the distinct questions in the 1983 immunity cases, where the burden can be easily divided. The two situations are simply not analogous.

The procedure for adjudicating whether the facts support immunity is not spelled out in the Stand Your Ground statute, leaving such a determination for the courts. Some courts have concluded that stand your ground immunity is simply an affirmative defense, to be adjudicated at trial just like any other defense. See, e.g., Loza v. State, 325 N.E.2d 173, 176 (Ind. 1975). Cf. Pfeil v. Smith, 900 P.2d 12, 13-14 (Ariz. Ct. App. 1995) (discussing immunity from civil suit).

This Court, however, has determined that the Legislature intended something more than the creation of an affirmative defense to be used at trial, giving defendants who raise such a defense the right to a pretrial evidentiary hearing to show that

the facts of their situation precludes further criminal proceedings. Dennis, 51 So. 3d at 462. This procedure goes well beyond that available to a defendant who asserts any other affirmative defense, who must still face a full trial before their defense can be considered. Such enhanced protection reflects this Court's deference to the legislative intent to impart a meaningful safeguard in these cases.

As the Colorado Supreme Court explained in reaching the same result in the first case addressing such immunity:

> **[Colorado's Stand Your Ground statute] creates a benefit to a defendant far greater than an affirmative defense.** If the statute is found to apply to the facts of the case, it will completely prohibit any further prosecution of charges for which, but for the statute, the defendant would otherwise be required to stand trial. Although the wisdom of such legislation is not for us to decide, it cannot be disputed that the immunity created by [the statute] is an extraordinary protection which, so far as we know, has no analogue in Colorado statutory or decisional law.
>
> Since [the statute] contemplates that an accused should be permitted to claim an entitlement to immunity at the pretrial stage of a criminal prosecution, **we believe it reasonable to require the accused to prove his entitlement to an order of dismissal on the basis of statutory immunity.** A hearing to determine the applicability of [the statute] to pending criminal charges is not a criminal trial, but, rather, is an ancillary proceeding in the nature of a motion to dismiss a pending criminal prosecution on the basis of a statutory bar. **We have often imposed on a criminally accused the burden of establishing his entitlement to dismissal of criminal charges at the pretrial stage of the case. . . . and we find it appropriate to impose that same burden on**

> **the defendant in connection with a pretrial claim for statutory immunity under [the Stand Your Ground statute.] Furthermore, the accused presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statute and, under these circumstances, should be in a better position than the prosecution to establish the existence of those statutory conditions which entitle him to immunity.**
>
> While we conclude that the burden of proof should be placed on the defendant, we decline to require that the defendant prove his entitlement to immunity beyond a reasonable doubt. We believe that the "preponderance of the evidence" is the appropriate standard of proof applicable to a defendant's pretrial motion to dismiss pursuant to [the statute]. We have imposed this burden of proof on defendants in hearings on motions for postconviction relief, and have likewise placed a similar burden on defendants in regard to certain issues raised at suppression hearings. There is nothing in the legislative history of [the statute] to indicate that the General Assembly intended to impose any enhanced measure of proof upon a defendant seeking statutory immunity. On the contrary, the General Assembly expressly intended the statutory immunity created by [the statute] as a means to ensure that Colorado citizens be afforded maximum safety in their own homes. The preponderance of evidence standard, in our view, is more consistent with that expressed legislative intent than is the more rigorous reasonable doubt standard of proof.

Guenther, 740 P. 2d at 980-81 (citations omitted) (emphasis added).

This rationale is equally applicable in Florida, providing individuals claiming immunity under the Stand Your Ground statute with true protection from the rigors of a criminal trial, while requiring such individuals to establish with a

reasonable modicum of proof their entitlement to such relief, as is true in other situations where a person claims that criminal prosecution is barred or seeks similar affirmative relief from the courts. See, e.g., Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993) (defendant bears burden of demonstrating inducement and lack of predisposition in claiming subjective entrapment); Henderson v. State, 135 So. 3d 1092, 1096 (Fla. 2d DCA 2013) (defendant bears burden of demonstrating reasonable expectation of privacy); McDade v. State, 114 So. 3d 465, 469 (Fla. 2d DCA) (defendant invoking protection of statute precluding secret recording of oral statements bears initial burden of proof), rev. granted, 121 So. 3d 1037 (Fla. 2013) (case no. SC13-1248; Capron v. State, 948 So. 2d 954, 957 (Fla. 5th DCA 2007) (defendant bears burden of proving a claim of double jeopardy).

Indeed, this Court has explicitly recognized as a general principle that "it is only logical that the party that filed the petition in the circuit court, i.e., the party seeking affirmative relief, be the party that bears the burden of persuading that the relief sought in the circuit court should be granted." Chrysler Corp. v. Pitsirelos, 721 So. 2d 710, 714 (Fla. 1998).

This general principle is applied throughout Florida law,

in any number of contexts. See, e.g., Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999) (party moving for summary judgment bears burden of proving that trial is not necessary because undisputed facts form no basis for relief); Telemundo Network Group, LLC v. Azteca Int'l Corp., 957 So. 2d 705, 709 (Fla. 3d DCA 2007) (party seeking to dismiss action based on grounds of forum non conveniens bears burden of proof on every element of this analysis); Courtesy Auto Group, Inc. v. Garcia, 778 So. 2d 1000, 1002 (Fla. 5th DCA 2001) (party seeking class certification bears burden of establishing required elements); Girten v. Andreu, 698 So. 2d 886, 888 (Fla. 3d DCA 1997) (party seeking name change bears burden of proof based on evidence beyond conclusory assertions).

Courts in other states have agreed with this burden of proof as well, following Florida law in acknowledging that immunity is a greater right than a simple affirmative defense, but requiring defendants claiming such immunity to establish their entitlement at a pretrial hearing. See Duncan, 709 S.E. 2d at 665; Bunn, 667 S.E. 2d at 608.

Perhaps most importantly, as discussed above, the Legislature has had multiple opportunities to amend the statute to change the procedure adopted by this Court in Dennis, and has

chosen not to do so. See Goldenberg v. Sawczak, 791 So. 2d 1078, 1081 (Fla. 2001) ("Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.")

If the Dennis decision is directly contrary to legislative intent, as Petitioner asserts, the Legislature certainly has the authority to correct this misinterpretation. See, e.g., Ch. 2001-58, § 1, Laws of Fla. (amending burglary statute in response to 2000 Florida Supreme Court decision construing statute in manner contrary to legislative intent). In the absence of such a statutory amendment, there is no reason to revisit the procedure.

Kentucky and Kansas

In support of his argument that this Court improperly allocated the burden of proof in Dennis, the Petitioner largely relies on two out-of-state cases, from Kentucky and Kansas. Both cases are distinguishable.

In Rodgers v. Commonwealth, 285 S.W.3d 740, 749-56 (Ky. 2009), the Supreme Court of Kentucky addressed the proper application of immunity under their Stand Your Ground law. Noting that the statute specifically provided that immunity must be granted pre-arrest by the investigating law enforcement

officer unless there was probable cause that the force used was unlawful, the supreme court applied that same standard to the prosecutor in bringing charges and to the trial court in evaluating a claim of immunity, requiring dismissal unless there was probable cause to conclude that the force used was not legally justified. Id. at 754.[1]

Notably, the court specifically rejected the defendant's argument that a pretrial evidentiary hearing would be required to evaluate a claim of immunity, instead treating the matter the same as any other motion to dismiss:

> The sole remaining issue is how the trial courts should proceed in determining probable cause. The burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Although **[the defendant] advocates an evidentiary hearing at which the defendant may counter probable cause with proof "by a preponderance of the evidence" that the force was justified, this concept finds no support in the statute.** The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is the aforementioned probable cause. **We decline to create a hearing right that the statute**

[1]Petitioner asks this Court to expand this holding to require the State to show that a defendant had no probable cause to believe his use of force was justifiable. This position has no support in any state, and it actually changes the substantive standard for the justifiable use of force, requiring this Court to effectively rewrite the statute. If the standard is changed in this manner, it should be done by the Legislature, not this Court.

does not recognize and note that there are several compelling reasons for our conclusion.

First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to Miranda warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. **An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial.** In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, **where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.**

* * *

Given the large volume of Kentucky cases for which immunity may be an issue, the probable cause standard expressly stated in KRS 503.085, and Kentucky's strong preference for jury determinations in criminal matters, we do not find the Colorado court's approach [in Guenther] appropriate.

Id. at 755-56 (emphasis added).

Kentucky's approach, then, does place the burden of proof

on the State, but it does so in a context analogous to a motion to dismiss under rule 3.190(c)(4) – a procedure specifically rejected by this Court in Dennis. 51 So. 3d at 462. Indeed, the defendant in Rodgers affirmatively sought the relief actually granted by this Court in Dennis – the opportunity to present, at a pretrial hearing, evidence establishing by a preponderance of the evidence that the use of force was justified. Rodgers, 285 S.W.3d at 755.

Petitioner now seeks to apply just one facet of the Rodgers holding, the State bearing the burden of proof, while rejecting the rest of the procedure established there. The Kentucky Supreme Court addressed the procedure as a whole, not in parts, and this Court has done the same. The State submits that this Court has already rejected the Rodgers holding and adopted a procedure better recognizing the nature of an immunity claim as the Florida Legislature intended.

Petitioner also relies on the decision by the Kansas Supreme Court in State v. Ultreras, 295 P.3d 1020 (Kan. 2013). There, the court found that the Rodgers rationale was more consistent with the language of the Kansas statute than the decisions in Colorado and Florida, accordingly requiring the prosecution to prove that the force was not justified as part of

the probable cause determination specifically mandated in their statute, which provides that a prosecutor "may commence a criminal prosecution upon a determination of probable cause." Id. at 1031.

In making this decision, however, the court specifically distinguished its statute from the Florida statute:

> In Colorado's circumstance, it is not surprising that the Colorado Supreme Court found it necessary to add a standard of proof because the Colorado statute, unlike the one in Kansas, makes no mention of any standard. **The Florida statute, like the Kansas statute, does refer to a probable cause standard, but only in reference to an arrest; it does not include language like that found in K.S.A. 21-3219(c) providing that a "prosecutor may commence a criminal prosecution upon a determination of probable cause." With no mention of the standard for initiating a prosecution, the Florida court felt the need to specify one and, in doing so, employed a commonly recognized rule of statutory construction that legislation should not be interpreted in a way that makes it meaningless.** Dennis, 51 So.3d at 463; see Hawley v. Kansas Dept. of Agriculture, 281 Kan. 603, 631, 132 P.3d 870 (2006) ("'There is a presumption that the legislature does not intend to enact useless or meaningless legislation.'"). **In contrast to the Florida statute, however, K.S.A. 21-3219(c) attaches the probable cause standard to the prosecution of a criminal case.** Given that legislative direction, it is not necessary for us to guess at what the legislature may have intended.
>
> In addition, **contrary to the situation in Florida**, applying a probable cause standard in Kansas does not mean that K.S.A. 21-3219 is useless. Generally, a detached Kansas magistrate considering whether to issue a warrant or summons merely determines "that there is probable cause to believe both that a crime has been committed and that the defendant has committed it." K.S.A. 22-2302(1). Under K.S.A. 21-

> 3219, however, once a defendant raises justified use-of-force immunity before a court, a probable cause determination must also include a determination that the defendant's use of force was not justified under K.S.A. 21–3211, K.S.A. 21–3212, or K.S.A. 21–3213. Hence, the statute as written with a probable cause standard adds an additional requirement and is meaningful. Consequently, we find no justification to add language not adopted by the Kansas Legislature.

Id. at 1030-31 (emphasis added).

Accordingly, the Kansas court itself recognized that Florida's statute did not include the same wording and that this Court's decision in Dennis made sense in light of the differences in the statutes.

Further, Petitioner is once again asking this Court to follow the Kansas holding only in so far as it suits him – by imposing a burden of proof on the State. The Kansas court did not require a pretrial evidentiary hearing on immunity, but instead left that procedural question to be resolved later. Id. at 1031. Additionally, the court required only that the State show probable cause to believe that the defendant's use of force was not justified – a standard far different from the "beyond a reasonable doubt" burden Petitioner seeks to impose. Id. See also State v. Jones, 311 P.3d 1125, 1133 (Kan. 2013) (noting that once a trial has taken place, "the State has already borne an evidentiary burden **far higher** than the probable cause burden

imposed upon it by the Stand-Your-Ground statute") (emphasis added).

In short, then, while Petitioner lauds the decisions in Kentucky and Kansas, he does not ask this Court to actually adopt the procedure used there, but instead picks only that portion of the procedure advantageous to him – the State bearing the burden of proof. He completely jettisons those portions of the procedure that he does not favor. Unless this Court is willing to revisit the Dennis decision *in its entirety* and follow the Kentucky procedure, or ignore the statutory differences *specifically cited* in the Kansas decision itself, the State submits that these decisions should play no role here.

Instead, this Court should reaffirm its own decision in Dennis, followed by other states and correctly recognizing the Legislature's intent, as discussed above.

Constitutional Considerations

Finally, to the extent that concerns have been raised about the constitutionality of imposing this burden of proof on the defendant, the State submits that such concerns are unwarranted. There is no due process violation where a defendant is required to establish that he falls under the protections of the Stand Your Ground law and therefore cannot be prosecuted. Indeed, the

United States Supreme Court has explicitly ruled that a defendant may be required to prove his entitlement to an affirmative defense *at the trial itself* without violating his due process rights. As the Court recently explained:

> While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.

Smith v. United States, 133 S.Ct. 714, 719 (2013) (citations and quotations omitted).

This applies to self-defense as well – there is no constitutional requirement that the burden of disproving self defense reside with the prosecution. Martin v. Ohio, 480 U.S. 228, 235-236 (1987).[2] See also United States v. Leahy, 473 F.3d 401, 405 (1st Cir.) (same), cert. denied, 552 U.S. 947 (2007); Paprocki v. Foltz, 869 F.2d 281, 282 (6th Cir. 1989) (same).

[2]As the Supreme Court noted, "the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." Martin, 480 U.S. at 235 (quotation and citation omitted).

In light of this holding, then, requiring that the defendant meet a more minimal burden, *at a pretrial hearing*, does not violate due process either.

Nor does the Dennis procedure compel the accused to testify. While the defendant is often in the best position to explain what happened, nothing compels him to do so, and other witnesses to the event are frequently sufficient to establish the presence, or absence, of justification for the use of force. The defendant is constitutionally entitled to remain silent throughout the criminal process, from investigation through trial, and nothing in the immunity procedure applied in Florida changes that.

This Case

Petitioner's extensive argument regarding the application of the Stand Your Ground statute to his particular situation is outside the scope of the certified question and need not be addressed by this Court. Should this Court answer the certified question in the negative, Petitioner has already received that to which he is entitled – an evidentiary hearing before the trial court, and review of the trial court's findings by the court of appeal. He is, of course, still free to argue at trial that he acted in self defense.

Should this Court answer the certified question in the affirmative, this case should be remanded for the trial court to reevaluate its conclusion in light of the new standard. There is no need, nor any authority, for this Court to engage in the credibility assessments sought by Petitioner.

Further, the facts, as found by the trial court and supported by the evidence at the hearing, fail to demonstrate by a preponderance of the evidence that the Petitioner's use of force was justified under Florida law.

Substantial evidence was presented at the hearing, including live testimony from several witnesses. Petitioner's testimony was offered to support his claim of self-defense, but this testimony was contradicted by the testimony of other witnesses – including the two witnesses who had no ties to either side. Simply stated, the trial judge found that Petitioner's version of events was not credible in light of the other evidence. Petitioner has failed to show that this ruling was erroneous.

The judge did exactly what he was required to do under Dennis. While there may have been evidence supporting Petitioner's argument that he was acting in defense of himself and others, there was also competent substantial evidence that

Petitioner was not acting in self defense or attempting to prevent a forcible felony at the time of the offense, but instead was trying to intimidate the victim in retaliation for the victim's earlier actions.

The judge, in denying the motion to dismiss, resolved the contradictions in the evidence against Petitioner, finding that under these facts, his fear of imminent death or great bodily harm for himself or his family was not reasonable and he was not trying to prevent a forcible felony, using an objective standard as required by the statute. An appellate court simply has no authority to revisit these factual findings, where those findings are supported by competent substantial evidence.

Perhaps a jury will agree with Petitioner's assertion that the victim's story is not credible and Petitioner's use of force was justified. The trial judge did not, and this Court must respect that factual determination.

Conclusion

No court in the United States has adopted the procedure proposed by Petitioner – placing the burden on the State to prove that the accused's use of force was not justified (1) beyond a reasonable doubt and (2) at a pretrial evidentiary hearing. This Court should not be the first to do so, where it

has already thoroughly addressed this issue and Petitioner has shown no reason to revisit that decision. The certified question should be answered in the negative, and the lower court's conclusion approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief on the Merits has been furnished to Eric J. Friday,

counsel for Petitioner, 541 East Monroe Street, Jacksonville, Florida 32202, by email to familylaw@fletcherandphillips.com and efriday@fletcherandphillips.com, this 11th day of August, 2014.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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