
STAND YOUR GROUND IMMUNITY: A DEFENDANT'S CATCH-22 DILEMMA

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I. INTRODUCTION

Stand Your Ground immunity grants an individual legal protection to use force against another in a place where he or she has a right to be.¹ In conducting a facial review of Oklahoma's Stand Your Ground statute,

The Legislature did not say that a person fitting the parameters of § 1289.25 could be prosecuted to the extent necessary to establish that his use of force was reasonable and justified; nor did it say that immunity is lost when evidence is presented in pretrial proceeding. The Legislature said instead that person "is immune from criminal prosecution and civil action," including "charging or prosecuting the defendant."²

Needless to say, an individual whose conduct is afforded protection under Oklahoma's Stand Your Ground statute may erroneously be forced to stand trial when a district judge abuses his or her discretion in denying his or her request for immunity. A defendant may generally obtain a writ of prohibition when a district judge abuses his or her discretion.³ A writ of prohibition was the proper procedure in *State v. Ramos*, in which the defendant sought an interlocutory review of the lower court's denial of

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1. Tit. 21, § 1289.25.

2. *McNeely v. State*, 2018 OK CR 18, ¶ 6, 422 P.3d 1272, 1281 (quoting Tit. 21, § 1289.25(F)).

3. OKLA. STAT. tit. 22, § 1051(a) (2011).

his Stand Your Ground immunity claim.⁴

The Court in *Ramos* authorized interlocutory reviews of Stand Your Ground immunity that “shall govern future cases.”⁵ Three years later, the same Court that decided *Ramos* overruled that approach in *McNeely v. State*.⁶ The only difference between the two cases is that the defendant in *McNeely* sought an interlocutory appeal through a writ of mandamus. There, the Court held that there would be no interlocutory appeals from any other lower court ruling that denies a motion to dismiss charges based on a claim of Stand Your Ground immunity.⁷

This Comment begins by dissecting Oklahoma’s Stand Your Ground statute⁸ and the Legislature’s intent with regard to the different rights it affords. It will introduce how the proper procedure in different states is through a writ of prohibition for an interlocutory review on this issue and will address how the Court in *Ramos* also came to this conclusion. Second, this Comment will describe the facts, procedural posture, opinion, concurrence, and dissent in *McNeely*, in which the Court overruled *Ramos*. Following an analysis of *McNeely*, this Comment will explore why the Court was incorrect in coming to its conclusion.

II. HISTORICAL BACKGROUND

Stand Your Ground statutes, also known as *make my day* statutes, have been enacted in many jurisdictions as a type of criminal immunity for defendants who use force to protect themselves within their own homes, places of business, or places of worship.⁹ In contrast to the common law, most Stand Your Ground statutes no longer require a person to retreat from confrontation.¹⁰ Based on the plain language of Oklahoma’s Stand Your Ground Statute in section 1289.25(D),¹¹ the

4. See *State v. Ramos*, No. S-2013-509, slip. op at 11 (Okla. Crim. App. June 9, 2015) (unpublished).

5. *Id.*

6. See *McNeely v. State*, 2018 OK CR 18, 422 P.3d 1272.

7. *Id.* ¶ 3, 422 P.3d at 1281.

8. See OKLA. STAT. tit. 21, § 1289.25 (2011 & Supp. 2019).

9. Tit. 21, § 1289.25(A).

10. Jay M. Zitter, Annotation, *Construction and Application of “Make My Day” and “Stand Your Ground” Statutes*, 76 A.L.R. FED. 6TH ART. 1 (2012).

11. Tit. 21, § 1289.25(D):

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly

Legislature clearly intended to allow an individual who is in a place where he has the right to be to protect himself against acts of aggression. Defensive force can be used against someone who is “in the process of unlawfully and forcefully entering . . . a dwelling, residence, occupied vehicle, or a place of business”, and the person using the defensive force “knew or had reason to believe that an unlawful and forcible entry . . . was occurring or had occurred.”¹²

The Oklahoma Legislature recognizes Stand Your Ground immunity as a right for its citizens to expect “absolute safety” within places he or she has a right to be.¹³

A person who uses defensive force, as permitted pursuant to the provisions of subsections A, B, D and E of this section, is justified in using such defensive force and is **immune from criminal prosecution** and civil action for the use of such defensive force. As used in this subsection, the term “criminal prosecution” includes charging or prosecuting the defendant.¹⁴

The Legislature’s intent in providing this immunity was to exclude persons who were actively committing a crime from the benefit of this statute.¹⁵ A defendant whose actions fall under section 1289.25(B) is precluded from the protections afforded by this statute when an exception in section 1289.25(C) applies.¹⁶ Therefore, “a person can be

force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

12. Tit. 21, § 1289.25(B)(1)-(2).

13. Tit. 21, § 1289.25(A).

14. Tit. 21, § 1289.25(F) (emphasis added).

15. See *Dawkins v. State*, 2011 OK CR 1, ¶ 8, 252 P.3d 214, 217.

16. Tit. 21, § 1289.25 (B)-(C):

C. The presumption set forth in subsection B of this section does not apply if:

1. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not a protective order from domestic violence in effect or a written pretrial supervision order of no contact against that person;
2. The person or persons sought to be removed are children or grandchildren, or are otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or
3. The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, occupied vehicle, place of business or place of

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.”¹⁷

When there is probable cause to believe the defendant is guilty of an offense, a district judge must conduct a preliminary examination to determine whether the defendant is immune from further prosecution.¹⁸ An order granting immunity assumes the charging information is true but justifies the use of force under the Stand Your Ground law.¹⁹ A district judge’s “order granting Stand Your Ground immunity is neither a judgment setting aside the information nor a judgment quashing it for insufficient evidence subject to re-filing at some future date.”²⁰ Stated differently, a defendant’s charges will be dropped, and he can no longer be prosecuted on that charge. In contrast, when a judge denies a defendant’s motion for Stand Your Ground immunity, he or she agrees that there is sufficient probable cause to show that the defendant’s conduct is not authorized by law.

“Appeal is a creature of statute and exists only when expressly authorized.”²¹ A criminal defendant in Oklahoma has a statutory right to appeal from a judgement made against him or her:

An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him, which shall be taken as herein provided; and, upon the appeal, any decision of the court **or intermediate order** made in the progress of the case may be reviewed²²

Accordingly, the Oklahoma Court of Criminal Appeals can conduct an interlocutory review of an intermediate order when there is constitutional, statutory, or judicially-created authority to do so.²³

A common approach in different jurisdictions for an interlocutory

worship to further an unlawful activity.

17. State v. Ramos, No. S-2013-509, slip op. at 9 (Okla. Crim. App. June 9, 2015) (unpublished).

18. *Id.* at 7.

19. *Id.*

20. *Id.* at 6-7.

21. McNeely v. State, 2018 OK CR 18, ¶ 3, 422 P.3d 1272, 1272 (citing White v. Coleman, 1970 OK CR 133, ¶ 11, 475 P.2d 404, 406).

22. OKLA. STAT. tit. 22, § 1051(a) (2011) (emphasis added).

23. *McNeely*, ¶ 3, 422 P.3d at 1274.

review of a ruling on Stand Your Ground immunity has been through a writ of prohibition.²⁴ A writ of prohibition will be issued when a petitioner establishes the following: “(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.”²⁵ This was introduced in Oklahoma as the proper procedure for pre-trial appellate review of a trial court’s denial of Stand Your Ground immunity in *State v. Ramos*.²⁶ *Ramos* was the first judicially-created authority in Oklahoma that granted a petitioner a pre-trial appellate review on a Stand Your Ground ruling through a writ of prohibition. There, the Court reasoned that when a defendant is erroneously forced to stand trial, the district judge’s exercise of judicial power in denying his immunity from prosecution is unauthorized by law.²⁷ *Ramos* allowed an interlocutory review on Stand Your Ground rulings that “shall govern future cases” in Oklahoma.²⁸

Following *Ramos*, the defendant in *McNeely v. State*²⁹ attempted to have the Oklahoma Court of Criminal Appeals conduct an interlocutory review of a Stand Your Ground ruling through a different procedural vehicle. Here, the defense tried to get their foot in the door through a writ of mandamus.³⁰ A writ of mandamus will be issued when a petitioner establishes the following: “(1) he 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.”³¹

There is debate as to whether the immunity granted by Oklahoma’s Stand Your Ground statute should be regarded as an absolute legal right

24. See *State v. Ramos*, No. S-2013-509, slip op. at 11 (Okla. Crim. App. June 9, 2015) (unpublished). See also *Wood v. Colorado*, 255 P.3d 1136, 1141-42 (Colo. 2011); *Bretherick v. Florida*, 170 So. 3d 766, 788 (Fla. 2015) (pre-trial original proceeding or petition for writ of prohibition are proper methods to challenge denial of Stand Your Ground immunity).

25. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

26. *Ramos*, slip. op. at 11.

27. *Id.* at 9.

28. *Id.* at 11.

29. See *McNeely v. State*, 2018 OK CR 18, 422 P.3d 1272.

30. *Id.* ¶ 1, 422 P.3d at 1274.

31. Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

or as a conditional immunity.³² Immunity is “defined as an exemption from a duty or liability, as granted by law to a person or class of persons.”³³ Although a legal right and a conditional immunity both involve a defense to criminal prosecution at different degrees, this distinction is important for determining whether an interlocutory appeal should be done through a writ of mandamus or a writ of prohibition. A legal right is a question of law that creates an absolute immunity to criminal prosecution.³⁴ The executive branch of the government authorizes the immunity that comes from a legal right, and in a criminal prosecution, it is the court’s duty to confirm that immunity.³⁵ A conditional immunity is a justified defense that applies if certain factual elements are met.³⁶ Because conditional immunity warrants a factual determination, it can never be a clear legal right.

III. MCNEELY V. STATE

A. Facts and Procedural History

Vicky McNeely (Mrs. McNeely) was arrested on January 11, 2013, for the charge of First Degree Murder when she shot and killed her husband (Mr. McNeely) in their home.³⁷ Upon arrival, the police found two butcher knives in front of Mr. McNeely’s dead body.³⁸ Mrs. McNeely alleged “she was forced to shoot her husband Daniel, who had threatened to kill her and then himself and was coming at her with two (2) butcher knives.”³⁹ The autopsy report showed Mr. McNeely was legally intoxicated and under the influence of a prescribed controlled substance when he died.⁴⁰ The evidence developed through discovery also showed Mr. McNeely was on suicide watch close to the date of his

32. McNeely, ¶ 7, 422 P.3d at 1275.

33. *Id.* (citing *Immunity*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

34. *McNeely*, ¶ 6, 422 P.3d at 1275.

35. *Id.* ¶ 2, 422 P.3d at 1276 (Lumpkin, J., concurring).

36. *See id.* ¶ 7, 422 P.3d at 1275.

37. Petition for Writ of Mandamus; Brief in Support; and Application for Stay of Proceedings at 2, *McNeely v. State*, 2018 OK CR 18, 422 P.3d 1272 (Okla. Crim. App. 2018) (No. MA-2017-770).

38. Defendant’s Amended Motion for Determination of Immunity and Request for Evidentiary Hearing at 1, *State v. McNeely*, No. CF-13-343 (Tulsa Cty. Ct. Jun. 23, 2015).

39. *Id.*

40. *Id.*

death and had a history of depression.⁴¹ It is undisputed that Mr. McNeely was arrested in August 2011 for allegations of domestic violence against Mrs. McNeely; however, there is nothing in the record that indicates Mrs. McNeely ever filed for a protective order for domestic violence against Mr. McNeely.⁴²

Mrs. McNeely argued that she was immune from criminal prosecution under section 1289.25(D) and section 1289.25(F) of Oklahoma's Stand Your Ground statute.⁴³ On June 23, 2015, Mrs. McNeely filed a Motion for Determination of Immunity and Request for Evidentiary Hearing.⁴⁴ Shortly thereafter, an immunity hearing was held, and on June 28, 2017, the court issued a written order denying Mrs. McNeely's grant of immunity from prosecution.⁴⁵ The district judge determined Mrs. McNeely was not subject to Stand Your Ground protection because the statute exempts an individual from using defensive force against a person who is a lawful resident of the dwelling.⁴⁶ Following this order, Mrs. McNeely filed a Petition for Writ of Mandamus seeking relief from a pre-trial appellate review, citing *State v. Ramos*⁴⁷ therein.

B. The Court's Opinion and Holding

The Oklahoma Court of Criminal Appeals held "that an extraordinary writ proceeding is not cognizable to allow merits review of a District Court's pretrial ruling denying Stand Your Ground immunity."⁴⁸ Here, the Court overruled its earlier decision from *Ramos* and created a procedural precedent: "Whether through a writ of prohibition or mandamus, we now expressly reject our previous approach to these cases."⁴⁹ It reasoned "there is simply no statutorily authorized means under existing law to address the issue pretrial as it is presented here."⁵⁰ More specifically, the Court concluded that had it been the

41. *Id.* at 1-2.

42. Petition, *supra* note 37, at 3.

43. OKLA. STAT. tit. 21, § 1289.25 (2011 & Supp. 2019).

44. Petition, *supra* note 37, at 3.

45. Petition, *supra* note 37, at 4.

46. *McNeely v. State*, 2018 OK CR 18, ¶ 2, 422 P.3d 1272, 1274.

47. Petition, *supra* note 37, at 1, 19-20.

48. *McNeely*, ¶ 4, 422 P.3d at 1274.

49. *Id.*

50. *Id.* ¶ 5, 422 P.3d at 1275.

legislature's intent to include a statutory right to an interlocutory appeal on Stand Your Ground issues, it would have included it in section 1289.25.⁵¹ The Special Concurrence made it crystal clear that if the Court were to create a right of interlocutory appeal from this immunity, it would "constitute legislating in derogation of the separation of powers."⁵²

As previously mentioned, the Court in *Ramos* allowed a writ of prohibition as the procedural vehicle for an interlocutory review on Stand Your Ground immunity.⁵³ This is no longer good law.⁵⁴ A writ of prohibition should only be issued when the court has exercised power, and the exercise of said power is unauthorized by law and results in irreparable injury.⁵⁵ The same Court that once found this issuance proper later found it incorrect because the purpose of this extraordinary writ is "not to address the merits of a decision rendered after the exercise of authorized judicial power."⁵⁶ The majority in *Ramos* justified its ruling on the fact that when a defendant is erroneously forced to stand trial, there is no adequate remedy for a defendant losing his right to not be prosecuted.⁵⁷ However, because a magistrate is authorized to rule on a motion for Stand Your Ground immunity, the Court in *McNeely* determined that a writ of prohibition is inapplicable for this type of interlocutory appeal.⁵⁸

The defendant in *McNeely* proposed, in addition to a writ of prohibition, a writ of mandamus operates synonymously to allow a pre-trial review of a trial court's denial of Stand Your Ground immunity.⁵⁹ A writ of mandamus would be proper had the Court concluded that an individual has a clear legal right to this type of immunity.⁶⁰ Instead, the majority in *McNeely* concluded "Stand Your Ground immunity is necessarily a factual determination and thus can never be a clear legal right."⁶¹ A legal right is a question of law, not a question of fact.

51. *Id.* ¶ 4, 422 P.3d at 1274.

52. *Id.* ¶ 3, 422 P.3d at 1277 (Rowland, J., specially concurring).

53. *See* State v. Ramos, No. S-2013-509, slip op. (Okla. Crim. App. June 9, 2015) (unpublished).

54. *McNeely*, ¶ 4, 422 P.3d at 1275.

55. *Id.* ¶ 5, 422 P.3d at 1275.

56. *Id.*

57. *See Ramos*, slip op. at 11.

58. *McNeely*, ¶ 5, 422 P.3d at 1275.

59. Petition, *supra* note 37, at 21.

60. *See McNeely*, ¶ 6, 422 P.3d at 1275.

61. *Id.*

Therefore, when a district judge exercises discretion in denying a claim of Stand Your Ground immunity, he or she is not refusing to perform a legal right.⁶² Here, the majority determined that an interlocutory review of the lower court's determination on a set of alleged facts is not the proper function of an extraordinary writ of mandamus.⁶³

C. Concurring Opinions

The concurrence in *McNeely* dissected the main issue the Court addressed: "whether we, as an appellate court, have the power to fashion such an appeal in the absence of legislative action."⁶⁴ The Oklahoma Legislature has only indicated that a defendant is afforded a pre-trial opportunity under section 1289.25 to make their case for immunity; therefore, its silence on a right to pre-trial appellate review should be interpreted as silence.⁶⁵ The concurrence took it a step further to address that if it were possible to create an appellate remedy without violating the separation of powers, "it could not be done by extraordinary writ without doing violence to our jurisprudence in those two areas."⁶⁶

"[T]he use of the [words] 'immune from criminal prosecution' [in the statute] creates some confusion as it is impossible for one to have absolute immunity from *any* prosecution when determination of that immunity requires at least *some* initial prosecution."⁶⁷ Because the language of the statute does not endorse *absolute* immunity from any prosecution, the law explicitly authorizes a trial court's denial on the question of immunity.⁶⁸ Thus, neither a writ of prohibition nor a writ of mandamus should be accepted as the proper method for pre-trial appellate review.⁶⁹ The Legislature only affords the accused to have a district court rule as to whether he or she may be further prosecuted.⁷⁰ There is no way for a right to an interlocutory appeal to be implied by the language in the statute.⁷¹ The concurrence offered that, even if a right

62. *Id.*

63. *Id.*

64. *Id.* ¶ 1, 422 P.3d at 1277 (Rowland, J., specially concurring).

65. *Id.* ¶ 5, 422 P.3d at 1278.

66. *Id.* ¶ 8, 422 P.3d at 1278.

67. *Id.* ¶ 6, 422 P.3d at 1278.

68. *Id.*

69. *Id.* ¶ 8, 422 P.3d at 1278.

70. *Id.*

71. *Id.* ¶¶ 7, 9, 422 P.3d at 1278.

were to exist, the Court would have to morph into a legislature to fashion parameters to answer whether both parties should have that right, whether the appeal must be immediate, whether it should be made to the trial judge or presiding district judge, among many other questions.⁷² To reiterate, silence should be interpreted as silence.

D. Dissenting Opinions

The dissent frowned upon the overruling of *State v. Ramos* and found the majority's judgment a "needless destruction of the interlocutory review procedure for Stand Your Ground immunity claims [that were] established almost three years ago."⁷³ Because the Oklahoma Legislature has had three years to alter "the *Ramos* procedure" in its sessions, there is no reason why it should be abandoned now.⁷⁴ The dissent further critiqued the Court stating it is at fault for turning "Stand Your Ground immunity into a present day Catch-22" in "misconstruing its *original* and *appellate* jurisdiction."⁷⁵ Simply put, the dissent disagrees with the majority's interpretation of *immunity* as it pertains to section 1289.25(F). The words "immune from criminal prosecution"⁷⁶ should be construed "according to the plain and ordinary meaning of its language, as our 'fundamental principle' is to give effect to the Legislature's intent."⁷⁷ When the district judge makes a dispositive determination that a defendant is immune from prosecution, the case is closed.⁷⁸ Therefore, Stand Your Ground immunity is "a right which is necessarily lost if a prosecution continues, [and which] is exactly the kind of dispositive claim ripe for a writ of prohibition."⁷⁹

Furthermore, the dissent pointed out how it is not uncommon for the

72. *Id.* ¶ 7, 422 P.3d at 1278.

73. *Id.* ¶ 1, 422 P.3d at 1278-79 (Lewis, J., dissenting).

74. *Id.* ¶ 2, 422 P.3d at 1279.

75. *Id.* ¶ 3, 422 P.3d at 1279.

76. OKLA. STAT. tit. 21, § 1289.25(F) (Supp. 2018):

A person who uses defensive force, as permitted pursuant to the provisions of subsections A, B, D and E of this section, is justified in using such defensive force and is immune from criminal prosecution and civil action for the use of such defensive force. As used in this subsection, the term 'criminal prosecution' includes charging or prosecuting the defendant.

77. *McNeely*, ¶ 4, 422 P.3d at 1281 (Kuehn, J., dissenting) (quoting *Gerhart v. State*, 2015 OK CR 12, ¶ 14, 360 P.3d 1194, 1198).

78. *Id.* ¶ 1, 422 P.3d at 1280.

79. *Id.* ¶ 3, 422 P.3d at 1280.

Court to imply an interlocutory right to appeal where it is not expressly stated and has in fact done so for the State regarding a decision on Stand Your Ground immunity.⁸⁰ The Court has previously held “that the State may appeal such a decision . . . [when] a defendant raises Stand Your Ground immunity in a motion to quash, rather than moving to dismiss the charges directly under Stand Your Ground.”⁸¹ Thus, there are loopholes for the State to “have an avenue of appeal from an unfavorable decision below, and may have the opportunity to continue the prosecution, depending on how a defendant happens to raise the issue in the trial court.”⁸² The dissent concluded that both the State and the defendant should have equal opportunity to an interlocutory appeal, and to preserve the Stand Your Ground immunity, a pre-trial appellate review must be included.⁸³

VI. ANALYSIS

If the defendant in *McNeely* had sought an interlocutory appeal through a writ of prohibition instead of a writ of mandamus, the Court would likely have followed the decision established in *Ramos* and would not have held that an extraordinary writ proceeding is not cognizable for review of Stand Your Ground immunity.⁸⁴ I agree with the majority in part that a writ of mandamus is not the proper method in this case; however, shutting the door on any attempt for an interlocutory review of an order denying this sort of immunity does not serve any justice. To this extent, I side with the dissent that a writ of prohibition is appropriate and “incidental to judicial administration.”⁸⁵ More specifically, there are three reasons why a writ of prohibition is the proper vehicle: (1) the same Court that allowed a writ of prohibition in *Ramos* authorized an interlocutory review of an intermediate order on this issue; (2) there is room for error when a district judge decides an intermediate order which can result in an unauthorized exercise of power; and (3) it is unfair to eliminate all avenues of pre-trial appellate review for a defendant when there are loopholes for the State.

80. *Id.* ¶ 7, 422 P.3d at 1281.

81. *Id.* See OKLA. STAT. tit. 22, § 1053(4) (2011 & Supp. 2019).

82. *Id.*

83. *Id.* ¶ 9, 422 P.3d at 1282.

84. *Id.* ¶ 4, 422 P.3d at 1274 (summary opinion).

85. *Id.* ¶ 9, 422 P.3d at 1282 (Kuehn, J., dissenting).

A. Overruling Ramos

What changed in three years that made the same Court in *Ramos* later decide that no method of pre-trial appellate review of denials on Stand Your Ground immunity shall govern future cases? Perhaps it was the appointment of two new judges on the Oklahoma Court of Criminal Appeals; or perhaps the same judge who wrote the dissent in *Ramos* and later wrote the majority's opinion in *McNeely* had a lot of influence on the decision. It should be noted that because *Ramos* was an unpublished opinion by the Oklahoma Court of Criminal Appeals, its decision in that case is not treated as precedent. Therefore, *Ramos* was not binding on the Court's decision in *McNeely*. This is what gave the majority in *McNeely* enough wiggle room to prohibit any interlocutory appeals of Stand Your Ground Immunity. That said, there are a few things the majority in *McNeely* failed to address.

Firstly, the majority stresses that because the Oklahoma Legislature did not expressly include a statutory right to an interlocutory appeal to the court on Stand Your Ground issues, there are no other procedural methods for a defendant to obtain one. The Court in *McNeely* undoubtedly misconstrued its original and appellate jurisdiction in asserting that the creation of an interlocutory appeal from Stand Your Ground immunity would "constitute legislating in derogation of the separation of powers."⁸⁶ The Oklahoma Court of Appeals can hold an interlocutory review of an intermediate order when there is "constitutional, statutory, or judicially-created authority" to do so.⁸⁷ Article 7, section 4 of the Oklahoma Constitution states:

The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute.⁸⁸

The State's Constitution expressly grants the Oklahoma Court of Criminal Appeals original jurisdiction to review a writ of prohibition.

86. *Id.* ¶ 3, 422 P.3d at 1277 (Rowland, J., specially concurring).

87. *Id.* ¶ 3, 422 P.3d at 1274.

88. OKLA. CONST. art. 7, § 4.

Conducting an interlocutory review through a writ of prohibition is also well within the Court's jurisdictional limits. Thus, when the Court in *Ramos* allowed an interlocutory review on Stand Your Ground rulings, this did not constitute legislating in derogation of the separation of powers. The Court's ability to conduct this type of interlocutory review was rational and constitutional. Therefore, the issue that the Court in *Ramos* addressed was in fact no issue at all. The Court of Criminal Appeals does have the power to fashion such an appeal because the State's Constitution gives it the power to do so. With regard to the proper procedural vehicle in obtaining an interlocutory review of a Stand Your Ground ruling, it was also within the Court's discretion to hold that it can be done through a writ of prohibition.

Arguably, the issue on appeal in *McNeely* was whether the Court could conduct an interlocutory review on a Stand Your Ground ruling through a writ of mandamus. Instead, it narrowed the question to whether it is appropriate to conduct an interlocutory appellate review on this type of immunity at all. If the Court already addressed this issue three years prior, why did it feel the need to address the merits of that decision again? The constitutionality of the Court's decision in *Ramos* was never appealed nor had it been up for debate until *McNeely*. The justices in *Ramos*, including Justice Harland who dissented in *Ramos* and who later wrote the majority opinion in *McNeely*, never discussed whether it was constitutional for the Court to grant interlocutory review of this immunity. It did not address that issue because the Court has the authority to create intermediate reviews on certain issues. Because it has the authority to do this, there is no need for the Court to retract its decision in *Ramos*.

To reiterate, the Court in *Ramos* allowed a defendant "to 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 future cases.⁸⁹ Though *McNeely* ruled that no interlocutory review of Stand Your Ground immunity is available for a defendant,⁹⁰ it failed to complement its holding with the simple language in its Court rules that:

[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against

89. *State v. Ramos*, No. S-2013-509, slip op. at 11 (Okla. Crim. App. June 9, 2015) (unpublished).

90. *McNeely*, ¶ 8, 422 P.3d at 1275.

him, which shall be taken as herein provided; and, upon the appeal, any decision of the court **or intermediate order** made in the progress of the case may be reviewed⁹¹

An order denying Stand Your Ground immunity at the district court level is an intermediate order made in the progress of a case. This coupled with the holding in *Ramos* is what should have given the defense in *McNeely* the right to a pre-trial appellate review.

B. Room for Error

Secondly, a judge should remain objective and reasonable when it comes to their rulings; however, that is not to say that every decision will be perfect. Even a neutral and detached magistrate has room for error. It is fair to say that all judges exercise authorized judicial power because they are under oath and have the right to make the decisions while they are on the bench. Needless to say, the mere fact that they are authorized to make decisions does not mean their decision is authorized by law. The judicial system made room for this type of error in our appellate process, which is why some cases on appeal reverse the lower court's ruling. Therefore, when a district judge erroneously makes a defendant face further criminal prosecution after a denial of Stand Your Ground immunity, he or she will not be afforded protection under the statute. The statute was designed to shield a person who has exercised their right to stand their ground from facing further criminal prosecution.⁹² Therefore, when a defendant is stripped of this right, there is no other adequate remedy because he has to go through what he was told would not happen—criminal prosecution.

The Court in *State v. Ramos* was correct in holding a writ of prohibition is the proper vehicle for interlocutory review on a Stand Your Ground ruling. However, the same Court in *McNeely* later held that, because a judge has the authority to determine a defendant's immunity on Stand Your Ground, a writ of prohibition⁹³ should not be issued since

91. OKLA. STAT. tit. 22, § 1051(a) (2011) (emphasis added).

92. Tit. 21, § 1289.25(D).

93. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (Supp. 2018):

Writ of Prohibition. Petitioner has the burden of establishing (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

that exercise of authority is authorized by law. Interpreting this narrowly, yes, a judge does have the power to make immunity determinations; nevertheless, when a judge abuses his or her discretion and unlawfully denies a defendant's Stand Your Ground immunity, this abuse is not authorized by law and should be subject to interlocutory appellate review. Thus, a writ of prohibition is the correct method for a review on Stand Your Ground immunity, and the Court in *Ramos* did not abuse its discretion in making that authorization.

C. An Interlocutory Appeal for the State

Thirdly, the opinion in *McNeely* took it a step too far when it held that there is no interlocutory appeal to the Court from the lower court's order, "or any other District Court ruling that denies a motion to dismiss charges based on a claim of Stand Your Ground immunity from prosecution under Section 1289.25."⁹⁴ What justice is served in shutting down all possible avenues of interlocutory review for a defendant when the State can still have a bite of the apple?⁹⁵ The State can present questions of law on a Stand Your Ground immunity ruling that can fit seamlessly within the parameters of a reserved question of law, and in fact has done so in *State v. Cooper*.⁹⁶ This is not mentioned at all in the majority's opinion, although it does not fail to address why an order on Stand Your Ground immunity is a factual determination rather than a legal right.⁹⁷ If the majority feels so strongly about that determination, surely the State should not be able to get an interlocutory review since a Stand Your Ground immunity ruling is not a question of law. This can certainly have consequences down the line. The majority unfortunately does not take these considerations into mind. If the State still has the ability to obtain an interlocutory review on this matter, the Court in *McNeely* should not have robbed a defendant from having that same right.

power will result in injury for which there is no other adequate remedy.

94. *McNeely*, ¶ 3, 422 P.3d at 1274.

95. See *State v. Cooper*, No. S-2014-961, slip op. at 6-7 (Okla. Crim. App. July 5, 2015) (unpublished). See also Tit. 22, § 1053(4).

96. *Cooper*, slip op. at 6-7.

97. *McNeely*, ¶ 6, 422 P.3d at 1275.

D. Repercussions Down the Road

Thankfully, the Court in *McNeely* did not necessarily do any harm to the defendant's case in denying a pre-trial appellate review. Here, the defendant erroneously claimed immunity from prosecution under section 1289.25(D),⁹⁸ although the applicable section to the case is section 1289.25(B)⁹⁹ since the homicide occurred within the defendant's residence.¹⁰⁰ The defendant is precluded from claiming immunity under section 1289.25(B) because of the exception in section 1289.25(C)(1):

The presumption set forth in subsection B of this section does not apply if:

The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not a protective order from domestic violence in effect or a written pretrial supervision order of no contact against that person¹⁰¹

Because Mrs. McNeely shot and killed her husband in their home, she would not be afforded Stand Your Ground protection under this exception. At no point does the record reflect that there ever was a protective order in effect, nor does the defense argue that Mrs. McNeely had attempted to get one after her husband's arrest in 2011 for allegations of domestic violence against her. If the defense showed evidence that Mrs. McNeely did in fact take measures to obtain a protective order against her husband, an argument for Stand Your Ground immunity under section 1289.25(C)(1) would have a little more weight. However, because this was not done, the lower court made a fair ruling in denying Mrs. McNeely's request for immunity because there is

98. Tit. 21, § 1289.25(D):

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

99. See Tit. 21, § 1289.25(B).

100. See State's Supplemental Brief to the Court at 2, *McNeely v. State*, 2018 OK CR 18, 422 P.3d 1272 (No. CF-2013-0343).

101. Tit. 21, § 1289.25(C)(1).

nothing in the statute that would warrant Mrs. McNeely Stand Your Ground protection.

However, just because the lower court in *McNeely* made a sound decision on Mrs. McNeely's motion does not mean that a judge will get an intermediate order right every time. For example, what if Mr. McNeely was prosecuted for the allegations of domestic violence against Mrs. McNeely and received a pre-trial supervision order of no contact with her, to which they would mutually ignore here and there? A situation like this could create a grey area, and a judge would be on the fence about granting a Stand Your Ground immunity. Depending on the arguments made at the evidentiary hearing, an interlocutory appeal could be the best route in determining whether a defendant should be stripped of his or her right to not be criminally prosecuted. A higher court's determination would inevitably resolve this grey area and would eliminate the likelihood of a defendant appealing on those grounds.

E. Correct in Part

The majority in *McNeely* was not entirely wrong when they decided that a writ of mandamus was not the proper method for receiving an interlocutory review on Stand Your Ground immunity. I agree with the opinion that "Stand Your Ground immunity is necessarily a factual determination and thus can never be a clear legal right."¹⁰² A defendant has a right to not be further prosecuted if he is afforded protection under the statute; however, this immunity is not absolute from any criminal prosecution. The defendant must be initially charged in order to assert this immunity in the first place. The defendant will then be prosecuted as to whether he or she should be immune from further prosecution after the defense presents "evidence showing why, under all the facts and circumstances of the case, the defendant's use of force was reasonable and justified under the Stand Your Ground law."¹⁰³ There is no clear legal right from being prosecuted if, in order to assert this immunity, a defendant must be prosecuted to some degree. Because Stand Your Ground protection is a conditional immunity, it would not be proper to get an interlocutory review through a writ of mandamus.

The State of Oklahoma treats Stand Your Ground immunity in the

102. *McNeely v. State*, 2018 OK CR 18, ¶ 6, 422 P.3d 1272, 1275.

103. *Id.* ¶ 8, 422 P.3d at 1275.

same category as self-defense.¹⁰⁴ Self-defense is also a conditional immunity that justifies a defendant's use of force against another person.¹⁰⁵ Both a Stand Your Ground immunity and a justification of self-defense can be given as jury instructions in a criminal proceeding. Given that Stand Your Ground protection and self-defense are factual determinations, it is appropriate for the trier of fact to deliberate on whether a defendant's conduct is justified on these grounds. Similar to how questions of law are for the judge to decide, questions of fact are reserved for the jury. Of course, when a judge denies a pre-trial request for Stand Your Ground immunity, he or she considers the facts and decides that the defendant is not subject to this immunity as a matter of law. However, the judge could still allow a defendant to receive a jury instruction on Stand Your Ground immunity where he or she sees fit. Ultimately, a clear legal right is not a speculation as to whether a set of facts meet certain criteria that would grant a defendant absolute immunity. Rather, this is a conditional immunity that "requires the adjudicatory role of the court to determine if a [certain] factual predicate exists for application" of Stand Your Ground immunity.¹⁰⁶

V. CONCLUSION

To conclude, it is important to keep in mind that, had the defense in *McNeely* sought an interlocutory appeal through a writ of prohibition instead of a writ of mandamus, the Court would likely have followed the decision established in *Ramos*. However, because the defendant gave the Court some wiggle room in deciding whether a writ of mandamus would be proper, that was enough to void an interlocutory appeal on this issue in its entirety. There is no rational reason why the Court would turn its back on such a recent decision when a writ of prohibition is the proper method for a pre-trial appellate review. The majority here did not consider how this could be consequential down the road, especially if the State still has a way of getting this type of review. Consequentially, it is

104. See OKLA. UNIF. JURY INSTRUCTION § OUJI-CR8-15A (Supp. 2017), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=454361> [<https://perma.cc/ER32-LWQX>].

105. See OKLA. UNIF. JURY INSTRUCTION § OUJI-CR8-46 (Supp. 2017), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=81445> [<https://perma.cc/TL98-DBZC>].

106. *McNeely*, ¶ 7, 422 P.3d at 1275 (citing *People v. Guenther*, 740 P.2d 971, 977 (Colo. 1987)).

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now this decision that shall govern future cases.