IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

CASE NO: 3D17-1633

OMAR RODRIGUEZ,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

On Petition for Writ of Prohibition from the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County L.T. No. F15-12785

BRIEF OF *AMICUS CURIAE* LAW CENTER FOR THE PREVENTION OF GUN VIOLENCE

IN SUPPORT OF NEITHER PARTY

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Law Center to Prevent Gun Violence ("Law Center") is a national, non-profit organization dedicated to reducing gun violence, which provides comprehensive legal expertise in support of gun laws and policies that improve public safety. The Law Center has provided informed analysis as an amicus in a wide variety of firearm-related cases nationwide, and has a strong interest in cases, such as this, that implicate the application of state laws in ways that may increase, or decrease, the incidence of firearm violence. The Law Center has provided amicus briefing and testimony to courts and legislatures throughout the country with respect to laws that prevent gun violence, and is a well-established nonpartisan, non-profit organization dedicated to reducing gun violence. It is intimately aware of self-defense statutes in application across the country. Based on this interest and background, the Law Center submits this brief urging this Court to affirm the Order under review.

SUMMARY OF ARGUMENT

In 2005, the Florida Legislature enacted the "Stand Your Ground" law which, among other things, created statutory immunity from criminal prosecution

for a class of individuals who justifiably use force as permitted by that law.[1] The immunity is not absolute as it does not prohibit the arrest (as well as detention or subsequent charging) of a defendant where there is probable cause that the force used or threatened was not lawful. § 776.032(2).

At that time, the Legislature properly declined to enact any pretrial procedures governing how the new immunity would be determined – such as the appropriate procedural vehicle in which to assert the immunity, who would bear the burden of proof and the applicable quantum of evidence required to establish entitlement to the immunity. The Legislature correctly left the establishment of such pretrial procedures to the courts, and the Florida Supreme Court appropriately exercised its exclusive constitutional authority to do so in a pair of decisions: *Dennis v. State*, 51 So. 3d 456 (Fla. 2010) and *Bretherick v. State*, 170 So. 3d 766

[1] References to the Stand Your Ground law are to the 2005 enactment and subsequent amendments to Chapter 776, which did primarily three things: (1) abolished the common law duty to retreat when an individual is not engaged in unlawful activity, is attacked in a 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; (2) created a presumption, with exceptions, 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; and (3) granted a person who justifiably uses force immunity from criminal prosecution and civil action. *See* Chapters 2005-27, 2014-195, and 2017-72, Fla. Laws (relating to sections 776.012, 776.013, 776.031 and 776.032). Unless otherwise stated, all statutory references are to the Florida Statutes and all citations are to the 2017 statutes.

(Fla. 2015). The judicially enacted procedures are pretrial only, they do not operate at trial.

Dennis and *Bretherick* established clear procedures for determining Stand Your Ground immunity in a pretrial evidentiary hearing at which a defendant must prove entitlement to it by a preponderance of the evidence. Those judicially created pretrial procedures: (i) effectuate legislative intent by sparing those entitled to immunity from undue criminal prosecution at the earliest possible point warranted under the circumstances; (ii) are based upon long-established practice and procedure governing other analogous pretrial matters; and (iii) have now been employed by countless Florida courts. Those procedures are entitled to full force and effect, including deference from the Legislature under Florida's Constitution and its separation of powers provisions – a core element of our democracy.

Notwithstanding that the adoption of these pretrial procedures fell squarely within the province of the judiciary, in 2017 the Legislature improperly attempted to repeal them by enacting section 776.032(4) (the "2017 Amendment"). The 2017 Amendment shifted the burden of proof to the State and required that the State prove that the threat or use of force was not lawful. This statutory enactment of judicial procedure directly conflicts with the procedural rules established by the Florida Supreme Court and constitutes an impermissible usurpation of the Court's rule making authority in violation of the separation of powers.

Under Article V, Section 2(a) of the Florida Constitution, the Legislature can only override the Court's procedural rules by a two-thirds majority vote – which it failed to do when adopting the 2017 Amendment. Unless and until the Legislature complies with the Florida Constitution, the practice and procedure established under *Dennis* and *Bretherick* remains the law of Florida and the conflicting 2017 Amendment cannot stand.

The 2017 Amendment was not the product of a public outcry for more protection of defendants asserting use of justifiable force; in fact, it fails to provide any greater protection than that afforded under *Dennis* and *Bretherick*. Instead, perversely, the 2017 Amendment benefits those *not* entitled to Stand Your Ground immunity at the public's expense. Significant, credible research demonstrates that states that adopted Stand Your Ground statutes experience an increase in homicides and that Stand Your Ground laws have disparate impact on racial minorities. Shifting the pretrial burden of proof away from defendants who use force, including force that results in the death of another, will only embolden and encourage people to use force, including deadly force, to the endangerment of society. That the Legislature has usurped a core power of the judiciary in purporting to enact this dangerous policy only underscores why this Court should affirm the order below and declare the 2017 Amendment unconstitutional.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE BURDEN OF PROOF PROVISION OF FLORIDA'S "STAND YOUR GROUND" LAW, SECTION 776.032(4) OF THE *FLORIDA STATUTES*, IS PROCEDURAL FOR PURPOSES OF ARTICLE V, SECTION 2 OF THE FLORIDA CONSTITUTION AND, AS A MATTER OF CONSTITUTIONAL SEPARATION OF POWERS, NOT SUBJECT TO LEGISLATIVE MODIFICATION.

A. In *Dennis* and *Bretherick*, the Florida Supreme Court Appropriately Exercised its Exclusive Constitutional Authority to Establish Pretrial Procedures.

The Florida Constitution vests the Florida Supreme Court with the exclusive authority to determine matters of practice and procedure before all Florida courts. Art. V, § 2(a), Fla. Const.; Art. II, § 3, Fla. Const. While courts have recognized an exception for the legislative enactment of statutory judicial procedures where such procedures are intimately related or intertwined with substantive statutory provisions,[2] that exception does not apply here because the procedures contained in the 2017 Amendment conflict with existing judicial procedures set forth in *Dennis* and *Bretherick*. *See, e .g.*, *State v. Raymond,* 906 So. 2d 1045 (Fla. 2005) (finding unconstitutional statute that was inconsistent with Criminal Rules of Procedure); *Jackson v. Fla. Dep't of Corrections*, 790 So. 2d 381, 383-86 (Fla. 2000) (finding unconstitutional procedural components of a statute that conflicted and interfered

[2] *See e.g.*, *In re: Cartwright*, 870 So. 2d 152 (Fla. 2d DCA 2004) (recognizing that courts will uphold procedural provisions in statutes if those provisions are "intimately intertwined with" the substantive statutory provisions).

with the procedural mechanisms of the court system; finding that conflicting statutory provisions violated separation of powers analysis and constitutional provisions vesting rulemaking within the exclusive province of the Florida Supreme Court); *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (finding Death Penalty Reform Act unconstitutionally encroached upon the Court's rulemaking authority because it was procedural and significantly changed Florida's post-conviction procedures already promulgated by the Court).

In establishing pretrial procedures to implement the substantive provisions of the Stand Your Ground law in *Dennis*, the Florida Supreme Court relied upon the statutory text to determine whether a defendant was immune from criminal prosecution. The Court recognized that the Stand Your Ground law "grants defendants a substantive right to assert immunity from prosecution and to avoid being subject to trial." *Dennis*, 51 So. 3d at 462. The Court further noted that the statute "contemplates that a defendant who establishes entitlement to the statutory immunity will not be subject to trial." *Id*. Because of this, the Court determined that a pretrial evidentiary hearing was necessary to provide those using justifiable force with the protections the Legislature created.

The Court found that Florida Rule of Criminal Procedure 3.190(b), regarding pretrial motions to dismiss, provided the proper procedural mechanism to meet the Legislature's statutory objective. *Id*. Under this Rule, courts had held

similar pretrial evidentiary hearings on motions to dismiss based on transactional or use immunity and prosecutorial misconduct. *Id.* at 463. And under this Rule, every defendant seeking immunity under the Stand Your Ground law would now be entitled to a pretrial evidentiary hearing determining that immunity. The Court recognized this procedure provided the protection required by the Stand Your Ground law and approved the First District's reasoning in *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), which provided:

> a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.

Id. at 460. In approving *Peterson*, the Court held that this procedure "best effectuates the intent of the Legislature." *Id*. at 462.[3]

Notably, the Legislature failed to question the procedures established in *Dennis* as inconsistent with legislative intent. On the contrary, four years after *Dennis*, in 2014 the Legislature amended Chapter 776 in part to address issues

[3] The Court rejected the State's contention that it need only show probable cause that the defendant's use of force was unlawful in order to proceed to trial, because the defendant was already afforded that protection by the Criminal Rules of Procedure. *Dennis* 51 So. 3d at 463. A showing of probable cause is the only protection afforded defendants in Kansas and Kentucky. Thus, reliance on case law from those states holding that placing the burden of proof on the State throughout each phase of criminal prosecution best fulfills legislative intent to create immunity is misplaced. *See Bretherick*, 170 So. 3d at 771, 775-76. The procedures adopted by the Florida Supreme Court provide more protection to this class of defendants than those states which do not provide for pretrial evidentiary hearings.

raised by the shooting of Trayvon Martin, Chapter 2014-195, yet made no change to the procedures established in *Dennis*.[4] Lower courts followed those procedures for years without objection by the Legislature.[5]

While the Florida Supreme Court firmly established the procedural mechanism of holding a pretrial evidentiary hearing under the Stand Your Ground law, it did not, in *Dennis*, expressly adopt the burden of proof / quantum of evidence practice and procedures utilized by the First District in *Peterson*. It did so, however, in *Bretherick*, "ma[king] explicit what was implicit in *Dennis* – the defendant bears the burden of proof by a preponderance of the evidence at the pretrial evidentiary hearing." *Bretherick*, 170 So. 3d at 768.

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[4] "[T]he legislature is presumed to know the judicial constructions of a law when enacting a new version of that law and the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version." *Jones v. ETS of New Orleans, Inc*., 793 So. 2d 912, 917 (Fla. 2001) (quotations omitted). While the Legislature is presumed to have adopted *Dennis*, the problem here is that it acted unconstitutionally when enacting the conflicting 2017 Amendment in response to *Bretherick*.

[5] Those procedures at the time included: (1) immunity from arrest unless the arresting law enforcement agency determined there is probable cause that the force threatened or used was unlawful, §776.032(2); (2) a pretrial evidentiary hearing to determine immunity pursuant to *Dennis* and *Peterson* in which the trial court determines whether the Stand Your Ground defendant has shown by a preponderance of the evidence that immunity attaches; and (3) an appeal of any trial court's denial of a motion to dismiss on immunity grounds via a petition for writ of prohibition. Beyond that, the defendant could (and still can) assert the immunity at trial.

Following *Dennis*, the Court in *Bretherick* reiterated its approval of "the procedure of a pretrial evidentiary hearing set forth in Peterson … for evaluating a claim of immunity under the Stand Your Ground law." *Id*. at 768. The Court expressly held that a defendant must establish entitlement to Stand Your Ground immunity by a preponderance of the evidence at the pretrial evidentiary hearing. *Id*. The Court noted that this was consistent with "the conclusion reached by every Florida appellate court to consider the 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." *Id*. The Court further reasoned that the decision was consistent with procedures resolving motions to dismiss for other types of statutory immunity which require the defendant to offer evidence and consistent with the procedures adopted by states with similar immunity laws. *Id.* at 775-77.[6]

[6] The Court also identified the procedural problems and abuses that arise from requiring the State to meet the same burden at the pretrial hearing and trial. *Bretherick*, 170 So. 3d at 777-78 (describing a process "fraught with abuse"). The State would be required to try its case twice, once before a judge and once before a jury. Defendants, including those who have no grounds on which to allege justifiable force, would have blanket immunity, unless and until the State met its burden pretrial. Defendants would be encouraged to file unsupported motions to dismiss because the State might not yet have all the evidence to prove that the defendant's use of force was not justified even where it was not. At a minimum the defendants could file unsupported motions to dismiss in order to obtain a preview of the States' case. *Id*.

There can be no debate that the Florida Supreme Court, in *Dennis* and *Bretherick*, has firmly established procedural law governing the application of Stand Your Ground immunity in the pretrial context, and that doing so fell squarely within the Court's proper role. In *Raymond*, 906 So. 2d 1045 (Fla. 2005), the Florida Supreme Court reiterated the distinction between "practice and procedure" and "substantive law" as follows:

> The terms **practice and procedure** encompass the **course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress** for their invasion…. [*i.e.*,] **the machinery of the judicial process** as opposed to the product thereof.…
>
> On the other hand, matters of substantive law are within the Legislature's domain. **Substantive law** … **creates, defines, and regulates rights**, or that part of the law which courts are established to administer.... In includes those rules … which **fix and declare the primary rights of individuals**….

Raymond, 906 So. 2d at 1048-49 (emphasis added; internal quotations and citations omitted). The court's conduct of the pretrial evidentiary hearing, including fixing the burden of proof and quantum of evidence, clearly encompasses the "form, manner, means, method, order, process or steps by which a [defendant] enforces" his or her substantive rights under the Stand Your Ground law. The practice and procedures established in *Dennis* and *Bretherick* are "the machinery of the judicial process" via which the product (*i.e.*, application of immunity) results.[7]

[7] Petitioner acknowledges that the standard of proof applied in the pretrial evidentiary hearing is procedural, but maintains that the Legislature can enact

It is of no moment that the Stand Your Ground procedures adopted in *Dennis* and *Bretherick* are not the result of the Court's formal rulemaking process. The Court regularly follows procedures it has not yet formally adopted by rule, and has consistently treated them as procedural rules over which it maintains constitutional authority. For example, the *Frye*[8] standard for determining the admissibility of novel scientific expert opinion has never been adopted as a formal rule, yet it has been deemed a procedural rule based upon Florida decisional law for decades. *See* Petition App. 4 (Order on Stand Your Ground Hearing at 9-10); *see also Bundy v. State*, 471 So. 2d 9 (Fla. 1985) (adopting *Frye* standard); *Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (same).

In 2012, the Legislature amended sections 90.702 and 90.704 adopting the *Daubert*[9] standard in place of the *Frye* standard (the "*Daubert* Amendment"). The Court declined to approve the *Daubert* Amendment to the extent that the statute

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statutes reassigning and redefining it in a pretrial procedure either because the Court did not adopt formal rules or because the burden of proof was intimately intertwined with the statute's substantive purpose. Others point out that the Legislature often assigns the burden of proof to effectuate the substantive purpose of a statute. Each of these arguments fails to acknowledge two critical points: (1) while the Legislature might enact rules of procedure that are intertwined with the substantive purpose of a law, the Florida Constitution renders the Court the ultimate arbitrator of whether such a procedural rule is constitutional; and (2) the Court created pretrial procedures to determine immunity when the Legislature conceded the role of rulemaking to it, as required by the Constitution.

[8] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[9] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

made procedural changes. The Court did so in order to preserve examination of that constitutional issue (along with any others) for the time when a case applying the *Daubert* standard properly comes before it.[10] *In re: Amendments to the Florida Evidence Code,* 210 So. 3d 1231 (Fla. 2017). The Court's decision to withhold judgment on the constitutionality of the *Daubert* Amendment demonstrates that the Court's authority to make that determination exists regardless of whether the judicial procedures were created by formal rule or by a decision of the Court. *See also In re: Amendments to Fla. Evidence Code*, 144 So. 3d 536 (Fla. 2014) (declining to adopt blanket fiduciary privilege in section 90.5021, Fla. Stat. (2014) to extent procedural); *see also Cartwright*, 870 So. 2d at 159 (recognizing Court's authority to approve and disapprove statutory amendments to the Evidence Code that it determines are procedural).

The Court in *Dennis* and *Bretherick* followed its constitutional directive and looked to the legislative intent of section 776.032, which expressly grants defendants a substantive right not to be arrested, detained, charged or prosecuted if they used legally justifiable force as defined in Chapter 776. The Court also looked to and applied its existing procedures for motions to dismiss, including motions to dismiss based on other statutory immunities, in developing pretrial

[10] The Court may soon decide whether the Legislature's adoption of *Daubert* is procedural or whether it is intimately intertwined with the substantive provisions of the statute in the case of *DeLilse v. Crane Co.*, 206 So. 3d 94 (Fla. 4th DCA 2016), *rev. granted*, 2017 WL 3484484 (Fla. Jul. 11, 2017).

procedures for determining immunity here. The fact that those procedures were not expressly set forth in a Criminal Rule of Procedure did not give the Legislature free rein to later enact statutes that contained conflicting procedures. To hold otherwise would ignore the Court's rulemaking authority and violate the separation of powers expressly provided in Florida's Constitution.

B. By Enacting the 2017 Amendment, the Legislature Usurped the Court's Authority to Establish Pretrial Procedures Violating the Separation of Powers.

It is without question that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [in the Florida Constitution]." Art. II, § 3, Fla. Const. It is similarly beyond debate that statutes that attempt to enact purely procedural rules are unconstitutional. *Raymond*, 906 So. 2d at 1048 (recognizing well-established principal that a statute that tries to create or modify a procedural rule of court is unconstitutional); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) (same); *Market v. Johnson*, 367 So. 2d 1003 (Fla. 1978) (same). Where, as here, the Legislature has enacted purely procedural rules that directly contradict those adopted by the Florida Supreme Court, Florida law requires that the 2017 Amendment cannot stand.

True, an exception to these general rules allows that a court will find constitutional statutes that include judicial procedures where the court determines

that the judicial procedure is intimately intertwined with the statutory purpose. *See, e.g.*, *Cartwright*, 870 So. 2d at 162 (finding legislative provision permitting consideration of hearsay evidence in Ryce Act proceedings constitutional where invalidating the provisions would "fundamentally alter the nature of those proceedings and disrupt the substantive statutory scheme.…"). However, and unlike here, in those cases there was no existing judicially created rule of procedure with which the subsequently enacted statute conflicted. For this reason, the exception cannot and does not apply here where the statutory judicial procedure set forth in the 2017 Amendment conflicts with the existing rule of procedure established by the Florida Supreme Court. *See Raymond*, *Allen*, *Jackson*, *Massey* and *Market*, above.

The Florida Supreme Court in *Bretherick* already expressed that the pretrial procedures it adopted were consistent with the Legislature's intent. When the Legislature passed the 2017 Amendment it improperly usurped the Florida Supreme Court's constitutional authority, specifically recognized in *Cartwright*, to determine whether the overriding of a procedural statute would disrupt the statutory scheme. It remains the role of the courts to determine whether statutorily enacted procedures are sufficiently intertwined with and necessary to effectuate a statutory scheme so as to warrant this exception. Thus, even if this Court were to examine whether the new burden shifting provision in section 776.032(4) was

intimately intertwined with the Stand Your Ground law's intent, it would have to yield to *Bretherick* as dispositive of the issue.

If the Legislature disagrees with the judicially-established procedures, which passage of 2017 Amendment indicates, it can repeal the procedural rule with a two-thirds vote. Art. V, § 2(a), Fla. Const. Unless and until that happens, the Florida Constitution prohibits the Legislature from replacing the rule in *Bretherick*, and the 2017 Amendment cannot stand.[11]

II. THE STATUTE'S BURDEN SHIFTING REGIME INAPPROPRIATELY IMMUNIZES A DEFENDANT FROM CRIMINAL PROSECUTION WHEN A HUMAN LIFE HAS BEEN TAKEN, AND THUS INADEQUATELY PROTECTS FLORIDA CITIZENS.

The 2017 Amendment creates a preferred class of defendants and, without adequate justification, places their rights above the safety of all Florida's citizens. Stand Your Ground laws in Florida and across the nation have been the subject of intensive study by a number of institutions and scholars. From those myriad studies, two common conclusions emerge: (i) Stand Your Ground laws are unnecessary in that they fail to provide criminal defendants any greater protection

[11] The Legislature cannot create a rule of pretrial procedure either. *See Raymond*, *Allen* and cases cited therein, discussed above. Should the Legislature repeal the judicially established pretrial procedures it must cooperate with the Court in formally developing an alternative rule. *See Raymond*, 906 So. 2d at 1051-52 (directing court to temporarily readopt procedural rules Legislature improperly repealed by two-thirds vote and publish those rules for comment concerning whether they should be amended to reflect legislative intent, including comment from the Legislature).

than traditional, common law self-defense doctrines; and (ii) states with Stand Your Ground laws have experienced increases in homicides and that Stand Your Ground laws result in significant racial disparities. Am. Bar Ass'n, National Task Force on Stand Your Ground Laws, *Final Report and Recommendations*, Sept. 2015. If the question presented does not implicate the first issue, the second raises significant policy concerns that warrant consideration here.

The data suggesting that Florida's Stand Your Ground Law has increased the frequency with which individuals use lethal force to resolve comparatively minor conflicts is extensive. For example, between 2005 and 2015, unlawful homicides in Florida increased 22 percent – even after controlling for justifiable homicides.[12] During the same period, justifiable homicides in Florida increased by 75 percent. Homicides deemed lawful under Florida's Stand Your Ground law accounted for 8.7 percent of homicides in the decade following its adoption, compared with 3.4 percent in the seven preceding years. *Id.* The results in Florida are consistent with those found in other states adopting similar Stand Your Ground laws, where such laws "are associated with a significant increase in the number of homicides."

[12] Humphreys, Gasparrini & Wiebe, *Association Between Enactment of a 'Stand Your Ground' Self-defense Law and Unlawful Homicides in Florida*, J. Am. Med. Ass'n Intern Med., Aug. 14, 2017, at http://bit.ly/2wvKS4U.

McClellan & Tekin, *Stand Your Ground Laws and Homicides*, Nat. Bur. Economic Research Working Paper *Working* Paper, June 2012.[13]

The research also demonstrates that the effects of Stand Your Ground laws are not distributed uniformly. According to a ground-breaking study of the first 200 cases involving the Stand Your Ground defense in Florida, defendants invoking a stand your ground defense were more likely to prevail if the victim is black: 73 percent of those who killed a black person faced no penalty while only 59 percent of those who killed a white victim were exonerated. This disparity is particularly striking given that in about a third of the cases, the persons invoking

[13] A study of 21 states that adopted laws like Florida's found that, from 2000 to 2010, *overall* homicides increased by around 8 percent; that police classified most of these killings as unlawful murder; and that there was no evidence the laws had a deterrent effect on burglary, robbery, or aggravated assault. Cheng & Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Castle Doctrine*, Nat. Bur. Economic Research Working Paper, June 2012. A study of FBI data revealed that homicides ruled *justified* increased even more than overall homicides in Stand Your Ground states. In those states, "the justifiable homicide rate was on average 53% higher in the years after passage of the law . . . while in states that did not enact Stand Your Ground laws during this period, the justifiable homicide rate fell by 5% on average." Nat. Urban League, Mayors Against Illegal Guns & VoteVets, *Shoot First: 'Stand Your Ground' Laws and Their Effect on Violent Crime and the Criminal Justice System*, Sept. 2013 ("*Shoot First Study"*).

stand your ground either initiated the conflict that led to the shooting, shot an unarmed person or pursued their after the victim retreated.[14]

The only systematic statistical analysis of racial and gender bias in Stand Your Ground cases that controlled for a broad range of objective, widely accepted factors found "striking evidence of both racial and gender bias in the outcomes of Florida cases between 2006-2013 in which 'stand your ground' laws [were] invoked": white defendants invoking Stand Your Ground avoided conviction more than black defendants, and there was an even wider gender disparity in domestic violence cases, where men invoking Stand Your Ground defenses did so successfully twice as often as women did. Murphy, *A Statistical Analysis of Racism and Sexism in "Stand Your Ground" Cases in Florida, 2006-2013*, Univ. of Southampton Working Paper, Feb. 5, 2015.

An analysis of FBI data from 2005 to 2010 found that white-on-black homicides were deemed justified at a rate *approximately six times greater* than black-on-white homicides, and that "the recent expansion of Stand Your Ground laws in two dozen states appears to worsen the [racial] disparit[ies]" in justifiable homicide determinations. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, Urban

[14] Hundley, Martin & Humberg, *Florida 'stand your ground' law yields some shocking outcomes depending on how law is applied*, Tampa Bay Times, June 1, 2012. *But see* McClellan & Tekin, *supra* (most significant increase in post-stand-your-ground homicides involved deaths of white men).

Institute, July 2013. A separate analysis of FBI data confirmed that, "[c]ontrolling for population, the number of homicides of black people that were deemed justifiable in Stand Your Ground states *more than doubled between* 2005 and 2011 . . . while it remained unchanged in the rest of the country." *Shoot First Study* (emphasis added).

These findings are alarming standing alone, and even more so when considering the adverse consequences of requiring the State to prove at the pretrial phase that Stand Your Ground immunity should not attach. *See* discussion of *Bretherick* at note 6. Shifting the burden to the State and raising the quantum of proof as contemplated by the 2017 Amendment will make it easier for defendants who are not entitled to Stand Your Ground immunity to avoid criminal prosecution, and may exacerbate the disparate impacts demonstrated under the law.

The immunity afforded under the Stand Your Ground law is not absolute, *see* discussion of Section 776.032(2) at page 2, above. The concept of criminal prosecution, particularly in light of the Stand Your Ground Law, should be viewed as a continuum of events from finding of probable cause and arrest to charging to trial and appeal, and, ultimately, conviction or acquittal. The statute is not intended to prevent a full and fair adjudication of the facts. But, rather, it is meant to ensure that those who have justifiably used force enjoy immunity where the Stand Your Ground criteria are met. In other words, it is intended to provide a

defendant entitled to immunity with the earliest possible exit from the criminal prosecution continuum as warranted by the facts and circumstances – and not to allow any defendant who has taken a life to avoid accountability altogether. This may mean immunity is established after a pretrial evidentiary hearing upon a motion to dismiss or not until after the overturning of a conviction on appeal. This is as it should be because defendants are afforded the full panoply of protections (discussed at note 5) while the State retains the ability to fully investigate the facts and present its case on behalf of the people.

CONCLUSION

For the foregoing reasons, this court should find the 2017 Amendment unconstitutional as inconsistent with the pretrial procedures previously established in *Dennis* and *Bretherick*, and therefore unconstitutional as a violation of the separation of powers.

Respectfully submitted this 20th day of September, 2017.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing was filed via the e-DCA this 20th day of September, 2017 and served on the list below.

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