Chapter 8: Justifications

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

Chapter Overview:

Sometimes a person can commit an otherwise criminal act but there are circumstances surrounding the act that cause it not to be considered a crime. These are affirmative defenses against criminal prosecution by which the defendant acquires the burden to produce supporting evidence and to persuade the court of his or her justification. These include such things as self-defense, defense of others or of the home, execution of public duties, and necessity. The defenses of consent and resisting an unlawful arrest are sometimes also utilized, but are generally not considered valid defenses.

The justification of self-defense is the claim that use of force was necessary to protect one's own safety. In order to justify the use of force in self-defense an individual must reasonably believe that force to be necessary to prevent his or her own death or serious injury. The force used in defense of self must also be proportional to the threat and must not be in excess of what is necessary. In some jurisdictions an individual is also required to make an attempt to retreat before resorting to the use of deadly force in self-defense. It is also a generally recognized rule that an aggressor who started a confrontation is not entitled to self-defense. Sometimes an aggressor may regain the right to self-defense by withdrawing from the struggle.

Justification may also be allowed on the grounds of the defense of others or defense of the home. In some jurisdictions, defense of others follows the same guidelines as self-defense in that the use of force is justified by the same conditions in either case. In other jurisdictions, however, defense of others is more limited and one can only be justified in using force to defend a certain set of individuals whom the defender is related to in a specific way. Justification based on defense of the home is meant to provide individuals with a sense of security within their homes. Some jurisdictions provide for broad discretion in the use of force, including deadly force, by occupants of a home that is being intruded upon. Others require occupants of a dwelling to be more limited in their use of force.

The use of varying degrees of force is also justified in the case of execution of public duties. This rule is applies to police officers who must use force in their line of duty. The justification for allowing police officers the discretion and use of force that they maintain is that a basic public interest is served in having police officers who are able to forcefully protect others. Due to the fear and danger of power abuses, however, even the ability of police officers to use force is limited dependent upon the nature of the situation.

The defense of necessity maintains the principle that an otherwise criminal act is justified if it is done in order to avoid a greater harm. This defense is evaluated on an individual case-by-case basis, allowing for a certain degree of flexibility on the part of the courts to determine when a use of force was necessary to protect against a significant danger.

Some defendants claim justification based on consent or the resist of an unlawful arrest. The idea of consent is that a victim agreed to have the crime acted upon them. Neither resisting unlawful arrest nor consent is generally considered to be valid justification for the use of force. In this chapter of the supplement you will find Florida statutes and case law relevant to these questions of justifying the use of force.

I. Self-Defense:

Section Introduction: The use of force, up to and including deadly force, can be justified if it was necessary in the defense of one's own safety. Specific definitions and requirements of self-defense can be found in the Florida statutes below, which are followed by a Florida case that involves the use of the self-defense justification.

Florida Statute, section 782.02 - Justifiable use of deadly force

The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be.

Florida Statute, section 776.012 - Use of force in defense of person

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to s. 776.013.

***Cleveland v. State*, 887 So.2d 362 (2004)**

Procedural History: Defendant was convicted in the Circuit Court, Volusia County, Julianne Piggotte, J., of aggravated battery. He appealed.

Issue(s): Did the trial court in error by providing jury instruction on forcible felony exception to self-defense when the defendant was only accused of one felony?

Holding: Reversed and remanded. The District Court of Appeal held that: (1) trial court erred by giving jury instruction on forcible felony exception to self-defense, and (2) error in giving instruction was fundamental error.

Opinion: PER CURIAM.

Paul H. Cleveland appeals his conviction for aggravated battery [§ 784.041, Fla. Stat. (2002)]. We reverse and remand for a new trial because the trial court committed fundamental error when it negated Cleveland's self-defense claim by instructing the jury that the use of force was not justified if he was committing or attempting to commit aggravated battery.

At trial, the trial court instructed the jury on Cleveland's self-defense claim. However, the trial court also gave an instruction on the forcible felony exception to self-defense. The forcible felony instruction was based on section 776.041(1), Florida Statutes (2002), which is applicable only in circumstances where the person claiming self-defense is engaged in another independent forcible felony at the time. [*Giles v. State*, 831 So.2d 1263 (Fla. 4th DCA 2002); see also *Zuniga v. State*, 869 So.2d 1239 (Fla. 2d DCA 2004); Barnes v. State, 868 So.2d 606 (Fla. 1st DCA 2004] More specifically, the forcible felony instruction is given in situations where the accused is charged with at least two criminal acts, the act for which the accused is claiming self-defense as well as a separate forcible felony. In the instant case, the trial court's instruction on the forcible felony exception to self-defense was erroneous because Cleveland was charged with only one forcible felony, the alleged aggravated battery. [*Giles*, 831 So.2d at 1265] Giving a section 776.041(1) instruction where the only charge against Cleveland was the alleged aggravated battery, an act he claimed was done in self-defense, would improperly negate the self-defense claim. [Id. at 1266]

Although Cleveland did not make an objection at trial to the section 776.041(1) instruction, the giving of the instruction to the jury constitutes fundamental error. [E.g., *Zuniga*, 869 So.2d at 1239; *Rich v. State*, 858 So.2d 1210 (Fla. 4th DCA 2003)]

ON MOTION FOR REHEARING

Opinion: PER CURIAM.

The State of Florida moves for rehearing after this court reversed Paul Henry Cleveland's judgment and sentence and remanded for a new trial, finding that the original trial was flawed by fundamental error when the court negated Cleveland's self-defense claim by instructing the jury on the forcible felony exception to self-defense. The State's motion for rehearing asserts for the first time that because a claim of self-defense acts as an affirmative defense, and not an element of the crime charged, the trial court's instruction was not fundamentally erroneous and Cleveland was required to enter an objection to preserve the issue for review. The motion also cites several cases that had not been cited earlier and directs our attention to its notice of similar issue and notice of supplemental

authority filed at the last possible moment before our earlier decision was released, and approximately three months after Cleveland filed his reply brief.

Florida Rule of Appellate Procedure 9.225 provides:

> Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument....

The State did not comply with rule 9.225 because its notice of supplemental authority contained new argument not previously addressed in its answer brief and this new argument relied on a supreme court case that had been decided four years prior to the State's filing of its answer brief. It appears to us that the State through its "supplemental authorities" is attempting to file an additional brief. [See, e.g., *Brown & Williamson Tobacco Corp. v. Young*, 690 So.2d 1377 (Fla. 1st DCA 1997) (recognizing that Florida Rule of Appellate Procedure 9.225 is intended to permit a litigant to bring to the court's attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because, through inadvertence, they were not discovered earlier; it is not intended to permit a litigant to submit what amounts to an additional brief, under the guise of "supplemental authorities")]

Similarly, Florida Rule of Appellate Procedure 9.330 regarding motions for rehearing, clarification or certification provides:

> A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding. ...

Motions for rehearing are strictly limited to calling an appellate court's attention - without argument - to something the appellate court has overlooked or misapprehended. "The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy." [*Goter v. Brown*, 682 So.2d 155 (Fla. 4th DCA 1996), rev. denied, 690 So.2d 1299 (Fla.1997)] No new ground or position may be assumed in a petition for rehearing. [*Corporate Group Service, Inc. v. Lymberis*, 146 So.2d 745 (Fla.1962); see also *Ayer v. Bush*, 775 So.2d 368 (Fla. 4th DCA 2000) (recognizing that it is a rather fundamental principal of appellate practice and procedure that matters not argued in the briefs may not be raised for the first time on a motion for rehearing); *Sarmiento v. State*, 371 So.2d 1047 (Fla. 3d DCA 1979) (same)] Here, the State impermissibly attempts to raise a new argument in its notice of supplemental authority and petition for rehearing. This court need not entertain new argument or consider additional authority cited in support thereof.

[See, e.g., *Cartee v. Fla. Dep't of Health & Rehabilitative Svcs.*, 354 So.2d 81 (Fla. 1st DCA 1977] In summary, we decline the State's belated invitation to consider the new argument and make no decision on its merits.

Critical Thinking Question(s): Admittedly, this case appears to be more concerned with procedure than with the issue of self-defense. Self-defense is clearly defined, but it is not so clear in application depending on the factual circumstances. In this case, if the defendant is charged with the felony is aggravated assault, why would the Court give an instruction that summarily eliminates the defendant's self-defense claim? Who's action's does the statute address when it references commission of a felony?

II. Defense of Others:

Section Introduction: Defending the safety of other people can also justify the use of force, similarly to the justification of self-defense. In this case, however, deadly force is not included in the justification. Read the Florida statute below to see precisely how the defense of others justifies use of force in the state. Following is a case in which a defendant claims to have been lawfully defending others through the use of force.

Florida Statute, section 776.031 - Use of force in defense of others
A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate the other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony. A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

***Goode* v. *State*, 856 So.2d 1101 (2003)**

Procedural History: Defendant was convicted in the Circuit Court, Duval County, Michael R. Weatherby, J., of aggravated battery. Defendant appealed. The District Court of Appeal held that defendant was entitled to jury instruction on defense of others.

Issue(s): Was the defendant entitled to a jury instruction on the defense of others?

Facts: The State charged appellant with attempted second-degree murder based upon appellant's involvement in a physical altercation in the apartment of Deidra Banks, the sister of Ernest Banks, a close friend of appellant's. Mark Williams, the victim, had kept Deidra Banks's car for two days without her permission, and on the night of the incident, Ernest Banks and appellant had planned to help Deidra Banks recover possession of her car. Upon arriving at Deidra Banks's apartment, Ernest Banks and appellant encountered

Williams, and a fight ensued. The parties gave conflicting testimony as to who instigated the fight but, by all accounts, the fight began almost immediately upon the men's entry into the apartment. The struggle lasted only a few minutes, at which time appellant and Ernest Banks left the apartment, leaving Williams with approximately seventeen stab wounds.

During appellant's trial, the primary evidence in the case establishing that appellant had knowledge of the victim's violent propensities and that appellant was acting in defense of those around him came in the form of appellant's written statement given to Robert Nelson, a homicide detective who interviewed appellant after his arrest. Nelson read appellant's written statement into evidence, stating as follows:

> The night in question, I was called by Ernest Banks to drive his sister's car to his sister's place. Before arriving his sister called him several times sounding frantic saying that Mark [Williams, the victim] says he is on his way back to her place and he will be there in thirty minutes. Recently learning that he has pulled a gun on her before I felt it might be trouble so I had a knife for protection. I didn't know if he would pull a gun on me for trying to retrieve the car. On arrival to Ernest sister's place we see Mark rush up to the apartment looking irate. We follow [sic] behind to make sure nothing happened to his sister. The apartment door was half way open before we enter [sic]. We could see Mark yelling at Ernest [sic] sister, his back toward us. Right at entering the threshold of the door Mark turned, rushed toward us. At that moment I felt my life was in danger. I then got my knife and stabbed in defense of my life. We all was [sic] in a scuffle together and we all fell on a glass table. The guy was bigger than me and he looked like he was on some sort of drugs because he was still punching me and Ernest and grabbing us. I didn't know how many times he was stabbed but I honestly was defending my life. After exhaustion of the scuffle me and Ernest left....

Additional testimony elicited from Ernest Banks on cross-examination, and from Deidra Banks on direct examination, conflicted with Williams' testimony as to the series of events culminating in the parties' altercation. Ernest Banks testified that Williams stood up and lunged at them when they entered the apartment, and Deidra Banks testified that when Williams entered her apartment, he began pacing across the floor, saying, "Let me explain." Williams' own testimony was that he entered the apartment and sat quietly on the couch, as Deidra Banks had instructed him, until she opened her front door and two men entered and began to charge him. Deidra Banks also testified that, after Williams arrived, she requested that the police be called because she was afraid that he was going to go into an "outrage," as he was apparently prone to do.

At the close of all the evidence, appellant renewed his earlier motion for judgment of acquittal and requested a jury instruction on defense of others. The trial court denied both the motion and the request. The trial court stated that it would have granted a request for an instruction on defense of others but for appellant's decision to defend upon the grounds that the State had not met its burden of proof. After the trial court instructed

the jury as to justifiable attempted homicide, excusable attempted homicide, attempted second-degree murder, and the lesser included crimes of aggravated battery and battery, the jury returned a verdict of guilty on the lesser included offense of aggravated battery. Appellant was subsequently sentenced to five years' imprisonment. This appeal followed.

Holding: Reversed and remanded.

Opinion: PER CURIAM.

Appellant, Joseph Goode, appeals his judgment and sentence for aggravated battery, contending that the trial court erred in denying his request for a jury instruction on the defense of others. Although not raised as a separate issue on appeal, within his argument that the trial court erred in failing to give the defense of others instruction, appellant also argues that it was fundamental error for the trial court to fail to instruct the jury on self-defense. However, he concedes that this issue was not raised at trial. Because this issue was not raised below, it is deemed waived. [See *Wuornos v. State*, 644 So.2d 1012, 1020 (Fla.1994)] The trial court's failure to give an instruction unnecessary to prove an element of the crime, such as the affirmative defense of self-defense, is not fundamental error. [See *Holiday v. State*, 753 So.2d 1264, 1268 (Fla.2000); cf. *Shells v. State*, 642 So.2d 1140, 1141 (Fla. 4th DCA 1994) (holding that to label the trial court's failure to give a jury instruction on self-defense as fundamental error, when the defense did not request such an instruction, "would place an unrealistic burden on the trial judge.")] Concluding that the trial court erred in failing to give the requested instruction, we reverse and remand for a new trial.

Although we review the trial court's ruling on whether to admit or exclude a jury instruction only for an abuse of discretion, that discretion is fairly narrow because appellant is entitled, upon request and by law, to have the jury instructed on his theory of defense if any evidence supports that theory, so long as the theory is valid under Florida law. [See *Palmore v. State*, 838 So.2d 1222, 1223 (Fla. 1st DCA 2003) (emphasis in original) (citing Mora v. State, 814 So.2d 322 (Fla.2002); *Bozeman v. State*, 714 So.2d 570, 572 (Fla. 1st DCA 1998)); *Langston v. State*, 789 So.2d 1024, 1026 (Fla. 1st DCA 2001) (citing Gardner v. State, 480 So.2d 91 (Fla.1985); *Rockerman v. State*, 773 So.2d 602, 603 (Fla. 1st DCA 2000)]

In determining whether to give a requested instruction, the trial court should consider the evidence presented without weighing the evidence, as the latter is a task for the jury. [*Rockerman*, 773 So.2d at 603; see also *Wright v. State*, 705 So.2d 102, 105 (Fla. 4th DCA 1998) (holding that "a defendant is 'entitled to a jury instruction on his theory of the case if there is any evidence to support it,' no matter how flimsy that evidence might be."); *Taylor v. State*, 410 So.2d 1358, 1359 (Fla. 1st DCA 1982) (holding that a defendant is entitled to his requested instruction no matter "how weak or improbable his testimony may have been with respect to the circumstances" leading to the commission of the offense)] The evidence supporting appellant's theory may be adduced from cross-examination of State witnesses or direct examination of the defense witnesses. [See

Wright, 705 So.2d at 104 (citing *Kilgore v. State*, 271 So.2d 148, 152 (Fla. 2d DCA 1972)]

A person is justified in the use of deadly force only if he or she reasonably believes such force is necessary to prevent the imminent commission of a forcible felony against a person who is a member of his or her immediate family or household or to protect himself, herself, or another from imminent death or great bodily harm. [§§ 776.012, .031, Fla. Stat. (2000)] Thus, an instruction on defense of others is cognizable under Florida law. [See *Palmore*, 838 So.2d at 1223; see also *Hancock v. State*, 276 So.2d 223, 225 (Fla. 1st DCA 1973) (noting that the appellant would be entitled to an instruction on the defense of others where there was conflicting evidence as to whether the appellant shot the victim in defense of his nephew or whether the appellant was engaged in the fight against the victim along with his nephew)] In addition, inconsistencies in criminal defense theories are permissible unless the proof of one theory necessarily disproves the other. [*Kiernan v. State*, 613 So.2d 1362, 1364 (Fla. 4th DCA 1993)]

In the instant case, the trial court denied appellant's requested instruction, reasoning that appellant's defense that the State had not met its burden of proof and his claim of defense of others were mutually exclusive. However, the defense that the State had not met its burden of proof did not exclude appellant's claim that he acted in the defense of others. [[See id.] Furthermore, based upon appellant's statements, the conflicting testimony of Ernest Banks and Williams as to who began the altercation, and Deidra Banks's testimony regarding her concern that Williams might become angry or violent, appellant presented, at the least, some evidence supporting his theory that he acted in the defense of others.

Thus, we agree with appellant that the denial of his requested instruction prevented him from presenting a valid defense. The trial court should have given the jury the opportunity to weigh this evidence, regardless of the court's own view of such evidence, in light of the applicable law on defense of others. Accordingly, because the trial court erred in failing to give appellant's requested jury instruction on the defense of others, we are constrained to reverse appellant's judgment and sentence and remand for a new trial. [See *Palmore*, 838 So.2d at 1224-25; see *Wright*, 705 So.2d at 105 (reversing and remanding for a new trial because the trial court erred in denying the appellant's requested self-defense instruction when the jury, if it had believed the appellant's version of the facts and had been properly instructed, could have concluded that the appellant's actions were defensive and reasonable, even when the appellant testified that she did not remember important facts central to the charges against her); *Johnson v. State*, 634 So.2d 1144, 1145 (Fla. 4th DCA 1994) (reversing and remanding for a new trial because the trial court failed to give the requested instruction of self-defense, when the appellant provided circumstantial evidence from which a jury could infer that the appellant believed his conduct was reasonably necessary for his own defense)]

Critical Thinking Question(s): How is “defense of others” similar to “self defense”? How do the two defenses differ? In 2005, Florida enacted the stand your ground statute

that expands the castle exception. How do you think this subtle change to the law will play out on the streets?

III. Defense of the Home:

Section Introduction: Another defense that may justify the use of force, including deadly force, is the defense of home. Under Florida statute, such as the one listed below, individuals are presumed to have broad discretion in protecting their rights within their own homes. This section also includes a Florida case involving the justification of use of force in one's home.

Florida Statutes, section 776.013 - Home protection; use of deadly force; presumption of fear of death or great bodily harm

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(2) The presumption set forth in subsection (1) does not apply if:

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

(b) The person or persons sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a law enforcement officer, as defined in s. 943.10(14), who enters or attempts to

enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(5) As used in this section, the term:

(a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

(b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

_E.A.B._ v. _State_, --- So.2d ----, 2006 WL 1933384 (Fla.App. 2 Dist.)

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Procedural History: Appeal from the Circuit Court for Hillsborough County; Richard A. Nielsen, Judge.

Issue(s): Did the appellant substantiate a legitimate self-defense, and if so, did the State sufficiently rebut the defense?

Facts: The record of the adjudicatory hearing shows that, on November 15, 2003, the following chronology of events occurred. Several teens, including E.A.B. and her brother, the alleged victim, had gathered and were talking outside the apartment residence

of the latter two. E.A.B. was fifteen; her brother, the victim, was sixteen and described as taller, heavier, and stronger than E.A.B. An argument began between the two and he pushed her. She turned and went into their residence to avoid him. He followed her inside where those outside could hear sounds of a commotion with yelling and crashing inside. A physical altercation between them occurred first in the living room, then in a hallway where he got her in a headlock. She broke free, leaving blood spots in both areas, and fled into the small kitchen where she could go no further. There, with her right hand, she grabbed a plastic handled steak knife with a five-inch blade for use, she said, only to protect herself should he follow to further injure her.

She said that she "feared for her life" or that he would inflict further injury on her such as, "bruises or broken bones." She stood there in the kitchen with her right elbow at her side and her forearm extended holding the knife with the blade pointed upward. Her efforts to avoid him by retreating to the kitchen, however, were to no avail. He said that he could see from outside the kitchen that she was standing there holding the knife. Despite that, he followed her into the kitchen and, as he moved toward her, she stood her ground without moving. As he moved forward he grabbed her right wrist with his left hand. His hand slipped from her wrist which caused her arm to move forward resulting in the knife cutting him once in his upper left chest. He backed into the living room. She immediately dropped the knife and, as she went to aid him, he punched her in her left eye injuring her.

Other than her brother, the alleged victim, the State's principal witness was the police officer who arrived at the home to investigate the incident. He found E.A.B. sitting on the front steps shortly after the trauma and violence had occurred. He said that she appeared "deadpan" and that when he asked her what happened, her version of the events was essentially as we have outlined them. He did not ask her whether she had been in fear of her life, whether the stabbing had been an accident, whether she had acted in self-defense or whether she was sorry her brother had been injured. Despite the lack of such questions by the officer, the officer testified, when asked by the prosecutor whether she had made such statements, that she did not offer any statements about those matters. The officer further said that he inspected the interior of the home and found it "pretty well disturbed" with blood in the living room, hallway and kitchen.

The second officer to arrive at the home had been to the hospital where he observed, but did not speak with, E.A.B.'s brother, the victim, who was treated and released. At the home this officer observed E.A.B. with an injury to her face. Photographs taken at some later date showing her swollen left eye were admitted in evidence. At the close of the adjudicatory hearing E.A.B. moved the court for a judgment of dismissal pursuant to Florida Rule of Juvenile Procedure 8.110(k). She argued that while she had presented a prima facie case of self-defense, the State had failed to rebut this hypothesis of innocence. In response the State argued, as it does here, that she failed to establish her defense, but that even if she did so, the testimony of the investigating officer was sufficient to rebut her theory of defense.

Holding: Reversed.

Opinion: DANAHY, PAUL W., Senior Judge.

We review the order of the trial court which found E.A.B. guilty of, and withheld adjudication for, the delinquent acts of improper exhibition of a dangerous weapon and culpable negligence with actual injury. We reverse the order because the State failed to rebut E.A.B.'s prima facie case of self-defense and, accordingly, failed to carry its burden to prove the delinquent offenses beyond a reasonable doubt.

E.A.B.'s motion tests the legal sufficiency of the State's case, including the evidence presented to establish her theory of defense, and the State's evidence presented to rebut that defense. Thus, as we do with a motion for judgment of acquittal in a criminal trial, we review the issue raised by its functional equivalent, a motion for dismissal in a juvenile proceeding, de novo. [*Pagan v. State*, 830 So.2d 792, 803 (Fla.2002); *I.M. v. State*, 917 So.2d 927, 929 (Fla. 4th DCA 2005).

We agree that E.A.B. presented a prima facie case of self-defense. Given the events that had just occurred, she was objectively afraid of further injury from her brother. Under our law, even if it were possible to flee from the home she occupied with her brother, she was under no duty to do so. Rather, under the "castle doctrine," she had a limited duty to retreat within their home to the extent she reasonably could without increasing her own danger of great bodily harm. Once she had gone into the kitchen, where she could go no further, she was entitled to stand and use the force she did to prevent further injury to herself, even if it were likely to, as it did, cause injury to her brother. [See *Weiand v. State*, 732 So.2d 1044 (Fla.1999)]

The State argues that the testimony of the investigating police officer was sufficient to rebut E.A.B.'s theory of self-defense, and that further, it carried its burden to prove the offenses charged. A study of the officer's testimony, however, reveals that he presented no competent evidence inconsistent with the testimony she presented to establish her prima facie case of self-defense. Rather, his testimony amounted to little more than responses to questions posed by the prosecutor to elicit answers E.A.B. never gave to questions the officer never asked her. We conclude that this testimony was inadequate, and legally insufficient to rebut E.A .B.'s case of self-defense. Accordingly, the State failed to meet its burden to disprove her defense beyond a reasonable doubt. [See *Sneed v. State*, 580 So.2d 169, 170 (Fla. 4th DCA 1991)]

While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt. [W]hen the State's evidence is legally insufficient to rebut the defendant's testimony establishing self-defense, the court must grant a motion for judgment of acquittal. The State failed in its burden to rebut E.A.B.'s prima facie case of self-defense. Because this is so, the State failed to prove beyond a reasonable doubt that E.A.B. committed the charged offenses. In sum, the trial court erred when it denied E.A.B.'s motion for judgment of dismissal. We reverse the order and remand with instructions to dismiss the State's petition for delinquency.

Critical Thinking Question(s): Do you believe the State presented enough evidence to rebut the self defense claim? Had this been a jury trial, do you think that the Court would reverse the verdict even though the triers of fact could choose to believe one version over the other and it must be look at in the light most favorable to their finding? Does the castle exception add anything to the current self-defense statute?

IV. Execution of Public Duties:

Section Introduction: Police officers have the right to use force as part of their official duties. The degree of force that is justified varies depending upon the situation. This is described in greater detail in the Florida statute below. The case at the end of the section illustrates the difficulty that is sometimes faced in determining what is an acceptable use of force by a police officer.

Florida Statute, section 776.05 - Law enforcement officers; use of force in making an arrest

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;

(2) When necessarily committed in retaking felons who have escaped; or

(3) When necessarily committed in arresting felons fleeing from justice. However, this subsection shall not constitute a defense in any civil action for damages brought for the wrongful use of deadly force unless the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and:

(a) The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or

(b) The officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person.

Florida Statute, section 776.07 - Use of force to prevent escape

(1) A law enforcement officer or other person who has an arrested person in his or her custody is justified in the use of any force which he or she reasonably believes to be necessary to prevent the escape of the arrested person from custody.

> (2) A correctional officer or other law enforcement officer is justified in the use of force, including deadly force, which he or she reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

***Tillman* v. *State*, --- So.2d ----, 2006 WL 1837903 (Fla.), 31 Fla. L. Weekly S479**

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Procedural History: Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions, Fifth District - Case No. 5D01-83 (Orange County).

Issue(s): Whether section 776.051(1), Florida Statutes (2005), which prohibits the use of force to resist an arrest notwithstanding the illegality of the officer's actions, extends to other types of police-citizen encounters.

Facts: The Fifth District has summarized the pertinent facts in this case. [On November 7, 1997,] Deputy Parks Duncan, Jr., was patrolling the Deerfield Subdivision when he observed 20 to 30 people standing in front of five to six houses.... Among the group of mostly Hispanic people were five black males standing in the street being loud and boisterous. Duncan approached them and asked them to return to the party. As they left, one of the black males uttered loud obscenities and threatened Officer Duncan. Due to this threat, Duncan called for back-up. After back-up arrived, Duncan and eight to ten other officers entered the screened pool enclosure at the rear of the house where the party was occurring. At that point, Duncan ... entered to "see if I could determine who made this threat to me." ...

Deputy Timothy Henriquez testified that he responded to [the] call for backup. Duncan advised him that he had been threatened by two individuals he recognized as possible bank robbers or robbery suspects. Henriquez and other backup officers followed Duncan to the pool enclosure where Henriquez saw the two gentlemen run into the pool enclosure. Duncan pointed out Tillman [sic] and Henriquez stopped Tillman inside the pool enclosure. Tillman was wearing a "very heavy jacket" which seemed odd to Henriquez because it was not cold. Henriquez asked Tillman if he could pat him down and Tillman refused, but Henriquez patted him down anyway. Henriquez was concerned about finding weapons on Tillman because he understood that Tillman had threatened Duncan and that Duncan recognized Tillman as having "been accused, or charged at one time or another with armed robbery with weapons." Henriquez did not find any weapons on Tillman.

Henriquez asked Tillman to sit down but Tillman refused ... and started to walk away. Henriquez grabbed Tillman's right shoulder, at which point Tillman suddenly spun around and put Henriquez in a headlock. Henriquez attempted to remove himself from Tillman's headlock by dropping to the ground. Just then, other deputies jumped on top of Tillman and Henriquez. Tillman did not release his hold on Henriquez until he was pepper sprayed. [Tillman, 807 So.2d at 107-08]

Holding: Section 776.051(1) applies only in an arrest scenario and requires that the State establish the element of lawful execution of a legal duty.

Opinion: PARIENTE, J.

The decision under review, *Tillman v. State*, [807 So.2d 106 (Fla. 5th DCA 2002)], expressly and directly conflicts with *Taylor v. State*, [740 So.2d 89 (Fla. 1st DCA 1999)], on the issue of whether section 776.051(1), Florida Statutes (2005), which prohibits the use of force to resist an arrest notwithstanding the illegality of the officer's actions, extends to other types of police-citizen encounters. We have jurisdiction. [See art. V, § 3(b)(3), Fla. Const.] We conclude that the statute, by its plain terms, applies only to arrest situations. In non-arrest cases, in order to convict a defendant under sections 784.07 and 843.01, Florida Statutes (2005), which define the crimes of battery on a law enforcement officer and resisting an officer with violence, the State must prove that the officer was "engaged in the lawful performance of his or her duties" or "in the lawful execution of any legal duty." In ruling on the sufficiency of the evidence to reach the jury on this element, which is not defined in either statute, trial courts should rely on the statutory and decisional law governing the particular duty in which the officer is engaged. In accord with these determinations, we approve the First District Court of Appeal's decision in *Taylor* and quash the Fifth District's decision in *Tillman*.

In reviewing Tillman's appeal of the trial court's denial of his motions for judgment of acquittal, the district court, as required, construed the facts in the light most favorable to the State. [Id. at 107] In his defense, Tillman had testified that he did not threaten the officer, hear anyone else do so, or give permission for the patdown. He also claimed that he was cooperating with the officers until Henriquez pushed him, causing Tillman to stumble, lose his balance, and fall to the ground on top of Henriquez. [Id. at 108]

The jury found Tillman guilty of aggravated battery on a law enforcement officer pursuant to section 784.07(2)(d) and resisting an officer with violence pursuant to section 843.01. Tillman argued on appeal that the trial court erred in denying his motion for judgment of acquittal on both counts because the State failed to present prima facie evidence that the officer was engaged in the lawful execution of his duty - a necessary element of both offenses. [*Tillman*, 807 So.2d at 108] The Fifth District affirmed Tillman's convictions and sentences. The district court acknowledged that the statutes governing the crimes charged require the State to prove that the officer was lawfully executing a legal duty at the time of the alleged battery or violent resistance. [Id.]

However, the district court cited a line of district court cases that have interpreted section 843.01 in pari materia with section 776.051(1) to hold that the use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful regardless of whether the arrest is technically illegal. [Id. (citing *State v. Barnard*, 405 So.2d 210 (Fla. 5th DCA 1981), and *Lowery v. State*, 356 So.2d 1325 (Fla. 4th DCA 1978)] The Fifth District explained that it had extended this rule to the crime of battery on a law enforcement officer defined by section 784.07 and had applied it to encounters that fall short of a full-blown arrest, including illegal stops, detentions, and contacts. [Id. at 109] Building on this line of precedent, the district court held that while the State must prove that the law enforcement officer was engaged in the lawful execution of a legal duty, the technical illegality of the officer's actions does not preclude a conviction of resisting with violence or battery on a law enforcement officer. [Id. at 110] The Fifth District expressly declined in this case to follow *Taylor*. [Id. at 109]

In *Taylor*, the First District held section 776.051(1) inapplicable in a prosecution for battery on a law enforcement officer and resisting with violence based on a defendant's violent reaction to an officer who entered the defendant's home in response to a noise complaint and attempted to lead him outside. [740 So.2d at 89-91] The First District reversed the convictions because the officer had acted unlawfully in entering the defendant's home without probable cause, permission, or exigent circumstances. [Id. at 90-91] The Fifth District in this case distinguished *Taylor* on the ground that the officer in *Tillman* entered the home of another person, not the home of the defendant. The Fifth District also concluded that the patdown and detention of Tillman were less intrusive than an arrest, "so Tillman was not justified in using force to resist." [*Tillman*, 807 So.2d at 109] We granted review to resolve the conflict between *Taylor* and *Tillman* on the scope of section 776.051(1).

The issues in this case require us to construe sections 776.051(1), 784.07, and 843.01, Florida Statutes (2005). Section 776 .051(1) provides:

> A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer.

Section 784.07 enhances the penalties for crimes against law enforcement officers and other enumerated classes of public servants by reclassifying the crimes of assault and battery committed against these persons. The reclassification from misdemeanor to felony or from a lower degree of felony to a higher degree increases the authorized sentences for the crimes. Section 784.07 provides in pertinent part:

> (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer, a firefighter, an emergency medical care provider, a traffic accident investigation officer ..., a traffic infraction enforcement officer ..., a parking enforcement specialist ..., or a security officer employed by the board of trustees of a community college, while the officer, firefighter, emergency medical care provider, intake officer, traffic accident investigation officer, traffic infraction enforcement officer, parking enforcement specialist,

> public transit employee or agent, or security officer is engaged in the lawful performance of his or her duties, the offense for which the person is charged shall be reclassified as follows:
>
> > ....
> > (d) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

Section 843.01 defines the crime of resisting an officer with violence as follows:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer ... is guilty of a felony of the third degree....

The crime has sometimes been described inaccurately as "resisting arrest with violence." [See, e.g., *State v. Espinosa*, 686 So.2d 1345 (Fla.1996)] However, neither the title of the statute, "Resisting an officer with violence to his or her person," nor its explicit terms limit it to arrest scenarios. [Cf. *N.H. v. State*, 890 So.2d 514, 516 (Fla. 3d DCA 2005) (noting that title of section 843.02, which defines crime of resisting without violence, is " 'resisting [an] officer,' not 'resisting arrest' ")] The facts of this case and *Taylor* demonstrate that section 843.01 encompasses resistance to actions by law enforcement officers other than arrests.

Because the issues we decide are exclusively matters of statutory construction, our review is de novo. [*Clines v. State*, 912 So.2d 550, 555 (Fla.2005)] In construing statutes, we first consider the plain meaning of the language used. [Id.; *State v. Ruiz*, 863 So.2d 1205, 1209 (Fla.2003)] When the language is unambiguous and conveys a clear and definite meaning, that meaning controls unless it leads to a result that is either unreasonable or clearly contrary to legislative intent. [*State v. Burris*, 875 So.2d 408, 410 (Fla.2004)]

Section 776.051(1) forecloses the defense of justifiable use of force by a defendant who resists an arrest by a law enforcement officer, regardless of the legality of the arrest. The plain meaning of the language used in this provision limits its application to arrest scenarios. This construction comports with another rule of construction governing laws that alter the common law. Enacted in 1974, section 776.051(1) abrogates the common-law right to resist an illegal arrest with force. [*State v. Saunders*, 339 So.2d 641, 642 n.2 (Fla.1976); *Morley v. State*, 362 So.2d 1013, 1014 (Fla. 1st DCA 1978); *Lowery v. State*, 356 So.2d 1325, 1325-26 (Fla. 4th DCA 1978)] Statutes in derogation of the common law should be strictly construed, and should not be interpreted to displace the common law further than is necessary. [See *Ady v. Am. Honda Fin. Corp.*, 675 So.2d 577, 581 (Fla.1996); *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla.1977); *Guerrier v. State*, 811 So.2d 852, 854 n.2 (Fla. 5th DCA 2002)] Thus, to effectuate its plain meaning and displace the common law no more than necessary, section 776.051(1) is implicated only when a defendant acts violently against an officer in resisting an arrest.

We reject the Fifth District's use of the interpretive maxim in pari materia to engraft the prohibition into sections 784.07(2) and 843.01 when an actual arrest is not involved. As the Fifth District recognized in reasoning that a patdown and detention are less intrusive than an arrest, policy reasons may support extending the prohibition in section 776.051(1) beyond police-citizen encounters involving an arrest. [*Tillman*, 807 So.2d at 109] However, "it is not this Court's function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute." [*State v. Rife*, 789 So.2d 288, 292 (Fla.2001); see also *State v. Jett*, 626 So.2d 691, 693 (Fla.1993) ("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.")] Further, given the heightened potential for violent resistance by one being placed under arrest, we cannot say that a literal interpretation of the statute "would produce an 'unreasonable or ridiculous conclusion.' " [*Perkins v. State*, 682 So.2d 1083, 1085 (Fla.1996) (quoting *Holly v. Auld*, 450 So.2d 217 (Fla.1984)]

In addition, contrary to the Fifth District's determination, section 776.051(1) requires an actual arrest and not merely probable cause for an arrest. [See *Tillman*, 807 So.2d at 110 (concluding that "once Tillman placed [the officer] in a headlock," the officer had probable cause to arrest him, rendering Tillman's subsequent actions sufficient to convict for battery on a law enforcement officer] Section 776.051(1) does not address the use of force to resist an officer when there are grounds for an arrest but no actual arrest is taking place. The notice provided by this provision does not inform persons that it applies once they could be arrested. [See generally *State v. Beasley*, 580 So.2d 139, 142 (Fla.1991) (recognizing that publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions)]

Accordingly, we agree with the First District in Taylor and hold that section 776.051(1) is limited by its plain terms to situations involving an actual arrest. The First District stated in dicta that "[t]he comparison between a detention and an arrest may be similar enough in this context," suggesting that it would extend the prohibition in section 776.051(1) to the use of force to resist illegal detentions. [Taylor, 740 So.2d at 91] This determination is for the Legislature.

Because the prohibition in section 776.051(1) applies only to the use of force to resist arrest, the provision has no application to prosecutions for crimes against law enforcement officers under other circumstances. The Legislature has not expressly precluded the defense of justifiable use of force against an officer in situations other than arrest. For this reason, and because the Legislature has placed the element of lawful execution of a legal duty in both sections 784.07(2) and 843.01, proof that the officer was acting lawfully is necessary in a prosecution for crimes committed under either statute that occur outside an arrest scenario.

In *Taylor*, the First District reviewed the sufficiency of the evidence on the lawful execution element by applying Fourth Amendment law governing warrantless entry by police into a home. [740 So.2d at 90] This approach is consistent with precedent

reviewing convictions of resisting arrest without violence under section 843.02, which has a "lawful execution" element identical to that in section 843.01. [See *N.H.*, 890 So.2d at 516 (determining the officers were in lawful execution of duties in making investigative stop based on "reasonable suspicion that criminal activity was afoot"); *Espiet v. State*, 797 So.2d 598, 602 (Fla. 5th DCA 2001) (concluding that officer was not engaged in the lawful execution of duties when he entered defendant's house to make misdemeanor arrest); *M.J.R. v. State*, 715 So.2d 1103, 1104 (Fla. 5th DCA 1998) (concluding that because no exigent circumstances existed and defendant could have been arrested only for misdemeanors, officers had no authority to demand entry into residence); *K.A.C. v. State*, 707 So.2d 1175, 1176-77 (Fla. 3d DCA 1998) (concluding that officers had "well-founded suspicion" to detain juvenile for truancy)]

Gauging the "lawful execution" element by the law governing the duty undertaken is also consistent with precedent holding that the element should not be defined in a manner that takes the issue from the jury. In *State v. Anderson*, [639 So.2d 609, 610-11 (Fla.1994)], this Court approved a jury instruction stating that "effecting a lawful arrest constitutes lawful execution of a legal duty." In other cases, district courts have reversed convictions because of erroneous jury instructions that referred to the specific defendant in a manner that removed from the jury the issue of the lawfulness of the officer's actions. [See, e.g., *Smith v. State*, 907 So.2d 582, 585 (Fla. 5th DCA 2005) (error to instruct jury that "detaining the defendant constitutes lawful execution of a legal duty"); *Royster v. State*, 643 So.2d 61, 65 (Fla. 1st DCA 1994) (error to instruct jury that "arresting and taking custody of the defendant does constitute the lawful execution of a legal duty or the execution of a legal process"); *Starks v. State*, 627 So.2d 1194, 1196 (Fla. 3d DCA 1993) (instruction that "the attempt to stop Mr. Starks constitutes a lawful execution of a legal duty" incorrect).

We decline to adopt less precise standards that would inevitably bring subjectivity and hence greater uncertainty into the process for determining when an officer is acting in the lawful performance of legal duties. This is consistent with the United States Supreme Court's refusal to adopt a subjective "reasonable officer" test in determining the constitutional validity of traffic stops. [See *Whren v. United States*, 517 U.S. 806, 808, 819 (1996) (adhering to probable cause test for traffic stops and rejecting test of whether a police officer, acting reasonably, would have made the stop for the reason given); see also *Holland v. State*, 696 So.2d 757, 759 (Fla.1997) (applying *Whren* under article I, section 12, Florida Constitution). We similarly decline to adopt a more amorphous, hence more subjective, "reasonable officer" test for determining whether an officer is acting in the lawful execution of legal duties as required to establish the crimes defined in sections 784.07(2) and 843.01. [Cf. *Whren*, 517 U.S. at 814 (characterizing "reasonable officer" test as an attempt "to reach subjective intent through ostensibly objective means")] Therefore, in construing the lawful execution element of sections 784.07(2) and 843.01, courts must apply the legal standards governing the duty undertaken by the law enforcement officer at the point that an assault, battery, or act of violent resistance occurs. These standards effectuate the Legislature's intent in making lawful execution of a legal duty an element of these crimes.

Tillman asserts that the officer was not lawfully executing a legal duty when he entered the pool enclosure, frisked Tillman for weapons, and prevented Tillman from leaving the officer's presence. Legal standards applicable to the element of lawful execution govern each of these actions. Absent consent, a search warrant, or an arrest warrant, a police officer may enter a private home only when there are exigent circumstances for the entry. [*Taylor*, 740 So.2d at 90 (citing *Payton v. New York*, 445 U.S. 573 (1980)] [See also *Brigham City v. Stuart*, 126 S.Ct. 1943, 1947 (2006) (discussing exigency exception)] The zone of protection under the Fourth Amendment extends to the curtilage of a home, which includes a fenced or enclosed area encompassing the dwelling. [See *State v. Rickard*, 420 So.2d 303, 306 (Fla.1982) (noting that courts will not allow a warrantless search or seizure in a constitutionally protected area such as one's back yard)]

In *Payton*, the United States Supreme Court stated that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." [445 U.S. at 590] This Court recently noted:

> The circumstances in which the Supreme Court has applied the exigent circumstances exception are "few in number and carefully delineated." They include pursuing a fleeing felon, preventing the destruction of evidence, searching incident to a lawful arrest, and fighting fires. Outside of those established categories, the Supreme Court "has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home." [*Riggs v. State*, 918 So.2d 274, 279 (Fla.2005) (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972), and *Illinois v. Rodriguez*, 497 U.S. 177, 192 (1990)]

Contrary to the Fifth District's determination, Tillman's status as a guest does not preclude application of the law governing warrantless entry into a home in determining whether the officer was lawfully executing a legal duty. The "lawful execution" element does not carry with it the standing requirements that have developed in Fourth Amendment precedent. Even if Tillman's status as a guest would deprive him of standing to seek suppression of evidence that might have been seized from the home, that status is irrelevant to the determination whether the State established that the officer was in the lawful execution of his duties when the struggle with Tillman occurred.

Assuming arguendo that the officer was in the lawful execution of a legal duty when he entered the pool enclosure, a court determining the lawfulness of the officer's actions would next determine whether there was reasonable suspicion to detain Tillman and frisk him for weapons. Section 901.151(2), Florida Statutes (2005), which governs detentions, provides:

> Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may

> temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.

This standard is consonant with the holding in *Terry v. Ohio*, [392 U.S. 1, 21 (1968)], which requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." For reasonable suspicion justifying a detention to exist, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." [*United States v.. Cortez*, 449 U.S. 411, 417-18 (1981)] An officer making an investigatory stop "must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch." ' " [*United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27)] *Terry* further provides that an officer may frisk a detained person for weapons if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. [392 U.S. at 27; see also *J.L. v. State*, 727 So.2d 204, 206 (Fla.1998) ("The circumstances may ... require a frisk of the person to determine whether the person is carrying a weapon, if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others."), aff'd, 529 U.S. 266 (2000)]

In this case, the officer twice exerted control over Tillman indicative of a Fourth Amendment seizure: first when the officer performed a weapons search against Tillman's wishes and again when the officer prevented Tillman from leaving his presence. The detention of Tillman constituted lawful execution of a legal duty only if the facts known to the officer created a reasonable suspicion either that Tillman was involved in criminal activity or that he was armed and dangerous.

The Fifth District, which concluded that "the technical illegality" of an officer's actions does not defeat a prosecution for battery on an officer and resisting with violence, did not apply the standards we adopt today when it assessed the sufficiency of the evidence to support Tillman's convictions. [See *Tillman*, 807 So.2d at 108-09] Our holding that section 776.051(1) applies only in an arrest scenario requires that the State establish the element of lawful execution of a legal duty under the facts of this case.

Without question, the statutory enhancement of the assault and battery offenses against law enforcement officers in section 784.07, and the "resisting" offenses contained in sections 843.01 and 843.02, Florida Statutes, reflect a strong public interest in the protection of law enforcement officers. However, in making "lawful performance" and "lawful execution" of duties an element of both sections 784.07 and 843.01, the Legislature has specified that this enhanced punishment applies only when officers operate within the limits of the law contained in constitutional and statutory provisions as well as pertinent precedent. In this case, those limits are found in Fourth Amendment precedent such as *Payton* and *Terry* as well as section 901.151(2), Florida Statutes. For the reasons explained herein, we approve the holding in *Taylor* that the prohibition on the use of force to resist an arrest in section 776.051(1) does not extend beyond arrest

scenarios. We quash the Fifth District's decision to the contrary in this case and remand for reconsideration of the denial of Tillman's motion for judgment of acquittal in accord with the standards set out in this opinion.

Critical Thinking Question(s): Do you believe a citizen should have the right to resist and unlawful arrest? How would you determine if the arrest was unlawful at the time of the incident? Does this case reinvigorate the common law right to resist? Has this case expanded the castle exception in any way? Do you think that the definition of execution of lawful duties should be expanded or narrowed?

V. Resisting an Unlawful Arrest:

Section Introduction: While the law does not allow for law enforcement officers to use force in making an unlawful arrest, it also does not allow for individuals to use force in resisting such an arrest. The statute regulating this issue in Florida can be found below, along with a Florida case regarding a defendant's use of force in resisting arrest.

Florida Statute, section 776.051 - Use of force in resisting or making an arrest; prohibition

> (1) A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer.
>
> (2) 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 is unlawful and known by him or her to be unlawful.

***Baucham* v. *Stat*, 881 So.2d 95 (2004)**

Procedural History: Defendant was convicted in the Circuit Court, Franklin County, Janet E. Ferris, J., of resisting an arresting officer with violence. Defendant appealed.

Issue(s): Should the police officers in a resisting arrest case be subject to cross-examination on what appear to be collateral matters but go to the issue of self-defense?

Facts: The defense theory was that Captain Steve James and Sergeant Gary Hunnings of the Apalachicola Police Department, the officers who arrested Mr. Baucham, used unlawful or excessive force against which he lawfully defended himself. [See *Johnson v. State*, 634 So.2d 1144, 1145 (Fla. 4th DCA 1994); *Holley*, 480 So.2d at 95-96; *Ivester*, 398 So.2d at 929-30] Mr. Baucham contended that they arrested him on trumped up charges (as to which the trial court did in fact grant the defense's motion for judgment of acquittal at the close of the State's case). His theory was that they used excessive force in effecting his arrest since they had it in for him, because he had on another occasion

complained about their job performance to the chief of police who had called them to task as a result.

The defense sought to establish, by cross-examining Captain James and Sergeant Hunnings, that (as the police chief had apparently already testified on deposition) Mr. Baucham had contacted the police chief, the officers' supervisor, and complained about their delay in the handling of a case. Mr. Baucham sought to prove that, because he had complained to the police chief, the police chief had instructed Captain James and Sergeant Hunnings to complete paperwork they had failed to submit. Mr. Baucham sought to show that this caused the officers to be "biased against him because he got them in trouble with ... their boss, giving them a motive to try and get even with Mr. Baucham."

Holding: Reversed and remanded. The District Court of Appeal, Benton, J., held that defendant was entitled to cross-examine arresting officers as to defendant's prior complaints to chief of police about officers' job performance.

Opinion: BENTON, J.

On direct appeal from his conviction for resisting an arresting officer with violence, in contravention of section 843.01, Florida Statutes (2002), Willie Fred Baucham contends that the trial court erred in precluding cross-examination of the arresting officers about antecedent events which, he maintains, biased them against him, motivated their use of excessive force during the arrest, and led to their giving false testimony against him at trial. Persuaded the trial court erred in failing to allow the defense to pursue this line of questioning, we reverse and remand for a new trial.

Mr. Baucham's defense at trial was that he was defending himself against unlawful or excessive force. While "[n]onviolent resistance to an unlawful arrest is no crime, [see *State v. Espinosa*, 686 So.2d 1345 (Fla.1996); *State v. Saunders*, 339 So.2d 641 (Fla.1976), *Sims v. State*, 743 So.2d 97, 100 (Fla. 1st DCA 1999)], section 843.01 condemns violent resistance even to an unlawful arrest. On the other hand, the law " 'permit[s] an individual to defend himself against unlawful or excessive force, even when being arrested.' " [*State v. Holley*, 480 So.2d 94, 95 (Fla.1985) (quoting *Ivester v. State*, 398 So.2d 926, 930 (Fla. 1st DCA 1981)]

The trial court ruled that no cross-examination about Mr. Baucham's complaints to the police chief would be permitted, declaring the matter collateral and irrelevant. [See *Griffin v. State*, 827 So.2d 1098, 1099 (Fla. 1st DCA 2002) ("An issue is collateral for purposes of impeachment by contradiction, if it cannot be introduced for any reason other than contradiction."); *Strasser v. Yalamanchi*, 783 So.2d 1087, 1095 (Fla. 4th DCA 2001) ("Evidence is collateral and therefore inadmissible when it neither (1) is relevant to prove an independent fact or issue nor (2) would discredit a witness by establishing bias, corruption, or lack of competency on the part of the witness.")]

But a witness may be impeached by testimony tending to prove bias, even if the testimony concerns facts not otherwise germane. [See § 90.608, Fla. Stat. (2002) ("Any party, including the party calling the witness, may attack the credibility of a witness by: ... (2) Showing that the witness is biased."); see also *Harmon v. State*, 394 So.2d 121, 125 (Fla. 1st DCA 1980) ("All witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or interest.")] The cross-examination proposed here went to the credibility of Captain James and Sergeant Hunnings, and should have been allowed. [See *Sanders v. State*, 707 So.2d 664, 667 (Fla.1998) ("[L]imiting cross-examination in a manner that precludes relevant and important facts bearing on the trustworthiness of testimony constitutes error, especially when the cross-examination is directed at a witness for the prosecution."); *Livingston v. State*, 678 So.2d 895, 897 (Fla. 4th DCA 1996) ("Because liberty is at risk in a criminal case, a defendant is afforded wide latitude to develop the motive behind a witness' testimony...."); *Lewis v. State*, 570 So.2d 412, 416 (Fla. 1st DCA 1990) ("It is, of course, fundamental that a criminal defendant has a constitutional right to full and fair cross-examination to show a witness's possible bias or motive to be untruthful."), quashed on other grounds, *Lewis v. State*, 591 So.2d 922 (Fla.1991)]

The proposed cross-examination also went to the putative motive for the alleged use of excessive force by Captain James and Sergeant Hunnings in the first place. For this reason, too, failing to permit the line of questioning proposed was error. [See *Lawson v. State*, 651 So.2d 713, 715 (Fla. 2d DCA 1995) ("If the evidence is relevant to independently prove a material fact or issue, or if it goes to discredit a witness by pointing out bias, corruption, or lack of competency, it will be allowed."); compare *Griffin*, 827 So.2d at 1099 (finding no abuse of discretion in excluding testimony, as collateral, where offered solely to contradict a witness's testimony on an immaterial fact, and not to establish bias, corruption, or lack of competency). "[A defendant] has a constitutional right to confront his accuser and develop his defense through reasonable cross-examination." [*Lewis v. State*, 591 So.2d at 925] Reversed and remanded.

Dissent: POLSTON, J.

The excluded testimony the lawyers proffered indicates that the paperwork in every Franklin County case takes a long time to be submitted, the paperwork was provided by the officers, and the officers were not reprimanded or disciplined in any way. The trial judge made a close relevance call, which I would affirm because there was no abuse of discretion. [See *Smith v. State*, 843 So.2d 1010, 1011 (Fla. 1st DCA 2003) (ruling that the trial court did not abuse its discretion by prohibiting cross-examination of two police officers regarding prior reprimands); *Forte v. State*, 662 So.2d 432, 433 (Fla. 3d DCA 1995) (ruling that the trial court did not abuse its discretion by limiting cross-examination of police officers who were witnesses as to a prior internal affairs investigation); *Sexton v. State*, 697 So.2d 833, 837 (Fla.1997) (stating that "[a] trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion")]

Critical Thinking Question(s): We saw an earlier case where the officers involved were not considered to be in the line of duty. Does this case expand the use of force on police officers during an arrest? How do you think the defendant will make out in the new trial? Should his claim at self defense be successful? What kind of message do these cases send to the public? To police?

VI. Necessity:

Section Introduction: There may be other cases in which the use of force is justified that are not covered by any of the statutes already listed in this chapter. In such an event, the law provides for the use of a broader statute on the justifiable use of force. The Florida statute governing such justification is listed here along with a case which utilizes this necessity defense.

Florida Statute, section 776.032 - Immunity from criminal prosecution and civil action for justifiable use of force

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

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

***Bozeman v. State*, 714 So.2d 570 (1998)**

Procedural History: Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of felony driving while license suspended, revoked, or cancelled. He appealed. The District Court of Appeals, Wolf, J., held that defendant was entitled to necessity defense.

Issue(s): Was the defendant entitled to a jury instruction on the defense of necessity?

Facts: Shortly after midnight on October 26, 1996, police officers initiated a routine traffic stop of a vehicle driven by appellant. After appellant identified himself, it was determined that his driver's license was at that time suspended and he was placed under arrest for DWLS. The vehicle's female passenger appeared intoxicated and several open containers of beer were visible in the interior of the car. The female passenger in the vehicle was appellant's ex-wife, Teresa Haskins. Appellant and Haskins are the parents of a teenage daughter who resides with Haskins. According to appellant, his ex-wife, on the afternoon before the arrest, came to his residence in her vehicle to obtain his assistance in locating their daughter who had apparently left home following a fight with Haskins. Appellant got in the passenger seat of Haskins' car and drove off with her. Although appellant concluded that Haskins had "been drinking a little bit," he did not believe when he got in Haskins' car that she was at that point intoxicated. Appellant decided, however, after the two stopped at a store and Haskins bought more beer, that he had to drive because Haskins had been driving unsafely (i.e. "running through stop signs, stuff like this") and was a danger to others on the road.

Appellant explained that he felt he could not have simply taken Haskins' keys because he feared he might get in trouble for having done so. He also explained that he had been very worried about his daughter's welfare at the time. Appellant further testified that it had been his intention at the time he assumed the wheel of Haskins' car to drive her home and then resume his search for his daughter. He did not specify in his testimony whether or not he would have resumed his search for his daughter using Haskins' vehicle. In response to cross-examination regarding possible alternative measures to having placed himself behind the wheel, appellant responded: "I don't know, you know. When you're trying to control somebody that's drunk you don't always get to think like you want to." Appellant also testified on cross-examination that he could not have gotten a taxicab that night because he had not had any money. Appellant conceded on cross-examination, however, that he could have called "somebody" to come get him rather than driving Haskins' vehicle and that he could also have taken Haskins' keys from her. Based upon this evidence, the defense requested an instruction on the defense of necessity which was denied by the trial court. The jury found appellant guilty as charged.

Holding: Reversed and remanded.

Opinion: WOLF, Judge.

Appellant raises a number of issues in this appeal from his conviction and sentence for the offense of felony driving while license suspended, revoked, or cancelled in violation of section 322.34, Florida Statutes (DWLS). We find that we need only address appellant's contention that the trial court abused its discretion in declining to give a requested instruction on the defense of necessity. As to that issue, we reverse and remand for a new trial.

A trial court's decision on the giving or withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review. [See *Pozo v. State*, 682 So.2d 1124, 1126 (Fla. 1st DCA 1996), rev. denied, 691 So.2d 1081 (Fla.1997); see also *Lewis*

v. State, 693 So.2d 1055, 1058 (Fla. 4th DCA), rev. denied, 700 So.2d 686 (Fla.1997)] Yet, as both parties have pointed out in their briefs, a defendant is entitled to have his jury instructed on the law applicable to his theory of defense if there is any evidence presented supporting such a theory, even if the only evidence supporting the defense theory comes from the defendant's own testimony. [See, e.g., *Hooper v. State*, 476 So.2d 1253, 1256 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986); *Carruthers v. State*, 636 So.2d 853, 856 (Fla. 1st DCA), rev. dismissed, 639 So.2d 981 (Fla.1994); *Williams v. State*, 588 So.2d 44, 45 (Fla. 1st DCA 1991)]

The essential elements of the defense of necessity are (1) that the defendant reasonably believed that his action was necessary to avoid an imminent threat of death or serious bodily injury to himself or others, (2) that the defendant did not intentionally or recklessly place himself in a situation in which it would be probable that he would be forced to choose the criminal conduct, (3) that there existed no other adequate means to avoid the threatened harm except the criminal conduct, (4) that the harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it, and (5) that the defendant ceased the criminal conduct as soon as the necessity or apparent necessity for it ended. [See *Hill v. State*, 688 So.2d 901, 905 n. 4 (Fla.1996), cert. denied, 522 U.S. 907, 118 S.Ct. 265, 139 L.Ed.2d 191 (1997); *Jenks v. State*, 582 So.2d 676, 679 (Fla. 1st DCA), rev. denied, 589 So.2d 292 (Fla.1991); *Marrero v. State*, 516 So.2d 1052, 1054-55 (Fla. 3d DCA 1987)]

The state contends in its brief that appellant failed to establish the second and third elements of the necessity defense as set forth above. Appellant's trial testimony appears, however, to include evidence supporting both elements. First, although appellant explained that he knew Haskins had "been drinking a little bit" before she arrived at his residence, he also explained that at the time he got in her vehicle he did not believe that she was intoxicated. This testimony appears to have been sufficient, given the facts of this case, to show that appellant did not intentionally or recklessly place himself in the position of having to later choose to drive when he agreed to go with Haskins in search of their daughter. Second, appellant's testimony indicates that he believed he had no viable alternatives to driving since he thought he could get in trouble if he took Haskins' keys away and since he had no money for a taxicab that night. While appellant conceded at one point during his cross-examination that he could have called "somebody" to come get him rather than drive Haskins' vehicle and that he could also have taken Haskins' keys from her, this testimony merely created an evidentiary dispute on the question of viable alternative measures which should have been resolved by the jury rather than the trial court. Thus, it appears that on the facts as presented at trial in this case, the trial court committed reversible error by not giving appellant's proposed instruction on the defense of necessity.

Critical Thinking Question(s): Do you think the defendant will be successful in his claim of necessity upon retrial of the case? Why or why not? Can you think of situations where the defense of necessity will apply and be successful? Is necessity an objective or subjective standard?

VII. Consent:

Section Introduction: While it may be the case that a victim consented to being harmed by a criminal action prior to the act being committed, this is typically not viewed as a valid justification. This issue is more closely examined by the Florida case provided here.

***State* v. *Raleigh*, 686 So.2d 621 (1996)**

Procedural History: In prosecution for lewd assaults on minors, which allegedly occurred when defendant was himself 16 or 17 years old, the Circuit Court, Brevard County, Jere E. Lober, J., held that defendant was entitled to raise consent defense. State petitioned for certiorari review. The District Court of Appeal, Griffin, J., held that defendant had no constitutional right to raise consent defense.

Issue(s): Should an offender that is a minor at the time of the charges of lewd and lascivious acts be permitted to raise a consent defense?

Facts: The State of Florida seeks certiorari to quash orders of the lower court which have allowed the defendant below, Michael Raleigh, to assert consent as a defense to charges of lewd assault in violation of section 800.04, Florida Statutes (1993).

Raleigh was sixteen or seventeen years old at the time of the charged offenses, both alleged victims were age fifteen. In case 95-15742-CF-A-F, defendant Michael Raleigh was charged with six counts of sexual battery in violation of section 794.011(5), Florida Statutes; six counts of lewd or lascivious assault on a child in violation of section 800.04(3), Florida Statutes (these counts are charged in the alternative); three counts of sexual battery; and one count of stalking, all involving J.O. He was sixteen at the time of these offenses. In case 95-103250-CF-A-F, defendant was charged with two counts of lewd and lascivious assault on a child, S.J., in violation of section 800.04(3), Florida Statutes. He was seventeen when these acts were alleged to have occurred. Raleigh moved to dismiss the charges, asserting that section 800.04, Florida Statutes (1993) is unconstitutional as applied to him because it precludes his raising as a defense the consent of the victims.

The lower court entered an order in each case finding that section 800.04, Florida Statutes, is facially constitutional; however, relying on the Supreme Court of Florida's reasoning and holding in *B.B. v. State*, [659 So.2d 256 (Fla.1995)], the lower court held the statute to be unconstitutional as applied to a sixteen-year-old defendant, presumably because he is a minor. The lower court granted Raleigh's motion to dismiss "to the extent that the statute prohibits the use of the victim's consent as a defense to the crime charged." The lower court held that evidence of the victim's consent would be admissible, and that the jury instructions would be modified accordingly.

Holding: Writ granted order authorizing the consent defense vacated.

Opinion: GRIFFIN, Judge.

In *Jones v. State*, [640 So.2d 1084 (Fla.1994)], the supreme court squarely held that section 800.04, Florida Statutes, is constitutional because the state's compelling interest in protecting children outweighed a minor's right to privacy. The court reasoned that the statute's disallowance of consent of the fourteen-year-old victims as a defense did not render the statute unconstitutional under the privacy provision of the state constitution. The court reiterated what it had said in *Schmitt v. State*, [590 So.2d 404 (Fla.1991), cert. denied, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992)]:

> [A]ny type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents ... [S]ociety has a compelling interest in intervening to stop such misconduct. [*Jones*, 640 So.2d at 1086]

The court wrote that "[t]he rights of privacy that have been granted to minors do not vitiate the legislature's efforts and authority to protect minors from conduct of others." [Id. at 1087]

Raleigh distinguishes *Jones* on the basis that the *Jones* defendants were adults, whereas the defendant in *B.B.* was a minor. The statute at issue in *B.B.* was section 794.05, Florida Statutes, which prohibits carnal intercourse with unmarried persons under age eighteen of previously chaste character. Although some of the "right to privacy" rationale for the *B.B.* decision and some of the language used in that opinion may have invited the challenged rulings of the lower court in this case, *Jones* is clear and its reasoning and holding both were reaffirmed in *B.B.* [659 So.2d at 258]. *B.B.* plainly is limited to its statutory target.

In *B.B.*, the court noted the state's compelling interest in "protecting children from sexual activity before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them ... and that this interest pertains to one minor engaging in carnal intercourse with another...." [659 So.2d at 259] The *B.B.* court held that section 794.05 did not further that compelling interest by the least intrusive means. The focus of the legislation at issue in this case is the protection of all minors in clear, neutral, logical terms. In *B.B.*, the problem was the way section 794.05 was drawn; the *B.B.* court concluded the weaknesses of the statute could not overcome the minor's rights. Whatever the well from which the high court found B.B.'s constitutional right to engage in consensual sex with another minor may have sprung, such a right is of limited force in the face of a compelling state interest. This was recognized in *B.B.* itself. [Id. at 259]

It should by now be clear through experience, as recognized in *Jones*, that there is no constitutionally protected right to the defense of consent when any person commits a lewd act on a minor. The difficulty of defining exactly what "consent" consists of when the "consenting" party is a child, what might be deemed the communication of "consent"

by a minor, how a minor would be expected (or required) to communicate lack of consent and determining the earliest age at which "consent" would be valid are just some of the obvious reasons why the legislature has determined this defense cannot apply in such cases. Moreover, the courts of Florida have not shown themselves adept in fairly defining "consent" in the context of sexual encounters with minors, nor is it clear that the definition of "consent" in section 794.011(1)(a), Florida Statutes, could be imported into chapter 800 by judicial fiat. The statutory provision removing the defense of consent from the crimes identified in section 800.04 is clearly constitutional where the perpetrator is eighteen years old and the victim is fourteen. It cannot be of any constitutional or logical significance to the child victim if the perpetrator is only seventeen - or sixteen ... or ten. To suggest that a minor has a constitutional right to have "consensual" sex with another minor until this right magically disappears on the minor's eighteenth birthday is to misread *B.B.*

Mr. Raleigh suggests that the true rationale for the *B.B.* decision was the high court's conclusion that when two minors are involved, it is impossible to determine who is the perpetrator and who is the victim. It has been the experience of this court that in the vast majority of such cases filed by prosecutors in this district, it is not difficult at all to tell. And where the facts support it, there is no reason why a female could not be prosecuted as readily as a male. We grant the writ in the consolidated appeals and vacate the order authorizing the consent defense.

Dissent: THOMPSON, Judge.

Because I believe that *B.B. v. State*, [659 So.2d 256 (Fla.1995)], controls, I would deny the petition for writ of certiorari. Further, I disagree with this court that "B.B. plainly is limited to its statutory target [section 794.05]." Since both *B.B.* and this case implicate a minor's right to privacy when the minor is prosecuted for sexual activity with another minor, the reasoning should apply to section 800.04, as well.

The salient issue in *B.B.*, who was 16 years old when charged, was whether a minor who engages in unlawful carnal intercourse with an unmarried minor of previously chaste character can be adjudicated delinquent of a felony in light of the minor's right to privacy guaranteed under the Florida Constitution. [Id. at 258] Justice Wells wrote that in *In re T. W.*, [551 So.2d 1186 (Fla.1989)], the Florida Supreme Court determined that minors, as natural persons, have the constitutional right to privacy. [Id.] He then found that a minor had a legitimate expectation of privacy in carnal intercourse. [Id. at 259] Accordingly, the court applied the test enunciated in *Winfield v. Division of Pari-Mutuel Wagering*, [477 So.2d 544 (Fla.1985)], to evaluate the lawfulness of government intercession into private lives.

The test requires the state to justify its intrusion by demonstrating that the challenged regulation serves a compelling state interest and accomplishes this goal by the least intrusive means. [Id. at 547] The court in *B.B.* found that the state had established a compelling interest in prohibiting sexual intercourse by minors and reiterated the court's ruling in *Jones v. State*, 640 So.2d 1084 (Fla.1994). However, the state failed to

demonstrate that its compelling interest would best be served by prosecuting one minor for sexual involvement with another minor. Justice Wells wrote that the state's interest in sexual activity between an adult and a minor differs from sexual activity between two minors:

> [T]he crux of the State's interest in an adult-minor situation is the prevention of exploitation of the minor by an adult. Whereas in this minor-minor situation, the crux of the State's interest is in protecting the minor from the sexual activity itself for reasons of health and quality of life.... [W]e conclude that the State has failed to demonstrate in this minor-minor situation that the adjudication of B.B. as a delinquent through the application of section 794.05 is the least intrusive means of furthering what we have determined to be the State's compelling interest. [659 So.2d. at 259]

This language creates tension if not conflict with the court's ruling in *Jones*. However, this reasoning cannot be limited to violations of section 794.05 because it was badly drafted or is archaic. Rather, the ruling should apply to any case in which a minor is accused of sexual activity with another minor.

This court reads *Jones* to mean that the state's compelling interest is to prevent minors from engaging in sexual activity with anyone until they are 18 years old and that prosecution is the least intrusive means to serve this interest. [c.f., *Jones* at 1086 (citing *Schmitt v. State*, 590 So.2d 404 (Fla.1991), cert. denied, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992)] By contrast, *B.B.* holds that in a minor-minor situation, prosecution is not the least intrusive means of furthering the state's compelling interest in protecting minors from sexual activity. If *B.B.* applies only to section 794.05, a minor escapes prosecution for having consensual sex with another minor, but is subject to prosecution under section 800.04 for the same activity. This result is neither logical or sensible. [See Chief Justice Grimes' dissent in *B.B.*, 659 So.2d at 261-62]

I would deny the petitions because B.B. is controlling and would certify this question to the Supreme Court:

> Whether Florida's privacy amendment, Article I, Section 23 of the Florida Constitution, renders section 800.04, Florida Statutes (1993), unconstitutional as it pertains to a minor's consensual sexual activity?

Critical Thinking Question(s):

- Do you side with the court’s Opinion or with the Dissent?
- Explain your reasoning.
- Do you believe it is fair to restrict minors from consenting to sexual relations with other minors?
- What kind of practical implications does this have for adolescents that are intimately involved?