STANDING YOUR GROUND

Applying Florida Statute §776

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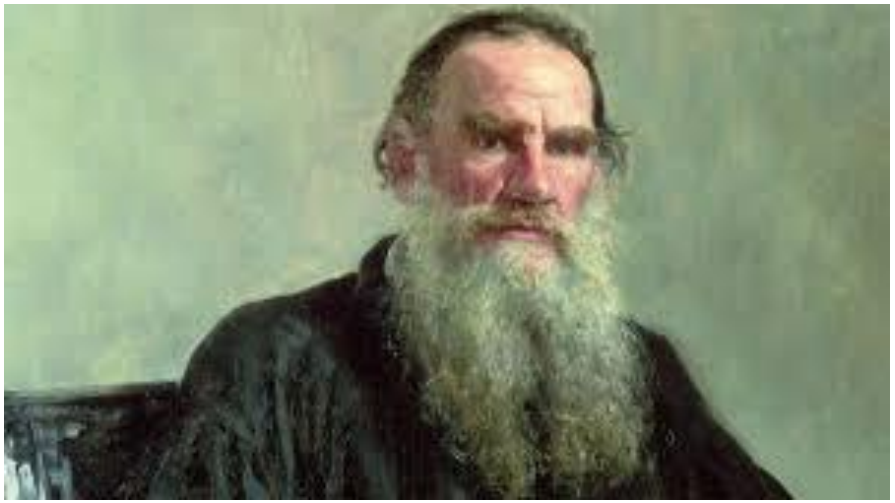
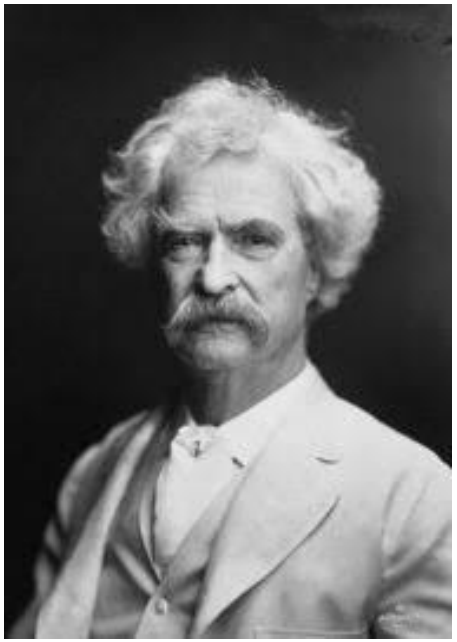
VISITOR WARNING
FLORIDA RESIDENTS CAN
USE DEADLY FORCE
BradyCampaign.org

The most difficult subjects can be explained to the most slow-witted man if he has not formed any idea of them already;
but the simplest thing cannot be made clear to the most intelligent man if he is firmly persuaded that he knows already, without a doubt, what is laid before him.”



- Leo Tolstoy

“It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just isn’t so.”

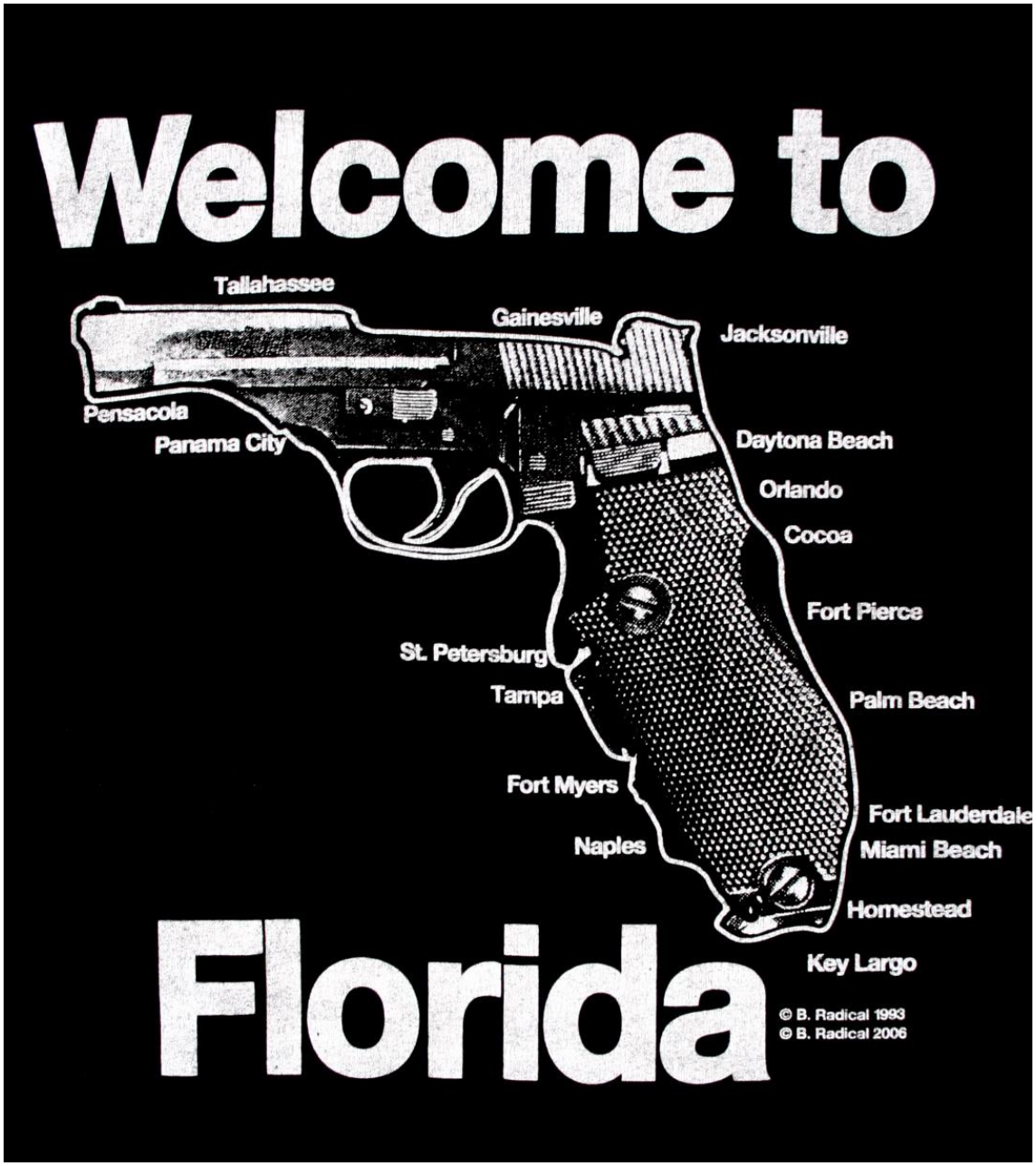


- Mark Twain

Learning Objectives

As a result of attending this course, participants will be better able to :

- ✓ Analyze and correctly apply current case law
- ✓ Properly conduct evidentiary hearings
- ✓ Apply correct burden of proof
- ✓ Identify potential issues
- ✓ Write an appropriate order
- ✓ Avoid being referred to as “the learned judge” in published opinions.


Welcome to
Tallahassee
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FLORIDA STATUTE §776

- §776.012 JUSTIFIABLE USE OF FORCE
- §776.013 THE CASTLE DOCTRINE
- §776.041 AGGRESSORS
- §776.031 DEFENSE OF PROPERTY
- §776.032 IMMUNITY

STANDING YOUR GROUND

JUSTIFIABLE USE OF FORCE

FLORIDA STATUTE §776.012

Use of **force** is justified:

"when and to the extent that the person reasonably believes such conduct is necessary":

- to defend self or another
- against the other's *IMMINENT* use of unlawful force

JUSTIFIABLE USE OF FORCE
F. S. §776.012

Use of **DEADLY force** is justified:

- when user "reasonably believes that such force is necessary to prevent *IMMINENT DEATH* or great bodily harm"

- or to prevent imminent commission of a forcible felony

FLORIDA STATUTE §776.012

- OPERATIVE WORDS:
  - ✓Reasonably
  - ✓Imminent

- DEADLY FORCE and FORCE
  - ✓Deadly force **only** to protect against DEATH or GBH

- STAND YOUR GROUND
  - ✓ No duty to retreat

WHAT IS A DEADLY WEAPON?

RAMBO

Chuck Norris

Mama

What is a Deadly Weapon?

A "deadly weapon" is any instrument which will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design and construction.

Who decides? Trier of fact

***Dale v. State*, 703 So.2d 1045 (Fla. 1997)**

So, in SYG hearing, it's you.

***Rudin v. State,* 182 So.3d 724 (Fla. 1st DCA 2015)**

OBJECTIVE OR SUBJECTIVE?

OBJECTIVE STANDARD:

- A defendant is not entitled to immunity based only upon a subjective belief that the use of force was justifiable.

- Rather, the court tests a defendant's belief using an objective, "reasonable man" standard.

- Court asks whether a **reasonable** and **prudent** person standing in the defendant's shoes, knowing what the defendant knew, would have used the same force.

- So, If a defendant subjectively believes the use of force is justified, but is not objectively reasonable in that belief, the defendant is not entitled to immunity.

***Mobley v. State*, 132 So.3d 1160 (3rd DCA, 2014)**

DEFENSE OF PROPERTY F.S. §776.031

- Justifies using or threatening use of **force**, except deadly force, where person **reasonably believes** force is necessary to prevent or terminate trespass on, or other tortious or criminal interference with, either **real property** (other than a dwelling) or **personal property**, lawfully in possession

- Justifies using or threatening to use **deadly force** if reasonably believes such force is necessary to prevent the **imminent** commission of a **forcible felony**

STAND YOUR GROUND

Prior to 2005, *unless* you were in your home or place of work, there was a common law **duty to retreat**.

In 2005, the Florida Legislature abolished the common law duty to retreat.

THE STAND YOUR GROUND BEFORE HE STANDS HIS GROUND DEFENSE

THE CASTLE DOCTRINE

FLORIDA STATUTE §776.013

THE CASTLE DOCTRINE

FLORIDA STATUTE §776.013

Same rule as F.S. §776.012 with a *PRESUMPTION*

A person is ***presumed*** to have a fear of imminent death or great bodily harm when person against whom force is being used either:

- ✓ Already has or is in the process of ***unlawfully*** and ***forcibly*** entering a dwelling or vehicle

or

- ✓ is ***unlawfully*** and ***forcibly*** removing someone from a dwelling or vehicle

and

- ✓ the person using defensive force knew or had reason to believe this was occurring or had occurred

THE CASTLE DOCTRINE

However…

The presumption will NOT apply when:

- ✓ The person against whom force is used had a **right to be where they were**
- ✓ The person being removed is a child or grandchild and the remover has **lawful custody**
- ✓ The person using defensive force is engaged in **unlawful activity**
- ✓ **Can not be used against a LEO** who enters in performance of official duties (officers must identify themselves)

AGGRESSORS

FLORIDA STATUTE §776.041

IMMUNITY IS NOT AVAILABLE TO ONE WHO:

- ✓ Is attempting to commit, committing or escaping after committing a forcible felony - or -
- ✓ Is the person who ***provokes*** the use of force (the initial aggressor) **unless**:
  - ❖ Reasonably believes they are in imminent danger
  - ❖ Have exhausted every reasonable means to escape
  - ❖ Withdrew from physical contact in good faith and clearly indicates desire to withdraw and terminate use of force

STANDING YOUR GROUND IS NOT PRUSUING YOUR GROUND

IMMUNITY

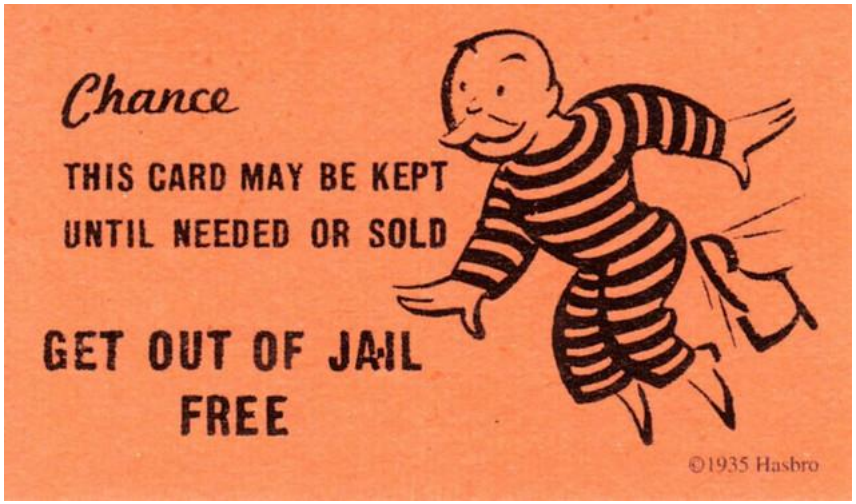
FLORIDA STATUTE §776.032

IMMUNITY from:

- ✓ criminal prosecutions
- ✓ civil actions

NOT an AFFIRMATIVE DEFENSE…

complete immunity



HOW IT WORKS

for a crime with an offense date of

June 9, 2017 or later:

- **Must** be raised by Defendant in pretrial motion

- Court **must** hold **pretrial** evidentiary hearing

***Dennis vs. State*, 51 So.3d 456 (Fla. 2010)**

***Bretherick vs. State*, 170 So.3d 766 (Fla. 2015)**

776.032(4) – once a prima facie claim of self-defense immunity has been raised by the defendant the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity

HOW IT WORKS

Trial Judge determines if immunity applies

- ✓ If granted – case is over, defendant is immune from prosecution or civil action
- ✓ If denied – case proceeds
  - Defendant may raise in trial as the affirmative defense of self-defense

Montanez v. State, 24 So.3d 799 (2DCA 2010)

Armstrong v. State, 120 So.3d 112 (4DCA 2013)

Grant Immunity and Dismiss

- When the trial court finds that the defendant is entitled to immunity under §776.032, the court must enter an order finding that the defendant is immune *and* **dismiss** the case (and release defendant).
- Error to simply granting immunity without entering an order of dismissal

  ***State v. Egido*, 113 So.3d 88, (2nd DCA 2013)**

THE EVIDENTIARY HEARING

BURDEN OF PROOF:

- is on the party seeking to overcome the immunity (prosecution) once a prima facie claim of self-defense immunity has been raised by the defendant

STANDARD OF PROOF:

- Clear and convincing evidence

MUST CONDUCT EVIDENTIARY HEARING

- Can not be denied based on a 3.190(c)(4) traverse

Dennis v. State, 51 So.3d 456 (Fla. 2010)

Bretherick v. State, 170 So.3d 766 (Fla. 2015)

Do the rules of evidence apply at the SYG evidentiary hearing?

Is hearsay admissible at the SYG evidentiary hearing?

You make the call

YES - the rules of evidence apply at evidentiary hearing

NO – hearsay is not admissible

"While the rules of evidence are inapplicable or relaxed in certain proceedings, we have been unable to find any authority holding that hearsay evidence is admissible at a pretrial evidentiary hearing on a motion to dismiss based on immunity"

"Hearsay is not admissible to prove a <u>material fact</u> for the court's consideration"

***McDaniel vs. State*, 24 So.3d 654 (Fla. 2nd DCA 2009)**

"When immunity under this law is properly raised by a defendant, **the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist."**

***McDaniel* at 656.**

Does a Defendant have to admit to the conduct before they can claim immunity pursuant to SYG?

Does the S.O.D.D.I. defense work?

You make the call

YES – Defendant must admit to the conduct (use of force) before they can claim immunity pursuant to SYG

(NO – "some other dude did it" defense will not work)

"If a defendant denies that any criminal conduct occurred or disavows all involvement in the criminal conduct then his defense is irreconcilable with self-defense"

***Wright v. State*, 705 So.2d 102 (Fla. 4th DCA 1998)**

Defendant's Testimony

Can the Defendant's testimony from the SYG hearing be transcribed and used as substantive evidence at trial?

You make the call

YES – Defendant's testimony at SYG hearing can be used as substantive evidence at trial

"Because appellant was not forced to make a choice between two constitutional rights, his testimony at the pre-trial SYG immunity hearing was admissible against him at trial. Appellant was not required to surrender any constitutional right by voluntarily testifying in the pre-trial SYG immunity hearing**."**

"This case does not present a reason to deviate from the general rule that a defendant's testimony is admissible against him in later proceedings."

***Cruz vs. State*, 189 So.3d 822 (Fla. 4th DCA 2015)**

Law Enforcement

Can a law enforcement officer claim SYG immunity when the use of force occurred in the course of making a lawful arrest?

You make the call

YES – SYG can be claimed by law enforcement officers

“Law enforcement officers are eligible to assert Stand Your Ground immunity even when the use of force occurred in the course of making a lawful arrest.”

***State vs. Peraza*, 259 So.3d 728 (Fla. 2018)** – affirming the decision of the 4th DCA and the articulate and beautifully written trial court order

APPELLATE REVIEW

A **writ of prohibition** is the appropriate remedy to challenge a trial courts denial of immunity.

***Mocio v. State*, 98 So.3d 601 (2 DCA 2012)**

The appellate court will defer to the trial court's findings if they are supported by **substantial, competent** evidence.

***Tover v. State*, 106 So.3d 958 (4 DCA 2013)**

THE EVIDENTIARY HEARING

The known unknowns…

There are many issues that have not yet been addressed in the DCAs. In the absence of case law to guide us, the Trial Court Judiciary will be the first to decide these new issues.

We came up with several known unknowns:

KNOWN UNKNOWNS (WHICH ARE NOW KNOWN?)

How does the Defendant meet the requirement of raising a prima facie claim of self-defense immunity under the current law?

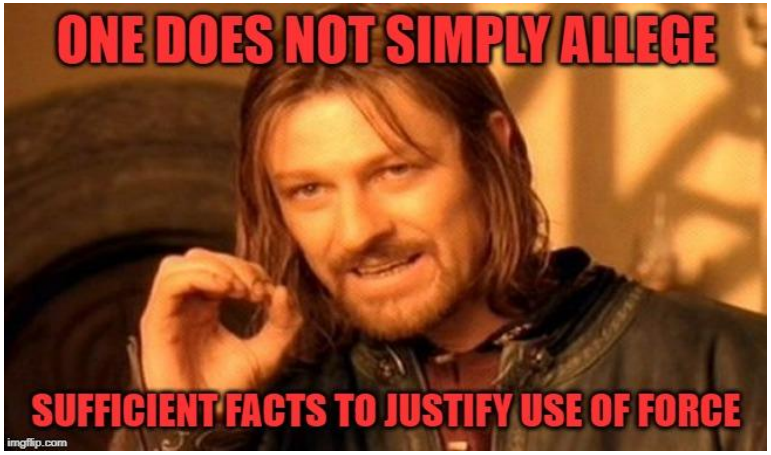
Can the Defendant meet the requirement with an unsworn pleading only?

Can the Defendant meet the requirement with affidavits only?

Is live testimony from a witness required?

Is live testimony from the Defendant required?

Can the parties stipulate to a prima facie claim?



***Langel vs. State*,**
255 So.3d 359
(Fla. 4th DCA 2018)
[decided September 5, 2018]

"To raise a prima facie claim of self-defense immunity . . . a defendant must show the elements for the justifiable use of force are met."

Ordinarily, **this will require the defendant to testify or otherwise present or point to evidence** from which the elements for justifiable use of force can be inferred.

Jefferson vs. State, 264 So.3d 1019 (Fla. 2nd DCA 2018)

[decided December 28, 2018]

"We interpret section 776.032(4)'s requirement of a prima facie claim of self-defense immunity …to mean that **an accused must simply allege** a facially sufficient prima facie claim of justifiable use of force… **and present argument** in support of that motion at a pretrial hearing**."**

"In sum, procedurally, a claim for immunity must first be raised… in a 3.190(b) motion to dismiss. The **trial court is then to determine whether, at first glance and <u>assuming all facts are true</u>**, the alleged facts… support the elements of self defense. If the **trial court determines that the defendant's claim of self-defense satisfies the requirements…**, the **State shall then present clear and convincing evidence** to overcome the self-defense claim**."** ***Jefferson* at 1029.**

SO… The answer depends on whether you preside in the 2nd DCA, the 4th DCA or in an undecided DCA.

Known Unknowns

- ✓ If there is a motion to suppress statements should the Court rule on that issue first?

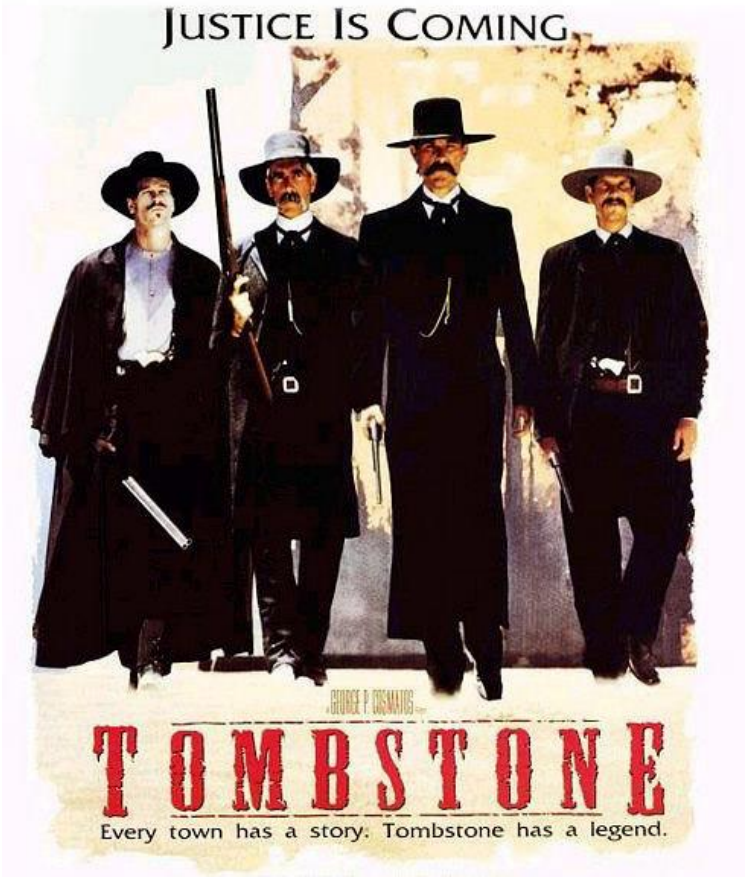
  - If a confession was suppressed, can it be considered for the motion to dismiss?

  - Would it make a difference if the suppression is granted based on a constitutional violation vs. a finding that it was not voluntary?

Known Unknowns

✓ Should the Judge consider prior records?

- of the victim ?
- of the defendant ?
- of other witnesses ?



More Known Unknowns

If the Defendant testifies, should (must) the Court advise him that his testimony can be used against him at trial?

Suggested answer is to advise Defendant

State may admit testimony from SYG hearing at trial as substantive evidence per ***Cruz***

Known:
CONVICTED FELONS

Can a convicted felon (or previously adjudicated delinquent) who is not legally permitted to possess a firearm be granted immunity?

You make the call

NO – 776.012 & 776.013 and 776.031 have all been amended to include the following language:

776.012(2) – ". . . If the person using or threatening to use deadly force is not engaged in a **criminal activity** and is in a place where he or she has a right to be"

776.013(3)(c) – ". . . The presumption does not apply if the person who uses or threatens to use defensive force is engaged in a **criminal activity** or is using the dwelling, residence, or occupied vehicle to further a **criminal activity**"

776.031(2) – ". . . If the person using or threatening to use deadly force is not engaged in a **criminal activity** and is in a place where he or she has a right to be"

Is a defendant entitled to claim SYG immunity if they are also:

- driving on a suspended license?

- possessing a controlled substance?

- trespassing or loitering?

Fletcher v. State 1D18-1867 (6/12/19)

- Trial court found that simple trespass would be sufficient criminal activity to deny SYG immunity

  (However, the case was reversed finding no trespass)

Safe to read as ***any*** criminal activity

Can a defendant claim SYG immunity if they are firing “warning shots”?

- “What a country. In America, you have warning shots. The police shoot in the air -- in Russia, they shoot straight ahead, that's a warning for the next guy.”

- Yakov Smirnoff

YES – 776.012 & 776.013 and 776.031 have all been amended to include the following language:

776.012(2) – ". . . If the person using or **threatening to use** deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be"

776.013(3)(c) – ". . . The presumption does not apply if the person who uses or **threatens to use** defensive force is engaged in a criminal activity or is using the dwelling, residence, or occupied vehicle to further a criminal activity"

776.031(2) – ". . . If the person using or **threatening to use** deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be"

EVERYTHING CHANGED ON JUNE 9, 2017:

- CHANGE IN BURDEN OF PROOF

- CHANGE IN PARTY WHO MUST MEET THE BURDEN

The burden of proof and the party who has the burden was changed when 776.032 was amended effective June 9, 2017 and 776.032**(4)** was added to the law

PRIOR to June 9, 2017: "We 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" (*Bretherick vs. State*, 170 So.3d 766 (Fla. 2015)

STARTING on June 9, 2017: "In a criminal prosecution, once a prima facie claim of self-defense immunity has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution"

HOW IT WORKS for a crime with an offense date of June 9, 2017 or thereafter – once a prima facie claim of self-defense immunity has been raised at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution

BUT HOW DOES IT WORK for a crime that has an offense date prior to June 9, 2017 but it still pending in front of you right now?

BUT HOW DOES IT WORK for a crime that has an offense date prior to June 9, 2017 but the Defendant has already been convicted at trial and sentenced?

Does the change in the law on June 9, 2017 apply retroactively to a pending case with a date of offense prior to June 9, 2017?

The retroactive application of the changes in the burden of proof and which party must meet the burden depends on which appellate district you preside in.

As of right now there is a conflict as to the retroactive application of the new law.

- "When a district court of appeal issues an opinion deciding a point of law that opinion is binding on trial courts within that district . . . until that decision is overruled or otherwise affected by a decision of the Florida Supreme Court." ***Link vs. State*****, 44 FLW D1226 (Fla. 3rd DCA 2019) citing** ***Pardo vs. State*****, 596 So.2d 665 (Fla. 1992)**

It depends on your appellate jurisdiction:

THE GOOD – CHANGE DOES NOT APPLY RETROACTIVELY

3rd DCA – *Love vs. State*, 247 So.3d 609 (Fla. 3rd DCA 2018)
4th DCA – *Hight vs. State*, 253 So.3d 1137 (Fla. 4th DCA 2018)

THE BAD – CHANGE DOES APPLY RETROACTIVELY

1st DCA – *Aviles-Manfredy vs. State*, 44 FLW D187 (1st DCA 2019)
2nd DCA – *Martin vs. State*, 43 FLW D1016 (Fla. 2nd DCA 2018)
5th DCA – *Fuller vs. State*, 257 So.3d 521 (Fla. 5th DCA 2018)

THE UGLY . . .

Manley vs. State, 44 FLW D1129 (Fla. 2nd DCA 2019)

- Trial judge denied Defendant's pretrial SYG motion to dismiss based on prior law, Defendant subsequently convicted at trial

"As we did in *Martin*, here we reverse Manley's judgment and sentences and remand for a new immunity hearing under the 2017 statute. If, following the hearing, the trial court determines that Manley is entitled to statutory immunity, it shall enter an order to that effect and dismiss the information with prejudice. If the court determines that Manley is not entitled to immunity, it shall enter an order so reflecting and reinstate Manley's conviction and sentences."

On March 6, 2019 FSC heard oral arguments in ***Love*** regarding conflict among the DCA's as to the retroactive application of current version of SYG law.

No opinion from FSC as of today . . .

Writing an Appropriate Order

- **Do include *detailed* findings of fact**
- Do use proper standard
- **See sample orders**

"I'm waiting for them to work out the bugs first."

Writing an Appropriate Order

Standard of Review

- ✓ On appeal, the trial court's legal conclusions are subject to ***de novo*** review
- ✓ Findings of fact are presumed correct
- ✓ Upheld when supported by **substantial, competent** evidence.

***State v. Gallo*, 76 So.3d 437 (2 DCA 2011)**

***Darling v. State*, 81 So.3d 574 (3 DCA 2012)**

***Tover v. State*, 106 So.3d 958 (4 DCA 2013)**

** You must include in written order your finding of fact as to if the Defendant was engaged in a criminal activity or not **

"In this case the written order of the trial court granting immunity does not make any findings or reach any conclusions as to the requirements of the second sentence of 776.012(2)."

"We reverse and quash the order below granting immunity and remand for the trial court to enter an appropriate order after making additional findings regarding the requirements of the second sentence in section 776.012(2)."

DCA includes the following: "We express no opinion, because the issues were not addressed by the trial court, as to what constitutes a criminal activity"

***State vs. Chavers*, 230 So.3d 35 (Fla. 4th DCA 2017)**

To Have or Not to Have…

- Reasons why parties may or may not want to have a fully litigated SYG hearing pre-trial
  - Better chance before a jury?
  - Requires Defense to show their cards
  - Defendant's statement can be used against him
  - Gives State a dry run with witnesses
  - Media attention
  - Other trial strategies

THE UNKNOWN UNKNOWNS

Will the Legislature repeal stand your ground?

The Tampa Bay Times Study

- ❖ Published June 1st, 2012
- ❖ Extensive study of almost 200 cases

Some Findings:

- ✓ 68% successful
  - 35% never arrested or charged
  - 23% granted immunity by Judge
  - 10% acquitted by jury after raising self-defense
- ✓ 32% unsuccessful
  - 16% pled
  - 16% convicted by jury

The Tampa Bay Times Study

Other Findings:

- ✓ Most of the “victims” were unarmed
  - 135 unarmed, 19 gun, 8 knife, 30 other weapon
- ✓ Most of the accused are armed
  - 121 firearm, 36 knife, 18 unarmed, 17 other weapon

The Tampa Bay Times Study

Did the victim initiate the confrontation?

- 90 yes
- 43 no
- 67 unclear

Was the victim armed?

- 47 yes
- 140 no
- 13 unclear

The Tampa Bay Times Study

Was the victim committing a crime that led to the confrontation?

- 45 yes
- 148 no
- 13 unclear

Did the defendant pursue the victim?

- 61 yes
- 106 no
- 33 unclear

The Tampa Bay Times Study

Could the defendant have retreated to avoid the conflict?

- 123 yes
- 26 no
- 51 unclear

Was the defendant on his/her property?

- 68 yes
- 132 no

The Tampa Bay Times Study

Is race an issue?

- ✓ Black victims: “stand your ground” defense successful 73% of cases
- ✓ White victims: “stand your ground” defense successful 59% of cases

BUT… the *Times* article found:

- ✓ White defendant who invoked the law were charged at the same rate as black defendants.
- ✓ White defendants who went to trial were convicted at the same rate as black defendants.