



*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Following a May 16, 2013, hearing, the district court granted the Appellees' motions to suppress their statements. The State again appealed. We initially accepted jurisdiction of the appeal under Title 22, O.S.2011, section 1053 (5).

On August 26, 2014, this Court retained jurisdiction of the State's appeal but remanded for further proceedings on Appellees' then-pending motions to dismiss the charges based on the statutory immunity from prosecution provided by 21 O.S.Supp.2006, section 1289.25, the so-called Stand Your Ground law.<sup>1</sup> On September 8, 2014, the district court conducted a further hearing, and granted Appellees' motions to dismiss the charges of murder, finding Appellees were immune from prosecution. The State of Oklahoma now appeals this ruling as well. Appellees argue there is no statutory authority for a State appeal from an order granting Stand Your Ground immunity from prosecution under section 1289.25.

Oklahoma's Stand Your Ground law provides that a "person" using lethal "defensive force" is "presumed to have held a reasonable fear of imminent peril of death or great bodily harm" from an intruder who "unlawfully and forcibly" entered or was entering a "dwelling, residence, or occupied vehicle;" or "had removed or was attempting to remove" someone from the dwelling, residence,

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<sup>1</sup> The current version of the law, 21 O.S.2011, section 1289.25, has expanded the areas protected from unlawful and forcible entry to include "a place of business;" and expanded those authorized to use force to include "an owner, manager, or employee of a business," but is otherwise identical to the 2006 version in effect when Appellees used deadly force against the decedent in 2009. Laws 2011, Ch. 106, § 1.

or occupied vehicle against their will, where the person “knew or had reason to believe” an unlawful forcible entry or removal “was occurring or had occurred.” § 1289.25 (B)(1) and (2).<sup>2</sup> Section 1289.25 (F) created the statutory immunity from prosecution that gives rise to the instant appeal:

A person who uses force, as permitted pursuant to the provisions of subsections B and D of this section, 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 charging or prosecuting the defendant (emphasis added).

The State’s right of appeal to this Court rests upon statutory authority; it “exists only when expressly authorized,” *City of Elk City v. Taylor*, 2007 OK CR 15, ¶ 7, 157 P.3d 1152, 1154; and cannot be enlarged by construction. *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 4, 157 P.3d 137, 138. Title 22, O.S.2011, section 1053, provides that the State may appeal in the following cases “and no other:”

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;

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<sup>2</sup> The Legislature excluded certain persons from triggering this presumption of imminent harm, including another “lawful resident of the dwelling, residence, or vehicle,” unless a protective or no contact order was in effect; and lawful custodians seeking to remove children or grandchildren in their custody. The Legislature also excluded from statutory protection those who use defensive force when “engaged in an unlawful activity” or “using the dwelling, residence, or occupied vehicle to further an unlawful activity.” § 1289 (C)(1), (2), and (3). Section 1289.25 (E) further provided that one “who unlawfully and by force enters or attempts to enter the dwelling, residence, or occupied vehicle of another” is presumed to possess the “intent to commit an unlawful act involving force or violence.”

3. Upon a question reserved by the state or a municipality;
4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice; and
6. Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.

The State's right to appeal is determined by whether the order of dismissal based on Stand Your Ground immunity falls within these statutory provisions. Considering the relevant provisions,<sup>3</sup> we first conclude that the order appealed here is not a "judgment for the defendant on quashing or setting aside an indictment or information," appealable by the State under section 1053 (1). In *State v. Hammond*, 1989 OK CR 25, 775 P.2d 826,

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<sup>3</sup> From the plain statutory language of section 1053 and our examination of the cases, we are guided by the principle that the right to appeal arises from the relief embodied in the specific "order" or "judgment" entered rather than the style or legal title given to the motion or other pleading seeking relief. Appellees cited the protections of the "Stand Your Ground" law in a January 21, 2011, motion entitled *Motion to Quash and Set Aside the Court Order Binding This Defendant Over to the District Court for Trial and Demurrer*, and requested that the court "dismiss this charge" based on "Stand Your Ground" immunity. We also think it beyond doubt that the instant order is neither an order "arresting the judgment," nor one suppressing evidence, as contemplated in sections 1053 (2), (5), or (6). An order arresting judgment is entered after the verdict and prior to the entry of judgment, based on a defect appearing on the face of the record. *State v. Robinson*, 1975 OK CR 237, ¶ 5, 544 P.2d 545, 549, *overruled on other grounds*, *State v. Young*, 874 P.2d 57, 1994 OK CR 25. We also note that section 1053.1 of Title 22 provides for a State appeal of a "final judgment entered by a district court in a criminal action rendering an act of the State Legislature to be unconstitutional." These provisions therefore have no application to the proceedings before us.

overruled on other grounds, *State v. Young*, 1994 OK CR 25, 874 P.2d 57,<sup>4</sup> the Court held that 22 O.S., section 493 “is the sole statutory authority for the setting aside of an information or indictment,” and “has been strictly construed” to remedy defects “evident on the face of the information” and certain errors in the grand jury process.<sup>5</sup> *Id.*, 1989 OK CR 25, ¶ 5, 775 P.2d at 828.<sup>6</sup> Further, an order setting aside the information under section 493 “is no

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<sup>4</sup> *State v. Young* overruled *Hammond* and several other cases only insofar as the latter held that a motion to set aside the information was not proper in misdemeanor cases. *Young*, 1994 OK CR 25, ¶ 4, 874 P.2d at 58.

<sup>5</sup> Title 22, O.S.2011, section 493 provides that upon motion, the court in which defendant is arraigned must set aside the information “in the following cases:”

1. When it is not found, endorsed, presented or filed, as prescribed by the statutes or when the grand jury is not drawn and impaneled as provided by law, and that fact is known to the defendant at or before the time the jury is sworn to try the cause: Provided, that the defendant shall be conclusively presumed to know matters of record;
2. When the names of the witnesses examined before the grand jury are not made to appear on some part of the indictment, as provided in this chapter;
3. When a person is permitted to be present during the session of a grand jury while the vote on the finding of the indictment is being taken, or when it is shown that after the grand jury was first impaneled any member or members thereof, were discharged and their places filled by persons not regularly drawn from the jury list, as provided by law, and that they were admitted into the grand jury or took part in their deliberations, or that the grand jury was not impaneled anew as a whole body in open court.

<sup>6</sup> The *Hammond* Court also found the pre-trial demurrer to the information, authorized by section 504, is limited to the enumerated statutory “defects which appear on the face of the information.” *Id.* Section 504 of Title 22 provides a defendant may demur to the information “when it appears *upon the face thereof*.”

1. That the grand jury by which an indictment was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county;

bar to a further prosecution for the same offense” by a technically proper criminal information. 22 O.S.2011, § 501.

We also conclude that the trial court’s order is not a “judgment for the defendant on a motion to quash for insufficient evidence in a felony matter” appealable under section 1053 (4). The defendant’s burden on such a motion is to “establish beyond the face of the indictment or information that there is insufficient evidence to prove any one of the necessary elements” of the charged offense. 22 O.S.2011, § 504.1(A). However, the Legislature also limited the scope of this remedy, providing that “judgment for the defendant on a motion to quash for insufficient evidence . . . *shall not be a bar* to a further prosecution for the same offense.” § 504.1 (D) (emphasis added).

By contrast, Appellees’ claim of immunity under the Stand Your Ground law involves the adjudication of evidentiary facts *beyond* the face of the information; and the order finding that Appellees are immune clearly bars further prosecution. The district court’s order granting Stand Your Ground immunity is neither a judgment setting aside the information nor a judgment

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2. That it does not substantially conform to the requirements of this chapter;
  3. That more than one offense is charged in the indictment or information;
  4. That the facts stated do not constitute a public offense.
  5. That the indictment or information contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. (emphasis added).

quashing it for insufficient evidence subject to its re-filing at some future date, either of which would be appealable under sections 1053 (1) and (4). The immunity granted by the Stand Your Ground law bars further criminal prosecution, which the statute defines as “charging or prosecuting the defendant” for the use of force. § 1289.25 (F). An order granting immunity does not merely set aside or quash the information for a facial defect or insufficient evidence. Such an order assumes the charging information is in proper form, and represents a judicial finding that the use of force was justified under the statute and not criminally prosecutable.

In *State v. Campbell*, 1998 OK CR 38, 965 P.2d 991, the Appellee in a non-jury trial moved to dismiss a charge of escape, arguing that any further prosecution was barred by the constitutional prohibition against double jeopardy. At the close of the State’s case, the trial court agreed and dismissed the case on grounds of former jeopardy. The State appealed, and Appellee moved to dismiss the appeal as unauthorized by section 1053. The Court held:

[T]he State can only bring this appeal if it is authorized by one of the limited instances listed in Section 1053 of Title 22 of the Oklahoma Statutes. This statutory authority cannot be enlarged by construction. The Legislature has not written . . . an express provision for the State to appeal from an order of the trial court sustaining a plea of former jeopardy and dismissing the defendant. The question is whether this appeal falls within one of the authorized appeals.

*Campbell*, 1998 OK CR 38, ¶ 6, 965 P.2d at 992.

The Court in *Campbell* found, as we do here, that the district court's dismissal of the charge on the ground of former jeopardy "was not entered as a result of a motion to quash or set aside the indictment or information," and thus could not be appealed under section 1053 (1). *Id.*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992. The State argued, in the alternative, that section 1053 (3) authorized its appeal of a reserved question of law. The Court agreed:

*To pursue such an appeal, there must be a judgment of acquittal or an order of the court which expressly bars further prosecution. In this case, the District Court found Appellee's double jeopardy rights were being violated and held that further prosecution of Case No. CF-96-71 was barred. . . . Therefore, there is no limitation precluding the State from appealing, on a reserved question of law, the District Court's order holding that the State's criminal prosecution of Appellee was a violation of double jeopardy (emphasis added).*

*Campbell*, 1998 OK CR 38, ¶ 8, 965 P.2d at 992 (internal citations omitted); *see also City of Norman v. Taylor*, 2008 OK CR 22, ¶ 8, 189 P.3d 726, 729 (district court's order of acquittal of public intoxication charge on trial *de novo* barred further prosecution, and limited the City's appeal to reserved question of law).

The district court's order in the present case and the order dismissing the charge on grounds of double jeopardy in *Campbell* both involved a legal bar to further prosecution, for which the *only* State appeal currently authorized is a reserved question of law. § 1053 (3). We decline to enlarge section 1053 by construction. The Legislature may broaden our authority to review Stand Your

Ground dismissals by statutory amendment if it chooses. This Court's limited authority to review such orders vests trial courts with a formidable power to dismiss charges for allegedly criminal assaults, batteries, and homicides, but this is nothing new. We trust that trial courts do not lightly exercise the power to grant immunity from criminal prosecution, and leave the wisdom of this policy for the judgment of the Legislature.

This case presents some additional unresolved procedural questions concerning pre-trial claims of Stand Your Ground immunity. Title 21, section 1289.25 (G) provides that law enforcement officials "may use standard procedures for investigating the use of force," and "may not arrest the person for using force" without "probable cause that the force that was used was unlawful." The statute thus establishes probable cause that the use of force was unlawful as a sufficient ground to arrest and detain a person to answer a charge arising from the use of force.

Where the charge is a felony, absent a waiver by the defendant, a magistrate must conduct a preliminary examination and order the defendant held to answer if the evidence shows "sufficient cause," which is equivalent to "probable cause," to believe the defendant guilty of an offense. Okla. Const. art. II, § 17; 22 O.S.2011, §§ 258 (7), 264; *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. We therefore hold that a person can be arrested, charged, and held to answer a criminal charge for a use of force allegedly authorized by section 1289.25 based upon probable cause that the use of force was unlawful.

We also hold that a defendant must assert entitlement to Stand Your Ground immunity before trial, or the immunity is waived. *State v. Jones*, 311 P.3d 1125, 1130-1133 (Kan. 2013). The claim of immunity is properly presented at district court arraignment by the defendant filing a motion to dismiss and request for evidentiary hearing. At the hearing, the trial court should consider relevant evidence and argument, and determine whether the defendant can show, by a preponderance of the evidence, that the use of allegedly defensive force warrants Stand Your Ground immunity. *Guenther v. State*, 740 P.2d 976, 980-81 (Colo. 1987).<sup>7</sup>

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<sup>7</sup> We noted in *State v. Anderson*, 1998 OK CR 67, ¶ 7, 972 P.2d 32, 34, that section 1289.25 was modeled on the Colorado statute. We are here persuaded by and adopt the Colorado Supreme Court's reasoning in *People v. Guenther*, 740 P.2d 976 (Colo. 1987), regarding the proper allocation of the burden and the standard of proof on a motion to dismiss under Oklahoma's Stand Your Ground law:

[The Stand Your Ground law] creates a benefit to a defendant far greater than an affirmative defense. If the statute is found to apply to the facts of the case, it will completely prohibit any further prosecution of charges for which, but for the statute, the defendant would otherwise be required to stand trial.

Since [the statute] contemplates that an accused should be permitted to claim an entitlement to immunity at the pretrial stage of a criminal prosecution, we believe it reasonable to require the accused to prove his entitlement to an order of dismissal on the basis of statutory immunity. A hearing to determine [the claim of immunity] to pending criminal charges is not a criminal trial, but, rather, is an ancillary proceeding in the nature of a motion to dismiss a pending criminal prosecution on the basis of a statutory bar. We have often imposed on a criminally accused the burden of establishing his entitlement to dismissal of criminal charges at the pretrial stage of the case and we find it appropriate to impose that same burden on the defendant in connection with a pretrial claim for statutory immunity . . . Furthermore, the accused presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statute and, under these circumstances, should be in a better position than the prosecution

Because immunity from prosecution is effectively lost if the defendant is erroneously forced to stand trial, a defendant may seek pre-trial appellate review of a trial court's denial of Stand Your Ground immunity by filing a petition for writ of prohibition in this Court. *Todd v. Lansdown*, 1987 OK CR 167, ¶ 8, 747 P.2d 312, 315 (granting writ of prohibition to prohibit trial of murder charge in violation of double jeopardy); *Sussman v. District Court*, 1969 OK CR 185, 455 P.2d 724 (granting timely filed application for writ of prohibition where prosecution was barred by former jeopardy). Failure to timely seek pre-trial appellate review of the denial of Stand Your Ground immunity waives the issue. These procedures shall govern future cases.

We now turn to the questions reserved for appeal by the State. The State of Oklahoma argued three propositions to the district court in opposing the Appellees' request for immunity:

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to establish the existence of those statutory conditions which entitle him to immunity.

While we conclude that the burden of proof should be placed on the defendant, we decline to require that the defendant prove his entitlement to immunity beyond a reasonable doubt. The preponderance of evidence standard, in our view, is more consistent with that expressed legislative intent than is the more rigorous reasonable doubt standard of proof.

*Id.*, 740 P.2d at 980-81 (internal citations omitted); *see also, regarding similar allocations of the burden of proof in Oklahoma law, Little v. State*, 21 Okl.Cr. 1, 14, 204 P. 305, 307 (burden on defendant filing motion to quash amended information to establish that testimony at preliminary examination shows commission of another offense); *Seitsinger v. State*, 50 Okl.Cr. 299, 302, 297 P. 312, 313 (defendant had burden to show laches in motion to dismiss for speedy trial violation); *Darity v. State*, 2009 OK CR 27, ¶ 5, 220 P.3d 731, 732-33 (defendant has burden to establish search warrant was invalid on motion to suppress evidence); 21 O.S.2011, § 701.10b (E) (capital defendant seeking pre-trial bar to punishment for mental retardation must show eligibility by "clear and convincing" evidence); 22 O.S.2011, § 1175.4 (B) (criminal defendant has burden to show incompetency by a preponderance of the evidence to suspend criminal proceedings).

1. The Appellees were not citizens of the State of Oklahoma and as a result are not entitled to the benefit of the “Stand Your Ground” law;
2. At the time of the victim’s death the Appellees were engaged in an unlawful activity and as a result are not entitled to benefit from the provisions of the “Stand Your Ground” law;
3. The Appellees have not shown an unlawful and forcible entry and as a result are not entitled to the benefit of the “Stand Your Ground” law.

In its supplemental brief, the State argues for the first time on appeal that the district court lacked jurisdiction to enter a ruling on remand from this Court because the court “retained” jurisdiction of the State’s earlier appeal. We summarily reject this argument. This Court retained jurisdiction of the State’s appeal of the ruling suppressing evidence, and remanded for further proceedings on the Stand Your Ground motions then pending before the trial court. This Court’s remand order did not limit the trial court’s jurisdiction to enter a judgment on Appellees’ pending motions.

Given the limited scope of our review, the State’s third argument provides a logical starting point. The State argued below that the Appellees had not shown an unlawful and forcible entry, and therefore were not entitled to the benefit of the Stand Your Ground law. In *State v. Anderson*, 1998 OK CR 67, 972 P.2d 32, we addressed a reserved question of law concerning whether an invited guest was an “occupant” whose use of deadly force against an intruder was entitled to statutory protection under an earlier version of section 1289.25, then known as the “Make My Day” law.

We there noted that “a state appeal on a reserved question of law does not address any part of the trial or proceedings except the precise legal issue reserved.”

If we should undertake to determine the applicability of the law to a given set of facts, we would constantly be engaged in a re-trial of every case involving an acquittal. This, in the Court's opinion, was not the purpose of giving the State the right to appeal upon a Reserved Question of Law.

*Anderson*, 1998 OK CR 67, ¶ 2, 972 P.2d at 33. The Appellee in *Anderson* had been acquitted by a jury, but we find a similar limitation on our review of the court's application of law to facts applies here, especially given the absence of any statutory appellate authority to reverse the judgment granting immunity.

The district court, applying the correct version of the statute, found from the evidence that the decedent forcefully entered the residence without permission of the Appellees, at which point the Appellees used presumptively justified force against him as permitted by the Stand Your Ground law. This determination clearly involves the trial court's application of the governing law to a given (and disputed) set of evidentiary facts. We find the correctness of this decision is beyond the scope of a reserved question of law, and provides no basis for relief.

The State's two remaining arguments concern the general application of the statute. Citing the statutory preamble in section 1289.25(A), where the

Legislature recognized “that the citizens of the State of Oklahoma<sup>8</sup> have a right to expect absolutely safety within their homes,” the State argued that only citizens of the State of Oklahoma are entitled to immunity for authorized uses of force under the Stand Your Ground law. We disagree.

In *Anderson*, we said the following about the Legislature’s use of the term “occupant” in an earlier version of the statute:

Reading the statute in its entirety, we find it a study in contradiction or compromise. The preamble seems to clearly set forth the intent of the law—“that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes.” However, the terms “resident,” “homeowner” or other such restrictive terms were not used in the remainder of the statute. Likewise, *the all encompassing term “any person” was not used* (emphasis added).

*Id.*, 1998 OK CR 67, ¶ 8, 972 P.2d at 34. The 2006 version of the statute applied in this case is broader in scope, and uses the very “all encompassing” term we mentioned in *Anderson*: Any “person” who “knew or had reason to believe” that an “unlawful and forcible act was occurring or had occurred” is justified in using defensive force against an unlawful intruder defined by the statute. § 1289.25(B)(2). Despite the preamble’s mention of the safety of “citizens,” the substantive law draws no distinctions based on citizenship.<sup>9</sup> We will not force upon the statute a meaning contrary to its plain language.

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<sup>8</sup> Persons born or naturalized in the United States are citizens of the United States and of the states in which they reside. U.S.Const., amend. XIV, § 1.

<sup>9</sup> Stand Your Ground protection for all persons who act to protect the safety of homes, cars, and businesses from intruders is arguably more faithful to the preamble than

The State next argues that Appellees are excluded from the protections of the Stand Your Ground law because they are foreign nationals who entered and were present in the United States without permission at the time of the use of force. The State points to language in the statute providing that the presumption of justifiable force granted in subsection 1289.25(B) “does not apply if . . . the person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, occupied vehicle, or place of business to further an unlawful activity.” § 1289.25(C)(2).

We considered the meaning of this language in *Dawkins v. State*, 2011 OK CR 1, 252 P.3d 214, and found the defendant’s illegal possession of a sawed-off shotgun used in the deadly force incident was “unlawful activity” sufficient to deny the protection of the Stand Your Ground law. Though the Court rejected any requirement of a causal nexus between the illegal activity and the use of force, we also said that not every infraction of the law would vitiate the protections of the statute:

[T]he Legislature’s intent was to exclude from the benefit of this statute persons who are *actively* committing a crime, not persons who have or may have committed a crime in the past. Examples of current crimes include, but are not limited to, use of an illegal weapon in commission of the homicide, possession of illegal drugs on the premises, or an ongoing assault by the defendant against another person in the residence . . . [T]he Legislature did not intend to prohibit use of the right of defense to persons who may have committed minor infractions of the law. Examples of such

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the narrow interpretation now advocated by the Appellants, as it arguably provides greater protection to Oklahoma citizens.

infractions include, but are not limited to, persons who are illegally parked or have outdated vehicle registration, have outstanding warrants for minor offenses, or are in arrears with child support payments.

*Dawkins*, 2011 OK CR 1, ¶ 11, 252 P.3d at 218.

Contrary to Appellant's argument, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States. *Arizona v. United States*, 567 U.S. \_\_\_, \_\_\_, 132 S.Ct. 2492, 2505, 183 L.Ed.2d 351 (2012)(citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984)). We see an important difference between a foreign national's immigration status and an "activity" involving the illegal use of weapons, drugs, violence, or the premises sufficient to warrant the statutory exclusion. The district court found that the Appellees were gainfully employed and renting their residence when the decedent unlawfully and forcibly entered. The court found no evidence that criminal activity was ongoing in the residence, or that it served as other than the Appellees' home. The trial court properly found that Appellees' status as undocumented foreign nationals provided no statutory basis for denying the protections of the Stand Your Ground law in the use of force against an intruder.

The district court's dismissal of the charges of murder on the basis of immunity from criminal prosecution renders the State's appeal of the order suppressing evidence moot. We therefore decline to address the issues presented in that aspect of the appeal.

## **DECISION**

The Order and Judgment of the District Court of Woodward County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF WOODWARD COUNTY  
THE HONORABLE RAY DEAN LINDER, DISTRICT JUDGE**

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OPINION BY LEWIS, J.

SMITH, P.J.: Concurr in Results

LUMPKIN, V.P.J.: Concurr in Part/Dissents in Part

JOHNSON, J.: Specially Concurr

HUDSON, J.: Concurr in Part/Dissents in Part

**SMITH, PRESIDING JUDGE, CONCURRING IN RESULT:**

I concur in the result reached by the majority. I disagree with that part of the Opinion which characterizes this fact-specific State appeal as a reserved question of law. This Court has the authority to review the District Court's decision, but I disagree on how that review is accomplished and its ramifications. From my review of the text and evolution of 21 O.S.2011, § 1289.25, I believe the Legislature intended for a district court's ruling on "Stand Your Ground" immunity to have meaningful appellate review, through statute or a writ of extraordinary relief, regardless of which party prevails. That right is lost, and neither party can be made whole if a trial occurs before the immunity issue is subject to review.

**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in affirming the Order and Judgment of the District Court and write separately so that the consistency of our jurisprudence is apparent. However, I dissent to the advisory dicta set forth in the Opinion.

Title 22 O.S.2011, § 1053 sets forth six separate enumerated circumstances where the State may appeal a trial court's judgment or order. We are bound by *stare decisis* in our interpretation of this statute. To determine whether § 1053 affords the State an appeal, we review the nature of the judgment or order to ascertain if it falls within the language of § 1053. *State v. Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d 991, 992. To resolve the nature of an order, we look to the specific request which the District Court sustained. *Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992 (finding District Court's order was not entered as result of motion to quash or set aside); *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1193-94 (finding motion to dismiss was essentially motion to quash for insufficient evidence); *State v. Thomason*, 2001 OK CR 27, ¶ 14, 33 P.3d 930, 934 (finding State's appeal pursuant to § 1053(3) where motion to quash, set aside, and dismiss charge best characterized as demurrer). In ascertaining the requested relief, this Court does not solely rely upon the title of the motion or pleading but instead reviews the substance of the request for relief. *Id.*; *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193; *Thomason*, 2001 OK CR 27, ¶ 14, 33 P.3d at 934.<sup>1</sup>

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<sup>1</sup> Nonetheless, I caution trial court practitioners to appropriately title their pleadings.

Even though the motions in the present case had originally been titled: “Motion to Quash and to Set Aside the Court Order Binding this Defendant Over to the District Court for Trial and Demurrer” and were essentially motions to quash for insufficient evidence pursuant to 22 O.S.2011, § 504.1, Appellees amended their motions and explicitly asserted that they were immune from prosecution pursuant to 21 O.S.Supp.2006, § 1289.25(F). There is no statutory authority for filing a motion requesting immunity, however, I find that the Appellees’ motion was properly filed. *State v. Hammond*, 1989 OK CR 25, ¶ 3, 775 P.2d 826, 829 (Lumpkin, J., Dissenting) (recognizing that criminal defendant may file motions encompassing wide variety of matters which may not be specifically enumerated in the statutes). Following the State’s appeal of the District Court’s suppression order, this Court remanded the matter and explicitly directed the District Court to determine whether Appellees had immunity under 21 O.S.Supp.2006, § 1289.25. The District Court sustained the amended motions and issued a written order stating: “these defendants are granted immunity from prosecution, and these cases are dismissed.” As the District Court explicitly granted Appellees immunity, the present case is distinguishable from those instances wherein this Court has reviewed a District Court’s order granting a motion to quash for insufficient evidence pursuant to § 1053(4). See *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193-94; *State v. Davis*, 1991 OK CR 123, ¶ 4, 823 P.2d 367, 369.

I also agree that Subsections 1 and 2 of § 1053 do not afford the State appellate review in this matter. *State v. Campbell*, 1998 OK CR 38, ¶¶ 6-7, 965

P.2d 991, 992. Because the District Court's Order in the present case explicitly granted Appellees immunity, a legal bar to further prosecution, the only State appeal authorized is upon a reserved question of law as provided in § 1053(3). *Id.*, 1998 OK CR 38, ¶¶ 8-9, 965 P.2d at 992; *Shepherd v. State*, 1992 OK CR 69, ¶ 9, 840 P.2d 644, 647.

Although the State's reserved questions are properly before the Court the Opinion itself goes far afield when it addresses "some additional unresolved procedural questions concerning pre-trial claims of Stand Your Ground immunity." I dissent to the Court's attempt to resolve future procedural questions and other issues not related to the adjudication of this appeal.

The Court's statement that a defendant must assert entitlement to Stand Your Ground immunity before trial, or the immunity is waived addresses an issue that is not presently before the Court. *Nesbitt v. State*, 2011 OK CR 19, ¶ 2, 255 P.3d 435, 441 (Lumpkin, J., concurring in part/dissenting in part) ("This Court has historically made emphatic statements that this Court cannot, should not, issue advisory opinions."). This declaration is dicta. *Id.* Nonetheless, I fear that the Court is shortsighted in this declaration. "A person who uses force, as permitted pursuant to the provisions of subsections B and D of this section, is justified in using such force and is immune from criminal prosecution and civil action for the use of such force." 21 O.S.2011, § 1289.25(F) (emphasis added). As this statutory provision both justifies and provides immunity, the defense of justifiable use of deadly force is available to a criminal defendant at trial regardless of any determination of immunity or

waiver thereof in pretrial proceedings. See Inst. No. 8-15, OUJI-CR(2d) (Supp.2014) (adopting justifiable use of deadly force against intruder instruction for use with 21 O.S.2011, § 1289.25 (B), (C), (F)); *Dawkins v. State*, 2011 OK CR 1, ¶ 14, 252 P.3d 214, 219 (finding error in instructions on “stand your ground” law harmless).<sup>2</sup>

I further dissent to the Court’s statement that a defendant may seek pretrial appellate review of a trial court’s denial of Stand Your Ground immunity through the filing of a writ of prohibition as it also addresses an issue that is not presently before the Court. Even though this statement is dicta, I note that it disregards the limitations of both our appellate and original jurisdiction.

Appeal is a creature of statute and exists only when expressly authorized. *Burnham v. State*, 2002 OK CR 6, ¶ 6, 43 P.3d 387, 389; *White v. Coleman*, 1970 OK CR 133, ¶ 11, 475 P.2d 404, 406. “[U]nless we are vested with original jurisdiction, all exercise of power must be derived from our appellate jurisdiction, which is the power and the jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law.” *In the Matter of L.N.*, 1980 OK CR 72, ¶ 4, 617 P.2d 239, 240. This Court does not engage in interlocutory review of an issue unless there is constitutional, statutory, or clear legal precedent establishing the circumstance. *Smith v. State*, 2013 OK CR 14, ¶ 24, 306 P.3d 557, 567. Absent a special right to interlocutory appeal, a criminal defendant must hold his

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<sup>2</sup> By analogy a defendant may file a pretrial motion challenging the voluntariness of a statement or confession but even if the motion is denied, the defendant may still raise the issue as a jury question. *Parent v. State*, 2000 OK CR 27, ¶ 17, 18 P.3d 348, 351-52; Inst. No. 9-12, OUJI-CR(2d) (Supp.2014).

complaint unless and until he has been convicted of, and sentenced for, the crime with which he is charged. *Id.*

The Legislature has not provided specific procedures for invoking or enforcing in the district courts the immunity granted within § 1289.25(F). Additionally, it has not created any special right of appeal to this Court should a trial court, in a criminal case, deny a pre-trial claim of immunity under § 1289.25(F). There are no published decisions by this Court or the United States Supreme court requiring pre-trial appellate review of a denied claim of immunity under this section. Therefore, there is no right to interlocutory review of a trial court's denial of a pre-trial claim of immunity under § 1289.25(F).

Section X of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), controls this Court's exercise of its original jurisdiction. For a writ of prohibition the appellant must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. *Office of State Chief Medical Examiner ex rel. Pruitt v. Reeves*, 2012 OK CR 10, ¶ 11, 280 P.3d 357, 359; Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). For a writ of mandamus, the petitioner has the burden of establishing (1) he or she has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *State, ex rel. Lane v. Bass*, 2004 OK CR 14, ¶ 5, 87

P.3d 629, 631 (*overruled on other grounds by Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135); *Woolen v. Coffman*, 1984 OK CR 53, ¶ 6, 676 P.2d 1375, 1377; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015).

Because the determination of the applicability of § 1289.25 involves the finding of facts, a trial court would have discretion in its resolution of a pre-trial claim of immunity. *See State v. Salathiel*, 2013 OK CR 16, ¶ 7, 313 P.3d 263, 266 (Applying abuse of discretion standard to review of district court's ruling on motion to dismiss); *Neloms v. State*, 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167 (holding this Court reviews trial court's evidentiary rulings for abuse of discretion); *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1142-43 (holding this Court reviews trial court's ruling on suppression motion for abuse of discretion); *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156 (holding review of trial court's ruling on motion for mistrial is for abuse of discretion); *Patterson v. State*, 2002 OK CR 18, ¶ 19, 45 P.3d 925, 930 (finding abuse of discretion review applicable when district court makes findings on an issue). This Court has often noted that writs of mandamus and prohibition are not appropriate to interfere in matters wholly within a district court's discretion. *Hamill v. Powers*, 2007 OK CR 26, ¶ 5, 164 P.3d 1083, 1085. Therefore, issuance of a writ of prohibition following a trial court's denial of a pre-trial motion asserting Stand Your Ground immunity would be inappropriate, and unauthorized by our Rules and case precedent.

As the Legislature has not expressly set forth the right of pre-trial appellate review of a trial court's denial of a motion asserting Stand Your Ground immunity, no such right to appeal exists. Even though the Court's statement is dicta, I cannot approve the idea of an appeal for which this Court is without jurisdiction.

**JOHNSON, JUDGE, SPECIALLY CONCURRING:**

I join the majority's well-reasoned disposition of this case. I write separately to emphasize the need for this Court, in the absence of legislative action, to allow a defendant to assert an immunity claim under 21 O.S.2011, § 1289.25 and to appeal any adverse ruling before a trial on the merits.

The situation here is analogous to that faced by this Court in *Allen v. District Court of Washington County*, 1990 OK CR 83, 803 P.2d 1164, *superceded by statute* 22 O.S.Supp.1994, §§ 2001-2002, and again in *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 567 *overruled by Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135. This Court held in *Allen* that, in the absence of legislative enactment, the proper administration of justice required us to promulgate rules for pre-trial discovery in criminal cases.

This Court is continually confronted with issues on appeal relating to compliance with pre-trial discovery within the framework of our criminal procedure. This case presents the pressing need to fill the gaps that currently exist within our statutory framework. As we held in *Inverarity v. Zumwalt*, 97 Okl.Cr. 294, 262 P.2d 725, 730 (1953) “[i]t is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction”. *See also Layman v. State*, 355 P.2d 444, 447 (Okl.Cr.1960).

*Allen*, 1990 OK CR 83, ¶ 13, 803 P.2d at 1167.

In *Murphy*, this Court again found that the proper administration of justice required us to establish procedures to allow defendants charged with capital murder to challenge their eligibility for the death penalty because of mental retardation in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242,

153 L.Ed.2d 335 (2002)(declaring executing the mentally retarded unconstitutional). The *Murphy* court noted its predicament, stating:

That puts this State in an interesting position, considering our legislature has attempted to [implement procedures to address *Atkins*], but our Governor has apparently disagreed with the legislature's efforts. Thus, the task falls upon this Court to develop standards to guide those affected until the other branches of government can reach a meeting of the minds on this issue.

*Murphy*, 2002 OK CR 32, ¶ 30, 54 P.3d at 567.<sup>1</sup>

In 2006, the Oklahoma legislature amended section 1289.25 to grant a person who uses force in accordance with the requirements of the statute immunity from criminal prosecution and defined "criminal prosecution" as "charging or prosecuting the defendant."<sup>2</sup> "Immunity" is a well understood legal term meaning "[f]reedom or exemption from penalty, burden, or duty." *Black's Law Dictionary*, 751 (6<sup>th</sup> ed. 1990). The legislative amendment created a statutory right of immunity from prosecution for the use of deadly force under certain conditions. Until 2006, section 1289.25—then referred to as "Make-My-Day"—provided only that a dwelling occupant had "an affirmative defense in any criminal prosecution for an offense arising from the reasonable

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<sup>1</sup> In *Blonner v. State*, 2006 OK CR 1, ¶ 5, 127 P.3d 1135, 1139, the Court adopted a different procedure to improve the resolution of claims of mental retardation as a bar to capital punishment.

<sup>2</sup> Subsection F of 21 O.S.2011, § 1289.25 provides:

A person who uses force, as permitted pursuant to the provisions of subsections B and D of this section, 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 charging or prosecuting the defendant.

Under § 1289.25(G), a law enforcement agency "may use standard procedures for investigating the use of force, but the law enforcement 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."

use of such force and [immunity] from any civil liability for injuries or death resulting from the reasonable use of such force.” 21 O.S.Supp.1987, § 1289.25 and 21 O.S.Supp.1995, § 1289.25. The Legislature’s 2006 amendment removed the language providing an affirmative defense, and instead, explicitly created a bar to criminal prosecution for those who use defensive force in accordance with the statute. See 21 O.S.Supp.2006, § 1289.25(F).

We presume that the Legislature has knowledge of the legal import of the words it uses. See *State ex rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250. We must further presume its choice to remove the affirmative defense language and insert the immunity language was calculated to bar criminal proceedings altogether against a person using force under the circumstances set forth in subsections B and D. *Id.* (“This Court will not presume the Legislature to have done a vain thing.”).

For this statutory right of immunity to have any affect on our criminal law and procedure, a defendant—charged with crimes arising out of circumstances colorably within the scope of section 1289.25(B) and (D)—must be able to fully litigate the issue pre-trial. The statute necessarily confers authority on a district court to determine before trial whether the statutory conditions for immunity from prosecution have been established and, if they have, to dismiss the criminal charges. As it did in *Allen* and *Murphy*, the proper administration of justice requires us, in the absence of legislative action, to establish procedures for defendants to assert a claim of immunity under

section 1289.25. On this point, there can be no real quarrel. And, the majority wisely used existing authority to fashion such a procedure.

Whether a defendant has a right to appeal an adverse immunity ruling through a writ of prohibition is an issue that sharply divides the Court. Without a right to seek corrective action from an adverse ruling before a trial on the merits, statutory immunity is effectively unenforceable. Protecting an immune defendant from the rigors of a criminal trial is the purpose for a grant of immunity. Forcing a defendant to erroneously endure the burden of a trial nullifies the objective of section 1289.25.

A defendant has always had the right to raise the issue of justifiable use of deadly force as an affirmative defense and appeal issues related to the defense upon conviction. The protection of immunity is not an interruption of the normal trial process, but is ancillary to it. Immunity under section 1289.25 is analogous to the right to avoid trial protected by the Double Jeopardy Clause. Denial of a pretrial claim of immunity or double jeopardy justifies immediate review because of the special nature of the asserted right. The very reason for such immunities is to protect a defendant from the burdens of trial, and that right is irretrievably lost if its denial is not immediately appealable. This right cannot be effectively vindicated after a trial has taken place.<sup>3</sup>

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<sup>3</sup> Oklahoma case law has recognized the writ process is appropriate to review pleas of former jeopardy before trial on the merits. See *Todd v. Lansdown*, 1987 OK CR 167, 747 P.2d 312; *Householder v. Ramey*, 1971 OK CR 205, 485 P.2d 247 *overruled on other grounds by Stockton v. State*, 1973 OK CR 200, 509 P.2d 153; *Heldenbrand v. Mills*, 1970 OK CR 146, 476 P.2d 375;

For the proper administration of justice, a defendant must press his immunity claim under section 1289.25 before trial to obtain the protection secured by the plain language of the statute; and any adverse ruling on an immunity claim must be reviewable by timely application for the writ of prohibition.<sup>4</sup>

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*Sussman v. District Court of Oklahoma County*, 1969 OK CR 185, 455 P.2d 724; *Hutchens v. District Court of Pottawatomie County*, 1967 OK CR 10, 423 P.2d 474.

<sup>4</sup> For such a writ to issue, the defendant must show (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Although there is fact finding involved, the issue is a mixed question of law and fact and is not wholly discretionary.

**HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in affirming the Order and Judgment of the District Court; however, I join with Judge Lumpkin's dissent and write separately to expand upon my concerns with the majority's over-reaching and ill-conceived decision to effectively create, through dicta, an interlocutory appeals process for Stand Your Ground cases.

The Legislature has not established a process for invoking or enforcing at the district court level the immunity granted within 21 O.S.Supp.2006, § 1289.25(F). Nor has the Legislature created any special right of appeal to this Court should a criminal defendant's pre-trial claim of immunity under § 1289.25(F) be denied. Furthermore, it is not this Court's role to undertake the responsibility of legislating by judicial fiat to create an interlocutory appeal process. Okla. Const. art. IV, § 1; *Roberson v. State*, 91 Okla. Crim. 217, 236-37, 218 P.2d 414, 423 (1950) ("It is not our place to legislate but to interpret.").

As accurately observed by Judge Lumpkin, the majority seeks to create a pre-trial review process that totally disregards this Court's appellate and original jurisdiction limitations. This Court cannot and should not engage in interlocutory review of an issue where no constitutional, statutory or clear legal precedent exists to do so. "[W]rits of mandamus and prohibition are not appropriate to interfere in matters wholly within a district court's discretion, or where some alternative remedy is available to the petitioner." *Hamill v. Powers*, 2007 OK CR 26, ¶ 5, 164 P.3d 1083, 1085. A pre-trial § 1289.25(F) immunity determination inherently involves the finding of facts, and the exercise of

discretion, by the district court. Thus, a writ simply cannot be used to attack a trial judge's denial of immunity pursuant to § 1289.25(F).

Additionally, the majority's proposed interlocutory appeals process would result in unnecessary delay and create an additional burden on an already overtaxed criminal justice system. As set forth by Judge Lumpkin (and contrary to the majority's opinion), a defendant is not precluded from raising the defense of justifiable use of deadly force before the jury and on direct appeal. Under current Oklahoma law, direct appeal is the only appropriate procedural vehicle by which a defendant can seek appellate review of the trial court's pre-trial § 1289.25(F) immunity ruling. The prospect of trial counsel interrupting the normal trial process with an interlocutory appeal addressing the trial court's § 1289.25(F) immunity ruling is untenable in light of a defendant's ability (a) to raise the immunity issue with the district court; (b) present the issue as an affirmative defense to a jury at trial; and (c) raise the issue again on direct appeal before this Court, having the benefit of a more fully developed record than was had before the district court's pre-trial determination.

The majority's approach to these cases through dicta is overreaching and unwise; therefore, I dissent.