The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL:	CS/CS/SB 344
INTRODUCER:	Rules Committee; Criminal Justice Committee; and Senators Bradley, Dean, and others
SUBJECT:	Justifiable Use or Threatened Use of Defensive Force
DATE:	December 7, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	Clodfelter	Sadberry	ACJ	**Recommend: Favorable**
3.	Cellon	Phelps	RC	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 344 shifts the burden of proof from the defendant to the prosecution in justifiable use of force pre-trial immunity hearings.

These new statutory procedures allocate the clear and convincing evidence evidentiary standard to the prosecution to overcome a defendant's claim of immunity from criminal prosecution.

The bill deletes the term "attacked" from s. 776.013(3), F.S., the home protection statute.

The bill includes new language in s. 776.013(3), F.S., that requires a person who is in his or her dwelling, residence, or vehicle have a reasonable belief that the use or threat of force, nondeadly or deadly, is necessary to prevent imminent death or great bodily harm or the commission of a forcible felony. This requirement appears to be applicable in situations other than those where the presumptions[1] found in s. 776.013(1) and (2), F.S., would apply.

The bill deletes the requirement that a person who is attacked in his or her dwelling, residence, or vehicle use or threaten to use force "in accordance with s. 776.012(1) or (2), F.S. or s. 776.031 (1) or (2), F.S." A strict reading of s. 776.013(3), F.S. (2014), would have the defender who is

[1] See pg. 9-10 of the Present Situation section.

attacked in his or her dwelling, residence, or vehicle *not be engaged in criminal activity*[2] at the time deadly defensive force is threatened or used. Deleting the cross-references appears to have the practical effect of eliminating that the defender not be engaged in criminal activity when using or threatening defensive force under s. 776.013(3), F.S.

The bill is effective upon becoming law.

II. Present Situation:

In 2005 the Justifiable Use of Force statutes (Self-Defense), were revised to expand a person's ability to lawfully defend himself, herself, or others, property, and the home.[3]

The 2005 changes in ch. 776, F.S., also created a new right to immunity from criminal prosecution or civil action.[4] Essentially the expanded self-defense statutes were no longer limited to application at the trial stage but also applied at the earliest stages of a criminal case. Under the 2005 revisions, if the facts of a case showed that a defendant used force *as permitted in the newly-expanded use of force statutes*, the defendant was immune from criminal prosecution or civil action related to that use of force.

Immunity from prosecution is different than the defense of justifiable use of force. Essentially, *immunity absolves* a person from criminal liability and the person has no risk of being convicted of the crime for which immunity has been granted.

In contrast, a defendant who is not immune from prosecution and who is presenting the affirmative defense of justifiable use of force is at risk of conviction. The *defense* of justifiable use of force requires some evidentiary showing to the judge or jury that criminal actions are justifiable and therefore excusable under the law.

The immunity law states:

> 776.032 Immunity from criminal prosecution and civil action for justifiable use or threatened use of force.—
> (1) A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened….As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

[2] See ss. 776.012(2) and 776.031(2), F.S. (2014), which provide that a person may use *deadly* force to prevent imminent death or great bodily harm, or the imminent commission of a forcible felony, *if* the person (defender) is *not engaged in a criminal activity* and is a place where he or she has a right to be.
[3] 2005-27, *L.O.F.* The statutory revisions came to be called the "Stand Your Ground" law because the common law duty to retreat applicable in places other than the home was abrogated whereby a person no longer had any duty to retreat, unless the person was in a place where he or she was not lawfully entitled to be.
[4] Section 776.032, F.S.; s. 4, ch. 2005-27, L.O.F.

> (2) A law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force that was used or threatened was unlawful.
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

Application of the Immunity Statute

Although s. 776.032, F.S., created immunity from criminal prosecution where a person justifiably uses force, it did not provide any *method* by which the immunity could be conferred. Therefore, it became the responsibility of the courts to craft a way to grant immunity from prosecution in cases where a defendant claims entitlement to immunity under s. 776.032, F.S.

Pretrial Evidentiary Hearing on Defendant's Motion to Dismiss the Case Where Defendant has the Burden of Proof

After many years of litigation the courts developed the following procedure for granting immunity in self-defense cases.

During the pretrial process the defendant may file a Motion to Dismiss[5] asking the court to dismiss the case against him or herself because the immunity statute applies to his or her actions. The courts have settled on the more general type of Motion to Dismiss,[6] rejecting the Rule 3.190(c)(4), FL R Cr.P, type of motion described in note 2 below. The trial court is required to conduct an evidentiary hearing on the motion to decide the facts as they relate to immunity.

> [T]reating motions to dismiss pursuant to section 776.032 in the same manner as rule 3.190(c)(4) motions would not provide criminal defendants the opportunity to establish immunity and avoid trial that was contemplated by the Legislature. … We conclude that where a criminal defendant files a motion to dismiss pursuant to section 776.032, the trial court should decide the factual question of the applicability of the statutory immunity.[7]

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[5] The motion must be sworn to by the moving party. The Florida Rules of Criminal Procedure provide two principal ways of approaching the Motion to Dismiss in a self-defense situation.

- Under Rule 3.190(c)(4) the motion can allege that there are no materially disputed facts and that the undisputed facts do not establish a prima facie case of guilt against the defendant. The court is not supposed to decide issues of fact that may exist in a "(c)(4)" motion as the facts should not be materially disputed. (Note: If the State specifically alleges that the material facts are in dispute or that the facts refute the defendant's claim, the motion to dismiss must be denied. *Dennis v. State*, 51 So.3d 456 (Fla. 2010) citing *State v. Kalogeropolous,* 758 So.2d 110, 112 (Fla.2000).)
- Rule 3.190(b) provides for the more general type of Motion to Dismiss.

[6] Rule 3.190(b), FL R Cr. P.

[7] *Dennis v. State*, 51 So.3d 456 (Fla. 2010). See also Defendant's Memorandum on Burden of Proof in *State v. Yaqubie*, 2009 WL 6866287 (Case No. F08-18175, Fla. 11th Jud.Cir., April 29, 2009).

In *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008), a case that early-on established the trial court procedures for immunity hearings and that was adopted in three of the other four district courts of appeal, the First District Court determined 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. As noted by the trial court, courts have imposed a similar burden for motions challenging the voluntariness of a confession. *See, e.g., McDole v. State*, 283 So.2d 553, 554 (Fla.1973). We reject any suggestion that the procedure established by rule 3.190(c) should control so as to require denial of a motion whenever a material issue of fact appears.

The case of *Bretherick v. State*, 170 So.3d 766 (Fla. 2015), finally and squarely addressed the issue of the burden of proof in the pretrial evidentiary hearing. In the *Bretherick* case, the court rejected the position that the State must disprove entitlement to immunity beyond a reasonable doubt at the pretrial evidentiary hearing. The court approved the *Peterson* court's view that the defendant should bear the burden of proof by a preponderance of the evidence.[8]

Justifiable Use of Force as an Affirmative Defense – Procedure; Applicable Burdens of Proof at Trial

Trial Procedure

A criminal defendant can raise and argue the issue of self-defense as an affirmative defense[9] to the criminal charges to which such a defense is applicable at a number of points during the criminal process. However, the defense is generally raised during the trial.

If the defendant raises an affirmative defense at trial there must be *some proof presented* upon which the jury can lawfully base a decision on the verdict in the matter. This evidence may come from sources other than the defendant, such as other witnesses or physical evidence.

Because the prosecution has the burden of proof as to guilt, the State presents its evidence first. After the prosecution has presented its case in chief to the jury, the defendant typically moves the court to grant a Judgment of Acquittal finding that the evidence is not sufficient to require any further proceedings such as the defense presenting evidence.

At the point in the proceedings where all of the evidence has been presented, including any evidence offered by the defendant and any rebuttal evidence offered by the prosecution, the

[8] The court reasoned that s. 776.032, F.S., although an immunity provision, is not a blanket immunity, but "rather requires the establishment that the use of force was legally justified." *Bretherick v. State*, 170 So.3d 766 (Fla. 2015). ("A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000)).

[9] The affirmative defense of justifiable use of force is generally raised by a defendant when there are facts showing that the victim was killed or injured by the criminal act of the defendant *but* the defendant's act was factually and legally justifiable and therefore the defendant is not criminally liable.

defendant typically argues the weaknesses in the prosecution's case and the strength of the self-defense evidence to the court, again asking to have the case dismissed with a Judgment of Acquittal.

Standards of Proof at Trial

The standard of proof that must be met in order for the court to grant the defendant a Judgment of Acquittal at trial requires the defendant to present a prima facie case of self-defense that is not sufficiently rebutted by the prosecution.[10]

> We recognize that the question of whether a defendant committed a homicide in justifiable self-defense is ordinarily one for the jury. However, when the State's evidence is legally insufficient to rebut the defendant's testimony establishing self-defense, the court must grant a motion for judgment of acquittal.[11]

It is important to remember that the burden of proof with regard to the question of the defendant's guilt *never leaves the prosecution*. The burden of proof requires that a defendant's guilt be proven beyond a reasonable doubt.

> While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt.[12]

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[10] The term prima facie evidence is usually used to describe whether the proponent, having the duty to produce evidence, has fulfilled the duty and there is sufficient evidence so that the jury will be allowed to consider the fact or issue. See IX Wigmore, Evidence § 2494 (1940 ed.). See *State v. Rygwelski*, 899 So. 2d 498 (Fla. 2d DCA 2005) (collecting Florida decisions which hold that a statute which provides that certain evidence is prima facie evidence of another fact creates a permissible inference).

[11] *Fowler v. State*, 921 So.2d 708 (Fla. 4th DCA 2008), citing *State v. Rivera*, 719 So.2d 335, 337 (Fla. 5th DCA 1998); *Sneed v. State*, 580 So.2d 169, 170 (Fla. 4th DCA 1991); and *Hernandez Ramos*, 496 So.2d at 838 (Fla. 2d DCA 1986).

[12] *Brown v. State*, 454 So.2d 596, 598 (Fla. 5th DCA 1984), *superseded by statute on other grounds, Thomas v. State, 918 So.2d 327 (Fla. 1st DCA 2005).*
(For a full explanation of what constitutes "reasonable doubt," see Fla. Standard Crim. Jury Instr. 3.7, which is read to the jury at the close of a criminal trial. The instruction states:

> The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the defendant's presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed and the defendant is the person who committed the crime.
>
> The defendant is not required to present evidence or prove anything.
>
> Whenever the words "reasonable doubt" are used you must consider the following: A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which

Other States

Although other states have justifiable use of force immunity statutes, in deciding the *Bretherick* case, the Florida Supreme Court focused on five states:

Colorado

Colorado appears to be the first state to pass a law providing for immunity in certain cases of self-defense.

In the 1987 case of *People v. Guenther*, 740 P.2d 971 (Colo. 1987), the Colorado Supreme Court found that the immunity statute does not prohibit a district attorney from initiating a criminal prosecution and therefore does not violate Colorado's separation of powers provision in the constitution.[13]

The court also decided that the *burden of proof* at the pretrial immunity hearing should be *upon the defendant*, who is seeking the benefit of the statute, and that he or she should establish by a *preponderance of the evidence* that the statute applies to the facts of the case.[14]

South Carolina

The South Carolina courts implemented the statutory immunity provision[15] in reliance on the reasoning in the Florida *Dennis* and *Peterson* cases.[16] The South Carolina "Protection of Persons and Property Act" is virtually identical to the Florida statutes.[17]

Georgia

The Georgia statutes related to self-defense are also virtually identical to the Florida statutes.

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is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.)

[13] *Id*. at 977. It should be noted that Colorado's statute differs from Florida's in that the Colorado law does not impose a probable cause standard for arresting the defendant (probable cause is the standard for arrest in *any* case), as the Florida statute does. Compare C.R.S.A. 18-1-704.5 with s. 776.032, F.S.

[14] *Id*. at 980-981. Note that the *Peterson* court relied heavily on the Colorado court's reasoning in *Guenther*. *Peterson v. State*, 983 So.2d 27, (Fla. 1st DCA 2008). See also *Dennis v. State*, 51 So.3d 456 (Fla. 2010) which approved *Peterson*.

[15] Code 1976 § 16-11-450, SC ST § 16-11-450.

[16] "[W]e hold that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a *preponderance of the evidence*." *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011).

[17] 2006 Act No. 379, effective June 9, 2006.

The Georgia Supreme Court observed that: "As a potential bar to criminal proceedings which must be determined prior to a trial, immunity represents a far greater right than any encompassed by an affirmative defense, which may be asserted during trial but cannot stop a trial altogether."[18] The Court decided that: "[T]o avoid trial, a *defendant bears the burden* of showing that he is entitled to immunity… by a *preponderance of the evidence*."[19]

Kentucky

The immunity provision in Kentucky's law is substantially the same as the Florida law.

In *Rodgers v. Commonwealth*, the Kentucky Supreme Court distinguished the immunity statute as being procedural, not substantive.[20] This issue has not been addressed in Florida as it relates to s. 776.032, F.S.

The *Rodgers* court arrived at a different conclusion than Florida, Colorado, South Carolina, or Georgia courts implementing very similar statutes.

Kentucky law differs from the Florida law in that the Kentucky application has *no evidentiary hearing* in matters of immunity, the *burden of proof is on the prosecution*, and the standard of proof is *probable cause* which may be reached by the admission of evidence in the form of witness statements, law enforcement reports, photos, and other documentation.[21]

Kansas

The Kansas immunity statute was interpreted and implemented to *require the State to negate a claim of immunity* by the *probable cause* standard or proof.[22]

The Florida statute is nearly identical to the Kansas law in that both statutes contain substantially the same phrases:

- "'[C]riminal prosecution' includes arrest, detention in custody and charging or prosecution of the defendant"; and
- A law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force that was used …was unlawful.[23]

However, the Kansas statute contains the following phrase which does *not* appear in the Florida immunity statute:

- A prosecutor may commence a criminal prosecution upon a determination of probable cause.[24]

[18] *Bunn v. State*, 284 Ga. 410, 667 S.E.2d 605 (Ga. 2008).
[19] *Id*. at 608.
[20] *Rodgers v. Commonwealth,* 285 S.W.3d 740 (Ky. 2009).
[21] "Probable cause" means a reasonable ground of suspicion supported by circumstances strong enough to warrant a cautious person to believe that the named suspect is guilty of the charged offense. *Gould v. State*, App. 2 Dist., 974 So.2d 441 (2007).
[22] K.S.A. 21-5231; *State v. Ultreras*, 296 Kan. 828, 295 P.3d 1020 (Kan. 2013).
[23] K.S.A. 21-5231; s. 776.032, F.S.
[24] Compare K.S.A. 21-5231(c) with s. 776.032, F.S.

From this statutory language, the *Ultreras* court inferred that because the only burden and standard of proof mentioned in the Kansas statute rested with the prosecution, the prosecution should bear the burden of showing that the force used by the defendant was not justified *"as part of the probable cause determination"* already required for the issuance of an arrest warrant or summons under Kansas criminal procedures.[25]

In *State v. Hardy*, 51 Kan.App.2d 296, 347 P.3d 222 (Kan.App. 2015) the court determined that the immunity claim should be decided at the time of the Kansas system's "preliminary hearing" and that the hearing should be evidentiary in nature.[26]

Role of State Attorney (Prosecutor) in the Criminal Justice System

In Florida the prosecuting attorney makes case filing decisions – whether to file or not, and what charges to file – based upon the prosecutor's assessment of the evidence known to him or her as it relates to the likelihood of meeting the beyond a reasonable doubt standard of proof.[27] These decisions are discretionary but the elected state attorney is answerable for them.[28]

Case evidence generally comes to the state attorney in the form of sworn law enforcement reports, witness statements, and forensic evidence. Sometimes the suspect or suspects, if they are located by law enforcement, may make a statement. A suspect has the right not to incriminate him or herself, therefore the state attorney may never know the suspect or defendant's "side of the story."

The Castle Doctrine, Justifiable Use of Force (Self-Defense), and Statutory Changes

Castle Doctrine

The essential policy behind the castle doctrine is that a person in his or her home or "castle" has satisfied his or her duty to retreat "to the wall."[29] In *Weiand v. State*, the policy for the doctrine was explained as follows:

> It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale: In case a man "is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo [self-defense], for he hath the protection of his house to

[25] *State v. Ultreras*, 296 Kan. 828, at 844-845; 295 P.3d 1020 (Kan.2013).
[26] *State v. Hardy*, 51 Kan.App.2d 296, 303; 347 P.3d 222 (Kan.App. 2015). The preliminary hearing seems analogous to Florida's first appearance hearing at which the court determines whether probable cause supports the defendant's arrest and any terms of release of the defendant from custody.
[27] For a comprehensive explanation of this process, see Lawson, "A Fresh Cut in an Old Wound – A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, The Prosecutors' Discretion, and the Stand Your Ground Law," 23 U.Fla.J.L.&Pub.Pol'y 271 (2012). The article suggests that beyond the legal issues in any given case, there are other factors that may be taken into account in filing decisions.
[28] "In each judicial circuit a state attorney shall be elected for a term of four years." Article V, Section 17, Florida Constitution.
[29] *State v. James*, 867 So. 2d 414 (Fla. 3d DCA 2003).

> excuse him from flying, as that would be to give up the protection of his house to his adversary by flight." *Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home .... The rule is the same whether the attack proceeds from some other occupant or from an intruder.*[30]

The castle doctrine is an exception to the common law duty to retreat before using deadly force reasonably believed necessary to prevent imminent death or great bodily harm. When a person is in his or her "castle," the person has no duty to retreat before using deadly force against an intruder. A person's castle is limited to his or her home and workplace.[31]

The castle doctrine is defined as:

> the proposition that a person's dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection, and even deadly force if there exist reasonable and factual grounds to believe that unless so used, a felony would be committed.[32]

The jury instruction designed to be read to juries in home-defense cases before the 2005 statutory expansion of the justifiable use of force, stated:

> If the defendant was attacked in [his] [her] own home or on [his] [her] own premises, [he] [she] had no duty to retreat and had the lawful right to stand [his] [her] ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent:
> [death or great bodily harm to [himself] [herself] [another].
> [the commission of a forcible felony].[33]

The castle-doctrine exception to the duty to retreat only applies to those "lawfully residing in the premises."[34] Visitors or invitees of a resident must attempt to retreat before using deadly force against an intruder.[35]

Amendments to Justifiable Use of Force Statutes

In **2005** the justifiable use of force statutes were revised to expand a person's ability to lawfully defend himself, herself, or others, property, and the home.[36]

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[30] *Weiand v. State*, 732 So. 2d 1044, note 5 (citing *Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981)).
[31] *James*, 867 So. 2d at 416.
[32] *Weiand v. State*, 732 So. 2d 1044, 1049-1050 (emphasis original).
[33] Instruction 3.6(f), Florida Standard Jury Instructions in Criminal Cases (2000).
[34] *James*, 867 So. 2d at 417.
[35] *Id.* (holding that the castle doctrine did not apply to the resident's new boyfriend in a shooting of the resident's violent exboyfriend).
[36] 2005-27, *L.O.F.* The statutory revisions came to be called the "Stand Your Ground" law because the common law duty to retreat applicable in places other than the home was abrogated whereby a person no longer had any duty to retreat, unless the person was in a place where he or she was not lawfully entitled to be.

In s. 776.013, F.S. (2005), the definition of one's home or "castle" was expanded to include a dwelling, residence or vehicle.[37]

Section 776.013, F.S. (2005), created a *presumption* that a defender in his or her home, in a place of temporary lodging, as a guest in the home or temporary lodging of another, or in a vehicle has a reasonable fear of imminent death or great bodily harm when an intruder is in the process of unlawfully and forcibly entering or enters.

The statute also created a *presumption* that the intruder intends to commit an unlawful act involving force or violence.

These presumptions about the intent of the intruder, however, do not apply when the intruder:
- Has a right to be in the home, place of temporary lodging, or vehicle, unless there is a domestic violence injunction or written pretrial supervision order of no contact against that person;
- Is seeking to remove a person lawfully under his or her care from a home, place of temporary lodging, or vehicle; or
- Is a law enforcement officer, acting lawfully, and the defender knew or had reason to know that the intruder was a law enforcement officer.

A defender is not entitled to the benefit of the presumptions created by the law if:
- The defender was engaged in unlawful activity at the time of the unlawful and forcible entry or
- The defender was using his or her home, place of temporary lodging, place of temporary lodging of another, or vehicle to further unlawful activity.

The statute does not require any connection between the defender's unlawful activity and the unlawful and forcible entry by the intruder.[38]

In **2014** the Legislature reconsidered the "Stand Your Ground" aspects of ch. 776, F.S. The 2014 bills and resulting law focused on two main issues:
- Providing a way for a court to sentence a defendant outside the minimum mandatory sentences for "10-20-Life" in aggravated assault cases; and
- Including *threatened* use of force (not just the actual *use* of force) in the justifiable use of force laws.[39]

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[37] As used in this section, the term:
(a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
(b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
(c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property. s. 776.013(5), F.S.
(Also note that the "categories" or legal status of persons who may justifiably use defensive force in relation to the defined locations is expanded. For example, temporary residents and visitors have the same status as the homeowner under the definitions.)

[38] s. 776.013(1),(2) and (4), F.S. (2005).

[39] CS/CS/HB 89; ch. 2014-195, *L.O.F.*

The 2014 revisions amended ss. 776.012, 776.013(3), and 776.031, F.S., to remove and clarify statutory inconsistencies identified by various courts of appeal since the enactment of the 2005 laws.[40] Specifically, the 2014 revisions did the following:

- Changed "unlawful" activity to "criminal" activity in **ss. 776.012, 776.013, and 776.031, F.S. (2014)**.
- Dedicated **s. 776.031, F.S. (2014),** to the defense of *property;* this section of law was previously entitled "use of force in defense of *others*" however the actual language only pertained to defense of property; specified that a person who threatens to use or uses nondeadly force under subsection (1) does not have a duty to retreat; reorganized the section by creating a subsection (2) containing pre-existing language from s. 776.031, F.S., permitting *deadly force* to prevent the imminent commission of a forcible felony; included language and concepts from s. 776.013(3) F.S. (2005), shown in italics below.[41]
- Amended **s. 776.012, F.S. (2005)**, the section of ch. 776 dedicated to the use of force in defense of person (self or another); specified that a person who threatens to use or uses nondeadly force under subsection (1) does not have a duty to retreat; reorganized the section by creating a subsection (2) containing pre-existing language from s. 776.012, F.S., permitting *deadly force* to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony; included language and concepts from s. 776.013(3) F.S. (2005).[42]
- Amended **s. 776.013, F.S. (2005),** in subsection (3) to limit its application to a person who is attacked in his or her dwelling, residence, or vehicle; although most provisions of subsection (3) are deleted by the amendment as superfluous the term "*attacked in*" remains. This appears to be due to the fact that an outright attack presents a situation that is different from the situations that give rise to the presumptions included in this section, specifically where an intruder is "in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered" the dwelling, residence or occupied vehicle. The 2014 amendment specifies that under the circumstances where a person is attacked in his or her dwelling, residence or vehicle, the person must use or threaten to use force "in accordance with" s. 776.012(1) or (2) or s. 776.031(1) or (2), F.S. It should be noted that both s. 776.012(2) and s. 776.031(2), F.S. (2014) (deadly force) require the defender *not be engaged in a criminal activity*.

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[40] *See, e.g., Pages v. Seliman-Tapia*, 2014 WL 950167 (Fla. 3d DCA 2014); *State v. Wonder*, 128 So.3d 867 (Fla. 4th DCA 2013); and *Little v. State*, 111 So.2d 214 (Fla. 2d DCA 2013).

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

*NOTE: The phrase "in any ***other*** place" appears to mean 'any place ***other than*** a dwelling, residence or vehicle.' Therefore logic dictates that the language and concepts shown in italics above would apply in places a person has the right to be such as property he or she is defending under s. 776.031, F.S.

[42] See note 39.

*NOTE: The phrase "in any ***other*** place" found in s. 776.031(3), F.S., appears to mean 'any place ***other than*** a dwelling, residence or vehicle.' Therefore logic dictates that the language and concepts shown in italics in footnote 39 above would be intended to apply in *all* other places a person has the right to be.

III. Effect of Proposed Changes:

Immunity

The bill amends s. 776.032, F.S., to create a procedure for implementing the justifiable use of force immunity provisions therein.

The procedure set forth in the bill differs from the one settled on by the courts in the absence of legislative provisions on the implementation of the 2005 expansion of the justifiable use of force law in ch. 776, F.S.[43]

The bill eliminates a defendant's burden of showing by a preponderance of the evidence[44] that he or she is entitled to immunity from arrest, detention, charges being filed against him or her, or prosecution in a situation where the defendant justifiably used or threatened to use force.

Instead, under the bill, once a defendant has made a prima facie[45] claim of self-defense immunity, the burden falls on the party seeking to overcome the claim. The bill diminishes the defendant's standard of proof because a prima facie claim is a lower standard of proof than the current preponderance of the evidence standard.[46]

The bill limits these allocations of the burden and standard of proof to claims of immunity from criminal prosecution. They do not apply to civil cases that may be brought against a defendant.

The bill requires that once the defendant has made a prima facie claim of immunity, the state bears the burden of proving by clear and convincing evidence, at a pretrial evidentiary hearing, whether the defendant is entitled to self-defense immunity.

"Stand Your Ground"

The bill deletes the term "attacked" from s. 776.013(3), F.S., the home protection statute. This term appeared in the original 2005 law and despite the fact that it was located in the home protection statute, the term appears to have applied to persons who were not necessarily in their dwelling, residence or vehicle, but rather "in any *other place* where he or she has the right to be."[47]

It also deletes the requirement that a person who is attacked in his or her dwelling, residence, or vehicle use or threaten to use force "in accordance with s. 776.012(1) or (2), F.S. or s. 776.031 (1) or (2), F.S." Although the use of this phrase in the 2014 amendment may have been viewed as a way of requiring adherence to certain aspects of the 2014 amendments to ss. 776.012 or 776.031, F.S., the phrase may have swept in unintended requirements. For example, a strict

[43] See *Bretherick v. State*, 170 So.3d 766 (Fla. 2015); *Dennis v. State*, 51 So.3d 456 (Fla. 2010); *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008).
[44] "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).
[45] Prima facie evidence is that evidence which is legally sufficient to establish a fact or a case unless disproved. http://www.merriam-webster.com/dictionary/prima%20facie.
[46] See notes 28 and 29.
[47] s. 776.031(3), F.S. (2005).

reading of s. 776.013(3), F.S. (2014), would have the defender who is attacked in his or her dwelling, residence, or vehicle *not be engaged in criminal activity*[48] at the time deadly defensive force is threatened or used.

The bill includes new language in s. 776.013(3), F.S., that requires a person who is in his or her dwelling, residence, or vehicle have a reasonable belief that the use or threat of force, nondeadly or deadly, is necessary to prevent imminent death or great bodily harm or the commission of a forcible felony. This requirement appears to be applicable in situations other than those where the presumptions[49] found in s. 776.013(1) and (2), F.S., would apply.

As amended by the bill, therefore, in addition to the presumptions a person may rely upon in the lawful use of defensive force under s. 776.013, F.S., a person need not be *attacked* in his or her dwelling, residence, or vehicle to lawfully use deadly or nondeadly defensive force so long as he or she has a reasonable belief such defense is necessary in order to prevent the grave consequences of another's conduct.

The bill is effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Dismissal of a case at the pre-trial immunity hearing stage will save the defendant's costs of defending the case at trial, however any cost savings will be offset by the expense related to the pre-trial hearing.

[48] See ss. 776.012(2) and 776.031(2), F.S. (2014), which provide that a person may use *deadly* force to prevent imminent death or great bodily harm, or the imminent commission of a forcible felony, *if* the person (defender) is *not engaged in a criminal activity* and is a place where he or she has a right to be.
[49] See pg. 9-10 of the Present Situation section above.

C. Government Sector Impact:

The change to give the prosecution the burden of proof at the hearing stage could result in a reduction in the number of cases that proceed to trial. Dismissal at the pre-trial hearing stage would save the costs and expenses of a trial however the cost savings will be offset by the cost of the hearing.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 776.013 and 776.032.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules on December 3, 2015:

- Changes the burden of proof assigned to the prosecution in a pre-trial immunity hearing from "beyond a reasonable doubt" to "clear and convincing evidence" which is a lower standard of proof.
- Eliminates the legislative findings and intent language from Section 1 of CS/SB 344 along with the directive to the Division of Law Revision in Section 2.
- Deletes Section 3 of CS/SB 344 which provided for the possibility of the payment of a prevailing defendant's costs, fees, and expenses from the state attorney's operating trust fund.

CS by Criminal Justice on October 20, 2015:
Limits the award of costs, fees, and expenses to the defendant who has his or her case dismissed under s. 776.032, F.S., to cases where the court finds:

- The prosecution willfully or substantially violated the rules of discovery; or,
- The prosecution's filing of the case violates the court's sense of fundamental fairness.

B. Amendments:

None.