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SUPREME COURT
STATE OF FLORIDA

JARED BRETHERICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO.: 13-2312
L.T. Case No.: 5D12-3840

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Rifle Association is a New York not-for-profit corporation that has more than 230,000 members in Florida. Thousands of other NRA members visit Florida each year. But the NRA represents more than its members' interests; it represents the fundamental, inalienable right of all Americans to defend themselves against violent crime without fear of unjust prosecution. That is why the NRA was deeply involved in advocating for the legislation that enacted the statutory provisions at issue in this case. Since the enactment of these provisions in Florida, the NRA has also advocated for similar legislation in other states. Just as the concurrence below relied on decisions in some of those states, sister states' courts may rely on this Court's decision. Accordingly, the NRA has a strong interest in ensuring that this Court's decision provides the strongest possible protection for self-defense rights under Florida law, and the best possible guidance for other courts.

SUMMARY OF ARGUMENT

This case is about whether a person who raises a facially valid claim of self-defense should have the burden of proving immunity from prosecution at a pretrial hearing, or whether the state should have to show that unlawful force was used, as it would have to prove at trial.

The statutory provision to be implemented specifies that a person lawfully using defensive force "is immune from criminal prosecution." § 776.032(1), Fla. Stat. That language, read in the context of the statute as a whole and its accompanying "whereas clauses," was chosen by the Legislature to express a strong public policy in favor of self-defense by law-abiding people in Florida. Forcing crime victims to prove their entitlement to immunity is inconsistent with that policy.

Recent and well-founded opinions interpreting virtually identical language in other states further support placing the burden of proof on the state to overcome claims of immunity based on self-defense. While some states' courts have taken a contrary view—putting the burden of proof on victims—those decisions have been based on factors that are not present in Florida, and in some cases have been based on inapt analogies even under those states' own laws.

In light of the language and intent of the statute, and the weight of opinion in other states, this Court should find that the burden of proof at a pretrial hearing is on the state.

ARGUMENT

I. The language and legislative history of section 776.032 require the state to bear the burden of proof at a pretrial immunity hearing.

This case turns on the proper method of applying one provision of Florida's "Stand Your Ground" law. *See* § 776.032, Fla. Stat., *enacted by* Ch. 2005-27, Laws of Fla. Sponsors of the law clearly expressed the Legislature's purpose of supporting the right to self-defense for those not engaged in violent crime. "If law-abiding citizens are able to protect themselves and have government stand behind them, you will have less violent crime," said House sponsor Rep. Dennis Baxley. David Royse, *Bush signs bill allowing meeting of "force with force,"* Associated Press, April 26, 2005. Supporters outside the Legislature agreed. "The measure was the NRA's top priority" in Florida, for reasons explained by the NRA's past president and longtime Florida lobbyist Marion Hammer after it was signed: "Now, the law and their government is on the side of law-abiding people and victims, rather than on the side of criminals." *Id*.

At the time of the appellant's pretrial hearing, the specific provision at issue stated, in relevant part:

> A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force *and is immune from criminal prosecution* and civil action for the use of such force …. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

§ 776.032(1), Fla. Stat. (emphasis added). Recent amendments to the provision show the Legislature's continuing desire to strengthen protection for crime victims, by extending the immunity clause to protect threatened use of force in addition to actual use. *See* H.B. 89, 2014 Leg., Reg. Sess. (Fla. 2014) (enacted June 20, 2014).

"Immune" is a strong word, deliberately chosen by the Legislature to provide strong protection. Statutory language should be given its plain and ordinary meaning, which can be ascertained through dictionaries. *Green v. State*, 604 So.2d 471 (Fla. 1992). One who is "immune" is "exempt from a duty or liability," *Black's Law Dictionary* 765 (8th ed. 2004), "secure against" an adverse condition, or "exempt from obligation, penalty, etc." *American Heritage Dictionary of the English Language* (4th ed. 2000). Further, the provision says that a person using force "*is* immune"—not "may be immune" or "shall have the opportunity to show he or she is immune." Given that strong language and the sponsors' stated intent to put the law on the side of those defending themselves, the state should bear the burden of showing that a person claiming lawful use of defensive force is not "exempt" or "secure against" prosecution.

Since every statute should be read as a consistent whole, with full effect given to all its parts, *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008), the Legislature's choice to define "criminal prosecution" to include "arresting,

detaining in custody, and charging or prosecuting the defendant," *see* § 776.032(1), Fla. Stat., further supports placing the burden of proof on the state. As Judge Schumann noted below, "[p]lacing the burden of proof on the State at the pretrial hearing on a motion to dismiss based on self-defense immunity gives meaning to the grant of immunity at the earliest stages of criminal proceedings[.]" *Bretherick v. State*, 135 So. 3d 337, 344 (Fla. 5th DCA 2013) (Schumann, J., concurring). If a person lawfully using defensive force is supposed to be "immune" even from arrest, forcing that person to prove his entitlement to immunity—with all the trouble and expense that entails—is at odds with the intent of the statute.[1]

The language of section 776.032(1) should therefore be clear enough on its own to express the intention of the Legislature. However, if "the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent." *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000). Language in an act's preamble, such as "whereas" clauses, may express legislative purpose. *See State v. Cotton*, 769 So. 345, 355 (Fla. 2000) ("Whereas" clauses in act show the "behavior which the legislatures were

[1] The statute does allow a law enforcement agency to arrest a person for using force based on "probable cause that the force that was used was unlawful." § 776.032(2), Fla. Stat. That allowance recognizes that not all uses of force are lawful, but only emphasizes the Legislature's intent to keep the burden on the state at every stage of a case. In essence, the state has an affirmative duty to rule out any colorable claim of self-defense.

endeavoring to curtail"); *State v. Jones*, 625 So. 2d 821, 823 (Fla. 1993) ("whereas clauses" help "delineate[] the premise upon which [an act] is based").

In this case, a "whereas" clause shows that the Legislature favored eliminating burdens on defenders, or reducing them to the greatest possible extent. The first "whereas" clause in the act stated the Legislature's finding "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." Ch. 2005-27, Laws of Fla. (emphasis added).[2] As noted by this Court in *Dennis*, the First District Court of Appeal has pointed to this preamble language as showing that the Legislature "'intended to establish a true immunity and not merely an affirmative defense.'" *Dennis v. State*, 51 So. 3d 456, 459 (Fla. 2010), *quoting Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008). The First District nonetheless held that the burden of proof at an immunity hearing should be on the person claiming self-defense—a conclusion based on the court's erroneous reliance on procedures under Colorado's dissimilar law. *Peterson*, 983 So. 2d at 29; *see also* pp. 12-15,

[2] Similar language appeared in every version of the bill throughout its consideration by the Legislature. *See* S.B. 436, 2005 Leg., Reg. Sess. (Fla. 2005), Original Filed Version, Committee Substitute 1, *and* Committee Substitute 2, *available at* http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=15498 (last viewed June 16, 2014); H.B. 249, 2005 Leg., Reg. Sess. (Fla. 2005), Original Filed Version, Committee Substitute 1, *and* Committee Substitute 2, *available at* http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=15738& (last viewed June 16, 2014).

infra. If the Legislature intended to leave "law-abiding people" free of "fear of prosecution," it could not have intended, in the same act, to upend the presumption of innocence and force crime victims to prove their entitlement not to be prosecuted.

Beyond the operative language of an act and its preamble, "this Court has on numerous occasions looked to legislative history and staff analysis to discern legislative intent." *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 369 (Fla. 2005).

The bill that enacted section 776.032 was first considered by the Senate Criminal Justice Committee, where a staff analysis noted that the language in subsection 776.032(1) "provides immunity from prosecution and civil action in cases where it is found by the court that the defendant's actions constituted justifiable use of force." Criminal Justice Committee, Senate Staff Analysis and Economic Impact Statement, SB 436 (Jan. 24, 2005) at 7. However, that analysis also suggested that the burden of proof was an open question. *Id*. at 9.

The Judiciary Committee was less equivocal, noting that the Criminal Justice committee substitute language providing criminal and civil immunity "in effect, appears to create a conclusive presumption of the intruder's malicious intent." Judiciary Committee, Senate Staff Analysis and Economic Impact Statement, SB 436 (Feb. 22, 2005) at 6-7. The reference to an "intruder" may

appear to erroneously limit the analysis to the presumption of reasonable fear in cases of home or vehicle, which was enacted as another part of the statute. *See* § 776.013, Fla. Stat. But read in full context, the cited passage of the staff analysis clearly refers to section 776.032. In any event, the two provisions are closely linked. As one scholar put it, the immunity provision "would appear to be simply another way of stating the substantive presumption" in favor of persons who use force in self-defense. Renee Lerner, *The Worldwide Popular Revolt Against Proportionality in Self–Defense Law*, 2 J.L. Econ. & Pol'y 331, 342 (2006).

II. Decisions of other states' courts support placing the burden of proof on the state.

Both this Court in *Dennis* and Judge Schumann, concurring in the decision below, took note of decisions in the courts of other states. *See Dennis*, 51 So. 3d at 459-60; *Bretherick*, 135 So. 3d at 342-44. Just as such consideration is appropriate when Florida "adopts a statute from another state," *Flammer v. Patton*, 245 So. 2d 854 (Fla. 1971), it should also be appropriate when another state adopts a Florida statute and happens to have the occasion to interpret it first. That is exactly what has happened in the development of self-defense immunity law. The sounder

decisions applying closely comparable statutes have reached the correct result, placing the burden on the state to negate a defender's claim of immunity.[3]

A. Two states with similar laws have properly placed the burden on the state.

As Judge Schumann noted below, "two other states with self-defense immunity laws which duplicated Florida's statute have determined that the burden of proof should lie with the State in a pretrial evidentiary hearing." *Bretherick*, 135 So. 3d at 342.

In its 2009 decision in *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), the Kentucky Supreme Court considered a provision that is identical (except

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[3] A few other states have similar statutes, but no reported decisions by state courts address their implementation. *See* Ala. Code § 13A-3-23(d); N.C. Gen. Stat. Ann. § 14-51.2(e) (defense of homes, workplaces and motor vehicles); N.C. Gen. Stat. Ann. § 14-51.3(b) (defense of persons); 21 Okla. Stat. Ann. § 1289.25(F).

In a *habeas corpus* case applying the Oklahoma law, a federal magistrate judge simply followed the reasoning of *Peterson* and *Guenther*, *infra* at 12-15. *See Parker v. Rudek*, 2010 WL 5661429 (W.D. Okla. 2010), *report and recommendation adopted*, 2011 WL 308369 (W.D. Okla. 2011). The ruling did not address the Kentucky Supreme Court's decision in *Rodgers v. Commonwealth*, *infra* at 9-11, and was issued before the Kansas Supreme Court's decision in *State v. Ultreras*, *infra* at 11-12. It should therefore be given no weight by this Court.

Additional states have statutes that promise immunity for defenders, but by statute or court decision allow the issue to be raised only at trial. *See, e.g.*, Ind. Code § 35-41-3-2(c); Wash. Rev. Code § 9A.16.110. Those laws are so unlike Florida's that they do not need to be considered here, given Florida's use of a pretrial hearing process.

for cross-references and a few purely stylistic differences) to Florida's section 776.032, and that was enacted one year later. *See* Ky. Rev. Stat Ann. § 503.085. The court noted that the legislation was part of "a trend urged by the National Rifle Association." *Rodgers*, 285 S.W.3d at 749-50.

The Kentucky court concluded that "immunity is designed to relieve a defendant from the burdens of litigation," and that a person who claims self-defense should therefore be able to invoke immunity "at the earliest stage of the proceeding." *Id*. at 755. The court did not fully state its reasoning for putting the burden of proof on the state. But in the context of the opinion, that choice appears to have resulted either from the court's concern about relieving the defender's burdens, or from the court's choice of a "probable cause" standard for deciding the question of immunity—a standard that usually results in a burden borne by the state.[4] A closely analogous Florida situation would be a challenge to a warrantless search, in which the accused must establish merely that a search occurred without a warrant, at which point the state bears the burden of proving that an exception to

[4] The NRA believes the Kentucky court erred in setting the bar that low, and agrees with the appellant that it would be more appropriate to require the state to disprove immunity beyond a reasonable doubt. *See* Appellant's Br. at 23-25. Certainly this Court was right in rejecting a probable cause standard. *See Dennis*, 51 So. 3d at 463. The Kentucky court also rejected holding evidentiary hearings on immunity claims—another issue fully resolved to the contrary in *Dennis*. *See Rodgers*, 285 S.W.3d at 755; *Dennis*, 51 So. 3d. at 462-63. But those issues have not been raised in this case, and are outside the scope of the certified question. *See Chester v. Doig*, 842 So. 2d 106, 109 n.4 (Fla. 2003).

the warrant requirement applies. *See, e.g.*, *Morales v. State*, 407 So. 2d 321, 325 (Fla. 3d DCA 1981). Applying that process by analogy would produce the correct result in this case: Once a person raises a *prima facie* claim of self-defense, the state should have the burden of proof to avoid dismissal before trial.

Likewise, Kansas has enacted a statute that is virtually identical in its grant of immunity to those who defend themselves from crime. *See* Kan. Stat. Ann. § 21-3219(a) (2007), *recodified at* Kan. Stat. Ann. § 21-5231 (2010).[5] As in Kentucky, the Kansas Supreme Court has read the statute as placing the burden of proof on the prosecution. *State v. Ultreras*, 295 P.3d 1020, 1031 (Kan. 2013).

The Kansas court's reasoning was straightforward. Forcing a person to prove his or her right to immunity would be "contrary to the language" of the provisions requiring law enforcement agencies and prosecutors to have probable cause for arrest or prosecution. *Id.* at 1031. Putting the burden on the defendant in a pretrial hearing would also be inconsistent with the state's burden at trial. *Id.*[6] Exactly the same is true of the Florida statute. Crime victims in Florida should not

[5] Further references will be to the version of the statute interpreted by the Kansas Supreme Court and cited in the decision below.

[6] The Kansas Supreme Court also adopted a "probable cause" standard, which again is not at issue in this case. *See* note 4, *supra*. Unlike Florida, Kansas expressly allows commencement of prosecution "upon a determination of probable cause." Kan. Stat. Ann. § 21-3219(c); *see also Ultreras*, 295 P.3d at 1026-27, 1030-31. Florida only refers to probable cause as the standard for arrest. *See* § 776.032(2), Fla. Stat.

be put on a rollercoaster, forced alternately to defend against the state's case and attack it.

B. States that have placed the pretrial burden of proof on the person claiming self-defense have done so erroneously, or for reasons that are not applicable in Florida.

This Court's brief discussion of the burden of proof in *Dennis* relied entirely on the Colorado Supreme Court's decision in *People v. Guenther*, 740 P.2d 971 (Colo. 1987). But as noted in the lower court in this case, "[t]he Colorado statute applies only to home invasion burglaries and does not define immunity from criminal prosecution as beginning at arrest"; it therefore provides "a far more limited immunity than is granted by section 776.032." *Bretherick*, 135 So. 3d at 342, (Schumann, J., concurring). And even a harsh critic of Florida's law argues that *Guenther*'s reasoning as to the burden of proof should not apply in Florida (at least in home invasion cases) because the Florida Legislature—unlike Colorado's—created a conclusive presumption that the defender's fear is reasonable. Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder,"* 34 Am. J. Trial Advoc. 105, 126 (2010).

Furthermore, *Guenther*'s reasoning was supported in part by the placement of the burden of proof on the defendant in motions to dismiss for lack of a speedy trial. *Guenther*, 740 P.2d at 980. But a defendant seeking a speedy trial is claiming entitlement to trial, not immunity from it—and is therefore in nearly the opposite of the situation addressed by section 776.032(1).[7] To put it another way, the defendant in a speedy trial case bears the burden because he is trying to force the government to act; a person claiming self-defense under section 776.032(1) is trying to prevent the government from acting, and the burden should be on the government to overcome the presumption of innocence.

The *Guenther* court also noted the defendant's burden in certain limited aspects of suppression motions. *Id*. But the decisions cited indicate that one of the key issues—the defendant's burden to show that his own rights were violated—relates to standing to litigate, rather than the merits of the matter. *See People v. Suttles*, 685 P.2d 183, 189 (Colo. 1984), *citing Rakas v. Illinois*, 439 U.S. 128 (1978). And the burden of proof on other issues may be shifting and uncertain. *People v. Dailey*, 639 P.2d 1068, 1076 n.9 (Colo. 1982) ("refinements in the application of this burden of proof remain to be developed").

[7] In speedy trial cases, Colorado only places the burden on defendants based on a general principle (adopted from other states) that a moving party bears the burden of proof. *See State v. Beckwith*, 57 N.E. 2d 193, 198 (Ind. 1944), *cited in Jordan v. People*, 393 P.2d 745, 748 (Colo. 1964). That principle should not apply under Florida's policy of "true immunity" expressed in section 776.032(1).

The *Guenther* court further noted the defendant's burden of proof in motions for post-conviction relief. 740 P.2d at 980. That burden is in no way comparable to the situation of a person claiming immunity under section 776.032(1). A person seeking post-conviction relief is far past the point of claiming immunity, and placing the burden on such a person is the practice in Florida as well, consistent with a public policy favoring finality of convictions. Fla. R. Crim. P. 3.850(f)(8); *Rowe v. Scheiber*, 725 So.2d 1245, 1249 (Fla. 1999).

Finally, the Colorado Supreme Court suggested that the person claiming self-defense has superior knowledge about the facts that support his or her claim. *Id*. That may or may not be so. A defendant would certainly have superior knowledge of his own state of mind, but lacks the investigative resources of the state. For example, a defendant in Florida may have reviewed witness statements provided by the prosecution, Fla. R. Crim. P. 3.220(b)(1)(B), but may not have been able to interview those witnesses personally. A defendant may also know "whether" the state has any information from confidential informants, but not the substance of that information. Fla. R. Crim. P. 3.220(b)(1)(G). Given the state's likely superior factual knowledge overall, it is proper to place the burden on the state.

The Georgia Supreme Court relied in part on *Guenther*'s flawed reasoning (as well as on the First District Court of Appeal's decision in *Peterson*) when it

held that a person raising a claim of immunity for self-defense must bear the burden of proof by a preponderance of evidence at a pretrial hearing. *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008). However, as in *Guenther*, the court was reviewing a statute that lacks section 776.032's broad definition of "criminal prosecution," and which (at the time the case arose) only provided immunity in cases of defense of habitation or property. *See* Ga. Code Ann. § 16-3-24.2 (1999).[8]

The Georgia Supreme Court also reasoned that "[a] similar burden is required of defendants who wish to avoid trial and guilt by showing that they are insane or mentally incompetent." *Bunn*, 667 S.E.2d at 608. But that comparison is inappropriate. A Georgia defendant claiming incompetence to stand trial rightly bears the burden of proof, because "[e]very person is presumed to be of sound mind and discretion but the presumption may be rebutted." Ga. Code Ann. § 16-2-3. Similarly in Florida, everyone accused of a crime is presumed competent to stand trial or enter a plea, and bears the burden of showing otherwise. *See Flowers v. State*, 353 So. 2d 1259, 1260 (Fla. 1978), *citing Child v. Wainwright*, 148 So. 2d 526, 527 (Fla. 1963). The comparison to the insanity defense was especially inappropriate—even in Georgia—because insanity is an affirmative defense to be proved at trial, not a matter for a pretrial hearing. *See Foster v. State*, 656 S.E.2d

[8] By the time the pretrial hearing in *Bunn* was held, the statute had been amended to provide immunity for use of force in defense of self or others. *See* 2006 Ga. Laws Act 599; *Bunn*, 667 S.E.2d at 607. The *Bunn* court did not specify which version of the statute it was interpreting.

838, 840 (Ga. 2008). Likewise in Florida, "[a]ll persons are presumed to be sane," and the burden of proving insanity as an affirmative defense is expressly placed on the defendant by statute. § 775.027, Fla. Stat. As a matter of public policy, Florida clearly does not favor claims of insanity or mental incompetence, but strongly favors lawful defense by sane, competent, law-abiding people.

Finally, the Supreme Court of South Carolina has also placed the burden of proof on persons claiming self-defense. *State v. Duncan*, 709 S.E.2d 662 (S.C. 2011). However, that court's brief reasoning was entirely based on this Court's language in *Dennis* approving the First District's decision in *Peterson*. *Id*. Since the issue of relative burdens was not squarely briefed or fully addressed in *Dennis*, any reliance on *Duncan* by this Court would be circular.

CONCLUSION

For all of these reasons, the NRA respectfully asks this Court to properly carry out the Legislature's intent to provide the strongest possible protection for crime victims, by finding that the state should bear the burden of disproving a defendant's entitlement to self-defense immunity at a pretrial hearing.

Dated this 23rd day of June, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this brief was written in Times New Roman 14-point type, in compliance with Fla. R. App. P. 9.210(a)(2).

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