

# **Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, -24, -24.1, and -24.2**

**by Robert Christian Rutledge\***

## I. INTRODUCTION

It is 11:49 p.m. Sarah's arm quivers as she pumps the shotgun. She yells again at the silhouette prying at the lock on the rear door of her house. "Get out of here! I'm gonna shoot!" Sarah points the shotgun awkwardly toward the lower part of the french door. The silhouette punches through the pane of glass near the doorknob, unlocks the doorknob, and begins patting around for the deadbolt. Sarah closes her eyes and squeezes the trigger. The shotgun flashes and kicks. The silhouette—Sarah's ex-boyfriend—emits guttural groans and fierce expletives as he limps from the porch and into the backyard, dragging his right leg. Sarah sees him hop and stumble into the darkness beyond the floodlight. Sarah runs into the kitchen, where she finds her cell phone. She calls the police.

The police secure the yard. One officer tries to calm an irate neighbor. Another officer radios the address to an ambulance coming to pick up Sarah's ex-boyfriend. He has fallen from loss of blood while attempting to climb the fence. Though in and out of consciousness, Sarah's ex-

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boyfriend explains to the police: “I told you when I called. She took the keys to my car and locked me out of the house. I know I’m not supposed to be here, but we made up. I was just knocking on the door and she shot me. She shot me!”

Sarah loses her breath. She turns to the nearest officer. “I . . . I called you! I talked to the operator!” she shrieks. “He was trying to kill me! He wasn’t trying to leave! He smashed the window in!” The officer tries to calm Sarah down, but Sarah begins struggling and trying to confront her ex-boyfriend. As Sarah struggles, and officers firmly restrain her, another officer calls dispatch and checks the names of Sarah and her ex-boyfriend for prior arrests and offenses. Apparently, Sarah had unsuccessfully petitioned for a restraining order against her ex-boyfriend to keep him out of her house. In turn, the ex-boyfriend reported Sarah for making terroristic threats on two occasions, but she was not arrested. Unable to determine conclusively who had been the aggressor in this instance, the police arrest both.

Two days later, Sarah’s ex-boyfriend is still recovering in the hospital under close supervision. Sarah spent the last thirty-nine hours in jail and has finally found a family member to put up a property bond for her. Based on its review of the records, the State has pressed charges against both parties: criminal trespass against the ex-boyfriend and aggravated assault and aggravated battery against Sarah.

## II. STATUTORY IMMUNITY FOR THOSE DEFENDING HABITATION AND PROPERTY

Georgia law provides statutory immunity for a person charged with an assault that arose in defense of property including habitation and real property.<sup>1</sup> Such a defense would apply to the scenario above. The procedure for utilizing those immunities, however, is not clear in the applicable statutes, Official Code of Georgia Annotated (“O.C.G.A.”) sections 16-3-23, -24, -24.1, and -24.2 (the “Immunity Statutes”),<sup>2</sup> or in recent cases applying those statutes. This Article proposes a procedure for using those immunities as efficiently as possible. While seeking an efficient procedure, this Article also attempts to ascertain the rationale and policies behind the Immunity Statutes.

First, this Article examines Georgia’s statutes, cases, and legislative history related to immunity for defense of property and habitation. Second, this Article examines how other states deal with this particular kind of immunity in their statutory schemes. In that section, a Colorado

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1. O.C.G.A. §§ 16-3-23, -24, -24.1, -24.2 (2007).

2. *Id.*

statute addressing immunity for defense of habitation is examined, as are the Colorado cases elaborating upon the nature of a pretrial immunity procedure based on the Colorado statute. Finally, this Article proposes a procedure for conducting pretrial immunity hearings for Georgia in light of the language of the statutes, the legislative history, and the possible policy rationale. For a perspective helpful in considering the proposed procedure, the final section considers Colorado's policy and the application of its statute as a comparison. Ideally, the proposed procedure will help implement the immunity demanded by Georgia's Immunity Statutes.

A. *O.C.G.A. sections 16-3-23, -24, -24.1, and -24.2*

The limits for the use of force in defense of property are provided in O.C.G.A. sections 16-3-23 and 16-3-24. Section 16-3-23 addresses the defense of habitation, and section 16-3-24 addresses the defense of real property other than habitation.<sup>3</sup> Section 16-3-24.1 defines habitation as "any dwelling, motor vehicle, or place of business," and defines personal property as "personal property other than a motor vehicle" to distinguish personal property from the kind of real property dealt with by the statutes.<sup>4</sup>

Under the Immunity Statutes, the defense of habitation justifies a person's use of force more broadly than the defense of other real property. Most of the sections and subsections of the Immunity Statutes limit the force to the amount that the person reasonably believes necessary to prevent trespass, entry, attack, or interference with the property. As discussed below in Part IV.B.1, however, O.C.G.A. section 16-3-23(2) may not require the defender of habitation to have an objectively reasonable belief.<sup>5</sup> Section 16-3-23, which addresses defense of habitation, justifies the use of force "which is intended or likely to cause death or great bodily harm,"<sup>6</sup> only under the following circumstances: (1) when the use of force is necessary to prevent the "assault or offer of personal violence" after an "entry is made or attempted in a violent and tumultuous manner," and the person "reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein";<sup>7</sup> (2)

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3. *Id.* §§ 16-3-23, -24. Although O.C.G.A. section 16-3-24.1 defines personal property, O.C.G.A. sections 16-3-23, -24, -24.1, and -24.2 do not address personal property. O.C.G.A. §§ 16-3-23, -24, -24.2.

4. O.C.G.A. § 16-3-24.1.

5. O.C.G.A. § 16-3-23(2).

6. *Id.* § 16-3-23.

7. *Id.* § 16-3-23(1).

when a person “who is not a member of the family or household . . . unlawfully and forcibly enters or has . . . entered the residence and the person using such force *knew or had reason to believe*” that the entry had occurred in that manner;<sup>8</sup> or (3) when the person who uses such force “reasonably believes that the entry is made or attempted for the purpose of committing a felony . . . and that such force is necessary to prevent” the entry.<sup>9</sup>

In contrast to section 16-3-23, section 16-3-24 justifies the use of force in defense of real property other than habitation more narrowly. Like most of section 16-3-23, section 16-3-24 limits the use of force to instances when the person reasonably believes that force is necessary, and to the extent that he or she reasonably believes the force is necessary to defend real property other than habitation.<sup>10</sup> However, section 16-3-24 further limits the situations in which a person is justified in defending real property from “trespass . . . or other tortious or criminal interference”<sup>11</sup> to those situations when the property is “[l]awfully in [the defender’s] possession,”<sup>12</sup> “[l]awfully in the possession of a member of [the defender’s] immediate family,”<sup>13</sup> or when the property belongs “to a person whose property [the defender] has a legal duty to protect.”<sup>14</sup> Section 16-3-24 does not justify the use of force “likely to cause death or great bodily harm” in those situations unless the person “reasonably believes that it is necessary to prevent the commission of a forcible felony.”<sup>15</sup>

The threat of force is also addressed in O.C.G.A. sections 16-3-23 and 16-3-24. Each statute begins by providing that “[a] person is justified in threatening or using force” to defend property.<sup>16</sup> Due to the disjunctive language distinguishing threat and use of force, however, it is not clear whether the limitations on the use of force in later subsections apply to the mere *threat* of force. After this language, each statute then addresses the use of force, but not the threat of force alone.<sup>17</sup> The distinction between threat and force is addressed below in Part IV.B.3, which discusses the proposed procedure for immunity.

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8. *Id.* § 16-3-23(2) (emphasis added).

9. *Id.* § 16-3-23(3).

10. O.C.G.A. §§ 16-3-23, -24.

11. O.C.G.A. § 16-3-24(a).

12. *Id.* § 16-3-24(a)(1).

13. *Id.* § 16-3-24(a)(2).

14. *Id.* § 16-3-24(a)(3).

15. *Id.* § 16-3-24(b).

16. O.C.G.A. §§ 16-3-23, -24.

17. *Id.*

Both O.C.G.A. sections 16-3-23 and 16-3-24 are governed by O.C.G.A. section 16-3-24.2, which creates the immunity.<sup>18</sup> Section 16-3-24.2 provides that a person is immune from criminal prosecution if that person uses force in compliance with section 16-3-23 or 16-3-24.<sup>19</sup> If the person uses a weapon, section 16-3-24.2 provides immunity as long as that person may lawfully carry or possess a weapon.<sup>20</sup> The statute directs courts to consider O.C.G.A. section 16-11-131,<sup>21</sup> which criminalizes the possession of firearms by convicted felons, to determine if the party may lawfully carry or possess the weapon.<sup>22</sup>

### *B. Application of the Immunity Statutes by Georgia Courts*

The procedure used by Georgia courts to determine immunity under the Immunity Statutes is unsettled, although the courts have sought an appropriate procedure and have made a few attempts at implementing it. In *Boggs v. State*,<sup>23</sup> the Georgia Court of Appeals emphatically held that, under the plain meaning of O.C.G.A. section 16-3-24.2, criminal proceedings are barred against a person who is immune, and that the trial court must determine the immunity before the person's trial commences.<sup>24</sup> Further, failure to raise this immunity defense prior to trial may be a ground for reversal due to ineffective assistance of counsel.<sup>25</sup> In *Benham v. State*,<sup>26</sup> the Georgia Supreme Court held that the failure to request a jury instruction that includes the defense of habitation as an affirmative defense constitutes ineffective assistance of counsel.<sup>27</sup>

Because *Boggs* establishes that these statutes set forth immunity defenses available prior to trial, and because *Benham* further establishes that the failure to raise the affirmative defense of defense of habitation before the jury is a ground for reversal based on ineffective assistance of counsel, it appears that failure to raise the defense of immunity prior to trial might also be considered ineffective assistance of counsel. Thus, it is imperative that defense attorneys understand and apply this

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18. O.C.G.A. § 16-3-24.2.

19. *Id.*

20. *Id.*

21. O.C.G.A. § 16-11-131 (2007).

22. O.C.G.A. §§ 16-3-24.2, -11-131; see *Millen v. State*, 267 Ga. App. 879, 883, 600 S.E.2d 604, 609 (2004) (holding that statute prohibiting convicted felon from possessing firearm negates immunity under O.C.G.A. section 16-3-24.2).

23. 261 Ga. App. 104, 581 S.E.2d 722 (2003).

24. *Id.* at 105, 581 S.E.2d at 723.

25. *Benham v. State*, 277 Ga. 516, 518, 591 S.E.2d 824, 826-27 (2004).

26. 277 Ga. 516, 591 S.E.2d 824 (2004).

27. *Id.* at 517-18, 591 S.E.2d at 826-27.

pretrial immunity defense in applicable cases. It would also benefit courts to take notice of this immunity in order to maintain judicial economy by preventing retrials on this issue. Further, prosecutors, obligated by their duty to justice, should take notice of the Immunity Statutes and the required procedure in order to assess whether to pursue prosecution, and in order to maintain convictions against defendants with claims of ineffective assistance of counsel. A close examination of *Boggs*, *Benham*, and other cases applying the Immunity Statutes will help clarify the procedure used by Georgia courts to determine immunity and guide courts in implementing the procedure under those statutes.

The Georgia Court of Appeals analyzed the language of O.C.G.A. section 16-3-24.2 and recognized the need for a pretrial proceeding to determine immunity in *Boggs*.<sup>28</sup> The defendant in *Boggs* had stabbed someone who was attempting a car-jacking. Prior to trial, the superior court found as a matter of law that the defendant was not acting in defense of his car, and that the victim was trying to flee when the stabbing occurred.<sup>29</sup> The court of appeals held that this pretrial determination was sufficient consideration of the defendant's immunity and affirmed the defendant's conviction.<sup>30</sup>

In *Boggs* the Georgia Court of Appeals simply reviewed the trial court's proceedings to determine whether, in retrospect, there had been a sufficient opportunity for the trial court to consider the defendant's immunity prior to the trial.<sup>31</sup> In its reasoning, however, the court of appeals noted the need for a specific pretrial hearing on the issue of immunity.<sup>32</sup> Relying on *Black's Law Dictionary*, the court of appeals defined "immunity" as "exempt or free from duty or penalty" and defined "prosecution" as "[a] criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime."<sup>33</sup> After considering these definitions, the court of appeals emphasized that the issue of immunity must be determined by the trial court prior to trial.<sup>34</sup>

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28. 261 Ga. App. at 105, 581 S.E.2d at 723.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (brackets in original) (quoting BLACK'S LAW DICTIONARY 676, 1099 (5th ed. 1979)); accord *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (en banc) (using plain language and definitions in *Black's Law Dictionary* to hold that immunity must be determined prior to trial).

34. *Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723; accord *Guenther*, 740 P.2d at 975.

In *Benham* the Georgia Supreme Court held that a defendant was denied effective assistance of counsel when a defense attorney failed to request a jury instruction on defense of habitation.<sup>35</sup> The defendant injured a person with a box cutter when that person reached into the defendant's car and grabbed her during a dispute.<sup>36</sup> According to the definitions under O.C.G.A. section 16-3-24.1, a motor vehicle qualifies as habitation for the purpose of the Immunity Statutes.<sup>37</sup> Instead of requesting an additional defense of habitation instruction, however, the defense attorney only requested jury instructions based on self-defense under O.C.G.A. section 16-3-21,<sup>38</sup> and the defendant was convicted of aggravated assault.<sup>39</sup>

Upon a motion for a new trial, the attorney explained that she considered it best to request only self-defense instructions and argued that the decision was at her strategic discretion.<sup>40</sup> The Georgia Supreme Court disagreed and, after applying the test for determining ineffective assistance of counsel, reversed the defendant's conviction.<sup>41</sup> The supreme court explained that, under the defense of habitation statute, unlike the self-defense statute, the defendant might have been justified in using deadly force disproportionate to the force "necessarily required to repel" the assailant's attack.<sup>42</sup>

In his dissenting opinion, Justice Carley disagreed with (1) the majority's assessment of the defense attorney's decision and (2) its interpretation of the defense of habitation statute.<sup>43</sup> Justice Carley emphasized that, under both the self-defense statute and the defense of habitation statute, a person must reasonably believe that the use of deadly force is necessary.<sup>44</sup> According to Justice Carley, the only difference between the two statutes, besides the attack on a habitation, is the degree of violence required before deadly force becomes necessary.<sup>45</sup> Thus, Justice Carley contended that the majority incorrectly concluded that a defendant under either statute could use deadly force when such force is not necessarily required.<sup>46</sup>

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35. *Benham*, 277 Ga. at 517, 591 S.E.2d at 826.

36. *Id.* at 516, 591 S.E.2d at 825-26.

37. O.C.G.A. § 16-3-24.1.

38. O.C.G.A. § 16-3-21 (2007).

39. *Benham*, 277 Ga. at 516-17, 591 S.E.2d at 825-26.

40. *Id.* at 517, 591 S.E.2d at 826.

41. *Id.* at 518, 591 S.E.2d at 827.

42. *Id.* at 517, 591 S.E.2d at 826.

43. *Id.* at 519, 591 S.E.2d at 827-28 (Carley, J., dissenting).

44. *Id.* at 520, 591 S.E.2d at 828.

45. *Id.*

46. *Id.*

The opinions in *Boggs* and *Benham* demonstrate the need for a specific, consistent procedure for determining immunity prior to trial. Although the Georgia Court of Appeals in *Boggs* held that the superior court's legal finding was sufficient to determine the defendant's immunity,<sup>47</sup> the court's reasoning demands that lower courts deal with this issue specifically in the future, and with more deference to the defendant's immunity, by holding an immunity proceeding *prior to trial*. To comply with the holding of the Georgia Court of Appeals, Georgia trial courts should either create a separate and specific proceeding to determine whether the party is immune, or expand an already existing proceeding, such as the preliminary hearing, to include a specific immunity determination.<sup>48</sup> A definite, consistent procedure for determining immunity would also assist both defense attorneys and prosecutors because, under the Georgia Supreme Court's decision in *Benham*, failure to properly raise the immunity defense prior to trial might result in a reversal based on ineffective assistance of counsel.<sup>49</sup>

Two other Georgia cases provide some guidance for immunity proceedings. In *Millen v. State*,<sup>50</sup> the Georgia Court of Appeals held that the immunity proceeding may be preempted by the defendant's criminal record.<sup>51</sup> In *Blazer v. State*,<sup>52</sup> the Georgia Court of Appeals recognized the need for a more structured proceeding, even though the court approved the outcome of the superior court's immunity proceeding.<sup>53</sup> As discussed below, the decision in *Millen* outlines a trial court's discretion in allowing for a hearing,<sup>54</sup> while the decision in *Blazer* suggests what an ideal proceeding might entail.<sup>55</sup>

The defendant in *Millen*, who was a convicted felon, claimed ineffective assistance of counsel because his lawyer failed to demand a pretrial hearing to determine whether the defendant was immune from prosecution under theories of self-defense or defense of habitation.<sup>56</sup> The Georgia Court of Appeals held that a hearing would have been useless because the immunity governed by O.C.G.A. section 16-3-24.2

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47. 261 Ga. App. at 105, 581 S.E.2d at 723.

48. See *Guenther*, 740 P.2d at 979 (holding that courts may either attach Colorado's immunity hearing to preliminary hearing or hold separate hearing if charged on information and that, in either case, probable cause should be determined first).

49. 277 Ga. at 518, 591 S.E.2d at 827.

50. 267 Ga. App. 879, 600 S.E.2d 604 (2004).

51. *Id.* at 883, 600 S.E.2d at 609.

52. 266 Ga. App. 743, 598 S.E.2d 338 (2004).

53. *Id.* at 744-45, 598 S.E.2d at 340-41.

54. 267 Ga. App. at 881-83, 600 S.E.2d at 608-09.

55. 266 Ga. App. at 745, 598 S.E.2d at 340-41.

56. 267 Ga. App. at 883, 600 S.E.2d at 609.

does not apply to convicted felons who are not allowed to possess firearms.<sup>57</sup> Thus, had there been a motion for a pretrial immunity hearing, the trial court could have denied such a motion as a matter of law.<sup>58</sup> The decision in *Millen* demonstrates that the issue of whether a person could possess a firearm is a threshold issue and should be addressed before determining if a pretrial immunity hearing is required.

The Georgia Court of Appeals decision in *Blazer* revealed the need for more structure in a pretrial hearing. The defendant in *Blazer* relied only upon written testimony as the substance of his pretrial motion for immunity.<sup>59</sup> The court of appeals stated that a live hearing would have been better for determining factual issues but nonetheless affirmed the superior court's procedure primarily because the court of appeals could not disturb the outcome under its standard of review.<sup>60</sup> The court explained that "where the facts are in dispute and thus credibility determinations are crucial, live testimony at an evidentiary hearing would appear critical to allow the court to observe each witness's demeanor, voice inflection, eye contact, and other credibility-related circumstances."<sup>61</sup> Nevertheless, the court of appeals went on to explain that the trial judge had become a finder of fact in this instance because

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57. *Id.*; O.C.G.A. § 16-3-24.2.

58. See *Millen*, 267 Ga. App. at 883-84, 600 S.E.2d at 609. Cf. *Tarvestad v. State*, 261 Ga. 605, 606, 409 S.E.2d 513, 514-15 (1991) (holding that convicted felon is entitled to jury instruction of justification when he or she is charged with operating motor vehicle without license in emergency situation); *Little v. State*, 195 Ga. App. 130, 131, 392 S.E.2d 896, 896 (1990) (holding that convicted felon is entitled to jury instruction of justification when he or she is charged with illegally possessing firearm while keeping it away from children for their safety). But see, e.g., *Jones v. State*, 220 Ga. App. 784, 785, 470 S.E.2d 326, 328 (1996) (holding that refusal to give self-defense jury instruction based on defendant's prohibition from possessing firearm due to a prior felony conviction was reversible error). The court's holding in *Jones* and the court's application of O.C.G.A. § 16-3-24.2 in *Millen* appear to conflict. Compare *Jones*, 220 Ga. App. at 785, 470 S.E.2d at 328, with *Millen*, 267 Ga. App. at 881-83, 600 S.E.2d at 608-09. Because, in *Jones*, it was an error not to provide a justification instruction if the convicted felon could possibly justify briefly possessing the firearm solely for self-defense, it appears that such justification might be applicable, and warrant a hearing, in the context of the Immunity Statutes. 220 Ga. App. at 785, 470 S.E.2d at 328. Based on the plain language of the statute, however, it can be argued that the legislature did not intend to extend the pretrial immunity to a convicted felon possessing a firearm for self-defense, although this justification remains available as an affirmative defense at trial. Although this issue might be raised in future cases, the holding in *Millen* currently implies that the Immunity Statutes prohibit pretrial immunity hearings for felons if they are prohibited from possessing or using a weapon, and they use a weapon in defense of habitation or real property. 267 Ga. App. at 881-83, 600 S.E.2d at 608-09.

59. 266 Ga. App. at 744-45, 598 S.E.2d at 340.

60. *Id.* at 745, 598 S.E.2d at 340.

61. *Id.*

he was required to resolve the conflict of written testimony.<sup>62</sup> In such a situation, the appellate court cannot disturb the trial court's decision if it can be "supported by *any* evidence."<sup>63</sup> Though uncomfortable with the proceedings, the court of appeals appropriately deferred to the trial court under the "any evidence" standard.<sup>64</sup>

These cases demonstrate the need for a consistent, established procedure for pretrial immunity hearings. The court in *Boggs* recognized that the Georgia statutes demand a pretrial hearing because, by definition, an immune party should not face prolonged proceedings to determine immunity.<sup>65</sup> The court in *Benham* established that a defendant is entitled to an instruction on this immunity as an affirmative defense and implied that, in light of the other cases, it may be error not to provide a pretrial immunity hearing if the facts support one.<sup>66</sup> Further, the court in *Millen* provided an example of a limit to a defendant's right to a pretrial immunity hearing: the party's ability to legally possess or use a firearm.<sup>67</sup> Finally, the court in *Blazer* suggested that such a pretrial hearing might be better executed with live testimony for the specific purpose of determining immunity.<sup>68</sup> These cases, however, only provide suggestions for the proceedings themselves and give little insight into the policy behind the Immunity Statutes. The legislative history of the Immunity Statutes and related statutes provides insight into the policy behind immunity and guidance for the necessary pretrial procedure.

### C. Legislative History and Related Legislation

The Immunity Statutes grew from Chapter 26-9, "Defenses to Criminal Liability," which was passed in 1968.<sup>69</sup> The 1968 statute derived from an earlier nineteenth-century statute.<sup>70</sup> Prior to the 1968 amendment, section 26-1011 of the Georgia Code of 1933 stated that

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62. *Id.*

63. *Id.* (emphasis added).

64. *Id.* at 744-45, 598 S.E.2d at 340-41.

65. 261 Ga. App. at 105, 581 S.E.2d at 723.

66. 277 Ga. at 518, 591 S.E.2d at 827-28.

67. 267 Ga. App. at 883, 600 S.E.2d at 609. *But see Jones*, 220 Ga. App. at 784-85, 470 S.E.2d at 328 (holding that jury instruction of justification was required although defendant was convicted felon who had possessed firearm briefly for self-defense). Based on *Jones*, a pretrial immunity hearing should arguably also be available to determine if the use of a weapon, as well as the defensive act itself, was justified. *See supra* note 58 for further discussion.

68. 266 Ga. App. at 745, 598 S.E.2d at 340.

69. 1968 Ga. Laws 1272, 1272-74.

70. *Id.*

there was no rational difference between justifiable and excusable homicide and explained that homicide would be justifiable if used

in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.<sup>71</sup>

The 1968 statute limited the use of force “intended or likely to cause death or great bodily harm” for a person defending his habitation.<sup>72</sup> A person defending his habitation was permitted, under section 26-903, to use lesser force in situations where the person reasonably believed that “such threat or force is necessary to prevent or terminate such other’s unlawful entry into or attack upon a habitation.”<sup>73</sup> The statute then delineated two circumstances in which force “likely to cause death or great bodily harm” might be used.<sup>74</sup> The first circumstance, described in subsection (1) of the statute, reflected the circumstance set forth above in section 26-1011 of the Georgia Code of 1933.<sup>75</sup> The second circumstance, described in subsection (2), allowed such serious force when the person reasonably believed that (1) the entry was made or attempted in order to commit a felony and (2) such serious force was necessary.<sup>76</sup> The section of the 1968 statute addressing defense of property other than habitation, section 26-904, is the same as the current statute, O.C.G.A. section 16-3-24.<sup>77</sup>

Years later, to further protect a person rightfully defending his or her home, the Georgia General Assembly passed O.C.G.A. section 51-11-9,<sup>78</sup> which granted immunity from tort liability to people who defend their habitation under O.C.G.A. section 16-3-23.<sup>79</sup> In 1986 Senators Turner, Barnes, and McKenzie introduced Georgia Senate Bill 489.<sup>80</sup> The bill originally created immunity from tort liability for persons acting in defense of habitation under O.C.G.A. section 16-3-23 and in defense of

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71. GA. CODE ANN. § 26-1011 (Harrison 1933) (referring to Cobb’s 1851 Digest, 784).

72. 1968 Ga. Laws 1273.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1273-74.

78. O.C.G.A. § 51-11-9 (2000 & Supp. 2007).

79. *Id.*

80. 1 GA. SENATE J. REGULAR SESSION 1986, at 467.

other real property under O.C.G.A. section 16-3-24.<sup>81</sup> In its substitute, however, the Senate Committee on Judiciary and Constitutional Law narrowed the bill to provide immunity only for persons who could justify their action under O.C.G.A. section 16-3-23.<sup>82</sup> On February 14, 1986, the Georgia Senate accepted this amendment and unanimously passed O.C.G.A. section 51-11-9.<sup>83</sup> Subsequently, the Georgia House of Representatives also passed the bill.<sup>84</sup> Thus, under O.C.G.A. section 51-11-9, a person is immune from tort liability as long as the person defends his or her habitation in accordance with O.C.G.A. section 16-3-23, but a person may be subject to liability for defending other property.<sup>85</sup>

In 1998 the Georgia General Assembly brought this immunity into the criminal context through two amendments to O.C.G.A. section 16-3-24.<sup>86</sup> Those two amendments, O.C.G.A. sections 16-3-24.1 and 16-3-24.2, extended immunity to people who protect their habitation or property in accordance with O.C.G.A. sections 16-3-23 and 16-3-24.<sup>87</sup> Prior to those amendments, the defense of habitation and the defense of real property would have been affirmative defenses.<sup>88</sup> As discussed above, those defenses must now be addressed prior to the commencement of trial.<sup>89</sup>

The legislative proceedings for the passage of O.C.G.A. sections 16-3-24.1 and 16-3-24.2 provide insight into the policy behind the Immunity Statutes that may help determine how best to administer pretrial immunity hearings. The original bill, House Bill 1360, did not address O.C.G.A. sections 16-3-23 or 16-3-24 at all.<sup>90</sup> Rather, the original bill addressed O.C.G.A. section 16-11-126,<sup>91</sup> which was written to allow people to transport weapons in private vehicles under certain conditions.<sup>92</sup> Representatives Powell, Floyd, and Coleman introduced House Bill 1360 in February 1998.<sup>93</sup> The bill passed the house and went to

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81. *Id.*

82. *Id.* at 804.

83. *Id.* at 804-05.

84. *Id.* at 1834.

85. O.C.G.A. § 51-11-9.

86. O.C.G.A. §§ 16-3-24.1, -24.2.

87. *Id.*

88. *See Hightower v. State*, 224 Ga. App. 703, 704, 481 S.E.2d 867, 869-70 (1997) (listing both defense of habitation and defense of property as affirmative defenses).

89. *See supra* Part II.B.

90. 1998 Ga. Laws 1153, 1153-54; 1 GA. HOUSE J. REGULAR SESSION 1998, at 148.

91. O.C.G.A. § 16-11-126 (2007).

92. 1998 Ga. Laws 1153, 1153-54; 1 GA. HOUSE J. REGULAR SESSION 1998, at 148.

93. 1 GA. HOUSE J. REGULAR SESSION 1998, at 148.

the senate.<sup>94</sup> The senate then submitted the bill to the Committee on Special Judiciary.<sup>95</sup> On March 18, 1998, the committee returned a substitute for the original house bill regarding O.C.G.A. section 16-11-126. The substitute included two additional amendments that created immunity applicable to the defense of habitation statute and the defense of real property statute. Senators Crotts and Dean, of the 17th and 31st districts respectively, propounded these two amendments. The senate approved the bill and sent it back to the house for a new vote.<sup>96</sup>

On the following day, March 19, 1998, the senate substitute was read to the house.<sup>97</sup> At least some of the members of the house appeared to believe that this immunity was too strong. Representative Teper of the 61st district sought to temper the immunity provided in O.C.G.A. section 16-3-24.2 by inserting the phrase “after a preliminary investigation,” offset by commas, between the phrase “shall be” and the word “immune.”<sup>98</sup> After the amendment, the overall phrase would have read as follows: “A person who uses threats or force in accordance with Code Section 16-3-23 or 16-3-24 shall be, *after a preliminary investigation*, immune from criminal prosecution therefor unless any deadly force used by such person utilizes a weapon [which that person cannot carry or possess according to other statutes].”<sup>99</sup> Either out of desire to pass the bill without returning it to the senate, or out of desire for the more powerful immunity, the house of representatives refused to adopt Representative Teper’s new amendment by a vote of 129 to 30.<sup>100</sup> Representative Powell then moved that the house accept the substitute, including the new amendments from the senate, and the bill passed by a vote of 133 to 32.<sup>101</sup>

Another relevant amendment to O.C.G.A. section 16-3-23 was added in 2001.<sup>102</sup> Retaining all the other parts of the defense of habitation statute, the Georgia General Assembly inserted subsection (2).<sup>103</sup> This subsection allows the use of deadly force or force likely to cause great bodily harm when three elements are met: (1) the force is used against a person who is not a family or household member, (2) the person is entering or has entered the residence forcibly and unlawfully, and (3)

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94. *Id.* at 1010-13.

95. *Id.* at 779-80.

96. 2 GA. HOUSE J. REGULAR SESSION 1998, at 1766-68.

97. *Id.* at 2543-45.

98. *Id.* at 2544.

99. *Id.* (emphasis added).

100. *Id.*

101. *Id.* at 2544-45.

102. O.C.G.A. § 16-3-23(2).

103. *Id.*

“the person using such force *knew or had reason to believe* that an unlawful and forcible entry occurred.”<sup>104</sup> This language is distinct from the language in the other two subsections of O.C.G.A. section 16-3-23 and does not invoke the same standard of objective reasonableness in assessing immunity.

In his treatise on defense of habitation and other property, Robert Cleary explains that subsection (2) was added because the reasonableness language in the pre-2001 statute required the resident to act with reasonable belief in situations that unfolded too quickly to determine if the intruder was about to attack or commit a felony.<sup>105</sup> According to Cleary, “the General Assembly added [subsection (2)] in order to permit a resident’s use of deadly force against an intruder without having to satisfy either of the two reasonableness requirements.”<sup>106</sup> Thus, a person defending his or her habitation could be justified in using deadly force under subsection (2) based on “mere knowledge or belief” about the unlawfulness or forcefulness of the entry instead of the reasonable belief that the person entering did so for the purpose of committing a felony.<sup>107</sup>

As a result of this statutory construction, Georgia’s statutory scheme has various levels of immunity for people who use force to defend their homes or other property. The person who defends his or her habitation has the highest level of immunity. That person is immune from both criminal charges and civil liability if immunity can be established. The person who defends his or her property other than habitation still qualifies for some immunity. He or she is immune from criminal charges, but this immunity is subject to a greater scrutiny that intensifies with the degree of force the person employs to defend the property. Unlike the defender of habitation, the defender of property is not immune from civil liability. The most appropriate procedure for finding immunity under the Immunity Statutes is discussed below in Part IV, with some guidance from an analysis of Colorado’s immunity statute. First, however, in order to better understand the statutory schemes of Georgia and Colorado, this Article considers the ways in

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104. *Id.* (emphasis added).

105. ROBERT E. CLEARY, JR., *KURTZ CRIMINAL OFFENSES AND DEFENSES IN GEORGIA* 233 (2004 ed.) [hereinafter CLEARY, *CRIMINAL OFFENSES*]; accord ROBERT E. CLEARY, JR., MOLNAR *GEORGIA CRIMINAL LAW: CRIMES AND PUNISHMENTS* § 4-7 (6th ed. Supp. 2007-2008); Derek E. Empie, *Defenses to Criminal Prosecution: Change Provisions Relating to the Use of Force in the Defense of Habitations or Residences; Provide for Related Matters*, 18 GA. ST. U. L. REV. 25, 25-27 (2001) (discussing policy leading to proposed amendment).

106. CLEARY, *CRIMINAL OFFENSES*, *supra* note 105, at 233.

107. *Id.*

which other states deal with the issue of defense of habitation and other property.

### III. DEFENSE OF HABITATION AND DEFENSE OF PROPERTY IN OTHER STATES

This section examines the way in which states other than Georgia have dealt with the defense of habitation and the defense of property in their statutory schemes. This survey does not discuss the relevant statutes in all fifty states, but it takes into account enough statutes to understand a variety of ways to deal with these defenses. Ultimately, this section focuses on Colorado's immunity statute—which is similar to Georgia's—and its application by Colorado courts.

#### A. *Other States' Statutory Constructions of Defense of Habitation and Property*

At least one state, Montana, considers the right to defend the property “of one’s self, of a wife, husband, child, parent, or other relative or member of one’s family, or of a ward, servant, master, or guest” from wrongful injury by “[a]ny necessary force” to be a basic personal right.<sup>108</sup> As explained in greater detail below, other states have incorporated the defense of habitation—also referred to as “dwelling” in many statutes—into self-defense or justifiable homicide.<sup>109</sup> Among their self-defense or justification statutes, those states have dealt with other real property as premises under a separate provision, and they have addressed personal property under yet another provision.<sup>110</sup> Other states have incorporated defense of habitation into the defense of property; still other states have separate statutes, some of which are similar to Georgia’s statutes.<sup>111</sup> Provisions in a few statutes create presumptions to benefit defendants, such as Massachusetts’s “Castle Rule,” which might remove the burden of pleading the defense affirmatively from a person who has allegedly defended his or her habitation.<sup>112</sup> Some states use immunity language but do not provide immunity from prosecution; those states provide an affirmative defense despite the statutory language.<sup>113</sup>

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108. MONT. CODE ANN. § 49-1-103 (2005).

109. See *infra* notes 114-25 and accompanying text.

110. *Id.*

111. See *infra* notes 128-46 and accompanying text.

112. *Commonwealth v. Painten*, 709 N.E.2d 423, 430-31 (Mass. 1999) (finding MASS. ANN. LAWS ch. 278, § 8A (LexisNexis 2002), or the “Castle Rule,” inapplicable to the case).

113. See *infra* notes 154-64 and accompanying text.

**1. Defense of Habitation and Defense of Property as Affirmative Defenses.** States that incorporate defense of habitation into self-defense statutes expand the right of self-defense to include defense of habitation when the nature of the crime committed or attempted in the habitation endangers the person dwelling therein.<sup>114</sup> In the self-defense regime, such defenses are affirmative defenses.<sup>115</sup> Those statutes incorporate defense of habitation as a factor that allows for the use of greater force or that makes retreat unnecessary before using deadly force in self-defense.<sup>116</sup> A New Hampshire statute provides an example of this construction of defense of habitation.<sup>117</sup>

The New Hampshire self-defense statute allows the use of deadly force in self-defense if the person acting in defense (the “actor”) reasonably believes that the other person is likely to use unlawful force while committing a felony against the actor in the actor’s dwelling or within its curtilage.<sup>118</sup> This statute does not require the actor to retreat before using deadly force in such a situation.<sup>119</sup> Another New Hampshire statute addresses “Use of Force in Defense of Premises.”<sup>120</sup> This statute is broader than defense of dwelling statutes because it entitles “[a] person in possession or control of [the] premises or a person who is licensed or privileged to be” there to use “non-deadly force” against a trespasser.<sup>121</sup> The statute allows the use of deadly force if the person defending the premises would be allowed to use such force under the self-defense statute or when the person reasonably believes the trespasser is about to commit arson.<sup>122</sup>

New Hampshire’s self-defense statute governs the “Use of Force in Property Offenses” in a similar way.<sup>123</sup> A person may use force “to prevent what is or reasonably appears to be an unlawful taking of his property” or to prevent other actions against the person’s property, but a person may not use deadly force unless he or she is allowed to do so under the self-defense statute.<sup>124</sup> Several other states have similar

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114. *See, e.g.*, N.H. REV. STAT. ANN. § 627:4 (LexisNexis 1996).

115. *See id.*

116. *See id.*

117. *See id.*

118. *Id.* § 627:4(II)(d).

119. *Id.* § 627:4(III)(a).

120. N.H. REV. STAT. ANN. § 627:7 (LexisNexis 1996).

121. *Id.*

122. *Id.*

123. N.H. REV. STAT. ANN. § 627:8 (LexisNexis 1996).

124. *Id.*

statutory constructions.<sup>125</sup> These states treat habitations and dwellings as special places where, in self-defense, greater force may be used more liberally.<sup>126</sup> In addition, these states limit the use of deadly force in defense of premises and other property to instances involving specific crimes, such as arson or burglary, or to situations governed by the dwelling provision in self-defense statutes.<sup>127</sup>

Other states incorporate this construction into their statutes that directly address defense of property as habitation, dwelling, premises, or some other designation. For example, Kentucky incorporates the defense into its "Protection of Property" statute.<sup>128</sup> The statute distinguishes between "physical force" and "deadly physical force" used in protection of property.<sup>129</sup> According to the statute, a person is justified in using physical force if the person believes such force is necessary to prevent criminal trespass or burglary in his or her dwelling.<sup>130</sup> A person is permitted to use "deadly physical force" only when he or she believes that the other person is "[a]ttempting to dispossess him of his dwelling otherwise than under a claim of right," "[c]ommitting or attempting to commit a burglary of such dwelling," or "[c]ommitting or attempting to commit arson of a dwelling or other building in his possession."<sup>131</sup> Thus, Kentucky's defense of property statute is distinct from its self-defense statute, unlike the New Hampshire statutes.<sup>132</sup>

Like Georgia, several other states have a specific statute for defense of habitation. One example is the North Carolina defense of habitation statute, which falls under "Burglary and other Housebreakings."<sup>133</sup> North Carolina's statutory scheme incorporates a defense for "Use of

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125. See, e.g., ALA. CODE §§ 13A-3-23, -25, -26 (LexisNexis 2005 & Supp. 2006) (similar statutory scheme including justification of deadly defense against arson and burglary); ARK. CODE ANN. §§ 5-2-607 to -609 (1997 & Supp. 2005) (similar statutory scheme); CONN. GEN. STAT. ANN. §§ 53a-19 to -21 (West 2001 & Supp. 2007) (similar statutory scheme); MO. ANN. STAT. §§ 563.031, .036, .041 (West 1999) (similar statutory scheme); N.Y. PENAL LAW §§ 35.10, .15, .20 (McKinney 2004 & Supp. 2008) (similar statutory scheme).

126. See statutes cited *supra* note 125.

127. *Id.*

128. KY. REV. STAT. ANN. § 503.080 (West 2006).

129. *Id.* § 503.080(1)-(2).

130. *Id.* § 503.080(1)(a).

131. *Id.* § 503.080(2).

132. For states with statutes similar to Kentucky's, see ARIZ. REV. STAT. ANN. §§ 13-407 to -408 (2001) (establishing defense of habitation and defense of property under separate statutes and limiting use of deadly force with self-defense statute). See also ME. REV. STAT. ANN. tit. 17-A, §§ 104, 108 (2006) (laying out parallel treatments of defense of property and self-defense under two separate statutes); 18 PA. CONS. STAT. ANN. §§ 505, 507 (West 1998) (similar statutory scheme).

133. N.C. GEN. STAT. §§ 14-51 to -54 (2003).

deadly physical force against an intruder.”<sup>134</sup> The defense is in addition to, and governed by, other defenses under North Carolina’s common law.<sup>135</sup> It allows the occupant to use any degree of force to prevent or terminate an unlawful entry into the home “if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or . . . if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.”<sup>136</sup>

Illinois has a statutory construction very similar to Georgia’s. It justifies a person using “force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other’s unlawful entry into or attack upon a dwelling.”<sup>137</sup> The Illinois statute limits when a person may use “force which is intended or likely to cause death or great bodily harm” to situations similar to those described in the Georgia statute.<sup>138</sup> Illinois allows such deadly force when “[t]he entry is made or attempted in a violent, riotous, or tumultuous manner, and [the person acting] reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling,” or when the person “reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling.”<sup>139</sup> The Illinois statute also incorporates immunity from civil liability for a person defending his or her habitation against anyone acting as an aggressor,<sup>140</sup> a role which is defined under another statute.<sup>141</sup>

Illinois law also provides a defense for persons defending property other than habitation.<sup>142</sup> This section allows the use of non-deadly force to the extent that the person reasonably believes that such force is “necessary to prevent or terminate [another’s] trespass on or other tortious or criminal interference” with real property or personal property which the person or a member of his or her household lawfully possesses or if it belongs to someone “whose property [the person] has a legal duty to protect.”<sup>143</sup> The statute also limits the use of greater force to

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134. *Id.* § 14-51.1.

135. *Id.* § 14-51.1(c).

136. *Id.* § 14-51.1(a).

137. 720 ILL. COMP. STAT. ANN. § 5/7-2 (West 2002).

138. *Id.* For a description of Georgia’s Immunity Statutes see *supra* notes 1-22 and accompanying text.

139. 720 ILL. COMP. STAT. ANN. § 5/7-2(a)-(b).

140. *Id.* § 5/7-2.

141. 720 ILL. COMP. STAT. ANN. § 5/7-4 (West 2002).

142. 720 ILL. COMP. STAT. ANN. § 5/7-3 (West 2002 & Supp. 2007).

143. *Id.*

situations in which the person reasonably believes that such force is necessary to prevent a forcible felony.<sup>144</sup> This section also incorporates civil immunity.<sup>145</sup> Other states follow this pattern or some variation thereof.<sup>146</sup>

Exploring the application of these statutory structures is beyond the scope of this Article. However, some observations can be made. While these statutes vary in structure, they mainly provide for an affirmative defense of justification. No statute, however, couches the defense against criminal charges in terms of immunity. In general, a defendant must raise the issue at trial, and the prosecution must disprove it to the jury. In contrast to these statutes, Georgia's Immunity Statutes provide for immunity from prosecution, which entitles a defendant to a pretrial determination of the issue, in addition to defining an affirmative defense that must be disproven at trial.

**2. The “Castle Defense” and Immunity Language.** Two other statutory methods of dealing with defense of habitation and real property further distinguish Georgia's Immunity Statutes. This section first considers another procedural layout, the “castle defense,” and then examines states that have used immunity language in their statutes but have not permitted pretrial determinations of immunity.

The castle defense essentially eases the burden of an affirmative defense for the defendant. The defense creates a rebuttable presumption that an “owner, tenant, or occupier” of a place was acting reasonably in self-defense if the person injured was committing an offense that involved entering the place.<sup>147</sup> Rhode Island offers an example of a castle defense statute in section 11-8-8 of its General Laws.<sup>148</sup> Under this statute, if someone enters the premises and is killed or injured while committing burglary, entry with intent to murder, robbery, arson, stealing poultry, or any of the other crimes enumerated in sections 11-8-

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144. *Id.*

145. *Id.*

146. *See, e.g.*, UTAH CODE ANN. §§ 76-2-405, -406 (2003) (similar statutory scheme including force against entry made surreptitiously or by stealth). For hybrid statutory structures, see, for example, DEL. CODE ANN. tit. 11, § 466 (2001) (summarizing degrees of force used in relation to kinds of property), DEL. CODE ANN. tit. 11, § 469 (2001) (specifying force against person unlawfully in dwelling and listing features of encounters that justify use of force, such as sudden and unexpected encounters), FLA. STAT. ANN. § 776.031 (West 2005) (addressing several defenses of property under statute entitled “Use of force in defense of others”), and FLA. STAT. ANN. § 782.02 (West 2007) (justifying use of deadly force to resist murder, or any felony, attempted upon defender in dwelling house).

147. R.I. GEN. LAWS § 11-8-8 (2002).

148. *Id.*

2 through 11-8-6,<sup>149</sup> a rebuttable presumption arises in favor of the defendant.<sup>150</sup> In those situations, the statute presumes that the owner, tenant, or occupier acted reasonably and “in the reasonable belief that the person engaged in the criminal offense was about to inflict great bodily harm or death upon that person” or anyone else lawfully on the premises.<sup>151</sup> Massachusetts has a similar statute.<sup>152</sup> Both the Massachusetts and the Rhode Island statutes also relieve the tenant of any duty to retreat in such instances.<sup>153</sup> Although those statutes alleviate the defendant’s burden for the affirmative defense, they still require the trial to proceed up to that point and do not provide as strong a defense as immunity, which acts as a bar to prosecution.

The language in the statutes of at least two other states seemingly provides immunity to a person who is defending his or her home or property. There is no evidence, however, that those statutes are actually used as anything more than affirmative defenses. Statutes from Indiana and Washington contain language clearly describing immunity. Indiana’s Criminal Code describes scenarios similar to those discussed above.<sup>154</sup> Subsection (a) of Indiana Code section 35-41-3-2 provides that “[n]o person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.”<sup>155</sup> Subsection (c) addresses the defense of habitation and refers back to subsection (a) in describing instances when deadly force may be used in defense of habitation.<sup>156</sup> Thus, it appears that the immunity from legal jeopardy set out in subsection (a) should extend to a person defending his or her habitation when that person reasonably believes that deadly force “is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony.”<sup>157</sup> Indiana courts, however, have not applied the statute in this way. Rather, Indiana courts treat statutory immunity as an affirmative defense.<sup>158</sup> For instance, in *Loza v. State*,<sup>159</sup> the Indi-

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149. R.I. GEN. LAWS §§ 11-8-2 to -6 (2002).

150. R.I. GEN. LAWS § 11-8-8.

151. *Id.*

152. MASS. ANN. LAWS ch. 278, § 8A; *see also Painten*, 709 N.E.2d at 431.

153. MASS. ANN. LAWS ch. 278, § 8A; R.I. GEN. LAWS § 11-8-8.

154. IND. CODE ANN. § 35-41-3-2(a)-(c) (LexisNexis 2004).

155. *Id.* § 35-41-3-2(a). The statute’s use of the word “person” is confusing. “[T]he person” refers to the person using force to defend himself or herself. *Id.*

156. *Id.* § 35-41-3-2(c).

157. *Id.* § 35-41-3-2(a).

158. *See Bell v. State*, 486 N.E.2d 1001, 1003 (Ind. 1985) (treating statutory immunity as affirmative defense); *Wash v. State*, 456 N.E.2d 1009, 1010-11 (Ind. 1983) (treating statutory immunity as affirmative defense).

ana Supreme Court emphatically held that the immunity language was merely an expression of public policy, not a right to a pretrial determination of immunity.<sup>160</sup>

Washington's statute uses similar language, but like Indiana, Washington's statute does not grant complete immunity to the person claiming defense of habitation.<sup>161</sup> The statute explains that "[n]o person . . . shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property."<sup>162</sup> Despite this language, Washington allows a person in this situation to go through a trial. If a person is found not guilty for the reason of self-defense, the person is entitled to reimbursement of "all reasonable costs, including loss of time, legal fees incurred, and other expenses."<sup>163</sup> Although this statute allows for restitution, it still requires the person to go through legal proceedings to determine whether the person reasonably defended his or her property.<sup>164</sup> Even though Indiana's and Washington's statutory language appears to provide immunity, the defendant is actually put into legal jeopardy, making the immunity qualified at best.

As shown through the examination above, most of the defense of habitation and defense of property statutory constructions appear to be a version of the affirmative defense of justification or self-defense. The statutes providing the defense closest to actual immunity are the castle defense statutes, which provide a presumption of valid defense of habitation. While this presumption does alleviate the burden on the defendant, the defendant must still assert the defense and await the outcome at trial, no matter how brief the trial may be. In contrast to those constructions of defense of habitation and property, Georgia's statutes and cases provide immunity which must be determined prior to trial.<sup>165</sup> Colorado law provides for similar pretrial proceedings.<sup>166</sup> Thus, in order to further distinguish Georgia's application of immunity, this Article closely examines the Colorado immunity statutes and related cases. As explained below, it is not only apparent that Colorado's statutes and cases provide immunity similar to that provided for in

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159. 325 N.E.2d 173 (Ind. 1975).

160. *Id.* at 176.

161. WASH. REV. CODE ANN. § 9A.16.110 (West 2000).

162. *Id.* § 9A.16.110(1).

163. *Id.* § 9A.16.110(2).

164. *Id.*

165. *Boggs v. State*, 261 Ga. App. 104, 105, 581 S.E.2d 722, 723 (2003). For a discussion of Georgia's application of its Immunity Statutes, see *supra* notes 23-68 and accompanying text.

166. See *infra* notes 167-236 and accompanying text.

Georgia, but it is also clear that immunity in Georgia is broader and more protective for someone defending his or her habitation or real property than it is in Colorado.

*B. Colorado's "Make-My-Day" Statute and Its Application*

The Colorado statute that deals with defense of habitation is located in section 18-1-704.5 of the Colorado Criminal Code (the "Colorado Immunity Statute").<sup>167</sup> The statute—which was dubbed the "make-my-day" statute in its legislative proceedings—resembles the Georgia statutes that deal with defense of habitation.<sup>168</sup> In interpreting the Colorado Immunity Statute, Colorado courts have established the proceedings and the weight and allocation of burdens for the statute's application, both in a pretrial hearing and as an affirmative defense. These cases, particularly the initial Colorado case that dealt with the Colorado Immunity Statute,<sup>169</sup> provide some guidance for Georgia courts applying Georgia's Immunity Statutes. The language of the Colorado Immunity Statute, however, differs from the language of Georgia's Immunity Statutes, and therefore the proposed proceedings for Georgia cases will differ. Further, as discussed below, Colorado's judiciary has seriously limited statutory immunity.<sup>170</sup> Also, unlike Georgia, Colorado law does not extend its immunity proceeding to the defense of property. Nevertheless, the proceeding that Colorado has instituted for the Colorado Immunity Statute should provide guidance for pretrial immunity hearings in Georgia on either matter.

**1. The Colorado Immunity Statute.** The Colorado Immunity Statute states its purpose outright: to recognize Colorado's citizens' "right to expect absolute safety within their own homes."<sup>171</sup> In recognizing this right, the Colorado Immunity Statute justifies the use of force—including deadly force—against an intruder.<sup>172</sup> According to subsection (2) of the statute, an occupant of a dwelling is justified in the use of any amount of force against an intruder when

the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or

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167. COLO. REV. STAT. § 18-1-704.5 (2006).

168. *See id.*; *People v. McNeese*, 892 P.2d 304, 317 n.1 (Colo. 1995) (en banc) (Scott, J., dissenting) (discussing origins of the "make-my-day" title).

169. *People v. Guenther*, 740 P.2d 971 (Colo. 1987) (en banc).

170. *See infra* notes 186-236 and accompanying text.

171. COLO. REV. STAT. § 18-1-704.5(1).

172. *Id.* § 18-1-704.5(2).

property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.<sup>173</sup>

The statute also establishes that immunity from criminal prosecution exists for the use of force in the above-described situations, as well as immunity from civil liabilities potentially arising from personal injury or wrongful death.<sup>174</sup> Subsection (3) provides that “[a]ny occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force.”<sup>175</sup> Subsection (4) provides that “[a]ny occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.”<sup>176</sup>

The Colorado Immunity Statute falls within a series of Colorado statutes that justify the use of physical force, which are similar to such statutes in other states.<sup>177</sup> However, Colorado’s specified immunity procedure applies only to the defense of a habitation against an intruder.<sup>178</sup> As the statute’s introduction provides, the purpose of the Colorado Immunity Statute is to give citizens a right to expect safety “within their own homes.”<sup>179</sup> Despite the use of the word “dwelling” throughout the immunity statute, there appears to be another statute that addresses the use of physical force in defense of a person within a “dwelling or business establishment.”<sup>180</sup> In contrast to the Colorado Immunity Statute, that statute only allows deadly force when the person reasonably believes that lesser force is inadequate to prevent the attack.<sup>181</sup> The two Colorado statutes that address (1) the defense of premises<sup>182</sup> and (2) defense of other properties<sup>183</sup> are similar to one another, and when addressing the use of deadly force, they both refer to

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173. *Id.*

174. *Id.* § 18-1-704.5(3)-(4).

175. *Id.* § 18-1-704.5(3).

176. *Id.* § 18-1-704.5(4).

177. *See supra* notes 108-64 and accompanying text.

178. COLO. REV. STAT. § 18-1-704.5(1).

179. *Id.* (emphasis added).

180. COLO. REV. STAT. § 18-1-704(2)(b) (2006).

181. *Compare id.* (requiring reasonable belief that lesser force is inadequate) with § 18-1-704.5 (allowing any force so long as there is unlawful and uninvited entry and commission of crime or intent to commit crime with physical force).

182. COLO. REV. STAT. § 18-1-705 (2006).

183. COLO. REV. STAT. § 18-1-706 (2006).

the statute requiring a reasonable belief that lesser force is inadequate.<sup>184</sup> In light of the existing Colorado Immunity Statute that describes the instances when pretrial immunity is available, these other defense statutes only appear to permit affirmative defenses at trial.<sup>185</sup>

**2. Judicial Decisions Defining and Limiting the Colorado Immunity Statute.** The Colorado Supreme Court in *People v. Guenther*,<sup>186</sup> sitting en banc, established the initial procedure and burden for persons seeking immunity under the Colorado Immunity Statute.<sup>187</sup> Later, the Colorado Supreme Court, again sitting en banc, modified the application of immunity under the Colorado Immunity Statute in *People v. McNeese*.<sup>188</sup> Under the court's reasoning in *McNeese*, it appears that, although the defendant still has the same burden of persuasion as in *Guenther*, the burden entails more elements that the defendant must prove.<sup>189</sup> As discussed below, the decision in *McNeese* might have either eviscerated the immunity or seriously altered the defendant's burden under the Colorado Immunity Statute.<sup>190</sup>

In *Guenther* the court established that immunity under the Colorado Immunity Statute must be determined prior to trial.<sup>191</sup> Ultimately, the court's decision placed the burden on the defendant to establish immunity by a preponderance of the evidence.<sup>192</sup> The court in *Guenther* further delineated the following specific factors that the defendant is required to prove by a preponderance of the evidence:

[that] (1) another person made an unlawful entry into the defendant's dwelling; (2) the defendant had a reasonable belief that such other person had committed a crime in the dwelling in addition to the uninvited entry, or was committing or [intending] to commit a crime against a person or property in addition to the uninvited entry; (3) the defendant reasonably believed that such other person might use physical force, no matter [how] slight, against any occupant of the dwelling; and (4) the defendant used force against the person who actually made the unlawful entry into the dwelling.<sup>193</sup>

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184. COLO. REV. STAT. §§ 18-1-705, -706 (referring to COLO. REV. STAT. § 18-1-704).

185. See COLO. REV. STAT. §§ 18-1-704, -705, -706 (all lacking immunity language).

186. 740 P.2d 971 (Colo. 1987) (en banc).

187. *Id.* at 981.

188. 892 P.2d 304 (Colo. 1995) (en banc).

189. *Id.* at 313-14.

190. See *Guenther*, 740 P.2d at 973-81.

191. *Id.* at 976.

192. *Id.* at 981.

193. *Id.*

The trial court in *Guenther* dismissed the charges against the defendant, who was accused of shooting three people who had come into his yard and onto his porch.<sup>194</sup> Although the trial court held a hearing prior to trial, according to the Colorado Supreme Court, the trial court used the wrong standard.<sup>195</sup> Apparently, this was the first case before the Colorado Supreme Court that addressed the Colorado Immunity Statute.

The Colorado Supreme Court in *Guenther* held that the Colorado Immunity Statute created more than an affirmative defense; the statute also created the need for a pretrial determination of immunity.<sup>196</sup> According to the court, the plain, imperative language of the statute, coupled with definitions of “immunity” and “prosecution” as provided by *Black’s Law Dictionary*,<sup>197</sup> made it clear that the use of the term “immunity” meant that the issue was to be decided prior to trial.<sup>198</sup> Thus, the Colorado Supreme Court held that the use of the term “immunity” distinguished the Colorado Immunity Statute from other affirmative defense statutes, making *any* proceeding against an immune party improper.<sup>199</sup>

To handle this immunity in a practical manner, the court in *Guenther* held that Colorado courts should determine immunity after the preliminary hearing: either shortly thereafter in a separate hearing on motion to dismiss or as a second part of the preliminary hearing itself.<sup>200</sup> In making its decision, the court observed that motions based on this kind of statutory immunity, though different in evidentiary matters, are similar to motions based on transactional or derivative immunity, which are also dealt with prior to trial in Colorado.<sup>201</sup> Additionally, the court reasoned that waiting until after the preliminary hearing was practical because a defendant is not technically charged until after a finding of probable cause, an issue which is determined in a preliminary hearing; if no probable cause is found, the defendant is discharged, and there would be no need to determine immunity.<sup>202</sup> The court also reasoned that waiting until after the preliminary hearing is practical because Colorado county courts lack the jurisdiction to

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194. *Id.* at 973-74.

195. *Id.* at 972.

196. *Id.* at 975; *accord Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723.

197. BLACK’S LAW DICTIONARY 676, 1099 (5th ed. 1979).

198. *Guenther*, 740 P.2d at 975; *accord Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723 (applying same “plain language” analysis).

199. *Guenther*, 740 P.2d at 975.

200. *Id.* at 979 n.5.

201. *Id.*

202. *Id.*

address felony cases beyond a preliminary hearing on probable cause.<sup>203</sup> Therefore, in a felony case, the issue of immunity can only be addressed after a transfer to the district court.<sup>204</sup> However, without the jurisdictional problem of a felony charge, the immunity hearing could be attached to the preliminary hearing for a more efficient pretrial process.<sup>205</sup>

The Colorado Supreme Court then addressed the scope of the Colorado Immunity Statute and held that the plain language of the statute applies immunity only to situations in which the homeowner has used force against a person who has actually made an unlawful entry.<sup>206</sup> According to the court, the “reasonable belief” and “appearance” factors in the statute only apply to the homeowner’s perception of the intruder’s activity, once the intruder is inside the house after an unlawful entry.<sup>207</sup> Thus the court in *Guenther* held that force could not be used against a non-entrant or a person lawfully in the home, despite the homeowner’s reasonable belief that entry was unlawful.<sup>208</sup>

Regarding the issues of burden allocation and weight, the court in *Guenther* decided that the burden should be on the defendant asserting immunity, and that the weight should be the preponderance of the evidence standard.<sup>209</sup> First, the court held that, in light of both the United States Supreme Court’s and the Colorado Supreme Court’s holdings regarding burdens on the defendant for affirmative defenses, the burden of proving immunity prior to trial could be constitutionally placed on the defendant.<sup>210</sup> The court reasoned that the proceedings used to determine immunity under the statute were analogous to a pretrial motion to establish a statutory bar, which a defendant often has

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 979.

207. *Id.*; see also COLO. REV. STAT. § 18-1-704.5(2) (distinguishing between crime of entry into habitation and commission, or attempt, of subsequent crime while within habitation).

208. *Guenther*, 740 P.2d at 979.

209. *Id.* at 980.

210. See *id.* at 979-80. The court noted the Supreme Court decisions in which the Court held that there is no violation of due process when the burden of proof for affirmative defenses is allocated to a defendant. *Martin v. Ohio*, 480 U.S. 228, 236 (1987); *Patterson v. New York*, 432 U.S. 197, 215-16 (1977). The court further noted that, although placing such a burden upon the defendant for an affirmative defense at trial violates due process under the Colorado constitution, the allocation of such a burden on a pretrial motion for dismissal is distinct and does not violate Colorado’s constitution. *Guenther*, 740 P.2d at 980.

the burden of proving.<sup>211</sup> According to the court, a defendant in a pretrial motion is not subject to the same jeopardy as he or she would be at trial, so there is no reason to remove the burden, whereas such a burden would not be placed on a defendant's affirmative defense at trial.<sup>212</sup> The court also reasoned that the defendant would have greater access to evidence to prove the immunity under the Colorado Immunity Statute.<sup>213</sup>

Although the court in *Guenther* placed the burden on the defendant in the pretrial motion, the court neither placed an unwieldy burden on the defendant nor took away the parallel affirmative defense derived from the statute at trial.<sup>214</sup> The court placed a burden on the defendant to prove immunity by a preponderance of the evidence.<sup>215</sup> The court reasoned that this kind of hearing was similar to postconviction-relief proceedings and motions to suppress, situations in which Colorado had placed the same burden on the defendant.<sup>216</sup> The court further held that the legislative purpose of the statute—to benefit Colorado citizens with maximum safety in their homes—extends to alleviate the burden on the defendant and therefore only called for the preponderance of the evidence standard.<sup>217</sup> The court refused to lighten the defendant's burden any further because the force permitted under the Colorado Immunity Statute could cause harsh injury, and because the defendant would be justifying actions that, but for the statute, would be criminal.<sup>218</sup>

Another issue arose in *Guenther* that might accompany the application of the defense of habitation and defense of property statutes in Georgia. The prosecution in *Guenther* alleged that, in determining immunity, the trial court had overstepped its bounds under the doctrine of separation of powers because discretion over immunity was a power attributed only to the prosecutor as an executive officer.<sup>219</sup> The court held that the determination of immunity, like findings on statutes of limitation or double jeopardy, was an accepted role of the court in its adjudicatory function.<sup>220</sup> Although the prosecution likened this power to allowing immunity for witness protection, which is under the control of the

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211. *Guenther*, 740 P.2d at 980.

212. *Id.*

213. *Id.*

214. *Id.* at 980-81.

215. *Id.* at 980.

216. *Id.*

217. *Id.* at 980-81.

218. *Id.* at 980.

219. *Id.* at 977.

220. *Id.*

prosecution according to prior Colorado cases, the court held that the imperative statutory language distinguished this new kind of immunity decision.<sup>221</sup> In other words, the language of statutes providing witness immunity gave the prosecution discretion to exchange immunity in return for testimony, whereas the imperative language of the statute that provided immunity for defense of habitation commanded the court to determine the immunity.<sup>222</sup> Discretionary executive power like that of the prosecutor was not available to the court under the statute providing immunity for defense of habitation, and thus, the court did not intrude upon executive power.

Although *Guenther* provides a template for analyzing Georgia's Immunity Statutes and determining the procedure and rationale for their application, another Colorado case, *People v. McNeese*,<sup>223</sup> must be considered because, in its holding, the court restricted immunity for a person defending his or her habitation under the Colorado statute.<sup>224</sup> The Georgia statute probably does not suffer from the same vulnerability as the Colorado statute.<sup>225</sup> The limitations imposed by *McNeese* should be examined nonetheless because attempts at similar restrictive reasoning might be used in efforts to limit immunity under the Georgia statutes.

In *McNeese* the Colorado Supreme Court altered the burden on the defendant to show immunity under the Colorado statute.<sup>226</sup> Although the court did not increase the preponderance of the evidence standard, it made the *Guenther* requirements for proof more exacting.<sup>227</sup> *McNeese* involved two fatal stabbings and an assault and attempted murder within the defendant's apartment. One of the decedent victims was in the apartment after being barred from the apartment by an oral lease agreement between the defendant and another victim, who was the decedent's wife (the wife had problems with the husband and had come to stay with the defendant). The trial court found that the decedent husband assaulted and threatened to kill the defendant after the husband came into the apartment to help his wife move out. Moments after the assault and the threat, the defendant killed the husband, killed the husband's friend, and wounded the wife. The trial court found that the defendant was immune to charges regarding the homicide of the

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221. *Id.*

222. *Id.*

223. 892 P.2d 304 (Colo. 1995) (en banc).

224. *Id.* at 311.

225. See *infra* notes 318-48 and accompanying text.

226. *McNeese*, 892 P.2d at 311.

227. *Id.*

decendent husband because the husband had (1) been barred from the apartment, (2) entered unlawfully, (3) assaulted the defendant, and (4) threatened the defendant with murder. The defendant was charged with the assault and attempted murder of the wife and the murder of the husband's friend, who was not barred and had the wife's permission to be in the apartment.<sup>228</sup>

The Colorado Supreme Court, sitting en banc, held that the trial court erred in its fact-finding and in the application of the Colorado Immunity Statute; therefore, the court had jurisdiction to review the case de novo.<sup>229</sup> On this premise, the court in *McNeese* began a tedious reasoning process based upon the language of the statute and the deliberations of the Colorado Legislature.<sup>230</sup> At the conclusion of its reasoning, the court determined there was within the statute an implied standard that the trial court should have applied.<sup>231</sup> This implied standard addressed the intruder's state of mind for the "unlawful entry" requirement.<sup>232</sup> The court in *McNeese* held that in order to satisfy the unlawful entry requirement, the defendant must prove that the intruder "knowingly" made an unlawful entry.<sup>233</sup> In other words, the court held that there is a requirement of a culpable mental state under the unlawful entry element of the Colorado Immunity Statute.<sup>234</sup> Thus, as Chief Justice Rovira pointed out, an intruder could commit third degree trespass under Colorado criminal law—entering the house "unlawfully" under the trespassing statute—and yet a court determining immunity could not consider this "unlawful" in the context of immunity for a homeowner who defended against the trespasser.<sup>235</sup> Under the procedure set forth by the court in *McNeese*, a Colorado court could not consider third degree trespass an "unlawful" act that the homeowner could defend against because third degree trespass does not require mens rea, a culpable mental state.<sup>236</sup>

Considering the difficult and attenuated reasoning that the majority in *McNeese* utilized in adding a new requirement for proving immunity under the defense of habitation statute, it appears that a pretrial hearing in Colorado and the usefulness of such a hearing have become limited. In Georgia, however, there is not as much flexibility in the

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228. *Id.* at 305-07.

229. *Id.* at 308.

230. *Id.*

231. *Id.* at 311.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 316 (Rovira, C.J., concurring in part and dissenting in part).

236. *Id.*

language of the Immunity Statutes. As explained below, Georgia's Immunity Statutes can be more clearly understood from the analysis in *Guenther*, but due to the distinct language of the Immunity Statutes, they should not fall victim to the narrow reasoning in *McNeese*.

#### IV. PROPOSED PROCEDURE FOR GEORGIA'S PRETRIAL HEARING ON IMMUNITY FOR DEFENSE OF HABITATION AND DEFENSE OF PROPERTY

##### A. *Framework for Proposed Proceedings*

This section sets forth the author's proposed pretrial immunity procedure and the policy and rationale behind the structure for a pretrial immunity proceeding ("Immunity Hearing"). Then this section discusses the Georgia statutes in light of the Colorado statute and cases. But first, a framework is set out to provide a basic understanding of the proposed procedure.

As demanded by the court in *Blazer v. State*,<sup>237</sup> an Immunity Hearing should include oral argument and live witnesses.<sup>238</sup> Also, immunity should be determined as quickly as possible because, if the person is immune, he or she should not face prosecution at all.<sup>239</sup> As the court in *People v. Guenther*<sup>240</sup> explained, a person is not formally charged until after probable cause has been determined.<sup>241</sup> In Georgia this occurs at the preliminary hearing, if one occurs, or through an indictment or accusation. At that point, the issue of immunity arises and must be dealt with immediately.

One way of addressing the statutory demand for a swift determination of immunity would be to combine the Immunity Hearing with a probable cause hearing and address both issues as a pre-indictment matter before a superior court—similar to a motion for bail on serious offenses. In the alternative, if the preliminary hearing must occur in magistrate court, then the superior court should hold an Immunity Hearing as soon as the case is bound over to superior court. In contrast to the allowance of hearsay testimony at preliminary hearings, however, hearsay should not be admissible at an Immunity Hearing because the Immunity Hearing should not be governed by a burden as light as probable cause. If a person is not incarcerated and is not entitled to a preliminary hearing, the superior court should hold an Immunity Hearing as a pre-indictment

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237. 266 Ga. App. 743, 598 S.E.2d 338 (2004).

238. *Id.* at 745, 598 S.E.2d at 340.

239. *Id.*

240. 740 P.2d 971 (Colo. 1987) (en banc).

241. *Id.* at 979.

hearing similar to a motion for bond or hold an Immunity Hearing as a special plea in bar immediately after the grand jury indictment or the accusation.

As a threshold issue, the defendant must first show that the property concerned in the alleged confrontation qualifies as habitation or other real property under O.C.G.A. section 16-3-24.1.<sup>242</sup> If the defendant has used a weapon, the defendant must also show that he or she was not prohibited from using or possessing the weapon under O.C.G.A. section 16-3-24.2.<sup>243</sup> Both of these issues should be addressed as threshold issues in the Immunity Hearing and proven by accompanying documents, or they should be addressed immediately at the beginning of the Immunity Hearing. If these issues are not addressed up front, the court should hold that the defendant has waived his or her right to a pretrial Immunity Hearing as a matter of law. Waiver of the Immunity Hearing, however, should not waive the affirmative defense of justification during the trial itself.<sup>244</sup>

In addition to asserting the threshold issues, in the Immunity Hearing the defendant should designate the statute and the specific parts of the statute under which he or she claims immunity. If the defendant did not use force “intended or likely to cause death or great bodily harm,” then the immunity issue should be dealt with under the first clause of O.C.G.A. section 16-3-23<sup>245</sup> if it involves habitation<sup>246</sup> or under section 16-3-24(a)<sup>247</sup> if it involves real property besides habitation.<sup>248</sup> Under either of these sections, if the defendant used force, he or she will have the burden to prove by a preponderance of the evidence that the force was used only to the extent that the defendant reasonably believed was necessary.<sup>249</sup> If the defendant has only threatened force, then the

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242. O.C.G.A. § 16-3-24.1 (2007).

243. O.C.G.A. § 16-3-24.2 (2007); *see supra* notes 58 and 67 and accompanying text (discussing whether convicted felons might nonetheless be entitled to immunity hearings even though they illegally possessed weapons).

244. *See Hightower v. State*, 224 Ga. App. 703, 704, 481 S.E.2d 867, 869-70 (1997) (listing both defense of habitation and defense of property as affirmative defenses). There is no reason to assume that the failure to establish immunity prior to trial should eviscerate the assertions as affirmative defenses at trial. Immunity to prosecution is ancillary to guilt of the offenses and should be assessed with different burdens, as explained below. *See Guenther*, 740 P.2d at 980 (determining that use of defense of habitation as preliminary immunity defense does not preclude its use as affirmative defense because immunity is ancillary issue).

245. O.C.G.A. § 16-3-23 (2007).

246. *Id.*

247. O.C.G.A. § 16-3-24(a) (2007).

248. *Id.*

249. O.C.G.A. §§ 16-3-23, -24.

matter becomes more complicated; however, the burden of proving that the threat was reasonable should still fall on the defendant.

If the defendant has used force “intended or likely to cause death or great bodily harm,” he or she must choose whether to file a motion with the court for an Immunity Hearing under O.C.G.A. section 16-3-23(1), (2), or (3), or under section 16-3-24(b).<sup>250</sup> The choice will depend on the circumstances under which the force was used. Different sections will invoke different burdens, and the failure to designate the section will place the burden of preponderance of the evidence on the defendant during the hearing. The defendant can file a motion with the court under multiple sections, but he cannot attain the most favorable burden—a burden of preponderance of the evidence on the prosecution—unless exclusively motioning the court under O.C.G.A. section 16-3-23(2).<sup>251</sup>

Moving for an Immunity Hearing based solely on defense of habitation under O.C.G.A. section 16-3-23(2) places a burden on the State to prove by a preponderance of the evidence that the defendant was not defending his habitation in the manner described under that subsection. However, if the defendant’s motion for an Immunity Hearing under this subsection concerns any other subsection, the defendant should not retain this generous burden. Filing a motion under any other section or subsection dealing with the use of deadly or very dangerous force should invoke a burden on the defendant to prove by a preponderance of the evidence that he or she was defending his or her habitation or real property in the manner described by that section or subsection. This shift in the burden occurs because the language of each applicable section or subsection, other than O.C.G.A. section 16-3-23(2), evokes an objectively reasonable standard, unlike the language in O.C.G.A. section 16-3-23(2).<sup>252</sup> (The statutory language is analyzed and discussed below in Part IV.B.)<sup>253</sup> If more than one section or subsection fits the facts, they may be asserted together, but the facts of each must be proven by a common standard. Thus, if the defendant moves for immunity under O.C.G.A. section 16-3-23(2) as well as any of the other sections dealing with defense of habitation, the defendant will assume a preponderance of the evidence burden.

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250. *Id.*

251. O.C.G.A. § 16-3-23(2).

252. O.C.G.A. §§ 16-3-23, -24.

253. *See infra* notes 254-93 and accompanying text.

*B. Burdens of Proving Immunity under Georgia Law*

**1. O.C.G.A. § 16-3-23(2): Broader Immunity in the Use of Deadly Force or Force Likely to Cause Great Bodily Harm; Burden of Preponderance on the State.** The highest level of immunity proposed springs from O.C.G.A. section 16-3-23(2).<sup>254</sup> This subsection allows the use of deadly force or force likely to cause great bodily harm when a person “who is not a member of the family or household . . . unlawfully and forcibly enters or has . . . entered the residence and the person using such force *knew or had reason to believe*” that the entry had occurred in that manner.<sup>255</sup> This immunity calls for the State to prove by a preponderance of the evidence that the defendant did not comply with the statute when he or she exercised force in defense of habitation.

If the defendant has pleaded under O.C.G.A. section 16-3-23(2), it is stipulated that force was used and that it was deadly or might have caused great bodily harm.<sup>256</sup> Under the subsection, after the defendant asserts and proves the threshold issues discussed above, the State must then prove by a preponderance of the evidence that the defendant did not know or have reason to believe that an unlawful or forcible entry into the habitation had occurred.<sup>257</sup> The State can prove this by showing that the person subject to the use of force was not unlawfully and forcibly entering or had not unlawfully and forcibly entered and that the defendant did not know or have reason to believe that the entry was unlawful and forcible.<sup>258</sup> However, O.C.G.A. section 16-3-23(2) completely excludes such a defense if the person is a member of the family or the household.<sup>259</sup> If the party injured by the defendant is a family member by sanguinity or affinity, O.C.G.A. section 16-3-23(2) is precluded altogether.<sup>260</sup> If the party injured is not clearly a member of the family, however, the State must prove that the injured party was a member of the household.<sup>261</sup>

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254. O.C.G.A. § 16-3-23(2).

255. *Id.* (emphasis added).

256. A defendant would stipulate to a threat or the use of lesser force during an Immunity Hearing addressing the use of lesser force, which is discussed below in *infra* notes 278-93 and accompanying text.

257. O.C.G.A. § 16-3-23(2).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

The reason for placing the burden on the State in the context of O.C.G.A. section 16-3-23(2) is based upon the simple, plain facts required to establish that the immunity defense is viable, the need for the swift determination of immunity in this context, and the intimacy and risk of the situation it describes. Essentially, the location of the event within the habitation and the identity of the victim and his or her relationship to the defendant are facts that speak for themselves. Moreover, commentators assert that subsection (2) was added to O.C.G.A. section 16-3-23 because events in this defense of habitation scenario unfold quickly and a person needs to be able to make an immediate decision to defend his or her household.<sup>262</sup> Accordingly, under this subsection, the prosecution should bear the burden of disproving the plain facts in order to overcome immunity in a situation that clearly speaks for itself.

**2. O.C.G.A. §§ 16-3-23(1), (3), and 16-3-24(b): Narrow Immunity in Use of Deadly Force or Force Likely to Cause Great Bodily Harm; Burden on Defendant.** Unlike the language in O.C.G.A. section 16-3-23(2), the statutory language in O.C.G.A. sections 16-3-23(1), 16-3-23(3), and 16-3-24(b) invokes a reasonable person standard.<sup>263</sup> Whereas O.C.G.A. section 16-3-23(2) only requires that the defendant “knew or had reason to believe” that the person injured had made or attempted an unlawful forcible entry into the habitation,<sup>264</sup> O.C.G.A. sections 16-3-23(1), 16-3-23(3), and 16-3-24(b) all require that the defendant “reasonably believe[]” that the entry made or attempted on the habitation, or the tortious or criminal interference with other real property, would lead to an “assault[] or offer[] [of] personal violence” or “forcible felony.”<sup>265</sup> This semantic distinction causes the burden to fall on the defendant. By providing that the defendant must have “had reason to believe,” O.C.G.A. section 16-3-23(2) simply requires that the situation provided the defendant with the perceptions necessary to believe that the other party had unlawfully and forcibly entered the habitation.<sup>266</sup> That section does not inquire into the reasonableness of that belief.<sup>267</sup> However, the language in O.C.G.A. sections 16-3-23(1), 16-3-23(3), and 16-3-24(b) demands that the defendant “reasonably believe[],” which adds a qualitative condition to the kind of belief on

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262. CLEARY, CRIMINAL OFFENSES, *supra* note 105, at 233; Empie, *supra* note 105, at 25-27 (discussing policy leading to proposed amendment).

263. O.C.G.A. §§ 16-3-23(1), (2), (3), -24(b).

264. O.C.G.A. § 16-3-23(2).

265. O.C.G.A. §§ 16-3-23(1), (3), -24(b).

266. O.C.G.A. § 16-3-23(2).

267. *Id.*

which the defendant based his actions.<sup>268</sup> Each of these subsections provides factors that are to be considered in evaluating the reasonableness of the defendant's actions.<sup>269</sup> Unlike O.C.G.A. section 16-3-23(2), those factors are less easily proven, and the defendant—as a person with greater access to the habitation or property, and as the party most directly involved in the event—has greater access to the facts sought to determine the reasonableness of his actions.<sup>270</sup>

In most pretrial motions, it is not unreasonable to place the burden of proof on the prosecution. By asserting immunity, however, the defendant is raising an affirmative defense prior to the trial under which the defendant does not deny the action but seeks to justify it.<sup>271</sup> Unlike a motion to suppress, the defendant is not demanding that the prosecution justify the State's actions in arresting the defendant or searching the defendant's person or property;<sup>272</sup> rather, the defendant is asserting that, under the facts alleged, reasonable force was used to protect his or her habitation or property. Thus, like an affirmative defense at trial, the defendant must raise a claim to immunity or it is waived, but unlike an affirmative defense at trial, the defendant must also prove that he or she is immune from any further proceedings by a preponderance of the evidence.

Beyond the threshold issues mentioned above, if making a motion under O.C.G.A. 16-3-23(1), a person claiming immunity should prove by a preponderance of the evidence that “the entry [was] made or attempted in a violent and tumultuous manner,” and that he or she reasonably believed (1) “that the entry [was] attempted or made for the purpose of assaulting or offering personal violence” to anyone who dwelt or was present in the habitation, and (2) that the kind of force was “necessary to prevent the assault or offer of personal violence.”<sup>273</sup> If making a motion under O.C.G.A. 16-3-23(3), a person claiming immunity should prove by a preponderance of the evidence that he or she reasonably believed (1) that the entry—whether tumultuous or not—was “made or attempted for the purpose of committing a felony” in the habitation, and (2) that the kind of force was “necessary to prevent the commission of

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268. O.C.G.A. §§ 16-3-23(1), (3), -24(b).

269. *Id.*

270. *Guenther*, 740 P.2d at 980 (reasoning that defendant would have greater access to evidence used to prove immunity).

271. *Id.* (explaining immunity as justification).

272. Note that, unlike Colorado, Georgia places the burden on the prosecution in a motion to suppress to prove that the arrest was conducted legally. *Graddy v. State*, 277 Ga. 765, 767, 596 S.E.2d 109, 111 (2004). According to *Guenther*, Colorado puts a burden of preponderance of the evidence on the defendant in a motion to suppress. 740 P.2d at 980.

273. O.C.G.A. § 16-3-23(1).

the felony.”<sup>274</sup> The former of these two subsections appears to deal with an attack on the habitation or people within, while the latter appears to address forms of burglary. It should be possible to make a single motion based on both subsections.

Finally, under O.C.G.A. section 16-3-24(b), if the defendant used force “intended or likely to cause death or great bodily harm” against someone attempting to trespass or commit “tortious or criminal interference with real property,” the defendant must prove by a preponderance of the evidence that he or she reasonably believed the force was “necessary to prevent the commission of a forcible felony.”<sup>275</sup> The term “forcible felony” implies not that the felony would endanger the property, but rather the defendant or someone else on the real property. This language contrasts with the absence of the descriptor “forcible” in O.C.G.A. section 16-3-23(3).<sup>276</sup> Thus, under O.C.G.A. section 16-3-24(b), there must be risk to the defendant or someone else on the real property which both arises from the felony and is also greater than the risk of the felony defended against in defense of habitation. The other factors listed in O.C.G.A. section 16-3-24 regarding ownership or protection of the real property<sup>277</sup> should be plain facts, but if there is a need to discover those facts, that burden should be on the defendant, who will most likely have the best access to the necessary information.

**3. The First Clause of O.C.G.A. § 16-3-23 and O.C.G.A. § 16-3-24(a): Threat or Use of Less-than-Deadly Force; Burdens in Proving Appropriateness.** Both O.C.G.A. section 16-3-23 and O.C.G.A. section 16-3-24(a) restrain the amount of less-than-deadly force that a person may use or threaten to use in defending habitation or other real property.<sup>278</sup> Under the first clause of O.C.G.A. section 16-3-23, the force or threat must be reasonable to prevent or terminate unlawful entry or attack on the habitation.<sup>279</sup> Under O.C.G.A. section 16-3-24(a), the force or threat must be reasonable to prevent or terminate trespass or criminal or tortious interference with real property other than habitation.<sup>280</sup> When addressing force, each statute prescribes that the person defending the habitation or other real property must *reasonably believe* that he or she is applying force to the extent

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274. *Id.* § 16-3-23(3).

275. O.C.G.A. § 16-3-24(b).

276. *See* O.C.G.A. § 16-3-23(3).

277. O.C.G.A. § 16-3-24(a)(1)-(3).

278. O.C.G.A. §§ 16-3-23, -24(a).

279. O.C.G.A. § 16-3-23.

280. O.C.G.A. § 16-3-24(a).

necessary for the situation at hand.<sup>281</sup> Thus, when a defendant uses force, there is an objective reasonableness standard under which the defendant must prove the reasonableness of his or her use of force. Based on the reasonableness language, and like the sections of the Immunity Statutes that ask for reasonable belief, in order to prove immunity for the use of less-than-deadly force, the defendant should bear a burden of preponderance of the evidence to prove that the use of force under O.C.G.A. section 16-3-23 or O.C.G.A. section 16-3-24(a) was justified.

Although the statute evokes a reasonableness standard in determining whether the defendant was justified in threatening the force, the court should carefully examine the nature of the threat when considering the threat of force alone. The defendant's threat could be considered a terroristic threat under O.C.G.A. section 16-11-37,<sup>282</sup> a simple assault under O.C.G.A. section 16-5-20,<sup>283</sup> or an aggravated assault under O.C.G.A. section 16-5-21.<sup>284</sup> The different requirements in those statutes should evoke different burdens when considering the reasonableness of the defendant's threat.

If the defendant threatened the alleged victim without a weapon and without action toward the alleged victim, the only charge that the defendant would face is a terroristic threat under O.C.G.A. section 16-11-37(a).<sup>285</sup> In such a situation, there is no assault, neither simple nor aggravated, because assault requires an action.<sup>286</sup> According to O.C.G.A. section 16-11-37(a), unless the terroristic threat is corroborated by a third party, a defendant cannot be convicted under the statute.<sup>287</sup> Thus, in an immunity hearing concerning a threat without a weapon or without action toward the alleged victim, the prosecution should have the burden of producing a corroborating witness. If the prosecution cannot produce a third-party witness to the alleged threat, the defendant should be found immune to prosecution because there is no crime for which to be prosecuted. However, if the prosecution produces a witness,

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281. O.C.G.A. §§ 16-3-23, -24(a).

282. O.C.G.A. § 16-11-37 (2007).

283. O.C.G.A. § 16-5-20 (2007).

284. O.C.G.A. § 16-5-21 (2007).

285. O.C.G.A. § 16-11-37(a); *see Hamby v. State*, 173 Ga. App. 750, 751, 328 S.E.2d 224, 226 (1985) (holding that threat to commit violence alone was insufficient to establish simple assault).

286. O.C.G.A. § 16-5-20; *Hamby*, 173 Ga. App. at 751, 328 S.E.2d at 226.

287. O.C.G.A. § 16-11-37(a). Although this statute falls under the heading "Offenses Against Public Order," it has been applied broadly to include any threat of violent crime against another person. *Thomas v. State*, 254 Ga. App. 226, 227-28, 561 S.E.2d 444, 447 (2002).

the burden of persuasion should fall on the defendant because the Georgia Immunity Statutes still apply a standard of reasonableness to the defendant's threat.<sup>288</sup> Based on the evidence and testimony, the court should then decide whether the defendant has shown by a preponderance of the evidence that the threat alone was reasonable.

If the threat used in defending habitation or other real property specifically involves action that "places another in reasonable apprehension of immediately receiving a violent injury"<sup>289</sup> or involves "a deadly weapon or . . . any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury,"<sup>290</sup> then the preponderance of the evidence burden should be placed completely on the defendant because the threat involved an action or a weapon and therefore must be shown to have been reasonable.<sup>291</sup> No longer is there an issue of the appropriateness of verbal threats. The language in the first clause of O.C.G.A. section 16-3-23 and in O.C.G.A. section 16-3-24(a) calls for the defendant to prove by a preponderance of the evidence that the threatening action or the threatening use of a weapon was reasonable.<sup>292</sup> Although beyond the scope of this Article, it must be noted that this type of threat should be distinguished from a failed attempt, which would be more appropriately governed by the subsections of O.C.G.A. sections 16-3-23 and 16-3-24 dealing with the use of deadly or very dangerous force.<sup>293</sup>

*C. Policy for O.C.G.A. §§ 16-3-23, -24, -24.1, and 24.2*

**1. Locus of Immunity for Those Protecting Their Homes.** As seen in the examination of the Georgia Immunity Statutes, Georgia has developed a locus of immunity to criminal charges and civil liability around the home.<sup>294</sup> This locus of immunity protects those who are

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288. O.C.G.A. §§ 16-3-23, -24(a).

289. O.C.G.A. § 16-5-20(a)(2).

290. O.C.G.A. § 16-5-21(a)(2).

291. Situations described by those statutes involving attempts—such as "attempt[ing] to commit a violent injury" under O.C.G.A. section 16-5-20(a)(1), or "discharging a firearm" during an assault under O.C.G.A. section 16-5-21(a)(3)—are not applicable in considering threats, because they involve actions which would be dealt with under the provisions addressing the use of force as discussed in *supra* notes 254-77 and accompanying text.

292. O.C.G.A. §§ 16-3-23, -24(a).

293. O.C.G.A. §§ 16-3-23, -24. Compare O.C.G.A. § 16-5-20(a)(1) with O.C.G.A. § 16-5-20(a)(2) (distinguishing between attempting to commit violent injury and placing another in reasonable apprehension of injury).

294. O.C.G.A. §§ 16-3-23, -24, -24.1, -24.2, 51-11-9 (2000 & Supp. 2007); see *supra* notes 255-93 and accompanying text.

defending themselves, their household, and their real property.<sup>295</sup> Immunity from criminal prosecution extends to include immunity from charges involving real property. Immunity from civil liability, however, is limited to defense of habitation, which includes a place of business or an automobile.<sup>296</sup>

In light of the legislative history behind Georgia's Immunity Statutes, Georgia appears to have adopted a policy similar to that expressed in the Colorado statute.<sup>297</sup> The Colorado statute addressing defense of habitation explains that its purpose is to recognize its citizens' "right to expect absolute safety within their own homes."<sup>298</sup> Georgia's movement toward establishing a similar expectation of absolute safety began with the initial forms of O.C.G.A. sections 16-3-23 and 16-3-24, which allowed an affirmative defense of immunity for force or threat used in protection of the home and real property.<sup>299</sup> This affirmative immunity defense was extended into civil immunity for defense of habitation under O.C.G.A. section 51-11-9.<sup>300</sup>

The Georgia General Assembly then sought to enhance this expectation of absolute safety around the home. First, the General Assembly alleviated the procedural burden on a person who has defended his or her habitation or real property by making this immunity a pretrial issue under O.C.G.A. sections 16-3-24.1 and 16-3-24.2.<sup>301</sup> Finally, in light of the difficulty of showing reasonable consideration behind an action that could require split-second decisions, the legislature enacted O.C.G.A. section 16-3-23(2).<sup>302</sup> This newer subsection allows the person defending his or her home great discretion in using force inside the home against someone whom he or she perceives as entering or having entered illegally and who is not a member of the family or household.<sup>303</sup> Rather than requiring objective reasonableness, subsection (2) only requires that the defender "[know] or [have] reason to

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295. O.C.G.A. §§ 16-3-23, -24, -24.1, -24.2, 51-11-9; *see supra* notes 254-93 and accompanying text.

296. O.C.G.A. §§ 16-3-24.1, 51-11-9; *see supra* notes 1-22 and accompanying text.

297. For the specific details of the chronology summarized here, *see supra* notes 69-106 and accompanying text.

298. COLO. REV. STAT. § 18-1-704.5(1) (2006); *see also* Empie, *supra* note 105, at 25-27 (discussing policy leading to proposed amendment, which includes explanation of legislative desire for greater safety and discretion for use of defensive force in one's home).

299. O.C.G.A. §§ 16-3-23, -24.

300. O.C.G.A. § 51-11-9.

301. O.C.G.A. §§ 16-3-24.1, -24.2.

302. O.C.G.A. § 16-3-23(2); CLEARY, CRIMINAL OFFENSES, *supra* note 105, at 233; *see also* Empie, *supra* note 105, at 25-27 (discussing policy leading to proposed amendment).

303. O.C.G.A. § 16-3-23(2).

believe” that the intruder has “unlawful[ly] and forcibl[y]” entered or is in the process of doing so.<sup>304</sup> However, the plain facts demanded by the statute seriously limit this defense.<sup>305</sup>

The efficiency of determining immunity under the Georgia Immunity Statutes is an essential, imperative requirement. As seen in the legislative history of O.C.G.A. sections 16-3-24.1 and 16-3-24.2, the Georgia General Assembly refused to add any procedure or language requiring any investigation before determining these immunities.<sup>306</sup> Thus, immunity must be determined as soon as the court has found probable cause to press the charge.<sup>307</sup>

The goal of the burdens ascribed to each kind of immunity under the Immunity Statutes is efficiency.<sup>308</sup> The burdens set forth above in Part IV.B. were essentially burdens of preponderance either on the State under O.C.G.A. section 16-3-23(2) or on the defendant under all the other sections and subsections.<sup>309</sup> The reasoning behind the assignment of the burdens depends on the language of the statutes. The weight of each burden relates to both the efficient nature of the proceeding demanded by the statutes and also the consequences of the outcome.

There are three reasons why a preponderance standard is appropriate for the State when it has the burden under O.C.G.A. section 16-3-23(2), which addresses the use of deadly or seriously dangerous force against a non-family or non-household member who is illegally entering or has illegally entered the habitation.<sup>310</sup> First, the preponderance of the evidence burden upon the State is appropriate instead of the beyond a reasonable doubt burden because, as the Colorado Supreme Court observed in *Guenther*, the immunity issue is ancillary to the factual determination of the defendant's guilt.<sup>311</sup> In the pretrial hearing, the defendant is not denying allegations; rather, he or she is providing a justification that creates immunity.<sup>312</sup> A negative pretrial determination of immunity would only result in continued legal proceedings in which affirmative defenses of justification are still available. Thus, the State is not proving guilt, but rather disproving immunity. Second, the preponderance of the evidence burden is appropriately upon the State

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304. *Id.*

305. *See supra* notes 254-93 and accompanying text.

306. 2 GA. HOUSE J. REGULAR SESSION 1998, at 2543-45.

307. *See Guenther*, 740 P.2d at 975.

308. *See supra* Part IV.B.

309. *See supra* Part IV.B.

310. O.C.G.A. § 16-3-23(2).

311. *Guenther*, 740 P.2d at 980.

312. *See id.*

because the statute demands an immediate hearing. In return for expediting the determination of the immunity issue, it is reasonable to hold the State accountable for proof by a preponderance of the evidence. In contrast, to demand that the State prove the lack of immunity beyond a reasonable doubt would consistently call the validity of such a quick determination into question, due to the evidentiary pressure on the State to create a case within a case on the immunity issue. Thus, the reasonable doubt standard would inevitably defeat the efficiency sought in determining immunity. The final reason the State should bear a preponderance of the evidence burden under O.C.G.A. section 16-3-23(2) is that there should be a balance between the scrutiny of the defendant's actions—considering their serious consequences—and the defendant's right to protection from an intruder within his or her home without having to prove a reasonable belief. Under section 16-3-23(2), the action for which the defendant seeks immunity is an action of violence, possibly resulting in death or serious injury.<sup>313</sup> However, under the subsection, the defendant is not subject to an objective reasonableness standard. Placing preponderance of the evidence burden upon the State keeps the defendant's actions under some scrutiny, while not demanding that the defendant prove that his or her actions were objectively reasonable.

The burden of preponderance of the evidence on the defendant under O.C.G.A. sections 16-3-23(1), 16-3-23(3), and 16-3-24 springs from the language in those sections requiring reasonableness.<sup>314</sup> Under those sections and subsections, even if the basic factual scenario of an incident could be established, reasonableness of the use of force or threat in the situation could still be unclear. Because the defendant has the most immediate access to details concerning reasonableness, the defendant should set forth the facts proving the reasonableness of his actions.<sup>315</sup> The preponderance of the evidence burden should be sufficient to encourage this production. Consequently, the defendant will be required to put forth more effort to show reasonableness at the pretrial stage, rather than at the later point, during a trial, when the defendant would need only to raise an affirmative defense in order to place a burden of beyond a reasonable doubt on the State.<sup>316</sup> It must be repeated that the reason for placing the burden on the defendant under O.C.G.A. sections 16-3-23(1), 16-3-23(3), and 16-3-24, and placing the burden on the State under O.C.G.A. section 16-3-23(2) springs from the reasonableness language present in O.C.G.A. sections 16-3-23(1), 16-3-23(3), and

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313. O.C.G.A. § 16-3-23(2).

314. O.C.G.A. §§ 16-3-23(1), (3), -24.

315. See *Guenther*, 740 P.2d at 990.

316. Cf. *id.* (describing motion to dismiss as ancillary to factually proving guilt).

16-3-24 and the more stringent factual scenario needed to establish immunity under O.C.G.A. section 16-3-23(2).<sup>317</sup>

The proposed burdens, coupled with the proposed proceedings under each section of Georgia's Immunity Statutes, will successfully implement a locus of immunity from prosecution that emanates from the habitation for the person defending his or her home. During the most intense instance—a sudden forced invasion by a stranger—the defender can use the force necessary to protect anyone or anything inside the defendant's home based on his or her own judgment of the situation. In other instances involving someone attacking the habitation and those within, or entering it to commit a felony, the defender can assess the situation to reasonably determine (1) if force should be used or threatened and (2) how much force to use. In all of those instances, the defender cannot be sued for tortious actions. Finally, in instances of trespass on real property, the defender can determine reasonably whether the trespass threatens someone on the property, including the defender, and respond accordingly, but the defender should refrain from using deadly or seriously dangerous force except in instances more akin to defense of self or others.

**2. Further Policy in Light of Colorado's Immunity Statute and Cases.** Although the Colorado Supreme Court has demonstrated how the language of the Colorado Immunity Statute can be read strictly to create difficult burdens based on the kinds of facts that must be proven, the Georgia Immunity Statutes do not suffer from such contorted language. Colorado's statute demands

a reasonable belief that [the intruder] has committed a crime in the dwelling *in addition* to the uninvited entry, or is committing or intends to commit a crime against a person or property *in addition* to the uninvited entry, *and* when the occupant reasonably believes [the intruder] might use any physical force, no matter how slight, against any occupant.<sup>318</sup>

The language in the Georgia statutes may be interpreted to require an analysis of the defendant's reasonableness in a less disjointed way—by focusing on the defendant's reasonableness in light of the totality of the circumstances. The language of O.C.G.A. section 16-3-23(1) is most similar to the language of the Colorado statute.<sup>319</sup> For immunity under O.C.G.A. section 16-3-23(1), the defendant is required to show that

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317. Compare O.C.G.A. §§ 16-2-23(1), (3), and -24 with O.C.G.A. § 16-3-23(2).

318. COLO. REV. STAT. § 18-1-704.5(2) (emphasis added).

319. O.C.G.A. § 16-3-23(1).

he or she reasonably believed that the “violent and tumultuous” unlawful entry was “attempted or made for the purpose of assaulting or offering personal violence” to anyone living in or present in the habitation, and that deadly or dangerous force was necessary.<sup>320</sup>

Although this language resembles Colorado’s requirement that the defendant demonstrate a reasonable belief that the intruder was about to commit, was committing, or had committed another crime besides the entry, the Georgia statute focuses the reasonable belief requirement on the defendant’s assessment of the violent or tumultuous nature of the intruder’s unlawful entry or attempt.<sup>321</sup> Instead of demanding that a person defending his or her habitation reasonably assess, after the unlawful entry occurs, whether a second crime distinct from the violent and tumultuous entry will occur in the dwelling, the Georgia statute calls for a person defending his or her habitation to reasonably assess the cumulative purpose of the entry itself.<sup>322</sup> Based on the violent and tumultuous manner of the entry, O.C.G.A. section 16-3-23(1) then allows that person to take reasonable measures to prevent a reasonably perceived violent purpose of the entry.<sup>323</sup> In other words, the Georgia statute requires the defendant to assess the intruder’s purpose based solely on the manner of the unlawful entry.<sup>324</sup> In contrast, Colorado’s use of the phrase “in addition to” appears to require the defendant to make a reasonable assessment about an additional crime occurring within the dwelling that is separate from the unlawful entry.<sup>325</sup> Further, as observed by the court in *McNeese*, there is yet another requirement in Colorado which makes it harder for a person alleging defense of habitation to establish immunity.<sup>326</sup> In addition to establishing the unlawfulness of the initial entry, a defendant in Colorado must establish that the intruder knew the entry was unlawful.<sup>327</sup> Thus, the Colorado Immunity Statute requires proof of the intruder’s knowledge of the criminality of the break-in and the defendant’s reasonable belief about what the intruder intends afterwards.<sup>328</sup>

In contrast to the language in the Colorado Immunity Statute, the language in O.C.G.A. 16-3-23(3) focuses on the purpose of the entry

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320. *Id.*

321. Compare COLO. REV. STAT. § 18-1-704.5 with O.C.G.A. § 16-3-23(1).

322. O.C.G.A. § 16-3-23(1).

323. *Id.*

324. *Id.*

325. COLO. REV. STAT. § 18-1-704.5; *People v. McNeese*, 892 P.2d 304, 311 (Colo. 1995) (en banc).

326. 892 P.2d at 311.

327. *Id.*

328. *Id.* at 311-14.

itself, not subsequent actions or deliberations of the intruder.<sup>329</sup> If the person defending habitation reasonably believed that the intruder had entered or was entering with the purpose of committing a forcible felony, that defender is permitted to use necessary preventative force.<sup>330</sup> The defendant's reasonable assessment focuses on the entry itself, not the intruder's actions or deliberations once he or she is within the habitation. Therefore, O.C.G.A. section 16-3-23(3) circumvents the difficulty of proving the reasonableness of the defendant's assessment of the intruder's intent beyond the nature of the entry itself.

The remainder of the Georgia Immunity Statutes need not be compared directly to the Colorado statute because Colorado's immunity does not extend beyond the defense of habitation. It bears repeating, however, that O.C.G.A. section 16-3-23(2) is distinct from the other sections and subsections of Georgia's Immunity Statutes because it does not require reasonable belief.<sup>331</sup> This lack of reasonableness language completely distinguishes O.C.G.A. section 16-3-23(2) from the Colorado Immunity Statute.<sup>332</sup> The Colorado statute requires that the intruder knowingly entered unlawfully and that the defender made a reasonable assessment of the intruder's intent to commit another crime,<sup>333</sup> whereas O.C.G.A. section 16-3-23(2) only requires an unlawful entry and the assessment of whether the defendant had reason to believe that the entry was unlawful and forcible.<sup>334</sup> The distinct burden on the State under O.C.G.A. section 16-3-23(2) springs from the lack of an objective reasonableness requirement under that subsection.

Those distinctions aside, the reasoning of the Colorado Supreme Court in *Guenther* provides insight for addressing other policy issues relevant to the pretrial immunity hearing demanded by the Georgia Immunity Statutes.<sup>335</sup> In assessing the constitutionality of the Colorado Immunity Statute, the court in *Guenther* evaluated several issues set forth by the prosecution regarding immunity in this context.<sup>336</sup> Initially, the court used reasoning similar to that of the Georgia Court of Appeals in *Boggs v. State*,<sup>337</sup> consulting the plain language of the statute to establish that the legislature intended for a person to be free from

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329. O.C.G.A. § 16-3-23(3).

330. *Id.*

331. *Id.* § 16-3-23(1)-(3).

332. *Id.*

333. COLO. REV. STAT. § 18-1-704.5.

334. O.C.G.A. § 16-3-23(2). Compare O.C.G.A. § 16-3-23(2) with COLO. REV. STAT. § 18-1-704.5.

335. *Guenther*, 740 P.2d at 977.

336. *Id.*

337. 261 Ga. App. 104, 581 S.E.2d 722 (2003).

prosecution.<sup>338</sup> Based on this reasoning, and like the court in *Boggs*, the court in *Guenther* held that the statutory language barred prosecution of a person who complied with the statute in defending habitation.<sup>339</sup> Thus, in both cases, a pretrial hearing was required to determine the immunity of the defendant.<sup>340</sup>

After this determination, the court in *Guenther* then addressed several issues that might be relevant in future Georgia cases dealing with pretrial immunity. First, the prosecution in *Guenther* argued that the court's power to determine immunity infringed on the executive discretion of the prosecutor, who normally chooses whether to press charges and whether to offer immunity in return for testimony.<sup>341</sup> The prosecution argued that the judiciary would usurp executive power on the matter; however, the court pointed out that it had no discretionary role in determining whether to press the charge, but instead had only a fact-finding role in determining whether the statutory requirements invoking immunity were met.<sup>342</sup> The court reasoned that the statute itself granted the immunity in its imperative language.<sup>343</sup> According to the statutory language, if the person defending his or her home meets the requirements of the statute, the person is immune.<sup>344</sup> Therefore, under Colorado's Immunity Statute, neither the court nor the prosecution can exercise any discretion.<sup>345</sup> Instead, the immunity was created at the Colorado legislature's discretion; the legislature defines what constitutes legal and illegal conduct and establishes "statutory defenses and bars to criminal prosecution."<sup>346</sup>

The Georgia Immunity Statutes contain similar imperative language regarding the immunity prescribed in O.C.G.A. sections 16-3-23 and 16-3-24. A person who uses force justified under those statutes "shall be immune from criminal prosecution" as long as he or she was not prohibited from using a weapon, if one was used.<sup>347</sup> Therefore, like the courts governed by the Colorado statute, Georgia courts do not assume a discretionary executive role. Instead, as directed by the Georgia

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338. Compare *Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723 with *Guenther*, 740 P.2d at 975.

339. *Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723; *Guenther*, 740 P.2d at 975.

340. *Boggs*, 261 Ga. App. at 105, 581 S.E.2d at 723; *Guenther*, 740 P.2d at 976.

341. *Guenther*, 740 P.2d at 977.

342. *Id.*

343. *Guenther*, 740 P.2d at 977; see COLO. REV. STAT. § 18-1-704.5.

344. COLO. REV. STAT. § 18-1-704.5.

345. See *id.*

346. *Guenther*, 740 P.2d at 977.

347. O.C.G.A. § 16-3-24.2.

General Assembly, courts must fact-find to determine, as quickly as possible, whether the party is immune from prosecution.

In its discussion of a court's power to determine this kind of immunity issue, the Colorado Supreme Court in *Guenther* pointed to analogous issues of fact that courts consider to determine if statutory requirements that create a bar against further proceedings have been met.<sup>348</sup> It likened this determination of immunity to a court's determination of whether a statute of limitations has run, whether a new case creates double jeopardy, or whether the State has failed to provide a speedy trial.<sup>349</sup> In those instances, the court is directed by statute to ascertain the necessary facts, and if it does find those facts, the court is ordered to dismiss the case or charge—in other words, the court has no discretion. The immunity procedure described in *Boggs*, and prescribed in the Georgia Immunity Statutes, also directs Georgia courts to make non-discretionary decisions analogous to the examples cited by the court in *Guenther* that do not infringe on the executive branch's authority. If objections to Georgia's pretrial immunity proceeding arise on such grounds, hopefully the Colorado Supreme Court's observations will assist in supporting the constitutionality of Georgia's Immunity Statutes.

#### V. CONCLUSION

As directed by the Georgia General Assembly and demanded by decisions from the Georgia Court of Appeals, there must be a consistent, efficient procedure to determine the immunity of a person defending his or her habitation or other real property. The plain language of the Georgia Immunity Statutes provides guidance, and the decisions of the Georgia Court of Appeals delineate what is needed to implement those statutes. Colorado's decisions and policies on immunity for a person defending habitation also provide helpful insights and comparisons. This Article provides guidance for Georgia courts presented with this immunity issue and will assist courts in implementing statutes designed to empower citizens to protect their homes and their real property.

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348. *Guenther*, 740 P.2d at 977.

349. *Id.*