IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT STATE OF FLORIDA

CURTIS JUDSON REEVES
Petitioner/Defendant,
vs.

DCA Case No. _____

STATE OF FLORIDA
Respondent/Plaintiff.
_____/

L.T. Case No. CRC14-0216CFAES

PETITION FOR WRIT OF PROHIBITION

Curtis Judson Reeves, by and through undersigned counsels, respectfully petitions for a writ of prohibition directed to the Honorable Susan G. Barthle of the Sixth Judicial Circuit (Dade City) and her Order Denying Defendant's Motion to Dismiss Pursuant to Florida Statute § 776.013(3) (Stand Your Ground Motion) (hereinafter "Order Denying Motion"), which denied his Motion to Dismiss Based on Statutory Immunity Pursuant to Sections 776.032(1), 776.013(3), and 776.012(1)-(2), Fla. Stat. (2013) and Addendum to said motion ("Motion Requesting Immunity") (A21, A22).

Mr. Reeves was charged with murder in the second degree and aggravated battery following a shooting incident in the Cobb Grove Theater ("Cobb Theater") in Wesley Chapel, Pasco County, on January 13, 2014. (A20). The shooting event was partially captured by motion activated infrared surveillance cameras, discussed and explained in greater detail below. (A32-45).

In this Petition, Mr. Reeves contends that (1) when applying the law to the facts supported by sufficient evidence, Petitioner established that immunity should be granted. Petitioner also contends that (2) the trial court misapplied the law to the uncontroverted facts. The uncontroverted proof also established that deadly force was necessary to prevent great bodily harm, death, and/or the commission of the forcible felonies of aggravated battery, robbery and aggravated assault. The trial court failed to make any findings concerning whether Petitioner used deadly force to prevent the commission of a forcible felony. (A21-23).

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue writs of prohibition. Fla. Const. Art. V, § 4(b)(3); Fla.R.App.P. 9.030(b)(3). The appropriate vehicle to review an order denying a motion to dismiss a criminal prosecution based on immunity is a petition for writ of prohibition. *Little v. State*, 111 So. 3d 214, 216 n.1 (Fla. 2d DCA 2013).

FACTS UPON WHICH PETITIONER RELIES

On January 13, 2014, then-71 years old Curtis Reeves ("Mr. Reeves") and his wife of 47 years, Vivian Reeves ("Mrs. Reeves"), then-69 years old, went to the Cobb Theater to watch the motion picture *Lone Survivor*. (V15, 1835-1836). During the playing of the previews, a 6 foot 4 inch tall and 43 year old male named Chad Oulson ("Mr. Oulson") was seated next to his wife, Nicole Oulson, in the row directly in front of Mr. and Mrs. Reeves. (A58, 1-7; V15, 1842-45; V17,

2211). Mr. Oulson physically and verbally attacked Mr. Reeves. (V15, 1850-1856). Mr. Reeves discharged a firearm at Mr. Oulson to prevent great bodily harm, several forcible felonies, and/or death. (V15, 1856-1872). The single fired shot hit Mr. Oulson in the chest, causing his death, and hit Mrs. Oulson's left hand, which she had placed on or in front of her husband's chest, indicating that she was trying to restrain him. (V9, 1082; V17, 2230, 2236).

As detailed below, Petitioner and the State disputed the number of attacks Mr. Oulson perpetrated upon Mr. Reeves. Petitioner presented evidence that there were two attacks. Petitioner contended that Mr. Oulson first attacked Mr. Reeves by lunging at him and throwing his iPhone 5, which was encased in a case and cover, at Petitioner's face. (A36; A58, 20-25; V15, 1874). The cellular phone struck Mr. Reeves in the face and thereafter fell to the ground in between his legs. (A36; A58, 20-25; V6, 713; V15, 1950) (first attack referred to as "cellular phone attack"). The State denied that there was a cellular phone attack.

It was uncontroverted that the second attack occurred. Both during and after the contended cellular phone attack, Mr. Oulson subjected Mr. Reeves to a series of curse words, vulgarities, and threats of violence. (A56, 5; V15, 1852) Mr. Oulson then extended his hand into Mr. Reeves' row, grabbed and removed the popcorn bag Petitioner was holding in his left hand, and shoved it into Petitioner's

body. (A39, 13:26:35.765 to 13:26:39.302, 47:55 to 48:11[1]; A45, 00253 to 00267[2]; V15, 1856-71) Mr. Reeves had no advance knowledge as to the type of physical attack or assault that Mr. Oulson was going to inflict upon him at the time Oulson's hand and arm approached the 71-year old. Mr. Reeves discharged his weapon at Mr. Oulson within approximately 1.41 seconds of when Mr. Oulson started extending his hand and arm at Petitioner. (V12, 1524-27).

I. Mr. Reeves' Law Enforcement and Public Safety Experience

Mr. Reeves argued both in his Motion Requesting Immunity and at the hearing that he relied upon the lessons of his 27 years of law enforcement and public safety experience when he used deadly force against Mr. Oulson. (A21, 6-19; V15, 1831-1834; A59).

On January 13, 2014, Mr. Reeves was a retired Captain with the Tampa Police Department ("Tampa PD"), where he had served for 27 years. (V14, 1745, 1783). Mr. Reeves joined the Tampa PD in 1966 as a patrol officer. (V14, 1745-48). A feature of Mr. Reeves' law enforcement career, starting in patrol and continuing thereafter, was seeing the types of serious injuries that the hands of one

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[1]References to video exhibits are in the following citation format: [Ax, 13:12:34.567, 01:23], with "x" as the appendix number, "13:12:34.567" as the time stamp depicted on the specific frame, and "01:23" as the time on the DVD player counter. This video footage is from "camera 11." *see Petition*, 20-21.

[2] Appendix item 45 is a hard drive containing digital images of the data captured by "camera 11." *Petition*, 20-21. The hard drive contains native, enhanced, and/or resized images. Any images referenced to A45 are in folder 1406270/Q6/cam 11 images/Event[ ] 20140113132612011/ 4x re-size (00000-01149) (enhanced).

person can inflict upon another. Mr. Reeves frequently saw individuals sustain serious injuries from punches or other strikes from a fist. Some of these observed injuries included broken orbital bones, jaws, and noses, as well as facial lacerations. (V14, 1746-49).

Mr. Reeves' 1970 promotion to Detective and assignment to the Tampa PD's Homicide/Robbery Bureau reinforced his knowledge and awareness of hand-inflicted injuries. (V14, 1754-55). Mr. Reeves conducted hundreds of criminal investigations for victims of assaults, batteries, and homicides. (V14, 1754-60). Many of the victims sustained serious injuries from the assailant's hands/fists. Some of the victims died from their hand-inflicted injuries. (V14, 1756-58).

Around 1975, as a result of some highly publicized violent crimes it became apparent that certain offenses required a specialized and highly trained force. (V14, 1763-64). After extensive study, research, and training Mr. Reeves presented to high-ranking Tampa PD officials a proposal to create an elite tactical unit. (V14, 1763-72). Mr. Reeves' plan was approved and he was named Co-Commander of the first Tampa Police Department TRT/SWAT team. (V14, 1771-72).

While Mr. Reeves led and supervised TRT/SWAT team operations, he continued serving as a supervisor in various bureaus – he was promoted to Captain in 1984 - and attended a wide-range of instructional courses on officer safety and law enforcement-related issues. (A59, 16-60; V14, 1770-80). He attended these

courses so he could better instruct his SWAT team officers on use of force and survival techniques. (V14, 1774-76). Mr. Reeves also trained both new recruits and other officers in topics ranging from officer safety, to firearms use and investigations. (V14, 1777-81).

Mr. Reeves' testimony detailed the types of issues that played a role in determining whether the use of force was necessary to ensure the officer's safety. He explained that environmental factors – such as lighting conditions, noise level, and type of location – play a role in assessing the danger level of a situation. (V15, 1832-34). Mr. Reeves noted that poorly lighted environments may adversely affect an officer's ability to perceive stimuli and increase the time needed to respond to an attack. (V15, 1833-34). Mr. Reeves believed that for 20 or 30 years the vast majority of officer shootings occurred in "low-light situations." (V15, 1833).

Mr. Reeves further testified that he instructed his pupils that their physical proximity to a suspect is a gauge for determining whether an attack is imminent. (V14, 1834). Mr. Reeves instructed his pupils that they should increase distance between themselves and a near-by aggressor - unless they are in control of the situation, such as to effectuate an arrest. (V15, 1834-35).

After retiring from law enforcement in 1993, Mr. Reeves served as the Director of Security at Busch Gardens for 12 years, where he was responsible for both protecting the safety of tens of thousands of visitors each day while also

ensuring customers enjoyed their experience at the park. (V14, 1784-89). He was hired, in part, to train other security professionals to effectively interact with customers. (V14, 1785-86). During this time, he also took a plethora of courses and training programs designed to, among other things, improve his ability to protect the guests and address problems and challenges that arise in a theme park that serves alcohol. (A60; V14, 1785-88; V15, 1822-32). Also during this time, after months of study and his passing of a rigorous test, he earned a then-rarely issued Certified Protection Professional designation. (A60, 2; V15, 1822-28).

Dr. Philip Hayden, a use of force expert, testified that Mr. Reeves' use of deadly force was objectively reasonable given the totality of the circumstances. (V14, 1703). Dr. Hayden was a retired Federal Bureau of Investigation (FBI) Supervisory Special Agent who, among other things, served on the FBI's SWAT team, created a training program that specifically focused on officer safety and survival procedures, and trained over 5,500 federal, state, and local law enforcement officers in defensive tactics and use of force protocols. (V14, 1645, 1651-1654). Among the lessons Dr. Hayden imparted to his students were the warning signs and cues for when the use of force was necessary to ensure officer safety. (V14, 1646, 1653-54).

Dr. Hayden had extensive experience investigating officer-related shooting incidents. He both served on the FBI's 12-person Shooting Review Board in

Washington, D.C. for 7 years, which was responsible for investigating each FBI non-training-related shooting incident within the United States, and had personally conducted between 200 and 300 post-shooting officer interviews. (V14, 1657-59).

Dr. Hayden explained that when investigating a shooting incident, the totality of the circumstances must be considered when assessing whether any use of force was appropriate. (V14, 1700, 1712-14). However, the FBI's policy was clear: "if you go to the head with any kind of hard object, it could be your fist – it could by anything else, it's considered deadly force at that point in time." (V14, 1703).

This policy reflected Dr. Hayden's field experience. On several occasions Dr. Hayden personally witnessed injuries and deaths caused by hands or feet. (V14, 1702-03). Dr. Hayden testified that hands are indeed deadly weapons that can cause great bodily harm or death. (V14, 1702-03).

In this case, Dr. Hayden reviewed police reports and deposition transcripts of witness statements, watched the surveillance camera footage from within the theater, interviewed Mr. Reeves, listened to Petitioner's January 13, 2014 on-scene voluntary statement to Detectives, and went into the theater where the shooting took place. (V14, 1660-62, 1676-78).

In the theater, Dr. Hayden sat in the Cobb Theater chair Mr. Reeves sat in to consider what Petitioner saw on January 13, 2014. (V14, 1662-67). This witness

had the opportunity to sit in Mr. Reeves' chair while movie previews were played, the sound for said previews were on, and the lights within the theater were dimmed. (V14, 1673-74).

Dr. Hayden also considered the physical constraints Mr. Reeves faced on the day of the incident. Dr. Hayden, for example, leaned into the back portion of the seat (as Petitioner is depicted doing in the video), reached forward from a seated position to the row ahead of him (to gauge the distance between Mr. Reeves and Mr. Oulson), and got up from the seat (to determine the ease or difficulty with escaping from that seated position). (V14, 1665-66). Concerning the latter, Dr. Hayden, like Mr. Reeves, had back problems and had to use his hands on the armrest to raise himself. (V14, 1665; V15, 1853).

Dr. Hayden also assumed various positions from Mr. Oulson's seat to determine if a person in Mr. Reeves' chair could be physically reached and touched. Dr. Hayden, though 4 inches shorter than Mr. Oulson, found that from multiple positions in Oulson's row he was able to reach a person sitting in Petitioner's chair. (V14, 1668-72).

Dr. Hayden ultimately concluded that on January 13, 2014 Mr. Reeves reasonably believed that he was going to be subjected to imminent harm or danger from Mr. Oulson. (V14, 1703). In support of this conclusion, Dr. Hayden opined that Mr. Reeves' claim that Oulson had hit Petitioner in the head was credible and

was corroborated by: (i) the surveillance video depicting Mr. Oulson's body and arm extending towards Petitioner, (A36; A39, 13:26:35.765 to 13:26:39.302, 47:55 to 48:11); (ii) the fact that Mr. Oulson's cellular phone was found between his legs, (A58, 7, 20-23); and (iii) Reeves' on-scene voluntary statement that he was hit in the head, possibly by an object, and that he had seen the blur of Oulson's cellular phone screen before the impact. (A56, 5; V14, 1685-87, 1694-95, 1727-28).

Dr. Hayden noted that the environmental and situational factors Mr. Reeves faced would have supported a decision to use deadly force. Mr. Reeves was in a confined space and had no means of escape. (V14, 1684, 1699, 1700).

Dr. Hayden noted that the theater was dark and loud, making it difficult for a person in Mr. Reeves' shoes to visualize and perceive stimuli accurately. (V14, 1700-02). Mr. Oulson's sudden movements should have placed a law enforcement officer situated in Mr. Reeves' shoes on alert for impending danger. (V14, 1701).

Mr. Oulson's behaviors were also uncharacteristic and unusual for a theater setting, a place where people go to relax and be entertained. (V14, 1701). Dr. Hayden further opined that any threat assessment also takes into account the language used. (V14, 1700-01). Given that Mr. Oulson was swearing and threatening physical harm to Mr. Reeves – in a movie theater – supported Petitioner's decision to use force. (V6, 701, 703; V14, 1679, 1683, 1700, 1703; V15, 1852).

According to Dr. Hayden, the physical and age disparities between Mr. Oulson (age 44) and Mr. Reeves (age 71) also supported Petitioner's decision to use deadly force. (V14, 1691, 1699; A56, 1). Further, Dr. Hayden believed Mr. Reeves' statement that his physical capabilities were diminished were consistent with his knowledge and personal experience. (V14, 1691).

Moreover, the close physical proximity of Mr. Oulson to Mr. Reeves placed Petitioner in danger. Fists are deadly weapons. (V14, 1702). They can shatter eye sockets, cause lacerations, and in general lead to great bodily harm or death. (V14, 1701-02).

Detective Aaron Smith of the Pasco County Sheriff's Office, a principal homicide detective assisting in the investigation of this case, testified that hands are deadly weapons. (V11, 1259-63). He stated that hands can kill, cause serious bodily injury, and great bodily harm. (V11, 1259). Detective Smith further agreed that a cellular phone can be a deadly weapon. (V11, 1259, 1345). **Detective Allen Proctor** of the Pasco County Sheriff's Office, the lead homicide detective, also acknowledged that fists are deadly weapons. (V9, 1189-90).

II. Mr. Reeves' Perceived Vulnerability to Great Bodily Harm

Mr. Reeves' argued both in his Motion Requesting Immunity and at the hearing that his perceived vulnerability to bodily harm played a factor in his decision to use deadly force. (A21; A22; A56, 6, 8-13). The State did not

controvert Petitioner's proof that on the day of the incident Mr. Reeves was a 71-year old man who possessed the ailments and frailties of an aged individual at heightened risk of bone fractures and other significant injuries from physical blows. (V1, 38, 41-42, 53-54, 73-74, 84-88; V2, 148-76). A number of witnesses also rendered testimony that corroborated Mr. Reeves' claims that he reasonably believed that a physical blow from Mr. Oulson placed him at heightened risk of great bodily harm or death. (V2, 148-76, 210-17, 226-30; V9, 1100, 1106).

Michael Foley, M.D. was a board certified radiologist who exhibited and analyzed Mr. Reeves' MRIs and x-rays. (A25; A26; A27; V2, 135-40). Dr. Foley opined, to a reasonable degree of medical probability, that prior to the shooting incident Mr. Reeves had degenerative changes in multiple parts of his body. (V2, 184, 188-89). Degenerative change is an umbrella term that describes the wearing out of joints and body parts through years of use. (V2, 151-52). Degenerative changes take multiple years to occur. (V2, 151-52). Further, muscle mass also diminishes as one ages, even if an individual remains physically active and exercises. (V2, 158-59). All of his findings of Mr. Reeves' MRIs and x-rays would have taken multiple years to develop. (V2, 152).

Degenerative changes within an individual can manifest themselves in, among other things, diminished abilities and functionality, weakness of extremities

and other parts of the body, pain, weakness, tingling, and numbness. (V2, 152-53, 156-57, 169, 175-76, 187).

Dr. Foley detailed the degenerative changes he observed in the MRIs and x-rays of Mr. Reeves. Mr. Reeves had degenerative changes: (i) in the collarbone area, rotator cuffs and joints of his shoulders; (V2, 153-58); (ii) in his left and right hips, where he had osteoporosis and there was evidence of loss of bone mass; (V2, 159-60); (iii) in his hands, fingers, and wrists; (V2, 148-49, 152-54); (iv) in his left and right knees; (V2, 165-68); and (v) in his spine. (V2, 169-76). Dr. Foley stated that each of Mr. Reeves' spinal discs were degenerated ("disc desiccation") and that it likely caused pain, weakness, and numbness. (V2, 169-76).

Dr. Foley further noted that Mr. Reeves had a prosthetic left hip. (V2, 159-161). 11 months after the January 13, 2014 incident, Mr. Reeves broke his hip after falling from standing height on the porch of his residence. A prosthetic left hip was inserted. Dr. Foley explained that the reason elderly individuals are susceptible to such fractures is due to degenerative changes and weakened bones. He explained how a 20-year old falls from standing height and sustains a bruise, while a 70-year old falls in a similar manner and breaks their hip. (V2, 160-61).

Dr. Foley's testimony corroborated Mr. Reeves' statements to Detectives in his January 13, 2014 on-scene voluntary statement that he had arthritis in his hands and his back was a "friggin wreck." (A56, 6).

Vernard Adams, M.D., a board certified pathologist, also provided corroborating expert opinions to Mr. Reeves' claim that he reasonably believed that a punch or other blow from Mr. Oulson could have caused him great bodily harm or death. (V9, 1054). This witness previously served as the medical examiner for Hillsborough County for 21 years. (A52; V9, 1054, 1056-57).

Dr. Adams explained why the elderly are susceptible to physical injury. The bones of the elderly are at a greater risk of fracture from blows and impacts due to reductions in calcium content and the diminishment elastic tissue. Elastic tissue makes bones more flexible and resistant to distortions. (V9, 1100, 1106).

A blow to the head similarly places an aged person at greater risk of great bodily harm or death. As one ages, his brain shrinks and loses volume. This shrinkage both creates space within the skull and changes the structure of the internal veins. (V9, 1089-92). Those changes increase the probability that a blow to the skull results in a life-threatening neurosurgical emergency. (V9, 1090-92). Likewise, the aged have less elastic skulls, which also make them more susceptible to brain contusions from physical blows. (V9, 1102-03).

Other parts of an elderly person's body are more susceptible to great bodily harm as well. An aged person's thorax is weaker and more vulnerable to fracture due to calcification and reduced flexibility of their bones. (V9, 1097). An older

person is more likely to sustain a jaw fracture from a punch due to age-related gum recession and other factors. (V9, 1093).

Dr. Adams further detailed how a physical blow from a fist can, in both the young and the elderly, cause great bodily harm or death. A fist is created when the fingers are curled in and then the thumb is brought across the middle bones of the index and middle fingers. (V9, 1100-01). Research demonstrates that the fist, compared to an open hand, presents a more effective mechanism to deploy a concentrated level of force onto another object. (V9, 1100-01, 1104).

Dr. Adams listed some of the significant injuries that a punch from a fist can cause. (V9, 1100-03). A blow from a fist can cause a nose fracture, and such an injury can lead to bone fragments entering the brain. (V9, 1093, 1102). A punch to the head can cause a fracture of the squamous portion of the skull, which is thinly structured and more vulnerable to distortion. (V9, 1085-86, 1102). A fist blow can knock out teeth and cause rib fractures. (V9, 1102-03).

Dr. Adams described various methods a punch from a fist can cause death. Dr. Adams noted that while laypersons may think homicides resulting from one or more punches are "freak occurrences," they are in fact "easily explained by the arrangement of the human anatomy." (V9, 1104-05). A single punch to the right side or back of the skull can lead to a laceration of an artery, internal bleeding, and death. (V9, 1090-92, 1104-05). A blow to one's larynx can lead to a fracture and

partial or full suffocation. (V9, 1095-96). A punch to an elderly man's testes, particularly someone with heart problems, can lead to a cardiac event. (V9, 1103-04). Dr. Adams further opined that an iPhone thrown at an individual can also cause great bodily harm. (V9, 1094). A thrown iPhone can, for example, cause an orbital, nasal, or cheek bone fracture or a facial laceration. (V9, 1094).

A third witness, **Dr. Donna Cohen**, a tenured University of South Florida ("USF") professor in the field of aging studies, testified concerning the elderly's subjective perceptions of vulnerability to physical harm. (V2, 189-194). Aging studies is a multidisciplinary field addressing biology, physiology, psychology, and other areas. (V2, 196-97). Dr. Cohen, among other things, had been in the field of aging studies since 1975 and had been published widely. (A28; V2, 189-209, 220).

Dr. Cohen testified that aging causes physiologic change to an individual's (i) senses, (ii) body structure (like muscle mass) (iii) efficiency (or the speed with which they can respond to stimuli) and (iv) capacity to respond to high stress situations. (V2, 229-30). Concerning the second, individuals lose muscle mass as they age. (V2, 212-13). A loss in muscle mass can give rise to pain in multiple parts of the body, including but not limited to the back and spine. (V2, 213). Exercise and exertive activity is recommended to delay the aging process, (V2, 211), but performing the daily tasks of life – like walking or going up stairs - nonetheless becomes increasing difficult as one grows older. (V2, 210-14).

Dr. Cohen explained that aging-related developmental and biologic processes, in turn, affect the psychology of elderly individuals and their perceptions of vulnerability. (V2, 215). Dr. Cohen opined that an individual's persistent reminders that they are weaker than their former selves gives rises to a belief that they are more vulnerable to harm from both accidents, like falls, as well as external factors. (V2, 213-16). Her research further found a correlation between a loss of physical functioning with an increase in fear. (V2, 216-17).

More specific to this case, Dr. Cohen testified that in her expert opinion it is reasonable for an elderly individual to believe himself to be vulnerable if a younger person was attacking him. (V2, 226-30). That elderly individual's ability to mobilize himself to respond to the younger person's threats is impaired. (V2, 229-30). Dr. Cohen's testimony addressed and corroborated Mr. Reeves' claim that he subjectively and reasonably believed he was unable to effectively respond to a physical attack from Mr. Oulson. (A21; A56, 6, 8-13).

Jennifer Shaw, Mr. Reeves' daughter, testified concerning the contrast between her father's physical capabilities when she was growing up from those in the months and years preceding January 13, 2014. As a younger man Mr. Reeves maintained a high level of fitness, but in later years he had difficulties performing the same exertive activities. (V1, 28-30). More recently, Ms. Shaw observed Mr. Reeves either having difficulty with or being unable to perform varied, basic tasks

like picking up his granddaughter, pulling apart kayak paddles, and rising from his seat without using his hands to propel himself up. (V1, 38, 41-42, 53-54, 73-74).

Matthew Reeves, Mr. Reeves' son, testified that as he aged Petitioner lost the capacity to engage in certain physical activities. (V1, 84-85). When he was younger, for example, Mr. Reeves rode a mountain bike for extended distances and hunted with a composite bow that required the application of significant pressure. (V1, 85-88). Over the years, Mr. Reeves had increasing difficulty using his mountain bike and ultimately transitioned to using a road bike. (V1, 85-86). Mr. Reeves' difficulties led him abandon mountain biking. (V1, 85-86). Similarly, several years before the January 2014 incident Mr. Reeves had difficulty using a composite bow and began using a different type of hunting bow that required a lower weight poundage pull. In December 2013 Mr. Reeves told his son that he was unable to use the bow with the diminished pressure requirement and asked his son to research the purchase of a crossbow. (V1, 87-88).

Vivian Reeves also testified concerning Petitioner's physical changes. (V6, 674). At the time of the incident, Mr. Reeves was significantly overweight, bruised easily, and had problems with his shoulder, back and feet. (V6, 682-83).

Basic tasks became difficult for the aging Mr. Reeves. On occasion Mr. Reeves, when playing with his granddaughter, got "stuck" and needed assistance to get back on his feet. (V6, 686). He began wearing a back brace when performing

yard work. (V6, 684). Routine household maintenance tasks became too difficult for Mr. Reeves and were delegated to their son Matthew Reeves. (V6, 686).

Dr. Adams', Dr. Cohen's, and Dr. Foley's testimony was not rebutted.

III. January 13, 2014

A. Mr. and Mrs. Reeves enter theater 10 in the Cobb Theater

On January 13, 2014 Mr. and Mrs. Reeves went to the Cobb Theater to see the 1:30 PM showing of the film *Lone Survivor* playing in "theater 10." (V6, 690-91; V15, 1835-42). Before reaching their destination, they had arranged to meet their son Matthew inside theater 10. (V6, 690-91; V15, 1835).

After purchasing two tickets, but before entering the theater playing the film, the two of them purchased a bag of popcorn and a soda fountain drink at the concession stand. (V6, 691). When they later entered the theater, they observed five adjacent seats at the top row. (V6, 692; V15, 1842, 1853-54; A58. 5-7). They selected the top row seats to allow their son Matthew to sit next to them and to have empty seats to their left and right. (V6, 692).

Mr. Reeves entered the row first and took a seat in the middle portion. Mrs. Reeves sat to Mr. Reeves' right. (V6, 692-93; V15, 1856-58; A39, 13:14:45.583, 00:39; A58, 5-7). As they took their seats, pre-preview advertisements were playing in the theater. (V6, 693; V15, 1842).

The last row abutted a large wall. (V12, 1476; V15, 1853-54). The wall behind the top row was 5 feet 2 inches in height. (A58, 6, 18-19; V12, 1476). Behind the wall was the CineBistro portion of the theater, where patrons could eat and drink, but it was closed during the 1:30 PM showing. (V5, 483-85, 499).

In the row in front of Mr. and Mrs. Reeves sat Chad Oulson and his wife Nicole Oulson. (A58, 5-7). Mr. Oulson was 43 years old, 6 foot 4 inches tall, and weighed 205 pounds. (V17, 2211).

Mr. Oulson sat in the seat in front of Mrs. Reeves, while Mrs. Oulson was seated in front of Mr. Reeves. (A58, 5-7; V6, 696-97). The chairs in which Mr. and Mrs. Oulson were seated substantially reclined backward upon the application of pressure. (A58, 5-9). The seats in which Mr. and Mrs. Reeves sat barely reclined, if at all, due to the wall behind them. (A58, 6, 18-19; V12, 1476; V14, 1666).

B. The motion detecting camera surveillance system in theater 10

Within theater 10 were two motion activated infrared cameras that partially recorded and saved footage on hard drives being stored in the Cobb Theater's projector room. (V5, 485-488). "Camera 11" was located (if looking at the movie screen) at an elevated height of 35 feet on the right-side wall, while "camera 12" was also at a similar elevated height, but on the left-side wall. (V4, 396-97; V5, 485; V12, 1405). These cameras were positioned to strictly monitor the CineBistro section of the theater, but did capture a small portion of the general seating area.

(A38; A39; V5, 485). Camera 11 partially recorded the area where Mr. and Mrs. Reeves were seated – but captured little to no portion of the row in which Mr. and Mrs. Oulson sat. (A39; A40; A41).

Forensic video analyst **Bruce Koenig**, a retired Supervisory Special Agent at the FBI and former head of its video and audio analysis section, created enhanced, magnified, and other DVDs and materials for consideration in this case. (V3, 305-06, 393-439; A33-A44). Throughout his career Mr. Koenig worked on over 6,000 cases featuring audio and/or video evidence, analyzed over 19,000 audio and/or video recordings, testified in over 350 proceedings, and worked on numerous high-profile matters. (V3, 305-20, 324-329).

Mr. Koenig explained that cameras 11 and 12 were part of a low-resolution motion-detecting camera recording system that only captured 240 by 320 pixels (i.e. 76,000). (V4, 357, 377-78). By comparison, an iPhone has 6,000,000 pixels. (V4, 378).

However, using forensic analysis tools Mr. Koenig was able to improve the visibility of portions of the footage, sharpen certain images, and magnify other sections. He also created various videos where the playback speed was modified and/or a particular portion of the screen was enlarged. (A39-A43). Further, in certain videos Mr. Koenig added content highlighting - i.e. placement of a colored circle around an object or person. (A36).

C. The movie previews start playing

At some point the movie theater announcement to discontinue use of cellular phones played and the previews commenced. (V6, 697; V15, 1842-43). When the previews started, the lights within the theater were substantially dimmed and the interior of theater 10 darkened. (V6, 697-98). The announcements asking the moviegoers to refrain from using their cellular phones were clearly displayed on the theater screen. (V6, 697; V15, 1843).

A DVD of the movie previews played in theater 10 on the day of the incident was entered into evidence (A29; V2, 241). The first several previews played that day were for action films, such as *Sabotage* starring Arnold Schwarzenegger and *RoboCop*, which featured explosions and gunfire. (A29).

While Mr. Reeves watched the previews, a light shined in Petitioner's face. (V15, 1843-44). The light was from Mr. Oulson's usage of his cellular phone. (V15, 1843-44).

Mr. Reeves politely asked Mr. Oulson to stop using his cellular phone. (V15, 1843-44). The 43 year old Mr. Oulson responded by yelling loud obscenities at the 71 year old Mr. Reeves. (V15, 1844). Mr. Reeves testified that Mr. Oulson told him to "F-off" or that he needed to "get the F out of my face." (V15, 1844).

Vivian Reeves testified that she saw her husband lean forward from his seat to, she presumed, speak to Mr. Oulson. Mr. Reeves' voice did not rise above the

sounds and noise from the previews. (V6, 697-98). Although those previews were loud, Mrs. Reeves heard Mr. Oulson say either "fuck" or "fucking" and then the word "texting" and "daughter" to her husband. (V6, 697-99).

Experts with the State and the Defense, prior to the start of the hearing, forensically established that Mr. Oulson was not text messaging or communicating with his daughter, who at the time was 2 years of age. Instead, forensics established that he was surfing Facebook and profootballmock.com. (A67).

Mr. Reeves remained in his seat after Mr. Oulson's vulgar response. Approximately 1 minute later, however, Mr. Oulson's use of his cellular phone had not stopped, causing light to continue shining in Mr. Reeves' face. (A39, 13:22:32.287 to 13:23:20.035, 31:44 to 34.54; V15, 1844-45). Mr. Reeves then told Mr. Oulson that he was going to notify theater management. (V15, 1845-47). Mr. Oulson responded and stated "I don't give a F what you do." (V15, 1845-47).

Mr. Reeves stood up from his seat, handed his bag of popcorn to his wife, walked to the aisle, and exited the theater. (A56, 3-4; V15, 1845-48).

D. Mr. Reeves speaks with theater manager Thomas Peck

Once he reached a service desk, Mr. Reeves patiently waited for the Cobb Theater manager, **Thomas Peck**, to finish a conversation with another patron named **Dawn Michelle Simpson**. (A33, 13:25:36.218 to 13:26:21.764, 16:02 to 16:51).

Dawn Michelle Simpson testified that she went to the Cobb Theater to obtain movie posters. (V5, 538-59). Ms. Simpson stated that as she was speaking with Mr. Peck at the service desk, she observed a man – identified during the hearing as Mr. Reeves - waiting patiently for her to complete her conversation. (V5, 539-42). After Mr. Peck asked her to write down the names of the movie posters she wanted, she moved to the side to create a list. (V5, 541). After moving aside, she observed and heard Mr. Reeves speaking with Mr. Peck. (V5, 541-42). Ms. Simpson testified that Mr. Reeves was "very calm" and "polite" and that she never felt threatened at any time. (V5, 542-43, 545-46).

When it was his turn to speak, Mr. Reeves calmly told Mr. Peck that he was embarrassedly bringing an issue to the manager's attention. Mr. Reeves told Mr. Peck that there was a man seated in front of him who was using his cellular phone, and that after Mr. Reeves asked for him to stop - the man had said to "F-off." (V15, 1848-49). Mr. Reeves asked Mr. Peck to address the situation. (V15, 1848). Mr. Reeves testified that the manager agreed to handle the issue. (V15, 1848). After completing his conversation with Mr. Peck, Mr. Reeves re-entered the theater and walked to his seat. (V15, 1849-50).

Mr. Peck could not recall any thing Mr. Reeves said or did that gave him any concern, fear, or anxiety. (V5, 500-02).

E. Mr. Reeves returns to his seat

As he walked to his seat, Mr. Reeves noticed that Mr. Oulson had both stopped using his cellular phone and was looking at him. (V15, 1849-50; A39, 13:26:12.742 to 13:26:19.416, 46:25 to 46:52). Mr. Reeves testified that he perceived Mr. Oulson's look at him as a sign of agitation, and as a goodwill gesture intended to defuse any ill feelings - Petitioner said he was sorry to have involved theater management. (V15, 1849-50, 1934-35).

Before sitting down, Mr. Reeves took the bag of popcorn from Mrs. Reeves. (A39, 13:26:16.946 to 13:26:21.093, 46:41 to 46:57; V15, 1849). Mr. Reeves testified that after he sat down, he was not certain whether he sat with his legs crossed or not. (V15, 1866). At that point, Mr. Reeves was then (i) seated in his chair, (ii) holding the popcorn bag with his left hand, and (iii) watching the movie previews. (A39, 13:26:19.416 to 13:26:21.685, 46:52 to 47:01).

F. Mr. Oulson's first attack – Cellular Phone Attack

Mr. Reeves testified that he was seated for a brief moment when he observed Mr. Oulson and Mrs. Oulson interacting. Mrs. Oulson had both of her hands on Mr. Oulson's left arm, indicating that she was trying to hold her husband down. (V15, 1850). Mr. Oulson nonetheless then jumped out of his seat, rapidly stood up, and swung around. (V15, 1850).

After completing this motion, Mr. Oulson was then directly in front of Mrs. Reeves. (V15, 1850-51). Mr. Reeves heard, either immediately before or during

the course of Mr. Oulson's rise from his seat, him loudly yell something about theater management or a manager.

When asked what then happened, Mr. Reeves testified that:

> [Oulson's] motion and swinging around got my eye. He's right off to my right here, caught my eye almost immediately. When I looked up, he was coming over the seat at me across the front of where my wife was, and he had – I saw just a snapshot of a – of something dark in his hand. Almost immediately, I saw what I perceived to be a – a glow from a light, a screen, right in front of my face and I was hit in the face.

(V15, 1850-51). He felt the impact over his left eye. (V15, 1851).

After getting hit in the face, Mr. Reeves was "dazed" and "disoriented." (V15, 1852). He testified that after the blow, he was "trying to get [his] thought processes back together as to what happened because it was so unexpected until – I mean, it's just something that you would not expect to happen in a theater." (V15, 1852).

The blow to his face knocked his glasses askew. After the facial impact the left temple/arm of the glasses were knocked out of their original position and were hanging parallel to his left cheek. (V15, 1851). Mr. Reeves' vision then became blurred, though he did not immediately associate the fact that his glasses were knocked askew with his difficulty seeing. (V15, 1851-52).

After the blow to his head, Mr. Reeves attempted to get out of his seat and stand up. (V15, 1852-53). His attempt failed. (V15, 1853). Mr. Reeves explained

he "had a bag of popcorn in [his] left hand, and [he] normally – because of some issues over the years, [he] normally... push[es] off the seat" using both of his hands. (V15, 1853). Mr. Reeves "tried to stand up by just leaning forward." But then he "realized that that was not a good idea" because "the guy that just hit me was right there. You try to get away from him, not closer to him." (V15, 1853).

After realizing that getting up was dangerous, Mr. Reeves pushed his person back in his seat as far as he could to increase the distance between Mr. Oulson and he. (V15, 1853). While he did this, he saw Mr. Oulson's wife trying to hold on to him. (V15, 1853). As Mr. Reeves leaned back and to his left, his legs were extended in the aisle. (V15, 1853-54). As this was occurring, Mr. Reeves heard Mr. Oulson yelling a "lot of sentences with the F word," such as "going to kick your F'in' ass," and "I'm going to – F you," and "if it was any of your F'ing business, I was texting my F'ing daughter." (V15, 1852).

Mr. Reeves, during his on-scene voluntary statement to Detectives, stated that Mr. Oulson jumped out of his seat, turned to face Petitioner, and started swearing. (A56, 4, 7-8). Petitioner told the detectives that Mr. Oulson repeatedly yelled the word "fuck" and that he was texting his daughter. (A56, 4, 7-8). Mr. Reeves further detailed to the Detectives how Oulson's wife was trying to hold him back. (A56, 4-7).

Mr. Reeves described to the Detectives the cellular phone attack by stating that: "I think he had his cell phone in his hand… um, because I saw the, I saw the, the blur of the screen." (A56, 5). He explained that he saw Mr. Oulson holding a "cell phone," and that after the shooting: "I looked down and his cell phone was laying at me [sic] feet, so I think that's what he hit me in the face with." (A56, 6). Mr. Reeves acknowledged to the law enforcement officers that Mr. Oulson may have hit him in the face with a fist. (A56, 5). Mr. Reeves further described how the blow to his face left him "dazed," caused his glasses to be partially knocked from their position, and impaired his vision. (A56, 5).

Mrs. Reeves also observed Mr. Oulson quickly stand up, turn, and lean into the aisle in which she and her husband were seated. (V6, 701-03). She "thought [Mr. Oulson] was coming over." Mrs. Reeves stated that she observed Mr. Oulson's "whole upper body just [come] forward and [she] thought that he was coming over." (V6, 703-04). Mrs. Reeves testified she heard Mr. Oulson say "who the fuck do you think you are" as he rose from his seat and seemingly started coming into the top row. (V6, 701, 703). After seeing Mr. Oulson lunging over the chair, Mrs. Reeves saw neither the cellular phone nor second attack committed upon her husband. (V6, 708-09). Mrs. Reeves "blocked" out the episode and could not remember whether she had closed her eyes. (V6, 708). She explained that she

"just couldn't handle what happened," she was "shaking," and she had never been so "scared" in her life. (V6, 709-11).

A witness seated in the same row as Mr. Reeves saw Mr. Oulson stand, face Mr. Reeves, hold an object in his hand - and then make a throwing motion. (V3, 263-67). **Joanna Turner** ("Mrs. Turner") testified that she was seated in same row as Mr. and Mrs. Reeves. Mrs. Turner was seated to the right of Mr. and Mrs. Reeves, in the second seat from the aisle and next to her husband, Mark Turner, who occupied the seat along the aisle. (V5, 260, 262).

Mrs. Turner was watching the previews and "suddenly [she] see['s] a man standing up[, and] she was looking at him. And [Oulson] stood up, sort of turned to his left towards – to the back row." (V3, 263). Mrs. Turner saw Mr. Oulson, facing the back row, talking and holding a dark colored object that she, at the time, perceived to be a "mug" or "thermos." (V3, 264-65, 267). Mr. Oulson's cellular phone was an iPhone 5 in a black case and cover. (A58, 20-25).

Mrs. Turner testified that she then observed Mr. Oulson make a rapid throwing motion with the arm holding the dark colored object. (V3, 264-65). Mrs. Turner reenacted the throwing motion for the trial court. (V3, 265-66). After seeing Mr. Oulson make the throwing motion with his arm, she returned her attention to watching the previews. (V3, 265-67).

Camera 11 also captured portions of the cellular phone attack. (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26). A36, which contains the real- and time-speed-adjusted looped, content highlighted enhanced and/or magnified videos, depicts Mr. Oulson's arm, shoulder, and head entering into the top row and moving towards Mr. Reeves' body. A yellow-colored circle was placed in this exhibit around Mr. Oulson's arm, shoulder and head as they both enter into Mr. Reeves' row and space - and then recede from the video. A39, at the pertinent portions, (13:26:25.322 to 13:26:27.924, 47:15 to 47:26), also captures Mr. Oulson committing the cellular phone attack.

Further, A36 features red-colored circles drawn around a set of lighted pixels that appear multiple times in the cellular phone attack portion of the camera 11 recording. Those referenced sets of lighted pixels appear in the same areas as would a cellular phone with a lighted screen, facing camera 11, thrown by Mr. Oulson at Mr. Reeves' head, and then falling to the ground.

Mr. Koenig stated that a rectangle-shaped 2 by 3 set of lighted pixels appear at 13:26:25.322 in the various videos and individual frames (i.e. bitmaps) based on and/or originating from the camera 11 footage. That 2x3 lighted pixel rectangle first appears to the left of Mr. Oulson's arm, shoulder and head and to the right of Mr. Reeves' body. (A36; A39, 13:26:25.322, 47:14; A45, 00211, 00215, 00216;

V4, 403-06) Another set of lighted pixels appear near Mr. Reeves' legs and may depict the lighted cellular phone falling to the ground after hitting Petitioner. (Id.)

While those aforementioned illuminated pixels could correspond to the cellular phone's trajectory from Mr. Oulson's hand, to Mr. Reeves's head, and then to the ground - Petitioner acknowledged that the lighted object may be a reflection from reflective strips on his shoe. (V15, 1865-66). He admitted that he could not be 100% certain as to what those lighted pixels represented. (V15, 1865-66). Mr. Koenig also testified that he was also unable to render an opinion on the source of those lighted pixels based solely on the video. (V4, 405-06). This is because there were an insufficient number of pixels to allow him to opine as to what the lighted objects depicted. (V4, 405-06).

Mr. Koenig and his colleague Douglas Lacey visited the Cobb Theater on July 28, 2015 to run various scientific tests designed to determine the source of the lighted pixels. (V4, 439-41). During the theater visit, the two had the necessary items to make such a determination, including a replica of Mr. Oulson's cellular phone and one of the shoes Mr. Reeves wore on January 14, 2014. (V4, 440-43). However, immediately following the incident the Cobb Theater replaced and modified the camera recording system. (V4, 440-43; V6, 612-14, 624-27). The non-preservation of the camera recording system and its settings precluded Mr. Koenig from ascertaining the source of the lighted pixels. (V4, 442-43).

The videos moved into evidence also capture Mr. Reeves attempting to exit his seat immediately after Mr. Oulson's arm, shoulder and head appear in the footage. (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A45, 00208 to 00260). The videos also recorded Mr. Reeves' reclining into the back portion of his chair, as his head either completely or predominantly disappears from the screen. (A39, 13:26:21.484 to 13:26:27.891, 46:59 to 47:25; A45, 00210 to 00266).

G. Mr. Oulson's Second Attack

The video footage captured the below-described second attack, and its occurrence was not controverted by either party. (A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A45, 00253 to 00267; V15, 1856-71). While leaning into the left, back portion of his chair, Mr. Reeves testified that Mr. Oulson was in a "fit of rage" and "out of control." (V15, 1868-69). Mr. Reeves observed Mr. Oulson attempting to climb into the back row. During this time, Mrs. Oulson was attempting to physically restrain her husband. (V15, 1868-69).

Then, Mr. Reeves testified he saw Mr. Oulson "reaching over the back of his seat attacking me. He[was] trying to come over the seat." (V15, 1869). Mr. Reeves stated that Mr. Oulson's whole body "[was] there and his arms. He's – he's – it looks like he's pulled away from his wife and that he's – he's gotten loose from her and he's trying to come back over the seat." (V15, 1869). Mr. Reeves then

realized that Mr. Oulson was "getting ready to attack again," and that decisive action was needed to survive the episode. (V15, 1869-70).

Mr. Reeves saw Mr. Oulson's hand coming over his seat. (V15, 1870). As Mr. Oulson's hand came forward, Mr. Reeves had no knowledge or information concerning the type of attack or assault Oulson was going to perpetrate. All Mr. Reeves could see was "a guy attack[ing] me and reaching out to get me." (V15, 1870). Mr. Oulson then grabbed and removed the popcorn Mr. Reeves was holding in his left hand and shoved it into the 71-year old's body. (V15, 1870-71). Petitioner perceived Mr. Oulson's body coming over the seat towards him, but did not see or realize that his popcorn had been taken. (V15, 1870-71).

When Mr. Reeves saw Mr. Oulson's arm and body coming towards him, Petitioner made the decision to shoot him before another physical blow would be inflicted. (V15, 1871). Mr. Reeves saw that Mr. Oulson was younger – he believed between 35 and 40 years of age - and was a "good-sized man" and "pretty tall." (V15, 1872). Petitioner did not think at his advanced age, and given Mr. Oulson's youth, size, and height, that he had any other option. (A58, 10, 12-13). Mr. Reeves removed a handgun that was in his front right pant pocket and discharged it at Mr. Oulson a single time. (V15, 1872). Thereafter he placed his firearm on his left leg, so as to not be perceived as a danger by others. (V15, 1872). A man approached

him several seconds later, identified himself as a law enforcement officer, and retrieved Mr. Reeves' gun from his leg. (V15, 1873).

When describing the second attack in his on-scene voluntary statement to Detectives, Mr. Reeves stated he saw Mr. Oulson coming over the seat into his area. (A56, 8). He admitted he was not entirely certain as to what had occurred. After seeing Mr. Oulson reaching over, Petitioner told the investigators: "I make contact with something… his arm, his chest, a shoulder, I don't know" and "I had a hold of something, I'm assuming it was probably his chest, I don't know." (A56, 8). Mr. Reeves repeatedly offered potential explanations as to what had occurred to him, but he frequently used the phrase "I don't know." (A56, 8-9). Mr. Reeves gave these potential explanations before he (or the law enforcement officers) had an opportunity to review the video footage.

Mr. Reeves also explained to the Detectives the fear that led him to use deadly force. Mr. Reeves stated Mr. Oulson's movement towards Petitioner, aggravated positioning, yelling, and cursing was fear-inducing. (A56, 9). He believed that Mr. Oulson was "fixing to beat the shit out of me." (A56, 9). Mr. Reeves noted that "I haven't been scared by that many people. Since I've been retired, nobody has ever scared me. This guy scared the shit out of me." (A56, 13).

The age disparity between Mr. Reeves and Mr. Oulson played a role in his decision to use deadly force. Mr. Reeves told Detectives that he was 71 years old,

had arthritis in his back, knees, and hands, and did not believe he could successfully battle a younger person. (A56, 1, 6, 10, 12-13). He noted that when he socialized with his former TRT/SWAT members, they wryly called each other "cripples" - due to their age-related diminished strengths and injuries. (A58, 11).

Robert Kerr, a retiree who was seated (with his wife) in one of the highest rows in the general seating area of theater 10, was watching the previews when he heard yelling within the theater. (V6, 764-65, 768). He then heard a voice yell "you're not going to hit me in the face again." (V6, 775). The State claimed the statement was hearsay and not admissible as an excited utterance. (V6, 766-67, 771-73). The trial court held that, though Mr. Reeves was the only person in the theater contending that he had been hit in the face, because Mr. Kerr could not identify the declarant the excited utterance exception to hearsay did not apply as it was insufficiently reliable. (V6, 773-74).

Marida Abrew (phonetic), a retiree who was also watching the previews in theater 10, heard someone yell the word "motherfucker." (V7, 880, 884). The trial court sustained the State's hearsay objection to that word being admitted and held:

> I don't find that the words uttered were to somehow prove that someone was really a mother-effer. But I do find that it's being offered to prove the ultimate allegation that the Defense is trying to prove, that there was some extreme hostility being put forth. So I do find it's hearsay.

(V7, 888-89). The trial court also held it was not an excited utterance, despite the Defense's arguments that the declarant's (i.e. Mr. Oulson) identity was sufficiently established. (V7, 884-904).

Allen Wolfe sat in the row in front of the Oulsons, one seat to the left of Mrs. Oulson. (V7, 843-44). While the previews played he heard "somebody yelling in the background, you know, getting louder." (V7, 846). Mr. Wolfe turned around and saw Mr. Oulson standing and facing Mr. Reeves. (V7, 846-48). Mr. Oulson was saying "shut the fuck up[,] I'm trying to text my daughter" and "cuss words." (V7, 848-49). Thinking that a "fight's getting ready to break out" Mr. Wolfe stood up to "break it up" when he heard a shot fired. (V7, 853).

Mrs. Turner - after seeing Mr. Oulson stand, face Mr. Reeves, hold a dark object in his hand, and make a throwing motion – then returned her attention to watching the previews. (V3, 265). After watching the previews for approximately 4 to 6 seconds, she turned her head to the left after hearing a loud voice from that direction. (V3, 266-67). The voice belonged to Mr. Oulson, who Mrs. Turner observed was still standing up. She heard Mr. Oulson say in a loud voice, over the sounds of the movie previews, the words "I'm texting my daughter" and "If you don't mind."

After turning her head from the previews to the left, she saw Mr. Reeves and described him as "sitting… very funny." (V3, 268, 270). Mrs. Turner testified Mr.

Reeves was leaning to his left. She reenacted Mr. Reeves' sitting posture for the trial court. (V3, 268).

Then, Mrs. Turner observed popcorn in the air and the muzzle flash. (V3, 270-71), She then saw Mr. Reeves place his firearm on his lap. (V3, 271). Mrs. Turner testified that she observed Mr. Reeves was "holding his head with two hands." (V3, 271). Another male approached Mr. Reeves and picked up the firearm from his lap. (A39, 13:26:43.114 to 13:26:53.417, 48:28 to 49:07; V3, 272).

That individual was **Allen Hamilton**, an off-duty law enforcement officer who was seated approximately nine chairs to the left of Mr. Reeves in the top row. (V17, 2089-90, 2092, 2094, 2137-38). Mr. Hamilton, while watching the movie previews, heard Mr. Oulson say that he was texting his "fucking daughter[,] do you mind." (V17, 2096, 2147). Because he was in a movie theater, the tone and substance of Mr. Oulson's language was concerning to Mr. Hamilton. (V17, 2156).

Although Mr. Hamilton was watching Mr. Oulson during these moments, he never saw him reach over into Mr. Reeves' row - despite the fact that the video footage clearly depicts this event occurring. (A39, 13:26:35.765 to 13:26:39.302, 47:55 to 48:11; V17, 2098-2100, 2156). Mr. Hamilton stated that when he looked at Mr. Oulson – the previews were playing at the time - he saw a silhouette. (V17, 2144-45). He could not see Mr. Oulson's facial features. (V17, 2146).

Mr. Hamilton then heard a gun fire, walked towards the area where the incident occurred, and removed the firearm which Mr. Reeves had placed on his left knee. (V17, 2100-01). Mr. Reeves told Mr. Hamilton he had been hit with something. (V17, 2103). Mr. Hamilton looked down and saw a cellular phone at Mr. Reeves' feet. (V17, 2109).

Mr. Hamilton claimed that at some point thereafter Mr. Reeves turned to his wife, pointed his finger at her, and told her not to say another "fucking" word. (V17, 2107). Mr. Hamilton, however, at the request of investigating detectives, made a written statement that day and made no reference to Mr. Reeves' purported statement to his wife. (V17, 2107). That day, Mr. Hamilton also made an oral (recorded) statement to law enforcement concerning the incident - and again made no reference to Petitioner's alleged comments to his wife. (V17, 2111-12). Mr. Hamilton's incredulous excuse for why he omitted Mr. Reeves' purported statement to his wife was that he believed a more detailed interview would occur at a future date. (V17, 2112-14).

On cross-examination, Mr. Hamilton admitted at a subsequent sworn deposition by the defense that he was unable to recall what Mr. Reeves had said to his wife. (V17, 2178). At the deposition, Mr. Hamilton's bizarre excuse for his lack of recollection was that he would have needed a recording of Mr. Reeves'

statement in the movie theater to be able to repeat or remember the words that Petitioner uttered. (V17, 2178).

After Mr. Hamilton picked up the firearm from Mr. Reeves's left leg, law enforcement officers entered the theater and took Petitioner into custody. Mr. Reeves was taken to a law enforcement vehicle, wherein he gave a statement to Detectives Proctor and Koenig of the Pasco County Sheriff's Office. (V15, 1874-75; A56; A57). Petitioner's voluntary statement to the Detectives was consistent with his sworn in-court testimony.

H. The positioning of Mr. and Mrs. Oulson at the time of discharge

Both **Dr. Adams** and **Dr. John Thogmartin**, medical examiner for Pasco County, testified and concurred on the relative body positioning of Mr. Oulson and Mrs. Reeves when the gun was fired. (V9, 1066-67, 1070-82; V17, 2210-30).

The single bullet traveled and: (i) grazed the right hand and wrist of Mr. Oulson, leaving a trough-wound (A53; V9, 1066-67, 1070-71); then (ii) grazed the fourth and fifth fingers of Mrs. Oulson's left hand, also leaving trough-wounds; (A54; V9, 1076-80, 1082); and ultimately (iii) went into Mr. Oulson's chest. (A; 53; V9, 1072-74). The stippling patterns were consistent with Mrs. Oulson's hand touching Mr. Oulson's chest at the time the gun was discharged, indicating she was attempting to hold him back. (V9, 1081-83).

Based on the stippling patterns, Dr. Adams opined that at the time the gun was fired, Mr. Oulson's right hand/fist was in front of his chest. (V9, 1068-69). The absence of stippling on Mr. Oulson's fingers was consistent with his right hand being curled up in a fist at the time the weapon was fired. (V9, 1066-1071).

Dr. Adams testified that the gun's muzzle was between 2 and 15 inches (less than the length of an arm) away from Mr. Oulson's right hand/fist. The distance between the muzzle and Mr. Oulson's right hand/fist was, however, "probably less than 10" inches apart. (V9, 1068-69). Dr. Thogmartin's estimate was 4 to 15 inches. (V17, 2220).

I. Detective Proctor arrests Mr. Reeves without first entering theater 10, not knowing that video footage of the incident existed, nor learning of Mrs. Turner's observations of Mr. Oulson

Detective Proctor, the designated lead investigator in his case, arrived at the Cobb Theater shortly after the shooting. (V9, 1135-39). Det. Proctor interviewed Mr. Reeves, who voluntarily consented to giving a statement. (A55; A56; V9, 1171-74, 1177-79). Det. Proctor concluded Mr. Reeves was being honest and truthful in his statement. (V9, 1197-98).

Det. Proctor testified that Mr. Reeves said he may have been hit in the face with a cellular phone or a fist. (V9, 1179-80). Mr. Reeves stated he saw Mr. Oulson was facing him and coming over his seat. (V9, 1187). Petitioner told Det.

Proctor that after he was hit in the face, he tried to increase his distance from Mr. Oulson by leaning back in his seat. (V9, 1187).

Det. Proctor had training in threat assessments and the escalating patterns of violence that suspects can exhibit. (V9, 1160-61, 1210). Prior to arresting Mr. Reeves, he nonetheless did not inquire into various issues related to the incident. (V9, 1194-95). Det. Proctor knew Mr. Reeves was a retired law enforcement officer, but did not ask Petitioner of his use of force and officer survival training. (V9, 1182-84). Det. Proctor did not learn of Mr. Oulson's height, weight, or specific age. (V9, 1182-83). Det. Proctor made no inquiry into the lighting conditions or noise level at the time of the shooting. (V9, 1180-81, 1190-91). Det. Proctor also had been informed that Mr. Oulson was cursing before the shooting, but he neither asked nor learned how loud those vulgarities were uttered. (V9, 1154-55, 1182). Det. Proctor acknowledged increasing distance from an aggressor is a normal tactic to avoid danger. (V9, 1187). Det. Proctor testified that Mr. Reeves said Mr. Oulson had threatened physical violence and that he had never been so scared in his life. (V9, 1187-88).

Det. Proctor admitted that at the time he arrested Mr. Reeves, the detective lacked knowledge of several aspects of the incident relating to whether Mr. Reeves was attacked by Mr. Oulson. For example, Det. Proctor arrested Mr. Reeves without first learning that Mrs. Turner had observed Mr. Oulson holding a dark

object and making a throwing motion at Mr. Reeves. (V9, 1200-02). At the time Petitioner was arrested, Det. Proctor was similarly unaware that there was a camera recording system within theater 10 that had partially captured the event. (V9, 1206-07). And it was only after Mr. Reeves was arrested that Det. Proctor even entered theater 10 to observe the scene of the incident. (V9, 1206-08).

Alarmingly and inexplicably, law enforcement: allowed the hard drives storing the footage of the camera surveillance system to be removed that same night by a Cobb Theater representative and sent to the Cobb Theater's corporate headquarters in Alabama; and failed to preserve and/or document the camera settings at the time of the shooting incident. (V6, 622-27). Days after the incident, Detective Smith had to travel to Alabama to pick up the hard drives containing the data captured from the movie theater cameras at a private law office associated with the Cobb Theater. (V11, 1366-70).

J. The Defense's efforts to reconstruct the event

Law enforcement arrested Mr. Reeves before conducting a reconstruction of the event to determine whether the discharge of the weapon was justified. The Defense ultimately conducted their own reconstruction of the event.

Michael Knox - a ballistics, human factors, and shooting incident reconstruction expert – testified that in a reconstruction of a shooting incident the perception of the shooter is at the forefront of the analysis. (V12, 1380-90, 1403-

09). The reconstruction process entails, among other things: examination of the physical evidence; ascertainment of the positioning of the parties, witnesses and objects; and consideration of the environmental factors (e.g. lighting, noise, visibility) present during the shooting incident. (V12, 1395-99, 1403-05, 1410-13, 1425-32).

In this case, Mr. Knox twice traveled to theater 10 to ascertain the source of the above-referenced lighted pixels and to conduct tests to determine the positioning of Mr. Reeves and Mr. Oulson at the time of the incident. (*Petition*, 20-21; V12, 1450-56). Due to law enforcement's dual failure to both preserve the positioning of the cameras and to preserve the recording system, the Defense was unable to ascertain the source of the lighted pixels and the exact positioning of Mr. Reeves and Oulson. (V12, 1455-57).

NATURE OF THE RELIEF SOUGHT

This Court should issue a writ of prohibition, which would have the legal effect of reversing the trial court's order and terminating any further prosecution of Mr. Reeves. (A20; A21; A22); §§ 776.032, Fla. Stat. (2013), 776.013(3), Fla. Stat. (2013), 776.012(1)-(2), Fla. Stat. (2013); *Little v. State*, 111 So. 3d at 216; *Nelson v. State*, 853 So. 2d 563, 565 (Fla. 4th DCA 2003), *citing Brown v. State*, 84 Fla. 660, 94 So. 874, 874 (1922).

ARGUMENT

I. The trial court's Order Denying Motion is predicated on one or more findings not supported by legally sufficient evidence

Numerous factual findings and/or inferences made by the trial court lack the necessary evidentiary support to be affirmed by this Court. These factual findings individually and cumulatively provide the foundations for the trial court's denial of Petitioner's Motion Requesting Immunity. Excision of the findings not supported by sufficient evidence would compel the granting of immunity. *Little*, at 217-18.

A. Standard of Review

In ruling on a petition for a writ of prohibition, this Court must review the trial court's legal findings de novo and the court's factual findings for competent, substantial evidence. *Little*, at 217. However, a "trial court's finding of fact based on conclusions drawn from undisputed evidence is subject to review by the less restrictive 'clearly erroneous' standard of review." *Chubb Custom Ins. Co. v. U.T. Investments, LLC*, 113 So. 3d 1017, 1018 (Fla. 5th DCA 2013), *citing Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956). "[I]f such findings [drawn from undisputed evidence] are contrary to the manifest weight of the evidence, or are contrary to the legal effect of the evidence, the reviewing Court has not only the authority and power, but it is its duty, to reverse." *B & B Super Markets, Inc. v. Metz*, 260 So. 2d 529, 531 (Fla. 2d DCA 1971), *cert. den.* 267 So. 2d 834 (Fla. 1972) (emphasis added). Further, "the legal effect of competent evidence which is not impeached,

discredited or controverted is a question of law." *Harris v. State*, 104 So. 2d 739, 744 (Fla. 2d DCA 1958). When there is no conflict, the fact-finder may not disregard direct and positive evidence demonstrating that a defendant is not guilty. *Flowers v. State*, 106 Fla. 686, 143 So. 612, 613 (1932).

A defendant is to be granted statutory immunity when he demonstrates by a preponderance of the evidence that he was justified in using deadly force under the circumstances described in sections 776.012(1) and/or 776.013(3). *Mobley v. State*, 132 So. 3d 1160, 1166 (Fla. 3d DCA 2014).

B. The trial court predicated its denial of relief on the finding that the cellular phone attack did not occur

(i) This Court is authorized and duty bound to conduct a weight of the evidence evaluation of the proof and determine whether Mr. Oulson threw the cellular phone at Mr. Reeves

The trial court stated there were two reasons supporting its conclusion that Mr. Oulson did not commit the cellular phone attack: (1) it viewed the camera 11 footage and concluded that the lighted pixels it observed during the pertinent portions "was simply a reflection from the defendant's shoe" – and not of an illuminated cellular phone thrown at Mr. Reeves; (A23); and (2) it credited Dr. Thogmartin's testimony and determined that the legal effect of doing so rendered Petitioner's claim of a cellular phone attack false. The trial court reversibly erred in both respects.

Given the trial court's errors on these issues, its findings must be overturned and replaced with the one overwhelmingly supported by the record – namely, that Mr. Oulson subjected Mr. Reeves to a cellular phone attack. This Court must do so, because the rule in *B & B Super Markets, Inc.* is that this Court has the "authority," "power," and "duty" to reverse a trial court's finding if it is against the manifest weight of the evidence and/or if it is contrary to the proper legal effect of the evidence. 260 So. 2d at 531.

(ii) The manifest weight of the evidence demonstrates that Mr. Oulson committed the cellular phone attack

The trial court's finding that the cellular phone attack never occurred because the lighted pixels are a reflection from Mr. Reeves' shoe is clearly erroneous. *See, e.g. Chubb Custom Ins.*, 113 So. 3d at 1018, *citing Holland*, 89 So. 2d at 258 ("clearly erroneous" standard of review for a trial court's finding based on conclusions drawn from undisputed evidence) (A23).

This particular error of the trial court's rests on the misperception that the source of the lighted pixels is dispositive to the question of whether Mr. Oulson committed the cellular phone attack. When Mr. Oulson threw his cellular phone at Mr. Reeves, its screen may have been facing away from camera 11, thereby preventing the recording system from detecting the light emanating from the screen. Camera 12 did not record this portion of the incident while camera 11 did. (A38). Given Mr. Reeves' on-scene voluntary statements to Detectives that from

his seat he had observed "the blur of the screen" as it came at him – it is entirely conceivable that the screen would have been facing Mr. Reeves, and not camera 11. (A56, 5). Due to law enforcement's failure to preserve the camera surveillance system and its settings from January 13, 2014, however, Petitioner's defense team was unable to forensically ascertain the specific source of the lighted pixels. (V12, 1455-57).

However, the trial court's finding that the lighted pixels are reflections from Mr. Reeves' shoe still supports the conclusion that Mr. Oulson committed the cellular phone attack. After Mr. Reeves was hit in the face, he attempted to get out of his seat. (A36). In the course of doing so, he was moving his legs, feet, and shoes. The movement of his shoes during his escape attempt could have led to the appearance of the lighted pixels in multiple locations near Mr. Reeves' seat.

In any event, the more probative and uncontroverted evidence nonetheless establishes that Mr. Oulson threw his cellular phone at Mr. Reeves' head. For example: (1) camera 11 footage clearly depicts Mr. Oulson's arm, shoulder, and head moving into and out of the video in a motion consistent with the throwing of an object; (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A45, 00208 to 00260); (2) Joanna Turner, while in the darkened theater, observed Mr. Oulson standing, facing Mr. Reeves, holding a dark object in his hand (a "mug" or "thermos") and then making a throwing motion at Petitioner; (V3, 264-65, 267);

(3) Mr. Reeves' body jerks or moves forward immediately after Mr. Oulson's arm, shoulder, and head recede from the video - thereby corroborating Petitioner's claim that he attempted to exit his seat immediately after getting struck in the head; (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A45, 00208 to 00260); (4) the cellular phone was immediately found on the floor between Mr. Reeves' legs, which is consistent with the claim that the object made contact with Petitioner's head and thereafter fell to the floor; (A58, 20-25); (5) neither the State, the trial court, nor the evidence provides any other viable explanation for the cellular phone's presence on the floor between Mr. Reeves' legs; (6) Petitioner told detectives in his on-scene voluntary statement that he saw the blur of a cellular phone screen and that such an object may have hit him in the face; (A56, 5-6); and (7) Mr. Reeves told both Allen Hamilton and Mrs. Reeves that he had gotten hit in the head – before having any meaningful opportunity to fabricate such a story. (V6, 709; V17, 2103). Given this overwhelming, credible, and material evidence, the trial court clearly erred in finding that there was no cellular phone attack.

The trial court's finding that Mr. Reeves fabricated the cellular phone attack "to justify his actions after the fact" is similarly not supported by the record. (A23). It is inconceivable that Mr. Reeves formulated a false cellular phone attack narrative immediately after the shooting given his lack of knowledge of, among

other things, both Joanna Turner's observations and Mr. Oulson's hand, arm, shoulder and head entering and receding from the camera 11 footage.

In light of all of this evidence and the applicable rule of law, it is requested that this Court re-weigh the proof and conclude Petitioner sustained his burden of proof and demonstrated: (a) Mr. Oulson threw his cellular phone at Mr. Reeves; and that (b) Petitioner was hit in the head with the object.

(iii) The crediting of Dr. Thogmartin's testimony neither confirms nor disproves that Mr. Oulson threw his cellular phone at Mr. Reeves

In finding that no cellular phone attack occurred, the trial court also held that "the credible testimony of the medical examiner [i.e. Dr. Thogmartin] casts grave doubt on the likelihood of anything hitting the defendant in the eye beneath his glasses in the manner the defendant described." (A23). A review of Petitioner's and Dr. Thogmartin's testimony, however, demonstrates that the trial court misunderstood the legal effect of crediting Dr. Thogmartin's testimony.

As a preliminary matter, in making its ruling on the cellular phone attack, it appears that the trial court referenced an otherwise inconsequential portion of Mr. Reeves' testimony. Mr. Reeves testified that he developed a bruise on his eye socket from the blow to his head and irritation "of some sort" on his eyeball. (V15, 1937). In other words, Mr. Reeves rendered a layperson opinion that after getting hit in the face he subsequently visually observed a bruise on his eye socket and that

his left eye was irritated. Crediting or rejecting this testimony of Petitioner's simply does not establish that no cellular phone attack occurred.

The legal effect of crediting Dr. Thogmartin's testimony similarly does not support the trial court's conclusion that Mr. Reeves fabricated the cellular phone attack allegation. For example, in response to a lengthy hypothetical question from the prosecutor concerning whether a cellular phone thrown at the head of a "70-plus years of age" individual would leave "some sort of indication", this witness stated that:

> You'd have to really chuck it. I mean, you could certainly hit him in the glasses area and leave no mark at all because you're tossing it or not throwing it with sufficient force. But, I mean, if you really heaved a phone, you could injure somebody. You could leave a mark, a welt or something.

(V17, 2236-37) (emphasis added). Dr. Thogmartin therefore agreed that it was possible for Mr. Reeves to have sustained a bruise from the cellular phone.

Dr. Thogmartin also hypothesized that Mr. Reeves' glasses would make it less likely that his eyeball or eyelid would be injured from a cellular phone thrown at this face. (V17, 2240-41). Dr. Thogmartin never, however, opined that it was impossible for Mr. Reeves to have sustained some sort of irritation on his eye from getting hit in the face with an iPhone 5. (V17, 2235-50).

A thorough review of this portion of the medical examiner's testimony therefore yields the conclusions that Dr. Thogmartin believed a cellular phone

thrown at an elderly person: (i) could leave a mark, welt, or bruise or, alternatively, could leave no mark, welt or bruise; and (ii) could cause injury to the aged person's eye and/or eyelid - or not cause injury to said person's eye and/or eyelid. (V17, 2238-42). His testimony on this issue does not give a legally sufficient basis for the trial court to have held that there were "grave doubt[s]" as to Petitioner's claim he was hit in the face. (A23). Notably, in rendering his opinions on these issues, Dr. Thogmartin seemingly relied upon his personal experiences with wearing glasses and not as a pathologist. (V17, 2239-40).

In any event, Dr. Thogmartin's testimony concerning Mr. Reeves' eyeglasses and the cellular phone hitting his face does not and could not impact the legal effect of the uncontroverted evidence. The trial court therefore clearly erred in determining that crediting Dr. Thogmartin's testimony leads to the conclusion that Mr. Oulson never threw his cellular phone at Mr. Reeves. That finding should be vacated by this Court. *B & B Super Markets, Inc.,* 260 So. 2d at 531.

C. The trial court's finding that Petitioner made statements contradicted by the video evidence and other witness testimony is not supported by sufficient evidence

In two portions of the Order Denying Motion, the trial court referenced its conclusion that Mr. Reeves' testimony was inconsistent with the "video evidence and other witness testimony." (A23). The trial court's conclusions concern Mr. Reeves' voluntary statements (not his testimony, as erroneously stated in the

Order) to law enforcement that during the attack Petitioner's left hand may have made contact with the arm, chest, shoulder, or other part of Mr. Oulson's body. (A56, 8). The trial court cited to these purported discrepancies in concluding that Mr. Reeves' immunity hearing testimony was not credible and that the Motion Requesting Immunity was denied. As detailed below, Mr. Reeves' statements were consistent with the uncontroverted proof (i.e. the video evidence), common experience, and the phenomena of perceptual distortion.

Mr. Reeves' statement, (A56, 5), concerning these issues to Detectives during his January 13, 2014 voluntary interview was as follows:

> [Oulson is] coming over on me. I've got a…I'm pushing him off with my left hand, and I had a hold of something, I'm assuming it was probably his chest, I don't know… [w]ith my left hand… I make contact with something.. his arm, his chest, a shoulder, I don't know. I'm saying no, no, no, whoa, whoa, whoa, whoa…. And like they say in the books, it happened so fast until… and as soon as I pulled the trigger, I said oh shit, what, this is stupid. But again, I don't, I'm 71 years old, I don't need an ass whipping… from a younger man.

The video shows Mr. Oulson extending his arm into Mr. Reeves' row. As he reaches into Mr. Reeves' aisle, Mr. Oulson's head is visible in the video, indicating that he was facing the top row and in close physical proximity to Petitioner.

Common experience supports a conclusion that when Mr. Oulson reached in to grab and remove Mr. Reeves' popcorn bag, Oulson's hand and/or arm made contact with Petitioner's left hand. This fully explains Mr. Reeves' statement to Detectives that "[w]ith my left hand… I make contact with something."

The uncontroverted proof also sufficiently describes why an individual in Mr. Reeves' shoes who was subjected to the stress of a physical attack would not have been able to precisely perceive and recollect each and every minute aspect of the violent episode. As Mr. Knox explained, high stress events lead to a fight or flight response, thereby altering an individual's ability to hear, gauge the passage of time, memorize and recollect events, and perceive other stimuli with full accuracy. (V13, 1556-64). Peer-reviewed research, for example, established that individuals undergoing stressful situations frequently reported a substantial reduction in their peripheral vision, also referred to as tunnel vision. Mr. Knox opined that the phenomena of perceptual distortion was "readily known by most law enforcement [officers]." (V13, 1559). Detective Aaron Smith, in fact, concurred with Mr. Knox's opinions concerning perceptual distortion. Detective Smith also noted that when stress and anxiety are elevated, blood flow changes lead to tunnel vision. (V11, 1261-62).

Mr. Reeves' inability to precisely state what part of Mr. Oulson's body touched his left hand is explained by the phenomena of perceptual distortion. At the time of the attack, the movie theater was dark and loud. Mr. Oulson started cursing and yelling at Mr. Reeves. The verbal barrage of obscenities was unexpected and wholly out of character with what ordinarily occurs in movie theaters. As established by the video evidence, at the time of the second attack, Mr.

Reeves would have perceived a tall, younger man's arm and body coming at him. Given all of this, the record demonstrates that there was a significant likelihood that Mr. Reeves' perception was distorted, his eyes were not necessarily focused on his own hands, and that the abrupt nature of the attack would have left him uncertain as to which of Oulson's body parts touched Petitioner's left hand.

Similarly, the trial court's findings concerning Mr. Reeves' stated positioning of his left hand at the time of the discharge of the weapon are also insufficiently supported by the record. Concerning this issue, the trial court seemingly referenced the following voluntary interview statements:

> the trajectory of the bullet should be upward, because I came out of my pocket with it, and… surprised I didn't shoot myself in the hand (A56, 5-6); […]; [A]fter he hit me, my face went sideways, my glasses came partially off, I, by now I'm stretched out completely, I'm in my seat… kind of like this, with my left hand out… and, and when I shot, he was… hell, it .. should have been pretty darn close to a contact… I know we're trained not to stick it out in front of us, but… [t]o be honest with you, I was afraid I'd shoot myself, I don't… and all that happened so fast I just… shit it just didn't… I'm thinking… this guys fixing to.. to do me, do me some bad stuff. If I had it to do over again, it would never have happened. We woulda moved. But you don't get do overs…. It scared the hell out of me… I though the guy was fixing to beat the shit out of me. (A56, 9).

The trial court concluded that there was a disparity between Mr. Reeves' statements to law enforcement and what is depicted in the video concerning the positioning of his left hand at the time of discharge. The trial court further held this was *material*, in that it undermined Mr. Reeves' credibility and cast doubt on

his claim that his use of deadly force was reasonable. The trial court's finding on this issue, however, was clearly erroneous and should be overturned by this Court.

The exact location of Mr. Reeves' left hand in the moment deadly force was used simply does not change the outcome in this case. The video evidence and other proof confirm that Mr. Oulson subjected Mr. Reeves to physical and verbal violence. Whether his left hand was higher or lower, closer to Mr. Oulson or further away, does not change the reasonable nature of Mr. Reeves' deployment of deadly force under sections 776.012(1) and 776.013(3). *Petition*, 66-69.

Further, the trial court's reliance on the fact that Mr. Oulson is not depicted in the camera 11 video footage at the time the weapon was discharged is similarly immaterial. (A23). The uncontroverted evidence establishes that Mr. Oulson was in a location where he was fully capable of continuing his violent attack upon Mr. Reeves, who was unable to leave his seat during the attack. (A39, 13:26:43.114 to 13:26:53.417, 48:28 to 49:07). A mere 19 inches separated Mr. Reeves' chair from the seat in front of him. (A58, 8). Dr. Adams analyzed the stippling patterns on Mr. Oulson and Mrs. Oulson's hands and concluded that the muzzle of the weapon was "probably less than 10" inches from Mr. Oulson's right hand/fist. (V9, 1066-69). Dr. Thogmartin believed that the distance was between 4 to 15 inches. (V17, 2220-21). Both of these expert opinions clearly establish that Mr. Oulson was in close physical proximity to Mr. Reeves at the time of the shooting.

In light of the above, the trial court clearly erred in concluding that the legal effect of Mr. Oulson's absence from the video footage somehow cast doubt on Mr. Reeves' claim of justifiable use of deadly force.

D. The trial court erroneously concluded that Mr. Reeves' conduct before he was physically attacked leads to a conclusion that he was not fearful after the physical and verbal violence commenced

The trial court also erroneously found that Mr. Reeves was not in fear of great bodily harm or death – because Petitioner "initiated contact with the alleged victim on at least three occasions and was not concerned about leaving his wife there alone when he went to talk to the manager." (A23). This finding demonstrates that the trial court misapprehended the timeline of events and their corresponding legal effect.

Though Mr. Reeves acknowledges that he spoke to Mr. Oulson two times, went to the manager's desk, and then sheepishly apologized to Oulson for involving the manager upon his return – all of this occurred before he was physically and verbally attacked. There is no competent, substantial evidence to indicate that Mr. Reeves was not in fear immediately after the cellular phone attack and/or the second attack. On the contrary, common sense and the credible proof demonstrate that Mr. Reeves exhibited fear after Mr. Oulson threatened him in a movie theater.

After the cellular phone attack, for example, Mr. Reeves leaned into the back left portion of his seat to increase his distance from Mr. Oulson. Joanna Turner confirmed that she saw Mr. Reeves sitting in a "funny" position and was leaning to his left. Mr. Reeves testified that he leaned into the back left portion of his seat to protect himself from Mr. Oulson's attack. (A39, 13:26:21.484 to 13:26:27.891, 46:59 to 47:25; A45, 00210 to 00266).

Given Mr. Oulson's physical and verbal violence, the reliable proof establishes that Mr. Reeves was reasonably fearful. An overturning of the trial court's finding would compel the granting of a writ of prohibition.

E. The trial court misapprehended the legal effect of Mr. Reeves' law enforcement training in firearms and dealing with conflict situations

The trial court further concluded that Mr. Reeves was "trained extensively in handling firearms and dealing with conflict situations" and that "he was far better prepared than the average person to deal with situations such as this one." (A23). The trial court in essence concluded that had Mr. Reeves employed his conflict resolution skills learned from his law enforcement years and his tenure as Director of Security at Busch Gardens - that the use of deadly force could have been avoided. This too constituted clear error.

The legal effect of Mr. Reeves' law enforcement and public safety training was that he had a heighted and superior understanding of when deadly force was necessary to prevent harm. Mr. Reeves had extensive training in detecting the cues

of violent and out-of-control individuals. The trial court was constrained to consider that specialized training and Mr. Reeves' subjective beliefs when it ruled on his Motion Requesting Immunity. *Dowe v. State*, 39 So. 3d 407, 410 (Fla. 4th DCA 2010); *Filomeno v. State*, 930 So. 2d 821, 822-823 (Fla. 5th DCA 2006); *see also In re. Std. Jury Instr. in Crim. Cases*, 976 So. 2d 1081, 1084 (Fla. 2008).

The correct legal conclusion from Mr. Reeves' possession of specialized training in firearms and "dealing with conflict situations" was that Mr. Oulson's actions signified immense danger to Petitioner. For example, Mr. Oulson presented as unstable and unpredictable. His rage-filled eruption of obscenities and vulgarities in a movie theater was bizarre and fear-inducing.

Mr. Oulson transitioned from being "mouthy" to menacing and dangerous when he commenced his physical attack. (A56, 8). Consistent with his training, Mr. Reeves' correctly and reasonably believed that a single blow from Mr. Oulson could cause great bodily harm or death. Petitioner's training therefore informed him that deadly force was necessary to prevent the infliction of significant harm. *Petition*, 66-72.

Mr. Reeves' training also led him to consider the viable and safe alternatives to using deadly force. There were none. The wall behind him and the aggressor immediately in front of him prevented any safe escape. Similarly, physical combat with a tall, younger man believed to be between the age of 35 to 40 was neither

realistic, feasible, nor safe. In light of Dr. Foley's, Dr. Adams', and Dr. Cohen's unrebutted testimony, and Petitioner's multiple decades of experiencing the symptoms of degenerative changes, Mr. Reeves both correctly and reasonably believed that he was at heightened risk of a fracture or other devastating injury from Mr. Oulson's fists.

Given all of this, the trial court clearly erred in concluding that Mr. Reeves' law enforcement and public safety training compelled a conclusion that deadly force could have been avoided. The facts and circumstances establish the opposite - namely that Mr. Reeves correctly and reasonably believed that deadly force was necessary to prevent great bodily harm, death, and/or a forcible felony.

F. The trial court's finding that Mr. Reeves was "quite a large and robust man" does not sufficiently support a conclusion that his subjective fear of great bodily harm or death was unreasonable

The trial court similarly erred in finding that because Mr. Reeves was "large" and "robust," he therefore "was not afraid of anyone." (A23). On this point, the trial court again misapprehended and/or ignored the uncontroverted proof.

Dr. Foley, for example, gave unrebutted testimony that Mr. Reeves had degenerative changes in multiple portions of his body and was at greater susceptibility of harm from a physical blow. Dr. Foley further explained that Mr. Reeves' hip fracture, which was sustained after a standing level fall 11 months after the incident, is consistent with an elderly individual's age-related physical

weaknesses. This uncontroverted proof demonstrated that underneath the skin, Mr. Reeves was clearly not "robust."

Further, Dr. Foley's testimony corroborated the multiple witnesses' statements that Mr. Reeves felt the signs and symptoms of the aging process. Petitioner had grown unable to perform basic tasks. He was therefore reasonably fearful of the tall man believed to be between the ages of 35 to 40 that was subjecting him to a physical assault.

Given the above, the trial court's finding on this issue is not supported by competent substantial evidence and is directly controverted by Dr. Foley's unrebutted testimony.

G. Conclusion

Once the factual findings and inferences insufficiently supported by credible, competent proof are excised, the law compels the granting of Mr. Reeves' Petition. Mr. Reeves sustained his burden by a preponderance of the evidence.

II. The facts supported by a preponderance of the evidence establish that Mr. Reeves was justified in using deadly force to prevent great bodily harm and death

If this Court finds that the cellular phone attack occurred, it must also find that Petitioner proved by a preponderance of the evidence that he was justified in using deadly force. *Mobley*, 132 So. 3d at 1166. A finding that the cellular phone attack occurred, standing alone, supports the granting of immunity.

Here, Mr. Oulson's throwing of his iPhone 5 at Mr. Reeves' head constituted the start of a physical and verbal attack upon Petitioner that only ended because the weapon was discharged. Consistent with Dr. Adam's testimony, a cellular phone thrown at a person's face can cause great bodily harm, such as nasal, cheek bone, or orbital bone fractures. (V9. 1088, 1093-94). The cellular phone attack was therefore an aggravated battery. §784.045(1)(a)2, Fla. Stat. (2013); Fla. Std. Jury Instr. (Criminal) 8.14 (Aggravated Battery).

The pain Mr. Reeves suffered as a result of being hit in the face from a cellular phone led him to reasonably believe he was in imminent danger. Mr. Reeves described being struck by an object which knocked his eyeglasses askew and caused him to feel disoriented. *Petition*, 25-29.

Though Petitioner had no legal obligation to retreat, Mr. Reeves' fear of Mr. Oulson led him to make an escape attempt. Mr. Reeves was, however, trapped by the aggressor in front of him and the wall behind him. Mr. Reeves was compelled to retreat to the back left corner of his seat, which in reality was no retreat at all. Mr. Oulson was physically situated in a position where he could again attack Mr. Reeves. *Petition*, 25-29.

The unexpected manner of the attack instilled fear into Petitioner. (V15, 1851-57). That fear remained with Mr. Reeves throughout Mr. Oulson's physical and verbal attack.

Further, the record makes clear that following the cellular phone attack Mr. Oulson continued cursing and threatening Mr. Reeves for the approximately 7 seconds until the "second attack" commenced. During this time there was no interruption in Mr. Oulson's attack. After getting hit in the face from Mr. Oulson's cellular phone, Mr. Reeves was further subjected to verbal threats of violence and threatening physical gestures. Mr. Reeves reasonably concluded that Oulson was out of control and intent on causing him significant harm. *Petition*, 32-35.

Given his advanced age, after the cellular phone attack Mr. Reeves also reasonably believed that he was susceptible to great bodily harm and possibly death by the inexplicably rage-filled younger man in the row ahead of him. Notably, according to Dr. Foley and Dr. Adams, Mr. Reeves' belief was, in fact *correct*. His x-rays, MRIs and medical science established that he was at heightened risk of sustaining a fracture or other significant injury from a physical blow. Mr. Reeves' hip fracture 11 months after the shooting incident from a standing height fall greatly reinforces the fact that Petitioner simply was not "robust." The uncontroverted scientific proof and his December 2014 hip fracture (from a standing height fall) established that Mr. Reeves was at heightened risk of great bodily harm or death - *making Petitioner's belief of that fact reasonable*. *Petition*, 12-18.

If this Court finds that Mr. Oulson committed the cellular phone attack, the issuance of a writ of prohibition is both lawfully authorized and warranted. Mr. Reeves, following the cellular phone attack and the remainder of Mr. Oulson's violence, reasonably believed deadly force was necessary to prevent great bodily harm and/or death.

It bears noting that if this Court finds that the cellular phone attack occurred, the facts and circumstances also warrant a finding that Mr. Reeves reasonably used deadly force to prevent the commission of one or more forcible felonies. (A21; A22). The trial court, notably, cited to section 776.013(3), which references "forcible felon[ies]," but failed to make any findings concerning that ground for immunity.

As contended in Claim III, even if this Court solely relies upon the uncontroverted evidence, Mr. Reeves was nonetheless justified in using deadly force to prevent the commission of one or more forcible felonies.

III. The trial court misapplied the law to the uncontroverted evidence because Petitioner was justified in using deadly force to prevent great bodily harm, death, and the commission of aggravated battery, a robbery, and an aggravated assault

Even if this Court were to accept the trial court's findings, the uncontroverted evidence still establishes - by a preponderance of the evidence - that Mr. Reeves reasonably believed that using deadly force was necessary to

prevent the types of harm listed in sections 776.012(1) and/or 776.013(3). *Mobley*, 132 So. 3d at 1166.

A. Standard of Review

A court determining whether a defendant was justified in using deadly force to prevent the commission of a forcible felony must determine if the conduct of the complainant rose to the level of one or more offenses listed in section 776.08. Fla. Std. Jury Instruction (Criminal) 3.6(f); *Bretherick v. State*, 135 So. 3d 337, 340 (Fla. 5th DCA 2013), *approved*, 170 So. 3d 776 (Fla. 2015).

B. Defendants in the "zone of uncertainty" are justified in using deadly force against a violent third-party

This Court has twice referenced the "zone of uncertainty" construct in determining whether a specific defendant reasonably used deadly force. *Montanez v. State*, 24 So. 3d 799, 801 (Fla. 2d DCA 2010); *Little*, 111 So. 3d at 217-18. *Montanez v. State* stands for the proposition that whether the defendant acted reasonably may depend on the complainant's physical capabilities at the specific time deadly force was deployed. *Id.* at 800-803 (affirming trial court's denial of immunity because the imminent danger had passed and Montanez was no longer in the "zone of uncertainty" at the time he fired his gun).

Little v. State stands for the proposition that whether deadly force is lawfully used depends, also in part, on whether the defendant voluntarily placed himself in danger. In *Little*, this Court reversed the trial court's denial of relief because the

defendant did not make any threatening moves, refrained from uttering any threatening words, and at the time of firing his firearm was defending himself from an aggressor who had not ended his attack. *Little*, 111 So. 3d at 216-17.

C. The uncontroverted proof supports the conclusion that Mr. Reeves reasonably believed that deadly force was necessary to prevent the commission of great bodily harm, death, an aggravated battery, a robbery, and an aggravated assault

Mr. Reeves alleged in his Motion Requesting Immunity that he reasonably used deadly force to prevent great bodily harm, death, and/or the commission of an aggravated battery, a robbery, and/or an aggravated assault - all forcible felonies under section 776.08. (A21; A22). The trial court, however, did not consider his forcible felony-related claims and the legal term "forcible felony," in fact, appears nowhere in the Order Denying Motion. (A23). This constituted reversible error.

The following conclusions, supported by the uncontroverted evidence, lead to a conclusion that Mr. Reeves reasonably used deadly force to prevent great bodily harm, death, and/or the commission of one or more forcible felonies:

(1) At no point did Mr. Reeves make any threatening moves or use any threatening language. *see Little*, 111 So. 3d at 218. Mr. Reeves' act of seeking the theater manager's assistance was a reasonable and responsible method of addressing the circumstance of Mr. Oulson using his cellular phone during the movie previews.

(2) Upon returning from the theater manager's desk, Mr. Reeves sat down into his

seat and began holding his bag of popcorn in his left hand. His body positioning and posture immediately before Mr. Oulson commenced his physical attack demonstrates that Petitioner was neither prepared for nor desiring of any type of physical altercation. (A39, 13:26:16.946 to 13:26:21.093, 46:41 to 46:57).

(3) Immediately before the "second attack," Mr. Reeves was subjected to a barrage of curse words and threats of violence from Mr. Oulson. (V6, 701-03; V7, 846-47, 904-05; V15, 1852)[3]; *see Little*, 111 So. 3d at 218.

(4) Mr. Oulson subjected Mr. Reeves to physical violence by reaching into Reeves' row, grabbing and removing the popcorn bag from Petitioner's left hand, and shoving it into the 71-year old's body. (A39, 13:26:35.765 to 13:26:39.302, 47:55 to 48:11; A45, 00253 to 00267).

(5) Mr. Reeves was incapable of safely escaping, despite having no duty to retreat. A 5 foot 2 inch wall stood behind Petitioner. (V12, 1456). Attempting an exit through the row would have endangered Mr. Reeves' safety, as it would have brought him closer to Mr. Oulson's fists and body.

(6) At the time the weapon was discharged, Mr. Oulson was situated in a place and

[3] The trial court erred in excluding Ms. Abrew's testimony that she heard someone in the movie theater yell the word "motherfucker." (V7, 884-905). The word was not hearsay, as the trial court initially acknowledged. (V7, 888-89). The circumstances also sufficiently established that Mr. Oulson – and no one else – screamed that word in the movie theater.

in a position where he was still physically capable of subjecting Mr. Reeves to additional violence. When the weapon was fired, Mr. Oulson was in front of Mr. Reeves. Mr. Oulson had already successfully subjected Mr. Reeves to a physical attack from that position[4]. It was reasonable for Petitioner to conclude Mr. Oulson was capable of inflicting a fist punch or other additional violence. Mr. Oulson's right hand/fist was a mere 2 to 15 inches from the muzzle of the gun, placing him in close physical proximity to Mr. Reeves. The presence of Mrs. Oulson's hand in between Mr. Oulson's right hand/fist and his chest corroborates Mr. Reeves' testimony that she was attempting to restrain her out-of-control husband. Mr. Reeves was therefore in the "zone of uncertainty" when he fired his gun. *Montanez*, at 800-03. *Petition*, 39-40.

(7) Petitioner knew and therefore reasonably believed that Mr. Oulson's fists were deadly weapons. Mr. Reeves' decades of law enforcement experience and his undergoing of officer safety and survival training reinforced the reasonableness of his subjective fear[5]. The unrebutted testimony from Dr. Hayden, Dr. Adams, and Detectives Smith and Proctor sufficiently established that fists are deadly weapons.

(8) Mr. Reeves reasonably believed that 71-year olds are at a heightened risk of

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[4] The trial court also erred in excluding Mr. Kerr's testimony that he heard someone yell "you're not going to hit me in the face again." That statement was sufficiently trustworthy and the time, place and circumstances satisfy the reliability requirement. (V6, 775).

[5] *Dowe*, 39 So. 3d at 410; *Filomeno*, 930 So. 2d at 822-823; *see also In re. Std. Jury Instr. in Crim. Cases*, 976 So. 2d at 1084.

sustaining fractures or injuries from physical blows. Mr. Reeves had undergone a multi-decade process of gradual loss of his physical capabilities and strength, which was coupled with the persistent symptomology stemming from the degenerative changes that Dr. Foley described during his unrebutted testimony. (V2, 158-76). Further, as Dr. Cohen opined, the available research confirms that elderly individuals are acutely aware of their increased vulnerability to physical injury from falls and blows. *Petition*, 4-18.

(9) At the time the gun was fired, Mr. Reeves had not been given any kind of signal or notice that would have led him to reasonably conclude that Mr. Oulson had ended his physical attack. There were a mere 1.41 seconds between the commencement of the "second attack" and the firing of the weapon. (V12, 1524-27). Further, at the time the gun was fired a reasonable person would have concluded that Mr. Oulson's contemporaneous inexplicable violent eruption of anger, rage, curse words, threats of violence, and actual physical violence *in a movie theater* made him volatile, unpredictable, unstable, highly dangerous - and fully prepared to inflict further harm.

Application of the law to the above facts leads to a conclusion that Mr. Reeves reasonably believed deadly force was necessary to prevent (1) great bodily harm and/or death, and the commission of: (2) an aggravated battery, (3) a robbery, (4) an aggravated assault (assault coupled with the fully formed intent to commit a

felony, i.e. battery on a person 65 years of age or older), (5) an aggravated assault (assault coupled with the fully formed intent to commit a felony, i.e. aggravated battery), (6) an aggravated assault (assault coupled with the fully formed intent to commit a felony, i.e. robbery); and (7) an aggravated assault (assault with a deadly weapon).

(1) Mr. Reeves reasonably believed using deadly force was necessary to prevent great bodily harm and/or death

The uncontroverted evidence in this case sufficiently and conclusively establishes that Mr. Reeves reasonably believed discharging his weapon was necessary to prevent Mr. Oulson from inflicting a fist punch[6] capable of inflicting great bodily harm and/or death.

A fist can be a deadly weapon. Whether an object is a deadly weapon is a factual determination that takes into consideration "size, shape, material, and the

[6] Notably, numerous appellate court rulings from this Court and others feature facts that confirm fists are deadly weapons. *See e.g., Williams v. State*, 84 So. 3d 1164, 1165 (Fla. 2d DCA 2012) (single punch caused the victim's jaw to fracture in two places); *Owens v. State*, 289 So. 2d 472, 474 (Fla. 2d DCA 1974) (*citing People v. Smith*, (1972), 6 Ill. App. 3d 259, 285 N.E. 2d 460 (two punches to the face causing a lump in the victim's mouth, scar on her face, and bruises under her chin constituted great bodily harm)); *Coronado v. State*, 654 So. 2d 1267 (Fla. 2d DCA 1995) (facial fracture, numbness and pain around the eye constitutes great bodily harm); *Michaels v. State*, 429 So. 2d 338, 339 (Fla. 2d DCA 1983) (victim killed by two strikes to the face with a fist); *Weir v. State*, 777 So. 2d 1073, 1074 (Fla. 4th DCA 2001); *Heck v. State*, 774 So. 2d 844, 845 (Fla. 4th DCA 2000) (single punch causing orbital fracture, swelling, and bruising sufficient to constitute infliction of great bodily harm).

manner in which it was used or was capable of being used." *Simmons v. State*, 780 So.2d 263, 265 (Fla. 4th DCA 2001) (emphasis added); *C.A.C. v. State*, 771 So. 2d 1261, 1262 (Fla. 2d DCA 2000) (citation omitted).

Here, the uncontroverted proof demonstrates that Mr. Oulson's fists were deadly weapons. Dr. Hayden, Dr. Adams, Detective Aaron Smith, Detective Allen Proctor, and Petitioner all agreed that fists are deadly weapons capable of causing great bodily harm and/or death. (V9, 1090-1105, 1189-90; V14, 1702-03, 1746-48, 1754-60). Dr. Adams, for example, testified in detail on the physical vulnerabilities and fragilities of the human body, as well as the myriad ways a blow from a fist punch can cause great bodily harm and/or death. Dr. Adams also opined on the anatomy of the fist and why they are effective vehicles for deploying a concentrated level of energy and force to a target. (V9, 1100-01). Both Detectives Smith and Proctor also acknowledged fists can kill and are deadly weapons.

There was no testimony or other proof disproving or rebutting the opinions of Dr. Hayden, Dr. Adams, Detective Aaron Smith, Detective Allen Proctor, or Petitioner on this issue. The trial court was required to accept the testimony as sufficiently proven. *Harris*, 104 So. 2d at 744; *Flowers*, 106 Fla. at 687.

Once Petitioner sufficiently established that Mr. Oulson's fists were deadly weapons, the uncontroverted facts compelled the granting of the Motion Requesting Immunity. As detailed above, *Petition*, at 45-49, the uncontroverted

proof established that when he fired the weapon Mr. Reeves reasonably believed that Mr. Oulson had not terminated his violent attack. Petitioner, at that time, also reasonably (and, given the proof presented, correctly) believed that Mr. Oulson's fists were deadly weapons. Likewise, Mr. Reeves reasonably (and, again, correctly) believed that Mr. Oulson was positioned in a location where he was physically able to hit Petitioner with a fist punch. Further, Petitioner correctly and reasonably believed that at the age of 71, he was vulnerable to bone fractures and other significant injuries from physical blows.

All of these facts sufficiently establish that Mr. Reeves was justified to use deadly force to prevent great bodily harm or death from a physical blow inflicted by Mr. Oulson. On this ground, relief is respectfully requested.

(2) Mr. Reeves was justified in using deadly force to prevent Mr. Oulson from committing an aggravated battery

Given the elements of aggravated battery and the uncontroverted evidence, *see, e.g. Petition*, at 65-68, Mr. Reeves also reasonably believed that deadly force was necessary to prevent the commission of that forcible felony.

Under section 784.045(1)(a)2, Fla. Stat. (2013), an aggravated battery is committed when an individual intentionally touches or strikes a victim against his will and a deadly weapon is used. Fla. Std. Jury Instr. (Criminal) 8.14 (Aggravated Battery). Here, it was reasonable for Mr. Reeves to have believed that he needed to discharge his weapon to prevent Mr. Oulson from: (1) intentionally touching or

striking Petitioner while (2) using a deadly weapon (i.e. his fist). Fla. Std. Jury Instr. (Criminal) 8.14.

The uncontroverted proof establishes that Petitioner reasonably believed he needed to use deadly force to prevent commission of an aggravated battery from Mr. Oulson. On this record, the trial court was duty bound to conclude Petitioner met his burden under sections 776.012(1), 776.013(3), and 776.032(1). *Cf. B & B Super Markets, Inc.*, 260 So. 2d at 531. The trial court therefore erred in denying Petitioner's Motion Requesting Immunity, and it is now requested that this Court grant this Petition.

(3) Mr. Reeves was justified in using deadly force to prevent Mr. Oulson from committing a robbery

The trial court's findings and the uncontroverted proof also establish that Mr. Oulson's grabbing, taking, and shoving of the popcorn bag into Mr. Reeves' body satisfied the legal elements of a robbery. (A22; A23). Given that the weapon was fired while Mr. Oulson's robbery was still ongoing, Mr. Reeves was justified in using deadly force to prevent that forcible felony as well.

Section 812.13(1), Fla. Stat. (2013) states that:

> "[r]obbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(emphasis added). Concerning "larceny," the Supreme Court has held:

> It is our conclusion that the substance of the definition [of larceny] followed in the several cases which seemingly conflict but, nevertheless, tend to the same end, should be held to mean that the intention to steal, that is to mean that deprive the owner permanently of his property, a question of fact to be determined by the jury, is an essential element in the crime the intention to steal, that is to feloniously of another [sic], without his consent, with the intent to permanently deprive the owner thereof, or the intentional dealing with the property of another, without his consent, in such a manner as to create an unreasonable risk of permanent loss, constitutes an intent to steal.

American Fire and Casualty Co. v. Sunny South Aircraft Service, Inc., 151 So. 2d 276, 278 (Fla. 1963) (emphasis added). That Court further noted that "[a]ny taking that may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner is larceny." *Id.* at 278, *quoting Groover v. State*, 90 So. 473 (1921).

In light of this clearly established law, Mr. Reeves reasonably believed that deadly force was necessary to prevent the robbery because: (1) Mr. Oulson took the popcorn bag from Mr. Reeves' person and custody; (2) Mr. Oulson used force, violence, assault, and the putting in fear during the course of the taking; (3) the popcorn bag had some value; and (4) Mr. Oulson took the popcorn bag in such a manner as to establish an intent to permanently deprive Mr. Reeves of his right to the property and to benefit from it. Fla. Std. Jury Instr. (Criminal) 15.1. Notably, as a result of Mr. Oulson's actions, Mr. Reeves' popcorn was strewn on the floor. (A58, 7, 20-26).

Further, at the time the weapon was fired Mr. Oulson was "in the course of [ ] taking" Mr. Reeves' property – in other words, the robbery was on-going and had not terminated. *Id.* "'In the course of the taking' means … subsequent to the taking of the property and that the act and the taking of the property constitute a continuous series of acts or events." *Id.* (emphasis added). Given this, in the 0.7 seconds following the actual shoving of the popcorn bag into Mr. Reeves' body and the shooting of the gun, both the facts and the law support a finding that a robbery was ongoing. (V12, 1526-27).

Mr. Reeves was therefore lawfully justified in using deadly force to prevent the commission of Mr. Oulson's robbery. Given that robbery is a forcible felony, the trial court erred in failing to grant the Motion Requesting Immunity. (A22).

(4) Mr. Reeves was justified in using deadly force to prevent Mr. Oulson from committing an aggravated assault

Given the Supreme Court's jury instruction, Mr. Oulson's conduct rose to the level of an aggravated assault under section 784.021(1)(a)-(b), Fla. Stat. (2013) because:

(1) Mr. Oulson intentionally and unlawfully threatened, either by word or act, to do violence to Mr. Reeves;

(2) At the time, Mr. Oulson appeared to have the ability to carry out the threat;

(3) The act of Mr. Oulson created in the mind of Mr. Reeves a well-founded fear that the violence was to take place; and

(4)(a) Mr. Oulson's assault was made with a deadly weapon, and/or

(4)(b) Mr. Oulson's assault was made with a full-formed, conscious intent to commit a felony upon Mr. Reeves.

Fla. Std. Jury Instr. (Criminal) 8.2 (Aggravated Assault). The first three aforementioned elements define assault under section 784.011(1). *Id.*

Here, the uncontroverted evidence supports a conclusion that Mr. Reeves reasonably used deadly force to prevent the commission of four different aggravated assaults under section 784.021(1)-(2).

First, the uncontroverted evidence establishes that Mr. Oulson's conduct rose to the level of an assault, which is the first requirement of establishing an aggravated assault. *Bretherick*, at 340. Here: (1) Mr. Oulson intentionally and unlawfully by words and acts threatened Mr. Reeves (and, in fact, actually did attack him); (2) Mr. Oulson appeared to have had the ability to carry out the threat (and, given his physical positioning, had the actual ability to attack Mr. Reeves); and (3) Mr. Oulson's acts and words created in Mr. Reeves' mind a well-founded fear that violence was going to take place. *Fla. Std. Jury Instr.* (Criminal) 8.2; (A36; A39, 13:26:25.322 to 13:26:39.302, 47:15 to 48:11; *Petition*, 65-68; V15, 1849-75).

Second, as explained below, at the time the weapon was fired Mr. Reeves also had the reasonable belief that Mr. Oulson had the fully formed intent to commit a felony and/or use a deadly weapon.

(i) Mr. Reeves had the reasonable belief that deadly force was necessary to prevent Mr. Oulson from committing an aggravated assault with a full-formed intent to commit a felony, i.e. battery on person 65 years of age or older

The uncontroverted evidence establishes that Mr. Reeves reasonably believed Mr. Oulson had the fully-formed, conscious intent to commit battery on a person 65 years of age or older. *Fla. Std. Jury Instr.* (Criminal) 8.2 (Aggravated Assault); *see also Fla. Std. Jury Instr.* (Criminal) 8.15 (Aggravated Assault on Person 65 Years of Age or Older); (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; *Petition*, 65-68; V15, 1849-75); see also §784.08 (2)(c), Fla. Stat. (2013); *Cf. Ramroop v. State*, 215 So. 3d 657, 663-65 (Fla. 2017) (concerning substantive reclassified offenses like battery on person 65 years of age or older).

The trial court, accordingly, erred in both failing to consider and failing to find that Mr. Reeves' use of deadly force was justified on this ground. (A21; A22). It is respectfully requested that a writ be issued on this claim.

(ii) Mr. Reeves had the reasonable belief that deadly force was necessary to prevent commission of an aggravated assault with a full-formed intent to commit a felony, i.e. an aggravated battery

Consistent with the uncontroverted evidence and the arguments above, at the time the gun was fired Mr. Reeves reasonably believed that Mr. Oulson had: (1) the fully-formed conscious intent to touch or strike Petitioner with (2) his fists, which were deadly weapons. *Fla. Std. Jury Instr.* (Criminal) 8.2; Fla. Std. Jury

Instr. (Criminal) 8.14 (Aggravated Battery); (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; *Petition*, 65-68; V15, 1849-75).

The trial court therefore erred in failing to conclude that Mr. Reeves was justified in using deadly force to prevent the forcible felony of an aggravated assault, as aggravated battery is a felony. §§ 784.021(1)(b); 784.045(1)(a)2.

(iii) Mr. Reeves reasonably believed that deadly force was necessary to prevent Mr. Oulson from committing an aggravated assault with a full-formed intent to commit a felony, i.e. robbery

Mr. Reeves was also justified in using deadly force to prevent the forcible felony of aggravated assault – based on Mr. Oulson's ongoing commission of a robbery. §§ 784.021(1)(b); 813.13(1), (3)(a)-(b). Mr. Oulson's conduct rose to the level of a forcible felony because the assault was made with a fully-formed, conscious intent to commit a robbery upon Mr. Reeves. In particular, the unchallenged proof demonstrates that (1) Mr. Oulson took the popcorn bag from Mr. Reeves' person and custody; (2) Mr. Oulson used force, violence, assault, and the putting in fear during the course of the taking; (3) the popcorn bag had some value; and (4) Mr. Oulson took the popcorn bag in such a manner as to establish an intent to permanently deprive Mr. Reeves of his right to benefit from it. *Fla. Std. Jury Instr.* (Criminal) 8.2, 15.1 (Robbery); (A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A58, 7, 20-26; *Petition*, 65-68; V15, 1849-75).

On this additional ground, Petitioner therefore requests that his Petition be granted. (A21, A22).

(iv) Mr. Reeves reasonably believed that deadly force was necessary to prevent Mr. Oulson from committing an aggravated assault with a deadly weapon

Mr. Oulson's conduct also rose to the level of aggravated assault with a deadly weapon, in that the assault was made with a deadly weapon (i.e. his fist). *Fla. Std. Jury Instr.* (Criminal) 8.2; (A21; A36; A39, 13:26:25.322 to 13:26:27.924, 47:15 to 47:26; A58, 7, 20-26; *Petition*, 65-68; V15, 1849-75). This conclusion

D. Conclusion

Given the above, the uncontroverted evidence establishes by a preponderance of the evidence that Mr. Reeves was justified in using deadly force against Mr. Oulson's violence. The deadly force was reasonably believed necessary to prevent great bodily harm, death, and/or forcible felonies. The trial court therefore erred in denying Mr. Reeves' Motion Requesting Immunity. A writ of prohibition is therefore respectfully requested.

WHEREFORE, Petitioner respectfully requests this Honorable Court to grant his Petition for a writ of prohibition and direct the circuit court to dismiss the prosecution of Curtis Judson Reeves within the 6th Judicial Circuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Petition for Writ of Prohibition has been furnished via eservice to the Office of the Attorney General at CrimAppTPA@myfloridalegal.com and to the Honorable Susan Barthle at sbarthle@jud6.org; this Petition was furnished by U.S. Mail to: the Office of the State Attorney for the Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758; Office of the Attorney General, 3507 East Frontage Rd., Suite 100, Tampa, FL 33607; and the Honorable Susan Barthle, 38043 Live Oak Avenue, Room 106A, Dade City, Florida 33523; this 20th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

Counsel for the Petitioner hereby certifies that the foregoing Petition for Writ of Prohibition satisfies the requirements of Florida Rules of Appellate Procedure 9.100(*l*) and the Local Rule requirements of this Court, in that this document is submitted in Times New Roman 14-point font.

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