IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1978

STATE OF FLORIDA,

Petitioner,

vs.

PETER PERAZA,

Respondent.

RESPONDENT'S ANSWER BRIEF

SCHWARTZREICH & ASSOCIATES, P.A.
Fort Lauderdale, Florida

ERIC T. SCHWARTZREICH
Florida Bar Number 0086452

ANTHONY J. BRUNO
Florida Bar Number 97830

208 S. E. 6th Street
Fort Lauderdale, Florida 33301
(954) 525-8000
Counsel for Respondent
esterictolin@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

THE TRIAL COURT PROPERLY GRANTED THE RESPONDENT IMMUNITY AS A MATTER OF LAW.

CONCLUSION 17

CERTIFICATE OF SERVICE 18

CERTIFICATE OF TYPE SIZE AND STYLE 18

TABLE OF AUTHORITIES

Cases

Dennis v. State, 51 So.3d 456, 462 (Fla. 2010)……...…5, 7, 10

Floyd v. Bentley, 496 So.2d 862, 863 (Fla. 2d DCA 1986)…….…...9, 11

Larimore v. State, 2. So. 3d 101, 106 (Fla. 2008)……..…….10

Spires v. State, 180 So. 3d 1175 (Fla. 3d DCA 2015)……..….……7

State v. Caamano, 105 So. 3d 18 (Fla. 2d DCA 2012)…….….11, 12

State v. Peraza, 226 So. 3d 937 (Fla. 4th DCA 2017)……..5, 6, 8, 12

Statutes

Florida Statute section 776.05…….7, 11, 12, 13

Florida Statute section 776.05(1) …….…..5, 9, 11, 13, 14

Florida Statute section 776.012…….6, 7, 8, 11, 12

Florida Statute section 776.012(1)…….…..5, 9, 12, 13, 14, 15, 17

Florida Statute section 776.032…….6, 7, 8, 10, 11, 12, 13

Florida Statute section 776.032(1)…….…..…..5, 9, 10, 11, 12, 14, 15, 17

Rules

Fla. R. App. P. 9.210……..……19

PRELIMINARY STATEMENT

The Respondent adopts the Petitioner's preliminary statement.

STATEMENT OF THE CASE AND FACTS

The Respondent generally agrees with the Petitioner's statement of the case and facts. However, at the bottom of page 2 of the Petitioner's brief, the Petitioner states: "The (Trial) Court held that other facts and circumstances were in dispute. Specifically, the Court credited the testimonies of the defense eyewitnesses who all stated that the victim was pointing the air rifle as he turned toward Officer Peraza. The Court noted that the testimony of state witness Michael McCarthy whose account was in contradiction to that of others, was not credible (R. 565-566). McCarthy testified that the victim turned but never moved the rifle from behind his head. (R. 564-565).

The Honorable Trial Court issued a 36 page order after a lengthy evidentiary hearing where dozens of witnesses were called. In that order, the Honorable Trial Court made the following findings of fact:

"The air rifle qualifies as a deadly weapon.

McBean was advised not to openly carry the rifle from the pawn shop and not to remove the weapon from the bag until he arrived home.

McBean removed the weapon from a bag and openly carried the rifle in a populated area.

Three separate concerned citizens called 911 emergency to report McBean.

McBean entered an apartment complex and walked towards a pool occupied by children.

Several Broward Sheriff's Office Deputies responded.

McBean ignored repeated warnings and commands to stop, not to turn around and to drop the weapon.

McBean turned towards the Deputies.

McBean pointed the weapon at or in the direction of the Deputies.

The Defendant (Peraza) was in fear for his life and the lives of others.

The Defendant shot at the victim three times and struck him twice.

The shooting was fatal." (R. 570-571)

While it can be said that Michael McCarthy's testimony was in contradiction to other witnesses at the hearing, the Trial Court's ultimate finding of fact disregarded Mr. McCarthy's testimony and found that Mr. McBean had in fact

turned towards Deputies and pointed the weapon at or in the direction of Deputies.

Furthermore, in affirming the Trial Court, the Fourth District Court of Appeal made the following findings: "We conclude the circuit court's findings of fact are

supported by competent substantial evidence."

The Trial Court did not find any facts were in dispute and the Fourth District Court of Appeal affirmed the Trial Court's findings of fact.

SUMMARY OF THE ARGUMENT

The Respondent agrees with the Fourth District Court of Appeal's holding in State v. Peraza, 226 So. 3d 937 (Fla. 4th DCA 2017) and respectfully urges this Honorable Court to adopt its holding and forever discharge Deputy Peraza of his charges. Additionally, the Respondent respectfully urges this Honorable Court to adopt the Fourth District Court of Appeal's reasoning below in recognizing that a law enforcement Officer, who while making a lawful arrest, uses deadly force which he or she reasonably is necessary to prevent imminent death or great bodily harm to himself or herself, or another or to prevent the imminent commission of a forcible felony, is *not limited* to invoking a defense under section 776.05(1), but is also permitted to seek immunity from criminal prosecution under sections 776.012(1) and 776.032(1).

Lastly, this Honorable Court has previously held that a court may not deny a motion seeking immunity pursuant sections 776.012(1) and 776.032(1) simply because factual disputes may exist. Dennis v. State, 51 So.3d 456, 462 (Fla. 2010). The Respondent respectfully urges this Honorable Court to apply its prior standard to the case at bar.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED THE RESPONDENT IMMUNITY AS A MATTER OF LAW.

The Fourth District Court of Appeal was correct in affirming the Trial Court's order granting the Respondent immunity pursuant to section 776.012 and 776.032. The Trial Court made the factual finding that Respondent was not making an arrest but was "responding to an emergency and was investigating a disturbance." (R. 577.) The Fourth District Court of Appeal agreed with the Trial Court's factual findings. State v. Peraza, 226 So.3d 937, 947 (Fla. 4th DCA 2017). In so doing, the Fourth District Court of Appeal held:

> "The circuit court's most significant finding of fact is that the officer was responding to an emergency and investigating a disturbance, but was not making an arrest. That finding of fact is significant because if true, it eliminates section 776.05's application to this case and distinguishes this case from *Caamano,* where three officers already had detained the suspect before Officer Caamano used unnecessary force against the suspect.
>
> While we **conclude the finding of fact here that the officer was responding to an emergency and investigating a disturbance was supported by competent substantial evidence . . ."** (Id.)

With Respect to the Respondent, the case is distinguishable from *Caamano* in that the suspect in *Caamano* had already been restrained by three officers and was essentially under control prior to the Defendant in that case offering to do violence

to the suspect. In the case at bar, the undisputed facts are that the suspect was not complying with officers' commands and still very much posed a threat to officers and civilians in the immediate area. Therefore, section 776.05 does not apply to the Respondent. The Respondent agrees that the Fourth District Court of Appeal was correct in holding, as a matter of law, the Respondent was eligible to seek Stand Your Ground immunity under sections 776.012 and 776.032 and that the Respondent was entitled to Stand Your Ground immunity.

There were facts in dispute at the trial level. This Honorable Court has previously held that when immunity under F.S. 776.032 is properly raised by the Defendant, the trial court must decide the matter by confronting and weighing only factual disputes. Dennis v. State, 51. So. 3d 456, 459 (Fla. 2010). The trial court may not deny a motion simply because factual disputes exist. (Id.) As such, the existence of factual disputes alone should not preclude a criminal case from being dismissed pursuant to section 776.032.

The standard of review appellate courts are to apply to a trial court's factual findings in a motion to dismiss claiming immunity pursuant to section 776.032 is competent substantial evidence. Spires v. State, 180 So. 3d 1175 (Fla. 3d DCA 2015). The Trial Court in the present case presided over a stand your ground hearing which lasted a week in which the Respondent, over thirty witness,

including experts, testified. After weighing the evidence the Trial Court found that the Respondent was eligible to seek Stand Your Ground immunity and was entitled to Stand Your Ground immunity. The Fourth District Court of Appeal agreed that the Trial Court's factual findings were supported by competent substantial evidence and agreed that ultimately the Respondent was entitled to Stand Your Ground immunity. Respectfully, this Honorable Court is to afford great deference to the Trial Court's findings when they are supported by competent substantial evidence. The Respondent respectfully urges this Honorable Court to affirm the Trial Court and the Fourth District Court of Appeal's holdings that the Respondent's case is distinguishable from *Caamano* and find that he is entitled to immunity pursuant to section 776.032 and 776.012 and forever discharge the Respondent of his charges.

LAW ENFORCEMENT OFFICERS ARE ELIGIBLE TO ASSERT STAND YOUR GROUND IMMUNITY

After the Fourth District Court of Appeal affirmed the Trial Court's order granting immunity to the Respondent, the Fourth District Court of Appeal disagreed with the Second District Court of Appeal's holding in Caamano and certified conflict. State v. Peraza, 226 So.3d 937, 948 (Fla. 4th DCA 2017).

The Fourth District Court of Appeal certified the following question as one of great public importance:

> WHETHER A LAW ENFORCEMENT OFFICER, *WHO WHILE MAKING A LAWFUL ARREST*, USES DEADLY FORCE WHICH HE OR SHE REAONABLY BELIEVES IS NECESSARY TO PREVENT IMMINENT DEATH OR GREAT BODILY HARM TO HIMSELF OR HERSELF OR ANOTHER OR TO PREVENT THE IMMINENT COMMISSION OF A FORCIBLE FELONY, IS LIMITED TO INVOKING A DEFENSE UNDER SECTION 776.05(1) OR IS *ALSO* PERMITTED TO SEEK IMMUNITY FROM CRIMINAL PROSECUTION UNDER SECTIONS 776.012(1) AND 776 032(1) FLORIDA STATUTES (2013), MORE COMMONLY KNOWN AS FLORIDA'S "STAND YOUR GROUND" LAW. (Id.)

The Petitioner argues that the Fourth District Court of Appeal erred because its holding would render section 776.05(1) a nullity. The Petitioner goes on to argue that the Fourth District Court of Appeal ignored longstanding precedent as it pertains to statutory construction. The Petitioner's argument that section 776.05(1) covers the same subject matter as section 776.012(1) and 776.032(1) and would render 776.05(1) a nullity is misplaced.

There exists a presumption that laws are passed with knowledge of all prior laws already on the books, as well as a presumption that the legislature neither intended to keep contradictory enactments in force nor to repeal a prior law without an express intention to do so. Floyd v. Bentley, 496 So.2d 862, 863 (Fla.

2d DCA 1986). In construing a statute, a court's purpose "is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Larimore v. State, 2. So. 3d 101, 106 (Fla. 2008).

This Honorable Court previously acknowledged the Legislature's intent in enacting section 776.032 in Dennis v. State, 51 So.3d 456, 462 (Fla. 2010). This Honorable Court held:

> "In resolving the conflict at issue, we conclude the plain language of section 776.032 grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial. We further conclude that the procedure set out by the First District in *Peterson* **best effectuates the intent of the Legislature.**" (Id.)

The section 776.032 provides for **absolute immunity** from prosecution upon a showing by the Defendant that he or she was acting in self-defense or defense of others. This Honorable Court went on to hold:

> "While Florida Law has long recognized that defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, **section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. Section 776.032(1) expressly grants defendant a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force." (Id.)**

Section 776.032(1) conveys absolute immunity from criminal prosecution as

opposed to an affirmative defense which is to be utilized by a defendant at trial and upon a showing of self-defense, the entitlement of a self-defense jury instruction.

Section 776.05 is an affirmative defense that is provided to law enforcement officers by virtue of the fact that the nature of their profession often requires them to put their hands on people throughout the course of their duty. [1] Section 776.05 **expands** the protections afforded to law enforcement in the amount of force they can utilize during the course of an arrest. Section 776.05 allows an officer to use **"any force"** (deadly or non-deadly) reasonably believed to defend from **"bodily harm".** Whereas section 776.012 permits the use of deadly force only when a person reasonably believes such force is necessary to **"prevent imminent death** or **great bodily harm."**

The Petitioner takes great pains to support the argument that allowing a law enforcement officer to assert immunity under section 776.032(1) would render 776.05(1) a nullity and then supports this argument by citing Caamano. However, these statutes co-exist. Courts have a duty to adopt a scheme of statutory construction which harmonizes and reconciles two statutes and to find a reasonable field of operation that will preserve the force and effect of each. Floyd v. Bentley, 496 So.2d 862, 864 (Fla. 2nd DCA 1986). The following illustrates how sections 776.05, 776.012, and 776.032 are harmonized and how all three statutes maintain

[1] Physical contact that if a civilian engaged in would be considered a battery.

their force and effect. Once a law enforcement officer is indicted or charged by information, he or she becomes a Defendant. In a criminal action, a Defendant is a person. Section 776.032 allows **a person** to avail him or herself to assert Stand Your Ground immunity. As the Trial Court, and the Fourth District Court of Appeals have previously held, "There is nothing in the term 'a person' that is unclear or unambiguous, the officer in this case was permitted to seek immunity from criminal prosecution under sections 776.012(1) and 776.032(1). State v. Peraza, 226 So.3d 937, 947 (Fla. 4th DCA 2017). The Respondent agrees with the Fourth District Court of Appeal as to why Caamano was incorrectly decided:

> The source of our disagreement with *Caamano* appears to arise from the following statement from that case: "In order to determine legislative intent, one must first look to the actual wording of the statute and give it its appropriate meaning. *Then, the doctrine of in pari material applies."* 105 So.3d at 20 (emphasis added). Respectfully, to suggest that the doctrine of in pari material applies in every case is incorrect as a matter of law. As the circuit court correctly found in this case, because sections 776.012(1)'s and 776.032(1)'s plain language is clear and unambiguous, *Caamano* "need not have gone into the doctrine of *in pari materia* at all." *See English v. State*, 191 So.3d 448, 450 (Fla. 2016) ("When statutory language is clear or unambiguous, this Court need not look behind the statute's plain language *or employ principles of statutory construction* to determine legislative intent.") (emphasis added).

The Petitioner's argument fails because sections 776.05, 776.012, and 776.032 do not cover the same subject area. The Petitioner simplifies the

significance of section 776.032 by arguing:

> " . . . the enactment of 776.032 did nothing more than grant the average citizen the right to stand his or her ground. It makes no sense to apply this statute to officers who have always had the right to stand their ground. Thus, permitting an officer, to elect an absolute immunity over qualified bypasses the statute specifically designed for this scenario, and renders section 776.05(1) meaningless."

On the contrary, 776.032 provides a Defendant with an avenue to avoid prosecution altogether by asserting an **absolute immunity from criminal prosecution**. Absolute immunity from criminal prosecution is a much different "scenario" than an affirmative defense to be asserted at trial. Section 776.05 allows a law enforcement officer to assert a more permissive standard of self defense at a jury trial and entitles law enforcement officers to a jury instruction featuring the more permissive standard of self defense.

Law enforcement officers take an oath that charges them with the task of placing themselves in mortal danger as a part of their job description. A civilian can retreat from danger or deadly force. If a law enforcement officer does so, it is considered a dereliction of duty. When a law enforcement officer is indicted or charged by information he or she becomes a defendant. In the criminal arena, a Defendant is a person. Likewise, a law enforcement officer is also a person. If the average citizen no longer has the duty to retreat and is permitted to assert immunity

then it would be counterintuitive for the legislature to not allow a law enforcement officer to do the same. For purposes of argument, assume that the facts were the same as in Peraza except the Deputies also yell "You're under arrest!" at the subject. The suspect fails to drop his weapon, turns and points his weapon at Deputies. The Deputies open fire, killing the suspect. Should Deputies be subjected to charges being filed and have to assert an affirmative defense at trial with no opportunity to argue for Stand Your Ground immunity pursuant to 776.032(1) and 776.012(1) because the argument could be made that Deputies were in the process of effectuating arrest? The level of danger the Deputies and civilians in the area face is exactly the same. The same hypothetical can be taken a step further. Assume the same facts as above, except the suspect drops the weapon and appears to comply. The Deputies approach, even get a hand on the suspect. The suspect, at the last second, whips around and attempts to grab a gun from one of the Deputies. Another Deputy opens fire killing the suspect. Should the Deputy not be permitted to avail him or herself of a defense of absolute immunity under section 776.032(1)?

In any event, section 776.05(1), 776.012(1) and 776.032(1) coexist. A law enforcement officer who is a defendant as the result of utilizing deadly force during the course of an arrest is permitted assert immunity under sections 776.012(1) and 776.032(1), have his or her motion to dismiss denied, then proceed

to trial and assert an affirmative defense under 776.05(1). It cannot be said that this course of action would render 776.05(1) a nullity. After all, civilians who use deadly force regularly assert immunity under 776.012(1) and 776.032(1), only to have their pre-trial motions denied. The civilian (defendant), then proceeds to trial where an affirmative defense of self-defense is utilized. There is no rational or legal reason to prohibit law enforcement officers from asserting the same defense if they find themselves in the same position.

The Respondent is not blind to the fact that many individuals in disadvantaged and minority communities feel they are being unfairly targeted by law enforcement. By the same token, many members of the law enforcement community feel that they are being unfairly attacked by some members of the community and the news media. These attacks often result in the very public they are tasked to protect turning against them. However, in this day and age, when troubled individuals are marching into our restaurants, schools, movie theaters, places of worship, and neighborhoods, and are opening fire indiscriminately and killing en masse, it is essential for law enforcement to not have one hand tied behind their back. Seconds, or less then seconds, can be the difference from preventing the killing of one innocent life to the slaughter of masses. A law enforcement officer should not be forced to have to imagine a scenario where they can be facing murder charges for making a decision or a split second decision to

use lethal force to defend others or themselves. This creeping doubt could lead to grave danger for both law enforcement and the public at large. Imagine a world, and the outrage that would ensue if police officers failed to act. Monday morning quarterbacking officers for acting in the face of a perceived danger is a dangerous precept. Monday morning quarterbacking officers for failure to act by not running into a school to save children from an active school shooter will not be the exception it will become the norm if our men and women sworn to protect us cannot utilize the stand your ground statute. Law enforcement officers are, 'people'. This issue is more than a matter of 'Great Public Importance.' In today's world it is a matter of 'The Greatest Public Importance.' To accept the Petitioner's interpretation of the law would allow the average citizen to assert Stand Your Ground Immunity, yet force a law enforcement officer to face a jury trial only to assert an affirmative defense. It is hard to imagine this would be the intent of the Legislature, now more than ever.

CONCLUSION

WHEREFORE, based on the foregoing, he Respondent respectfully urges this Honorable Court to affirm the Trial Court and the Fourth District Court of Appeal's holdings that the Respondent's case is distinguishable from *Caamano* and find that he is entitled to immunity pursuant to section 776.032 and 776.012 and forever discharge the Respondent of his charges. Aditionally, the Respondent respectfully requests this Honorable Court adopt the well-reasoned opinion of the Fourth District Court of Appeals. The Respondent respectfully urges this Honorable Court to hold that a law enforcement officer, while making a lawful arrest, uses deadly force which he or she reasonably believes is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony is permitted to seek immunity from criminal prosecution under sections 776.012(1) and 776.032(1), Florida Statutes (2013) more commonly known as Florida's "Stand Your Ground" law.

Respectfully submitted,
SCHWARTZREICH & ASSOCIATES
Fort Lauderdale, Florida

/s/ Eric T. Schwartzreich
Eric T. Schwartzreich
Florida Bar No. 0086452

/s/ Anthony J. Bruno
Anthony J. Bruno
Florida Bar No. 97830
Schwartzreich & Associates, P.A.
208 SE 6th Street
Ft. Lauderdale, Florida 33301
(954) 525-8000
Counsel for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Respondent's Answer Brief" has been furnished electronically on May 14, 2018 to Melanie Dale Surber at: CrimAppWPB@myfloridalegal.com.

/s/ Eric T. Schwarzreich
Eric T. Schwartzreich

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14-point Times New Roman Type.

/s/ Eric T. Schwarzreich
Eric T. Schwartzreich