No. SC18-

In the Supreme Court of Florida

TASHARA LOVE
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

* * *

On Discretionary Review from the Third District
Court of Appeal of Florida, DCA No. 3D17-2112
Cir. No. F15-24308

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

This case presents an issue of statewide importance impacting countless criminal prosecutions: whether the 2017 amendment to the Stand Your Ground law applies to all pending cases or only those arising after its enactment.

On November 26, 2015, Petitioner Tashara Love, her daughter, and others were involved in a three-minute altercation outside a Miami-Dade County nightclub. A3. As Thomas Lane, the alleged victim, was about to strike Petitioner's daughter, Petitioner shot him. *Id.* For that act, the State charged Petitioner with attempted second-degree murder with a firearm. *Id.* Because she was defending her daughter when she shot Lane, Petitioner moved for statutory immunity under section 776.032, Florida's "Stand Your Ground" law. *Id.*

Before the date of Petitioner's immunity hearing, the Legislature amended section 776.032 by adding a fourth subsection. *See* Ch. 2017-72, § 1, Laws of Fla. 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). The amending bill specified that it took effect "upon becoming law," and the Governor signed the bill into law on June 9, 2017. Ch. 2017-72, § 2, Laws of Fla.

Section 776.032(4) changes the Stand Your Ground law by specifying that the prosecution, rather than the defense, shall bear the burden of proof at the immunity hearing, bringing the immunity procedure closer into line with the burden the State ultimately bears at trial of disproving the self-defense claim beyond a reasonable doubt. Prior to Chapter 2017-72, this Court had held, as a matter of "statutory interpretation," A3, that a criminal defendant bore the burden of establishing his entitlement to immunity at the pretrial hearing by a preponderance of the evidence. *See Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

At Petitioner's immunity hearing, the prosecution argued that the amendment was inapplicable for two reasons. The State first contended that section 776.032(4) was outright unconstitutional because it violated the Separation of Powers. A4. Alternatively, it claimed that the amendment did not apply to Petitioner because subsection (4) was non-retroactive, and thus did not govern an immunity hearing for actions occurring prior to the amendment's effective date. *Id.*

The circuit court rejected the State's retroactivity argument but declined to apply the clear and convincing burden of proof because it found the amendment unconstitutional. *Id.* Applying the old burden of proof, it denied Petitioner's claim of immunity. But it noted that the retroactivity issue was outcome determinative, ruling that it would have granted immunity under the new burden of proof. DCA Pet. App'x at 25-26 (filed Sept. 25, 2017).

Petitioner then sought a writ of prohibition in the Third District. A4. The district court overruled the portion of the circuit judge's order invalidating section 776.032(4), concluding that the burden of proof provision was "intertwined with substantive rights" conferred by the Stand Your Ground law, and thus that the Legislature had the authority to enact it. A5-6. But it denied the petition for writ of prohibition because, in its view, this Court's decision in *Smiley v. State*, 966 So. 2d 330 (Fla. 2007), compelled the conclusion that the amendment should be "treated as a substantive change in the law." A9. The district court reasoned that, as a result of subsection (4), Petitioner "could not be prosecuted in the same manner as before," thereby "imposing new legal burdens" on the State. A8-9.

The Third District acknowledged, however, that its holding on retroactivity was inconsistent with the Second District's approach in *Martin v. State*, No. 2D16-4468, 43 Fla. L. Weekly D1016c (Fla. 2d DCA May 4, 2018). A6 n.5 (discussing *Martin*'s holding that section 776.032(4) "is a procedural amendment that should be applied retroactively to all pending cases"). It therefore certified conflict with *Martin*. A6-7 n.5; *see also* A10 ("Petition denied. Conflict certified."). Petitioner timely invoked this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

This Court possesses discretionary jurisdiction to review this appeal under multiple provisions of the Florida Constitution. *See* Art. V, §§ 3(b)(3) & 3(b)(4).

First, the Third District certified that its holding on retroactivity is in direct conflict with *Martin v. State*. In *Martin*, the Second District concluded that section 776.032(4)'s burden of proof provision is procedural in nature, and therefore applies to "all pending cases"—the exact opposite conclusion the Third District reached here. Second, even apart from the certification of conflict, the decision below expressly and directly conflicts with the many cases holding that, under Florida law, burden of proof provisions are procedural for purposes of the retroactivity analysis. Due to the issue's importance, this Court's review is warranted.

ARGUMENT

I. The Court Has Jurisdiction to Review This Appeal

A. The Third District certified direct conflict with *Martin*, which applied the Stand Your Ground amendment to all pending cases

Most obviously, this Court has jurisdiction because the Third District certified direct conflict with the Second District's recent decision in *Martin v. State*, No. 2D16-4469, 43 Fla. L. Weekly D1016c (Fla. 2d DCA May 4, 2018). *See* A6-7 n.5 ("Thus, we certify conflict with the Second District Court of Appeal's decision in *Martin*."), A10 ("Petition denied. Conflict certified.").

In *Martin*, the district court considered the very same retroactivity question but reached the opposite conclusion. Tymothy Martin had moved for Stand Your Ground immunity in the circuit court after being accused of a 2016 felony battery. *Martin*, 43 Fla. L. Weekly at D1016. Finding that the defense had "not met their

burden" under the version of section 776.032 in effect at the time of the hearing, the circuit judge denied immunity. *Id.* But upon section 776.032(4)'s subsequent enactment, Martin argued in the Second District that he was entitled to a new immunity hearing, this time with the State bearing the burden of disproving his self-defense claim by clear and convincing evidence. *Id.*

The Second District agreed. Applying longstanding principles of Florida law, it held that "statutory changes to the burden of proof … are invariably deemed procedural in nature for purposes of retroactive application." *Id.* at D1017. It therefore concluded that amended section 776.032 "applies to pending cases" and remanded for a new immunity hearing. *Id.* at D1018; *see also id.* at D1016 ("this amendment is retroactive in its application" and "applies to [Martin's] case"). That decision stands in direct conflict with the Third District's holding that Petitioner "is not entitled to the benefit of the shift in the burden of proof" because the amendment "has no retroactive application." A7, 10.

Certification of direct conflict is a basis for this Court's discretionary jurisdiction. *See* Art. V, § 3(b)(4). On that ground alone, this Court should accept this case for review.

B. The decision below is also in express and direct conflict with a series of decisions holding that burden of proof enactments are procedural

Apart from the conflict certified by the Third District, the decision below expressly and directly conflicts with a series of decisions holding that statutes

allocating the burden of proof in judicial proceedings are procedural. *See* Art. V, § 3(b)(3) (Supreme Court may review a district court decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law"). In fact, prior to the Third District's decision in Petitioner's case, no Florida appellate court had ever categorized a burden of proof provision as substantive.

To the contrary, this Court has often held that "[b]urden of proof requirements are procedural in nature." *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977); *see also Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) ("generally in Florida the burden of proof is a procedural issue").

Taking their cues from this Court, the district courts have unanimously concluded that burden of proof provisions are procedural, including in the context of retroactivity. *See, e.g., Stuart L. Stein, P.A. v. Miller Indus., Inc.*, 564 So. 2d 539, 540 (Fla. 4th DCA 1990) (holding that "increasing the burden of proof to a 'clear and convincing' standard did not amount to a substantive change in the statutory scheme," meaning amendment applied retroactively); *Litvin v. St. Lucie Cnty. Sheriff's Dep't*, 599 So. 2d 1353, 1355 (Fla. 1st DCA 1992) ("However, the application of procedural amendments such as burden of proof enactments is not constrained by the date of accident and injury, as there is no vested right in any given

mode of procedure.") (citing *City of Clermont v. Rumph*, 450 So. 2d 573, 575 (Fla. 1st DCA 1984)); *Ziccardi v. Strother*, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990) (modification of burden of proof in statute did not amount to substantive change in the law and was retroactive).

More generally, the Third District's mode of analysis conflicts with the one prescribed by this Court. To resolve the retroactivity dispute, the district court asked whether prosecutions could still proceed "in the same manner" they did before the amendment. A9. Concluding that the manner of prosecution had changed, the Third District found the statute non-retroactive. *Id.* But that got the law backwards. This Court has squarely held that "procedural law concerns the *means and methods*" of enforcing substantive rights. *Shaps*, 826 So. 2d at 254 (quoting *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994)) (emphasis added). Thus, because only the "manner" (or "means and methods") of prosecution has changed, the amendment should have been deemed procedural, not substantive.

II. This Case Presents a Critically Important Issue Affecting Countless Criminal Prosecutions

As the Second District has observed, the retroactivity question here will likely impact "a significant number of criminal cases." *Martin*, 43 Fla. L. Weekly at D1018. There are potentially hundreds of criminal defendants, charged with crimes ranging from misdemeanor battery to first-degree murder, whose self-defense claims arose before June 9, 2017 but whose cases are not yet final. In the Second District,

those defendants will get the benefit of the new burden of proof the Legislature intended, whereas in the Third District they will not.

Which party bears the burden can affect not only the ultimate outcome of an immunity hearing, but also any number of important pretrial decisions. For example, a defendant who must shoulder the burden of proving her self-defense claim at the hearing is far likelier to forego constitutional protections like the right to remain silent than is a person who bears no such burden. And because the pre-amendment burden favors prosecutors, they have enormous leverage in plea bargaining, raising the specter that even persons with legitimate claims of self-defense may plead guilty to avoid trial and lengthy or minimum-mandatory sentences,[1] subverting the very purpose of the Stand Your Ground law. *See* § 776.032(1) (explaining that self-defense immunity is intended to prevent not only prosecution, but also arrest and detention). Underscoring the significance of this issue, *Martin* certified the question as one of great public importance. 43 Fla. L. Weekly at D1018.

This case also goes to the heart of the relationship between the legislative and judicial branches. Chapter 2017-72 was adopted to correct what the Legislature perceived as a misinterpretation of its intent: in *Bretherick*, a divided Supreme Court

[1] Stmts. of Public Defender Stacy A. Scott, Fla. Sen. R. Comm. (Feb. 9, 2017), *available at* http://thefloridachannel.org/videos/2917-senate-rules-committee/, at 1:40:45 – 1:41:41 (discussing CS/SB 128 (2017)).

held that section 776.032 placed the burden on criminal defendants to establish their claims to immunity. Legislators quickly responded by enacting section 776.032(4). The sponsor of the amending bill, Senator Rob Bradley, explained that it was meant to serve as remedial legislation restoring the Legislature's original intent, telling his colleagues at a Senate Rules Committee hearing that the law affects "what happens at one of those immunity hearings" by "giving full effect to what we did when we passed the law."[2] Others agreed that "there are many in the Legislature who feel like [*Bretherick*] was not the original intent of this law and it's time to address it."[3]

Retroactively abrogating *Bretherick*'s holding was well within the province of the Legislature and, indeed, was merely part of the expected give and take of multi-branch governance. As this Court has made abundantly clear, the Legislature is free to enact "remedial statutes" which "respond to recent decisions of the Supreme Court" misconstruing legislative intent. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994). To effectuate the Legislature's policy judgments, remedial statutes "are to be applied retrospectively and are to be applied to pending cases." *Alamo Rent-a-Car*, 632 So. 2d at 1358; *see also Arrow Air*, 645 So. 2d at 424 ("We have recognized that the presumption in favor of prospective application generally

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[2] Stmts. of Sen. Rob Bradley, Fla. Sen. R. Comm. (Feb. 9, 2017), *available at* http://thefloridachannel.org/videos/2917-senate-rules-committee/, at 1:16:49 – 1:17:53 (discussing CS/SB 128 (2017)).

[3] Stmts. of Sen Tom Lee, *id.* at 1:14:15-1:14:22 (same).

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.") (citation omitted).

Yet, as things stand, the Third District's decision frustrates the Legislature's efforts to accomplish that aim. In the meanwhile, there is no telling how many Florida citizens are awaiting trial who otherwise would be immune.

CONCLUSION

This Court should exercise its discretionary jurisdiction to review the important and pressing matter presented in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14-point Times New Roman.

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