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Protecting the Home: Castle Doctrine in North Carolina

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ABSTRACT

The idea that a person's home is her castle dates back to at least the seventeenth century in England. This idea can be seen today in a plethora of places throughout American Law, including Fourth Amendment jurisprudence. Part of North Carolina's self-defense law has been deemed a "castle doctrine," yet courts have applied its protections inconsistently at best. As it now stands, the North Carolina castle doctrine does not truly afford a homeowner the ability to defend her home from an unlawful intruder. A potential criminal prosecution is the last thing that a homeowner should have to worry about when defending her home from an invasion. This Comment explores the history of the castle doctrine in general, in North Carolina, and in Florida, and offers solutions in the form of amendments to North Carolina General Statutes sections 14-51.2 and 14-51.3.

INTRODUCTION

Jason Clary, a convicted felon, stepped into his front yard with a loaded muzzleloader rifle and faced two male intruders.[1] The intruders, armed with metal pipes, yelled and cursed at Clary while they advanced toward him and his girlfriend.[2] After retorting with curses of his own, Clary warned the men to retreat from his property or face consequences.[3] One of the men refused Clary's warning and instead advanced further.[4] As promised, Clary aimed his rifle and fired, striking the intruder in the abdomen.[5] The wounded intruder died on the way to the hospital.[6] Clary was subsequently arrested and charged with first degree murder.[7]

Clary filed a motion to dismiss the charges pursuant to the affirmative defense of the home under North Carolina General Statutes sections 14-51.2 and 14-51.3, collectively known as the "castle doctrine,"[8] and moved for a pretrial immunity hearing;[9] both motions were denied.[10] At trial, Clary, through his counsel, again asserted the castle doctrine defense.[11] Clary wanted an instruction slightly different than the pattern jury instruction found in North Carolina Pattern Jury Instruction—Criminal 308.80, which he felt better explained when the castle doctrine defense applied.[12] The

1. Motion to Dismiss Pursuant to NCGS 15A-954(a)(9) and NCGS 14-51.2, State v. Clary, No. 16-CRS-50484 (N.C. Super. Ct. Aug. 24, 2018) [hereinafter Motion to Dismiss].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* Order Denying Motion to Dismiss at 1, *Clary*, No. 16-CRS-50484 (N.C. Super. Ct. Sept. 6, 2018); Dave Faherty, *Alexander Co. homeowner claims self-defense in deadly shooting*, WSOCTV (May 3, 2016, 11:32 AM), https://www.wsoctv.com/news/local/deputies-say-homeowner-shot-man-in-yard-near-taylorsville/209457942/ [https://perma.cc/Q3KQ-NQBX].

8. *See* Order Denying Motion to Dismiss, *supra* note 7, at 2; N.C. GEN. STAT. §§ 14-51.2 to -51.3 (2019).

9. *See* Motion to Dismiss, *supra* note 1; Order Denying Motion to Dismiss, *supra* note 7, at 1–2.

10. Order Denying Motion to Dismiss, *supra* note 7, at 1–2.

11. N.C. GEN. STAT. §§ 14-51.2 to -51.3; Motion to Dismiss, *supra* note 1.

12. N.C.P.I.—CRIM. 308.80 (2012) ("In addition, (absent evidence to the contrary), the lawful occupant of a [home] . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to [himself] . . . when using defensive force . . . if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a [home] . . . and (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.").

judge rejected Clary's modifications and instructed that Clary would only be justified in using self-defense if he "reasonably believed that the intruder would kill or inflict serious bodily harm" to him or others with him.[13] The judge also qualified the justification by stating, "It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time."[14] Although the jury returned a verdict of not guilty, this case from Alexander County Superior Court provides a recent example of the struggles North Carolina judges have faced when trying to apply the state's castle doctrine. To avoid future issues, the North Carolina General Assembly should amend the statutes encompassing the castle doctrine, using Florida's statute as guidance, and implement a pretrial immunity hearing.

The arguments this Comment makes, in short, are as follows: First, the traditional understanding of the castle doctrine, garnered from English common law, is that a person has a right to defend himself within his home when there is an unlawful attack upon it.[15] Second, the variation among United States jurisdictions in applying such a doctrine to general understandings of self-defense has created many versions of this doctrine that do not truly reflect its traditional understanding.[16] Third, North Carolina has taken some encouraging steps to strengthen the doctrine's effect, but its application in practice has been inconsistent at best.[17] Finally, Florida's provisions, sections 776.013 and 776.032, are very similar to

Clary asserted that the presumption should be rebuttable only by negating elements (1) and (2), not by evidence tending to show absence of reasonable fear, but the judge declined to provide an instruction to such effect. In other words, Clary wanted the "absent evidence to the contrary" language from the pattern jury instruction to only apply to evidence negating elements (1) and (2) listed above, and not apply to evidence seeking to establish that Clary did not fear death or serious bodily harm. *See* Defense of Home, *Clary*, No. 16-CRS-50484 (N.C. Super. Ct. Mar. 8, 2019); Instructions at 9, *Clary*, No. 16-CRS-50484 (N.C. Super. Ct. Mar. 11, 2019).

13. *See* Instructions, *supra* note 12, at 9.

14. *Id.* at 10.

15. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 574–75 (1903).

16. *See generally* McDonald v. City of Chicago, 561 U.S. 742, 888 n.32 (2010) (Stevens, J., dissenting) (discussing widespread jurisdictional variation on how different states implement the right to self-defense as a defense to criminal prosecution).

17. *See generally* John Rubin, *Defensive Force in the Home*, UNIV. N.C. SCH. GOV'T: N.C.: CRIM. L. (Aug. 7, 2018, 9:11 AM), https://nccriminallaw.sog.unc.edu/defensive-force-in-the-home/ [https://perma.cc/4T76-8J8M].

North Carolina's laws, yet seem to afford defendants a more clear-cut way to receive the justification.[18]

Section I of this Comment analyzes the historical understanding of the castle doctrine with an emphasis on early English case law. It also analyzes the difficulties in applying the doctrine throughout the United States to demonstrate that North Carolina's problems are not unique. Section II provides a comparative analysis of the North Carolina statute before 2011—contained in the now-repealed section 14-51.1 of the North Carolina General Statutes—and the current statutes, sections 14-51.2 and 14-51.3, including their strengths and shortcomings. Section III contrasts North Carolina's statutes with Florida's and shows how, even with the 2011 amendments, North Carolina law does not align with the historical understanding of the doctrine. This section closely examines how the language of the statutes does not adequately protect defendants seeking to argue defense of the home in homicide cases. Section IV proposes changes in the law that will simplify its application in the real world and properly protect the people who defend their homes against harmful intrusions.

I. THE CASTLE DOCTRINE'S ROOTS

A. English Defense of Habitation

Society has long valued a person's right to defend himself or herself from intruders in his or her home. At common law, a person generally had a duty to retreat from potentially harmful situations before engaging in self-defense.[19] However, common law also combined defense of habitation and self-defense to create an exception to this general duty to retreat.[20] English law considered a person's home to be his "castle" and allowed one to defend his home against felonious harm without retreating.[21] When defending one's home from felonious harm, the use of self-defense was "justifiable," meaning that no pardon was necessary for the person to be acquitted of murder.[22] This exception to the general "flee to the wall" rule was notable because English law did not excuse parties who killed in mutual

18. *Compare* N.C. GEN. STAT. §§ 14-51.2 to -51.3 (2019), *with* FLA. STAT. §§ 776.013, .032 (2015 & Supp. 2020).

19. *See* Beale, *supra* note 15, at 575–76.

20. Benjamin Levin, *A Defensible Defense: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 530 (2010).

21. Beale, *supra* note 15, at 574–75.

22. *Id.* at 573–74.

combat, even if the killing party was acting in self-defense.[23] Instead, the only way the party could avoid criminal punishment—usually death—was to receive a pardon.[24] Defense of habitation, however, was elevated above even these "excusable" killings, since no pardon was required to acquit.[25]

One of the first cases to recognize the castle doctrine at common law was *Semayne's Case*.[26] There, an English court laid out the traditional understanding of the castle doctrine as explicitly allowing a citizen whose castle was under siege to commit a deadly attack on an intruder without incurring criminal liability.[27] The English court wrote:

> [T]he house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; . . . [and] if thieves come to a man's . . . house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . .[28]

Thus, the traditional common law view of the castle doctrine required only two things for a killing to be justified: (1) the intruder broke into the defendant's house with the intent to commit a felony therein, and (2) the defendant knew or had reason to believe that the unlawful intrusion was occurring or had occurred.[29]

B. Defense of Habitation in the United States

Although the United States adopted much of the English common law, the general idea of defense of habitation to stop an intruder within the home has not always aligned with the traditional English understanding as discussed above. The United States Supreme Court most recently referenced the castle doctrine in 1998,[30] but one of its earliest explanations of the doctrine of self-defense was espoused by the Court over 100 years earlier. In *Beard v. United States*, Beard was convicted by a jury of manslaughter after killing Will Jones over a dispute regarding a cow.[31]

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23. *Id.* at 575.
24. *See id.* at 574–75.
25. *Id.*
26. Semayne's Case (1604) 77 Eng. Rep. 194, 194; 5 Co. Rep. 91 a, 91 a.
27. *Id.*
28. *Id.* at 195, 5 Co. Rep. at 91b.
29. *Id.* at 194–95, 5 Co. Rep. at 91 a–91 b.
30. Minnesota v. Carter, 525 U.S. 83, 94 (1998).
31. Beard v. United States, 158 U.S. 550, 552 (1895) ("In the afternoon of the day on which the Jones brothers were warned by Beard not again to come upon his premises for the cow unless attended by an officer of the law . . . they again went to his farm, in his absence—

Beard was on his own property when he struck Jones in the head with a pistol.[32] Jones was in the process of drawing a weapon, intending to unlawfully take Beard's cow.[33] The trial court instructed the jury as follows:

> If these boys . . . went down there, and they were there unlawfully . . . you naturally inquire whether the defendant was placed in such a situation as that he could kill for that reason. Of course, he could not. He could not kill them because they were upon his place. . . . And if these young men were there in the act of attempting the larceny of this cow and calf and the defendant killed because of that . . . that is manslaughter; that is all it is; there is nothing else in it; that is considered so far provocative as that it reduces the grade of the crime to manslaughter and no farther. If they had no intent to commit a larceny; if it was a bare, naked trespass; if they were there under a claim of right to get this cow . . . and Will Jones was killed by the defendant for that reason, that would be murder, because you cannot kill a man for bare trespass—you cannot take his life for a bare trespass—and say the act is mitigated.[34]

When reviewing the trial court's instruction, the Supreme Court, in an opinion written by Justice Harlan, stated only the general principle of self-defense, which requires a reasonable and subjective fear of death or serious bodily harm before a defendant could respond with deadly force.[35] In doing so, the Court quoted Bishop's Criminal Law,[36] a leading treatise at the time, but did not mention the castle doctrine.[37]

Whether Justice Harlan intended to omit the castle doctrine is unknown, but this opinion highlights the struggles that even the Supreme Court experiences in differentiating between when reasonable fear of imminent death or serious bodily harm is *required* to be shown at trial for a person to be justified in using deadly force versus when reasonable fear is *presumed*.[38]

In *Minnesota v. Carter*, written over one hundred years later, Justice Scalia stated the traditional understanding of the doctrine when he gave

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one of them, the deceased, being armed with a concealed deadly weapon—and attempted to take the cow away, but were prevented from doing so . . . .").

32. *Id.* at 552–53.

33. *Id.*

34. *Id.* at 554–55.

35. *See id.* Additional instructions were given. *Id.* at 554–58. For the purposes of this Comment, the instructions above provide enough background information.

36. *See generally* Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 L. & HIST. REV. 215, 215 (1995) (discussing Bishop's contributions as a legal scholar).

37. *Beard*, 158 U.S. at 559–62.

38. *See id.* at 557.

homage to Blackstone's treatise by writing, "[E]very man's house is looked upon by the law to be his castle . . . [and] it is the defendant's own dwelling which by law is said to be his castle."[39] But like in *Semayne's Case*, the Court in *Carter* was not facing a self-defense claim when discussing the doctrine.[40]

In the well-known case of *McDonald v. City of Chicago*, Justice Stevens pointed out the widespread variation among jurisdictions in the United States in implementing the right of self-defense in the home:

> All 50 States already recognize self-defense as a defense to criminal prosecution . . . so this is hardly an interest to which the democratic process has been insensitive. And the States have always diverged on how exactly to implement this interest, so there is wide variety across the Nation in the types and amounts of force that may be used, the necessity of retreat, the rights of aggressors, the availability of the 'castle doctrine,' and so forth. . . . Such variation is presumed to be a healthy part of our federalist system, as the States and localities select different rules in light of different priorities, customs, and conditions.[41]

Still, it is hard to justify why jurisdictional variation should exist when considering the right to defend one's home from attack. But, since North Carolina has a castle doctrine, it should accurately portray the traditional English understanding.

II. NORTH CAROLINA CASTLE DOCTRINE

The North Carolina General Assembly reconstructed its castle doctrine statutes in 2011.[42] Since this amendment, courts across the state have struggled with applying the law to benefit defendants as it seems the legislature intended because the distinct lines separating the two self-defense statutes have been blurred.

That is not to say that the changes are unwarranted, as there was an actual need for clarification and modification. Prior to the changes, the law allowed a person to use deadly force to prevent or terminate an unlawful, forcible entry by an intruder into the home if the person reasonably believed

39. Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 287, 287 n.5 (Thomas Cooley ed., 2d ed. rev. 1872)).

40. *See id.*

41. McDonald v. City of Chicago, 561 U.S. 742, 888 n.32 (2010) (Stevens, J., dissenting).

42. *Compare* N.C. GEN. STAT. § 14-51.1 (repealed 2011), *with* N.C. GEN. STAT. §§ 14-51.2 to -51.3 (2019).

that the intruder intended to commit a felony.[43] The law provided as follows:

> (a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.
>
> (b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law.[44]

Thus, a defendant who argued defensive force in the home as an affirmative defense to a criminal homicide charge, prior to 2011, needed to show: (1) the intruder unlawfully and forcibly entered the home, and (2) the defendant reasonably believed that the intruder intended to kill or inflict serious bodily harm on someone in the home or commit a felony.[45]

On June 23, 2011, the North Carolina General Assembly passed North Carolina House Bill 650 to change the law surrounding defensive force in the home.[46] The statutes encompassing the castle doctrine are North Carolina General Statutes sections 14-51.2 and 14-51.3. Section 14-51.3 sets out the two situations in which a person is justified in using force.[47] The bulk of the substantive law is laid out in section 14-51.2.

Section 14-51.2 begins by listing the areas where a person is presumed to have reasonably feared imminent death or serious bodily injury: in the

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43. N.C. GEN. STAT. § 14-51.1 (repealed 2011); *see* State v. Kuhns, 817 S.E.2d 828, 830–31 (N.C. Ct. App. 2018) ("The common-law rule limiting the defense of habitation to circumstances where the defendant was acting to prevent forcible entry into the home was eliminated in 1993, when our General Assembly enacted N.C. GEN. STAT. § 14-51.1 . . . . [which] 'broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder.'") (citations omitted); *see also* Rubin, *supra* note 17.

44. N.C. GEN. STAT. § 14-51.1 (repealed 2011).

45. *Id.*

46. H.B. 650, 150th Gen. Assemb., Reg. Sess. (N.C. 2011), 2011 N.C. Sess. Laws 268.

47. N.C. GEN. STAT. § 14-51.3(a) (2019) ("[A] person is justified in the use of deadly force and does not have a duty to retreat . . . . [u]nder the circumstances permitted pursuant to G.S. 14-51.2.").

home, in a motor vehicle, or at the workplace.[48] When in any of these three places, two factual circumstances must also be present for the presumption to apply. First, the entrant "against whom" the lawful occupant of a protected place is using defensive force against must have unlawfully and forcefully entered, or be in the process of unlawfully and forcefully entering, the premises.[49] Second, the lawful occupant using the defensive force must have known or had reason to believe that the entry or attempted entry was unlawful and forcible.[50] But even if both circumstances are present and the presumption is applied, the law deems it "rebuttable."[51]

Furthermore, the law provides that when a person unlawfully and forcefully enters one of the protected spaces above the intruder is presumed to be acting with the intent to commit an unlawful act involving force or violence.[52] Thus, the lawful occupant of the protected space is "immune from civil or criminal liability" when responding with violent force.[53] Finally, the statute provides that a person does not have a duty to retreat from "an intruder in the circumstances described in this section."[54]

At first glance, it seems as if the changes provide that a person is justified in using deadly force within the home, and does not have a duty to retreat, as long as the circumstances under section 14-51.2 are present.[55] The new law continues to require an unlawful, forcible entry, but now allows a person to prevent the entry of an intruder or to stop an intruder that

48. N.C. GEN. STAT. § 14-51.2(b) ("The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply . . . .").

49. N.C. GEN. STAT. § 14-51.2(b)(1) ("The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace . . . .").

50. N.C. GEN. STAT. § 14-51.2(b)(2) ("The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.").

51. N.C. GEN. STAT. § 14-51.2(c) ("The presumption set forth in subsection (b) of this section shall be rebuttable . . . .").

52. N.C. GEN. STAT. § 14-51.2(d) ("A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence . . . .).

53. N.C. GEN. STAT. § 14-51.2(e) ("A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force.").

54. N.C. GEN. STAT. § 14-51.2(f) ("A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.").

55. N.C. GEN. STAT. § 14-51.3(a)(2).

has already entered.[56] This change clarified that a person still has the right to use defensive force once an intruder was actually *inside* the home, as opposed to being in the process of *entering* the home.[57] Moreover, the entry is not limited to the home; section 14-51.2 also covers a person's right to use self-defense while in a motor vehicle or at the workplace.[58]

The major change, however, was that when both requirements of section 14-51.2(b) were met, the defendant's reasonable fear of imminent death or serious bodily harm would be presumed, thus justifying the defendant's use of deadly force.[59] Adding a presumption of reasonable fear would, in theory, afford a person more protection in the home. Instead of needing reasonable fear of death or serious bodily harm, a defendant would be justified in using deadly defensive force in the home so long as the intruder had entered or was entering the premises unlawfully or forcibly, and the defendant subjectively believed that the unlawful or forcible entry was occurring or had already occurred.[60]

This theoretical approach is in line with the traditional common law understanding of the doctrine.[61] The two prongs of section 14-51.2(b) require the same elements that the English common law required: (1) a break-in by someone intending to commit a crime and (2) knowledge of the break-in by the person using defensive force.[62]

In practice, however, prosecutors have used evidence tending to show a defendant's lack of reasonable fear to rebut the presumption, instead of attacking the two prongs of section 14-51.2(b), as should be the case. Because the introductory language in section 14-51.2(c) states that "[t]he presumption set forth in subsection (b) of this section shall be rebuttable,"[63] prosecutors are using evidence tending to show a lack of reasonable fear to rebut the presumption—just as before the 2011 amendments.[64] Hence, it is unclear what evidence a jury should consider in determining whether the castle doctrine defense applies.

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56. N.C. GEN. STAT. § 14-51.2(b)(1)–(2).

57. Rubin, *supra* note 17.

58. N.C. GEN. STAT. § 14-51.2(b)(1).

59. N.C. GEN. STAT. § 14-51.3(b)(1)–(2); *see* Beale, *supra* note 15, at 575.

60. *See generally* Rubin, *supra* note 17.

61. *See supra* Section I.

62. N.C. GEN. STAT. § 14-51.2(b).

63. N.C. GEN. STAT. § 14-51.2(c).

64. *See* State v. Cook, 802 S.E.2d 575, 578 (N.C. Ct. App. 2018) ("[A] defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C. GEN. STAT § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm.").

It is possible to interpret the statute as requiring three elements for the justification to apply: (1) reasonable belief of imminent death or serious bodily harm, (2) unlawful and forceful entry, and (3) actual knowledge of or subjective belief of the unlawful or forceful entry. It is also possible that reasonable fear is presumed when the second and third elements are met; thus, a prosecutor must negate one of those elements to rebut the presumption.

If all three elements are required, then the rebuttable presumption does not establish an either-or option as the language of section 14-51.3 suggests. Instead, the law forces defendants to meet the requirements of both self-defense theories encompassed in section 14-51.3 in order to receive a defense of home instruction under section 14-51.2. Thus blurring the distinct line separating the two self-defense statutes.[65]

In 2018, the North Carolina Court of Appeals stated, "Neither the common law self-defense theory nor the [North Carolina General Statute section] 14-51.2 defense theory applies where the defendant did not hold a reasonable fear of imminent death or serious bodily injury."[66] This statement provides support that the language of section 14-51.2 does not actually make a defendant *justified* to use deadly force in defense of the home, as section 14-51.3 purports is the case.[67] With this ruling, defense attorneys have seemingly no choice but to argue that a defendant held a reasonable belief of death or serious bodily harm, regardless of whether the two prongs of section 14-51.2(b) are met. If the presumption actually applied, then the reasonableness of a defendant's belief of death or serious bodily harm would not be considered when the intruder unlawfully and forcefully entered the protected area and the defendant subjectively believed that to be the case.

The legislative decision to provide a "rebuttable presumption" is called into question when the history of the statute is examined. On June 2, 2011, the North Carolina House of Representatives submitted a version of the bill that encompassed sections 14-51.2 and 14-51.3.[68] In that version of the bill, section 14-51.2 made the presumption of the defendant's reasonable fear of imminent death or serious bodily harm in using the defensive force rebuttable only when such force occurs in a motor vehicle or at the

65. *See* State v. Copley, 828 S.E.2d 35, 48 (N.C. Ct. App. 2019) (Arrowood, J., dissenting) ("Distinct from the defense of habitation, the General Assembly set out the requirements for self-defense in N.C. GEN. STAT. § 14-51.3."), *rev'd*, 839 S.E.2d 726 (N.C. 2020).

66. *Cook*, 802 S.E.2d at 578.

67. *See id.*

68. H.B. 650, 149th Gen. Assemb., Reg. Sess. (N.C. 2011).

workplace.[69] Hence, the proposed statute omitted the rebuttable language when considering defensive force of the home.[70] This version of the bill suggests that the legislature at one point intended for the defense of the home to receive special treatment within the statute itself, which is in line with the historical understanding of the castle doctrine.

In sum, no matter how one views the current law, several issues can be addressed to strengthen the doctrine. These issues are as follows: whether establishing the elements of (1) a felonious entry and (2) knowledge of the entry establish a lawful occupant's reasonable fear; and whether the rebuttable presumption should be extended to the home. These issues can be clearly seen by comparing North Carolina law to Florida law.

III. FLORIDA'S STAND YOUR GROUND LAW

Florida's castle doctrine has been in the spotlight on many occasions.[71] Florida has long provided substantial protection for persons who engage in deadly force to protect the home. In *Wilson v. State*, the Florida Supreme Court stated:

> [O]ne's home is the castle of defense for himself and his family, and . . . an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and . . . he may meet the assailant at the threshold, and use the necessary force for his and their protection against the threatened invasion and harm.[72]

Florida's highest court made this statement in 1892, and it was quoted by a Florida appellate court in November 2019, over 120 years later, in *Derossett v. State*.[73] The court in *Derossett* determined that a person's home

69. Proposed section 14-51.2(c) stated, "The presumption provided in subsection (b) of this section shall be rebuttable if the use of defensive force occurs in a motor vehicle or a workplace." *Id.*

70. *Id.*

71. Debbie Lord, *What does Florida's 'Stand your Ground' Law Say You Can Do?*, ATLANTA J.-CON. (Aug. 14, 2018), https://www.ajc.com/news/national/what-does-florida-stand-your-ground-law-say-you-can/jpSBjlmK7L7bQdSFR45E1N/ [https://perma.cc/2WBW-GNTL].

72. Wilson v. State, 11 So. 556, 561 (1892) (citations omitted).

73. *See* Derossett v. State, 44 Fla. L. Weekly 2713 (Fla. Dist. Ct. App. 2019); Derossett v. State, 294 So.3d 984, 987 (Fla. Dist. Ct. App. 2020) (approving the 2019 opinion and quashing the trial court order denying Derossett immunity). The facts of *Derossett* are similar to the facts from the highly publicized Breonna Taylor case. In both cases, plain-clothed law enforcement officers were fired on by a homeowner and proceeded to return fire. In each case, the homeowner and another civilian were struck by an officer's bullet. No casualties occurred in *Derossett*, but Breonna Taylor, who was asleep when the shooting began, lost her life. The crux of the castle doctrine analysis in *Derossett* turned on

is "his or her ultimate sanctuary," and that when attacked there, the lawful inhabitant has "no duty to retreat, [can] stand his or her ground, and [can] use such force, even deadly force, as necessary to avoid death or great bodily harm or to prevent the commission of a felony."[74]

Today, Florida's castle doctrine, encompassed in sections 776.013 and 776.032 of the Florida Statutes, has been described as "a powerful legal tool for any person who is accused of a crime and claiming justification."[75] Together, the "stand your ground" laws truly afford defendants a presumption of reasonable fear. The laws require "prosecutor[s] to overcome the presumption with evidence showing that the defendant's fear . . . was unreasonable," not the other way around.[76]

Notably, the language in the Florida statutes is not all that different from the North Carolina statutes. In section 776.013, the Florida statute likewise provides that lawful occupants have no duty to retreat, but limits the locations in which it applies to when a person is lawfully in a "dwelling or residence."[77] Similar to North Carolina, Florida then highlights the need for a reasonable belief that the use of defensive force will prevent death or great bodily harm or will "prevent the imminent commission of a forcible felony."[78] Next, the Florida statute provides the familiar presumption of reasonable fear; however, it makes no mention of it being rebuttable.[79] Finally, the Florida law lays out the same requirements for the presumption to apply: if the intruder "was in the process of unlawfully and forcefully" entering the place where the person using defensive force was lawfully

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the law enforcement exception, which the court concluded did not apply since Derossett did not know, nor should he have known, that the men who opened fire on him were in fact law enforcement. Based on the similarities between the two cases, the law enforcement exception should not apply in the Taylor case.

74. *Derossett*, 44 Fla. L. Weekly at 2713 (citing Falco v. State, 407 So. 2d 203, 208 (Fla. 1981); Danford v. State, 43 So. 593, 596–97 (1907)).

75. David S. Katz, *The Castle Doctrine in Florida*, KATZ & PHILLIPS, P.A.: FIREARM FIRM BLOG (Dec. 25, 2018), https://thefirearmfirm.com/the-castle-doctrine-in-florida/ [https://perma.cc/UU6Y-H4UJ].

76. *Id.*

77. FLA. STAT. § 776.013(1) (2015 & Supp. 2020) ("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 . . . .").

78. FLA. STAT. § 776.013(1)(b) (stating a person may use "[d]eadly 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").

79. FLA. STAT. § 776.013(2) ("A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm . . . .").

entitled to be, and the person using defensive force "knew or had reason to believe" that the entry was "unlawful and forcible."[80]

When comparing North Carolina's and Florida's laws, one may notice many similarities, but there is at least one notable difference: Florida's law provides that a person "has no duty to retreat and has the right to stand his or her ground."[81] This expressly indicates what is implied in North Carolina's version of the law—that when in a dwelling or residence, a person has the unequivocal right to defend her home. North Carolina provides the same "no duty to retreat" language, but its statutes do not include the "stand his or her ground" language.[82]

Furthermore, Florida's law effectuates the traditional understanding of the castle doctrine by providing that section 776.013 is a justification for the use of deadly force that will immunize a defendant who acted in compliance with the statute.[83] Section 776.032 states that "[a] person who uses or threatens to use force as permitted in . . . [section] 776.013 . . . is justified in such conduct and is immune from criminal prosecution."[84] "'[C]riminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant."[85] This immunity language is significant because it actually encompasses the common law understanding of the defense—instead of needing to be excused for the defense of habitation, the legal justification of the doctrine is created. In theory, a person that can show he was reacting to an unlawful intrusion in his home when he killed the intruder should not be arrested or charged with murder unless the police can find evidence that the person was not actually reacting to such an intrusion. North Carolina's statutes include this language, but a review of the recent court of appeals' decisions applying the castle doctrine do not reveal any effort taken at or before trial to determine if a defendant is justified under North Carolina General Statutes section 14-51.2.[86]

Additionally, Florida law provides for a pretrial immunity hearing to determine if the section 776.012 defense applies.[87] In Florida practice,

80. FLA. STAT. § 776.013(2)(a)–(b).

81. FLA. STAT. § 776.013(1).

82. N.C. GEN. STAT. § 14-51.2(f) (2019) ("A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.").

83. *See* FLA. STAT. § 776.032(1), (4) (2017 & Supp. 2020).

84. FLA. STAT. § 776.032(1).

85. *Id.*

86. N.C. GEN. STAT. § 14-51.2 (2019).

87. FLA. STAT. § 776.032(4) (2017 & Supp. 2020) ("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

when a defendant raises the defense of habitation under section 776.012, the parties must determine whether the defense applies at a pretrial immunity, or "Stand Your Ground," hearing.[88] At this hearing, the defendant's burden is "simply to *raise a prima facie claim* of self-defense immunity."[89] The State bears the burden of proving, by clear and convincing evidence, that the defendant is not entitled to immunity from further prosecution.[90] Thus, a defendant is given a significant amount of protection after showing that he was in his home and knew or had reason to know of the intrusion upon his home. Once these two prongs are met, and the prima facie case is established, the State carries the remaining burden to show why the defendant was not justified in using deadly force.[91]

IV. REFORMING NORTH CAROLINA'S LAW

North Carolina now has several options moving forward, but only two logically flow from the discussion above. First, the legislature could incorporate the language found in the original draft of the law, or second, the state could adopt a pretrial immunity hearing like the one offered in Florida.

A. Return to the Language Found in the June 2, 2011, Version of House Bill 650

The first option is for the General Assembly to revert to the language found in the June 2, 2011, version of the bill and establish the home as a place where the defendant's presumption of reasonable fear of death or serious bodily harm is not rebuttable.[92] This modification would provide defendants with the ability to assert the castle doctrine defense under section

evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).").

88. *See* Derossett v. State, 44 Fla. L. Weekly 2713, 2721 (Dist. Ct. App. 2019).

89. *Id.* ("Derossett's sole burden at the pretrial immunity hearing was simply to *raise a prima facie claim* of self-defense immunity. The Second District Court has recently explained that, under this statute, a prima facie claim of immunity is 'an assertion that, at first glance, is sufficient to establish a fact or right but is yet to be *disproved* or rebutted by someone[]' . . . . In other words, Derossett was not required to prove his immunity claim at the Stand Your Ground hearing." (citations omitted)).

90. *Id.*

91. *Id.*

92. H.B. 650, 149th Gen. Assemb., Reg. Sess. (N.C. 2011).

14-51.2, without concern for satisfying reasonable fear under section 14-51.3.[93]

Adopting this approach would require amending the current statutes, something that always seems simpler in theory than in practice, but this would be a very direct solution. This does assume, however, that the legislature wants to establish the home as a place that receives special protections over other places where a person is lawfully entitled to be. As explained above, this makes sense if the legislature wants to enact a *true* castle doctrine. Since a person's home is his or her castle, it is almost improper to call current section 14-51.2 a castle doctrine. Instead, the legislature has enacted a "lawful place to be" doctrine. Rather than elevating the other places a person has a lawful right to be to receive equal treatment as the home, the protections a person is afforded in the home have been reduced to the same protections one receives in a motor vehicle or at the workplace. A legislative amendment reverting section 14-51.2 back to the June 2, 2011, version would return the home to its traditional level of importance.[94]

Some legislators have already proposed bills to repeal and replace sections 14-51.2 and 14-51.3. In 2017, Representatives Harrison and Insko proposed a bill that would entirely repeal the 2011 legislation and replace it with the common law "use of force against an intruder."[95] As amended, the statute would be simpler than the current laws, but would require reasonable belief of either (1) death or serious bodily injury, or (2) that the intruder intended to commit a felony in the home, for the defendant to be justified in using deadly force.[96] Therefore, defense of habitation would be similar to the general understanding of self-defense, only with the added protection for reasonable belief of the commission of a felony. The 2017 bill supports the idea that the current law is not entirely appropriate, but it does not go as far as House Bill 650 went in providing enhanced protection in the home.

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93. This is not to say that a defendant should have to choose between making a self-defense argument based on only one of the two sections. As is the practice in many self-defense cases, the defendant should have the ability to argue the applicability of both options contained in section 14-51.3 and be afforded protection by whichever prong is met. *See, e.g.*, State v. Coley, 822 S.E.2d 762, 764 (2018) (showing that the defense requested jury instructions on both self-defense and defense of habitation).

94. Instead of section 14-51.2(c) stating, "The presumption set forth in subsection (b) of this section shall be rebuttable," the reformed law would read: "The presumption provided in subsection (b) of this section shall be rebuttable *if the use of defensive force occurs in a motor vehicle or a workplace*." *See* N.C. GEN. STAT. § 14-51.2(c) (2019). This would set the home out as a place that receives greater protections, and the statute would thus be a true castle doctrine.

95. H.B. 723, 153d Gen. Assemb., Reg. Sess. (N.C. 2017)

96. *Id.*

The above solution may create concern that people would unjustifiably resort to deadly force and still receive the statutory protection. This concern, however, is already addressed under current North Carolina law. If an intruder ceases all efforts to unlawfully and forcefully enter and exits the premises, then the use of deadly force against the intruder is not justified.[97]

B. Adopt a Pretrial Immunity Hearing Similar to the Florida Stand Your Ground Proceedings

The second option that flows from the discussion above is to adopt a procedure similar to the immunity hearing provided in Florida.[98] In such a proposed hearing, a defendant in North Carolina would need to only make a prima facie case of the castle doctrine defense to receive the presumption of a justified use of deadly force. The defendant would need to show two things by a preponderance of the evidence: (1) that the intruder was in the process of entering or had already unlawfully and forcefully entered the defendant's home, and (2) that the defendant knew or had reason to believe that the unlawful and forcible entry was occurring or had occurred.[99] Upon making such a showing, the defendant would meet the prima facie case of the castle doctrine defense. The State could rebut the presumption by showing that at least one of the two elements of the prima facie case were not actually present. The State's burden would be to show this by clear and convincing evidence. The court would not consider evidence of reasonable fear at this hearing because the outcome of the hearing would establish the presence or absence of reasonable fear.

It is possible that a pretrial immunity hearing could negatively affect judicial economy; however, having such a hearing would provide several positive outcomes. First, the reasonable belief portion of the current law would be entirely ignored at the hearing, which comports with the statute's intent as it is written. Therefore, a pretrial immunity hearing would better effectuate the legislature's intent. Second, the traditional aim of the castle doctrine would be realized—defendants who truly acted in defense of their home would be justified in their actions and not subject to a formal trial.

Furthermore, a pretrial immunity hearing could enhance judicial economy. A judge could dispose of cases where no reasonable jury could find that the castle doctrine was inapplicable at the pretrial hearing stage,

97. N.C. GEN. STAT. § 14-51.2(c)(5) (2019).

98. FLA. STAT. § 776.032(4) (2017 & Supp. 2020) (providing the process for adjudicating a pretrial immunity hearing under the state's stand your ground laws).

99. N.C. GEN. STAT. § 14-51.2(b).

and cases where the evidence is not as clear would proceed to trial as usual. Since cases in which a person was surely justified in using deadly force to defend the home would be dismissed after the hearing, no jury would have to be impaneled, the possibility of an extended trial would be quashed at the outset, and the state's resources would be saved.

CONCLUSION

The right of self-defense has long been recognized at common law and in North Carolina's criminal jurisprudence. The castle doctrine, historically, has enhanced that protection for people who need to protect their home from unlawful intrusion. Although in many jurisdictions the castle doctrine provides that defendants have a right to use deadly force against intrusions in places other than the home, the traditional view of the home as a castle should elevate the protections one receives in a home above all other places.[100] The doctrine's presence in North Carolina is a promising start, but enacting the changes as suggested above will give genuine effect to the traditional understanding of justified defense of habitation.

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100. *See supra* Section I.

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