

**IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN AND
FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO.: 05-2015-CF-039550-AXXX-XX

JOHN FRANKLIN DEROSSETT,

Defendant.

_____ /

MOTION TO GRANT IMMUNITY FROM PROSECUTION

COMES NOW the Defendant, JOHN FRANKLIN DEROSSETT, by and through his undersigned counsel pursuant to Rule 3.190(b), Florida Rules of Criminal Procedure and § 776.032 of the Florida Statutes and moves this Honorable Court to dismiss the Information and grant immunity from further prosecution in this cause and as grounds therefore states as follows:

Procedural History and Case Summary

Following his arrest on August 20, 2015, the defendant, John DeRossett, was charged in a three-count Information on September 15, 2015 with Attempted First Degree Premeditated Murder of a Law Enforcement Officer While Inflicting Great Bodily Harm and two counts of Attempted First Degree Premeditated Murder of a Law Enforcement Officer While Discharging a Firearm.¹

The following is a summary of the circumstances giving rise to the near tragic events resulting in the prosecution in this case. Those facts will be further developed in subsequent sections with references to the record.²

¹ Upon conviction, all three offenses require mandatory life sentences without early release. § 782.065, Fla. Stat.

² An appendix to this Motion has been prepared and filed. Citations throughout reference the original source as well as the appendix page number for convenience.

On August 20, 2015, the defendant was involved in an exchange of gunfire in the front yard of his house with individuals he believed were actively attempting to kidnap his niece, a resident of his home. After the exchange of gunfire, the defendant learned that the individuals he believed to be kidnappers or home invaders were actually deputy sheriffs conducting an undercover operation to arrest his niece for solicitation. During the incident, BCSO Special Investigations Unit (SIU) Agent John Casey Smith was shot in the lower abdomen and seriously injured. The defendant was shot in his back left shoulder and in his elbow; the defendant's niece sustained a grazing wound to her arm. The defendant asserts that although it was later revealed that the "kidnappers" were actually law enforcement officers conducting an undercover operation,³ he did not know they were law enforcement until after the incident was over and accordingly his use of deadly force was in lawful self-defense and that he is entitled to the immunity conferred by § 776.032, Florida Statutes.

August 20, 2015 Incident

On August 20, 2015, the Brevard County Sheriff's Office SIU was engaged in a prostitution sting at the Quality Inn in Titusville, Florida. The defendant's niece (Mary Ellis) was targeted in the sting because of the content of her webpage, prior contact with law enforcement, and recent text message discussions regarding sex with an undercover agent. When Ms. Ellis declined to travel to the location of the sting, BCSO SIU decided to go to her residence in an undercover operation and arrest her for solicitation to commit prostitution. Ms. Ellis stayed in a spare bedroom at the defendant's home.

At the time of the incident, defendant John DeRossett was a 65-year-old retired General Motors employee who moved from Michigan to Brevard County, Florida in 2012. He also worked

³ It is practically unheard of in law enforcement circles to conduct an undercover operation at a suspect's residence to make a warrantless arrest for a second-degree misdemeanor.

during the day as a part-time security guard at Port Canaveral during the time period relevant to this case. He has no prior criminal record and possessed a concealed weapons permit issued by the State of Florida. Mary Ellis (also known as “Mary DeRossett”) is John DeRossett’s niece (his brother’s daughter). Mary Ellis has lived for several years in Brevard County and for several months prior to the August 20, 2015 incident had been living on and off at the defendant's home. Ms. Ellis has a history of drug use, was suspected by law enforcement as working in the sex trade, and from time to time was homeless. At the urging of other family members, in 2014 Mr. DeRossett reluctantly agreed to allow Ms. Ellis to live with him to help her get on her feet and hopefully help clean up her life.

In the weeks leading up to the August 20, 2015 incident the BCSO had become aware of possible prostitution activity at Mr. DeRossett's house located at 1051 Covina Street, Cocoa and over the course of several months the SIU conducted surveillance at the residence.⁴ The complaints originated from BCSO Chief Michael Lewis who happened to live near the defendant's house and relayed his wife’s observations of suspicious daytime vehicle traffic at the house to the BCSO SIU.⁵ As a result of the information passed on from Chief Lewis, Mary Ellis became a target of the SIU. Agent Jason Roberts was a team member of the SIU and was involved in some of the surveillance activity and was part of the ill-fated undercover operation on August 20, 2015.

Mr. Panella: ...[A]t this point you said she [Mary] had become a target of yours?
Agent Roberts: Yes.

Roberts Dep. 55 – 56; App. 22-23.

One month before the August 20, 2015 shooting incident, on July 20, 2015, agents of the SIU conducted an undercover sting operation targeting Mary Ellis. They found her ad on

⁴ Steuerwald Dep. 20; App. 34.

⁵ Lewis Dep. 9-10; App. 35-36; *See also* Fernez Dep. 25; App. 40.

“Backpage.com,”⁶ contacted her posing as a “John,” had her meet an undercover agent in the parking lot of a CVS, and subsequently arrested her. Ms. Ellis did not resist arrest and she was taken into custody without incident.⁷

One month later, on August 20, 2015, the SIU was conducting an undercover prostitution sting operation at the Quality Inn in Titusville.⁸ During the operation, undercover agents posing as “Johns” contacted suspected female prostitutes who had posted ads on Backpage and arranged to meet them at the hotel for sex. Once the individual came to the hotel room, she would be arrested. The operation was conducted entirely at the Quality Inn.⁹

At some point during this operation at the Quality Inn, Agent Jason Roberts and Agent Peter Stead contacted Mary Ellis through her ad posted on Backpage.¹⁰ Through a series of texts that were exchanged between Agent Stead in his undercover capacity and Ms. Ellis, a sex act was agreed upon and it was determined that the activity would take place at Ms. Ellis’s residence.¹¹

SIU assembled a three-person team to travel from the hotel where the sting operation was underway to Mary Ellis’s residence to continue the undercover operation in order to make contact with Mary Ellis and make an arrest for solicitation. Agent Peter Stead¹² was the undercover “John”

⁶ This website and other affiliated websites have been seized by the Department of Justice since April 6, 2018. *See* <https://www.justice.gov/usao-cdca/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution>. (Last visited July 27, 2018).

⁷ *See* Brevard County Case Number: 2015-MM-035073.

⁸ Fernez Dep. 11; App. 39; *see also* Steuerwald Dep. 13-14; App. 30-31.

⁹ Steuerwald Dep. 15; App. 32; *see also* Roberts Dep. 31; App. 21.

¹⁰ Roberts Dep. 23-24; App. 18-19.

¹¹ *Id.* at 71; App. 24.

¹² It was determined that Agent Stead would be the undercover because this was his first prostitution detail (indeed, it was only his fourth day in the SIU), Mary would not have recognized him, and it was considered good training because Mary was “known” not to have any violent history and that she had been fully cooperative in the past. Roberts Dep. 24, 29, 85; App. 19, 20, 26; *see also* Steuerwald Dep. 16; App. 33.

and Agent Jason Roberts and Agent Casey Smith were the take down team. Agent Roberts and Agent Smith drove together in an unmarked pickup truck while Agent Stead drove his personal vehicle to the house. Agent Stead parked across the street from the house and the other agents parked completely out of sight so they would not be noticed by the occupants of the house.¹³ Agent Stead wore a black t-shirt, jeans, and sneakers, Agent Roberts and Agent Smith both wore black long sleeve shirts with the word Sheriff screen printed on each sleeve and a black tactical vest with the word Sheriff written on the front and back. Aside from the tactical vest and shirt, both men were wearing plain clothes. Both wore sports team baseball caps (at least one was worn backwards), Agent Smith wore khaki shorts, and Agent Roberts wore jeans.

The agents arrived at the residence around 9:30 P.M.¹⁴ Agent Stead got out of his car and walked along the driveway, up the walkway in the front yard to the front door of the residence.¹⁵ Agent Stead knocked on the front door, and Mary Ellis opened it and invited him inside. As Mary Ellis began to turn to move farther inside the house, Agent Stead reached into the house, grabbed her arm and pulled her out of the house.¹⁶

Mr. Panella: First of all, from where you are standing, you are right at the threshold of the front door, right?

Agent Stead: Yes, sir.

Mr. Panella: And she's still inside the house?

Agent Stead: She is right in her doorway.

¹³ Stead Dep. 63-64; App. 1-2; *see also* Roberts Dep. 79; App. 25.

¹⁴ Roberts Dep. 19; App. 17; *see also* CAD report; App. 56.

¹⁵ Stead Dep. 68, 71-72; App. 4-5.

¹⁶ The fact that Agent Stead forcefully pulled Mary out of the house is uncontroverted. Agent Stead does say that after Mary turned away after she invited him inside he identified himself as a law enforcement officer by pulling a previously hidden badge on a lanyard from under his t-shirt. However, he acknowledged that the whole thing happened very fast in one continuous motion. As he grabbed her arm he stated he pulled his badge out. Stead Dep. 75; App. 6. However, nothing Ms. Ellis said or did indicated that she understood that the man grabbing her and pulling her out of her house was a police officer.

Mr. Panella: Right. And so when, like you said, you weren't going to go in the house, but you're also, you said that the screen door and the front door are right next to each other, right?

Agent Stead: Right.

Mr. Panella: And you are holding the screen door open?

Agent Stead: Right.

Mr. Panella: And you're close enough to reach in and grab her, right?

Agent Stead: Right.

Mr. Panella: And you did say on your statement that, you know, that's what you did. So what I'm curious about is **she was still inside the doorway, she was inside the house** and you are right on the porch, correct?

Agent Stead: Yes.

Mr. Panella: When you grabbed her?

Agent Stead: Yes, sir.

Stead Dep. 76-77; App. 7-8.

The operation was designed for Mary Ellis to believe that the person at the door was the "John" she had been texting with that evening.

Mr. Panella: There were almost three hours of text messages between you and Mary prior to this happening, right?

Agent Stead: Yes.

Mr. Panella: And all the while she was, you were pretending not to be a law enforcement officer?

Agent Stead: Correct.

Mr. Panella: And she was expecting to meet with a client?

Agent Stead: Correct.

Mr. Panella: And so there is nothing that you can tell me that would suggest that when she originally opened the door, she thought otherwise, right?

Agent Stead: Right.

Mr. Panella: She would have – If you did your job right, she would have thought you were a John?

Agent Stead: Correct.

Id. at 80-81; App. 11-12.

Ms. Ellis's predictable response to being dragged out of her house in the darkness by a stranger was to try to pull away and to scream hysterically.¹⁷

¹⁷ All accounts from the Agents show that Agent Roberts quickly joined in the effort to assist Agent Stead with pulling Mary into the front yard. From Ms. Ellis's perspective, this created an even more terrifying and chaotic situation as she was now struggling with not one, but two men. Agent Roberts states he spoke to

Mr. Panella: And she started going crazy, right?

Agent Stead: She started saying "John, John," right after I grabbed her. And Agent Roberts came around also and started to handcuff her. She started calling for John.

Mr. Panella: So at this point she is calling for John?

Agent Stead: Yes.

Mr. Panella: And is it fair to say that she was like screaming for John?

Agent Stead: Yes.

Mr. Panella: And she is also struggling, trying to get away from you; correct?

Agent Stead: Right, she is pulling away.

Mr. Panella: And at that point you're actually putting more force trying to get her out of the house, right?

Agent Stead: Right.

Mr. Panella: And the door is open while she screaming John, John?

Agent Stead: It's not inside the house. It is in the doorway. All this is happening -- this is the door. Right here in the doorway. So underneath the door.

Mr. Panella: I get it. I don't think you're in the living room, I'm just saying that she is -- if there was a line, a threshold, right, for the house? First of all, you're in the porch already, right? You're under the overhang?

Agent Stead: Yes, sir.

Mr. Panella: And she is on one side of the line of the house and you are just on the other side?

Agent Stead: Right.

Mr. Panella: And that's when you reach in and grab her wrist, I think you said?

Agent Stead: Yes.

Mr. Panella: And then she starts pretty immediately screaming "John, John," right?

Agent Stead: Right.

Mr. Panella: And pulling away from you?

Agent Stead: Yes, sir.

Mr. Panella: And you did not let go?

Agent Stead: No, sir.

Mr. Panella: And as a matter fact, you try to pull her out toward you into the porch, correct?

Agent Stead: Correct.

Mr. Panella: And it's at this point that Agent Roberts shows up and tries to help you do that?

Agent Stead: Yes, within seconds, he walks in, saying, hey, Mary, stop.

Mr. Panella: Walks in -- I mean, you are -- this all happened on the porch, right?

Agent Stead: All this happened right in front of the porch.

Mr. Panella: While she is still like struggling to get back inside the house? She's in the house, struggling to get away from you and run back inside.

Agent Stead: Yes, sir.

Mr. Panella: ...And is it fair to say she was pretty much screaming throughout the entire struggle?

Ms. Ellis and told her to calm down, however, there was no indication from her that she understood she was dealing with the police.

Agent Stead: Right.
Mr. Panella: And that was a struggle with you guys, right?
Agent Stead: Right.

Id. at 77-79; App. 8-10.

It is clear from the statements of everyone at the scene, (Agent Stead, Agent Roberts, Agent Smith, Mary Ellis, and John DeRossett) that Mary Ellis began screaming loudly and repeatedly upon being taken from the house: Agent Roberts said she was “screaming in a high pitch voice,” “like really screaming,” “she’s going ballistic;” Agent Smith: “She was screaming as loud as she could,” “She was pretty loud,” “screaming and fighting and pulling away;” John DeRossett: “I didn’t hear a word other than she was screaming for help.”¹⁸

Contributing to the fear and confusion surrounding these events, it was particularly dark at the time and location of the incident. It had been a rainy day, which left a cloudy overcast at 9:30 P.M. The moon was at a 31.9% crescent which happened to be in the lower part of the sky at the time so the moon may not have been visible at all. The nearest streetlight was across the street and at least one house down from the address. There were no garage lights. The house is on a corner lot without an additional street light or light from nearby houses. There is a porch light which was likely off,¹⁹ but even if it were on it would have provided little or no lighting into the yard past the small, ground-level porch where the encounter started.²⁰

¹⁸ Agents interviews and depositions; *see also*, DeRossett 8/20-21/2015 Transcript at 14; App. 41.

¹⁹ There have been conflicting reports of whether the porch light was on or off during the encounter. However, when BCSO Crime Scene Investigation came to document the scene that night their video and pictures show that the porch light was not on. The relevant crime scene investigators testified under oath that they do not change any conditions of a crime scene including turning a light on or off and that they also did not in this case.

²⁰ Haggerty Dep. 32-34; App. 46-48.

The scene was nearly universally described by the responders as “dark.” Agent Smith: “I just know it was dark;” Corporal Beuer: “It was pitch dark;” Chief Lewis: “I wouldn’t be able to tell you who it was because it was still dark out there;” Leslie Lewis: heard people yelling but couldn’t see because it was dark in that area of the yard; CSI Tech Chretien: (on why her pictures came out so dark) “it is so dark out, that if you use a handheld [camera] you wouldn’t be able to see it;” Sergeant Deans: “It was dark;” Deputy Dobrowsky: “It was definitely dark out, I remember that for sure;” CSI Tech Cooper Haas: “It was mostly dark;” Agent Hawkins: “used the cover of darkness” to his advantage; CSI Tech Strait: “I remember it being dark... I am using the flashlight because you can’t really see much [outside],” etc. In a post-*Miranda* interview the night of the incident John DeRossett himself said, “it was totally dark out there.” *See* witness interviews and depositions.

John DeRossett was interviewed post incident at the hospital where he was being treated for his gunshot wounds. He described the events of that evening from his perspective. He explained that he was in the back bedroom of the house watching TV and was about to eat the dinner he had prepared when he heard Mary Ellis screaming for help. Fearing the worst, Mr. DeRossett grabbed his handgun and went to the front door.²¹ “Well – well, she started, you know, I thought she sounded pretty scared... so I grabbed my gun and well, like I said, that’s when I... I went to the doorway. And I had seen what looked like two or three people out there had a hold of her.”²² When

²¹ Mr. DeRossett was concerned for Ms. Ellis’s safety given the lifestyle she was living. When asked by the detectives in one of his post-event interviews why Mr. DeRossett came to the conclusion that Ms. Ellis was being kidnapped, Mr. DeRossett explained: “That’s my first reaction that somebody was kidnapping her... I told her you’re going to have somebody over here who is going to cause you a problem... I’ve thrown her out about 3 or 4 times. For acting crazy. Everybody’s kindof told me you need to get her out of there. Looking at me right now, I think I probably should have.” DeRossett 8/20-21/2015 Audio Statement Part 2 at 56:50.

²² DeRossett 8/20-21/2015 Transcript at 15-17; App. 42-44.

Mr. DeRossett got to the front porch area, the first thing he observed was his niece being forcibly taken by two or three men in the darkness of his front yard, all while she was screaming for help. “[T]hey had a hold of her. There was two or three people that had a hold of her... She’s standing up. But they just got a hold of her like they are taking her forcibly.... It was dark... It was dark, I couldn’t see every detail of it.”²³

Hearing his niece screaming for help and after going out to the front porch of his house and seeing his niece being taken by force by several figures in the darkness, he reasonably believed she was being kidnapped. Thinking he could disrupt what they were doing and "run them off" he raised his gun and fired one shot in the air. However, instead of "running off," the individuals in his front yard that had been struggling with his niece, separated and quickly began to shoot at him. He fired back. In the defendant's post-*Miranda* statement the night of the shooting he explained the following:

I went outside the door and said “what the hell is going on.” Didn’t get no answer, so I just kinda shot and fired the gun up in the air. Thinking maybe it would scare them off. Because if they were kidnapping her, that’s what I was trying to do, scare them off. Next thing I know they are shooting at me... they are shooting towards me, so I started shooting back.

See DeRossett 8/20-21/2015 Audio Statement Part 2 at 2:00.

No one disputes that his first shot was fired in the air. Mary Ellis said the same thing in her statement the night of the incident and, indeed, the agents also confirm that the defendant's first shot was in the air. Further, Agent Stead added that as soon as he saw DeRossett shoot in the air the agents immediately began shooting at him. The other agents have similar recollections.

Mr. Panella: You indicated that the first shot from that muzzle flash from, let’s call it John DeRossett, was in the air; is that right?

Agent Stead: Yes, the muzzle flash I saw was approximately six, seven feet in the air and I just saw a muzzle flash.

Mr. Panella: Right. And so it wasn't in the direction of any of you, correct?

²³ *Id.* at 18; App. 45.

Agent Stead: Once he shot, we started shooting. There was rounds that started coming towards me and Agent Smith. Again, it was fast, so I don't know.
Mr. Panella: And so you know that the first shot was from John DeRossett, right?
Agent Stead: Yes.
Mr. Panella: And you know that it was elevated or in the air, correct?
Agent Stead: Yes.
Mr. Panella: ...So it was, at least what you can recall, and I know it was quick, but the first shot was in the air and then immediately you started addressing the fire?
Agent Stead: Correct.

Stead Dep. 90-91; App. 14-15.

Agent Roberts also confirmed the first shot was in the air:

Mr. Panella: Okay. But he [DeRossett] certainly didn't look at you or anything like that and so he passes you?
Agent Roberts: Yes.
Mr. Panella: And shoots his gun in the air?
Agent Roberts: Yes.

Roberts Dep. 109; App. 28.

All three agents opened fire on DeRossett after his initial shot in the air. Agent Roberts was to the defendant's right in some shrubbery by the front of the house, Agent Smith was in the front yard "15 to 20 feet" in front of the defendant and off to DeRossett's left,²⁴ and Agent Stead was to the left (west) of Smith in the front yard.²⁵ In John DeRossett's post-*Miranda* statement the night of the shooting he explained he shot to his left in the direction of the shots being fired at him.²⁶

During the exchange of gunshots, DeRossett was hit twice – once in his left elbow and once in his back. Agent Smith was shot once in his tactical vest, and once that penetrated his lower abdomen just under the vest.

²⁴ Smith Dep. 64; App. 50.

²⁵ Stead Dep. 89; App. 13.

²⁶ DeRossett 8/20-21/2015 Transcript at 24; App. 46.

A number of shell casings and projectiles were recovered as well as all the guns, however, the ballistics evidence was challenging to process as the agents and DeRossett were all using similar Glock handguns and firing the same caliber ammunition. Florida Department of Law Enforcement conducted a firearms analysis on the shell casings and projectiles recovered from the scene. FDLE was unable to determine whether the projectile that was found lodged in Agent Smith's vest came from John DeRossett's firearm or from one of the other agents' firearms.²⁷ The projectile that wounded Agent Smith was not recovered by medical personnel.

There is no direct evidence that John DeRossett knew the "kidnappers" were law enforcement and there is significant circumstantial evidence that he did not. The agents were wearing dark clothing, one entirely in plain clothes and the two with black vests were wearing baseball caps. Further, by the time DeRossett came out of the house, they were off the porch and in the dark front yard struggling with his niece. Further, from the defendant's perspective, they were not acting like how one would expect law enforcement to act. He saw them forcefully dragging his niece out in the yard at night while she was screaming for help. Nothing she said or did would make him think the men who were apparently abducting her were police.

There is also considerable confusion on when or if the agents identified themselves to DeRossett as law enforcement. Agent Smith acknowledged that he likely did not yell "Sheriff's Office," and said he does not recall anyone else yelling Sheriff's Office either.²⁸ Agent Stead unequivocally said he did not identify himself to DeRossett as an agent or deputy or yell "Sheriff's Office" and said that he did not hear anyone else say "Sheriff's Office" either.²⁹ Agent Stead added

²⁷ See FDLE Investigative Summary at 18-20; App. 53-55.

²⁸ Smith Dep. 78; App. 51.

²⁹ Stead Dep. 107; App. 16.

that there was no time for that. Agent Roberts believes he identified himself by saying “Sheriff’s Office” but whether he did or did not, neither of his fellow officers heard him say it, so it is certainly reasonable that the defendant would not have heard it either if it was in fact said.

Everyone acknowledges that the entire shooting incident happened very fast. BCSO Chief Lewis, who heard the gunfire from his house across the street, estimated that the gunfire exchange lasted approximately 10 seconds.³⁰ Once the defendant fired the shot in the air, the agents immediately returned fire and the entire shooting incident was over with quickly.

Agent Roberts said unequivocally that DeRossett did not even notice him only a few feet away when DeRossett came outside,³¹ and Roberts was one of only two agents with any identifying clothing on him. Smith was the other agent with identifying clothing (lettering on his sleeves and vest) but he was already out in the darkness of the yard beyond the porch when DeRossett came outside.

The defendant has consistently maintained that he had no idea the people at his house were law enforcement. “I didn’t know who in the hell they were,” “Well, I had no idea who they were,” “They could’ve been the man in the moon, they could’ve been anybody; who knows?”³²

Pictures documenting the scene by the BCSO CSI team the night of the incident reveal significant amounts of blood on the porch floor and on the front of the house near the front door where the defendant was standing. The evidence also shows a drip pattern of blood leading from outside the front porch through the front door threshold into the living room and onto the couch

³⁰ Lewis Dep. 26-27; App. 37-38.

³¹ When the agents noticed John DeRossett come out the door with a gun, they let go of Ms. Ellis and pushed her in John DeRossett’s direction, drew their weapons and took different positions in the yard. Roberts tripped over some shrubs on the east side of the front door of the house which would explain why he does not believe John DeRossett even noticed him. Roberts Dep. 106; App. 27.

³² DeRossett 8/20-21/2015 Transcript at 14-15; App. 41-42.

where the defendant ended up. Evidence also shows at least 23 documented “bullet defects” in the walls of the house from bullets that were fired at the defendant, separate from the two that hit him.³³

Additional circumstantial evidence that DeRossett did not know that the people at his house were law enforcement is the strong evidence that his niece, Mary Ellis, didn't know either. Right after the exchange of gunfire when she and DeRossett were back in the house, Ms. Ellis placed a desperate call to emergency services. In her 911 call she is asking for help for her uncle that has been shot and frantically explained how some unknown men had pulled her out of the house and then shot her uncle.

911: 911 what's the address to your emergency?

Mary: (Frantic) My uncle's been shot!

911: [Inaudible]

Mary: 1051 Covina Street!

911: Okay. Stay on the phone and I'm gonna connect you to an ambulance, are you with him?

Mary: Yes!

911: Stay on the phone I'm connecting you with the ambulance, okay?

Mary: [Inaudible]

[Call drops, Mary calls back]

911: 911 what's the location of your emergency?

Mary: Yes, it's 1051 Covina Street, I got disconnected.

911: Okay what's going on ma'am?

Mary: I don't know there was people at the door and they tried to pull me out of the door, I screamed for my uncle and he came out with his gun and they shot, and (inaudible)!

911: What's your name?

Mary: Mary.

911: Okay, Mary, (I'm talking to her she called back), Mary what happened?

Mary: I don't know! Somebody tried to pull me out of the door and I screamed for my uncle and he came up and was shooting up in the sky and got shot!

911: Did somebody get shot?

Mary: Yes, my uncle got shot!

911: Okay, who shot your uncle, do you know?

³³ Stuart Dep. 35; App. 52.

Mary: I don't know, somebody tried to pull me out the door and then ran off! I went to the door and they tried to pull me out the fucking door!

911: Okay, Mary, who tried to – was it a white male, black male?

Mary: I don't know who it was! It was a man, and then two other men came up behind me! It's dark!

911: Okay, ma'am, please don't yell at me I'm trying to help you, okay?

Mary: Where's the ambulance he's been shot in the back. I'm scared, I can't go out there.

911: (Inaudible)

Mary: (Inaudible) ... ambulance.

911: They're coming, ma'am, they're coming. Is there anybody with your uncle outside?

Mary: He's in my house! He's been shot in the back, he's sitting here on the couch.

911: You want to stay on the line with me, I'm gonna get you over to medical so they can tell you what to do, okay?

Mary: There's no ambulance.

911: Mary, Mary, stay on the line with me I'm going to transfer us to medical so they can tell you how to control the bleeding, okay?

Mary Ellis, 911 Calls.

Clearly, if Mary Ellis didn't know the men who were at her home were law enforcement as is evident from the screaming for help and in resisting their efforts to subdue her,³⁴ and her distressed call to 911 following the incident, it's certainly reasonable that John DeRossett didn't know either. His response was based on the reasonable perception that his niece was being kidnapped and he had the legal right to stop that from happening.

Legal Procedure and Standard

Self-Defense Immunity Procedure

In 2005, the legislature enacted broad sweeping legislation expanding the right of self-defense for individuals. It largely eliminated the duty to retreat required under Florida common law and it (and subsequent caselaw) created a pretrial procedure to claim self-defense immunity. §§ 776.012, 776.013, 776.031, 776.032, Fla. Stat. (2005). The statute was not clear on the actual procedure (including the burden of proof or standard of proof) by which one would litigate the

³⁴ Her reaction to being grabbed by Agent Stead and pulled out of the house underscores her failure to appreciate that she was dealing with the police. She had never before resisted the police during an arrest or an encounter, including prior contacts with Roberts.

statutory immunity. Eventually the law settled on a procedure for how to litigate these claims. In *Dennis v. State*, 51 So. 3d 456 (Fla. 2010), the Florida Supreme Court reviewed the law and determined the legislative grant of immunity for those using force under the new statute required the trial court to conduct a pretrial hearing to determine its applicability. At that time, the Florida Supreme Court adopted the procedure previously announced in *Peterson v. State*, 983 So. 2d 27 (Fla 1st DCA 2008):

Likewise, we hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.

Peterson, 983 So. 2d at 29-30; *Dennis*, 51 So. 3d at 460. Therefore, in a criminal case, the defendant was to initiate the claim of immunity by filing a pretrial motion asserting same and would bear the burden of showing lawful self-defense by a preponderance of the evidence at an evidentiary hearing. *See also Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

However, in its next session after *Bretherick*, the Florida Legislature amended the statute to specifically state the burden and standard of proof the trial court is to apply in the pretrial statutory immunity hearing by adding subsection (4) to § 776.032, Fla. Stat. (2017) which now provides:

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

Thus, when the issue of immunity is raised by a defendant, the defendant need only demonstrate the claim to immunity to a *prima facie* standard. The burden then shifts to the State to overcome the claim of self-defense immunity by clear and convincing evidence.

Since this legislative change shifting the burden of proof to the prosecution and establishing the standard of proof to clear and convincing evidence, the issue of retroactivity has been litigated in both trial and appellate courts. There is currently a conflict on this issue in the 2d and 3d District Courts of Appeal. The statute has been found to be retroactively applicable to immunity claims prior to the effective date of the statute in *Martin v. State*, 43 Fla. L. Weekly D1016 (Fla. 2d DCA May 4, 2018) (holding that the 2017 amendment to § 776.032 is procedural in nature and, therefore, retroactive in application to pending cases). While the 3d DCA in *Love v State*, 43 Fla. L. Weekly D1065 (Fla. 3d DCA May 11, 2018) has held that the statute did not apply retroactively and certified the conflict with *Martin* to the Florida Supreme Court (finding that the legislative change was substantive rather than procedural). This Court should find that the reasoning in *Martin* is persuasive³⁵ and continue to apply the procedure set forth in the current statute to this case. The 5th DCA has not addressed the retroactivity issue and the undersigned is unaware of any written opinions on this issue in the 18th Circuit.

John DeRossett is Entitled to Immunity From Further Prosecution

The central issue is whether John DeRossett knew the people in his yard were police officers. If he did, and chose to try and kill them as the State has charged, then the State should properly convict him. We accept that he cannot legally claim self-defense if he is shooting at people he knows to be the police. However, the evidence shows that he did not know the people he saw struggling with his niece or shooting at him were the police so his immunity claim should

³⁵ See the scholarly and well reasoned analysis of the retroactivity issue in Circuit Judge Samantha Schosberg Feuer's June 1, 2018 Order in the recent self-defense immunity hearing in the 15th Circuit, *State of Florida v. Nouman Khan Raja*, 2016-CF-005507-AXXX-MB. Judge Schosberg Feuer reviewed the history of Florida's self-defense law, addressed the procedural vs. substantive change issue in detail and concluded that the changes to the immunity statute should be given retroactive effect. *See Order Denying Motion to Dismiss at 2-9; App. 58-65.* Further, at a previous pretrial hearing, this Court indicated that it would apply the new immunity procedures to the case at bar.

be measured by whether he had the right to use deadly force against these individuals as if they were actual kidnappers or home invaders. Under that standard, John DeRossett is clearly entitled to immunity from prosecution because he was justified in his use of deadly force to prevent the imminent commission of a forcible felony (kidnapping) against Mary Ellis as well as the imminent use of deadly force against himself.

§ 776.012(2), Fla. Stat. (2017), provides:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in criminal activity and is in a place where he or she has a right to be.

§ 776.032(1), Fla. Stat. (2017), provides in pertinent part:

A person who uses force as permitted in s. 776.012, s. 776.013, or 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force.... As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

On the night of August 20, 2015, not only was the defendant in a place he was legally allowed to be, he was actually in his home.³⁶ Therefore, under the circumstances of this case DeRossett is entitled to a “presumption of fear” in addition to the protection of the “no duty to retreat” application of the “Stand Your Ground” law. For the State to meet its burden, the State must show by clear and convincing evidence that the defendant did not reasonably believe the use of force (or threatened use of force) was necessary to prevent the imminent commission of a forcible felony. Furthermore, the State must also show by clear and convincing evidence that Mr.

³⁶ § 776.013(5)(a) also specifically includes “any attached porch” in the definition of a “dwelling.”

DeRossett did not reasonably believe the use of force (or threatened use of force) was necessary to prevent imminent great bodily harm to himself or another.

Self-defense cases are unique in that the finder of fact must put herself in the shoes of the defendant under the circumstances as he perceived them to determine whether his use of force was reasonable. Further, the danger need not be actual, but only perceived to be real by the person who used deadly force. Florida Standard Jury Instruction 3.6(f) is instructive.

In deciding whether [John DeRossett] was justified in the use (or threatened use) of deadly force, you must consider the circumstances by which he was surrounded at the time the force (or threat of force) was used. The danger need not have been actual; however, to justify the use (or threatened use) of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force (or threat of force). Based on appearances, [John DeRossett] must have actually believed the danger was real.

Florida Standard Jury Instruction 3.6(f). Furthermore, under the circumstances as John DeRossett perceived them, he is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or Mary Ellis because he knew that these people “had removed” another against her will from his dwelling, and John DeRossett had reason to believe that an unlawful and forcible act was occurring or had occurred. *See* § 776.013(2), Fla. Stat.

Additionally, because § 782.065, Fla. Stat. requires that the State prove John DeRossett knew the victims in this case were law enforcement officers³⁷ to prevail at the self-defense immunity hearing, the State must convince the Court by clear and convincing evidence that the defendant is not entitled to immunity because he knew the people he was shooting at were law enforcement in addition to proving to the same standard that he did not act in lawful self-defense if they were not.

³⁷ *See* Florida Standard Jury Instruction 6.7.

There is no credible evidence in this case that contradicts the claim that John DeRossett did not know the individuals that appeared to be trying to kidnap his niece or were shooting at him were law enforcement officers. To the contrary, the evidence in this case shows he did not. Given how dark it was, the time of night, the screaming, the fact that at least two of the three agents present at the scene did not identify themselves as law enforcement officers to John DeRossett, nor hear anyone else identify as a law enforcement officer to John DeRossett, as well as John DeRossett's own statements and the fact of the frantic 911 call by Mary Ellis to report the shooting (*to the police*), the most reasonable conclusion consistent with the evidence is that he had no idea.

John DeRossett did know that his loved one was screaming for help like her life depended on it, and that she was being forcefully drug out of his house into the dark of night by people much bigger than she. John DeRossett also knew that these people were on his property, and he had every reason to believe they forcibly removed Mary Ellis from his home – which they actually did.³⁸ John DeRossett was under no obligation to sit back, let Mary Ellis be kidnapped by strangers in the night, and do nothing to save her. It's clear that had John DeRossett known they were police officers, he never would have fired his weapon. He has said this from the very beginning, and frankly, no other theory makes sense.³⁹

John DeRossett did not only witness the “imminent commission of a forcible felony”⁴⁰ (which presumes it has not even taken place yet) but he watched it actually occur before his eyes. From his back bedroom he heard Mary Ellis screaming, when he got to the front porch he witnessed her being taken by force, and he saw her struggling with the figures in the darkness. At no time did

³⁸ See also the recent Florida Supreme Court case *State v. Markus*, 211 So. 3d 894 (2017) where the court emphasized that this sort of “warrantless” entry into the threshold of a home for a misdemeanor is illegal on the part of the police in the first place.

³⁹ It defies common sense that a person intending to kill police would fire a warning shot first.

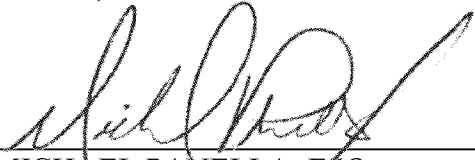
⁴⁰ Kidnapping is enumerated as a forcible felony under § 776.08, Fla. Stat. as is home-invasion robbery.

he think this scenario involved the police. Under these circumstances, even though John DeRossett had the legal right to shoot at the people trying to kidnap his niece, he instead chose to shoot in the air, in an effort to scare them off and actually avoid a deadly encounter. When they did not leave the property but instead began shooting at him, he was facing an imminent threat of great bodily harm or death to himself as well as the forcible felony being committed against his niece. Once John DeRossett was being shot at following his warning shot, he was also reasonably justified to use deadly force to defend himself.⁴¹

This is a case where an extraordinary series of events resulted in chaos, confusion, and fear. John DeRossett reasonably believed the use of force was necessary, and his actions under the “circumstances by which he was surrounded at the time” were legal and justified. He was justified in attempting to prevent the imminent commission of a forcible felony, and he was justified in defending himself.

WHEREFORE, John DeRossett respectfully requests this Court grant him the immunity to which he is entitled and bar further prosecution for the actions he took in accordance with sections 776.012, 776.013, 776.031, and 776.032 of the Florida Statutes.

Respectfully submitted,



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⁴¹ There is no doubt that the agents were shooting at John DeRossett to kill him. When asked under oath whether Agent Roberts would have done anything differently looking back on this night, his answer was simply: “Kill John DeRossett.” Roberts Dep. 139; App. 29.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Service to the OFFICE OF THE STATE ATTORNEY, (brevfelony@sa18.org), 400 South Street, Suite D, Titusville, Florida 32780 this 6th day of August, 2018.



MICHAEL PANELLA, ESQ.