No. _____

---

IN THE
SUPREME COURT OF THE UNITED STATES

---

**VIRGINIA DENISE WYCHE,**

Petitioner,

v.

**THE STATE OF FLORIDA**,

Respondent.

---

On Petition for a Writ of Certiorari
to Florida's First District Court of Appeal

---

# PETITION FOR WRIT OF CERTIORARI

---

ANDY THOMAS
Public Defender

VICTOR HOLDER
Assistant Public Defender

GLEN P. GIFFORD
Assistant Public Defender
Counsel of Record for Petitioner
Member of the Bar of this Court
Second Judicial Circuit of Florida
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
(850) 606-8500
victor.holder@flpd2.com

## QUESTIONS PRESENTED

1. Whether the First District's expansion of the scope of Florida's homicide statute could be used to affirm Wyche's conviction and sentence in light of the Constitution's *ex post facto* clause and the due process clause of the Fifth Amendment.

2. Whether the trial court's use of jury instructions that misstated Wyche's legal rights and duties regarding the justifiable use of deadly force in self-defense violated Wyche's Second Amendment right to bear arms and her Fifth and Fourteenth Amendment rights to due process.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS PAGE(S)



STATUTES PAGE(S)



JURY INSTRUCTIONS PAGE(S)

## PETITION FOR WRIT OF CERTIORARI

Virginia Denise Wyche petitions for a writ of certiorari to review the decision of Florida's First District Court of Appeal.

## OPINIONS BELOW

The decision of Florida's First District Court of Appeal was rendered November 6, 2017. See Wyche v. State, 232 So. 3d 1117 (Fla. 1st DCA 2017). A copy of the decision is attached as Appendix A. The First District affirmed Wyche's conviction but certified conflict with decisions from Florida's Second, Third, and Fourth District Courts of Appeal: State v. McCall, 458 So. 2d 875 (Fla. 2d DCA 1984); State v. Gonzalez, 467 So. 2d 723 (Fla. 3d DCA 1985); Knighton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992). Rehearing was denied by the First District on January 17, 2018. A copy of the denial is attached as Appendix B. Wyche petitioned the Florida Supreme Court for review of the First District's decision under the Florida Supreme Court's discretionary conflict jurisdiction. A copy of the notice invoking the Florida Supreme Court's jurisdiction is attached as Appendix C. On April 24, 2018, the Florida Supreme Court declined to exercise jurisdiction and denied Wyche's petition for review. A copy of the denial is attached as Appendix D.

## JURISDICTION

The First District Court of Appeal affirmed Wyche's conviction and certified conflict with opinions from several other Florida district courts. By a vote of five to two, Florida's Supreme Court declined to exercise its discretionary jurisdiction to review the opinion of the First District. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 776.012, Florida Statutes provides:

> (1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.
>
> (2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the

deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Section 776.013, Florida Statutes, provides in pertinent part:

> (1) A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use:
>
> (a) Nondeadly force against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force; or
>
> (b) Deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.
>
> (2) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Section 782.04(2), Florida Statutes (2013), provides in pertinent part:

> The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree.

Section 782.09, Florida Statutes (2013), provides in pertinent part:

> (1) The unlawful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which would have been committed against the mother. Any person, other than the mother, who unlawfully kills an unborn quick child by any injury to the mother:
>
> > (b) Which would be murder in the second degree if it resulted in the mother's death commits murder in the second degree, a felony of the first degree…

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the United States Constitution provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

## STATEMENT OF THE CASE

The State of Florida charged Wyche with one count of murder in the second degree pursuant to section 782.04(2), Florida Statutes, and one count of attempted murder in the second degree for the shooting of a pregnant woman and the death of her unborn, viable child that resulted on April 23, 2014 (R I 21)[1]. Wyche was tried by a jury and convicted as charged (R I 126-29). The relevant trial testimony is summarized below.

Markeisha Brooks testified that on April 23, 2014, while she was pregnant, Wyche shot her (R IV 294). Wyche and Brooks were friends, and Wyche was going to be the baby's godmother (R IV 297-98). On April 23, Wyche and one of Brooks's cousins had a disagreement on Facebook over what to name the baby (R IV 301-06). Brooks testified that Wyche's Facebook posts upset her (R IV 302). Wyche and Brooks then exchanged some unfriendly Facebook posts (R IV 309-11). The messages back and forth between Wyche and Brooks escalated in hostility (R IV 311-12).

Brooks testified that she was upset and she decided to go to Wyche's house (R IV 314). She woke up her sister Materia Brooks and brought her to Wyche's

[1] Record citations are to the record on appeal before Florida's First District Court of Appeal. The record will be referred to as "R" followed by the volume number in Roman numerals followed by the appropriate page number, all in parentheses

house (R IV 314). Brooks testified that she and her sister drove to their mother's house, which was close to Wyche's house, parked, and then walked to Wyche's house (R IV 315). Brooks testified that she was wearing sandals and a sleeveless dress with no pockets (R IV 315-16). She testified that she knocked on Wyche's front door and Wyche answered the door (R IV 316). She testified that Wyche said "hello" to her sister and then starting talking with her (R IV 317).

Brooks testified that Wyche had a gun on her hip (R IV 317). Brooks testified that she asked Wyche if Wyche was going to shoot her and Wyche said she would (R IV 317). Brooks said she laughed the comment off and started talking with Wyche about the earlier Facebook conversation (R IV 317). Brooks testified that she did not go to Wyche's house to fight her and she did not bring any weapons with her (R IV 317-18). Brooks testified that she went to Wyche's house solely to confront her about the Facebook posts (R IV 317-18). Brooks testified that she and Wyche argued and she told Wyche, "If I came over here to beat your ass, I would have been beat your ass" (R IV 319). Brooks testified that Wyche then asked Brooks what Brooks had said (R IV 319). Brooks testified that she repeated the statement and then Wyche pulled out her gun, pointed it at Brooks's stomach, and fired (R IV 319). Brooks testified that she was shot in the stomach (R IV 319). She testified that she was "in [Wyche's] face" (R IV 319) and she

reached out towards Wyche (R IV 320). Brooks testified that Wyche then fired the gun into the air three or four times (R IV 320).

Brooks testified that she never slapped Wyche or raised her hands in a threatening manner toward Wyche (R IV 320). She testified that she was "pretty much touching" Wyche and she was less than an arm's length from Wyche when she was shot (R IV 321). The shooting occurred on Wyche's front porch (R IV 322). She testified that immediately after the shooting her sister ran away and one of Wyche's neighbors came to her aid (R IV 323).

Materia Brooks testified that she was twenty years old and that she was Markeisha Brooks's sister (R IV 368). She testified that on the morning of the shooting, Markeisha woke her up and told her about the dispute on Facebook with Wyche (R IV 370). She testified that she went with Markeisha to Wyche's house in order to discuss the Facebook postings (R IV 372). She testified that she had no intentions of fighting Wyche (R IV 372). She testified that she was not armed and that neither she nor her sister were carrying purses (R IV 373). She testified that it was the middle of the day when they went to Wyche's house (R IV 373-74). Materia testified that Wyche came to the door, acknowledged her, and then spoke with her sister about the Facebook posts (R IV 374-76). She testified that she did not see the gun on Wyche's hip (R IV 377), but she remembered her sister mentioning the gun during the discussion with Wyche (R IV 377). During cross-

examination when confronted with her prior deposition testimony she admitted that she had previously stated that she did not know Wyche had a gun until Wyche shot it (R IV 404).

Materia testified that she remembered her sister making a remark that if she came to fight Wyche she would have asked her to step out into the road (R IV 376). Materia testified that Wyche asked her sister to repeat the comment, her sister did, and then Wyche shot her (R IV 379). Materia testified that neither she nor her sister threatened Wyche, pulled out any weapons on her (R IV 378-79), or attempted to get into her house (R IV 380). She testified that after Wyche shot her sister, Wyche told them to get off her property (R IV 378) and fired more shots into the air (R IV 381). Materia testified that a neighbor named Lashawn Mitchell, who was a paramedic, gave aid to her sister (R IV 383). She testified that when she heard the first shot she started running (R IV 404).

Lashawn Mitchell, Wyche's neighbor, testified that he returned home from the gym around 11:00 a.m. and that when he arrived at his home he stayed in his car listening to music (R IV 416). He heard someone beating on Wyche's door and saw Markeisha and Materia there (R IV 417). He testified that he saw Wyche come outside and that the women started arguing (R IV 418-19). The arguing was very loud (R IV 437). Mitchell testified that he went into his house to get some items to wash his car with (R IV 419). He was inside for three or four minutes and

he returned outside (R IV 419). He testified that when he returned outside the women were still on Wyche's front porch (R IV 420). He testified that he then heard, "Get the fuck out of my yard," stated twice, then he heard a gunshot (R IV 420-21). He testified that he ducked behind his car and heard Wyche continue to yell, "Get out of my yard," and more gunshots (R IV 422). When the shooting stopped, he emerged from behind his car and saw Markeisha holding her stomach and saying, "You shot me," and, "you killed my baby" (R IV 422-24). He testified that he saw Materia running away (R IV 424). He testified that he saw Wyche with the gun in her hand (R IV 426). He testified that he then treated Markeisha until paramedics arrived (R IV 427).

Craig Carpenter testified that he was a former co-worker of Wyche's (R V 455) and that on the morning of the shooting he went to Wyche's house in order to have some documents signed (R V 457). When he arrived at Wyche's house she was by herself working in her backyard (R V 457). He offered to help Wyche and began mowing the yard and cutting down some of the branches (R V 457-58). He testified that he saw Wyche texting on her phone while they were working in the yard (R V 458). He testified that at some point that morning he heard two loud noises that sounded like firecrackers (R V 460-61). He testified that he heard Wyche say that she had to make sure it worked (R V 461). At that point there was no one else in the yard other than he and Wyche (R V 461-62).

Carpenter testified that about an hour later (R V 464) he needed some paper in order to burn some leaves so he went inside the house to find Wyche (R V 463). When he could not find her he opened the front door and saw her outside with two women (R V 463). He testified that he did not see any weapons in the hands of the two women (R V 465). He testified that the three were close together (R V 463). Carpenter testified that he walked past the women and went to the side of the house to try to find paper (R V 464). He testified that once he was on the side of the house he heard Wyche tell the women to leave her property and then he heard a gunshot (R V 464-65). He testified that he then heard one of the women say, "You just shot my sister" (R V 465). He then heard two more shots (R V 465). Carpenter testified that he went back inside the house and that Wyche was there (R V 466). He testified that he told Wyche he was leaving and Wyche asked him to take the gun (R V 466). Carpenter testified that Wyche put the gun in his waistband and then he left (R V 467). He was contacted by police later that day, and he turned in the gun (R V 468).

Detective Stephanie Grimes with the Jacksonville Sheriff's Office testified that there were no signs of damage to Wyche's front door (R V 481-82). She testified that there were three spent shell casings and three live rounds in the gun that was recovered (R V 485-86). Detective Michelle Soehlig of the Jacksonville Sheriff's Office testified that she collected the firearm from Carpenter (R V 503).

She testified that she did not observe any injuries on Wyche's body when she saw her on April 23, 2014 (R V 506).

Dr. Aurelian Nicolaescu, an associate medical examiner, was tendered by the State as an expert witness in forensic pathology, and the trial court deemed him to be an expert in forensic pathology (R V 518). Dr. Nicolaescu testified that he performed an autopsy on Markeisha Brooks's fetus on April 24, 2014 (R V 520). He testified that the fetus suffered a gunshot wound to the face and chest which damaged its lung, liver, umbilical cord, and kidney (R V 524-26). He testified that the gunshot wound caused massive bleeding inside the fetus, which caused the death of the fetus (R V 529). Dr. Nicolaescu testified that the gunshot wound was the cause of death and the manner of death was homicide (R V 531).

Wyche testified that on the evening of April 22, 2014, she and Markeisha Brooks had a disagreement on Facebook regarding what to name Brooks's baby (R V 565). On the morning of April 23, Wyche started working in her yard (R V 567). Her co-worker Craig Carpenter came over with some paperwork that she needed (R V 567-68). Carpenter then helped her work in the yard (R V 568). Wyche testified that she had a .22 revolver on her while she was working in the yard because her neighborhood is "very rough" (R V 568). Wyche fired the gun that morning in the yard (R V 569). While Wyche was in her house using the restroom, she heard a pounding on the front door (R V 569). The gun was still in

her waist from when she was working in her yard (R V 569). She answered the door and Markeisha and Materia Brooks were standing on her front porch (R V 570).

Wyche testified that the Brooks sisters were belligerent, cursing at her, and standing very close to her (R V 570). Wyche was standing in her doorway with her front door open (R V 585). Wyche asked the two to leave but they did not (R V 570-71). Markeisha saw the gun on Wyche's hip and asked Wyche if she was going to shoot her (R V 571). Wyche asked Markeisha why she had come to her house, and Markeisha replied that if she came over to beat her ass she would beat her ass (R V 571). Wyche again asked them to leave (R V 571). Wyche testified that Markeisha Brooks then slapped her in the face (R V 571). Wyche testified that Brooks had to reach into Wyche's home in order to slap her because Wyche was standing inside the doorway (R V 586). Wyche testified that as a result of the slap she went to her knee (R V 571). At that point, she saw Markeisha Brooks reaching into the chest area of her dress and Materia Brooks with a sharp object in her hand (R V 572). Wyche testified that she was aware of previous acts of violence committed by Markeisha including shooting a firearm at someone (R V 572). She testified that she was not sure if Markeisha actually had a weapon on her or not when Markeisha was reaching into her breast area (R V 572). Wyche

testified that when she saw the sharp object in Materia's hand, she pulled out the gun and fired it (R V 573).

After Markeisha was shot, Markeisha came toward Wyche, and Wyche pushed her away (R V 573). Markeisha's blood was transferred to Wyche's clothes at this point (R V 573, 623). Wyche testified that she went inside her house (R V 573). Wyche testified that she was scared (R V 573). Wyche saw that they were not leaving her property so she opened the door and fired the gun two more times into the air in an effort to make them leave (R V 573-74). At that point, Materia ran off of Wyche's property, and Markeisha started walking off the property (R V 574). Wyche's neighbor then approached Markeisha and assisted her off the property (R V 574). Wyche checked on Markeisha and then went back inside her house (R V 575). She testified that she panicked and gave the gun to Carpenter (R V 575). Wyche testified that she cut her lip as a result of the slap from Markeisha, that Markeisha knocked her dental bridge loose, and that Wyche had to be brought to the dentist from jail as a result (R V 594-95).

The jury was instructed on Wyche's sole theory of defense: justifiable use of deadly force in self-defense. As part of the justifiable use of force instruction, the jury was instructed:

> If you find that the defendant who because of threats or prior difficulties with Markeisha Brooks had reasonable grounds to believe that she was in danger of death or great bodily harm at the hands of

> Markeisha Brooks, then the defendant had the right to arm herself. However, the defendant cannot justify the use of deadly force, if after arming herself she renewed her difficulty with Markeisha Brooks when she could have avoided the difficulty, although as previously explained if the defendant was not engaged in an unlawful activity and was attacked in any place where she had a right to be, she had no duty to retreat.

(R I 147).

Wyche was convicted and sentenced to twenty-five years in prison for each count with twenty-five year mandatory minimum sentences (R I 216). The sentences were imposed consecutively (R I 216). Wyche appealed her conviction to Florida's First District Court of Appeal. The First District affirmed Wyche's conviction and sentence with a written opinion. The Florida Supreme Court declined to exercise its discretionary conflict review jurisdiction.

## REASONS FOR GRANTING THE PETITION

### I. Wyche's conviction and sentence under Florida's homicide statute violated the *ex post facto* clause and the due process clause of the United States Constitution.

This case tests whether the First District's pronouncement in Wyche that the Florida Legislature had abrogated the common law "born alive" doctrine can be used to uphold Wyche's conviction and sentence, which obviously occurred prior to the First District's holding. This case calls on the Court to decide whether the *ex post facto* clause of the Constitution prevents Wyche's conviction and sentence for homicide of the fetus.

Wyche was charged by the State and convicted of homicide of the fetus under section 782.04(2), Florida Statutes. The fetus was not born alive. Wyche filed a pro se motion to dismiss the homicide charge in the trial court prior to trial based on the common law born alive doctrine[2]. The filing is treated as a nullity under Florida law because Wyche was represented by appointed counsel at the time. Appointed counsel did not adopt the motion. The motion was never addressed or acknowledged by the trial court. During her direct appeal, Wyche

2 Under the common law born alive rule the killing of a fetus was not homicide unless the child was born alive and then expired as a result of the injuries previously sustained. State v. Gonzalez, 467 So. 2d 723, 725 (Fla. 3d DCA 1985); Knighton v. State, 603 So. 2d 71, 72 (Fla. 4th DCA 1992); State v. McCall, 458 So. 2d 875, 876 (Fla. 2d DCA 1984).

raised the issue and argued that the common law born alive doctrine prevented her conviction under Florida's homicide statute. The First District affirmed Wyche's conviction for homicide and ruled that the common law born alive doctrine had been abrogated by the Florida Legislature's enactment of a separate feticide statute found at section 782.09, Florida Statutes. The First District certified conflict with the Second, Third, and Fourth District Courts of Appeal, which had previously cited to the common law born alive doctrine to hold that a fetus not born alive was not considered a human being under Florida law and could not be the victim of a homicide or manslaughter. Wyche filed with the First District a motion for rehearing arguing that the court's holding expanded the reach of the homicide statute to include fetuses not born alive as potential victims and that it was a violation of the *ex post facto* clause of the Constitution to apply this ruling to Wyche retroactively in order to affirm her conviction.

The First District noted in the majority opinion authored by Judge Lewis that a statute does not displace the common law unless the Legislature expressly indicates an intention do so. Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1207 (Fla. 1997). "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990). Here, neither the feticide statute nor the homicide

statute in effect at the time of the alleged crime expressly abrogated the common law born alive doctrine. Neither statute even mentioned the born alive doctrine. It is clear that there was no unequivocal statement by the Legislature that the born alive doctrine had been abrogated. The First District relied on the proposition that the common law born alive doctrine was abrogated because the feticide statute is so repugnant to the born alive doctrine that the two cannot coexist. Wyche at 1120.

However, by rejecting the born alive doctrine, expanding the reach of Florida's homicide statute (the statute under which Appellant was charged and convicted), and affirming Wyche's homicide conviction, the First District has overlooked the Constitutional prohibition against *ex post facto* laws. Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Specifically, this Court has held:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1954).

With respect to judicial interpretation of a criminal statute, this Court has held:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto

> law, such as Art I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates* a *crime,* or makes it *greater* than it was, when committed.' ... The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred' ... must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

Bouie v. Columbia, 378 U.S. 347, 353-54 (1964).

This Court further explained in Marks v. United States, 430 U.S. 188, 191-192 (1977):

> The Ex Post Facto Clause is a limitation upon the powers of the legislature ... and does not of its own force apply to the Judicial Branch of government. ... But the principle on which the Clause is based-the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties-is fundamental to our concept of constitutional liberty. ... As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Id.

Judge Rowe's concurring opinion in Wyche cites to Commonwealth v. Cass, 467 N.E. 2d 1324 (Mass. 1984); Hughes v. State, 868 P. 2d 730 (Okla. Crim. App. 1994); and State v. Horne, 319 S.E. 2d 703 (S.C. 1984), as examples of cases in which state supreme courts have abandoned the common law born alive doctrine.

Missing from the concurring opinion is any acknowledgement that these courts all held that the abandonment of the born alive doctrine was prospective and could not be applied to the defendants at bar because to do so would have been a violation of the *ex post facto* clause and unconstitutional. The Hughes court stated:

> We believe that our construction of Section 691 as including viable fetuses was not foreseeable. This conclusion is supported by the fact that Oklahoma, by means of this decision, joins a minority of two states whose courts have expressly rejected the ancient, yet obsolete, born alive rule. In addition, although Hughes had notice of the criminal nature of her conduct when she chose to drive her vehicle while under the influence, her "liability for one specific consequence of [her] conduct and the possibility of increased punishment resulting therefrom may have been unforeseeable." ... Because Hughes did not have fair warning that her conduct was criminal and subject to punishment under Section 691, our decision should not apply to her.

Hughes at 735-36.

The Cass court stated:

> In deciding whether our decision can fairly be applied to the conduct of the defendant, the two important considerations are the foreseeability of the new rule and the extent to which the defendant might have relied on the old rule. Our decision may have been unforeseeable. We have never been called upon to decide the issue, but the rule that a fetus cannot be the victim of a homicide is the rule in every jurisdiction that has decided the issue, except those in which a different result is dictated by statute. [citations omitted] We find it highly unlikely that the defendant could have relied on prior law in shaping his conduct. His alleged conduct was a clear violation of G.L. c. 90, § 24. He thus had notice of the criminality of his conduct. See *Mullaney v. Wilbur*, 421 U.S. 684, 690 n. 10, 95 S.Ct. 1881,

> 1885 n. 10, 44 L.Ed.2d 508 (1975). However, his liability for one specific consequence of his conduct and the possibility of increased punishment resulting therefrom may have been unforeseeable. An unpredictable judicial decision which has the effect, as here, of increasing the possible available punishment, is objectionable, and may raise constitutional issues. See *Commonwealth v. Harrington*, 367 Mass. 13, 20-21, 323 N.E.2d 895 (1975); *Bouie v. Columbia*, 378 U.S. 347, 353-354 (1964). Furthermore, some considerations favoring prospective decision-making may not be exclusively concerned with reliance of the defendant. Prospective-only application of a decision which may have been unforeseeable avoids the appearance of "badly motivated or erratic action" and ensures impartiality and regularity in decision-making. *Commonwealth v. Lewis*, supra 381 Mass. At 418, 409 N.E.2d 771. We therefore conclude that our decision should not be applied to the defendant in this case.

Cass at 1329-30.

The Horne court stated:

> Therefore, we hold an action for homicide may be maintained in the future when the state can prove beyond a reasonable doubt the fetus involved was viable, i.e., able to live separate and apart from its mother without the aid of artificial support. However, at the time of the stabbing, no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide. The criminal law whether declared by the courts or enacted by the legislature cannot be applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Therefore, the conviction of voluntary manslaughter must be reversed. From the date of this decision henceforth, the law of feticide shall apply in this state.

Horne at 704.

In each of these cases the defendants committed criminal acts that led to the deaths of the fetuses. In Horne it was a stabbing of the mother. In Cass it was a vehicular homicide through intoxication or by operating the vehicle in such a reckless manner that the lives or safety of the public was endangered when the vehicle struck the mother of the fetus on a sidewalk. In Hughes it was driving a vehicle while intoxicated and causing a crash that killed the fetus. Even though the acts that the defendants committed were of a criminal nature, these courts held that the prohibition against *ex post facto* laws prevented their convictions for homicide. Just because the defendant's behavior is criminal does not mean that he is not entitled to the protection of the *ex post facto* clause.

Here, though Appellant was convicted of shooting a woman in the stomach, a clearly criminal act, there had been no judicial decision or express statement by the Florida Legislature expanding the homicide statute at section 782.04(2) to include viable unborn fetuses as potential victims. This Court's decision is the first to expand Florida's homicide statute's reach to include viable fetuses not born alive as "human beings." Prior to Wyche the Second, Third, and Fourth Districts Courts of Appeal of Florida all stated that the common law born alive doctrine remained in effect and that fetuses not born alive were not human beings for the purposes of the homicide statute. See State v. Ashley, 670 So. 2d 1087 (Fla. 2d DCA 1996); McCall; Gonzalez; and Knighton.

Affirmance of Wyche's homicide conviction based on the pronouncement that the common law born alive doctrine had been previously abrogated violated the *ex post facto* clause in Article I and the due process clause of the Fifth Amendment.

## II. The jury instructions given on the justifiable use of deadly force in self-defense violated Wyche's Second, Fifth, and Fourteenth Amendment rights to bear arms and to due process.

This case calls upon the Court to decide whether a jury instruction that sets a condition precedent for a person to be able to carry a firearm in her own home is Constitutionally permissible, and if it is not, whether the instruction violated her due process rights.

The trial court's use of jury instructions containing erroneous statements of Florida and constitutional law violated Wyche's due process right to a fair trial and infringed on her right to bear arms[3]. The jury instruction was facially erroneous. The jury instruction stated:

> If you find that the defendant who because of threats or prior difficulties with Markeisha Brooks had reasonable grounds to believe

3 Wyche first made this argument in her initial brief in the direct appeal to Florida's First District Court of Appeal. Her trial attorney did not object to the instruction contemporaneously, so the First District could only review the issue for fundamental error.

> that she was in danger of death or great bodily harm at the hands of Markeisha Brooks, then the defendant had the right to arm herself.[4]

(R I 147). (The full justifiable use of force jury instruction given at trial is attached as Appendix E.) The implication to be drawn from the "if-then" language of the instruction was that if Wyche did not have reasonable grounds to believe she was in danger of death or great bodily harm at the hands of Markeisha Brooks due to prior threats or prior difficulties with her, then she did not have the right to arm herself. The jury instruction at issue here made Wyche's right to carry a firearm in her home contingent on whether she had reasonable grounds to believe that she was in danger of death or great bodily harm at the hands of Brooks due to prior threats or difficulties with Brooks. The shooting occurred at the threshold of Wyche's home. The instruction was not an accurate statement of Florida law or of Wyche's constitutional right to keep and bear arms in her own home or on her private property. The instruction misinformed the jury as to the law. Florida law is clear that a citizen may carry a firearm in her home. §790.25(3)(n), Fla. Stat. (2013) ("It is lawful for the following persons to own, possess, and lawfully use

---

4 Florida's prior threats standard jury instruction has been amended as of May 5, 2016, and the language at issue has been removed. In re Standard Jury Instructions in Criminal Cases, 191 So. 3d 411 (Fla. Mem. 2016). The new instruction now states, "If you find that the defendant, who because of threats or prior difficulties with (victim), had reasonable grounds to believe that [he] [she] was in danger of death or great bodily harm at the hands of (victim), you may consider this fact in determining whether the actions of the defendant were those of a reasonable person." Fla. Std. Jury Inst. (Crim.) 3.6(f)(2016).

firearms and other weapons, ammunition, and supplies for lawful purposes: [a] person possessing arms at his or her home or place of business"). There is no prerequisite event or set of circumstances that must occur before a citizen is allowed to keep and bear a firearm in her home.

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment applies to the states by operation of the Fourteenth Amendment. The Supreme Court has held that a law banning the keeping and carrying of a handgun in a citizen's private home violates the Second Amendment. District of Columbia v. Heller, 554 U.S. 570 (2008); Norman v. State, 159 So. 3d 205, 211 (Fla. 4th DCA 2015) (recognizing Heller's holding). Likewise, a jury instruction that predicates a Florida citizen's right to carry a firearm within her home on whether or not she had been previously threatened violates the Second Amendment and is clearly afoul of federal constitutional law.

In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. Middleton v. McNeil, 541 U.S. 433, 437 (2004). Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. Id. The question is whether the ailing instruction so infected the entire

trial that the resulting conviction violates due process. Id. A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Id. If the charge as a whole is ambiguous, the question of whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. Id.

Wyche's sole defense at trial was self-defense and the justifiable use of the firearm. Wyche had the right to bear arms in her house and on her private property regardless of any reasonable grounds to believe she was in danger of death or great bodily harm or prior threats or difficulties with Brooks. Wyche testified that she carried the gun on her at home because she lived in a "very rough" neighborhood. Wyche's neighbor testified that he heard Markeisha Brooks banging on Wyche's front door and that he could hear the women arguing loudly. He heard Wyche tell them to leave her property multiple times. Wyche testified that the Brooks sisters would not leave her property and that they were in her face, cursing her, and acting aggressively. Wyche testified that Markeisha slapped her in the face so hard that she fell to her knee. She testified that Markeisha had to reach into her home in order to hit her because she was standing just inside of her front door[5]. Wyche testified that after slapping her, Markeisha reached into her bra area as if she was

5 This was a burglary under Florida law. Burglary is defined in Florida as entering a dwelling with the intent to commit an offense therein. § 810.02(1)(b), Fla. Stat.

grabbing for a weapon, and Wyche also saw that Materia had something sharp in her hand and was coming toward her. She testified that she was aware of the fact that Markeisha had previously used a deadly weapon against another person. Wyche testified that she fired a shot in order to protect herself from the two sisters.

The jury instruction containing the erroneous statements of law so infected the trial that the resulting conviction violates due process. The erroneous instruction had a substantial and injurious influence in determining the jury's verdict. The misstatement of the law eviscerated Wyche's self-defense claim. The erroneous instruction was especially harmful in conjunction with the State's arguments at trial. The State argued to the jury that because Wyche was carrying the gun it showed she was planning on shooting Brooks and had the intent to do so before there was ever any necessity for self-defense. During opening statement, the prosecutor told the jury that "the defendant never should have armed herself" (R VI 666). During closing argument, the State told the jury that Wyche armed herself because she knew Brooks was coming over to talk to her (R VI 733-34). Then the prosecutor told the jury:

> On April 23rd, 2014, this defendant shot Markeisha Brooks for the worst reason on earth, because she wanted to, because she got to. There is no better evidence of ill-will, hatred, spite, evil intent than the loaded functioning .22-caliber pistol that she answered the door with.

(R VI 733). The prosecutor told the jury that Wyche's decision to arm herself on her own property "doesn't make any sense" (R VI 739). The jury was then instructed, consistent with the State's arguments, that unless there were reasonable grounds to fear Brooks, Wyche had no right to arm herself. The State highlighted Appellant's action of arming herself and painted it as unlawful, sinister behavior. The erroneous instruction reinforced that idea.

The jury instruction improperly allowed the jury to conclude that Wyche did not have the right to carry a gun in her own home without first having a reasonable fear of Brooks. The State's arguments combined with the erroneous jury instruction mandated that Wyche had to first justify to the jury carrying a firearm in her own home before she could legally choose to do so. The legal reality is that Florida law and the Second Amendment provide no such requirement. A citizen may arm herself in her own home with or without "reasonable grounds to believe that she is in danger of death or great bodily harm at the hands" of another.

Here, as in Dixon v. Williams, 750 F. 3d 1027 (9th Cir. 2014), the erroneous self-defense jury instruction had substantial and injurious influence on the jury's verdict. See, also, Wynn v. Mahoney, 600 F. 2d 448 (4th Cir. 1979) ("Because proof of self-defense constitutes an absolute defense in that it renders the homicide justifiable, any error in the trial court's instruction concerning self-defense was

necessarily prejudicial"). The prejudice to Wyche was exacerbated when the jury was also instructed that Wyche "cannot justify the use of deadly force, if after arming herself she renewed her difficulty with Markeisha Brooks when she could have avoided the difficulty, although… if the defendant was not engaged in an unlawful activity and was attacked in any place where she had a right to be, she had no duty to retreat" (R I 147). This instruction further obfuscated Wyche's rights and duties under Florida law.

This instruction gave contradictory instructions regarding Wyche's duties before justifiably using deadly force. If Wyche was in a place where she had a right to be and she was not engaged in unlawful activity, the law is clear that she had no duty to retreat before standing her ground. §776.012, Fla. Stat. (2013); §776.013, Fla. Stat. (2013). Even before the Florida Legislature passed the Stand Your Ground statute and eliminated a person's duty to retreat in public, the common law duty to retreat never applied when a person was attacked in her own home. Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999); Hedges v. State, 172 So. 2d 824, 826-27 (Fla. 1965); Wilson v. State, 30 Fla. 234, 253 (Fla. 1892). Consistent with the common law castle doctrine, section 776.012 and section 776.013, Florida Statutes, do not require a person acting in self-defense to avoid the difficulty by retreating or getting out of the way when that person is at her home. Section 776.012 states that

the use of deadly force is justifiable when a person "reasonably believes that such conduct is necessary" to defend herself. There is no requirement under the common law or under sections 776.012 or 776.013 that Wyche flee her home, get out of the way, or take some other action in order to "avoid the difficulty" as the jury instruction suggests. The language in the prior threats instruction stating that if Wyche renewed her "difficulty" with Brooks when she could have avoided the difficulty contradicts the Florida laws of self-defense and the castle doctrine and further confused the jury. This error was further compounded by the prosecutor's arguments that Wyche should have retreated inside her house (R VI 687), called out to Craig Carpenter (R VI 697), or done "a million and one other things" (R VI 694) before using deadly force against an assailant at the threshold of her own home. These comments were not consistent with the common law castle doctrine or sections 776.012 and 776.013.

When the jury instructions are viewed as a whole, the erroneous instruction that indicated that Wyche must first have had reasonable grounds to believe she was in danger of death or great bodily harm at the hands of Brooks before she could arm herself with a firearm in her own home combined with the language that appeared to require Wyche to avoid the difficulty before exercising her right to self-defense

violated Wyche's due process rights to a fair trial under the Fifth and Fourteenth Amendments.

## CONCLUSION

Wyche requests that this Court grant a writ of certiorari to determine whether the First District's novel interpretation of Florida's homicide statute and its application to Wyche's case was a violation of the *ex post facto* clause and the due process clause of the Constitution, and whether the erroneous jury instructions regarding justifiable use of deadly force in self-defense used at trial deprived Wyche of a fair trial under the Fifth and Fourteenth Amendments to the Constitution.

GLEN P. GIFFORD
Assistant Public Defender
Office of the Public Defender,
Second Judicial Circuit of Florida
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301

Member of the Bar of this Court

## INDEX TO APPENDICES

# APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VIRGINIA DENISE WYCHE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D15-4797

_____/

Opinion filed November 6, 2017.

An appeal from the Circuit Court for Duval County.
Mark Hulsey, Judge.

Andy Thomas, Public Defender, Victor Holder, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.

LEWIS, J.

Virginia Denise Wyche, Appellant, challenges her convictions and sentences for second-degree murder of an unborn quick child and attempted second-degree murder of the unborn child's mother, raising eleven issues, only the first of which

merits discussion. Appellant argues that her second-degree murder conviction cannot be legally sustained because under the common law born alive rule, an unborn child is not a human being within the meaning of Florida's homicide statute, section 782.04(2), Florida Statutes (2013). We reject Appellant's argument for the reasons that follow and affirm her convictions and sentences in all other respects without further discussion.

In this tragic case, on April 23, 2014, twenty-five to twenty-six weeks into her pregnancy, the mother was shot with a .22-caliber revolver in the abdomen by Appellant, her friend, over a dispute involving the naming of the unborn quick child, with the bullet striking the unborn quick child and causing multiple injuries to the unborn child. While the mother survived the gunshot wound, the unborn quick child was not born alive and died as the result of the gunshot wound. Following trial, the jury found Appellant guilty as charged of attempted second-degree murder of the mother and guilty of second-degree murder of the unborn quick child. Thus, the issue we must resolve is whether the common law born alive rule has been abrogated by the Florida Legislature so as to allow Appellant's second-degree murder conviction to stand under section 782.04(2). Given that this issue presents a pure question of law and turns on statutory interpretation, our review is *de novo*. See Townsend v. R.J. Reynolds Tobacco Co., 192 So. 3d 1223, 1225 (Fla. 2016).

Section 782.04(2), Florida Statutes (2013), defines second-degree murder as "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." Under the common law born alive rule, "the killing of a fetus was not homicide unless the child was born alive and then expired as a result of the injuries previously sustained." State v. Gonzalez, 467 So. 2d 723, 725 (Fla. 3d DCA 1985); see also Knighton v. State, 603 So. 2d 71, 72 (Fla. 4th DCA 1992); State v. McCall, 458 So. 2d 875, 876 (Fla. 2d DCA 1984).[1]

The Florida Legislature enacted section 782.09, Florida Statutes, commonly referred to as the feticide statute, in 1868. Ch. 1868-1637, § 10, Laws of Fla. Through September 2005, the feticide statute provided that "[t]he willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." § 782.09, Fla. Stat. (2005). Effective October 2005, the feticide statute was amended to provide that the unlawful killing of an unborn quick child shall be deemed

[1] Cf. State v. Ashley, 701 So. 2d 338, 339-42 (Fla. 1997) (noting the born alive rule, and holding that an expectant mother cannot be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy because the common law immunity from prosecution for the pregnant woman was not abrogated by sections 390.001, 782.04, and 782.07, Florida Statutes (1993)).

manslaughter or murder in the same degree as that which would have been committed against the mother if the act had resulted in her death. Ch. 2005-119, § 2, Laws of Fla. At the time of Appellant's offenses, the feticide statute set forth:

> (1) *The unlawful killing of an unborn quick child*, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, *shall be deemed murder* in the same degree as that which would have been committed against the mother. Any person, other than the mother, who unlawfully kills an unborn quick child by any injury to the mother:
>
> . . . .
>
> (b) Which would be murder in the second degree if it resulted in the mother's death commits murder in the second degree . . . .

§ 782.09, Fla. Stat. (2013) (defining "unborn quick child" as a "viable fetus") (emphasis added).[2]

"Under our rules of statutory construction, a statute will not displace the

[2] Effective October 2014, the feticide statute was amended to criminalize the killing of an "unborn child," which is defined as "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb." § 782.09(1), (5), Fla. Stat. (2014); § 775.021(5)(e), Fla. Stat. (2014). Also effective October 2014, a new rule of construction was added to section 775.021, Florida Statutes (2014), which provides in part as follows:

> (5) Whoever commits an act that violates a provision of this code or commits a criminal offense defined by another statute and thereby causes the death of, or bodily injury to, an unborn child commits a separate offense if the provision or statute does not otherwise specifically provide a separate offense for such death or injury to an unborn child.

common law unless the legislature expressly indicates an intention to do so." Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1207 (Fla. 1997) (citing Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977)). "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted); see also Townsend, 192 So. 3d at 1231; Webb v. Sch. Bd. of Escambia Cty., 1 So. 3d 1189, 1190 (Fla. 1st DCA 2009). The 2013 version of the feticide statute presents such a sequence of events.

"The polestar of a statutory construction analysis is legislative intent." W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012). To discern legislative intent, the court must first look to the plain and obvious meaning of the statute's text, which may be discerned from a dictionary. Id. at 9. If the statutory language is clear and unambiguous, the court must apply that unequivocal meaning and may not resort to the rules of statutory construction. Id. "Likewise, the '[a]dministrative construction of a statute, the legislative history of its enactment, and other extraneous matters are properly considered *only in the construction of a statute of doubtful meaning.*'" Atwater v. Kortum, 95 So. 3d 85, 90 (Fla. 2012) (quoting Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000)) (emphasis in original). This is so because the Legislature is assumed to know the meaning of the words used in

the statute and to have expressed its intent through the use of the words. Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1225 (Fla. 2006).

The clear and unambiguous language of the feticide statute provides that the killing of an unborn quick child may constitute murder, which is in direct conflict with the common law rule requiring the fetus to be born alive. As such, the Legislature has expressed a clear intent to recognize an unborn quick child as a human being entitled to the protection of Florida's homicide statute. Therefore, we hold that the Legislature has abrogated the common law born alive rule by enacting the 2013 version of the feticide statute as the two cannot coexist.

We recognize that our holding appears to be in conflict with Knighton, McCall, and Gonzalez. In Knighton, the Fourth District affirmed the appellant's conviction for third-degree murder of a fetus that was born alive, unlike the unborn quick child in the instant case, but subsequently died due to the injuries the appellant inflicted on the mother upon concluding that the fetus was a human being under the common law born alive rule because she was born alive. 603 So. 2d at 72-73. Significantly, the court rejected the appellant's argument that the born alive rule has been abrogated by the feticide and termination of pregnancy statutes and "suggest[ed] . . . [the rule's] continued viability in the absence of any statutory definition of 'human being.'" Id. at 73.

In McCall, the Second District affirmed the dismissal of the DWI manslaughter and vehicular homicide charges relating to the death of an unborn child upon holding that such crimes do not exist in Florida because an unborn child is not a human being within the definitions of DWI manslaughter and vehicular homicide, which require the death of a "human being," in light of the common law born alive rule. 458 So. 2d at 876. The court quoted the feticide statute, but stated that it did not apply because the information did not allege the willful killing of the unborn child or his mother, and "adopt[ed] the traditional interpretation of the words 'human being' under the homicide statutes as meaning one who has been born alive." Id. at 877. Conversely, in this case, the information tracked the language of the feticide statute, in addition to the homicide statute.

Finally, in Gonzalez, the Third District affirmed the dismissal of the manslaughter charge against the appellant, a doctor who allegedly performed an illegal abortion on a minor, upon holding that an unborn child is not a human being within the meaning of the manslaughter statute in light of the common law born alive rule. 467 So. 2d at 725-26. The court reasoned that the Legislature believed the feticide and abortion statutes were adequate protections for the unborn; if the Legislature chooses to expand the protections, it can expressly do so, such as by amending the manslaughter statute to criminalize "the killing of a human being or viable fetus"; the Legislature "has indicated it is capable of distinguishing between

an unborn child and a person born alive since it has enacted statutes which acknowledge this distinction"; and "[s]ince 'human being' is not defined in Florida Statutes and until the Florida Legislature specifically changes it, the common law definition controls." Id. While the feticide statute in effect when the alleged illegal abortion on the minor was performed on June 25, 1982, did not apply to the facts of Gonzalez, as we previously stated, under the 2013 version of the feticide statute that applies to the facts of this case, an unborn quick child is recognized as a human being entitled to the protection of Florida's homicide statute.

We, therefore, affirm Appellant's convictions and sentences and certify conflict with Knighton, Gonzalez, and McCall to the extent our holding conflicts with those decisions.

AFFIRMED; CONFLICT CERTIFIED.

B.L. THOMAS, C.J., CONCURS; ROWE, J., CONCURS WITH OPINION.

ROWE, J., concurring,

A dispute that began over a Facebook post ended with the murder of an unborn child. Markeisha Brooks, who was approaching the third trimester of her pregnancy, asked her Facebook "friends"[3] to suggest names for her baby. Virginia Denise Wyche responded to the post in a profane and belligerent manner. Brooks decided to visit Wyche at her home to attempt to resolve their disagreement in person. However, after Brooks arrived at Wyche's home, tensions between the two women escalated. While standing less than an arm's length away from Brooks, Wyche pulled a .22-caliber revolver from her waistband and shot Brooks directly in the womb. Brooks survived the bullet wound, but her unborn child did not. The bullet entered the child's abdomen and exited near the child's right shoulder. Brooks testified at trial that after the bullet entered her womb, she felt the last movements of her child as the child died. The jury found Wyche guilty of attempted second-degree murder of Brooks and guilty of second-degree murder of Brooks's unborn child.

Wyche argues that she could not legally be convicted of second-degree

[3] "A Facebook friendship does not necessarily signify the existence of a close relationship." *Chace v. Loisel*, 170 So. 3d 802, 804 (Fla. 5th DCA 2014).

murder of Brooks's unborn child because under the common law "Born Alive" Rule, an unborn child is not a human being within the meaning of Florida's homicide statute, section 782.04(2), Florida Statutes (2013). As explained in the majority opinion, the Legislature abrogated the common law when it enacted the 2013 version of the feticide statute, section 782.09, Florida Statutes, and expressed its clear intent to give protection under the homicide statute to unborn human beings from the point of viability.[4] Pursuant to the statute, a viable, unborn child is recognized as a human being entitled to the protection under Florida's homicide statute. I write to explain why, even absent Legislative abrogation, the courts should abandon the "Born Alive" Rule.

The earliest cases under the common law of England held that a defendant could not be convicted for killing an unborn child. *Commonwealth v. Morris*, 142

[4] In 2014, the Legislature amended the definition of "unborn child" to include any "member[s] of the species *Homo sapiens*, at any stage of development, who is carried in the womb." §§ 782.09(1), (5), Fla. Stat. (2014); § 775.021(5)(e), Fla. Stat. (2014). Thus, where a defendant's actions end the life of an unborn child, the State has rejected the viability framework employed in the context of abortion in favor of providing the broadest protection of human life. The United States Supreme Court has repeatedly held that "the State has legitimate interests *from the pregnancy's outset* in protecting the health of the woman and the life of the fetus." *See Gonzales v. Carhart*, 550 U.S. 124, 125 (2007) (emphasis added). When it comes to actions by third parties that end the life of the unborn child, the viability of the unborn child is "simply immaterial." *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987); *see also State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990) ("*Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus.").

S.W.3d 654, 656 (Ky. 2004). During the thirteenth century when the earliest references to the Rule appear, knowledge of life in the womb was primitive and medical science was not sufficiently advanced to allow a court or jury to determine beyond a reasonable doubt whether a defendant's actions or some unrelated event was the cause of death of an unborn child. *Id.* at 657; *see also Commonwealth v. Cass*, 467 N.E.2d 1324, 1328 (Mass. 1984). Instead, live birth was the required evidentiary standard to prove that the child was alive at the time of the acts by the defendant that resulted in the alleged homicide. Coke explained the "Born Alive" Rule in this way:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

Sir Edward Coke, *Third Institute* 50-51 (1644). Thus, the "Born Alive" Rule has been frequently described as "an evidentiary principle that was required by the state of medical science of the day." *Morris*, 142 S.W.3d at 657 (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563, 586 (1987)).

American courts first applied the "Born Alive" Rule in the late eighteenth century. *Morris*, 142 S.W.3d at 657. Since that time, the Rule has been applied in both civil and criminal actions. *Id*. In Florida, the "Born Alive" Rule has been relied

upon in four reported decisions involving homicide convictions. *See State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (holding that a pregnant woman who shot herself in the abdomen during her third trimester and whose child was born alive was immune from prosecution on grounds that the common law "Born Alive" Rule conferred immunity on the pregnant woman); *Knighton v. State*, 603 So. 2d 71 (Fla. 4th DCA 1992) (affirming a murder conviction of a defendant who shot a pregnant woman in the abdomen, fatally wounding her unborn child, where the child died shortly after birth); *State v. Gonzalez*, 467 So. 2d 723 (Fla. 3d DCA 1985) (relying upon the "Born Alive" Rule to affirm a trial court's dismissal of a manslaughter charge brought against a doctor who allegedly performed an illegal abortion on a minor, where the child was not born alive); *State v. McCall*, 458 So. 2d 875 (Fla. 2d DCA 1984) (holding that a viable, but unborn child could not be the victim of the crimes of vehicular homicide or DWI manslaughter). In none of these decisions did the reviewing courts consider the evidentiary purpose served by the Rule along with whether that purpose has been undermined by modern-day advancements in medical science and technology. The necessity for the Rule has long since passed, and serving no purpose, the Rule should no longer be applied.

Medical experts in the twenty-first century possess exponentially more knowledge about life inside the womb than did their counterparts living in the thirteenth century when the "Born Alive" Rule originated. With recent

developments in medical technology and neonatal medicine such as sonography, fetal heart monitoring, amniocentesis, and chorionic villus sampling, medical experts can competently establish the point at which the unborn child is viable, as well as the proximate cause of the death of the child. *See* Robert H. Blank, *Emerging Notions of Women's Rights and Responsibilities During Gestation*, 7 J. Legal Med. 411, 452 (1986); Carolyn J. Chackin, *What Potent Blood: Non-Invasive Prenatal Genetic Diagnosis and the Transformation of Modern Prenatal Care*, 33 Am. J.L. & Med. 9, 10-11 (2007). Because medical experts can offer reliable testimony on viability and cause of death, the evidentiary necessity of the "Born Alive" Rule no longer exists. *See McCarty v. State*, 41 P.3d 981, 986 (Okla. Crim. App. 2002) ("As medical science continues to improve and viability comes at earlier and earlier stages of the birth process, individuals should be, and will be, put on notice that their acts which lead to the death of that unborn child, once the child has attained that level of viability as determined by the medical evidence, can, and will, make them liable for the taking of the life of that unborn child."); *see also Cass*, 467 N.E.2d at 1328 ("Medical science now may provide competent proof as to whether the fetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death."). Many states have already abandoned the "Born Alive" Rule, some through legislation, others by judicial decision. *See Hughes v. State*, 868 P.2d 730, 731 (Okla. Crim. App. 1994) (abandoning the "Born Alive" Rule); *State v. Horne*, 319

S.E.2d 703, 704 (S.C. 1984) (holding that a viable, unborn child is a "person" within the statute defining murder as the killing of "any person"); *see also Farley v. Smith*, 466 S.E.2d 522, 528 n.13 (W. Va. 1995) (providing a list of the thirty-six jurisdictions that permit tort recovery for the death of a viable, unborn child). Florida should abandon the Rule, too.

Moreover, the facts of this case amply demonstrate why the "Born Alive" Rule is no longer required to assist the trier of fact in determining whether the unborn child was alive at the time of the defendant's acts that led to the alleged homicide and whether the defendant caused the death of the unborn child. Brooks testified that she felt her unborn child's last movements, following the entry of the bullet into her abdomen. The medical evidence established that Brooks was twenty-five to twenty-six weeks pregnant at the time of the shooting. The medical examiner testified that the child was viable. He explained that at twenty-five weeks, Brooks's child had between a fifty and an eighty percent chance of surviving, and at twenty-six weeks, the survival rate would be between eighty and ninety percent. The medical examiner testified that other than the trauma resulting from the fatal gunshot wound, Brooks's child was free of any pathology, abnormalities, or congenital defects. He provided his expert opinion that Brooks's child was capable of life and that the child died because of the bullet that passed through the mother's womb into the child. Due to the medical and lay testimony in this case, the jury could determine

beyond a reasonable doubt whether Brooks's child was alive and viable when Wyche shot Brooks and whether the shooting was the cause of the child's death.

Accordingly, I would affirm Wyche's conviction for the second-degree murder of Brooks's unborn child. I join the majority in holding that the Legislature abrogated the "Born Alive" Rule through its enactment of the feticide statute. But I also conclude that the "Born Alive" Rule should no longer be applied in Florida because the evidentiary basis for the Rule no longer exists. Developments in modern medicine allow for experts to testify competently as to the health and development of the unborn child and the cause of the child's death. The medical evidence and testimony presented in this case was more than sufficient for the jury to determine beyond a reasonable doubt that Wyche's gunshot to Brooks's womb resulted in the death of her viable, unborn child. Because Brooks's unborn child was a human being entitled to the protection under Florida's homicide statute, Wyche's conviction should be affirmed.

# APPENDIX B

**DISTRICT COURT OF APPEAL, FIRST DISTRICT**
**2000 Drayton Drive**
**Tallahassee, Florida 32399-0950**
**Telephone No. (850)488-6151**

January 17, 2018

**CASE NO.**: **1D15-4797**
L.T. No.: 16-2014-CF-003791-AXXX

| Virginia Denise Wyche | v. | State of Florida |
|---|---|---|
| Appellant / Petitioner(s), | | Appellee / Respondent(s) |

**BY ORDER OF THE COURT:**

Appellant's motion filed November 21, 2017, for rehearing and new written opinion is denied.

**I HEREBY CERTIFY** that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, AG Hon. Andy Thomas, PD Sharon Traxler, AAG
Victor D. Holder, APD

jm

KRISTINA SAMUELS, CLERK

# APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VIRGINIA WYCHE,

Appellant/Petitioner,

CASE NO. 1D15-4797

v.

STATE OF FLORIDA,

Appellee/Respondent.
_____/

**NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF FLORIDA SUPREME COURT**

Appellant/Petitioner, through the undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.120(b)-(c), hereby invokes the discretionary jurisdiction of the Florida Supreme Court to review the November 6, 2017, decision of this court, for which rehearing was denied on January 7, 2018. The decision is certified to be in direct conflict with decisions of other district courts of appeal: Knighton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992); State v.Gonzalez, 467 So. 2d 723 (Fla. 3d DCA 1985); State v. McCall, 458 So. 2d 875 (Fla. 2d DCA 1984).

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, this 15th day of February, 2018.

Respectfully submitted,

/s/ Victor Holder
VICTOR HOLDER
Assistant Public Defender
Florida Bar No. 71985
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
victor.holder@flpd2.com
ATTORNEY FOR
APPELLANT/PETITIONER

# APPENDIX D

Filing # 71132842 E-Filed 04/24/2018 09:55:09 AM



# Supreme Court of Florida

TUESDAY, APRIL 24, 2018

**CASE NO.: SC18-275**
Lower Tribunal No(s).:
1D15-4797; 162014CF003791AXXXMA

VIRGINIA DENISE WYCHE vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on Certified Direct Conflict of Decisions pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

LABARGA, C.J., and QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.
PARIENTE and LEWIS, JJ., would grant.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

lc
Served:
VICTOR HOLDER
HON. KRISTINA SAMUELS, CLERK
HON. MARK HULSEY, III, JUDGE
SHARON S. TRAXLER
HON. RONNIE FUSSELL, CLERK

# APPENDIX E

## JUSTIFIABLE USE OF DEADLY FORCE

An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which VIRGINA DENISE WYCHE is charged if the death of an unborn viable fetus and injury to Markeisha Brooks resulted from the justifiable use of deadly force.

"Deadly force" means force likely to cause death or great bodily harm.

A person is justified in using deadly force if she reasonably believes that such force is necessary to prevent

1. imminent death or great bodily harm to herself or another, or

2. the imminent commission of a burglary against herself.

A Burglary, consists of the following three elements:

1. Markeisha Brooks entered the dwelling owned by or in the possession of Defendant.

2. At the time of entering of the dwelling, Markeisha Brooks had the intent to commit a battery in that dwelling.

3. Markeisha Brooks was not invited to enter the dwelling or if having been invited to enter that invitation was withdrawn.

The entry necessary need not be the whole body of the person. It is sufficient if the person, with the intent to commit a crime, extends any part of her body into the dwelling.

Even though an unlawful entering or remaining in a dwelling is proved, if the evidence does not establish that it was done with the intent to commit a battery, the elements of burglary are not satisfied.

"Dwelling" means a building of any kind, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings

immediately surrounding it. For purposes of burglary, a "dwelling" includes an attached porch or attached garage.

However, the use of deadly force is not justifiable if you find:

1. VIRGINIA DENISE WYCHE initially provoked the use of force against herself, unless:

a. The force asserted toward the defendant was so great that she reasonably believed that she was in imminent danger of death or great bodily harm and had exhausted every reasonable means to escape the danger, other than using deadly force on Markeisha Brooks.

b. In good faith, the defendant withdrew from physical contact with Markeisha Brooks and clearly indicated to Markeisha Brooks that she wanted to withdraw and stop the use of deadly force, but Markeisha Brooks continued or resumed the use of force.

In deciding whether defendant was justified in the use of deadly force, you must judge her by the circumstances by which she was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

If the defendant was not engaged in an unlawful activity and was attacked in any place where she had a right to be, she had no duty to retreat and had the right to stand her ground and meet force with force, including deadly force, if she reasonably believed that it was necessary to do so to prevent death or great bodily harm to herself or to prevent the commission of a forcible felony.

If the defendant was in a dwelling or residence where she had a right to be, she is presumed to have had a reasonable fear of imminent death or great bodily harm to herself, if Markeisha Brooks had unlawfully and forcibly entered, that dwelling or residence and the

defendant had reason to believe that had occurred. The defendant had no duty to retreat under such circumstances.

The presumption of reasonable fear of imminent death or great bodily harm does not apply if:

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

A person who unlawfully and by force enters or attempts to enter another's dwelling or residence is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

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

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

If you find that the defendant who because of threats or prior difficulties with Markeisha Brooks had reasonable grounds to believe that she was in danger of death or great bodily harm at the hands of Markeisha Brooks, then the defendant had the right to arm herself. However, the defendant cannot justify the use of deadly force, if after arming herself she renewed her difficulty with Markeisha Brooks when she could have avoided the difficulty, although as previously explained if the defendant was not engaged in an unlawful activity and was attacked in any place where she had a right to be, she had no duty to retreat.

If you find that Markeisha Brooks had a reputation of being a violent and dangerous person and that her reputation was known to the defendant, you may consider this fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and Markeisha Brooks.

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the defendant was justified in the use of deadly force, you should find the defendant not guilty.

However, if from the evidence you are convinced that the defendant was not justified in the use of deadly force, you should find her guilty if all the elements of the charge have been proved.