HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/HB 245	**FINAL HOUSE FLOOR ACTION:**	
SUBJECT/SHORT TITLE	Self-Defense Immunity	74 **Y's** 39 **N's**	
SPONSOR(S):	Judiciary Committee; Payne; Fischer and others	**GOVERNOR'S ACTION:**	Approved
COMPANION BILLS:	CS/SB 128		

SUMMARY ANALYSIS

CS/HB 245 passed the House on April 5, 2017, as CS/SB 128 as amended. The Senate refused to concur in the House amendment to the Senate Bill on May 4, 2017. The House refused to recede from the amendment on May 5, 2017, and, subsequently that same day, the Senate concurred in the House amendment and passed the Senate Bill as amended. The bill revises a provision in ch. 776, F.S., entitled "Justifiable Use of Force."

Currently, Florida law provides immunity from criminal prosecution and civil suit for a person who justifiably uses or threatens to use force to defend himself or herself, other persons, or property. This law is commonly referred to as "Stand Your Ground" (SYG).

When SYG was adopted in 2005, the law did not specify a procedure by which to raise a claim of immunity. As a result, litigation ensued throughout the state regarding the proper procedure by which to raise the claim. The issue was ultimately resolved in 2015 when the Florida Supreme Court ruled in a five-to-two decision that the appropriate procedure is for the criminal defendant to assert the immunity through a motion to dismiss at a pretrial evidentiary hearing where the defendant bears the burden of proof to establish his or her entitlement to the immunity by a preponderance of the evidence.

The bill amends the SYG law to shift the burden of proof to the State when SYG immunity is asserted. Under the bill, once a criminal defendant raises a prima facie case of self-defense immunity, the State must overcome the asserted immunity with clear and convincing evidence.

The bill will have an indeterminate impact on state government expenditures. The bill does not appear to have a fiscal impact on local government revenues or expenditures. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

The bill was approved by the Governor on June 9, 2017, ch. 2017-72, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Pre-Stand Your Ground

Overview

Before passage of Florida's "Stand Your Ground" (SYG) law in 2005, both statute and common law governed when a person could justifiably use force in self-defense and in the defense of others or property. In 2004, ss. 776.012 and 776.031, F.S., stated that a person was justified in using:

- Force, other than deadly force, if the person reasonably believed such force was necessary to:
  - Defend himself, herself, or another against another's imminent use of unlawful force; or
  - Prevent or terminate another's trespass on or interference with real property other than a dwelling or certain personal property.
- Deadly force if the person reasonably believed such force was necessary to prevent imminent death or great bodily harm to himself, herself, or another or to prevent the imminent commission of a forcible felony.[1]

Statute did not address a duty to retreat; however, Florida common law recognized such duty and required a person to "retreat to the wall" if attacked outside of his or her home or workplace, meaning that a person could not justifiably resort to deadly force without first using every reasonable means to avoid the danger, including retreat.[2] Within the home or workplace, there was no duty to retreat.[3] This exception from the duty to retreat is commonly known as the "Castle Doctrine."[4]

Procedure to Raise Self-Defense

Statute also did not address any procedure by which justifiable use of force could be raised by a defendant; however, pursuant to case law and court rule, such defense had to be raised at trial as an affirmative defense.[5] According to the appellate courts, under Fla. R. Crim. P. 3.190(c)(4), a pretrial motion to dismiss raising self-defense was authorized only if there were "no material disputed facts and the undisputed facts … [did] not establish a prima facie case of guilt against the defendant."[6]

Stand Your Ground

Overview

In 2005, the Florida Legislature enacted the "Stand Your Ground" (SYG) law.[7] This legislation significantly amended justifiable use of force in this state by:

- Abolishing the common law duty to retreat by stating that a person may use force, including deadly force, and does not have to retreat if he or she:
  - Is not engaged in unlawful activity;

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[1] Section 776.08, F.S., both in 2004 and now, defines the term "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

[2] *Weiand v. State*, 732 So.2d 1044 (Fla. 1999).

[3] *Id.*; *Frazier v. State*, 681 So.2d 824 (Fla. 2d DCA 1996).

[4] *See Hedges v. State*, 172 So.2d 824, 827 (Fla. 1965) and *Pell v. State*, 122 So. 110 (Fla. 1929) (Florida has long recognized that there is no duty to retreat before using force when in one's home - a principle often referred to as the "Castle Doctrine.").

[5] "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" *State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990).

[6] *State v. Hull*, 933 So.2d 1279, 1280(Fla. 2d DCA 2006); (trial court improperly granted defendant's motion to dismiss where defendant's self-defense claim presented questions for the factfinder); *see also Lusk v. State*, 531 So. 2d 1377, 1381(Fla. 2d DCA 1988) ("The questions of 'reasonable belief' and the 'amount of force necessary' were factual determinations to be made by the jury after a proper instruction.").

[7] Chapter 2005-27, L.O.F.

    - Is attacked in any other place where he or she has a right to be; and
    - Reasonably believes such force is necessary to prevent death, great bodily harm, or the commission of a forcible felony.[8]
- Creating a presumption, subject to certain exceptions,[9] that a person using deadly force was in reasonable fear of death or great bodily harm to himself, herself, or another when faced with an unlawful intruder in a dwelling, residence, or occupied vehicle.[10]
- Granting a person who justifiably uses force immunity from criminal prosecution and civil action. The term "criminal prosecution" was defined to include arresting, detaining in custody, and charging or prosecuting a defendant, and specified that a person who uses force may not be arrested until law enforcement has probable cause that the force used was unlawful.[11]

Since 2005, the above-described SYG laws have only been amended once. The amendments, which were adopted in 2014, were primarily for purposes of: (a) expanding SYG criminal and civil immunity so that it applies not only to the actual use of force but also to the threatened use of force; (b) clarifying that a person is not entitled to SYG immunity if the person was engaged in a criminal activity (formerly referred as "unlawful activity") when using or threatening to use deadly force; and (c) limiting the immunity from civil actions to actions filed by the person against whom the force was used or threatened and the personal representative or heirs of such person.[12]

Procedure to Raise SYG Immunity

Like the pre-2005 statutes governing the justifiable use of force defense, SYG did not specify a procedure for a defendant to raise a claim of immunity. Shortly after the law took effect, litigation ensued regarding the means by which to raise the claim. Criminal defendants argued it should be raised through a pretrial motion to dismiss. Prosecutors countered that such motion was not authorized where the facts were disputed. Two District Courts of Appeal (DCAs) split on the issue with the:

- First DCA holding in *Peterson v. State*[13] that the wording in SYG "makes clear that [the Legislature] intended to establish a true immunity and not merely an affirmative defense …." As such, the proper procedure for claiming such immunity is for the defendant to raise the claim pretrial at which time "the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches."[14, 15]
- Fourth DCA holding in *Velasquez v. State*[16] and *Dennis v. State*[17] that Fla. R. Crim. P. 3.190(c)(4), requires denial of a motion to dismiss whenever the facts are in dispute. Although SYG may permit an immunity determination at any stage because of the manner in which the

[8] s. 776.013(3), F.S. (2005). Sections 776.012 and 776.031, F.S., addressing justifiable use of force, were retained by the 2005 legislation, but were amended to conform to the legislation's abolition of the duty to retreat.

[9] The presumption does not apply if: (a) the person against whom the defensive force was used had the right to be in the dwelling, residence, or vehicle, was the parent, grandparent, or guardian of the person sought to be removed, or, under specified circumstances, was a law enforcement officer; or (b) the person who used defensive force was engaged in unlawful activity or was using the dwelling, residence, or vehicle to further unlawful activity. s. 776.013(2), F.S. (2005).

[10] Such presumption arose if: (a) the person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and (b) the person using the force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. s. 776.013(1), F.S. (2005).

[11] s. 776.032, F.S. (2005).

[12] ch. 2014-195, L.O.F.

[13] 983 So.2d 27 (Fla. 1st DCA 2008).

[14] *Peterson,* 983 So.2d at 29.

[15] "Preponderance of the evidence" means "proof which leads the factfinder to find that the existence of a contested fact is more probable than its nonexistence." *Department of Health and Rehabilitative Services v. M.B.,* 701 So. 2d 1155 (Fla. 1997).

[16] 9 So.3d 22 (Fla. 4th DCA 2009).

[17] 17 So.3d 305 (Fla. 4th DCA 2009).

> law defined "criminal prosecution," such determination may not be made through a pretrial motion to dismiss unless the facts are undisputed.[18]

Thereafter, the Florida Supreme Court (FSC) addressed the conflict in *Dennis*. The FSC approved the procedure adopted in *Peterson,* stating that SYG, "grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. [19] Accordingly, "the procedure set out by the First District in *Peterson* best effectuates the intent of the Legislature…."[20]

After *Dennis*, defendants continued to argue that the burden of proof (BOP) to establish they were entitled to the immunity should not have been placed on them. The Fifth DCA considered this argument in *Bretherick v. State,*[21] wherein the defendant asserted that "[p]lacing the burden on a person who acted in self defense, after they have been charged makes the immunity granted largely illusory …." The Fifth DCA rejected this argument because it was bound by the holding in *Dennis*.[22]

In a concurring opinion in *Bretherick*, Judge Schumann wrote that while she agreed *Dennis* is controlling, she did not think the FSC directly addressed the BOP issue in that case.[23] She also stated, "Kentucky and Kansas, states with statutes that were modeled directly on our 'Stand Your Ground' law, have found that the burden of proof properly rests with the State at the pretrial stage to demonstrate that the use of force in self-defense was unjustified. This construction creates a better procedural vehicle to test the State's case at the earliest possible stage of a criminal proceeding. Self-defense immunity statutes are designed to relieve a defendant from the burdens of criminal prosecution from arrest through trial."[24, 25]

In response to Judge Schumann's concurrence, the majority in *Bretherick* certified the following question: "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?"[26]

In a July 2015 opinion, five of the seven justices of the FSC answered the certified question in the negative, stating, "[w]e now make explicit what was implicit in *Dennis*—the defendant bears the burden of proof by a preponderance of the evidence at the pretrial evidentiary hearing. This is the conclusion reached by every Florida appellate court to consider this issue both before and after *Dennis*, and it is a conclusion fully consistent with the legislative intent to provide immunity to a limited class of defendants who can satisfy the statutory requirements."[27]

The majority provided the following reasons in support of its conclusion:[28]

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[18] *Velasquez*, 9 So.3d at 23-24.
[19] *Dennis v. State*, 51 So.3d 456, 458, 462 (Fla. 2010).
[20] *Id.* at 463-464.
[21] 135 So.3d 337 (Fla. 5th DCA 2013).
[22] *Id.* at 340.
[23] *Id.* at 342.
[24] *Id.* at 344.
[25] The BOP placed on the State in Kentucky and Kansas is that the State must establish that there is probable cause that the defendant's use of force was not legally justified. *See Rodgers v. Commonwealth*, 285 S.W.3d 740, 752-56 (Ky. 2009)("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."); Ky. Rev. Stat. § 503.085; *see State v. Ultreras*, 296 Kan. 828, 844-45 (2013)(" the standard of proof for whether a defendant is entitled to immunity from criminal prosecution … is probable cause. We further find that the State bears the burden of establishing proof that the force was not justified as part of the probable cause determination…."); Kan. Stat. Ann. § 21-5231.
[26] *Id.* at 341.
[27] *Bretherick v. State*, 170 So.3d 766, 769 (Fla. 2015).
[28] *Id.* at 775.

- The Legislature did not confer blanket immunity from criminal prosecution with SYG. It provided immunity only if the use of force was justified under SYG. The *Dennis* procedure gave effect to that immunity by authorizing a defendant to establish his or her immunity pretrial. Such procedure provides a defendant with greater protection than the mere ability to assert self-defense at trial.[29]
- No court in this country has "required, at a pretrial evidentiary hearing, the prosecution to disprove beyond a reasonable doubt that the use of force by a defendant was justified. The highest courts in three states—Colorado, Georgia, and South Carolina—agree with a procedure similar to that described in *Peterson*…. … These courts have adopted a procedure in which the defendant bears the burden of proof, by a preponderance of the evidence at a pretrial evidentiary hearing, in the context of their analogous immunity law."[30]
    - Defendant's reliance on cases from Kentucky and Kansas is misplaced. Neither require the State to disprove beyond a reasonable doubt that the force was justified; rather, it was held that the State must only establish probable cause that the force was not legally justified. Probable cause is the standard the State argued for in *Dennis*. We rejected this argument because this standard does not provide defendants with any greater protection from prosecution than the law did before SYG. Under Fla. R. Crim. P. 3.133, the court must make a probable cause determination before or within 48 hours after arrest.[31]
- Placing the BOP on the defendant is consistent with the procedures for other motions to dismiss. Such procedures "all require the defendant to offer the evidence in support of the motion, rather than placing the burden on the State."[32]
- Placing the burden on the State to prove, beyond a reasonable doubt, that the defendant is not entitled to immunity requires the State to establish the same degree of proof twice—once pretrial and again at trial. This essentially results in two full-blown trials: one before a judge and a second before a jury. Such two-trial process would:
    - Expend tremendously more resources. Undoubtedly, the interests in expense and judicial economy do not outweigh a defendant's right to a fair determination of guilt or innocence; however, such right is not diminished by placing the BOP on the defendant at the pretrial stage because the State must still prove all of the elements of the crime beyond a reasonable doubt at trial.
    - Enable a defendant to file a motion to dismiss, which may not be supported by any evidence, to obtain a preview of the State's case. Moreover, if at the time of the pretrial hearing, the State did not yet possess all the evidence to refute the alleged justifications for the defendant's use of force, the defendant would be found immune. The result is a process is "'fraught with potential for abuse.'"[33]
- The issue in the pretrial evidentiary hearing is whether the defendant was justified in the use of force, not whether the defendant committed the crime. As recognized by the Colorado Supreme Court, "'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.'"[34]

Justice Canady wrote a dissent in which Justice Polston concurred. Justice Canady indicated:

- The majority fails to recognize that the issue the trial court must resolve pretrial is the same issue that must be resolved by the factfinder at trial; i.e., "whether the evidence establishes beyond a reasonable doubt that the defendant's conduct was not justified under the governing

[29] *Id.*
[30] *Id.* (citations omitted).
[31] *Bretherick,*135 So.3d at 775-776; *Dennis*, 51 So.3d at 463.
[32] *Bretherick,* 170 So.3d at 769.
[33] *Id.* at 777-778.
[34] *Id.* at 777.

statutory standard. The State does not dispute that a defendant presenting a Stand Your Ground defense can only be convicted if the State proves beyond a reasonable doubt that the defense does not apply. … By imposing the burden of proof on the defendant at the pretrial evidentiary hearing, the majority substantially curtails the benefit of the immunity from trial conferred by the Legislature under the Stand Your Ground law. There is no reason to believe that the Legislature intended for a defendant to be denied immunity and subjected to trial when that defendant would be entitled to acquittal at trial on the basis of a Stand Your Ground defense. But the majority's decision here guarantees that certain defendants who would be entitled to acquittal at trial will nonetheless be deprived of immunity from trial."[35]

- The majority's argument that "the burden should be placed on the defendant because it is easier for a defendant to prove entitlement to immunity than it is for the State to disprove entitlement to immunity has no more force in the context of a pretrial evidentiary hearing than it does in the context of a trial, where it admittedly has no application. That argument has no basis in the text of the Stand Your Ground law."[36]
- The majority's valid concern that placement of the burden of proof on the defendant may result in two full-blown trials does not justify curtailing immunity from trial for those who lawfully used or threatened force and is a practical matter for the Legislature to consider and resolve.[37]

Effect of the Bill

The bill amends s. 776.032, F.S., to reverse the effect of the FSC's holding in *Bretherick* and shift the BOP to the State at the pretrial stage of a criminal prosecution when the defendant files a motion to dismiss based on SYG immunity. Under the bill, once a criminal defendant raises a prima facie[38] case of self-defense immunity, the State must overcome the asserted immunity with clear and convincing evidence.[39]

The bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state government revenues.

1. Expenditures: The Criminal Justice Impact Conference considered this bill on March 2, 2017, and determined that it will have a negative indeterminate impact on prison beds (i.e., an unquantifiable reduction in the need for prison beds).

   Due to the bill's reduction in the level of proof required to be asserted by a defendant filing a motion to dismiss based on SYG immunity, there may be an increase in the number of motions filed and in

[35] *Id.* at 779-780.
[36] *Id.* at 780.
[37] *Id.*
[38] "'Prima facie' means that the proponent has fulfilled his duty to produce evidence and there is sufficient evidence for the court to consider the issue." Charles W. Ehrhardt, Florida Evidence § 301.2 (2002). "Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232 So.2d 166, 168 (Fla. 1970) .
[39] "Clear and convincing evidence" means "evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue." FLA. STD. JURY INSTR. (Crim.) ss. 2.3 and 3.6; *see also State v. Graham*, 240 So.2d 486 (Fla. 2d DCA 1970)(stating that clear and convincing evidence "is an intermediate standard of proof, more than the 'preponderance of the evidence' standard used in most civil cases, and less than the 'beyond a reasonable doubt' standard used in criminal cases.").

the number of cases in which the State will be required to present its case both at a pretrial hearing and trial. These increases may result in additional costs to prosecutors,[40] public defenders, and the court. Such additional costs, however, may be offset by a reduction in costs that could result from cases that: (a) do not continue to trial because the defendant's motion to dismiss is granted at the pretrial stage; or (b) result in a plea because the defendant's motion to dismiss is denied at the pretrial stage.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.

2. Expenditures: The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

[40] According to the Florida Association of Prosecuting Attorneys, the cost for a 12-hour immunity hearing would be $1,033.60 ($375.72 for an Assistant State Attorney + $500 for an expert witness + $100.38 for a Victim Advocate + $49.50 for Support Staff + $8 for consumables). Based on an estimated 78,069 hearings annually, the FAPA projected an annual fiscal impact of $8,069,212. Document entitled "Self-Defense Immunity Hearing, Estimated Financial Impact to State Attorneys" from Arthur I. Jacobs, Florida Prosecuting Attorneys Association, (February 22, 2017) (on file with Criminal Justice Subcommittee).