IN THE SUPPREME COURT OF FLORIDA

CASE NO. SC-17-1978

STATE OF FLORIDA

Petitioner,

vs.

PETER PERAZA,

Respondent.

On discretionary review of a certified question of great public importance and conflict jurisdiction of a decision of the Fourth District Court of Appeal

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BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE, LODGE #31 FILED IN SUPPORT OF RESPONDENT

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STATEMENT OF THE IDENTITY OF AMICUS CURIAE

The Fraternal Order of Police, Fort Lauderdale, Lodge #31 is a public employee organization and the state certified bargaining agent for all municipal Fort Lauderdale police officers, sergeants, and captains pursuant to Florida Statute Section 447.203. FOP Lodge #31 membership consist entirely of law enforcement officers and is exclusively responsible for bargaining for their terms and conditions of employment. Further, FOP Lodge #31 provides legal representation, advice, and defense to all its members when it relates to situations arise during the course and performance of their duties as law enforcement officers. FOP Lodge#31 also is responsible for representating its members in the employment grievance procedure. FOP Lodge #31 collectively represents over 500 sworn law enforcement officers all of whom have a keen interest in any rule of law clarified, interpreted, or promulgated by this Supreme Court in response to the certified question. This case does not just affect Broward Sheriff's Deputy Peter Peraza, it affects all law enforcement officers who must contemplate and train for real-life confrontations involving life and death or shoot- don't-shoot scenarios.

The case at bar directly concerns all law enforcement officers who are duty bound to confront dangerous suspects and balance the safety of the public and fellow officers with safe constitutional investigations and apprehension of those suspects. FOP #31 believes the Circuit Court and the Fourth District Court of

Appeal correctly decided this case.

SUMMARY OF THE ARGUMENT

The Fraternal Order of Police, Lodge #31 supports Deputy Peraza and supports affirmance of the Fourth District Court of Appeal's opinion below for two reasons. First, the plain language of the statute supports the Fourth District's sound reading of the "Stand Your Ground" statute; and, it does not distinguish between police officers and "persons."

The second reason this Supreme Court should affirm the certified question is the importance of having a uniform and clear rule of procedure throughout the State and recognize in the context of the "Stand Your Ground" statute, law enforcement officers are indeed "persons," entitled to evidentiary review at the earliest stage of a criminal proceeding. The Second District Court's opinion in *State v. Caamano*, 105 So. 3d 18 (Fla. 2d DCA 2012), makes a distinction between formal arrest and less formal citizen encounters by law enforcement officers. This distinction is illusory and confusing. Whenever a law enforcement officer uses force, the officer is making a constitutional seizure of that person. The seizure must be justified. Distinguishing between the process of "arresting" versus "investigating" a suspect, as the Second District does, distorts the meaning of the term "seizure" and "arrest," under the Fourth Amendment and in Stand Your Ground contexts. This distortion hurts constitutional policing and prosecuting,

while maintaining civil rights.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTORY SCHEME SUPPORTS PRETRIAL HEARINGS FOR LAW ENFORCEMENT OFFICERS ASSERTING THE STAND YOUR GROUND IMMUNITY.

Law enforcement officers are persons too. When analyzing a statutory scheme the plain meaning of the statute should be read rather than diving into the implicit legislative interpretation and other rules of statutory constructions. Interpreting the plain meaning of the statute is always the starting point in statutory interpretation. *E.g.*, *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007) (citing *Holly v. Auld,* 450 So. 2d 217, 219 (Fla.1984)).

In 2013, section 776.012(1) provided:

> [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[.]

In 2013 Section 776.032(1) provided, in pertinent part:

> A person who uses force as permitted in s. 776.012 . . . is justified in using such force and is immune from criminal prosecution and civil action 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.

Both of the above sections of the statute refer to a "person" who would seek to assert the Stand Your Ground immunity. Nowhere in the statute is the term "person" defined. Thus, the plain and ordinary meaning of the word is used. *E.g.*, *Green v. State,* 604 So. 2d 471, 473 (Fla. 1992) (citation omitted). The plain and ordinary meaning of the word "person," includes the law enforcement officers who find themselves in the position of asserting the Stand Your Ground statute justifying their use of force.

Whether the officer can resolve that legal question in a pretrial evidentiary hearing in front of a judge or as an affirmative defense in front of a jury should be resolved by this case. The immunity provided by Stand Your Ground comes from the early intervention of a judicial determination of justifiable force for all persons asserting it. It does not change the standard (higher or lower) for law enforcement officers.

Section 776.05(1) provides, in pertinent part:

> A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force: (1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest[.]

§ 776.05(1), Fla. Stat. (2013).

The only difference between a citizen and a law enforcement officer is that a law enforcement officer is called to the danger and does not retreat and a citizen is not. Therefore, Stand Your Ground should be viewed as a procedural overlay to a defense that is provided to all persons, including law enforcement officers.

Even earlier versions of the Stand Your Ground section of the statute provided clear wording providing immunity and not just a defense at trial. "The wording selected by our Legislature makes clear that it intended to establish a true immunity and not an affirmative defense." *Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008) (emphasis added). *See also Cruz v. State*, 54 So. 3d 1067, 1069 (Fla. 4th DCA 2011). "Further, the law abrogates the common law duty to retreat where the defender is in a place where he or she is lawfully entitled to be." FLORIDA LEGISLATION – THE CONTROVERSY OVER FLORIDA'S NEW "STAND YOUR GROUND" LAW – Fla. Stat. § 776.013, 33 Fla. St. U. L. Rev. 351, 356 (2005). But law enforcement officers never had to abide by the common law duty to retreat. The Stand Your Ground law provided a new right to citizens to defend themselves and not retreat; and, it provided the procedure of asserting that right soon after an indictment or information is charged. There is no language that excludes or precludes a law enforcement officer from participating in the accompanying procedural avenue Stand Your Ground provides.

When analyzing a statute: "The text must be constued as a whole." Antonin Scalia & Bryan A. Garner, Reading Law, The Interpretation of Legal Texts 167 (2012). The State in this case, and the *Caamano* Court, jumped straight into analysis of statutory construction rather than follow the first rule of construction, a plain reading of the statutory scheme. *See State v. Caamano,* 105 So. 2d 18, 20 (Fla. 2d DCA 2012). A plain reading of the statututory scheme does not define "persons" as something excluding law enforcement officers. The distinction between Section 776.05(1) ("Law enforcement officers; use of force in making an arrest"), is that it excludes persons other than law enforcement officers. It provides a defense for law enforcement officers who have a distinct duty to engage a violent suspect. *See City of Miami v. Sanders,* 672 So. 2d 46, 47 (Fla. 3d DCA 1996). It offers protection when executing an arrest, which in this context is to apprehend a suspect for criminal conduct; something an ordinary citizen does not have a duty to do. *Id.* But the State has argued that because the Legislature specifically provided a defense for law enforcement officers in Section 776.051(1), then the Legislature must have meant to exclude law enforcement officers from the procedural avenue provided by the Stand Your Ground section of the statute. The State cuts the sections of the statute like a salami and argues "the specific statute controls over the general," rather than reading it as a whole. *See Caamano,* 105 So. 3d at 21.

Additionally, the title of Chapter 776 is "justifiable use of force." It does not exclude law enforcement officers; it includes law enforcement officers. Section 776.012 entitled: "Use or threatened use of force in defense of person" and Section 776.032 "Immunity from criminal prosecution and civil action for justifiable use or threatened use of force" do not exclude law enforcement officers from any procedural right provided by this portion of the statute. Section 776.05 provides protections for law enforcement officers who are making an arrest, but does not exclude the procedural right afforded above. Law enforcement officers are provided this right because they have a duty not to ignore crimes committed in their presence and affirmatively investigate reported crimes, unlike the citizens those officers are sworn to protect. It does not raise or lower what is deemed to be justifiable force by a law enforcement officer. The practical effect of what this Court must decide is whether law enforcement officers are allowed to endeavor to prove this defense at an evidentiary hearing prior to trial. Neither law enforcement nor other citizens are prohibited from presenting an affirmative defense of self-defense or defense of others at trial if a judge were to deny the immunity offered in a Stand Your Ground hearing pursuant to Section 776.032.

The defense provided under Section 776.05 (use of force in making an arrest) does not provide "qualified immunity." (I.B. at 7, 8, 9, 15, 16); *Caamano*, 105 So. 3d at 19. "Qualified immunity" is a term with a specific meaning in 42

U.S.C. Section 1983 civil rights cases. It does not apply in Stand Your Ground cases. *Bretherick v. State*, 170 So. 3d 766, 778 (Fla. 2015). The misuse of the term only leads to greater confusion because there is but one standard of proof for public officials and citizens in the use of force context. *See id. See also,* § 776.032(4), Fla. Stat. (2017) (amended statute) (clarifying burden of proof); *Rodriguez v. State*, 2018 WL 735244 *1 (Fla. 3d DCA Feb. 7, 2018).

"Consistent with this purpose, the qualified immunity of public officials involves '*immunity from suit* rather than a mere defense to liability.'" *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985)) (italics in original) (explaining qualified immunity in § 1983 context). To the extent the State means the pretrial evidentiary hearing provided by a trial court pursuant to Stand Your Ground (section 776.032), is an attempt to avoid the jeopardy of a trial, it is an immunity from trial. Assertion of self defense as an affirmative defense is not an immunity at all. Qualified immunity in the Section 1983 setting is a hybrid of a motion to dismiss and summary judgment in the civil arena. *Id.*; *Mitchell*, 472 U.S. at 526. But Section 776.05 does not preclude that evidentiary hearing or a full immunity; and certainly does not change the proof required to support the defense, just when an officer can present it.

An interpretation different than the plain meaning of the statute, would go against the presumption that law enforcement officers' actions are given the benefit of the doubt when using force in making an arrest. *Sanders*, 672 So. 2d. at 47 (citing *Jennings v. City of Winter Park*, 250 So. 2d 900 (Fla. 4th DCA 1971) (other citation omitted)). The statutory construction utilized by the State, the "specific statute controls," ignores the plain language and strains the meaning of the statute in order to deny law enforcement officers of the procedural right overlayed on the entire statute. The language of the Section 776.032(1), is expansive as it pertains to the immunity that is afforded to a "person." If the Legislature wanted to narrow the meaning of "person," it would have done it. Because law enforcement officers are persons and the statute does not specifically exclude officers, they get the opportunity to assert the defense at a "Stand Your Ground" evidentiary hearing like any other person.

Lastly, the legislative history demonstrates that the intent was to provide the procedural right to law enforcement officers because the justifiable use of force section of the statute for officers was enacted four decades prior to the more recent Stand Your Ground procedure provided under Section 776.032.

Sections 776.012 and 776.05 were enacted in 1974. Section 776.032 was enacted in 2005 and amended in 2014 and 2017. Since law enforcement officers may use appropriate force when making an arrest, section 776.032 provides a

procedural overlay on the Stand Your Ground statute for all persons who wish to assert the defense. At the same time, the Stand Your Ground statute allows all persons to stand their ground regardless of one's status as a law enforcement officer or citizen. *State v. Peraza*, 226 So. 3d 937, 942 (Fla. 4th DCA 2017), *review granted,* SC17-1978, 2018 WL 2073456 (Fla. Feb. 1, 2018).

In that respect, the statute expanded the right of persons who are not law enforcement officers to stand their ground and not retreat. In addition to that expanded right, the Legislature allowed all persons to utilize a pretrial evidentiary procedure to support the immunity from trial, granted by Stand Your Ground.

In short, Stand Your Ground does not confer a special substantive right to law enforcement officers above other persons; it provides a procedure where a trial judge, in the form of an evidentiary hearing, determines whether the immunity from prosecution applies to any person charged with certain qualifying crimes. *Dennis v. State*, 51 So. 3d 456 (Fla. 2010). It does not provide special treatment to law enforcement officers. Indeed, it is the State's argument that differentiates based upon a class of persons that law enforcement officers should be denied this procedural avenue afforded to others. The plain language of the statutory scheme does not proscribe such a strained reading.

II. A UNIFORM RULE IS IMPORTANT FOR A CLEAR AND FAIR APPLICATION OF THE STAND YOUR GROUND LAW RELATED TO ALL TYPES OF POLICE ENCOUNTERS.

A uniform rule regarding the procedural right for all persons, including law enforcement officers is important. This Court should resolve the distinction the *Caamano* Court makes versus *Peraza*, which is one based upon whether the officer is making an "arrest." *See Caamano*, 105 So. 3d at 22. That distinction between whether a law enforcement officer is making an arrest versus some other type of citizen encounter should not dictate the outcome of whether an officer gets the benefit of a pretrial hearing in a use of force case. First, whether an officer is making an "arrest" or about to, is not always clear and in large part depends on the context. Strangely, an officer (whether under an objective or subjective standard) would have to claim he was not making an arrest in order to obtain the benefit of the Section 776.032 evidentiary hearing. While there are circumstances where a suspect is objectively being arrested when an officer uses force; following *Caamano*, the rule of law would compel the officer to stand trial rather than a pretrial Stand Your Ground hearing. *See* § 776.032, Fla. Stat.

The State and the *Caamano* court contemplate an "arrest" as an intention to subject a person to the formal booking process, and the law enforcement officer would therefore not be granted the procedural benefit of a pretrial hearing. (I.B. at 3, 4, 7-10). But an encounter short of formal arrest, the Stand Your Ground

procedural benefit would apply. Parsing police activity as the standard of determining whether Stand Your Ground applies would lead to an inconsistent application of a statutory procedural right. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968). A seizure under the Fourth Amendment will only occur "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.*

> In *Popple v. State*, 626 So.2d 185 (Fla.1993), this Court identified three levels of police-citizen encounters. The first level, a "consensual encounter," involves minimal police contact and does not invoke constitutional safeguards. During a consensual encounter, an individual is free to leave at any time and may choose to ignore the officer's requests and go about his business. *Popple*, 626 So.2d at 186. The second level is an "investigatory stop," during which an officer "may reasonably detain a citizen temporarily if the officer has reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Id.* (citing § 901.151, Fla. Stat. (1991)). While mere suspicion is insufficient to support an investigatory stop, a stop will not violate a citizen's rights where it is based on "a well-founded, articulable suspicion of criminal activity." *Id.* (citing *Carter v. State*, 454 So.2d 739 (Fla. 2d DCA 1984)). The third level of police-citizen encounter is an arrest, which requires probable cause on the part of the officer that a crime has been, is being, or is about to be committed. *See id.* (citing *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); § 901.15, Fla. Stat. (1991)).

Caldwell v. State, 41 So. 3d 188, 195–96 (Fla. 2010) (emphasis added).

Even when a law enforcement officer points a firearm at a person, it may not be considered an arrest, even though it is a seizure for constitutional purposes. *Jackson v. Sauls*, 206 F.3d 1156, 1166 n.13 (11th Cir. 2000) ("Under this Circuit's law, Defendants' drawing their guns and ordering Plaintiffs to lie down did not convert this investigatory stop or seizure into an arrest."); *United States v. Roper*, 702 F.2d 984, 985 (11th Cir. 1983) ("we hold that a drawn gun by a police officer did not convert an otherwise investigative stop into an arrest"); *United States v. Ochoa*, 402 Fed.Appx. 478, 483 (11th Cir. 2010) ("the officers acted reasonably in drawing their guns during the initial approach, and their decision to do so did not convert the approach into an arrest"). Yet, it is established that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat therof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Since there is no distinction in the degree of physical coercion in some instances between a formal arrest and an investigatory stop, nor does it contemplate an abrupt confrontation requiring an immediate use of force where the officer had no intention to arrest or investigate the individual. Without question it seems arbitrary and disparate to require an officer to claim he was not attempting to make a formal arrest in order to get the benefit afforded all other persons of the Stand Your Ground hearing.

Thought about in another way, any lawful application of Section 776.032 would likely require that an arrest could be made. Meaning, the physical force used or threatened by a suspect against a law enforcement officer that would satisfy a trial judge would justify an arrest for that suspect's conduct upon the officer or another person. Anything less, would demonstrate that the officer used excessive force and would not be entitled to immunity from trial. A consensual encounter could turn into an arrest based upon the circumstances. But the Stand Your Ground hearing should not be contingent upon an officer's immediate intention to make an official arrest; for example, an officer that knows a person has a warrant when the officer approaches that person.

Police work is dangerous. As the *Terry* Court said: "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Terry*, 392 U.S. at 33. But when an officer is compelled to answer for her use of force, the Justifiable Use of Force statute allows that officer to explain her actions pretrial. The Legislature has given no reason by the language of its statute to distinguish the application of the procedural right afforded citizens versus a law enforcement officer. The law enforcement officer has an additional duty based upon their oath, training, and by statute not to retreat; and in exchange, when making an arrest, have the benefit of avoiding a trial, even if the force used was

during a formal arrest or in response to another's conduct in a less formal encounter. An evenly applied application of the procedural right to a pretrial evidentiary hearing eliminates an unfair distinction based upon status of person and the type of police action.

CONCLUSION

The Fraternal Order of Police (Fort Lauderdale), Lodge #31 requests this Court affirm the Fourth District Court of Appeal's opinion in *Peraza* and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I HEREBY CERTIFY that this document has been filed through the Statewide e-filing Portal, which will serve all counsel of record named below, by e-mail service, this _14th_ day of MAY, 2018.

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