IN THE SUPREME COURT OF FLORIDA

CASE NO: SC18-747

TASHARA LOVE
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

On Discretionary Review from the Third District Court of Appeal of Florida
DCA No. 3D17-2112; Cir. F15-24308

BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE

IN SUPPORT OF THE TRIAL COURT DECISION ON THE ISSUE OF THE CONSTITUTIONALITY OF SECTION 776.032(4)

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IDENTITY AND INTEREST OF AMICUS CURIAE

Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a national, non-profit organization dedicated to reducing firearm violence and supporting gun laws and policies that improve public safety. Giffords 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, like this one, that implicate the application of state laws in ways that may increase the risk of firearm violence. Giffords Law Center is a well-established nonpartisan, non-profit organization with expertise on self-defense statutes in application across the country. Based on this interest and background, Giffords Law Center submits this brief identifying separation of powers principles that are not addressed by either party but which are dispositive of this and similar cases. Giffords Law Center urges this Court to reverse the Third District Court of Appeal and find section 776.032(4), Florida Statutes, unconstitutional for the reasons stated herein.

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 use force as deemed justified by that law.[1] The Legislature did not include in the Stand Your Ground law any pretrial procedures governing how the new immunity would be determined. Instead, the Legislature appropriately left the enactment of these pretrial procedures to the courts, and this Court exercised its exclusive constitutional authority to establish the procedures in a pair of decisions: *Dennis v. State*, 51 So. 3d 456 (Fla. 2010) and *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

Dennis and *Bretherick* established clear procedural rules for determining Stand Your Ground immunity in a pretrial evidentiary hearing, at which a defendant must prove entitlement to immunity by a preponderance of the evidence. Those judicially created pretrial procedures: (i) effectuate legislative intent by

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[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). The 2017 amendment to section 776.032 added subsection (4) which altered the burden of proof for pretrial evidentiary hearings established in *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

Unless otherwise stated, all statutory references herein are to the Florida Statutes and all citations are to the 2018 statutes.

sparing those entitled to immunity from undue criminal prosecution at the earliest possible point warranted under the given circumstances; (ii) are based upon long-established practice and procedure governing other analogous pretrial matters; and (iii) have been employed by countless Florida courts. The Legislature must defer to these rules because Florida's Constitution gives courts the power to enact procedural law, including "all rules governing the parties, their counsel, and the Court throughout the progress of the case from the time of its initiation until final judgment." *See DeLisle v. Crane*, 43 Fla. L. Weekly S459, S460 (Fla. Oct. 15, 2018) (quoting *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972)). This is true regardless of whether the procedural rules are enacted by the Florida Supreme Court through formal rulemaking or case law.

In 2017, the Legislature unconstitutionally repealed the existing procedural rules established by this Court by enacting section 776.032(4) (the "2017 Amendment"). The 2017 Amendment shifted the burden of proof in pre-trial proceedings to the State, requiring the State to prove before trial by clear and convincing evidence that the threat or use of force was not lawful. However, under Article V, Section 2(a) of the Florida Constitution, the Legislature can only repeal the Court's established procedural rules by a two-thirds majority vote – which it failed to do when adopting the 2017 Amendment. *See DeLisle*, 43 *Fla. L. Weekly*

at S459. Until the Legislature complies with the Florida Constitution, the procedures established under *Dennis* and *Bretherick* remain the law of Florida and the conflicting 2017 Amendment cannot stand.

Courts holding otherwise, including the Third District Court of Appeal in this case, incorrectly deemed the procedures in the 2017 Amendment substantive law, or an intimately intertwined procedural-substantive hybrid that amounted to substantive law. Doing so led these courts to erroneously conclude that the Legislature, in passing the 2017 Amendment, constitutionally enacted a substantive law, rather than a procedural rule, that was not subject to retroactive application as a procedural rule would otherwise be. The 2017 Amendment, however, is procedural and, as other District Courts of Appeal have correctly determined, must fall in the face of an already existing Court-created procedural rule.

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 with Stand Your Ground statutes experience an increase in gun violence, including homicides, and that these statutes 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, in ways that endanger us all. 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 BURDEN OF PROOF PROVISION IN SECTION 776.032(4) CONFLICTS WITH THIS COURT'S PREVIOUSLY ANNOUNCED PROCEDURAL RULES, AND THUS VIOLATES ARTICLE II, SECTION 3 AND ARTICLE V, SECTION 2 OF THE FLORIDA CONSTITUTION.

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. That is exactly what this Court did in *Dennis* and *Bretherick*. While this Court has upheld the legislative enactment of statutory judicial procedures where such procedures are intimately related or intertwined with substantive statutory provisions that approval is the exception, not the rule.[2] As will be further discussed below, this exception does not apply where, as here, the legislature adopted its conflicting procedural rule **after t**he Court announced its rule.

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

While the Court must make every effort to construe a statute as constitutional, it maintains the constitutional authority to reject a legislative enactment of procedural rules if those statutory rules conflict with existing judicially created procedural rules. *See, e .g.*, *DeLisle*, 43 Fla. L. Weekly at S462 (finding unconstitutional Legislature's adoption of *Daubert* where court had previously in case law adopted *Frye*, establishing the rule that expert testimony should be deduced from generally accepted scientific principles); *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 statutory procedures that conflicted and interfered with 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*, 756 So. 2d at 64 (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). Thus, the Court must strike the 2017 Amendment as unconstitutional because it conflicts with the procedural rules this Court previously announced in *Dennis* and *Bretherick* to effectuate the intent of the Stand Your Ground Law.

A. In *Dennis* and *Bretherick*, This Court Appropriately Exercised its Exclusive Constitutional Authority to Establish Pretrial Procedural Rules Implementing the Stand Your Ground Law.

In *Dennis*, this Court announced pretrial procedures to effectuate the Stand Your Ground law after analyzing the statutory text to determine the scope of a defendant's immunity. 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; *see also Smiley v. State*, 966 So. 2d 330 (Fla. 2007) (recognizing the original Stand Your Ground law passed in 2005 was substantive and therefore would not apply retroactively). The Court further noted that the Stand Your Ground law "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 held:

> 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]

The Legislature gave no signal that the procedures pronounced in *Dennis* were inconsistent with its legislative intent when it amended Chapter 776 in 2014. On the contrary, four years after *Dennis*, the Legislature amended Chapter 776—in part to address issues raised by the shooting of Trayvon Martin (see Chapter 2014-195)—but made no change to the procedures established in *Dennis*.[4] Lower courts implemented those procedures for years before and after *Dennis* without objection

[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.

[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* in 2014, it later acted unconstitutionally by enacting the conflicting 2017 Amendment in direct response to the procedural rule established in 2015 in *Bretherick*.

by the Legislature. *See Bretherick*, 170 So. 3d at 775; *Early v. State*, 223 So. 3d 1023, 1025 (1st DCA 2017); *Rudin v. State*, 182 So. 3d 724, 725-26 (1st DCA 2015).[5]

While this 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 in *Bretherick*, "m[aking] 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.

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." *Bretherick,* 170 So. 3d at 768. The Court held that a defendant must establish entitlement to Stand Your Ground immunity by a preponderance of the evidence at the pretrial evidentiary

[5] The procedures followed included: (1) granting 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) granting 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) permitting 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.

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]

There can be no debate that in *Dennis* and *Bretherick* this Court firmly established procedural rules governing the application of Stand Your Ground immunity in the pretrial context, and that doing so fell squarely within the Court's constitutional authority to pronounce procedures for the judicial process. In

[6] To further counter the arguments that the pre-trial burden of proof should fall on the State (as later required by the 2017 Amendment), the Court in *Bretherick* also identified the reasons why this would be problematic and create a process "fraught with abuse." 170 So. 3d at 777-78. 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 State's case. *Id*.

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 . . . It includes those rules . . . which **fix and declare the primary rights of individuals** . . .

Raymond, 906 So. 2d at 1048-49 (emphases added; internal quotations and citations omitted); *see also DeLisle*, 43 Fla. L. Weekly at S460 (defining procedural and substantive law). The Court's implementation of the pretrial evidentiary hearing, including fixing the burden of proof and quantum of evidence, encompasses precisely 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 pronounced in *Dennis* and *Bretherick* are "the machinery of the judicial process" via which the product (*i.e.*, application of immunity) results.

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

recognizes them as procedural rules over which it maintains constitutional authority. For example, in its recent decision in *DeLisle*, the Court recognized that prior cases adopted the *Frye*[7] standard for determining the admissibility of novel scientific expert opinion, and in doing so enacted a procedural rule. *DeLisle*, 43 Fla. L. Weekly at S462 (quoting *School Board of Broward County v. Surette,* 281 So. 2d 481, 483 (Fla. 1973), *receded from on other grounds by School Board of Broward County v. Price*, 362 So. 2d 1337 (Fla. 1978) ("Where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure … the statute must fall.").[8] The Court went on to find unconstitutional the Legislature's 2012 statutory adoption of the conflicting *Daubert*[9] standard for determining reliability of expert evidence, holding that the Legislature could not repeal this procedural rule of the Court by a simple majority vote. *DeLisle*, 43 Fla. L. Weekly at S462.

This 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

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

[8] *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).

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

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 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 conflicting procedures.[10] To hold otherwise ignores the Court's rulemaking authority and violates the separation of powers expressly established in Florida's Constitution.

B. By Enacting the 2017 Amendment, the Legislature Usurped this Court's Authority to Pronounce Judicial Procedures and Violated Separation of Powers Principles in Florida's Constitution.

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 principle 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); *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978) (same). Where, as here, the

[10] Proponents of the 2017 Amendment, and the Third DCA below, erroneously maintained that it does not conflict with any rule of procedure because the Florida Supreme Court did not adopt formal rules. This Court's recent decision in *DeLisle* confirms that the Court may enact procedural rules through case law.

Legislature has enacted purely procedural rules that directly contradict those previously adopted by the Florida Supreme Court, Florida law compels invalidation of the 2017 Amendment.

True, the Court can uphold legislative enactments that include judicial procedures where the court determines that the procedure is intimately intertwined with the statutory purpose. *See, e.g.*, *Cartwright*, 870 So. 2d at 162 (upholding legislative provision permitting consideration of hearsay evidence in Ryce Act proceedings where invalidating the provisions would "fundamentally alter the nature of those proceedings and disrupt the substantive statutory scheme.…"). However, this Court, at all times, retains the constitutional authority to reject procedures adopted by the Legislature. While this Court may choose to, and often does approve statutorily enacted procedures, such as a burden of proof necessary to effectuate the substantive purpose of a statutory scheme, it not constitutionally bound to do so. Here, where the 2017 Amendment conflicts with established Court procedure, the separation of powers doctrine in Florida's Constitution requires the Court to reject the statutorily enacted procedures. *See DeLisle, Raymond, Allen*, *Jackson*, *Massey* and *Markert*, above. To hold otherwise unconstitutionally transfers power from one branch to another.

Florida's Constitution contains safeguards to prevent such transfers. If the Legislature disagrees with judicially established procedures, as passage of 2017

Amendment indicates it does, the Legislature can only repeal those procedures with a two-thirds vote. Art. V, § 2(a), Fla. Const. *See DeLisle* 43 Fla. L. Weekly at S461-S462. Unless and until that happens, the Florida Constitution prohibits the Legislature from repealing 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 than traditional, common law self-defense doctrines; and (ii) states with Stand Your Ground laws have experienced increases in homicides and that Stand Your

[11] The Legislature cannot create a rule of pretrial procedure following a constitutional repeal 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 about whether they should be amended to reflect legislative intent, including comment from the Legislature).

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); *see also* Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides*, *and Injuries* (Nat'l Bureau Econ. Research, Working Paper No. 18187, 2012) (concluding that at least 30 more individuals nationwide are killed each month due to SYG laws, and noting significant increase in hospitalizations related to gun inflicted injuries). If the question presented does not implicate the first issue, the second raises significant policy concerns that warrant consideration here.

There is extensive data suggesting that Florida's Stand Your Ground Law has increased the frequency with which individuals use lethal force to resolve comparatively minor conflicts. 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

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

homicides." 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 in Florida in which the law was invoked, defendants using a Stand Your Ground defense were more likely to prevail if the victim was 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 Stand Your Ground

[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 Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Castle Doctrine* (Nat'l Bureau Econ. Research, Working Paper No. 18134, 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'l 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"*); *see also* Chamlin, *An assessment of the Intended and Unintended Consequences of Arizona's Self-Defense, Home Protection Act,* J. of Crime and Justice, Vol. 37, No. 3, 327-338 (Sept. 7, 2013) (concluding that the act failed to achieve its goal of reducing robberies and noting that robberies and suicides increased after passage of the act, and that the act may result in greater risk of violent death).

either initiated the conflict that led to the shooting, shot an unarmed person, or pursued their victim 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." Justin 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). 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. *Id.*

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. John K. Roman, *Race, Justifiable Homicide, and Stand*

[14] Kris Hundley, Susan Taylor Martin & Connie 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).

Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data, Urban 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.

As discussed above, the immunity afforded under Florida's Stand Your Ground law is not absolute. The concept of criminal prosecution, particularly where a Stand Your Ground defense is available, 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 Stand Your Ground law is not intended to confer immunity from prosecution in way that thwarts a full and fair adjudication of the facts. Rather, the law 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 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 29th day of October, 2018.

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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 Florida e-filing Portal this 29th day of October, 2018 and served on the list below.

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