NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DERRION RICH, Petitioner, v. STATE OF FLORIDA, Respondent.	)	Case No. 2D19-4196

Opinion filed June 10, 2020.

Petition for Writ of Prohibition to the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Jeremy S. Clark and Cory J. Powell, Clark Law, St. Petersburg, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Jeffrey H. Siegal, Assistant Attorney General, Tampa, for Respondent.

LUCAS, Judge.

The State of Florida alleges that Derrion Rich fired a handgun at Maurice Cole while they were sitting together in Mr. Rich's car, killing Mr. Cole. The State contends that what precipitated this shooting was a disputed drug deal and has charged Mr. Rich with second-degree murder. Mr. Rich claims that he acted in self-defense

when he shot Mr. Cole and filed a motion to assert his immunity under section 776.032, Florida Statutes (2017).[1]

At the hearing on Mr. Rich's motion it appears that neither the State nor the defense wished to broach what happened *during* the alleged altercation between Mr. Rich and Mr. Cole that led to the latter's shooting; instead, it was agreed that the State would focus its evidence, and the parties would confine their arguments, to the legal effect of what happened *before* the altercation. Specifically, the court and counsel agreed to limit the hearing to: (1) the discrete evidentiary issue of whether Mr. Rich was engaged in criminal activity at the time leading up to the shooting, and, (2) if he was, what legal effect that would have on his claim of immunity. Or, as defense counsel put it: "We're not going to get into the merits of the motion . . . just the criminal activity." The court agreed to proceed in the manner the attorneys proposed.

The reason for this unusual approach, apparently, was to expedite our court's consideration of a legal issue concerning section 776.032's interpretation that the Fifth District had recently addressed in State v. Kirkland, 276 So. 3d 994, 997 (Fla. 5th DCA 2019). In Kirkland, the Fifth District concluded that "[b]ecause Kirkland was engaged in illegal activity at the time he used or threatened to use deadly force, he

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[1]Section 776.032(1) provides, in pertinent part, that:

> A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened . . . .

[was] not entitled to benefit from the provisions of the Stand Your Ground Law." Id. Mr. Rich's attorney requested the circuit court provide a limited ruling on whether he would be entitled to the statute's immunity if he had been engaged in criminal activity at the time of the alleged offense: "[I]f you [the court] deny our ability to do that, then I will take it up to the Second on a writ and have them make a call on it because . . . I disagree with the case—the [Fifth] DCA saying there's no entitlement to the immunity."

With that framework in place, the State presented one witness, Sarah Wright. Ms. Wright testified that she had met Mr. Rich in his car in a parking lot outside of an apartment, had paid Mr. Rich for heroin and crack cocaine, and that she, in turn, gave the heroin to Mr. Cole. Mr. Cole, she said, was apparently dissatisfied with the heroin because it "didn't weigh correctly," and so she phoned Mr. Rich to return to discuss the matter. Mr. Rich drove back to the parking lot, and Mr. Cole approached his car from the passenger side door.

> Q. And how did that go?
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> A. At first it was, you know, he [Mr. Rich] was trying to get him to buy other things instead of giving the money back.
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> Q. Fentanyl?
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> A. Typically, you don't get your money back in a drug deal. And it escalated from there.

Ms. Wright testified that while Mr. Cole was sitting in the passenger seat of Mr. Rich's car, she saw Mr. Rich retrieve a revolver from his side of the console and put it in his lap. The State did not ask Ms. Wright to describe whatever may have happened next,

but with the prosecutor's prompt of "events went forward," resulting in her "hearing, what, two shots," Ms. Wright replied, "Yes."

The defense declined to cross-examine Ms. Wright. Mr. Rich's counsel also indicated that Mr. Rich would not dispute that the substance Ms. Wright purchased was heroin, and further stipulated that Mr. Rich was a convicted felon on the date of the incident. The remainder of the proceeding was spent in legal argument over Kirkland's interpretation of the Stand Your Ground statute.

At the conclusion of the hearing, the circuit court ruled that Mr. Rich was engaged in criminal activity and that "given the [Fifth] DCA case, that precludes a finding of stand your ground immunity," Mr. Rich was not entitled to immunity and a dismissal of the second-degree murder charge. The court indicated that it was bound to follow Kirkland in the absence of any guiding precedent from our district. The court's denial of Mr. Rich's motion was not reduced to writing.

Mr. Rich now seeks review of that ruling through a writ of prohibition.

The parties have presented this case in an unusual manner. Ordinarily, immunity claims under section 776.032 should proceed as follows: first, the accused defendant files a motion; second, the court reviews the motion to determine whether it raises "a prima facie claim of self-defense immunity"; third, if it does, the court convenes and completes an evidentiary hearing under the auspice of Florida Rule of Criminal Procedure 3.190(b), in which the State bears the burden of proving by clear and convincing evidence that the accused defendant is not entitled to statutory immunity; and then, fourth, the court issues a dispositive ruling either granting or denying the

defendant's motion. See generally § 776.032(4) ("In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1)."); Dennis v. State, 51 So. 3d 456, 462-63 (Fla. 2010) (adopting procedure of convening an evidentiary hearing under Rule 3.190(b) to adjudicate motions for statutory immunity under section 776.032); Jefferson v. State, 264 So. 3d 1019, 1029 (Fla. 2d DCA 2018) ("In sum, procedurally, a claim for immunity from criminal prosecution pursuant to section 736.032(4) must first be raised, as petitioner did here, by the criminal defendant in a pretrial rule 3.190(b) motion to dismiss. The trial court is then to determine whether, at first glance and assuming all facts as true, the alleged facts set forth in the motion support the elements of self-defense in either section 776.012, 776.013, or 776.031. If the trial court determines that the defendant's claim of self-defense satisfies the requirements set forth in the applicable self-defense statute raised by the accused, the State shall then present clear and convincing evidence to overcome the self-defense claim.").

The court below never completed that fourth step. At the parties' behest, the court did not rule on the merits of Mr. Rich's motion. Because there has been no dispositive ruling on the merits of Mr. Rich's motion, we cannot determine whether Mr. Rich is entitled to prohibition on the merits of his petition. Cf. Jefferson, 264 So. 3d at 1023 (holding that prohibition was an improper vehicle to review a circuit court's ruling on a defendant's Stand Your Ground immunity motion where the circuit court declined to

convene an evidentiary hearing on the motion). When an appellate court issues a writ of prohibition to a lower tribunal, it means just that: the court below will be prohibited from acting further. See Madico v. Taos Constr., Inc., 605 So. 2d 850, 853 (Fla. 1992) ("Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction."); State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175, 176 (Fla. 1939) ("We have repeatedly held that the writ of prohibition is that process by which an inferior court is restrained by a superior court from usurping jurisdiction over parties or subject matter with which it has not been vested by law, or when action is threatened which would be in excess of and beyond its jurisdiction."). Regardless of whether we were to agree, disagree, or partly agree with the Kirkland court's construction of section 776.012, any ruling we would issue on Mr. Rich's petition, as it is presently framed, would necessitate further action by the circuit court below. Indeed, Mr. Rich states as much in his petition. He does not ask us to prohibit the circuit court from considering his case further, rather he "seeks a writ of prohibition preventing the trial court from denying his motion on a limited basis, effectively quashing the order denying Petitioner's motion for declaration of immunity and dismissal." In essence, he requests an advisory opinion from this court on a preliminary (but certainly important) legal question about section 776.012's interpretation.

But that is not a proper function for the writ of prohibition. Cf. Fla. Comm'n on Hurricane Loss Projection Methodology v. State, Dept. of Ins. and Treasurer, 716 So. 2d 345, 346 (Fla. 1st DCA 1998) (dismissing state department's petition challenging

administrative law judge's decision because, "In short, we are asked to further 'the Commission's work' by rendering an advisory opinion on whether a non-dispositive passage in a favorable recommended order correctly stated the law"). The Florida Supreme Court has cautioned against using the writ of prohibition for the purpose of obtaining legal guidance:

> Another distinguishing feature of the writ is that *it is a preventive rather than a corrective remedy* . . . . Nor will the suggestion that there are other suits of the same nature pending against the relator in the same court avail to procure the writ, since *the court will not issue a prohibition* in a case where it is not justified, *for the sole purpose of establishing a principle to govern other cases*.

See English v. McCrary, 348 So. 2d 293, 297 (Fla. 1977) (emphasis added) (quoting State ex rel. Jennings v. Frederick, 189 So. 1, 3 (Fla. 1939)). Accordingly, we must deny his petition to the extent it seeks relief in prohibition.

This same dilemma thwarts our consideration of Mr. Rich's petition in certiorari. Recently, our court expanded the circumstances in which immunity claim rulings under section 776.032 may alternatively be considered in certiorari. See Garcia v. State, 44 Fla. L. Weekly D2859, 2861 (Fla. 2d DCA 2019) ("[B]ecause the trial court erred in its construction of the Stand Your Ground statute, we are unable to determine whether Mr. Garcia is entitled to immunity on the merits. Thus, prohibition is not the proper vehicle under which to proceed. We best proceed under our certiorari jurisdiction.").[2] However, an elemental requisite of our court's certiorari jurisdiction is a

[2]We would take this opportunity to observe that reviewing these immunity claim rulings through extraordinary writ petitions is less than ideal. In fact, trying to do what all concerned would have us do—review these rulings—within the unique

definitive ruling on the merits by the lower tribunal of whatever it is the petitioner would have us review.

> Our jurisdiction to issue a writ for the "extraordinary remedy" of certiorari, Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004) (quoting Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1098 (Fla. 1987)), is well settled. To obtain certiorari relief, a petitioner must show "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." Reeves, 889 So. 2d at 822 (quoting Bd. of Regents v. Snyder, 826 So. 2d 382, 387 (Fla. 2d DCA 2002)). "The last two elements are jurisdictional and must be analyzed before the court may even consider the first element." Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011) (citing Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 527 (Fla. 1995)).

See Gift of Life Adoptions v. S.R.B., 252 So. 3d 788, 790 (Fla. 2d DCA 2018). It is simply impossible for us to meaningfully consider any of the three elements of certiorari relief when all we have is the circuit court's verbal indication of a forthcoming ruling on the merits. Cf. Davis v. Heye, 743 So. 2d 1200, 1200 (Fla. 5th DCA 1999) ("We dismiss the petition for writ of certiorari because no order was rendered from which certiorari can be taken and vest jurisdiction in this court. The circuit court only pronounced an oral ruling."); In re Guardianship of A.P., 644 So. 2d 169, 170 (Fla. 4th DCA 1994) ("Petitioner's failure to provide this court with a written order denying his request for appointment of counsel is a sufficient basis for denial of the petition [for certiorari].").

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analytical and jurisprudential confines of writ proceedings can be downright problematic. We would respectfully suggest that the appellate court rules committee consider whether it might be advisable to add immunity claim rulings issued under section 776.032 to the defense and State appeals permitted under Florida Rule of Appellate Procedure 9.140.

We do not mean to suggest that the issue Mr. Rich has attempted to bring before us—whether an accused defendant is entitled to claim immunity under section 776.012 if he was engaged in criminal activity—is at all inconsequential. It is, however, at this point premature. Therefore, we cannot consider his arguments in certiorari.

Petition denied.

VILLANTI, J., Concurs.
ATKINSON, J., Concurs in result only with opinion.

ATKINSON, Judge, Concurring in result only.

I agree that, given the posture of this proceeding, we cannot grant relief. The trial court's ruling denying Rich's motion to dismiss was not reduced to writing. See Holt v. State, 250 So. 3d 206, 209 (Fla. 2d DCA 2018) ("Absent a signed, written order, our certiorari jurisdiction may not be invoked."). Resorting as we must to the discussions recorded on the transcript of the motion hearing, it is indeed difficult to discern what exactly was the nature of the procedural stipulation of the trial court, defense counsel, and the State. The majority opinion's description is not an unfair characterization: essentially an agreed-upon truncation of the statutory self-defense immunity proceedings in order for the defendant to "request[] an advisory opinion from this court on a preliminary . . . legal question about 776.012's interpretation."

While by no means encouraging the piece-meal adjudicatory arrangement reached in the trial court, I write to express my perception that the trial court's ruling was nonetheless definitive, and we would have certiorari jurisdiction to review it had it been in written form. The trial court denied Rich's motion to dismiss based on its conclusion

that the opinion in State v. Kirkland, 276 So. 3d 994 (Fla. 5th DCA 2019), establishes that a defendant's engagement in criminal activity at the time of his use of deadly force effects an unqualified bar to the justification and immunity provided in sections 776.012(2) and 776.032(1)—as opposed to the mere elimination of the defendant's right to stand his ground without satisfying the duty to retreat. But see Garcia v. State, 286 So. 3d 348, 351–52 (Fla. 2d DCA 2019) ("Under section 776.012(2), a defendant is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself, or to prevent the imminent commission of a forcible felony. A defendant who is engaged in unlawful activity or who is in a place where he does not have a right to be, has a duty to retreat and must use all reasonable means in his power, consistent with his own safety, before his use of deadly force will be justified under the Stand Your Ground law. A defendant is not foreclosed from defending himself simply because he is in a place where he does not have the right to be, but he must first attempt to retreat from the situation if he can do so safely. The trial court's finding failed to consider whether Mr. Garcia was able to retreat prior to his use of force." (internal citations omitted)).

Considering itself constrained by the Fifth District's Kirkland opinion, the trial court went on to set the matter for trial after determining that Rich had been engaged in criminal activity. The State was complicit in this decision not to conduct an inquiry into whether Rich harbored a reasonable belief that use of deadly force was necessary to prevent imminent death or great bodily harm to himself or another or the imminent commission of a forcible felony. See § § 776.012(2). Because it was the

State's burden to disprove this by clear and convincing evidence, whether Rich is immune under section 776.032 depends solely on the rectitude of the trial court's interpretation of section 776.012(2). See § 776.032(4) ("In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity . . . ."); Jefferson v. State, 264 So. 3d 1019, 1027 (Fla. 2d DCA) ("[T]here is no evidentiary burden upon the person seeking Stand Your Ground immunity.").

Rich also acquiesced to the setting of a trial date, satisfied that "all the work's been done" for purposes of the immunity hearing. He then filed a notice of appeal from a ruling on his motion to dismiss that had not been rendered. Had the trial court's ruling been reduced to writing, this court would have certiorari jurisdiction to address the question of statutory interpretation. See Garcia, 286 So. 3d at 352 (proceeding under certiorari instead of prohibition after concluding it was not possible "to determine whether Mr. Garcia is entitled to immunity on the merits" "because the trial court erred in its construction" of section 776.012(2)). Because no written order was entered, I agree that Rich's petition must be denied. And I share the majority's sentiment that amendment of Florida Rule of Appellate Procedure 9.140 to allow for review on an interlocutory basis of orders granting or denying a defendant's motion to dismiss based on self-defense immunity under section 776.032 would be preferable to the conundrum of determining which of the original writs is the imperfect vessel available and most appropriate under the circumstances of each case.