

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 128

INTRODUCER: Judiciary Committee and Senator Bradley and others

SUBJECT: Self-defense Immunity

DATE: January 26, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	<u>RC</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 128 changes the burden of proof and who must bear it during pretrial hearings to evaluate a defendant's claim of immunity based on a justifiable use of force. Current law provides a defendant a right of immunity from criminal prosecution and civil action if he or she is justified in using force.

The procedures, however, to determine a person's immunity from prosecution are not set forth in current law. As a result, the majority of the Supreme Court in the 2015 opinion of *Bretherick v. State* set forth procedures to effectuate the grant of immunity which it believed was consistent with the intent of the Legislature. Under the majority opinion, a defendant claiming immunity must prove by a preponderance of the evidence the entitlement to the immunity at a pretrial hearing.

The dissenting opinion in *Bretherick*, however, interpreted the existing substantive right to assert immunity and concluded that the state has the burden of proof. Consistent with the *Bretherick* dissent, the bill places the burden of proof on the state at pretrial immunity hearings. Additionally, the bill provides that the state must prove its burden by the beyond a reasonable doubt standard.

## II. Present Situation:

### Stand Your Ground law

In 2005, the Legislature enacted into law chapter 2005-27, L.O.F., commonly known as the “Stand Your Ground” (SYG) law. The law expanded the common law Castle Doctrine and abrogated the common law duty to retreat on the part of the defender, provided that the defender is not committing a crime and is in a place where he or she has a right to be. These changes were incorporated into chapter 776, F.S., which governs the justifiable use of force.

### *The Castle Doctrine and Home Protection*

The Castle Doctrine, a doctrine dating back to common law, provided that when faced with an intruder, a person had no duty to retreat from his or her home, the proverbial “castle.” Rather, the defender had the right to stay in the home and protect himself or herself with force, including deadly force.<sup>1</sup>

The SYG law expanded the concept of the Castle Doctrine in two main ways. First, the law extended the concept of a person’s “castle” to include a dwelling, residence, or occupied vehicle.<sup>2</sup> Second, the law created a presumption that a person within a “castle” has a reasonable fear of imminent peril of death or great bodily harm if two conditions are met.<sup>3</sup> First, the offender must have entered or be in the process of unlawfully and forcibly entering the dwelling, residence, or occupied vehicle or be attempting to forcibly remove a person. Second, the defender must know or had reason to believe that an unlawful and forcible entry had occurred or was occurring.<sup>4</sup>

As under the common law Castle Doctrine, the SYG law imposes no duty to retreat on a person who acts in self-defense in his or her castle. But the defender in a castle will generally receive a grant of immunity from arrest, criminal prosecution, and civil action.<sup>5</sup>

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<sup>1</sup> *Recent Development: Florida Legislation; Florida Legislation—The Controversy over Florida’s New “Stand Your Ground” Law—Fla. Stat. S. 776.013(2005)*, 33 FLA. ST. U.L.REV. 351, 355 (Fall 2005).

<sup>2</sup> Section 776.013(5), F.S., defines a dwelling as a temporary or permanent building or conveyance of any kind, including an attached porch with or without a roof, mobile or immobile, including a tent, provided that it is designed for nighttime lodging. A residence is a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest. A vehicle is a conveyance of any kind, whether or not motorized provided that it is designed to transport people or property.

<sup>3</sup> Conversely, s. 776.013(4), F.S., presumes that a person who unlawfully and by force enters or attempts to enter a person’s dwelling, residence, or occupied vehicle intends to commit an unlawful act involving force or violence.

<sup>4</sup> Section 776.013(1) and (2), F.S. The presumption does not apply if the person against whom defensive force is used or threatened has the right to be in or is a lawful resident of the location and against whom there is no injunction for protection; the person sought to be removed is in the lawful custody or guardianship of the person against whom the defensive force is used or threatened; the person who uses or threatens to use defensive force is committing a crime or using the location to further a criminal act; or the person against whom defensive force is used or threatened is a law enforcement officer entering the premises pursuant to an official duty and who identifies him or herself as a law enforcement officer. Section 776.013(2), F.S.

<sup>5</sup> Section 776.032(1), F.S.

### ***Defense of Self or Others***

The 2005 changes to the self-defense law generally eliminated the duty to retreat before using force outside of a person's dwelling, residence, or occupied vehicle. When acting in self-defense or in defense of others, a person does not have a duty to retreat and may use non-deadly force, if the person reasonably believes the force is necessary to defend himself or herself or another against an imminent use of unlawful force.<sup>6</sup> The person may use deadly force, if the person reasonably believes the force is necessary to prevent imminent death or great bodily harm to himself or herself. However, the common law duty to retreat before using deadly force still applies to a person who is engaged in criminal activity or is not in a place where he or she has a right to be.<sup>7</sup>

### ***Defense of Property***

When acting in defense of property, a person does not have a duty to retreat and may use non-deadly force, if the person reasonably believes that the force is necessary to stop a trespasser's entry on personal or real property other than a dwelling.<sup>8</sup> A person may use deadly force, if the person reasonably believes deadly force is needed to prevent a forcible felony.<sup>9</sup> However, the common law duty to retreat before using deadly force still applies to a person who is engaged in criminal activity or is not in a place where he or she has a right to be.<sup>10</sup>

### ***Immunity from Criminal Prosecution and Civil Action under Stand Your Ground***

A person who uses force in self-defense as authorized under chapter 776, F.S., is justified for those actions and is immune from criminal prosecution and any civil action.<sup>11</sup> Immunity from criminal prosecution includes immunity from being arrested, detained in custody, and charged or prosecuted.<sup>12</sup> A defendant to a civil action based on a use of force is entitled to reasonable attorney's fees, court costs, lost income, and all expenses related to the defense of the action if the defendant prevails in a claim of immunity.<sup>13</sup>

### **Case Law**

Although the SYG law created an express right to immunity, it did not specify procedures for evaluating a person's claim of a justifiable use of force and immunity. However, the courts have developed the procedures in case law.

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<sup>6</sup> Section 776.012(1), F.S.

<sup>7</sup> Section 776.012(2), F.S.

<sup>8</sup> Section 776.031(1), F.S.

<sup>9</sup> A forcible felony is defined to include the following offenses: "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." Section 776.08, F.S.

<sup>10</sup> Section 776.031(2), F.S.

<sup>11</sup> Section 776.032(1), F.S.

<sup>12</sup> Section 776.032(1), F.S.

<sup>13</sup> Section 776.032(3), F.S.

### *Immunity Determination*

In 2008, in *Peterson v. State*, the First District Court of Appeal reviewed a first-degree murder case involving a claim of immunity under the Stand Your Ground law.<sup>14</sup> In upholding the trial court's use of a pretrial, adversarial hearing to determine immunity, the appellate court stated that "the Legislature makes clear that it intended to establish a true immunity and not merely an affirmative defense."<sup>15</sup> However, should the court deny the immunity claim, the defendant is not foreclosed from introducing the basis of the claim as an affirmative defense at trial.<sup>16</sup> The court also endorsed the trial court's review of the defendant's motion to dismiss under a showing of a preponderance of the evidence.<sup>17</sup>

In 2010, the Florida Supreme Court in *Dennis v. State* upheld the *Peterson* process of determining immunity through a pretrial evidentiary hearing.<sup>18</sup> According to the Court:

section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. Section 776.032(1) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.<sup>19</sup>

The Court also recognized the availability of the claim of self-defense as an affirmative defense at trial.<sup>20</sup>

Building on the *Dennis* court's validation of the use of pretrial evidentiary hearings in determining immunity, in 2015, the Court reviewed the burden of proof and the level of proof required in *Bretherick v. State*.<sup>21</sup> The review was based on the defendant's assertion that the state should bear the burden of proof in immunity hearings and that the required showing is beyond a reasonable doubt.

The Court began its analysis of the issues by recognizing that the law is silent on how to procedurally effectuate the right to immunity.<sup>22</sup> However, the Court concluded, "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."<sup>23</sup>

The Court further supported its conclusion with several policy arguments. One of these arguments is that placing the burden of proof on a state "has never previously been embraced by

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<sup>14</sup> *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008).

<sup>15</sup> *Id.* at 29.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Dennis v. State*, 51 So. 3d 456, 464 (Fla. 2010).

<sup>19</sup> *Id.* at 462.

<sup>20</sup> *Id.* at 459.

<sup>21</sup> *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

<sup>22</sup> *Id.* at 772.

<sup>23</sup> *Id.* at 768.

any state with an analogous immunity law and is actually inconsistent with the procedure for resolving motions to dismiss involving other types of statutory immunity.<sup>24</sup>”

The Court also noted that no state court has required the prosecution at a pretrial hearing to disprove beyond a reasonable doubt that the use of force by a defendant was justified.<sup>25</sup> Otherwise, placing the burden of proof on the state, the Court reasoned, would require the state to satisfy the same degree of proof twice, resulting in basically two adversarial trials, one before the judge, and the other, the jury.<sup>26</sup>

However, the dissenting opinion written by Justice Canady in which Justice Polston concurred, argued that the statutory right to claim immunity places the burden of proof on the state at pretrial immunity hearings. In support of his interpretation of the right to assert immunity, Justice Canady stated that:

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.<sup>27</sup>

Similarly, Judge Schumann, one of the judges on the district court opinion in *Bretherick*, wrote in a concurring opinion that she felt bound by earlier Supreme Court precedent to place the burden of proof on the defendant.<sup>28</sup> Absent the precedent, she stated that she would have found that the trial court erred in placing the burden of proof on the defendant.<sup>29</sup> She explained that “[p]lacing the burden of proof on the State throughout each phase of criminal prosecution best fulfills the legislative intent to create a broad grant of immunity.”<sup>30</sup> She further noted that in close cases who bears the burden of proof might be dispositive.<sup>31</sup>

### **Task Force on Citizen Safety and Protection**

Florida Governor Rick Scott convened a task force, the Task Force on Citizen Safety and Protection, to thoroughly review the state’s Stand Your Ground law. The task force held public hearings around the state, took testimony, and issued recommendations, detailed in a report dated February 21, 2013.<sup>32</sup> The task force provided the report to the Governor, President of the Senate, and the Speaker of the House of Representatives.

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<sup>24</sup> *Id.* at 769.

<sup>25</sup> *Id.* at 775.

<sup>26</sup> *Id.* at 777.

<sup>27</sup> *Id.* at 780.

<sup>28</sup> *Bretherick v. State*, 135 So. 3d 337, 341 (Fla. 5th DCA 2013)

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 344.

<sup>31</sup> *Id.*

<sup>32</sup> Governor’s Task Force on Citizen Safety and Protection, Final Report (Feb. 21, 2013). The task force developed its mission as follows: “The Task Force on Citizen Safety and Protection will review ch. 776, F.S., and its implementation, listen

Members concurred in the belief that all persons who are conducting themselves in a lawful manner have the right to defend themselves and to stand their ground when attacked.<sup>33</sup> Additionally, the task force determined that the *Peterson* hearing is an adequate mechanism to resolve immunity claims.<sup>34</sup>

### Stand Your Ground Law in other States

At least 22 states have a version of the Stand Your Ground law. These laws provide that a defender does not have a duty to retreat from an attacker in any place in which the defender is lawfully present.<sup>35</sup> These states having SYG laws include Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia.<sup>36</sup> Nine of these states have adopted laws with specific language providing that a person may stand his or her ground.<sup>37</sup>

Persons who use self-defense may claim immunity from civil liability in certain circumstances in at least 22 states. These states include Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin.<sup>38</sup>

At least 4 states, Alabama, Colorado, Georgia, and South Carolina specify the burden of proof required in a pretrial hearing on immunity. These states place the burden of proof on the defendant, either in statute or case law, to demonstrate a right to immunity by a preponderance of the evidence.<sup>39</sup>

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to the concerns and ideas from Floridians, and make recommendations to the Governor and Florida Legislature to ensure the rights of all Floridians and visitors, including the right to feel safe and secure in our state.”

<sup>33</sup> *Id.* at 5. “The Task Force concurs with the core belief that all persons ... have a right to feel safe and secure in our state. To that end, all persons who are conducting themselves in a lawful manner have a fundamental right to stand their ground and defend themselves from attack with proportionate force in every place they have a lawful right to be.”

<sup>34</sup> It is important to note that the Task Force drafted its report pre-*Bretherick*. The final report of the task force is available at: <http://www.flgov.com/citizensafety/>.

<sup>35</sup> *Self-defense and “Stand Your Ground,”* National Conference of State Legislatures (Aug. 30, 2013).

<http://www.ncsl.org/issues-research/justice/self-defense-and-stand-your-ground.aspx> (last visited Jan. 10, 2017).

<sup>36</sup> Alabama (s. 13A-3-20, 23); Arizona (s. 13-405); Florida (ch. 776, F.S.); Georgia (ss. 16-3-23, 16-3-23-1, 16-3-24); Indiana (s. 35-41-3-2); Kansas (ss. 21-5222, 21-5223, 21-5224, 21-5225, 21-5230); Kentucky (ss. 503.050, 503.055, 503.080); Louisiana (ss. 14:19, 14:20); Michigan (s. 780.972); Mississippi (s. 97-3-15); Montana (s. 45-3-110); Nevada (ss. 200.120, 200.160); New Hampshire (s. 627:4); North Carolina (ss. 14-51.2, 14-51.3); Oklahoma (s. 1289.25); Pennsylvania (title 18, s. 505); South Carolina (ss. 16-11-440, 16-11-450); South Dakota (s. 22-18-4); Tennessee (s. 39-11-614); Texas (ss. 9.31, 9.32, 9.41, 9.42, 9.43); Utah (ss. 76-2-402, 76-2-405, 76-2-407); West Virginia (s. 55-7-22).

<sup>37</sup> States including Stand Your Ground language in self-defense laws are: Alabama (s. 13A-3-23(b)), Florida (s. 776.013, F.S.), Georgia (s. 16-3-23.1), Kansas (s. 21-5320), Kentucky (s. 503.055), Louisiana (s. 14:19), Oklahoma (s. 1289.25), Pennsylvania (title 18, s. 505), and South Carolina (s. 16-11-440(C)).

<sup>38</sup> *Immunity, Burden of Proof, and Presumptions in State Self-defense Laws*, National Conference of State Legislatures (Jan. 5, 2017).

<sup>39</sup> These states are: Alabama (s. 13A-3-23(d)(2)), Colorado (*People v. Guenther*, 740 P.2d 971, 980 (Colo. 1987); *People v. Eckert*, 919 P.2d 962, 965 (Colo. App. 1996), Georgia (*Bunn v. State*, 284 Ga. 410, 413 (Ga. 2008), and South Carolina (*State v. Duncan*, 392 S.C. 404, 410-411 (S.Ca. 2011)).

### **III. Effect of Proposed Changes:**

This bill shifts the burden of proof to the state in pretrial hearings to determine whether a defendant is immune from criminal prosecution based on claimed justifiable use of force. Additionally, the bill requires the state to prove its burden beyond a reasonable doubt. The burden of proof of beyond a reasonable doubt is the same burden of proof imposed on the state in the prosecution of criminal cases, including cases in which self-defense is raised at trial as an affirmative defense.

Under the bill, a defendant is entitled to an immunity hearing in which the state bears the burden of proof by filing a motion that clearly states the reasons the defendant is immune and alleges the facts on which the immunity claim is based. However, if the court does not grant the motion for immunity, the motion and its contents are inadmissible at trial.

The bill takes effect upon becoming a law.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The bill does not appear to affect cities or counties and, as a result, does not appear to be a mandate.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

The bill may reduce a defendant's legal costs in immunity hearings by shifting the burden of proof to the prosecution. Costs to the private sector may be further reduced if the bill results in fewer prosecutions or if more prosecutions are dismissed before trial.

#### **C. Government Sector Impact:**

By shifting the burden of proof to the prosecution in immunity hearings, and to the extent that prosecutors do not drop or plea bargain any of their weaker cases, additional costs may be incurred by public defenders, prosecutors, and the court. Because the burden shifts to the prosecution, more defendants may have an incentive to claim the right to

immunity. Additionally, some cases that would go to trial under the current procedures will be resolved at the immunity hearing or encourage plea bargains when the state prevails at the pretrial hearings.

The Office of the State Courts Administrator indicates that it cannot accurately determine the fiscal impact of the bill at this time due to unavailability of data.<sup>40</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 776.032, Florida Statutes.

**IX. Additional Information:**

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

**CS by Judiciary Committee on January 24, 2017:**

This CS:

- Removes the burden on the defendant by requiring him or her to state a case in the motion for immunity, rather than requiring the defendant to make a prima facie case at the pretrial hearing;
- Provides that if the court does not grant the motion for immunity, the motion and its contents are inadmissible at trial; and
- Clarifies that the court must grant the motion unless the state meets its burden of proof.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>40</sup> Office of the State Courts Administrator, *2017 Judicial Impact Statement* (Jan. 19, 2017).