

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION: "X"  
CASE NO.: 2016CF005507AXXXMB

STATE OF FLORIDA

v.

NOUMAN KHAN RAJA,  
Defendant.

**ORDER DENYING DEFENDANT, RAJA'S, MOTION TO DISMISS  
ON THE BASIS OF FLORIDA'S "STAND YOUR GROUND LAW"**

**THIS CAUSE** came before the Court on Defendant Nouman Raja's "Amended Motion to Dismiss on the Basis of Florida's "Stand Your Ground' Law" ("Motion"), filed on April 19, 2018 (D.E. #448). The State filed a Response to Defendant's Motion to Dismiss on May 1, 2018 (D.E. #469). An evidentiary hearing on Defendant's Motion was held on May 7 and May 8, 2018. Closing arguments were submitted in writing by the Defense and the State on May 15, 2018 (D.E. #501, #502). The Court has carefully and extensively considered Defendant's Motion, the State's Response, all the evidence and arguments presented at the hearing, the case file, all applicable law, and is otherwise fully advised in the premises.

**INTRODUCTION**

On October 18, 2015, Defendant Nouman Raja ("Defendant") was an on duty police officer for the Palm Beach Gardens Police Department, conducting a plain-clothes police operation to investigate recent auto burglaries in the area. At approximately 3 a.m., Defendant observed what he believed to be an abandoned vehicle on the side of the Interstate 95 southbound off-ramp at PGA Boulevard in Palm Beach Gardens, Florida. Defendant, in an

unmarked white van, drove the wrong way up the off-ramp and parked diagonally a few feet in front of the car, occupied by Corey Jones (“Jones”). Jones was on the phone with AT&T roadside assistance when the Defendant approached Jones’s car on the off-ramp. The Defendant and Jones had a verbal exchange while the roadside assistance call was still recording inside Jones’s vehicle. In the following moments, Defendant fired six shots, which killed Jones. The State charged the Defendant by Information with Manslaughter by Culpable Negligence (Count 1) and Attempted First Degree Murder with a Firearm (Count 2) on June 1, 2016 (D.E. #7). On April 19, 2018, Defendant moved for statutory immunity from criminal prosecution pursuant to § 776.032, Florida Statutes. The State filed a Response on May 1, 2018.

### **STAND YOUR GROUND LAW**

#### **Substantive vs. Procedural**

Chapter 776, Florida Statutes, commonly referred to as the “Stand Your Ground” law, establishes a right to immunity from prosecution when a defendant uses force in accordance with specified prerequisites. The provision most relevant to this case is section 776.032, which states in pertinent part:

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 . . . for the use of such force . . . . As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

§ 776.032(1), Fla. Stat. (2015). Section 776.012 permits the use of both deadly and non-deadly force in certain circumstances. *See Little v. State*, 111 So. 3d 214, 217-18 (Fla. 2d DCA 2013).

Section 776.012, Florida Statutes provides:

(2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use 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. A person who uses or

threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

§ 776.012(2), Fla. Stat. (2015).

The Florida Legislature last year amended the “Stand Your Ground” law to add the following provision to section 776.032:

(4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

§ 776.032(4), Fla. Stat. (2017) (emphasis added) (hereinafter “Amendment”). The bill states that the Amendment “shall take effect upon becoming a law,” and was signed on June 9, 2017. Ch. 2017-12, Laws of Fla. This recent Amendment replaced the previous burden, which required a Defendant to prove by a preponderance of the evidence that he was entitled to immunity, was first proposed in *Bretherick v. State*, 170 So. 3d 766, 775 (Fla. 2015).

When the Legislature initially enacted the “Stand Your Ground” law, it provided for a defendant’s immunity from prosecution, but did not set forth who had the burden of proof in the pretrial evidentiary hearing on a defendant’s motion to dismiss based on this statutory immunity. *Id.* at 768. The Florida Supreme Court in *Bretherick* observed “the statute was silent as to how best effectuate the defendant’s substantive right to this immunity from prosecution,” and no clear legislative intent could be found; therefore, the court held that motions to dismiss based on “Stand Your Ground” immunity should be treated the same as other pretrial motions to dismiss based on Florida Rule of Criminal Procedure 3.190(c)(3). Thus, the burden was on the defendant to prove by a preponderance of the evidence that he is entitled to immunity. *Id.* at 772-73. Due to the subsequent Amendment, the burden of proof now rests with the State to prove by clear and

convincing evidence that a defendant is not entitled to immunity once a defendant has raised a prima facie claim of self-defense.

Since the Amendment's enactment, courts across the state have grappled with questions regarding retroactivity and constitutionality of the law in pending cases where defendants claim immunity for conduct that occurred prior to the date of the Amendment. In order to assess retroactivity following "a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law." *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007).

The Florida Supreme Court defines procedural statutes as those "which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing." *Id.* (quoting *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961)). Substantive statutes, conversely, achieve a "remedial purpose by creating substantive new rights or imposing new legal burdens." *Smiley*, 966 So. 2d at 334 (quoting *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994)). There is a presumption against retroactivity for substantive statutes, while procedural statutes "should be applied to pending cases in order to effectuate the legislation's intended purpose." *Arrow Air, Inc.*, 645 So. 2d at 424.

Florida courts have traditionally relied upon the procedural versus substantive dichotomy to assess whether a law should be applied based upon events that antedate the law's enactment. "The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Metro. Dade Cnty. v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). The "presumption against retroactivity will generally coincide with legislative and public expectations." *Arrow Air, Inc.*, 645 So. 2d at 425. Additionally, "[t]he policy rationale behind this rule of construction is that

the retroactive operation of statutes can be harsh and implicate due process concerns.” *Id.* at 499.

In many other legal contexts, burden of proof requirements were held to be procedural in nature. *Shaps v. Provident Life & Acc. Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) (holding that the burden of proof is procedural for conflict-of-laws purposes); *Ziccardi v. Strother*, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990) (determining in an action for civil damages based on criminal activity that the modification of the burden of proof in a statute was a procedural change); *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) (finding in a negligence action that “burden of proof requirements are procedural in nature,” and “procedural rights granted by the act could be abrogated retroactively because ‘no one has a vested right in any given mode of procedure’”).

Since the change in the law, this Court has found the Amendment to be procedural and thus retroactive. *State v. Harris*, Order Denying Defendant’s Motion to Dismiss Stand Your Ground, Case No. 2015CF004115B (Fla. 15th Cir. Ct. Mar. 16, 2018); *State v. Coley*, Order Denying Defendant’s Motion for Declaration of Immunity and Dismissal, Case No. 2016CF011345 (Fla. 15th Cir. Ct. Dec. 20, 2017). Therefore, the Legislature intended for the Amendment to apply to all future immunity hearings. The Amendment filled the gap in the initial statute as discussed in *Bretherick*, and specifically states that it is effective immediately upon becoming law. Although neither the Florida Supreme Court nor the Fourth District have ruled on the Amendment’s retroactivity, the Second District Court of Appeal held recently in *Martin v. State*, No. 2D16-4468, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018), that the Amendment is procedural in nature and can be applied retroactively. However, *Martin* also held that if the trial court did not determine the defendant was entitled to “Stand Your Ground”

immunity following a *new* “Stand Your Ground” hearing, the defendant’s conviction should be reinstated. *Id.* at \*4. This Court disagrees with this aspect of *Martin* and the Second District’s instruction because a jury had already rejected the *Martin* defendant’s self-defense claim under the higher “beyond a reasonable doubt” standard, and thus the error, if any, was harmless.

Aside from the substantive versus procedural dichotomy, the Amendment also raises constitutional questions. Article X, section 9 of Florida’s Constitution provides that “[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” FLA. CONST. art. X, § 9. The term “criminal statute” is broadly defined. *Smiley v. State*, 966 So. 2d 330, 337 (Fla. 2007). In *Smiley*, the Florida Supreme Court held the creation of “Stand Your Ground” statutory immunity, which replaced the common law duty to retreat, was a substantive change in the law that could not be applied to a pending case under article X, section 9. *Id.* at 332-33. An article X, section 9 inquiry is interrelated to a retroactivity inquiry and the critical question is whether a defendant’s substantive rights are affected. *Id.* at 337. The recent Third District Court of Appeal in *Love v. State*, No. 3D17-2112, 2018 WL 2169980 (Fla. 3d DCA May 11, 2018), held that the Amendment is not retroactive and cannot be applied to pending cases pursuant to article X, section 9 of the Florida Constitution.

Article X, section 9 has been construed “to bar criminal defendants from benefitting from changes in the statute that controlled the original prosecution and sentence.” *State v. Watts*, 558 So. 2d 994, 998 (Fla. 1990). In *Watts*, the defendants were serving community control sentences after being released from prison as youthful offenders; the trial court subsequently revoked their community control and youthful offender status and sentenced them to ten years in prison. *Id.* at 995-96. A statute was passed in 1985, after the defendants were initially sentenced, that imposed a ceiling of six years’ imprisonment for youthful offenders who violate community control. *Id.*

at 995-96. The State argued that the statute did not apply pursuant to article X, section 9. *Id.* at 998. The Florida Supreme Court observed that the new statute did not violate article X, section 9 because it did not change the nature of the offense or “the character of the degree of the punishment authorized” by the statute. *Id.* at 1000. Article X, section 9 does not prevent retroactive application of a statute where the prosecution and punishment for the offense remain the same. *Id.* at 999-1000.

This Court respectfully disagrees with the Third District’s reasoning in *Love* and finds the application of the Amendment in the instant case does not violate article X, section 9 of the Florida Constitution. Following the reasoning set forth above, the shift in the burden of proof is procedural and does not change the substantive offense or punishment. The instant case is distinguishable from *Smiley*, since *Smiley* centered on the expansion of the right of self-defense, which affected a defendant’s substantive rights and punishment. This Amendment is analogous to the statutory change in *Watts*, since “the same punishment may be inflicted, and the same form of sentence is to be entered as before the approval of the later act.” *Id.* at 1000 (quoting *Ex parte Pells*, 28 Fla. 67, 74 (Fla. 1891)). Thus, article X, section 9 does not prevent the Amendment from being applied in the instant case.

An additional constitutional concern stemming from the substantive versus procedural dichotomy is whether the Amendment constitutes an unconstitutional violation of the separation of powers set forth in article II, section 3 of the Florida Constitution. Article V, section 2 vests the Florida Supreme Court with the authority to promulgate “rules for the practice and procedure in all courts.” FLA. CONST. art. V, § 2(a). As the Amendment is procedural, but promulgated by the Legislature, it raises separation of powers concerns.

Legislative acts have a presumption of constitutionality and are construed “to effect a constitutional outcome whenever possible.” *Florida Dept. of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005). When there are two possible interpretations of a statute, one that is valid and one that is invalid, courts must adopt the valid construction. *State v. Lick*, 390 So. 2d 52, 53 (Fla. 1980). Additionally, “[o]nly clear and demonstrated usurpation of power will authorize judicial interference with legislative action.” *Eastern Air Lines, Inc. v. Dep’t. of Revenue*, 455 So. 2d 311, 314 (Fla. 1984).

In *State v. Raymond*, the Florida Supreme Court ruled that a statute prohibiting nonmonetary pretrial release for persons charged with a dangerous crime was unconstitutional, violating separation of powers. *State v. Raymond*, 906 So. 2d 1045, 1047-48 (Fla. 2005). The *Raymond* court acknowledged that “[i]t is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm.” *Id.* at 1048. Nevertheless, in *Kalway v. State*, the First District Court of Appeal held that a requirement for inmates to file information regarding their prison bank account when requesting indigency status was not an impermissible intrusion on separation of powers, although the requirement was procedural. *Kalway v. State*, 730 So. 2d 861, 862 (Fla. 1st DCA 1999). The *Kalway* court observed that “[t]he procedural aspects of the law under examination in this case are minimal and do not void the statute, because they are intended to implement the substantive portions of the law.” *Id.* at 862.

The Florida Supreme Court echoed this reasoning in *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49 (Fla. 2000). At issue in *Caple* was a statute allowing a commercial mortgagee to request a court order requiring the mortgagor to continue payments despite pending litigation. *Id.* at 50. The court evaluated the statute as a whole in light of due process requirements,

ensuring that parties' rights were adequately protected. *Id.* at 52-53. The court held that despite procedural requirements, the statute "creates substantive rights and any procedural provisions contained therein are intimately related to the definition of those substantive rights. We have consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights." *Id.* at 54. Ultimately, the court upheld the statute because it did not infringe on its own rulemaking authority. *Id.*

Despite the Amendment's procedural nature, this Court finds that it is constitutional, as it is intertwined with the substantive provisions of the "Stand Your Ground" law. The Florida Supreme Court specifically articulated in *Bretherick* the "Stand Your Ground" law was "silent as to how best effectuate the defendant's substantive right to this immunity from prosecution," thus acknowledging that the Legislature could have (and should have) added a procedural provision regarding the burden of proof in the original statute. *Bretherick*, 170 So. 3d at 772. In 2017, the Legislature amended the statute to include the burden of proof, albeit different from the court's conclusion regarding the burden of proof in *Bretherick*. The Florida Supreme Court acknowledged the Legislature should have included the burden of proof in the original statute, and the burden of proof is intertwined with the substantive portions of the "Stand Your Ground" law. Furthermore, this Court is aware *Martin* and *Love* are in conflict<sup>1</sup> regarding the Amendment's applicability to pending cases; with that in mind, this Court finds that the Amendment is retroactive and constitutional, and now turns to the instant case.

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<sup>1</sup> In the absence of a decision on this issue from the Fourth District and Florida Supreme Court, and in light of the interdistrict conflict between the Third and Second District Courts of Appeal, there is no binding decision to which this Court must adhere. *See Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992) ("in the absence of interdistrict conflict, district court decisions bind all Florida trial courts").

## **FINDINGS OF FACT**

On October 18, 2015, Defendant Nouman Raja shot and killed Corey Jones. As a result of the shooting, Defendant was charged with Manslaughter by Culpable Negligence and Attempted First Degree Murder with a Firearm. On April 19, 2018, Defendant filed the instant Motion, arguing that he was justified in using deadly force against Jones under the “Stand Your Ground” law, and is therefore immune from prosecution. A hearing on Defendant’s Motion was held on May 7, 2018, and continued on May 8, 2018. The Court’s findings of fact are the following.

### **The Defendant’s Case**

At the evidentiary hearing, Defendant submitted several exhibits: a series of photographs from the crime scene (Defense Ex. 1A-H); audio clip from the radio call from the Defendant to his sergeant asking to check out a car on the off-ramp (Defense Ex. 2); the AT&T roadside assistance call placed by Jones that describes the location of Jones’s car, followed by the verbal exchange between Defendant and Jones and gunshots (Defense Ex. 3); and the 911 call made by Defendant following the shooting (Defense Ex. 4).

First, Defendant called Frank Piazza (“Piazza”), a forensic audio analyst, albeit not a voice recognition analyst, to discuss his evaluation of Jones’s roadside assistance call. The call was played numerous times during the hearing and the below is what can be heard between the Defendant and Jones:

Jones: “Huh?”

Jones: “No, I’m good. Yeah, I’m good.”

Defendant: “Really?”

Jones: “Yeah.”

Defendant: “Get your fuckin’ hands up! Get your fuckin’ hands up!”

Jones: “Hold on.”

Defendant: "Get your fuckin' hands up! Drop."

(Three gunshots heard)

(Car door open bell heard)

Defendant: "Drop it!"

(Three gunshots heard)

(Car door open bell heard)

Piazza testified, upon enhancing the call, he was able to hear another voice at the beginning of the exchange between Jones and Raja, before Jones says "huh," and there is a 50 percent chance it is Raja's voice. Piazza further testified he believes the voice does not belong to Jones nor anyone on the roadside assistance call. Piazza testified that multiple syllables were uttered and could have contained the word "police," or something else. The parties stipulated there was a voice or a noise prior to Jones saying "huh" on the roadside assistance call. However, no one is able to state with certainty what was said before Jones said "huh," nor who said it.

The Court finds Piazza credible; however, upon listening to the call numerous times, the Court is unable determine what was said prior to "huh?" Furthermore, any argument regarding whether Defendant identified himself as a police officer as he approached Jones is moot, since the first discernible word on the call was Jones saying "huh?" It is common sense that in saying "huh," Jones did not hear what was, if anything, specifically said to him that evening.

The Defense played a video of Raja's "walk-through" of the incident for the Court. (Defense Ex. 5). During the walk-through, the Defendant gave a sworn statement on camera at the scene around 8 a.m. on October 18, 2015, approximately five hours after the shooting. During the sworn statement, Defendant testified he was patrolling the Palm Beach Gardens area in an unmarked white van and setting up decoy cars for a plain-clothes operation to investigate recent auto burglaries. Defendant stated he had his tactical vest, duty holster, and police radio in

the van with him, but none of them were on his person when he got out of his van. Defendant testified around 3 a.m., he saw a silver SUV on the Interstate 95 southbound off-ramp, which he believed was abandoned. At that point, Defendant radioed his supervisor for clearance to investigate the vehicle. Then, Defendant testified he drove the wrong way up the I-95 exit off-ramp and parked in front of the vehicle diagonal to the stopped car.

Defendant testified as soon as he pulled up to Jones's vehicle, Jones got out of his car, which then caused the Defendant to get out of the van. Defendant testified that he stated, "Police, can I help you," and Jones immediately stepped back, drew his gun, and pointed it at the Defendant. Defendant stated he saw a red laser flickering on Jones's gun. Defendant testified he drew his gun as well and told Jones to drop his weapon. Defendant stated he fired two or three shots at Jones while they were both near the front of the two vehicles. Defendant testified Jones started running on the grass right by the guardrail when he then saw Jones spin around as if he was pointing the gun with his right hand to shoot back at the Defendant. Defendant testified he fired another volley of shots and saw something silver fall to the ground. Defendant testified he called 911 as Jones was running away, before the second volley of shots.

Defendant then called Michael LaForte ("LaForte"), a forensic consultant, to testify regarding crime scene reconstruction. An aerial photo of the crime scene annotated with boxes identifying various locations and an approximation of Raja and Jones's positions during each volley of shots was admitted into evidence (Defense Ex. 6). LaForte testified based on the location of the shell casings, Defendant was approximately 5-7 feet behind Jones's car when the first volley of shots was fired and Jones was about 20-25 feet away from Raja at this time. Jones's body was found approximately 196 feet behind his car; Jones's gun was found approximately 72 feet behind his car. LaForte testified that there was no red laser on Jones's gun

when it was found and that the Defendant's walk-through statement is inconsistent with the physical evidence in this case. The Court finds LaForte's testimony credible.

Then, the Defendant called Michael Knox ("Knox"), a forensic consultant, to testify regarding his reconstruction of the crime scene. Knox testified that he synchronized Jones's roadside assistance call with Raja's 911 call, which illustrated that Defendant did not call 911 until approximately 33 seconds after the second volley of shots was fired. The synced phone call was admitted into evidence (Defense Ex. 7). Knox testified about a concept he claimed is quite common in officer-involved shootings, known as "perception distortion," where a person remembers a stressful situation differently than it actually happened. The Court finds Knox's testimony credible.

Defense then called Dr. Christopher Chapman ("Chapman"), of the National Excessive Force Institute, to testify regarding his opinions on the case. Chapman testified that the standard for use of force is objective reasonableness, and he believes that each of the six shots fired by Defendant was reasonable. Chapman testified he did not consider the manner in which Defendant approached Jones's vehicle as one of his "units of analysis" because an approach is a police tactic. Chapman testified that he did not consider Defendant's credibility when assessing the reasonableness of the use of force. The Defense entered a "light reflectivity test," which demonstrated that the traffic lights near the crime scene could have reflected off Jones's gun, into evidence (Defense Ex. 8). The Court does not find Chapman's testimony credible due to the numerous inconsistencies in his testimony.

The next day, on May 8, 2018, Defendant called Dr. John Marraccini ("Marraccini"), a forensic pathologist, to testify regarding Jones's injuries. Marraccini testified that Jones received three gunshot wounds: two perforating wounds through each of his arms, and one penetrating

wound that went through the upper right side of his chest and lodged inside the left shoulder. Marraccini testified that he was not able to determine the order of the wounds. Although Marraccini demonstrated many potential body positions Jones could have been in to receive the wounds, he testified that he was unable to determine how Jones was positioned. Furthermore, he was unable to conclude in which hand Jones was holding his gun. Marraccini testified he did not believe that the fatal wound would have been immediately incapacitating, and it would have been possible for Jones to continue moving after he received the wound. The Court finds Dr. Marraccini's testimony credible.

Next, the Defendant called Detective Kenny Smith ("Smith") of the Palm Beach Gardens Police Department. Smith responded to the crime scene and conducted the walk-through with Raja. Smith testified that Raja was upset and emotional during the walk-through, which Smith considered a normal reaction in the circumstances. Photos of the interior of Jones's car (State's Ex. 2) and Defendant's van (State's Ex. 3) were admitted into evidence. Smith testified he conducted the "light reflectivity test" several days after the shooting to determine if the traffic lights at the scene could have reflected off Jones's gun to mimic a laser. Smith testified he approximated where Jones would have been standing during the incident, but was not able to be precise. Smith testified the firearm was reflecting red light during the "light reflectivity test," but did not opine on the validity or accuracy of the test. Photos of the test were admitted into evidence (Defense Exs. 9A-K). The Court finds Smith's testimony credible.

Defendant next called Crime Scene Investigator Thomas ("Thomas") to testify about processing the crime scene and the light reflectivity test. Thomas testified he conducted the light reflectivity test with Smith and they approximated where Jones would have been standing during the incident. Thomas testified that the traffic light reflections did not look like a laser to him.

Photographs of the crime scene were admitted into evidence (State Exs. 4A-E). The Defense then rested their case.

### **The State's Case**

First, the State called Matthew Huntsberger (“Huntsberger”) to testify about what happened prior to the shooting, on the evening of October 17 and the early morning of October 18, 2015. Huntsberger testified he was playing music with Jones at a show in Jupiter that night. After the show, Jones called Huntsberger because his car was broken down, and Huntsberger went to try to help Jones. Huntsberger testified he offered to drive Jones home, but Jones did not want to leave his car with his drums inside. Huntsberger identified a photo of Jones, which was admitted into evidence (State Ex. 5). Huntsberger gave inconsistent statements regarding the amount of alcohol he had to drink that night and further testified that he and Jones had smoked marijuana at the show. The Court does not find Huntsberger to be a completely credible witness.

The State then called Clinton Jones, Jr., Corey Jones’s brother, (“Clinton”) to testify. Clinton testified Jones was left handed and that Jones had recently bought a gun, but he was not aware of Jones having a familiarity with firearms. Clinton stated Jones did not have a reputation for violence. On the night of the shooting, Clinton testified Jones called him and told him his car had broken down, but he did not want to leave his drums in the car. Clinton testified that Jones seemed calm and did not sound impaired or angry on the phone. The Court finds Clinton’s testimony credible.

Several exhibits were then admitted: audio of roadside assistance and 911 call on a thumb drive (State Ex. 6); wireless subscriber information for Jones and Raja (State Ex. 7); and the call detail log (State Ex. 8).

The State then called Sergeant Javier Garcia (“Garcia”) of the Palm Beach Gardens Police Department to testify. Garcia testified regarding the difference between plain-clothes and undercover police operations; plain-clothes operations generally require an officer to wear a tactical vest or some kind of identification, while undercover operations require no identification. Plain-clothes detail means an officer should be able to be identified. Garcia testified that Defendant’s operation was plain-clothes and he was required to have a tactical vest, radio, department-issued firearm and police equipment readily available. The Court finds Garcia’s testimony credible.

The State then called Sergeant Andrew Spragg (“Spragg”) of the Palm Beach Gardens Police Department to testify. Spragg testified he was the first to respond to the crime scene and he spoke with Defendant when he arrived. Spragg testified that Defendant told him that the suspect had a gun, Defendant believed he had shot the suspect, and Defendant saw the suspect’s gun drop in the grass. Spragg testified Defendant said he did not have his tactical vest on during the incident. Spragg made an oral report of the incident, in which he stated that he had a conversation with Defendant when he arrived at the scene. The Court finds Spragg credible.

The State then called W.D. Libby, (“Libby”) a law enforcement consultant with 35 years of law enforcement experience, to testify regarding his opinions on the case. Libby testified that he considered Defendant’s behavior “lazy and reckless,” and described the appropriate way to approach a vehicle to ensure the safety of all parties. Libby testified that Defendant (1) failed to follow accepted police practices in his initial approach to investigate Jones’s vehicle; (2) failed to follow accepted police practices in his initial approach to Jones; (3) failed to follow best practices concerning how the plain-clothes operation was to be conducted; (4) did not follow accepted police practice of identifying himself with either a verbal announcement and/or the

wearing of police indicia of authority; and (5) relayed a version of events during his walk-through with investigators that attempted to justify the shooting of Jones, but his testimony is not supported by forensic evidence. Libby testified he believes Defendant's creation of the circumstances directly resulted in the death of Jones and Defendant's use of force was not justified. The Court finds Libby's testimony credible.

The State then re-called Crime Scene Investigator Thomas to verify several photos taken at the crime scene. A photo of Jones's gun obscured by the grass before anyone had touched it was admitted into evidence (State Ex. 9). State Exhibit 9 is similar to Defense Exhibit 1H, in which the gun was flipped over to reveal the writing on the reverse side of the gun. The Court finds Thomas credible.

The State called Dr. Gertrude Juste ("Juste") from the Palm Beach County Medical Examiner's Office to testify regarding Jones's autopsy. Juste testified that Jones's cause of death was a gunshot wound to the chest and the manner of death was homicide. Autopsy photos were admitted into evidence (State Exs. 10A-I). Juste testified that the entrance wounds in each of Jones's arms were on the back, consistent with someone who is facing away from the shooter. Juste testified that the chest wound was fatal and significantly damaged Jones's heart and lungs. Juste testified that wound entered through the right front of Jones's chest. Juste testified Jones could have kept moving for a short time after receiving the wound, but not the 41 yards from where his gun was found. The Court finds Juste credible. The State then rested its case.

Defendant called a rebuttal witness, Deputy Nicholas Arlotta of the Palm Beach Gardens Police Department, to testify regarding the immediate response on the night of the shooting. Specifically, Arlotta testified when he arrived at the scene, he did not see Spragg speak with Defendant. Arlotta testified that there were several instances when Spragg could have gotten out

of his car to speak with Defendant. The Court finds Arlotta credible but his testimony is de minimus for the purpose of this ruling.

### **LEGAL ANALYSIS AND RULING**

As discussed above, the Court finds the Amendment to the “Stand Your Ground” law retroactive and applicable in this case. Therefore, after the Defense raised a prima facie claim of self-defense the State must prove by clear and convincing evidence the Defendant is not entitled to self-defense immunity. The Fourth District Court of Appeal has held:

a workable definition of clear and convincing evidence must contain both qualitative and quantitative standards. We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

As a threshold matter, this Court finds that “Stand Your Ground” immunity is applicable to law enforcement officers. The Fourth District Court of Appeal in *Peraza v. State*, 226 So. 3d 937 (2017), has recently held that law enforcement officers are entitled to immunity under the general provisions of sections 776.012(1) and 776.032(1), applicable to “a person.” *Peraza* certified conflict with the Second District’s opinion in *Caamano v. State*, 105 So. 3d 18 (Fla. 2d DCA 2012), which held that a law enforcement officer when using deadly force while making an arrest must proceed under section 776.05, specific to law enforcement. This Court notes that the Florida Supreme Court granted review of *Peraza*, regarding applicability of Stand Your Ground immunity to law enforcement, but has not issued a ruling as of the date of this decision. *State v. Peraza*, No. SC17-1978, 2018 WL 2073456 (Fla. Feb. 1, 2018).

The Amendment states that “once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing,” the burden is on the State to prove that a defendant is not entitled to immunity. § 776.032(4), Fla. Stat. (2017). Prima facie is defined as “sufficient to establish a fact or raise a presumption unless disproved or rebutted,” or “on first appearance but subject to further evidence or information.” *Prima Facie*, Black’s Law Dictionary (8th ed. 2014). While there is no precedent regarding what constitutes a prima facie case for “Stand Your Ground” purposes, this Court holds that a prima facie claim of self-defense under “Stand Your Ground” is not established by the mere filing a motion to dismiss. First, the defense must present some evidence to establish a presumption of self-defense before the burden shifts to the State. In the instant case, the Court finds that Defendant has raised a prima facie case of self-defense pursuant to section 776.012.

To be immune from prosecution under section 776.012(2), the trial court must find from the evidence that at the time a defendant used deadly force, “he (1) reasonably believed that using such force was necessary to prevent imminent death or great bodily harm to himself or to prevent the imminent commission of a forcible felony, (2) was not engaged in criminal activity, and (3) was in a place he had a right to be.” *State v. Chavers*, 230 So. 3d 35, 39 (Fla. 4th DCA 2017).

This Court must apply an objective standard in determining whether the Defendant’s belief of imminent death or great bodily harm was reasonable. *Mobley v. State*, 132 So. 3d 1160, 1164-65 (Fla. 3d DCA 2014); *Chaffin v. State*, 121 So. 3d 608, 612 (Fla. 4th DCA 2013). This analysis entails asking

whether, based on the circumstances as they appeared to the defendant when he or she acted, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant.

*Mobley*, 132 So. 3d at 1164-65. This objective reasonableness standard also applies to law enforcement officers. *Peraza*, 226 So. 3d at 942; *see also Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004). In *Peraza*, the court ruled that the officer's use of deadly force was objectively reasonable and supported by competent substantial evidence, in part because "the officer's account was consistent with the other credible witnesses' testimony and the physical evidence." *Peraza*, 226 So. 3d at 946.

Having set forth the applicable law, the Court now makes its findings. During the course of the hearing, the Court had the opportunity to observe witnesses as they were testifying on the stand. The Court has taken into consideration certain intangible observations regarding the witnesses voices, emotions and body language displayed or exhibited during the hearing. Specifically, the Court observed the following: the witness's demeanor while testifying; the frankness or lack of frankness of the witness; whether the witness was honest and straightforward in answering the attorney's questions; any interest the witness might have in the outcome of the case; the means and opportunity the witness had to know the facts about which they testified; the ability of the witness to remember the matters about which they testified; any prior inconsistent statements; whether the testimony agreed with other testimony and evidence presented; and the reasonableness of the testimony in light of all the evidence presented.

The Court finds the Defendant's sworn statement testimony unreliable and not credible, primarily because his sworn statement during the walk-through was inconsistent with the physical evidence. Defendant testified he stated, "police, can I help you?" and Jones immediately drew his gun and pointed it at Defendant. The roadside assistance call captured some noise or voice prior to Jones saying "huh;" regardless of what the words were, it is clear from the call that Jones did not hear Defendant possibly announce himself as a police officer

when Defendant got out of his car. Nowhere else in the call can Defendant be heard identifying himself as a police officer nor is there any evidence whatsoever that he ever did. The shell casings found at the crime scene are also inconsistent with Defendant's location description during each volley of shots. The shell casings from the first volley of shots place Defendant approximately 5-7 feet behind Jones's car and Jones was approximately 30 feet behind the car when Defendant first shot at Jones. This physical evidence indicates that Jones moved away from Defendant, around and behind his car, before the Defendant fired the shots. Additionally, although the witnesses were unable to determine when each of the shots were fired or the order in which Jones received the wounds, two of the three wounds entered through the back side of Jones, consistent with someone who is running away from the shooter.

Defendant testified that he saw Jones turn around as if he was pointing the gun with his right hand to shoot back at him when Defendant fired the second volley of shots. Jones's brother testified that Corey was left-handed. Defendant also testified that he called 911 while chasing Jones, before firing the second volley of shots. The synced phone call indicates that Defendant did not place the 911 call until approximately 33 seconds after firing the second volley. While several witnesses testified that perception distortion could cause an inaccurate rendering of a stressful event, Defendant is unable to choose which of his statements are inaccurate due to perception distortion and which are accurate for the sake of his argument.

Defendant testified Jones pointed a gun at Defendant as soon as Defendant announced himself as police, and that Jones's gun was equipped with a red laser. While Jones's gun did not have a laser, the "light reflectivity test" demonstrated that the traffic lights near the crime scene reflected off Jones's gun and could have mimicked a laser. Defendant claims Jones was shot while pointing his gun at Defendant and this argument is corroborated by both the "light

reflectivity test” and Defendant’s testimony regarding a red light flickering off the barrel of Jones’s gun. The Court finds the “light reflectivity test” is not conclusive proof Jones had his gun drawn as Defendant approached. Defendant’s unreliable testimony is all that supports that proposition.

On the other hand, Jones is heard calmly on the roadside call saying: “Huh?” “No, I’m good. Yeah, I’m good,” to which the Defendant replies, “Really?” and then Jones again calmly says “Yeah.” The next words that are heard are the Defendant’s yelling loudly and rapidly: “Get your fuckin’ hands up! Get your fuckin’ hands up!” Jones replies “hold on, hold on,” and then upon the Defendant yelling for Jones to get his hands up again, three gunshots are heard, and then the sound of a bell consistent with a car door bell when it remains open. The Court finds, and common sense dictates, the evidence shows the Defendant had his gun drawn when he jumped out of the car and approached Jones. It was upon seeing the Defendant—in plain clothes with no indication, understanding, or knowledge that the Defendant was a police officer, pointing a gun at him—that it was then, and only then, that Jones pulled out his gun in response. Jones then tried to run away from the Defendant to the back of his car when the Defendant fired the first three shots, hence the shell casings found behind the car. No shell casings from Jones’s gun were ever found, nor was there any evidence that Jones ever fired his weapon that evening.

During the hearing, testimony was elicited regarding Defendant’s failure to follow generally accepted police practices and his supervisor’s instructions regarding the plain-clothes detail Defendant was participating in on the day of the shooting. The Court previously ruled on a motion in limine, which specifically excluded evidence and testimony regarding Defendant’s failure to follow Palm Beach Gardens Police Department policies and his supervisor’s instructions for the plain-clothes detail. Although testimony to this effect was elicited during the

hearing, the Court has not considered specific policies or Defendant's failure to follow supervisor instructions as part of the instant Motion, pursuant to the motion in limine. The Court did consider, however, the generally accepted police practices that Defendant did not follow. Specifically, Defendant did not have any insignia of police authority such as his tactical vest, badge, radio, or duty holster on when he approached Jones. Despite receiving clearance to investigate further from his supervisor, the evidence presented indicates prior to Defendant's exit from his vehicle, neither the circumstances of Mr. Jones's stranded vehicle nor Mr. Jones's actions rose to the level of reasonable suspicion of criminal activity. Further, there had been no complaints nor reports made about Jones or his vehicle prior to Defendant exiting his vehicle. There is nothing inherently suspicious about a motorist broken down on the side of the road.

In his closing statement, Defendant cites several cases to stand for the proposition that this Court should not consider police practices in evaluating whether Defendant's use of force was reasonable. The constitutional standard regarding a police officer's use of force "is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 388 (1989). In *Tanberg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005), the court excluded evidence of a police department's standard operating procedures, partially because it "require[d] an assessment of an officer's choice between various techniques for de-escalation, it is beyond the scope of the inquiry mandated by state and federal law, which require that an officer use reasonable, not optimal force." *Id.* at 1162. In *Whren v. U.S.*, 517 U.S. 806 (1996), the Supreme Court held that it would not consider police enforcement practices because "[petitioner's] claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations." *Id.* at 815. The Court finds that these cases are

distinguishable because they involve considerations of specific police regulations, which this Court has already excluded through its ruling on the motion in limine (D.E. #453). Additionally, the cases cited by Defendant support the reasonableness calculation employed in a “Stand Your Ground” analysis.

State and Defendant both called experts to testify regarding generally accepted police practices and whether they believed Defendant’s use of force was reasonable. Defendant’s expert testified that he did not consider the manner in which Defendant’s approach to Jones or Defendant’s credibility as part of his opinion that Defendant’s use of force—including the firing of each of the six shots—was objectively reasonable. State’s expert testified that Defendant’s behavior, especially concerning his approach to Jones and his vehicle, was “lazy and reckless.” The Court finds the State’s expert to be credible, and echoes the opinion that Defendant’s creation of the circumstances resulted in the death of Jones.

Based on the testimony and evidence presented at the hearing on Defendant’s Motion, the Court finds the State has met this burden and proved by clear and convincing evidence the Defendant is not immune from prosecution and his use of force was not justified under sections 776.012 and 776.032. Although the Court finds that Defendant was not engaged in criminal activity at the time of the shooting and he was in a place where he had a right to be, Defendant is not entitled to Stand Your Ground immunity because his use of force was not reasonable. *See Chavers*, 230 So. 3d at 39. The most credible and precise evidence that supports the meeting of the State’s burden is the recorded roadside call coupled with the location of the shell casings behind Jones’s car. The Court finds Defendant’s initial approach to Jones’s vehicle and Jones himself were in violation of generally accepted police practices. Furthermore, there is no indication Jones knew the Defendant was a police officer. The physical evidence indicates that

both Defendant and Jones were behind Jones's car when the first volley of shots were fired. State and Defense agree that Defendant and Jones were behind Jones's vehicle when the first shots were fired and that Defendant's account of those shots was initially incorrect.

Unlike *Peraza*, Defendant's account of the events was inconsistent with the physical evidence. The officer in *Peraza* was also wearing a uniform, in a marked police unit with overhead emergency lights on, and repeatedly shouted "stop," "police," and "drop the weapon," at the decedent, who was walking down a busy street with a gun. *Peraza*, 226 So. 3d at 939. Furthermore, the officer's account of the incident in *Peraza* was consistent with several other credible eyewitnesses' testimony. *Id.* at 940. Here, Defendant was in plain clothes with no police insignia and did not identify himself as a police officer. There is also no witness testimony to corroborate Defendant's version of events here as there were in *Peraza*.

Furthermore, as previously stated, due to the inconsistencies in the Defendant's statements to the police and the potential of "perception distortion," this Court cannot rely on the Defendant's testimony as credible. Considering the totality of the circumstances, the Court finds that Defendant's use of deadly force was not objectively reasonable and not justified under the law. The manner in which Defendant approached Jones—in the middle of the night, driving the wrong way up the ramp, in a white unmarked van, parking head-on diagonal to Jones's vehicle just feet away, jumping out of his vehicle, in plain clothes, with his firearm drawn with no indication he was a police officer—would not afford an ordinary citizen Stand Your Ground immunity. As elucidated from the roadside call, Jones did not draw his weapon until *after* the Defendant jumped out of his vehicle with his weapon drawn on Jones. In other words, the Defendant's actions created a situation where a reasonable person in Jones's position would think he were about to be harmed by a person wielding a firearm. If Jones reacted to an

aggressive approach by a stranger brandishing a firearm, not known to be a police officer, by brandishing his own firearm, he was justified in doing so.

While the ruling of this Court is not based upon the application of section 776.041,<sup>2</sup> the Court finds that its application would necessitate a finding that the Defendant is not entitled to immunity pursuant to sections 776.032 and 776.012. Likewise, while the ruling of this Court is not based upon an application of section 776.051(2),<sup>3</sup> the Court finds its application would also support the Court's decision herein and necessitate a finding that the use of force by the Defendant was not justified.

While the Court did consider the Defendant's failure to follow generally accepted police practices, *Peraza* holds that police officers and citizens are treated the same for purposes of Stand Your Ground. Regardless of the Defendant's failure to follow police practices, Defendant Raja acted unreasonably and not as a prudent person under the circumstances and the law and therefore, his Motion for "Stand Your Ground" immunity is therefore denied. Defendant remains free to use the defense at trial.

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<sup>2</sup> Section 776.041 sets forth that the preceding sections of the same chapter, including sections 776.012 & 776.032, are not available to a person who:

- (2) Initially provokes the use or threatened use of force against himself or herself, unless:
  - (a) Such force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or
  - (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force. § 776.041(2), Florida Statutes (2015).

<sup>3</sup> See § 776.051(2), Fla. Stat. (2015) ("A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, is not justified in the use of force if the arrest or execution of a legal duty is unlawful and known by him or her to be unlawful").

Accordingly, it is hereby, **ORDERED** that Defendant's "Amended Motion to Dismiss on the Basis of Florida's 'Stand Your Ground' Law" is **DENIED**.

**DONE AND ORDERED** in Chambers in West Palm Beach, Palm Beach County,  
Florida, this 1<sup>st</sup> day of June, 2018.



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SAMANTHA SCHOSBERG FEUER  
Circuit Judge

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