IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

v.

CURTIS J. REEVES,
Defendant.

Case No.: CRC-1400216FAES

Division: 1

MOTION REQUESTING A PRETRIAL IMMUNITY HEARING PURSUANT TO §776.032, FLA. STAT. (2017)

COMES NOW, the Defendant, CURTIS J. REEVES, by and through undersigned counsels, and requests a de novo pre-trial immunity hearing pursuant to section 776.032(1)-(4), Fla. Stat. (2017) (enacted by Chapter 2017-72), and as grounds in support states as follows:

I. PROCEDURAL HISTORY

1. On November 6, 2015, Defendant filed "DEFENDANT'S MOTION TO DISMISS BASED ON STATUTORY IMMUNITY PURSUANT TO SECTIONS 776.032(1), 776.013(3), AND 776.012(1)-(2), FLA. STAT. (2013)."
2. An evidentiary hearing upon Defendant's motion was held from February 20, 2017, through March 3, 2017.
3. On March 10, 2017, Defendant's motion was denied by Circuit Judge Susan G. Barthle.
4. On December 8, 2016, prior to the March 2017 hearing on Defendant's motion, 2017 Florida Senate Bill No. 128 titled, "Self-defense immunity" was filed. That bill introduced the 2017 amendment to section 776.032 which was approved by the governor and became law on June 9, 2017 as Section 776.032(4).

II. FLORIDA'S STAND YOUR GROUND LAW

5. The original version of Florida Statute 776.032, "Immunity from criminal prosecution and civil action for justifiable use of force" became effective on October 1, 2005.

6. Originally, the legislature did not specify a procedure by which to raise a claim of immunity nor did it specify which party had the burden of proof when statutory immunity is asserted under Florida Statute 776.032.

7. On July 9, 2015, the Florida Supreme Court concluded in *Bretherick v. State*, a five-to-two decision, as a matter of statutory interpretation, that the defendant bears the burden of proof to establish his or her entitlement to statutory immunity under the SYG law by a preponderance of the evidence. *Bretherick v. State*, 170 So.3d 766 (Fla.2015).

8. The dissent in *Bretherick* argued that the burden should be on the State to establish "that the defendant's conduct was not justified under the governing statutory standard." *Bretherick*, 170 So. 3d 766, 779 (Canady, J., dissenting)).

9. On June 9, 2017, the Legislature amended Florida's "Stand Your Ground Law" ("SYG law") by adding a fourth subsection to section 776.032 of the Florida Statutes and, for the first time since the SYG law's enactment in 2005, set forth its intent regarding which party has the burden of proof when immunity is asserted under the SYG law. § 776.032(4), Fla. Stat. (2017).

10. That subsection reads: "In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1)."

§ 776.032(4), Fla. Stat. (2017).

11. Following the enactment of section 776.032(4), Florida's District Courts of Appeals certified conflict to the Florida Supreme Court regarding the application of the newly enacted version of the Stand Your Ground Law.

III. DCA rulings: *MARTIN v. STATE* and *LOVE v. STATE*

On May 4, 2018, the Second District Court of Appeal entered an opinion in TYMOTHY RAY MARTIN vs. STATE OF FLORIDA, Case Number 2D16-4468 in which it concluded, "that section 776.032(4) 'is procedural in nature and, therefore, retroactive in application; that, as such, it applies to pending cases, including those on appeal.'" "This retroactivity meant that the defendant who had already been convicted prior to the statute's effective date was 'entitled to a new immunity hearing under the amended procedure of the statute.'"

On June 18, 2018, the Supreme Court stayed the proceedings in Case Number SC18-789, STATE OF FLORIDA vs. TYMOTHY RAY MARTIN pending its ruling in TASHARA LOVE VS. STATE OF FLORIDA, Case Number SC18-747.

At Tashara Love's immunity hearing, which took place after the 2017 amendment, the circuit court applied the burden of proof applicable before the amendment and found that Love did not prove by a preponderance of the evidence that she was entitled to Stand Your Ground immunity. Love appealed to the Third District Court of Appeal. On May 11, 2018, the Third District Court of Appeal held that the amended statute did not apply to Love's case because the date of incident in her case was before the amendment's effective date, and the statute was not retroactive. The Third DCA's opinion certified conflict with the Second DCA decision in *Martin*:

> "We are cognizant of the recent opinion out of the Second District Court of Appeal, *Tymothy Ray Martin v. State*, No. 2D16-4468, 43 Fla. L. Weekly D1016c

(Fla. 2d DCA May 4, 2018), where the Second District decided that section 776.032(4) is a procedural amendment that should be applied retroactively to all pending cases. We disagree with the Second District Court of Appeal's holding because we believe *Smiley v. State*, 966 So.2d 330 (Fla. 2007), mandates a finding that the subsection (4) amendment to section 776.032 is a substantive change in the law. We further disagree with the Second District Court of Appeal in *Martin* because we believe that *Smiley's* holding that Article X, section 9 of the Florida Constitution prohibits retroactive application of criminal legislation is applicable to section 776.032(4). Thus, we certify conflict with the Second District Court of Appeal's decision in *Martin*."

IV. Supreme Court's ruling in *LOVE v. STATE*

On March 6, 2019, the Supreme Court held oral argument in *Love v. State* and issued its ruling in that case on December 19, 2019. The Supreme Court in *Love* agreed with the Second DCA's conclusion in *Martin* that section 776.032(4) created a procedural change in the Stand Your Ground law, rather than a substantive change. *Love v. State*, 286 So.3d 177 (2019) (citing *Martin v. State*, --- So.3d ---- (2018) 43 Fla. L. Weekly D1016). The Court went on, however, to state that the *Martin* decision "seemingly gave the statute 'a true retroactive application,' by ordering a new immunity hearing for a defendant convicted prior to the statute's effective date." *Id.*, at 188.

The Court in *Love* found that the "Second District in Martin erred in concluding that section 776.032(4) applied in all pending cases, including cases in which the Stand Your Ground immunity hearing was conducted prior to the effective date of that provision," that "[t]he case law does not support such a default application of a procedural statute," [a]nd the legislation itself is devoid of any suggestion that the Legislature intended section 776.032(4) to undo preeffective-date immunity hearings." *Id.*

The Court's ruling went on to discuss retroactivity and began its analysis by stating:

> "We recognize that this Court's previous pronouncements have not been entirely consistent regarding the retroactivity of procedural statutes. *Compare Alamo Rent-ACar, Inc. v. Mancusi*, 632 So.2d 1352, 1358 (Fla.1994) ("Procedural or remedial statutes ... are to be applied retrospectively and are to be applied to pending cases."), with *Lee v. State*, 128 Fla. 319, 174 So.589, 591 (1937) ("[T]hose [statutes] affecting procedure ... may in some cases be given a retrospective operation ...."). *Id.,* at 186-187.

The Court acknowledged that "[i]ndeed, some of those pronouncements arguably support the Second District's retroactivity approach in *Martin*." *Id.* Ultimately, however, the Court concluded that section 776.032(4) was intended to be applied to post-amendment immunity hearings only and was therefore "prospective," as opposed to retroactive, thereby disagreeing with the Third DCA's decision in *Love* and also with the Second DCA's decision in *Martin. Id.*

"*Remedial* statutes or statutes relating to remedies or modes of *procedure*, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes." *Smiley v. State*, 966 So.2d 330 (Fla.2007) (citing *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla.1961) (emphasis added). "Moreover, the 'presumption in favor of prospective application generally does not apply to 'remedial' legislation; rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose.'" *Id.* (citing *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla.1994) (citing *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla.1986)). "Courts should *not* interpret remedial statutes strictly or narrowly to thwart the intent of the legislature." *E.A.R. v. State,* 4 So.3d 614, 629 (Fla.2009).

"While statutory changes in law are normally presumed to apply prospectively, *procedural* or *remedial* changes may be immediately applied to pending cases, including in some instances

cases pending on direct appeal." *Heilmann v. State*, 310 So.2d 376, 377 (Fla. 2d DCA 1975). "Remedial statutes are exceptions to the rule that statutes are addressed to the future, not the past." *Metro. Dade Cty. v. Leslie Enterprises, Inc.*, 257 So. 2d 29, 30 (Fla.1972).)). It is a settled principle of law that "procedural or remedial changes in the law are applicable to pending cases, including cases pending on appeal from a lower court." *Smith v. Smith*, 902 So.2d 859 (Fla. 1st DCA 2005) (citing e.g., *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477 (Fla.1995); *Lowe v. Price*, 437 So.2d 142 (Fla.1983); *Hendeles v. Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla.1978); *Florida E. Coast Ry. Co. v. Rouse*, 194 So.2d 260 (Fla.1966); *Galloway v. State,* 802 So.2d 1173 (Fla. 1st DCA 2001); *McMillian v. Dep't of Revenue ex rel. Searles*, 746 So.2d 1234, 1237 (Fla. 1st DCA 1999); *Fallschase Dev. Corp. v. Blakey*, 696 So.2d 833 (Fla. 1st DCA 1997); *Lockheed Space Operations v. Pham*, 600 So.2d 1261 (Fla. 1st DCA 1992) (Ervin, J., concurring); *Promontory Enter., Inc. v. S. Eng'g & Contracting, Inc.*, 864 So.2d 479 (Fla. 5th DCA 2004); *State v. Marechal*, 532 So.2d 730 (Fla. 3d DCA 1988); *City of Miami v. Harris*, 490 So.2d 69, 73 (Fla. 3d DCA 1985)).

On January 7, 2020, the Supreme Court of Florida issued an "Order to Show Cause" in *State v. Martin*, Case Number: SC18-789 directing Mr. Martin to show cause why the Court "should not exercise jurisdiction in this case, summarily quash the decision being reviewed, and remand to the district court for reconsideration in light of [its] decision in *Love v. State*, No. SC18-747, 2019 WL 6906479 (Fla. Dec. 19, 2019)." *Martin's* response to the Court's "Order to Show Cause" was filed on January 15, 2020 and is attached to this motion as Exhibit A. *Martin's* response contained the following arguments, which Defendant adopts in the instant motion, regarding why the Supreme Court should not quash the Second District Court of Appeals' ruling:

1. "[I]t was always the Florida Legislature's intention to place the burden of proof for Stand your Ground immunity on the State, and that *Bretherick* was wrongly decided from its inception." Exhibit A at 5.

2. "The legislative history reinforces that the intent of the Stand Your Ground statute was to provide true immunity from prosecution (and its attendant consequences) - - not merely to provide a defense - - and that it should be interpreted broadly to effectuate its purpose." Exhibit A at 5.

3. "Legislative intent has been described as the "polestar that guides statutory construction." (citing *Heilman v. State*, 135 So.3d 513, 517 (Fla. 5th DCA 2014). "In that regard, this Court has observed that "[w]hen ... an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Exhibit A at 5-6 (citing *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 503 (Fla.l999) (quoting *Lowry v. Parole and Probation Commission*, 473 So.2d 1248, 1250 (Fla.1985)).

4. "The very fact that the Florida legislature enacted the burden of proof amendment so promptly after the Court, in a split decision, interpreted or misinterpreted its intent, strongly indicates that the amendment was not only procedural, but also remedial." Exhibit A at 7.

Ultimately, on May 29, 2020, the Supreme Court issued the following ruling in *Martin*:

"Upon review of the response(s) to this Court's Order to Show Cause dated January 7, 2020, the Court has determined that it should exercise jurisdiction in this case. It is ordered that the Petition for Review is granted, that the Second District Court of Appeal's decision in this case is quashed, and this matter is remanded to the district court for reconsideration upon application of our decision in *Love v. State*, 286 So. 3d 177 (Fla. 2019)."

While it is true that the language of 776.032(4) *itself* is devoid of any express language that the Legislature intended section 776.032(4) to undo preeffective-date immunity hearings," the legislation's intended purpose, to remedy the Supreme Court's decision in *Bretherick*, is clear. "Legislative intent has been described as the "polestar that guides statutory construction." (citing *Heilman v. State*, 135 So.3d 513, 517 (Fla. 5th DCA 2014). The fact that the amendment was

enacted so quickly after the ruling in *Bretherick* further evidences that it was always the Florida Legislature's intention to place the burden of proof for Stand your Ground immunity on the State, and that the Supreme Court's interpretation of the SYG law in *Bretherick* was flawed. In *Love*, the Supreme Court directly acknowledged that it was the Legislature's intent when enacting section 776.032(4) to remedy the *Bretherick* decision that wrongly placed the burden of proving statutory immunity from prosecution on the accused. This response by the Legislature makes clear that the SYG law was always to provide true immunity from prosecution, not to provide a defense that could be raised at trial. This is consistent with our long-held constitutional principle "that there is a presumption of innocence in favor of the accused," and that "its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432 (1895).

As the Supreme Court explained in *Love*, the burden of proof amendment imposed a 'clear and convincing' burden on the State to prove at a pretrial hearing that a criminal defendant is not entitled to statutory immunity as opposed to the more exacting trial burden of beyond a reasonable doubt. *Love v. State*, 286 So.3d 177, 180 (Fla.2019). At the time the legislature enacted the burden of proof amendment, Tymothy Martin had been convicted after a jury trial and his conviction was pending on appeal. As such, in Martin's case, the State had already met the higher standard of proving beyond a reasonable doubt that Martin's use of force was not justified. Therefore, requiring a new pretrial hearing in that case at which the State's burden of proof is a lower one than the one they already satisfied at trial would be futile. Mr. Reeves, on the other hand, has not been convicted and is still awaiting his trial date. Thus, Mr. Reeves was situated differently than Martin at the time the legislature enacted the burden of proof amendment and as the State has never proven, under any burden of proof, that Mr. Reeves is not entitled to statutory immunity.

Accordingly, Mr. Reeves should be given the benefit of a new pre-trial immunity hearing based on the 2017 amendment to the SYG law.

CONCLUSION

WHEREFORE, in light of the foregoing, Defendant, CURTIS J. REEVES, respectfully requests this Court grant him a de novo pre-trial immunity hearing pursuant to section 776.032(1)-(4), Fla. Stat. (2017) (enacted by Chapter 2017-72).

Date: June 30, 2020

Respectfully Submitted,

/s/ Richard Escobar	/s/ Dino M. Michaels	/s/ Nicole N. Sanchez
Richard Escobar, Esq.	Dino M. Michaels, Esq.	Nicole N. Sanchez, Esq.
FBN: 375179	FBN: 526290	FBN: 107402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this has been furnished by electronic delivery to the Office of the State Attorney for the Sixth Judicial Circuit, c/o Glenn Martin, Esq., at glenmartin@co.pinellas.fl.us and via U.S postal service at P.O. Box 5028, Clearwater, Florida 33758 on this 30th day of June 2020.

/s/ Nicole N. Sanchez

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Exhibit A: Response to Order to Show Cause State v. Martin, Case Number SC18-79

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

TYMOTHY RAY MARTIN,

Respondent.

_____/

CASE NO: SC18-789
Lower Tribunal No.
2D16-4468
292006CF002331000AHC

RESPONSE TO THIS COURT'S JANUARY 7, 2020 ORDER

Respondent, TYMOTHY RAY MARTIN, responds to this Court's January 7, 2020 order directing him to show cause why this Court should not summarily quash the Second District Court of Appeal's decision in this case in light of Love v. State, SC18-747 (Fla. Dec. 19, 2019).

Tymothy Martin and Tashara Love are not similarly situated. Because, fortuitously, Love became the lead case and Martin was designated a "tag case", Martin - - like other "tag case" defendants whose Stand Your Ground hearings took place before the June 9, 2017 effective date of the burden of proof amendment - - never had an opportunity to brief or argue his position that this procedural and remedial amendment was intended to apply to all "pipeline" cases pending on appeal. Worse yet, in oral argument Love's appellate attorney threw Martin and the other pre-amendment defendants under the bus by making a strategic concession - - strategic from Love's point of view but fatal to Martin - - that it made a lot of sense to find the amendment applicable only to hearings held after its effective date.

Martin's direct appeal was decided on May 4, 2018; the Second DCA concluded that the amendment was procedural and remedial and thus applicable to all cases pending on appeal, and certified the issue as one of great public importance. Martin v. State, 2018 WL 2074171. Love's appeal was decided a week later on May 11, 2018; the Third DCA concluded that the amendment applied prospectively only, and certified conflict with Martin. Love v. State, 247 So.3d 609 (Fla. 3d DCA 2018). Love, the losing party, filed her notice to invoke discretionary jurisdiction on the same day the opinion was issued, May 11, 2018; while the state, the losing party in Martin, did not file its notice to invoke discretionary jurisdiction until May 17. On May 23, this court postponed its decision on jurisdiction in Martin, and directed the parties to file jurisdictional briefs. On June 18, this Court entered a "tag case" order staying proceedings in Martin pending disposition of Love. On June 26 the Court accepted jurisdiction in Love, setting a briefing schedule for that case and indicating that oral argument would be scheduled by separate order. Subsequently a number of other cases were designated as "tag cases" to Love. The various defendants were not all similarly situated, since some cases arose from pre-amendment Stand Your Ground hearings and some arose from post-amendment hearings, but all of the defendants would prevail under the Second DCA's holding in Martin, and all would lose under the Third DCA's holding in Love.

In the briefs on the merits in this Court, Love's appellate counsel argued - - consistently with Martin and the overwhelming weight of authority regarding procedural and remedial statutes, and consistently with its legislative history - - that the burden of proof amendment was intended to apply to all cases pending

on appeal. Tashara Love Initial Brief (filed August 15, 2018), p.1,11,13,17-21,24,30, and Reply Brief (filed December 19, 2018), p.1,6,14-15. However, at the very beginning of oral argument on March 6, 2019, Love's appellate counsel was invited to retreat from that position. Chief Justice Canady posed the following question:

> Let me ask you this. If you just look at all this on its face, the legislature passes a statute that changes the burden of proof in particular proceedings and there's an effective date with that change, isn't the most common sense way to understand that is that the hearings, the proceedings that take place, after that effective date would be proceedings in which that new burden of proof would apply? I understand that's not what you're arguing, but that still gets your client what your client needs on that. Why wouldn't that be the most common sense way to understand such a statute?

(emphasis supplied).

In response Love's appellate counsel agreed that "that makes a lot of sense. Our position is somewhat broader. We say all pending cases, but you certainly could resolve this case in Ms. Love's favor by saying that it applies to hearings held after the date that the law took effect."

And that is ultimately what this Court decided in its December 19, 2019 opinion in Love, disagreeing with both the Third DCA's Love decision and the Second DCA's Martin decision, and making the date of the Stand Your Ground hearing the dispositive factor.

Undersigned counsel for Martin cannot fault Love's attorney for strategically retreating from the position which, if successful, would have benefitted both pre- and post-amendment defendants. That attorney's ethical obligation was to try to obtain a favorable outcome for Ms. Love, and he succeeded in this. The problem is that because a number of the "tag case" defendants,

including Martin, were not similarly situated, the argument which might have obtained a favorable outcome for them was essentially abandoned. If Martin's case had been the lead case undersigned counsel would have stood his ground and answered Chief Justice Canady's question very differently. This Court should reconsider its disapproval in Love of the Second DCA's decision in Martin for the following sound reasons:

This Court correctly determined in Love that the Stand Your Ground burden of proof amendment is procedural. It is a "settled principle" that "procedural or remedial changes in the law are applicable to pending cases, including cases pending on appeal from a lower court." Smith v. Smith, 902 So.2d 859,863 (Fla. 1st DCA 2005), citing eleven decisions including Gupton v. Village Key and Saw Shop, Inc., 656 So.2d 475,477 (Fla. 1995); Lowe v. Price, 437 So.2d 142 (Fla. 1983); and Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978). See also State v. Castillo, 456 So.2d 565 (Fla. 1986)(rule relating to racial bias in use of peremptory challenges "applies to all cases pending on direct appeal at the time the decision [in State v. Neil, 457 So.2d 481 (Fla. 1984)] became final; "Generally an appellant is entitled to the benefit of the law at the time of appellate disposition", and "[w]e see no exception to this principle in this case").

See also Tahiti Beach Homeowners Ass'n, Inc. v. Pfeffer, 52 So.3d 808 (Fla. 3d DCA 2011); Antunez v. Whitfield, 980 So.2d 1175,1177 (Fla. 4th DCA 2008).

In a context somewhat analogous to burden of proof in Stand Your Ground hearings - - i.e., whether the Frye or Daubert stand-

ard[1] is to govern hearings on the admissibility of expert testimony - - Florida appellate courts have applied the changes to cases pending on appeal. See Perez v. Bell South Telecommunications, Inc., 138 So.3d 492(Fla.3d DCA 2014)(holding that the 2013 revision to Fla. Stat. §90.702 should be applied retrospectively to pending cases); Kemp v. State, 280 So.3d 81,87 (Fla. 4th DCA 2019)(citing Perez holding); see also Conley v. State, 129 So.3d 1120 (Fla. 1st DCA 2013); Vitiello v. State, 281 So.3d 554,559 n.4 (Fla. 5th DCA 2019).

In its opinion in Love this Court stated "Because there is no indication that the Legislature intended the statute to undo pre-effective-date immunity hearings, we disapprove Martin's decision to order a new immunity hearing in that case." 2019 WL 6906479, p.1, see p.10. The Court also concluded that the pretrial hearing in Martin "was properly conducted under Bretherick [v. State, 170 So.3d 766(Fla. 2016)." Id, at p.11.

In this response to the Court's show cause order, Martin submits that, contrary to those comments in Love, it was always the Florida Legislature's intention to place the burden of proof for Stand your Ground immunity on the state, and that Bretherick was wrongly decided from its inception. The legislative history reinforces that the intent of the Stand Your Ground statute was to provide true immunity from prosecution (and its attendant consequences) - - not merely to provide a defense - - and that it should be interpreted broadly to effectuate its purpose.

Legislative intent has been described as the "polestar that

[1] Frye v. United States, 293 F.1013(D.C.Cir.1923); Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

guides statutory construction." Heilman v. State, 135 So.3d 513, 517 (Fla.5th DCA 2014). In that regard, this Court has observed that "[w]hen . . . an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494,503 (Fla.1999)(emphasis in opinion); quoting Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla.1985). Accord, Leftwich v. Florida Dept. of Corrections, 148 So.3d 79,83 (Fla.2014); Madison at Soho II Condominium Assoc. v. Devo Acquisition Enterprises, LLC, 198 So.3d 1111, 1116 (Fla.2d DCA 2016); Essex Ins. Co. v. Integrated Drainage Solutions, Inc., 124 So.3d 947,952 (Fla.2d DCA 2013).

The 2017 burden of proof amendment to the Stand Your Ground law is a classic example of that kind of remedial legislation. See Fla. H.R. Subcomm. on Crim. Justice, Final Bill Analysis, CS/HB 245, p.6 (July 15, 2017) (explaining that "[t]he bill amends §776.032, F.S., to reverse the effect of the [Florida Supreme Court's] holding in Bretherick").

Bretherick was a 5-2 decision (Justices Canady and Polston dissenting) issued on July 9, 2015. The majority, noting that "the Legislature has not explicitly stated which party should bear the burden of proof in establishing whether a defendant is entitled to immunity under the Stand Your Ground law", sought to discern the Legislature's intent [170 So.3d at 772, 774-75, and 778-79], and concluded:

> that placing the burden of proof on the defendant to establish entitlement to Stand Your Ground immunity by a preponderance of the evidence at the pretrial eviden-

> tiary hearing, rather than on the State to prove beyond a reasonable doubt that the defendant's use of force was not justified, is consistent with this court's precedent and gives effect to the legislative intent.

Bretherick, 170 So.3d at 779 (emphasis supplied).

The very fact that the Florida legislature enacted the burden of proof amendment so promptly after the Court, in a split decision, interpreted or misinterpreted its intent, strongly indicates that the amendment was not only procedural, but also remedial. Metropolitan Dade County; Lowry; Leftwich. That conclusion is buttressed by its legislative history, as illustrated by the reasons asserted by the bill's sponsors and proponents.

At a Senate Rules Committee meeting on February 9, 2017, Senator Rob Bradley, who sponsored the bill in that chamber, identified the Bretherick decision as the catalyst:

> One would naturally assume that the government has the burden of proof in this immunity hearing that I just described. However, in 2015 the Florida Supreme Court held otherwise. In Bretherick v. State, in a five to two decision the Florida Supreme Court ruled that the burden of proof for self-defense rested on the accused not the government. Two conservative judges dissented on the Florida Supreme Court. This bill corrects the error of the Bretherick decision. . . . If they [the Florida Supreme Court] issue a decision that in the estimation of the legislature is not consistent with the intent of the legislature and the result of that decision is that something happens in our system of government that's inconsistent with the intent of the legislature as a result of that decision then I think it is our duty to address that.[2]

(emphasis supplied)

At the same hearing, Senator Tom Lee confirmed that the Court had misinterpreted the intent of the legislature in 2005, and

[2] CS/SB 128, 2/9/2017 Senate Rules Committee, https://theflorida channel.org/videos/2917-senate-rules-committee/, timestamp: 59:41.

that this amendment was a response to that error:

> I was around when this legislation was originally adopted and I believe our now Senator Baxley was a sponsor in the House of Representatives at the time and I was also chairman of the Judiciary Committee as we tried to address this issue. . . . Essentially what happened . . . is that we passed this legislation in 2005 or 2006 and the court ended up construing the legislation as an affirmative defense . . . much like entrapment or an insanity plea or something of that nature. Those do exist in the law but upon review of that case the legislature has come back and now taking another look at the original legislative intent and whether the court's interpretation was consistent with that.[3]

(emphasis supplied)

On April 4, 2017, the Florida House of Representatives had a debate on the amendment. The following exchange occurred between Representative Robert Asencio and the bill's House sponsor, Representative Bobby Payne.

> Rep. Asencio: So, can you explain briefly the intent. Is it to ease the burden of those who are going to claim this defense?
>
> Rep. Payne: No, I would disagree with that in saying it's not easing the burden it's putting the burden back where it should belong based on our constitutional beliefs and that is everyone is innocent until proven guilty and that burden is on the state.
>
> Rep. Asencio: I guess a better way of asking is for those who are justified or those who are claiming to be justified in using force whether it is deadly or less than deadly, less than lethal, is this bill supposed to make it easier on them so they don't go through the burden of prosecution or I'm sorry pretrial and post pretrial?
>
> Rep. Payne: Yes, this bill based on the original intent of the law in 2005 was to shift the burden to the state. It was not intended to be another form of an affirmative defense but a true immunity.
>
> Rep. Asencio: So this is just codifying what was in the statute as self-defense, am I correct?
>
> Rep. Payne: Yes this is putting the intent back

[3] Id, at timestamp: 1:13:00

> where it was or excuse me putting the burden back where it was intended by the 2005 law.[4]

(emphasis supplied)

One day later on April 5, 2017, Representative Paul M. Renner emphasized the immunity from prosecution which the 2005 law was intended to confer:

> such that someone is not required to remain incarcerated in many cases or face the deep financial burden of defending a criminal action for a period of months or even years if in fact they used force justifiably. It does not change the law of self-defense but it does protect those that have done so reasonably in consistence with the law. . . . We should really be focused on that fiscal impact to the defendant. . . . There's certainly the fiscal impact of having to hire an attorney. But for those who cannot afford to even post bond, often times those that don't have much money are prosecuted. They may find themselves incarcerated for the duration of time while they await trial. And this is a significant burden that this statute was intended to resolve. But because of a court decision we are now coming back to make sure that we clarify and give real meaning to the purpose of that law from 2005 that it is the state's burden not the defendant to prove by clear and convincing evidence that force was not justifiable.[5]

(emphasis supplied)

At the same hearing, Representative Gayle B. Harrell provided firsthand insight into the objectives of the legislature in 2005, as well as the remedial objectives of the 2017 amendment:

> This bill is truly about our Constitution. It's about what that constitution provides us in the way of protections and rights, members. This is not about violence this is not about guns. This is not about killing people. This is about the rule of law. The rule of law that our Constitution has guaranteed us. The burden of proof is on the state. You do not have to prove your innocence. You - we are so blessed to live

[4] CS/SB 128 Second Reading, 4/4/2017 House Session, https://thefloridachannel.org/videos/4417-house-session/, timestamp: 3:25:30.

[5] CS/SB 128 Third Reading, 4/5/2017 House Session, https://thefloridachannel.org/videos/4517-house-session/, timestamp: 2:59:00.

> in this country where we are innocent - innocent - innocent until proven guilty. That's what this bill is about. The burden of proof. I was here in 2005 when we passed the very first - the first bill that this is really trying to correct. This bill is trying to correct what the court has overruled legislative process and really has legislated from the bench on this bill. I was here and I was very much a part of the conversation on the intent of that bill. There is no doubt that the intent of that bill was to make sure that the state had the burden of proof, and that when you used force to protect yourself, that the burden of proof was on the state to say that you committed a crime. This is a correction. This bill is simply a correction of a misinterpretation of what the intent was in 2005.[6]

(emphasis supplied)

Because the amendment is procedural, because it is remedial, and because the legislative history makes it so clear that its purpose was to place the burden of proof where the legislature had always meant for it to be, it would be illogical to assume that the legislature nevertheless intended to carve out an exception to the general rules that procedural/remedial statutes apply to all pending cases, and that litigants are entitled to the benefit of the law at the time of appellate disposition.

Here, the Florida legislature's manifest purpose in adopting the 2017 amendment was to restore its original intent, that the burden of proof be placed on the state to show by clear and convincing evidence that the defendant is not entitled to immunity under the Stand Your Ground law. In light of (1) the amendment's legislative history; (2) the fact that it was adopted soon after and in response to the Bretherick decision; and (3) the generally accepted principle in Florida that burdens of proof are procedural, it is clear that it was meant to apply, and should apply, to cases pending at the time of its adoption. The fact that Martin's

[6] Id, at timestamp: 3:12:00

Stand Your Ground hearing was "properly conducted under Bretherick" is precisely what the legislature didn't want. As Justice Canady, dissenting in Bretherick, perceived "By imposing the burden of proof on the defendant at the pretrial evidentiary hearing, the majority substantially curtails the benefit of the immunity from trial conferred by the Legislature under the Stand Your Ground law." 170 So.3d at 780. By enacting the 2017 amendment, the legislature did intend to undo pre-effective-date immunity hearings which, by applying the wrong burden of proof, deprived defendants of that benefit.

WHEREFORE, respondent respectfully requests that this Court either (1) reconsider its disapproval of the Second DCA's decision in Martin, and instead approve that decision, or (2) allow Martin an opportunity to brief and orally argue the Second DCA's certified question as applied to him.

CERTIFICATE OF SERVICE

I certify that a copy has been emailed to Solicitor General Amit Agarwal at amit.agarwal@myfloridalegal.com and Assistant Attorney General Jonathan Hurley at jonathan.hurley @myfloridalegal.com on this 15th day of January, 2020.

Respectfully submitted,

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