IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NUMBER: F10-9090

SECTION 14

VS.

JUDGE MILTON HIRSCH

QUENTIN WYCHE,
Defendant.
_____/

ORDER ON MOTION TO DISMISS

Charged with the stabbing death of Kendall Berry, Quentin Wyche moves to dismiss. His motion asserts the statutory form of immunity created by Florida's "Stand Your Ground" law.

The Common-Law Duty to Retreat

There is nothing quite so comforting for a judge to write, or a lawyer to read, as a ruling which draws support from the treatises of Coke or Hale, from the opinions of Mansfield or Cardozo. This is true not, as is too commonly believed, because judges and lawyers are inappropriately resistant to change. It is true because judges and lawyers are appropriately deferential to the common law and its processes. That a principle of law has been sifted and again sifted through the alembic of the common law is evidence of its enduring wisdom. For time itself is the stithy of the common law.

Few legal principles are so venerable, or so universally accepted in the Anglo-American law, as that known as the "duty to retreat." *See generally Regina v. Smith*, (1837) 173 Eng. Rep. 441 (K.B.); *Regina v. Bull*, (1839) 173 Eng. Rep. 723 (K.B.).[1] Of course the law recognizes every man's

[1] Henry Clay and John Randolph were bitter antagonists for much of their adult lives. On an occasion when spring rains had turned the roads of Washington, DC, into rivers of mud, Randolph and Clay found themselves at opposite ends of a narrow wooden plank, the only means by which a

right of self-defense, but "[t]he law of self-defense requires everyone to avoid killing when possible and to retreat, if necessary, and consistent with his own safety[,] before taking life." *Harris v. State*, 104 So.2d 739, 743 (Fla. 2d DCA 1958). Although "a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm," *Weiand v. State*, 732 So.2d 1044, 1049 (Fla. 1999), "a person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger, including retreat." *Id.* The reason for the rule is so apparent that it is seldom stated: Retreating from the prospect of combat may cause a man to think less of himself, or cause others to think less of him; but not retreating may cause permanent injury or death. As between the two outcomes, the common law was more concerned with wounded bodies than with wounded feelings. *See, e.g., State v. Shaw*, 441 A.2d 561, 565 (Conn. 1981); *People v. Canales*, 624 N.W.2d 918, 919 (Mich. 2001) (citing *Pond v. People*, 8 Mich. 150 (1860)).

To the general duty of retreat the common law made an exception, sometimes known as the "castle doctrine." "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground." *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (Cardozo, J.). "Florida has long recognized the venerable 'castle doctrine' . . . that a person's dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection." *Falco v. State*, 407 So.2d 203, 208 (Fla. 1981) (citing *Peele v. State*, 20 So.2d 120 (Fla. 1944); *Russell v. State*, 54 So. 360 (Fla. 1911); *Wilson v. State*, 11 So. 556 (Fla. 1892)); *see also Danford v. State*, 43

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particular street could be safely crossed. Randolph stood his ground, bellowing, "I never make way for fools!" Clay, in response, retreated from his end of the plank and, with great flourish, replied, "I always do." *See generally* Lorenzo Sabine, Notes on Duels and Duelling (1855).

So. 593 (Fla. 1907); *Alday v. State*, 57 So.2d 333 (Fla. 1952). Here again the reason for the rule is entirely straightforward: Retreat "is for sanctuary and shelter, and shelter, if not sanctuary, is in the home." *Tomlins,* 107 N.E. at 497.

Florida's "Stand Your Ground" Law

"In a much-publicized move, the Florida Legislature enacted in 2005 what has been popularly . . . referred to as the 'Stand Your Ground' law." *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008). "This law, as codified [in section 776.032, Fla. Stat.], provides that a person who uses force as permitted in section 776.01[2] is justified in using such force and is immune from criminal prosecution as well as civil action for the use of such force." *Id.* In the situations to which it applies, the "Stand Your Ground" law abrogates the duty to retreat. In effect, it moves the "castle doctrine" out of the castle and into the street. The neighborhood bar, the street corner, the left-field bleachers of the ballpark – all these become every man's castle, where he may stand his ground and meet force or the threat of force with force.

Sections 776.032, 776.012, 776.013, and 776.031 – which sections, collectively, comprise the "Stand Your Ground" law – appear in that portion of the Florida criminal statutes captioned, "Justifiable Use of Force." The notion of justification is a familiar one to the criminal law. A defense of justification is in the nature of confession and avoidance: the defendant admits the commission of the crime – or at least the *actus reus* of the crime – but insists that his conduct was brought about by extraneous circumstances, which circumstances, if accepted by the trier of fact, render the otherwise-criminal conduct dispunishable. Self-defense, *see Bolin v. State*, 297 So.2d 317, 320 (Fla. 3d DCA 1974), and defense of others are common examples, but justification defenses are not limited to crimes or defenses involving violence. *Pflaum v. State*, 879 So.2d 93 (Fla. 4th

DCA 2004), for example, involved a prosecution for perjury. The defendant admitted making the false statements in question, but asserted a defense of duress -- a defense of justification. *See also Koontz v. State*, 204 So.2d 224, 226 (Fla. 2d DCA 1967).

Of course claims of justification must, as an almost invariable rule, be presented to the trier of fact at a trial on the merits. Whether a defendant was faced with circumstances that justified conduct that would otherwise be punishable turns upon the facts of the case, and unless those facts are undisputed,[2] any dispute must be resolved by the jury.

The "Stand Your Ground" law, however, does not speak the language of justification; it purports to speak the language of immunity. It does not provide a defense to criminal charges; it purports to provide immunity from criminal charges. It does not provide a defense at trial; it purports to provide a bar to trial, indeed even to arrest. This is the diacritical feature of the statutory scheme.

Traditionally, immunity attaches to status. It is separate and apart from, and unrelated to, the factual merits of a claim or defense that could be asserted by or against the litigant who claims or disputes it. For some purposes, for example, a United States congressman,[3] or a foreign diplomat,[4] is immune. His immunity is a function of his status as a congressman, or as a diplomat. The merits of

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[2] *See* Fla. R. Crim. P. 3.190(c)(4), which provides a mechanism for adjudication of a motion to dismiss when the material facts of the case are undisputed, and the undisputed facts do not make out a *prima facie* case of the crime charged, or do make out a complete defense.

[3] *See* U.S. Const. art. I, § 6 (senators and representatives "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same").

[4] *See, e.g.*, Vienna Convention on Diplomatic Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, [1972] 23 U.S.T. 3227, 3240-3243, 3375, T.I.A.S. No. 7502.

a claim for or against him are never reached; the mere presentation of his credentials – the evidence of his status – brings litigation to a full and final halt. Similarly, at various times in the history of this country and England some jurisdictions have afforded immunity to eleemosynary organizations. *See, e.g., Benton v. Young Men's Christian Ass'n of Westfield,* 27 N.J. 67 (1958); *Collopy v. Newark Eye and Ear Infirmary,* 27 N.J. 29 (1958); *Dalton v. St. Luke's Catholic Church,* 27 N.J. 22 (1958). In such jurisdictions the merits of a legal claim against such an organization would never have been reached. Proof of the organization's status acted as a bar to any litigation intended to consider those merits. Or again: If government, as a matter of public policy, chooses to confer immunity on the manufacturers of certain vaccines,[5] then those manufacturers will be immune from suit simply because of their status as manufacturers of those vaccines, without regard to or consideration of the merits of any claim that could be made, or defense that could be offered, as to the effects of those vaccines.

Once upon a time, immunity in this true sense – immunity attaching to the status of a class of persons or entities, conferred by government as a policy choice about that class of persons or entities – was an important part of the criminal law. Persons compelled to testify over an assertion of their rights against self-incrimination pursuant to the Fifth Amendment of the U.S. Constitution or Article I, section 9 of the Florida Constitution were, as a consequence of that compulsion, immune from prosecution. It mattered not whether the testimony was inculpatory, exculpatory, or inconsequential. It mattered not whether the testifier was deemed a target,[6] a subject,[7] or a mere witness. Every

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[5] *See Legal Immunity set for Swine Flu Vaccine Makers*, http://www.msnbc.msn.com/id/31971355/ns/health-cold_and_flu/t/legal-immunity-set-swine-flu-vaccine-makers/ (last visited Feb. 14, 2012).

[6] Regarding the meaning of this term, *see, e.g.*, U.S. Attorney's Manual, http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html (follow "title 9: Criminal" hyperlink; then follow

member of the class of persons compelled to testify in derogation of an assertion of his rights against self-incrimination was immune from prosecution by virtue of his status as a member of that class.

The Organized Crime Control Act of 1970, however, began the trend toward the elimination of immunity in the criminal law. *See generally* 2 Joseph A. Varon, Searches, Seizures, and Immunities 737 *et. seq.* (2d ed. 1974). The person compelled to testify despite his assertion of his rights against self-incrimination would no longer be immune. He could be charged and prosecuted, tried and convicted. At his trial, however, he would be entitled to the exclusion from evidence of his compelled testimony, and of any evidentiary artifact derived from his testimony. *See* § 914.04, Fla. Stat.[8] This exclusionary rule as to testimony is termed "use immunity," and the exclusionary rule as

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"9-11.000: Grand Jury" hyperlink; then follow "9-11.151: Advice of 'Rights' of Grand Jury Witnesses" hyperlink), which provides that:

> A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

[7] *Id.* ("A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation.")

[8] Section 914.04 provides:

> No person who has been duly served with a subpoena or subpoena duces tecum shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of the person may tend to convict him or her of a crime or to subject him or her to a penalty or forfeiture, but no testimony so given or evidence so

to evidence derived from such testimony is termed "derivative use immunity," *see, e.g., Novo v. Scott*, 438 So.2d 477 (Fla. 3d DCA 1983), although of course these are misnomers of Orwellian dimensions. The person from whom the testimony and its fruits were obtained is not in any sense immune from prosecution, or from anything else.

There is a vast difference between immunity from prosecution and exclusion of evidence at a criminal trial. The rule against hearsay, for example, compels the exclusion of evidence at trial. § 90.801, Fla. Stat. But it would be absurd to say, and we do not say, that the rule against hearsay is a rule of immunity, or that it vests a litigant with a form of immunity. True, section 914.04 works to exclude a defendant's own testimony while section 90.801 typically works to exclude the testimony of out-of-court declarants, but that is hardly a basis for distinguishing between rules of evidentiary exclusion and rules of immunity. Both section 914.04 and section 90.801 exclude evidence; but neither renders a defendant immune from arrest, prosecution, trial, conviction, or punishment. "Stand Your Ground" does exactly that.

Thus immunity, properly understood, had passed out of the criminal law of Florida until the very particular form of it embodied in the "Stand Your Ground" law was enacted. Fortunately, a vehicle for the assertion of immunity, a vestige of the old law, remained and remains on the books.[9]

> produced shall be received against the person upon any criminal investigation or proceeding. Such testimony or evidence, however, may be received against the person upon any criminal investigation or proceeding for perjury committed while giving such testimony or producing such evidence or for any perjury subsequently committed.

[9] A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds

Florida Rule of Criminal Procedure 3.190(c)(3) provides that a defendant in a criminal case may at any time make, and the "court may at any time entertain[,] a motion to dismiss" on the grounds that the "defendant is charged with an offense for which the defendant previously has been granted immunity." The defendant who makes a "Stand Your Ground" claim asserts that, as a matter of statute law, he "previously" – *i.e.*, by previous legislative enactment – "has been granted immunity."[10]

> set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

Oliver Wendell Holmes, The Common Law 5 (Dover ed. 1991) (1881). About three decades passed between the filing of the last motion to dismiss based upon a claim of traditional immunity, *see, e.g., State v. Toogood*, 349 So.2d 1203 (Fla. 2d DCA 1977) and the filing of the first motion to dismiss based upon a claim of "Stand Your Ground" immunity, *see, e.g., Govoni v. State*, 17 So.3d 809 (Fla. 4th DCA 2009). During those intervening decades there was no reason in law that subsection (c)(3) of Rule 3.190 should have continue to exist on the statute-books; there was, after all, no form of immunity that could have been asserted under its rubric. But like the clavicle in the cat, the rule remained in place, a vestige of an earlier form. With the advent of "Stand Your Ground," lawyers put new wine in an old bottle and began – quite properly – to bring immunity claims pursuant to the new statutory scheme via the old rule.

[10] *Dictum* in the opinion of the Florida Supreme Court in *Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010) suggests that, "Florida Rule of Criminal Procedure 3.190(b) . . . provides the appropriate procedural vehicle for the consideration of a claim of [Stand Your Ground] immunity." If that is so, the defendant's present motion must be denied as waived. Fla. R. Crim. P. 3.190(c) provides that, "Unless the court grants further time, the defendant shall move to dismiss . . . either before or at arraignment" and that "every ground for a motion to dismiss that is not presented by a motion to dismiss [at arraignment, or within such time as is granted by the court at arraignment] shall be considered waived." Defendant's present motion was filed nearly a year and a half after arraignment; and although perhaps it could have been filed sooner, it is frankly inconceivable that a "Stand Your Ground" motion has ever been or will ever be filed at arraignment, or within the 15-day period customarily granted at arraignment for the filing of motions directed to the sufficiency of the charging document. If, however, as I conclude, Defendant's present motion (and indeed any motion asserting a "Stand Your Ground" claim) is brought pursuant to Fla. R. Crim. P. 3.190(c)(3), it may

Here we confront a novel feature of the "Stand Your Ground" law. The statute – the substantive law – provides that immunity attaches at, or even immediately prior to, the very moment of arrest. § 776.032, Fla. Stat. The defendant whose conduct is protected by "Stand Your Ground" should never be arrested at all, and of course none of the customary post-arrest steps in the criminal justice process should be visited upon him. The rule – the procedural law – provides that a claim of immunity can be asserted "at any time," Fla. R. Crim. P. 3.190(c)(3); and of course customarily it will be asserted (as in this case it was) long after the point of arrest, probably after pretrial discovery is complete or nearly so. Unlike traditional forms of immunity, "Stand Your Ground" turns not upon the status of the putative claimant of the immunity, but upon the factual merit of his claim of immunity. A congressman or foreign diplomat can produce his credentials at the moment when arrest is threatened and attempt to assert his immunity. A "Stand Your Ground" claimant must – as a practical matter, although not in contemplation of law – endure arrest, pretrial procedure, discovery; and only then file and litigate his motion to dismiss. The best that can be said in an attempt to reconcile the substantive with the procedural law is that if it is determined at a "Stand Your Ground" hearing that a defendant is immune by operation of the statute, his immunity relates back, *nunc pro tunc,* to the moment before his arrest.

The Case at Bar

All witnesses appear to agree -- if they agree on nothing else -- that the confrontation between Kendall Berry and Quentin Wyche that ended with Berry's death took place in a crowded area of the Florida International University campus. Berry was in the company of many of his friends; Wyche in the company of some of his own friends; and there were any number of onlookers and bystanders.

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be brought and adjudicated at any time.

To add to the distraction created by the milling crowd and the hubbub of noise, fights broke out between some of Berry's partisans and some of Wyche's. In short order, chaos reigned. What Clausewitz called "the fog of war" rendered eyewitness testimony vague, incomplete, and contradictory.

In a statement to the police, Antwoine Bell claimed that just as Berry and Wyche "put up their set, like they ready to fight,"[11] someone other than Berry hit Wyche. It was in response to this attack from an unidentified assailant that Wyche "took off running." (*Bell* at 5.) Bell saw (or at least told the police that he saw) Berry run after Wyche (*Bell* at 6), but by the time he caught up to the two men, Berry was already lying on the ground bleeding. If Berry struck, or sought to strike, Wyche – thus justifying Wyche in the use of at least some force – Bell did not see it. If Berry employed, or sought to employ, great force against Wyche – thus justifying Wyche in the use of force likely to cause death or serious bodily injury – Bell did not see it.

Marquis Rolle saw things differently. As he remembered it, both Berry and Wyche "squared up" to fight, at which point Wyche immediately "took off running."[12] At that point, "the big brawl started" between Berry's faction and Wyche's. (*Rolle* at 3.) Like Bell, Rolle saw the beginning of the confrontation, and the tragic effects of its conclusion. But he was distracted at the crucial point when Berry either did, or did not, present Wyche with the prospect of force likely to cause death or serious bodily injury; distracted because "everything happened so fast" (*Rolle* at 5); distracted because "everybody just jumped in." (*Rolle* at 5.) Whether Berry sought to employ deadly force; or a lesser

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[11] (Sworn Statement of Antwoine Bell (Mar. 26, 2010) (on file with attorneys) at 5) [hereinafter *Bell*].

[12] (Sworn Statement of Marquis Rolle (Mar. 26, 2010) (on file with attorneys) at 3) [hereinafter *Rolle*].

degree of force; or no force at all; at that critical juncture in the chronology of events is more than Rolle can say.

Jason Frierson remembers that Wyche and Berry "were like head-to-head, they was about to have a one-on-one-fight."[13] Then, according to Frierson's recollection, Wyche "took off running" and Berry ran after him. (*Frierson* at. 5.) Asked if there were other fights that broke out at that time, Frierson frankly confessed that he "[c]ouldn't see." (*Frierson* at 5.) The next time Frierson did have an unobstructed view of events, Berry was already "like laying out on the floor." (*Frierson* at 5.) When the interrogating detective asked, "Did you ever see 'Q'" – meaning Quentin Wyche – "and Kendall [Berry] fighting?" Frierson answered with a simple, "No." (*Frierson* at 5.)

The way James Jones recalled things, Berry was never the aggressor at all; both Berry and Wyche "were ready to fight."[14]

> Q: Was it mutual on both parts?
>
> A: Yes.
>
> Q: What happened at that point?
>
> A: They fought.
>
> Q: Okay. When they first started to fight, did Quentin stand his ground and fight or did he initially take off running?
>
> A: I think he took off running.
>
> Q: What did [Berry] do at that time?

[13] (Sworn Statement of Jason Frierson (Mar. 26, 2010) (on file with attorneys) at 4) [hereinafter *Frierson*].

A: Chased him.

(*Jones* at 9). Jones went on to testify that Berry caught up to Wyche and "[t]hey were about to" fight (*Jones* at 11) when friends of the two principals arrived and began brawling. (*Jones* at 11-12.) Jones himself was occupied fighting Anthony Cooper. (*Jones* at 12.) When next Jones looked over at Berry and Wyche, Berry "was laying on the ground bleeding." (*Jones* at 13.) What happened in the interim – and more specifically, whether or not Berry menaced Wyche with the prospect of force likely to cause death or serious bodily injury – is something about which Jones has nothing to say.

In Alex Legion's version of affairs, Quentin Wyche was "laughing" or "laughing and smiling" when he first ran from Kendall Berry[15] – hardly the portrait of a man who reasonably believes himself to be facing life-threatening force. Although Berry caught up to Wyche, and it appeared that they were fighting or about to fight, "[b]y then, it was too late because there was too many people so I didn't see" what happened. (*Legion* at 8.) And in any event, "[i]t was too dark to tell." (*Legion* at 9.)

As Colt Anderson remembers things, it was Quentin Wyche who "walk[ed] up to Kendall" Berry, rather than the other way around.

Q: What happened when he walked up to Kendall?

A: First he walked up, and they started sizing each other up.

Q: They were squaring off?

A: Yes, sir.

Q: And then what happened?

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[14] (Sworn Statement of James Jones (Mar. 26, 2010) (on file with attorneys) at 9) [hereinafter *Jones*].
[15] (Sworn Statement of Alex Legion (Apr. 5, 2010) (on file with attorneys) at 7) [hereinafter *Legion*].

> A: Then Quentin turned and ran . . . and then Kendall chased him. They turned back around and started to square off and actually started throwing punches . . . .[16]

But at that point Anderson's attention was diverted to the fight in which Cooper was involved. (*Anderson* at 5.) "[W]hen I looked back, I saw Kendall on the ground." (*Anderson* at 5.)

Thus, depending on who tells the tale, Berry was the initial aggressor, or Wyche was the initial aggressor, or both men were equally aggressive. Depending on who tells the tale, no punches were actually thrown, or punches were thrown but perhaps by neither Berry nor Wyche. Depending on who tells the tale, Wyche ran from Berry in fear, or Wyche ran from Berry "laughing and smiling." Crucially, no one can testify to the events immediately preceding Berry's being stabbed.[17] On the defense's theory of the case, Wyche attempted to flee the altercation before it went from merely verbal to physical; was pursued by Berry and others; and, finding himself in that last extremity from which flight would be neither possible nor availing, armed himself and did what he had to do to save his own life.[18] On the prosecution's theory of the case, Wyche fled the field of

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[16] (Sworn Statement of Colt Anderson (Mar. 26, 2010) (on file with attorneys) at 5) [hereinafter *Anderson*].

[17] In addition to those who gave statements to the police, two witnesses testified in open court at the hearing on Defendant's "Stand Your Ground" motion. But the testimony of these individuals was as incomplete as that of the other bystanders, particularly as to what took place in the seconds and moments just before Mr. Berry was stabbed.

[18] If the facts are as the defense claims they are, Mr. Wyche need not rely on "Stand Your Ground;" the common law would justify him. The common law justified a defendant who discharged his duty to retreat, but was pursued by his nemesis, in using force – even force calculated to cause death or serious bodily injury – to defend himself. As applied to the facts of the case at bar, the only difference between the law as it existed prior to "Stand Your Ground" and the law as it presently exists is that a defendant can now seek a pretrial judicial determination as to the validity of his act of putative self-defense (which determination, if in his favor, brings the case against him to a permanent end) rather than having to await the decision of a jury of his peers.

combat; procured the most readily-available deadly weapon; then either returned or lay in wait, and stabbed Berry in the heart.[19]

Angry confrontations between impulsive young men – confrontations full of sound and fury, but often signifying nothing – have been part of human experience since the dawn of human experience. Standing over (and at one point inside) the open grave in which Ophelia is to be buried, Hamlet and Laertes snap and snarl at one another, threatening violence and retribution of every kind. William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, act V sc. 1. In some stagings of the play they wrestle briefly; in others they push and shove one another. But despite all the bluster, neither employs any real force or violence.[20] And had Florida's "Stand Your Ground" law been in effect, neither would have been justified in doing so.

Section 776.012, Fla. Stat., begins by stating the general rule: "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." (e.s.) The statute then provides the "Stand Your Ground" exception: "[A] person is justified in the use of deadly force . . . if . . . [h]e . . . reasonably

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[19] If the facts are as the prosecution claims they are, Mr. Wyche cannot rely on "Stand Your Ground;" the statutory law would not immunize him. The statutory scheme entitles a defendant to stand his ground. It does not entitle him to abandon his ground, then arm himself, then hunt down his nemesis and kill him, and afterward assert a claim of immunity.

[20] It appears that Laertes grabbed Hamlet by the neck. He must not have done so with force likely to cause death or serious bodily injury, however, because Hamlet is still perfectly capable of declaiming at the top of his lungs:

> I pr'ythee, take thy fingers from my throat;
> For though I am not splenitive and rash,
> Yet have I something in me dangerous,
> Which let thy wiseness fear: away thy hand.

Id. Hamlet threatens to "fight with" Laertes/ "Until my eyelids will no longer wag." But he doesn't.

believes that such force is necessary to prevent imminent death or great bodily harm to himself." § 776.013(3), Fla. Stat., is to the same effect: "A person who is . . . attacked . . . has the right to stand his . . . ground and meet force with force, including deadly force, if he . . . reasonably believes it is necessary to do so to prevent death or great bodily harm to himself." These statutes, in conspicuous derogation of the common law, are to be strictly construed; and clearly, they do not purport to justify the use of deadly force in response to threats or shows of force of any and every kind. In ordinary circumstances a push or a slap may be met with a push or a slap, or perhaps with a punch -- but not with a bullet, whether under "Stand Your Ground" or any other provision of Florida law. An act of deadly force is the gravest act upon which the law can put its imprimatur. The defendant who claims the law's protection for his use of deadly force must show that his conduct comes within the narrow limits to which that protection extends. He must show, not that he was confronted with a latter-day version of Hamlet's and Laertes's threatening, posturing, and roughhousing, but that a reasonable person in his circumstances would have concluded that life itself hung in the balance. A defendant claiming immunity under "Stand Your Ground" bears the burden of proof. *See Dennis,* 51 So.3d at 459-60 (citing *Peterson v. State*, 983 So.2d 27, 29-30, (Fla. 1st DCA 2008) (citing *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987)) (explaining that the defendant must prove his entitlement to immunity by a preponderance of the evidence)).[21]

[21] If, at a pretrial hearing, a defendant meets his burden and establishes his claim of immunity by a preponderance of the evidence, any charge as to which the immunity applies would of course be dismissed. If, however, the court finds that the defendant has not met his burden, the court's ruling has no preclusive effect, whether pursuant to the "law of the case" doctrine, the issue-preclusion doctrine (*i.e.*, collateral estoppel), or any other doctrine. Such a defendant would still be free at trial to plead his claim of immunity to the jury. At trial the burden of proof is exclusively on the prosecution to establish the guilt of the defendant beyond and to the exclusion of a reasonable doubt. To earn an acquittal, the defendant need do no more than show reasonable doubt – a quantum of

The record before me is silent when it most needs to speak. There is general consensus regarding a confrontation between Wyche and Berry, general consensus that Wyche ran from that confrontation and that Berry followed. It is there that the narrative ceases. Did Berry, or Berry and his companions, hunt Wyche down and present him with no choice but to kill or be killed? Or did Wyche arm himself and then turn upon Berry at a time when Berry had broken off the chase, or was at worst offering a reprise of the chest-pounding in which the two young men had engaged at the outset of their conflict? The record does not tell me. I can draw no conclusion.

And because I can draw no conclusion, this motion must fail. The evidence is in equipoise. The defendant has not met his burden of proof.

Conclusion

As such questions have been for centuries, the question presented by the facts of this case -- the question whether a defendant acted in reasonable self-defense -- must be decided, not by a pretrial motion, but by a jury trial. Defendant's motion is respectfully DENIED.

SO ORDERED, in chambers in Miami, Miami-Dade County, Florida, this 16th day of February, 2012.

MILTON HIRSCH
CIRCUIT COURT JUDGE

Copies to: all counsel of record.

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evidence considerably less than a preponderance. And any attempt to bar a defendant from asserting a lawful defense based on the trial court's ruling that the defendant had not sufficiently established that defense at a pretrial hearing would no doubt run afoul of the defendant's constitutional entitlement to a fair jury trial, *see* U.S. Const. amend VI; Art. I § 16, Fla. Const.