IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC13-2312

Lower Tribunal: 5D12-3840
2011-CF-004788

JARED BRETHERICK,
Appellant

v.

STATE OF FLORIDA,
Appellee

_____/

Appeal from the Fifth District Court of
Appeal for the State of Florida

APPELLANT'S INITIAL BRIEF

FLETCHER & PHLLIPS
Eric J. Friday, Esq.
Fla. Bar No: 797901
541 E. Monroe St.
Jacksonville, FL 32202
familylaw@fletcherandphillips.com
efriday@fletcherandphillips.com

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

Federal Statutes

State Statutes

CITATIONS TO THE RECORD

Citations to the Record will be in the format (Vol I, R. __). Citations to transcripts of testimony will be in the format of (F.L. ___), with F.L. being the first and last initials of the witness.

INTRODUCTION

This case involves Jared Bretherick, a young man with no criminal record who is a law-abiding gun owner. He and his family were attacked by Derek Dunning, a convicted felon with a history of violence. Jared defended himself and his family in response to the aggressive actions of Dunning who stopped in the middle of a busy highway and got out of his truck to attack the Brethericks.

The issues on appeal are the courts' failure to properly place the burden on the State to overcome immunity, and whether the lower court erred when it failed to find that Jared was immune from prosecution.

None of the prior decisions on the Stand Your Ground Law directly considered the placement or standard for the burden of proof in an immunity determination. In all of the cases to date the sole issue on appeal was whether the Defendant was entitled to an evidentiary hearing on his claim of immunity. After the courts answered that question, they held that the burden should be on the Defendant and should be a preponderance of evidence standard, without that issue

being directly argued. All of the brief's since the *Peterson* decision by the First DCA have assumed the correctness of the procedure established, and never argue for a shift of the burden, or change in the burden proof.

STATEMENT OF CASE

This case arose out of a criminal action filed against the Defendant in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County. After the Defendant was charged by Information (Vol. I, R. 8) a Motion to Dismiss was filed pursuant to Sec.776.012, 776.031, and 776.032, Fla. Stat. (Florida's self-defense immunity and no duty to retreat statutes), seeking the immunity granted by the Florida Legislature to those who act in self-defense. (Vol I, R. 14-18).

On June 22, 2012, an evidentiary hearing was held before the Honorable Scott Polanda relative to Bretherick's Motion to Dismiss. On July 19, the trial court entertained oral arguments and memorandums of law. On August 21, Judge Polanda entered an order denying Bretherick's Motion to Dismiss. Subsequently, Bretherick filed a Motion to Reconsider based on significant material factual issues, arguments based on the totality of the circumstances, and the objective, reasonable person standard.

Notably, the trial court's denial of that motion included a statement that there may have been *miscommunication* between Bretherick and Dunning supporting *a lack of intent* on Bretherick's part, which is the first element that the State must prove on a charge of

aggravated assault with a deadly weapon.

Bretherick sought an appeal pursuant to a Writ of Prohibition in the Fifth District Court of Appeal barring his prosecution pursuant to Sec. 776.012, 776.031, and 776.032, Fla. Stat., and reversing the trial court's previous rulings. The Fifth District Court of Appeal heard the case and issued an opinion affirming the trial court and certified the following question to the Supreme Court:

> ONCE THE DEFENSE SATISFIES THE INITIAL BURDEN OF RAISING THE ISSUE, DOES THE STATE HAVE THE BURDEN OF DISPROVING A DEFENDANT'S ENTITLEMENT TO SELF-DEFENSE IMMUNITY AT A PRETRIAL HEARING AS IT DOES AT TRIAL?

STATEMENT OF FACTS

On December 29, 2011, while driving on Irlo Bronson Memorial Highway/Highway 192 (a three-lane highway) toward Disney World, Dunning nearly ran the Bretherick family off the road due to his aggressive and reckless driving. (J.B. 1:23-25, 2:1-11, R.B. 4:20-24). Ronald Bretherick, Jared's father, honked his horn to alert Dunning to his family's presence. (D.B. 5:9-17; R.B. 10:11-21). After seeing Dunning's face through her side window, Deborah, Jared's mother, told Ronald, "that man had a crazy look on his face," and that "there is something wrong with him." (D.B. 5:9-21). Jared's 14 year old sister, Anna, was seated next to him in the back seat. Jared was seated directly behind Deborah where he also saw Dunning's reckless driving, and heard his mother scream.

(R.B. 4:20-21). Jared testified that after seeing Dunning almost run his family off the road, that Dunning's expression "was crazed, "[h]e had no emotion, [h]e just stared us down" with a "threatening stare." (J.B. 2:12-22).

Ronald continued to drive toward Disney World moving from the left lane to the middle lane. Suddenly, Dunning passed the Brethericks in the left lane, where Ronald had been previously driving, and abruptly swerved into the middle lane in front of the Brethericks and stopped. (R.B. 5:6-11; D.B. 5:25, 6:1-7, 7:20-23; J.B. 5:8-18, 23:23-25). Caught off guard by Dunning's abrupt stop, Ronald stopped his truck behind Dunning's, unable to quickly change lanes due to the steady flow of traffic in both side lanes. (R.B. 13:10-25, 14:1). Dunning had now effectively blocked the Bretherick's vehicle from moving in any direction.

Suddenly, Ronald saw Dunning exit his truck and come toward his family. Fearing that Dunning was going to harm him or his family, Ronald told Deborah to get his gun out of the glove compartment and call 911. Both Ronald and Jared are licensed to carry concealed firearms. (R.B. 5:12-17; D.B. 6:7-16). Ronald held the holstered gun up in the front windshield to deter Dunning from coming any closer. (R.B. 11:16-24; J.B. 4:23-25, 5:1-4). Upon seeing the gun, Dunning returned to his truck, but instead of leaving, he put his truck in reverse and backed closer to the family. (D.B. 6:16-25, 7:1-4; J.B. 5:1-4). Dunning's actions of reversing his truck toward the Brethericks served to heightened Jared's

and his family's already fearful state based on Dunning's actions only moments earlier. (D.B. 6:22-25, 7:1-4; J.B. 5:5-11).

Based on all that has previously transpired, Jared believed that Dunning was either going to come out of his truck with a gun or ram his family's vehicle with his truck. Jared also believed that he could not properly protect his family from the backseat, so he exited the Bretherick vehicle. (J.B. 7:18-25, 8:1-13). As Jared was exiting, Ronald, who is a disabled Vietnam Veteran, handed his gun to Jared for protection. Ronald testified that he believed, based on the circumstances, Dunning may have had a gun. (R.B. 17:14-25). Jared made his way to the front of the Bretherick vehicle with his father's gun in his right hand, and shouted to Dunning, "I have a gun, just leave," while waiving him off with his left. (J.B. 8:7-14).

In response, Dunning shouted back, "I have a gun, too, just shoot." Dunning then pulled in his side view mirrors. (J.B. 8:15-25) Jared, can be heard on the 911 call anxiously repeating Dunning's words back to his father immediately after Dunning said them. Based on the 911 call time log, the Brethericks were the first to call. Dunning, the fifth caller to 911, is heard on his 911 call threatening to "f******* ram" the Bretherick's vehicle. Even though the other Brethericks could not hear this threat, Dunning's actions to that point, and Jared's recitation of the threat led the Brethericks to believe that Dunning intended to cause them harm. (J.B. 9:12-25, 10:1-5).

About this time Deborah and Anna, in fear for their lives from Dunning, fled the truck. (J.B. 10:9-16; 8:16-25). In order to do so, however, Deborah and Anna had to cross a busy highway not meant for pedestrian travel, where there are no cross-walks or lights. (D.B. 10:9-25). While waiting for law enforcement to arrive, Jared protected his disabled father, Ronald, who was unable to make it across the busy highway while Dunning continued to falsely imprison Ronald. (R.B. 14:15-22).

Even though Jared feared for his life and that of his family, he maintained his composure. Jared's response to Dunning's continuous and escalating threats was measured and appropriate while he waited for law enforcement to help him and his family.

Dunning claimed to have seen the Bretherick vehicle for the first time when it was behind him. (D.D. 7: 1-7). However, Dunning was able to describe to 911 the license plate on the Bretherick truck as blue and from out of state, (Vol. I, R. 59), even though there is no front license plate on the Bretherick vehicle -- only on the back. (R.B. 11:9-12).

At the self-defense immunity hearing, Dunning also denied that he was driving recklessly or that he nearly drove the Brethericks off the road but the State's own independent witness, Steven Oxenrider, testified that he avoided Dunning that day because of his dangerous and aggressive driving. The trial court accepted Oxenrider's statement over Dunning's testimony. Mr. Oxenrider also testified that even though none of Dunning's anger was directed toward him, he purposely delayed at an earlier green light to put distance

between him and Dunning. (S.O. 4:10-25 and 7:10-25).

Both independent witnesses contradict Dunning's statement as to at which door, allegedly, Jared was pointing the gun. Oxenrider and Hetrick testified that they saw Jared at the driver's side window with the gun, whereas Dunning claims Jared came to his passenger side window. (D.D. 10:21-25).

Jared is charged with the offense of Aggravated Assault with a Firearm. The State contends that Jared, who has no prior criminal history, suddenly and intentionally committed an Aggravated Assault in violation of Florida Statutes §784.021 and §784.011, without any provocation from Dunning.

Jared does not deny that he defensively displayed Ronald's firearm. Jared asserts that he defensively displayed Ronald's firearm as a justifiable use of force as permitted under Florida Statutes §776.012 and 776.031, and as such, he is immune from prosecution pursuant to Florida Statutes § 776.032. (Vol. I, R. 14-18).

SUMMARY OF ARGUMENT

Florida's Stand Your Ground Law and self-defense immunity statute have been terribly misconstrued. Despite a grant of immunity by the Legislature from even being charged with a crime, crime victims have been repeatedly forced to bear the burden of proving they acted in lawful self-defense.

Numerous decisions from Florida state courts have quoted Sec. 776.032, Fla. Stat.,

and related provisions of law. What most of these decisions ignore however, is the enacting language included in public law Chapter 2005-27 with regard to the legislative intent concerning immunity proceedings.

> WHEREAS, the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others, and
> . . .
> WHEREAS, Section 8 of Article I of the State Constitution guarantees the right of the people to bear arms in defense of themselves, and
> WHEREAS, the persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles, and
> WHEREAS, no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack,

Placing the burden of proof upon a defendant who is entitled to immunity is contrary to the legislative intent embodied in the law. The law does not state that a defendant can apply for or seek immunity - the law states that a person **has immunity** and those words are clearly expressed by the Legislature in Sec. 776.032, Fla. Stat.

Despite the Legislature clearly granting immunity to law-abiding citizens, the courts have determined that defendants, and not the State, carry the burden of proving their entitlement to immunity. This is contrary to the plain and unambiguous words contained in the law.

Jared Bretherick acted in lawful defense of himself and his family on December 29.

Jared and his family were assaulted, threatened, and falsely imprisoned by the initial and sole aggressor in this case, Derek Dunning. Jared used force as permitted in Sec. 776.012, Fla. Stat., and was "justified in using such force" in protecting his family and himself from an aggressor's "imminent use of unlawful force." Florida law allows the use of force to defend against assault and forcible felonies.

Jared's belief was based on the *totality of the circumstances* he faced. Those circumstances were created and maintained solely by Dunning. As such, Jared "is immune from criminal prosecution" under Florida Statutes § 776.032, and the court below erred in failing to grant immunity.

ARGUMENT

I. FLORIDA COURTS HAVE IMPROPERLY PLACED THE BURDEN OF PROOF ON DEFENDANTS TO PROVE IMMUNITY FROM PROSECUTION CONTRARY TO THE EXPRESS LANGUAGE AND INTENT OF THE LEGISLATURE.

Standard of Review

The standard of review as to the proper procedure for determining entitlement to a claim of immunity is a question of law and is reviewed de novo. *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008) and *Hair v. State*, 17 So.3d 804, 805 (Fla. 1st DCA 2009).

Argument in Support

As stated by the First DCA:

> [W]e feel that a proper administration of justice invites respect for the admonition of Alexander Hamilton, who once wrote that courts "must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body." If, therefore, a change in the long established rule of immunity prevailing in this State is to be made, it must come as it did in the States of New York, Washington and extent as privately owned hospitals. Implicit in or by enactment of appropriate legislation, or both.

Buck v. McLean, 115 So. 2d 764, 768 (Fla. 1st DCA 1959).

This Court's approved procedure for determining a defendant's entitlement to immunity does not give effect to either the plain language of the statute or the express legislative intent. The intent of the Florida Legislature in enacting Sec. 776.032, was to provide law-abiding citizens with a true immunity from prosecution and not merely an affirmative defense. *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008). This immunity protects against **arresting, detaining, charging, or prosecuting** any individual who acted in self-defense. The First DCA stated:

> The wording selected by our Legislature makes clear that it intended to establish a true immunity and not merely an affirmative defense. In particular, in the preamble to the substantive legislation, the session law notes, '[T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.' Ch.2005-27, at 200, Laws of Fla.

Peterson, 983 So.2d 27, 29 (Fla. 1st DCA 2008).

In enacting Sec. 776.032, the Florida Legislature intended that law abiding people be immune from prosecution when they justifiably use force to protect themselves and their families. Chapter 2005-27, Laws of Florida, provides that law abiding citizens who are victims of crime should not have to risk becoming additionally victimized by the State because they were forced to defend themselves or others.

"It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Martinez v. State*, 981 So.2d 449, 452 (Fla. 2008) (quoting *State v. Bodden*, 877 So.2d 680, 686 (Fla. 2004)). Accordingly, "the grant of immunity from 'criminal prosecution' in Sec. 776.032 must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule [of criminal procedure]." *Dennis v. State*, 51 So.3d 456, 458-463 (Fla. 2010).

Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified. Sec. 776.032 contemplates that a defendant who is immune will not be subjected to any trial. Sec. 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, not merely protection from conviction.

Not one shred of evidence has been introduced to show that Jared Bretherick was

anything other than a law-abiding citizen, minding his own business, when a convicted felon, Dunning, chose to threaten Jared and his family. The charges here are based on the fact that Jared defended himself and his family in direct response to what he and his family believed was a serious, possibly deadly, ongoing attack.

A. States with nearly identical immunity from prosecution statutes to Florida's have properly placed the burden on the State to prove that an individual is not entitled to immunity for acting in self-defense.

Florida's immunity statute is substantially identical to those of both Kansas and Kentucky. *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009); *State v. Ultreras*, 295 P.3d 1020 (Kan. 2013). Like Florida's, they were passed as part of a broader law to give victims who act in self-defense greater protection from both criminal and civil penalties as a result of their lawful self-defense. Kansas and Kentucky have both placed the burden on the State to show that the immunity granted by the Legislature does not apply. *Bretherick v. State*, 2013 Fla. App. LEXIS 17324, 13 (Fla. 5th DCA 2013) (Schumann, B.B., concurring specially).

In *Peterson*, the First DCA ignored the plain language of the statute and instead relied on a weaker Colorado statute and the Colorado Supreme Court's interpretation of that state's immunity from prosecution statute. Their statute provides only immunity from prosecution, and is limited to home invasion burglaries.

The *Peterson* court determined that just as the Colorado court had done, it would use

the rules of criminal procedure requiring all lawful self-defense defendants to bring a motion to dismiss under Rule 3.190(g) or (h)[1], Fla. R. Crim. P., where the defendant has the burden of proof. However, nowhere in Sec. 776.032, Fla. Stat. is such a procedure authorized.

The *Peterson* court explained in its reasoning that this would be similar to the burden placed on a criminal defendant seeking to suppress the fruits of an illegal search, or a convicted criminal's motion for post conviction relief. This is mixing apples and oranges. The Florida Legislature wanted self-defense defendants free from the burden of prosecution irrespective of Florida's rules of criminal procedures. The Legislature wanted the person-accused treated like a victim to be protected, not a criminal to be charged and tried.

This Court upheld and approved of the *Peterson* court's recognition that the Florida Legislature intended the establishment of a "true" immunity from prosecution for those using justifiable force in self-defense in the enactment of § 776.032. This Court further held that the trial court shall make a factual determination whether a defendant is immune from prosecution. *Dennis v. State*, 51 So.3d 456 (Fla. 2010).

The Florida Legislature went much farther and defined prosecution as not only actual prosecution, but also including arrest, detention, or even charging a person who acts in self-defense. All of the Florida Stand Your Ground cases have ignored this distinction

[1] Motion to Suppress Evidence or Confession

and have treated all self-defense claims as any other criminal case, ignoring and turning the plain language of the statute on hits head. This Court erred however, when it determined that the burden should be on the Defendant and failed to give effect to that portion of the statute that prohibits even charging a person who claims immunity. See, *Bretherick v. State*, 2013 Fla. App. LEXIS 17324 at 18 (Fla. 5th DCA 2013)(Schumann, B.B., concurring specially).

While the procedure created by First DCA in *Peterson* and approved by this Court in the *Dennis* case gave partial effect to the legislative language when it created an evidentiary hearing, it improperly shifted the burden to the defendant to prove an entitlement to the immunity. The Kansas Supreme Court said as much by copying Florida's right to an evidentiary hearing to determine whether a person was immune from prosecution, but rejected the burden shifting approved by this Court.

B. A proper interpretation and application of the express legislative intent and statutory language requires the State bear the burden of proof and establish it is entitled to prosecute a law-abiding citizen despite the grant of immunity.

Florida law is clear that at trial, when a party satisfies the initial burden of raising self-defense, the State has the burden of proving beyond a reasonable doubt that the individual did not act in self-defense. *Montijo v. State*, 61 So. 3d 424 (Fla. 5th DCA 2011)("The burden never shifts to the defendant to prove self-defense beyond a reasonable

doubt. Rather, he must simply present enough evidence to support giving the instruction.").

In the initial cases after passage of the immunity statute, prosecutors argued that the sole remedy of a self-defense victim charged with a crime, was a Rule 3.190(C)(4) motion to dismiss. They also argued that if there was any disputed fact the judge should deny immunity to the citizen-victim and allow the prosecution to move forward. *Dennis v. State*, 51 So.3d 456 (2010); *Wonder v. State*, 64 So.3d 1208 (Fla. 2011); and *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008).

This Court's decision in *Dennis* to rely on *Peterson* created an evidentiary hearing that improperly shifted the burden to the defendant for purposes of an immunity hearing under Sec. 776.032, Fla. Stat. This burden shifting has forced defendants to do that which the Legislature never intended or authorized- prove their entitlement to an immunity they already have by law.

C. It is the prosecutor's obligation to overcome the immunity granted by the Legislature and to bear a high burden of proof.

Placing the burden on a person who acted in self-defense, after they have been charged, makes the immunity granted largely illusory and fails to give effect to each word in the statute. *Martinez v. State*, 981 So.2d 449, 452 (Fla. 2008) (quoting *State v. Bodden*, 877 So.2d 680, 686 (Fla. 2004)). Furthermore, the use of procedural rules that are reserved to criminal defendants against individuals acting in self-defense, is improper and in conflict

with the plain wording and intent of the statute.

The Legislature is presumed to be aware of the state of the law when it passes new statutes. There would have been no question in the mind of the legislators that the burden of proof in a self-defense case is on the State to overcome that defense beyond a reasonable doubt. Nowhere in the passage of the Stand Your Ground law does the language or the legislative history relieve the State of its burden, either at trial or beforehand.

Only once in the Stand Your Ground law did the Legislature specifically authorize a change in the normal procedure or burdens when it added an additional burden prior to arrest. While normally probable cause that a crime was committed is sufficient to arrest, the Legislature added a requirement that there be probable cause that the use of force was unlawful. The Legislature took the lawful use of force from an affirmative defense, to an element to be disproved by probable cause prior to arrest. If the Legislature had wished to change or shift the burden of proof in any other way, it knew how to do so. It is improper for a court to ignore the plain language of the reasoned determination of the Legislature as to the criminal laws of the state and to substitute its own judgment.

Even before the passage of Stand Your Ground, judges had the inherent power to dismiss a case at trial if the State failed to meet its burden of disproving self-defense beyond a reasonable doubt. The very fact that the Legislature passed the law shows that the Legislature intended to create more protection for victims of criminal attack than currently

existed. See *Dennis*, 51 So.3d 456 (Fla. 2010). This Court interpreted that as the right to a pre-trial hearing, but failed to consider that a defendant was already entitled to a judgment of acquittal at trial if the State failed to prove its case. Because the Legislature passed a new law creating this immunity, it must be something more, not less, than what already existed. It must also be something more than the standard already applied to criminals seeking to suppress the illegally obtained evidence of their wrongdoing, the standard the Court relied on in *Dennis*.[2]

Nothing in the Stand your Ground law authorized any burden other than beyond a reasonable doubt as to the law-abiding citizen's entitlement to immunity. If the state cannot meet a beyond a reasonable doubt burden that the victim did not act in self-defense, then how can the State prove its case to a jury?

Jared, the real victim in this case, seeks a ruling that the trial court improperly placed the burden of proof on him and that in self-defense cases, once properly raised, the burden should be on the State to establish that a defendant is not entitled to immunity. Because the Legislature did not authorize any change in the burden of proof, the proper burden for the State to meet in an immunity hearing should be beyond a reasonable doubt to give full

---

[2] Treating these law-abiding citizens the same as a person found with a large amount of illegal drugs further erodes the Legislative finding that these are law-abiding citizens and that such persons should not be subjected to the criminal justice system after being attacked in a place where they have the right to be.

effect to the plain language and legislative intent of Sec. 776.032, Fla. Stat. If a prosecutor acting in good faith believes that they can prove guilt beyond a reasonable doubt to a jury, then they should have to prove a similarly high standard to the Court to overcome the immunity before bringing a defendant to trial.

II. THE PROCEDURE USED TO DETERMINE IMMUNITY UNDER SEC. 776.032, FLA. STAT., MAY NOT BE MORE BURDENSOME TO THE CITIZEN THAN THE PROCEDURE USED IN CASES UNDER 42 U.S.C. §1983.

Standard of Review

The standard of review as to the proper procedure for determining entitlement to a claim of immunity is a question of law and is reviewed de novo. *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008) and *Hair v. State*, 17 So.3d 804, 805 (Fla. 1st DCA 2009).

Argument

The concept of immunity for use of lawful force is well established and supported by substantial precedent that was, unfortunately, overlooked by the *Dennis* and *Peterson* courts as well as in the Kentucky and Kansas decisions.

Case law under 42 U.S.C. Sec. 1983, also known as deprivation of civil rights under color of law, has long provided for *qualified* immunity for law enforcement when civil claims for excessive force are brought by citizens. Under this qualified immunity doctrine,

when a law enforcement officer is acting within his discretionary duty, he is immune from civil suit. Unlike the procedure established by this Court in *Dennis*, once a prima facie case of Sec. 1983 immunity is made, it becomes the plaintiff's burden to bring forth the necessary evidence to overcome the immunity.

Jared Bretherick has legislatively granted, absolute immunity from prosecution. If it can overcome that immunity, the State must prove him guilty beyond a reasonable doubt at trial. In cases under Sec. 1983, the immunity is only qualified and only requires a preponderance of the evidence standard at trial to establish liability. This Court however has decided to require presumably law-abiding citizen defendants such as Jared to prove their entitlement to immunity to a much higher standard than any court has required under the judicially created qualified immunity doctrine.

Instead of giving effect to the express **absolute** immunity of the Stand Your Ground law, the *Dennis* and *Peterson* cases result in less protection than the judicially created **qualified** immunity. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)("qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." (*internal quotes omitted*)).

The effect of this Court's decision in *Dennis*, is to provide a person with legislatively granted absolute immunity less protection than is provided by a judicially created *qualified immunity.* For example, the Eleventh Circuit held in one case that:

> In a split-second, rapidly escalating situation involving perceived deadly force, coupled with his police response training, Officer Fortson acted in an objectively reasonable manner to the perceived imminent threat to his fellow officer to save his life.
> . . .
> We have "acknowledged[d] that law enforcement officers . . . may reasonably but mistakenly conclude that probable cause exists to justify the use of deadly force.
> . . .
> As we have noted previously when a seizure by shooting occurred in a rapidly escalating situation that resulted in death: "'Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer."

Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. July 23, 2003) *citing Vaughan v. Cox*, 264 F.3d 1027, 1033 (11th Cir. 2001)(overturned on other grounds on remand from U.S. Supreme Court August 29, 2003)("For qualified immunity purposes, therefore, we ask whether officers had "arguable probable cause" - that is, whether the officer reasonably could have believed that probable cause existed"). Qualified immunity has even shielded officers who shoot innocent bystanders, including children, who were car jacked by an armed bank robber. *Cooper v. Rutherford*, 503 Fed. Appx. 672 (11th Cir. 2012).

In other words, where the immunity is only qualified, it is enough that the defendant (who does not even bear the burden of proof) had a reasonable but mistaken belief that probable cause exists to use force. *Carr,* 338 F.3d 1259 (11th Cir. 2003) It cannot seriously be argued that based on the totality of the circumstances facing Jared

Bretherick, he did not have "arguable probable cause" to defensively display a firearm to prevent continued attack or other further aggression by Dunning against the members of the Bretherick family.

According to the Eleventh Circuit in *Clark v. City of Atlanta*, 544 Fed. Appx. 848 (11th Cir. 2013), it was sufficient that the officers had a ***mistaken*** reasonable suspicion, that Mr. Clark was engaged in criminal activity, and because his hands were in his pockets where they could not be seen, the officers were justified in exiting their vehicles with guns drawn and pointed at Mr. Clark. It is important to note that at the time the officers exited their vehicles, Mr. Clark had taken no aggressive actions against the police and that the entire basis for the detention was in error. In fact Mr. Clark was lawfully present with his mother in the yard of a house owned by her boyfriend.

This Court should recognize that the legislative grant of immunity provided by Sec. 776.032, Fla. Stat., should be at least as strong, if not stronger than an immunity that has not been specifically authorized by the representatives of the people, the Legislature. As Alexander Hamilton warned, situations like this are properly the province of the Legislature, not the courts.

III. THE TRIAL COURT ERRED IN DENYING JARED BRETHERICK'S CLAIM OF STATUTORY IMMUNITY.[3]

[3]The remainder of argument in the brief will be based on the current precedent in which the burden of proof is on the Defendant to prove entitlement to immunity by

Standard of Review

This Court should review the lower court's findings of fact to determine if they are supported by competent substantial evidence. The events and facts as found by the lower court need only be supported by competent substantial evidence, but the application of the facts to the standards of the statute is an issue reviewed by this Court de novo. *Hair v. State*, 17 So.3d 804, 805 (Fla. 1st DCA 2009).

Argument in Support

A person acting in self-defense is forced to make split second decisions that may mean life or death for him or his family with no time for self-reflection or Monday morning quarter-backing. In fact, for many criminals, it is the element of surprise that they rely upon when they target an unsuspecting law-abiding citizen - whether it be a vacationing family from out of state or a disabled veteran, or as in this case, both.

In fear for their life, with the fight or flight response engaged, victims must make an immediate decision to defend themselves and their families, all while adrenaline pumps, their heart rate increases, and they experience the traumatic event of a criminal attack. They act on instinct and do what they have to do to protect and defend themselves and their families. For this reason, the Legislature granted immunity from prosecution, including

---

a preponderance of evidence, but is not a concession that such burden conforms to the legislative language or intent.

even being charged or arrested, to those who act in self-defense. The intent was that a victim's split second decisions would not be questioned in the sterile environment of a courtroom months or even years after they were attacked, and after substantial expense where the victim faces a second trauma - the prospect of losing his liberty because he could and did protect himself and his family. A victim should not have to be in a body bag to escape prosecution for defending himself or others.

The credible and consistent statements of the Bretherick family demonstrate, by a preponderance of the evidence, that Jared was exercising his rights under the self-defense immunity statute while defending himself and his family against an imminent assault as well a forcible felony. The Bretherick family's credible and consistent testimony are in direct contrast to the significant changes and contradictions in the testimony of Dunning, Mr. Oxenrider and Ms. Hetrick as found in their 911 calls, and their June 22 hearing testimony. Several key pieces of testimony support Jared's right to stand his ground and demonstrate that Dunning was no victim at all but the aggressor from the beginning of this situation to the end as shown by the statement that Mr. Dunning made to the 911 Dispatcher that he would "… f***ing ram their car."

The defensive display of a firearm is not the use of deadly force. *Toledo v. State*, 452 So. 2d 661, 663 (Fla. 3d DCA 1984)(citing Sec. 776.06, Fla. Stat.)(holding that per the statute, only the firing of a weapon is an act of deadly force, not the mere display). So the

question before the Court is first, did Jared have the right to use either the defensive display of a firearm, non-deadly force, or deadly force. The right to use deadly force necessarily includes the right to use less force, or defensive display of a firearm. If Jared had the right to use any force, he is protected by Florida's self-defense immunity statute.

The question then becomes whether Jared was justified in defensively displaying a firearm because he "reasonably believe[d] that such conduct was necessary to defend himself" and his family from Mr. Dunning's "imminent use of unlawful force" or to prevent or stop the commission of a forcible felony. Jared proved that his actions on December 29, were taken solely for the protection of himself, his family and his family's property, and that he lacked any intent to threaten Dunning except in self-defense.

The evidence demonstrates that Jared was operating under an "objectively reasonable" fear for the lives of him and his family that they had never encountered before. The defensive display of a firearm in self-defense was "such conduct… necessary to defend himself" against Dunning's "imminent use of unlawful force" based on the threatening, reckless, and dangerous actions of Dunning that included using his truck as a weapon. As such, Jared was justified in his defensive display of his lawful firearm.

In determining the "reasonableness" or more specifically what a "person reasonably believes" in making the decision to use force for self-defense, the Court must look at the person's "state of mind" and "perceptions" under the circumstances at the time. As stated

by Justice Holmes, "Detached reflection cannot be demanded in the presence of an uplifted knife". *Brown v. US*, 256 US 335 (1921).

In the *Filomeno* case the Fifth DCA considered testimony from a psychologist in a self-defense case regarding the defendant's fight or flight response. The court stated:

> The standard jury instruction for self-defense recognizes that a defendant's perceptions of the surrounding events are relevant when assessing the reasonableness of the use of force in self-defense."

Filomeno v. State, 930 So.2d 821, 822 (5th DCA 2006).

More recently, and building further upon the holding of the *Filomeno* Court, the Fourth District Court of Appeals in *Dowe v. State*, 39 So.3d 407(4th DCA 2010), observed and held in relevant part as follows:

> We have recognized that a defendant's state of mind can be relevant to the issue of self-defense. *Ruddock v. State*, 763 So.2d 1103, 1105 (Fla. 4th DCA 1999); see also *Filomeno v. State*, 930 So.2d 821, 822 (Fla. 5th DCA 2006) (state of mind is "a relevant inquiry on the question of self-defense"). Indeed, '[t]he standard jury instruction for self-defense recognizes that a defendant's perceptions of the surrounding events are relevant when assessing the reasonableness of the use of force in self-defense.

Dowe, 39 So.3d at 410(emphasis added).

A. Jared's objective and reasonable belief that Dunning was using his truck as a weapon against him and his family is supported by the evidence.

In the *Montanez* case, the court found that it is *reasonable* for an individual to display a weapon in self-defense while he is in the *zone of uncertainty* that is created by

another individual who uses a vehicle in a threatening manner. *Montanez v. Florida*, 24 So.3d 799 (Fla. 2nd DCA 2010). Vehicles can be classified as weapons if they are used for an unlawful purpose. *Jenkins v. Florida*, 747 So. 2d 997 (Fla. 5th DCA 2000).

Using an objective reasonable belief standard while viewing the totality of the circumstances as it occurred at the time: Dunning's dangerous and aggressive driving that almost ran the Brethericks off the road; Dunning's observed demeanor; Dunning's threatening act of intentionally blocking the Bretherick family in traffic with his truck; his threatening act of stopping his truck in the middle of a highway and exiting it coming toward the family; his threatening act of backing toward the family with his truck; Deborah and Anna's fearful exit from their vehicle; Ronald's inability to move from his vehicle -- all rightfully placed Jared and his family in an objective and reasonable fear for their lives. Dunning created and maintained the Bretherick family within a zone of uncertainty. Jared objectively and reasonably believed that he had to protect his family from Dunning's threats and likely next actions.

Jared testified that he considered Dunning's vehicle a potential weapon. Jared's testimony was that he was scared for his safety and that of his family, and that he had no way of knowing whether the aggressive driver had any other weapons with which to continue his attack. (J.B. 15-18, 20).

It was not just Jared's fear that the trial court failed to properly consider, but also the

other family members. Sec. 776.012 and Sec. 776.031, Fla. Stats., both provide for the use of force in defense of others and property as well as self. Jared had the right not only to use force in defense of himself but also in defense of any member of his family, as long as that family member reasonably believed the conduct was necessary to defend themselves their property or to prevent the commission of a forcible felony.

The fear of each person in the car was clearly established. Ronald stated that his fear, after seeing Mr. Dunning exit his vehicle, led him to display his weapon for the first time in his life. The family's fear that Dunning would use his vehicle as a weapon forced Anna and Deborah Bretherick's to brave highway traffic to attempt to escape as Jared provided them with cover. Furthermore, the threat to the Bretherick's personal property, their vehicle, allowed for the use of non-deadly force. Sec. 776.031, Fla. Stat.

To make an analogy, if Dunning was using his truck as a potential weapon, then his initial driving pattern along with backing up his vehicle constituted pointing a gun. When he placed his truck in park, he lowered the gun, but did not retreat or otherwise cease to be a threat. He was still holding a loaded gun that at any point could be raised to further attack the Bretherick family.

B. Based on the totality of the circumstances as viewed from an objective, reasonable person standard, Jared's actions were in lawful self-defense of himself and his family.

Dunning placed the Brethericks in a zone of uncertainty that he created and

maintained well before Jared ever left the truck. Jared and his family did everything that could be expected of a law-abiding citizen to avoid engaging and escalating Dunning's growing aggression, until Dunning left Jared with no choice.

When Dunning almost ran the family off the road, Ronald did not brandish his weapon at Dunning. When Dunning abruptly swerved into the Bretherick lane and stopped, Ronald did not ask for his gun. It was not until Dunning got out of his truck and started toward his family after blocking them in traffic that Ronald held up his holstered gun to stop Dunning from coming closer. It was only when Dunning intentionally backed closer to his family, that Jared left the truck so that he could protect his family from what he believed was Dunning's escalating aggression against his family.

The Bretherick family's fear was reasonable under the circumstances as they knew them. To truly understand the fear of imminent bodily harm or death that the Bretherick family experienced one must recognize the escalating level of rage that Mr. Dunning exhibited toward the family well before Jared even left the truck. One must place themselves in the shoes not simply of a reasonable person, but a reasonable person who had just witnessed the threatening actions of a man using his truck as a weapon, driving dangerously and making threats. A "crazy" looking man who had stopped in the middle of a busy highway and refused to move, and then moved closer even after seeing Ronald's gun.

Florida Statutes § 776.032-Immunity from Criminal Prosecution and Civil Action for Justifiable Use of Force, provides in relevant part as follows:

> (1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

Florida Statutes § 776.012-Use of Force in Defense of Person, provides as follows:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:
>
> > (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
> >
> > (2) Under those circumstances permitted pursuant to s. 776.013.

The totality of the circumstances that the Brethericks faced includes Dunning's actions and reactions to Jared's measured response. The Brethericks wanted nothing more than to see Dunning leave, which is why Ronald held his still holstered gun up to the driver's side windshield shouting to Dunning to leave his family alone. Jared and Deborah

both testified that they were glad to see Dunning return to his truck believing that he was going to leave. However, any movement of Dunning's truck toward the Brethericks and not away, rightfully placed the Brethericks in objective fear of his next move keeping them in the zone of uncertainty that Dunning had created and intended to maintain. Regardless, Dunning simply going back to his truck and staying there is not a retreat – Dunning driving away is a retreat, anything less kept the Brethericks within the zone of uncertainty until law enforcement arrived.

1. The trial court did not properly apply the objective reasonable person standard to Jared.

The court in *Montanez* stated that the *proper measurement* of justifiable use of deadly force is "the objective, reasonable person standard," and not a subjective one. *Montanez* at 803. The court noted Florida's standard criminal jury instruction that includes the objective, reasonable person standard:

> Fla. Std. Jury Instr. (Crim.) 3.6(f) providing that when a person claims to have acted in self-defense or in defense of others, they must be judged by the circumstances with which they were faced at the time the deadly force was used and to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. *Montanez* at 803.

The Third DCA recently overturned a denial of immunity under Stand Your Ground

in the *Mobley* case because the trial court failed to consider the totality of the circumstances that the defendant was faced with, using the objective, reasonable person standard. *Mobley v. State*, 132 So. 3d 1160 (Fla. 3d DCA 2014).

Mobley was a licensed concealed carry weapon holder who was charged with two counts of second degree murder for a shooting that occurred outside of a restaurant. *Mobley* at 1162. The decision provides a detailed description of the events leading up to the shooting that had begun sometime earlier culminating into the *totality of the circumstances* facing Mobley at the time of the shooting. *Mobley* at 1162.

Mobley had been invited to unwind at a local restaurant with some co-workers after work. *Mobley* at 1162. Prior to entering the restaurant, Mobley secured his holstered gun in the glove compartment of his car in deference to laws regulating the carrying of concealed weapons into bars. *Mobley* at 1162. During the course of the evening, Mobley's female co-workers were harassed by two unknown men who were not co-workers of Mobley, but who had initiated a verbal altercation with the women and a male friend of Mobley's named Chico. *Mobley* at 1162. Mobley, who had not participated in the verbal altercation, attempted to play peacemaker hoping to diffuse any further hostilities." *Mobley* at 1162

Even though the verbal hostilities had ended, Mobley testified that one of the men continued to stare at his friends with "a mean, cold look on his face", so Mobley decided that it was time to leave. *Mobley* at 1163. Before leaving the restaurant, however, Mobley

went to use the restroom and, upon exiting the restroom, passed a window where he saw one of the men, with the other nearby, "banging aggressively on the … window and pointing toward them." *Id.* Mobley went back to join his friends at their seats and suggested to them that, after the men leave, they should all go home. *Id.* Once it appeared that the men had left, some fifteen minutes later, Mobley left the restaurant to go to his car while his friend paid the check. *Id.*

Mobley retrieved a sweatshirt and took his gun from the glove compartment of his car and put it in the holster around his waist. *Id.* Less than a minute later, Mobley was joined by his friend Chico where they spoke by his car for awhile and then proceeded to move onto a sidewalk area to smoke a cigarette together. *Id.* Seconds after moving to the sidewalk, Mobley and his friend were viciously attacked by the two men who they thought had left. *Id.* During the attack, Mobley believed that one of the men was reaching for a weapon under his baggy shirt at which time Mobley drew his gun. *Id.* at 1164. However, Mobley never actually saw a weapon before he shot the men. *Id.*

The court's analysis in the *Mobley* case included the law as it relates to the duty to retreat, Sec. 776.012, *Supra*. *Id.* The *Mobley* court applied the objective standard as found in the *Montanez* case in determining whether immunity would attach to the actions of Mobley. *Id.* The *Mobley* court found that the conduct of a person acting in self-defense is measured by an *objective* standard, but the standard must be applied to the facts and

circumstances *as they appeared at the time* of the altercation to the one acting in self-defense (emphasis added). *Id.* The court of appeals overruled the trial court based in part on the fact that

> … the [trial] court discounted the totality of the circumstances facing Mobley and concluded that the use of deadly force was not reasonable, first, because Mobley "never saw a weapon and did not know anything about the possibility of a weapon, … and second, because Mobley should have brandished his gun, fired a warning shot or told the attackers to stop because he had a gun.

Mobley at 1165.

The court also overruled the trial court's primary reason for rejecting Mobley's Stand Your Ground defense based on the fact that he had not seen a weapon before he shot the men. *Mobley* at 1165. The appellate court found that, "the shooting … did not occur in a vacuum, and based on the *totality of the circumstances* facing Mobley at the time," Mobley was immune from prosecution. *Mobley* at 1166.

2. Application of *Mobley* to the facts of this case.

The trial court and the 5th DCA failed to properly consider the Brethericks' state of mind and totality of the circumstances. The trial court found that Jared placed an "inordinate importance on the timing of Mr. Dunning's vehicle rolling back 1.5 feet toward the Defendant's truck." (Vol I, R. 133). The trial court further found that the rolling back was "negligible in its importance when the totality of the circumstances are taken into

account …." (Vol I, R. 133). The trial court further found that there was "no imminent threat of unlawful force by Mr. Dunning once he retreated to his truck." *Id.* This finding however, was an abuse of discretion. The initial aggressor was still in full control of the situation and still blocking the family, while in possession of a weapon. In order to constitute a retreat an initial aggressor must withdraw from physical contact with the assailant and indicate clearly to the assailant that he or she desires to withdraw and terminate the use of force not, walk away only to then move closer, all the time maintaining the threat and the zone of uncertainty. Sec. 776.041(b), Fla. Stat.

Additionally, the trial court too easily dismisses Dunning's intentional act of moving his truck closer to the Bretherick family based on the totality of the circumstances and its timing. Dunning's truck coming closer and not away from the Bretherick family was a pivotal event in the frightened minds of Jared and his family. In fact, it is what drove Deborah and Anna to leave their vehicle and Jared's belief that he needed leave the back seat to better protect his family from Dunning's escalating threat. The Court's finding that Dunning's movement back toward the Brethericks was insignificant, is not reasonable given the interaction that had transpired between the parties up to that point.

The trial court and the Fifth DCA failed to properly consider the Brethericks' state of mind and totality of the circumstances, including Dunning's inexplicable failure to leave the scene after returning to his vehicle, in reaching their conclusions. Jared's testimony was that

he was scared and based on the totality of the circumstances, believed he needed to take measures to defend himself and his family from Dunning's imminent use of force, when Dinning made his next move.

The fact Dunning failed to leave when he could meant that the family had no idea what Dunning's next action would be. Would Dunning decide to suddenly put his truck in reverse and ram them? Would Dunning exit his truck, now armed with a firearm? For over seven minutes, all Jared knew was that a person who had already shown aggression and had the Bretherick family cornered. Dunning was in his vehicle, mirrors in and windows up, out of sight, doing who knows what. Jared could only assume Dunning intended to continue his attack, possibly with a firearm. A very reasonable assumption since, knowing full well that the Bretherick's were armed, Dunning still did not leave or attempt to get away. (Vol I, R. 114).

The Brethericks, like Mobley, tried to diffuse the situation by driving away, but were followed by Dunning who took special notice of their license plate and then passed them at a high rate of speed. Dunning abruptly swerved into their lane where he stopped, effectively blocking the Bretherick family from moving in any direction. (R.B. 5:6-11; D.B. 5:25, 6:1-7, 7:20-23; J.B. 5:8-18, 23:23-25).

Despite seeing the gun, Dunning does not leave but, instead, he backs his truck closer to the Bretherick family. (D.B. 6:16-25, 7:1-4; J.B. 5:1-4). Dunning's actions

heightened Jared's and his family's already fearful state that Dunning intends to do them harm. (D.B. 6:22-25, 7:1-4; J.B. 5:5-11).

Just as in Mobley, Jared had to consider what he had already observed, and like Mobley came to a logical conclusion that there was a real chance that Dunning was armed, obviously with his truck and possibly with a firearm or other weapon. Jared's testimony and the findings of fact by the trial court establish that Jared "reasonably believed" he needed to take measures to defend himself and his family from Mr. Dunning's "imminent use of unlawful force" based on the totality of the circumstances. While unlike Mobley, the situation may not have risen to the authorization of deadly force, Jared only defensively displayed his lawfully possessed forearm in defending his family.

Unlike the facts in the *Montanez* case, Jared *never* fired or threatened to fire his gun at Dunning. Dunning's actions created a zone of uncertainty. After failing to leave, the uncertainty of Dunning's next step escalated an objective fear of imminent bodily injury or death within the Bretherick family that could only be defended, by taking up a tactically sound defensive posture and awaiting Dunning's next move.

As in *Mobley*, the situation that Jared was confronted with did not occur in a vacuum, but was part of a *continuous escalating and threatening chain of events* caused by Dunning toward Jared and his family. Like Mobley, Jared was a witness to Dunning's behavior that included almost running his family off the road and hearing his mother's

description of Dunning with a crazy look on his face; stopping abruptly in the middle of the highway; then coming toward his family; and then witnessing Dunning back up his truck closer to his family.

Fearing that Dunning would either exit his truck with a weapon or ram his family, Jared left the Bretherick vehicle, with his father's gun for protection, to stop Dunning from coming any closer and to encourage Dunning to leave. Throughout the entire ordeal, Jared's response to Dunning's threatening and escalating behavior was lawful, measured, and appropriate.

Until the police arrived[4], the Brethericks remained in the zone of uncertainty that Dunning had created. With respect to the trial court, Dunning backing up his truck was *not* a negligible fact, but an objective fact that tied together in Jared's mind the totality of the circumstances leading to his belief that Dunning had intended to do harm to his family and that the gun was their only protection until law enforcement arrived.

C. Dunning kept the family in the zone of uncertainty until law enforcement arrived.

In the *Montanez* case the owner of a tow truck company who was charged with second degree murder after shooting the owner of a car that he had towed. *Montanez v.*

---

[4] The police arrived over seven minutes after the first call. The call was made after Dunning attempted to assault the Brethericks and was repelled by Ronald's lawful display of his firearm.

Florida, 24 So.3d 799 (Fla. 2nd DCA 2010) The facts show that the owner of the car was *not* driving toward the defendant and his employees when he was shot but, rather, away from them: therefore, the defendant and his employees were not in the zone of uncertainty justifying the use of deadly force. *Montanez* at 801. However, the court reasoned that if the vehicle had been proceeding toward them, they would have been in the zone of uncertainty justifying the use of deadly force. *Id.*

Dunning used his truck as a weapon with the intended purpose to block the Bretherick family in traffic so as to commit a false imprisonment and a battery upon members of the Bretherick family. However, Ronald's display of his holstered gun as Dunning was coming toward the Bretherick vehicle, caused Dunning to go back to his truck. Angry that the Brethericks could defend themselves, Dunning *reversed his truck toward* the Brethericks and continued to trap them on the highway with no reasonable and safe means of escape.

The trial court's reasoning seems to be that because Dunning returned to his car, backed it closer to the Bretherick family and did not take any further aggressive actions, the family should have ignored all that had gone before. The trial court's reliance on Dunning's return to his truck is misplaced. Dunning's return to his truck only after his failed attempt to commit a battery on the Bretherick family does not constitute a retreat. In fact nothing in Florida statutes references that a retreat by an attacker in any way terminates

the right of a person to defend themselves, so long as they remain in the zone of risk. If anything, by backing up his vehicle Dunning brought the zone of risk closer to the family. Moreover, the family, especially Ronald, was not free to move about or escape from Dunning.

As stated by the First DCA "The statute makes no exception from the immunity when the victim [initial aggressor] is in retreat at the time the defensive force is employed." *Hair v. State*, 17 So. 3d 804, 806 (Fla. 1st DCA 2009). Dunning's action in backing his vehicle closer to the Brethericks and continuing to block their way shows no intent to retreat or terminate the encounter. If anything, Dunning's words and actions demonstrate that he wished to escalate the situation.

D. Dunning was in the process of committing a forcible felony against Ronald Bretherick by falsely imprisoning him, justifying the threat of defensive force by Jared.

Were the Court to find that Dunning's dangerous driving pattern and exiting his truck in a threatening manner, and then backing his truck closer were not sufficient to warrant the use of force based on the imminent threat of attack or of death or great bodily harm, then Jared was still entitled to use force pursuant to the forcible felony provision of Secs. 776.012 and 776.031, Fla. Stat., which allow for the use of even deadly force, to prevent the imminent commission of a forcible felony and by extension, a forcible felony that is in progress.

"Forcible felony" means . . .; carjacking; . . .; aggravated assault; aggravated battery; . . .; and ***any other felony which involves the use or threat of physical force or violence*** against any individual. (emphasis added) Sec. 776.08, Fla. Stat. Florida defines false imprisonment thusly:

> (1)(a) The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will….(2) A person who commits the offense of false imprisonment is guilty of a felony of the third degree….

Sec. 787.02, Fla. Stat.

Actual force is not necessary to constitute false imprisonment, nor does there have to be any oral objection to the restraint. It is enough that the restraint was unreasonable and unwarranted. *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. 1st DCA 1983). Furthermore, the threat of force may be by words or conduct as long as there is a reasonable apprehension that force may be used. *Lewis v. Atl. Disc. Co.*, 99 So. 2d 241, 242 (Fla. 1st DCA 1957). It is indisputable that Mr. Dunning's dangerous driving, threatening conduct, and blocking of the Bretherick family's vehicle put them in fear that they could not move past him without the threat of force against them, including the possibility that Mr. Dunning might continue to use his car as an aggressive weapon as he threatened to 911. (Vol. I, R. 63). This is especially true considering Jared told Dunning to just go and leave his family alone. (J.B. 8).

Under Florida law, false imprisonment only requires general intent and does not require "proof of intent to commit or facilitate commission of any felony …" *State v. Smith*, 840 S0.2d 987, 990 (Fla. 2003). Florida courts have agreed that there are essentially four elements to false imprisonment:

1) the unlawful detention and deprivation of liberty of a person;
2) against the person's will;
3) without legal authority or "color of authority;" and
4) which is unreasonable and unwarranted under the circumstances.

Montejo v. Martin Mem. Med. Cen., Inc. 935 So. 2d 1266, 1268 (Fla. 4th DCA 2006).

Dunning's actions in blocking the middle lane with his vehicle, with traffic flowing on either side, eliminated the only reasonable avenue of escape for Ronald, a disabled veteran with limited ability to go anywhere quickly without his vehicle. This constituted a clear case of false imprisonment by Dunning. *Gray v. State*, 939 So. 2d 1095 (Fla. 1st DCA 2006)(holding that requiring a victim to disrobe to slow them down to aid in the escape of a robber was an act of false imprisonment).

The *Kanner* case demonstrates a type of false imprisonment seemingly arising out of an innocuous set of circumstances where it would appear, on the surface, that the plaintiff's liberty was not unlawfully restrained. *Kanner v. First Nat'l Bank of So. Miami*, 287 So. 2d 715 (Fla. 3d DCA 1974). The plaintiff was a bank teller who suffered a medical

emergency and called her husband to pick her up from the bank. *Kanner* at 715. However, the head teller informed the plaintiff that she could not leave until the amount of money in her drawer had been verified. *Id*. The court found that this was an unlawful, unreasonable, and unwarranted restraint of the plaintiff's liberty that served no useful purpose to the bank. *Id*. Nowhere in the recitation of facts does it state that the plaintiff was physically restrained, doors locked, or even threatened if she left.

Applying the elements of false imprisonment to the Brethericks: 1) Dunning unlawfully detained Ronald who was physically unable to cross the moving lane of traffic 2) Dunning did not possess the legal authority or "color of authority" to detain Ronald in the middle of the highway to assault or hinder him from traveling; and, 3) It was unreasonable and unwarranted for Dunning to use his car as a weapon to stop Ronald from the lawful use and enjoyment of his vehicle..

Neither the trial nor the appellate court addressed Ronald's inability to leave his vehicle. If the *Kanner* case stands for the proposition that a bank teller can be falsely imprisoned by being ordered, without even the implied use of actual force, to stay until the money in her drawer is counted, then Dunning's actions against Ronald is an even more compelling example of false imprisonment.

The evidence overwhelmingly shows that any person in such circumstances would have "reasonably believed" that they were not free to leave and were being confined to that

location unless they chose to risk a dangerous highway crossing, if they physically could.

E. The trial court abused its discretion in relying on inconsistent testimony from a convicted felon and from Hetrick whose testimony directly conflicts with her present sense impressions as recorded in her 911 call.

The statements of Dunning and Hetrick changed dramatically from the 911 tapes which were introduced into evidence to their testimony before the trial court. The 911 tapes are much more reliable as they are the present sense impression of the witnesses, rather than their memory six months later and should have been acpeted as true where they conflicted with the later testimony at the hearing. See, *Scott v. Harris,* 550 U.S. 372 (2007)(holding that in a case of disputed testimony, video evidence should be adopted for a court's findings of fact over contradicting testimony)

The direct contrast between Dunning's description of his driving and the traffic that day, and the testimony and 911 tapes from the State's witnesses, make Dunning's testimony completely unreliable. To the extent the ruling below was based in anyway on Dunning's testimony, this Court should find that the court below abused its discretion.

Dunning's lack of credibility is shown by his claim that the first time he saw and took notice of the Bretherick vehicle was when it was behind him. Dunning intentionally concealed from the Trial Court that he was behind the Bretherick truck taking special notice of its out of state blue license's plate. In his 911 tape, Mr. Dunning describes the Bretherick truck as having "out of state tags plates{sic}." The problem with Mr. Dunning's

testimony is that it would have been impossible for him to know the type of license plate on the Bretherick truck unless he was behind it taking special notice of the plate.

Mr. Ronald Bretherick testified that the only license plate indicating the car is from out of state is on the back of the Bretherick vehicle. (R.B. 11:6-12). There are more than enough holes and contradictions in Mr. Dunning's testimony when he lies about how he was driving that day as well as the first time that he sees the Bretherick truck to question all of his testimony.

The state's witnesses, Hetrick, and Dunning who claim that Jared approached Dunning's window cannot even agree as to which window Jared supposedly pointed the gun at. Hetrick claims that Jared went to Dunning's driver side window as she drove by (S.H. 3-4), but Dunning claims that Jared came to his passenger side window, on the other side of the car. (D.D. 7). The State apparently expects a jury to convict Jared, of pointing a gun at Dunning from the driver's side, when Dunning denies that Jared was ever even there.

Mr. Oxenrider's testimony in relation to his 911 call and written statements is also conflicting. In his 911 call Mr. Oxenrider's claims that Dunning's vehicle passed him and was "hauling ass" and that all the cars are having to go around Dunning's now stopped vehicle. He only ever places Jared (the man with the gun) on the side of the red Chevy (the Bretherick vehicle). Other than that he admits he has no idea what happened. Contrary to

his June 22 testimony, Mr. Oxenrider never states in the 911 call that he sees Jared pointing the gun at the driver's side window of Dunning's truck. .

At the pre-trial evidentiary hearing, Jared testified that the alleged victim, Dunning, was driving "erratically" and "recklessly" and specifically testified that Dunning was erratic, aggressive and dangerous, and that it impaired the families' safety. (J.B. 16-17.) Jared's testimony was corroborated by the testimony of his family and by the 911 calls produced at the hearing and The State's witness, Mr. Oxenrider.

The alleged victim, Dunning, denies the overwhelming evidence presented and claims he was not in a hurry or speeding. (D.D 5-6.) Oxenrider, whom the trial court found credible, testified that he waited at a light longer to avoid being next to Dunning who concerned him. (S.O. 4). Mr. Dunning's fabricated testimony when taken into consideration with the evidence presented and the testimony by unrelated, uninterested sources cast serious doubt as to his credibility, especially considering that he is a convicted felon which casts his credibility into even further doubt.

A preponderance of the evidence clearly establishes that Jared's testimony, his family's testimony, the introduced 911 calls, and the testimony of Mr. Oxenrider are consistent and credible and their combined version of the events that day, specifically that Mr. Dunning was driving erratically and recklessly endangering all other drivers, is what occurred that day..

Once again, the Brethericks' testimony is the only credible and consistent recollection of events starting from the 911 call, to their written statements, and all the way to the June 22 hearing. This case, unfortunately for Jared, is a classic textbook example of why the eye witness testimony of Ms. Hetrick and Mr. Oxenrider, though they are good people is unreliable and may be embellished over time.

When Jared exited his vehicle with Ronald's firearm, he feared that Dunning's assault was going to continue and that further attacks were imminent. His family was trapped with no where to go, and he could not see Dunning's door if Dunning came after the family again. In fact, a preponderance of all the evidence presented from the testimony of the Brethericks, Oxenrider, and the introduced 911 calls clearly prove that Dunning, in an act of threatening aggression, suddenly and dangerously stopped his truck in front of the Bretherick family vehicle in moving traffic, exited and reentered his vehicle and then moved it back toward the Bretherick's.

IV. THE PROSECUTION PRESENTS TWO DIAMETRICALLY OPPOSED FACTUALLY ARGUMENTS TO THE TRIAL COURT UNDERMINING THE CREDIBILITY OF ITS CASE

Standard of Review

The standard of review as to the proper procedure for determining entitlement to a claim of immunity is a question of law and is reviewed de novo. *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008) and *Hair v. State*, 17 So.3d 804, 805 (Fla. 1st DCA

2009).

Argument

In Jared's self-defense immunity hearing the State made two *diametrically* opposed factual arguments to the trial court regarding Dunning's actions. The State's two opposing arguments were that

1) Dunning never left his truck; and

2) But if Dunning had left his truck, he retreated after Ronald Bretherick held up his gun.

The State's factually inconsistent arguments *are material* as to Dunning's conduct on the day of incident and Jared's objective belief of Dunning's intent to do his family harm based on that conduct. The State must pick its poison as to which factual scenario that it wishes to argue: either Dunning got out of his truck to assault the family or he never got out of his truck. If Jared approached Dunning's truck, was it the driver's door or the passenger door?

If the State cannot determine the actual factual scenario that occurred, then it cannot meet its burden of proof at trial or argue for denial of Jared's motion for immunity. Dunning is the State's primary witness. If the State cannot determine Dunning's actions that day, then it should reexamine why it is prosecuting Jared and not Dunning for falsely imprisoning a law-abiding family on its way to Disney World and assaulting them in the

middle of a highway. Moreover, Jared's case supports the argument that the burden of proof, from start to finish in a criminal case, should *always* rest with the State to avoid the type of guessing game with the State's facts that occurred here.

CONCLUSION

Jared should not be prosecuted because he was able to successfully protect him and his family from an attack by a convicted felon. That is why the Florida Legislature passed the immunity from prosecution statute. It was Dunning who caused and forced the altercation that occurred between himself and the Bretherick family. The Brethericks' gun stopped Dunning's plans. Dunning knew that if he continued his attack, the Brethericks would be able to defend themselves just as the Florida Legislature intended.

Jared Bretherick asks that this Court find that the burden of proof in a self-defense immunity hearing should be placed on the State to prove beyond a reasonable doubt that immunity does not apply. He further requests the Court enter a Writ of Prohibition preventing any further prosecution of this case, and letting every citizen and visitor to Florida know, that those who are attacked in the streets will not be attacked again in the Courts of Florida. The aggressive, reckless, and dangerous behaviors without regard for human life exhibited by Dunning created a reasonable fear in Jared Bretherick and his family. Jared's actions were necessary and lawful. It is time to give effect to the immunity Jared should have had from day one.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e -service and US Mail this 11th day of June 2014 to the following.

Kristen Davenport, Esq.
Assistant Attorney General
444 Seabreeze Blvd.
Suite 500
Daytona Beach, Florida 32118
crimappdab@myfloridalegal.com
Kristen.Davenport@myfloridalegal.com

Jonathan Blocker, Esq.
Office of the State Attorney
Jeff Ashton, Esq.
Osceola County State Attorney Office
2 Courthouse Square
Kissimmee, Florida 34741
Jblocker@sao9.org

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of Rule 9.210, Fla R. App. P. The font is Times New Roman 14 point type.

FLETCHER & PHILLIPS

/s/ Eric J. Friday

Eric J. Friday
Fla. Bar No: 797901
541 E. Monroe St.
Jacksonville, FL 32202
efriday@fletcherandphillips.com
Attorneys for Jared Bretherick

Dawn L. Drellos-Thompson
Fla Bar No. 22503
P.O. Box 11645
Naples, Florida 34108