

SC18-747

In the Supreme Court of Florida

TASHARA LOVE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT
Case No.: 3D17-2112

RESPONDENT'S BRIEF ON JURISDICTION

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
edward.wenger@myfloridalegal.com
marlon.weiss@myfloridalegal.com

PAMELA JO BONDI
Attorney General

AMIT AGARWAL (FBN 125637)
Solicitor General
EDWARD M. WENGER (FBN 85568)
Chief Deputy Solicitor General
MARLON J. WEISS (FBN 49057)
Assistant Attorney General

Counsel for the State of Florida

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS1

SUMMARY OF THE ARGUMENT5

ARGUMENT6

I. The Third District’s Decision Expressly And Directly Conflicts With A
Second District Decision On The Same Legal Question.6

II. Contrary To Love’s Assertion, The Third District’s Decision Does Not
Conflict With Any Other Precedent.8

III. The Conflict Between The District Courts Warrants This Court’s Review....9

CONCLUSION10

CERTIFICATE OF SERVICE12

CERTIFICATE OF COMPLIANCE.....13

TABLE OF CITATIONS

Cases

<i>Arrow Air, Inc. v. Walsh</i> , 645 So. 2d 422 (Fla. 1994)	8, 9
<i>Bretherick v. State</i> , 170 So. 3d 766 (Fla. 2015)	1
<i>Martin v. State</i> , No. 2D16-4468, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018)	passim
<i>Mathis v. State</i> , 12 So. 681 (1893)	7
<i>Mobley v. State</i> , 132 So. 3d 1160 (Fla. 3d DCA 2014)	3
<i>Old Port Cove Holdings v. Old Port Cove Condo Ass’n One</i> , 986 So. 2d 1279 (Fla. 2008)	9
<i>Ramcharitar v. Derosins</i> , 35 So. 3d 94 (Fla. 3d DCA 2010)	9
<i>Smiley v. State</i> , 966 So. 2d 330 (Fla. 2007)	6, 9
<i>State v. Martin</i> , No. SC18-789 (Fla.)	4
<i>Wainwright v. Taylor</i> , 476 So. 2d 669 (Fla. 1985)	6

Statutes

§ 776.032, Fla. Stat.	1, 4
ch. 2017-72, Laws of Fla. (2017)	1

Constitutional Provisions

Art. V, § 2, Fla. Const.	2
Art. V, § 3, Fla. Const.	5, 6, 8
Art. X, § 9, Fla. Const.	3, 4, 6, 7

STATEMENT OF THE CASE AND FACTS

This case arises out of an early-morning brawl involving Petitioner Tashara Love, her daughter, and several others outside of a nightclub on November 26, 2015. Pet. App. 3. At the end of the group altercation, Love shot the victim, Thomas Lane. *Id.* The State charged Love with one count of attempted second degree murder with a firearm. *Id.* Love sought immunity from prosecution by invoking Florida's Stand Your Ground law, section 776.032, Florida Statutes. *Id.* In particular, Love claimed that she acted out of fear for her daughter's life because Lane was about to hit her daughter at the time Love shot him. Pet. App. 3.

In June 2017, the Florida Legislature amended the Stand Your Ground law. *See* ch. 2017-72, § 1, Laws of Fla. (2017). Before this amendment, “the defendant [bore] the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing.” *Bretherick v. State*, 170 So. 3d 766, 775 (Fla. 2015). As relevant here, the amended statute now states: “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” § 776.032(4), Fla. Stat. In other words, the State must now *disprove*, by clear and

convincing evidence, a prima facie claim of Stand Your Ground immunity raised by a criminal defendant. *See* Pet. App. 4. The amendment took effect on June 9, 2017, more than one-and-a-half years after the incident that forms the basis for Love's immunity claim. *See id.*

At the immunity hearing, the Miami-Dade State Attorney argued that the Stand Your Ground amendment violated the rulemaking authority of this Court and thus contravened Article V, Section 2 of the Florida Constitution.¹ Pet. App. 4. She also argued that the amendment did not apply retroactively. *Id.* The circuit court concluded that the Stand Your Ground amendment violated the Florida Constitution and declined to apply it to Love's case. *Id.*

Applying the older scheme, the circuit court found that Love had failed to carry her burden of establishing by a preponderance of the evidence that she was entitled to Stand Your Ground immunity. *Id.* But, viewing as outcome determinative the question as to which party bears the burden of proof, the circuit court issued an alternate ruling that would apply if its decision was overturned on

¹ The Attorney General, who represents the State in criminal appeals before Florida's District Courts of Appeal and before this Court, takes the position that the Stand Your Ground amendment passes constitutional muster. The Third District agreed with that position, no other District Court of Appeal has held otherwise, and neither party asks this Court to review that aspect of the Third District's decision.

appeal. In its alternate ruling, the circuit court found that, should the amendment apply retroactively, Love would be entitled to immunity from prosecution because the State had failed to disprove Love's prima facie Stand Your Ground claim by the requisite clear and convincing evidence.

Love filed a writ of prohibition in the Third District,² which held that the Stand Your Ground amendment complied with the Florida Constitution. Pet. App. 5. It nonetheless denied Love's petition, holding that "the statute did not apply to Love's case because the crime she committed occurred before the amendment's effective date, and the statute has no retroactive application." *Id.* at 7. Explaining that Florida's Stand Your Ground amendment "imposed a new legal burden on the State," the Third District reasoned that amendment must be "treated as a substantive change in the law" that "does not apply retroactively." *Id.* at 8-9.

In further support of its holding, the Third District noted that "[t]he Florida Constitution imposes a restriction on retroactive application of criminal legislation," *id.* at 9—*i.e.*, Article X, Section 9, which provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed," Art. X, § 9, Fla. Const. The Third District concluded

² A petition for writ of prohibition is the proper method to review a trial court's denial of Stand Your Ground immunity. *Mobley v. State*, 132 So. 3d 1160, 1161 (Fla. 3d DCA 2014).

that Florida’s Stand Your Ground amendment “qualifies as a criminal statute because it affects whether the State can prosecute a defendant in the same manner as before.” Pet. App. 9. “Thus,” the Third District reasoned, “article X, section 9 of the Florida Constitution does not allow” the Stand Your Ground amendment “to be applied retroactively.” *Id.* at 10.

In reaching its holding, the Third District was “cognizant” of the Second District’s opinion in *Martin v. State*, No. 2D16-4468, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018), which, a week earlier, had arrived at the opposite conclusion—*i.e.*, that Florida’s Stand Your Ground amendment “is a procedural amendment that should be applied retroactively to all pending cases.” Pet. App. 6 n.3.³ Accordingly, the Third District certified conflict. *Id.* On May 11, 2018, Love

³ In so holding, the Second District “certif[ied] the following question of great public importance”:

IS THE 2017 AMENDMENT TO SECTION 776.032 OF THE FLORIDA STATUTES PROCEDURAL IN NATURE SUCH THAT THE AMENDMENT SHOULD BE APPLIED RETROACTIVELY TO CASES THAT WERE PENDING IN FLORIDA COURTS AT THE TIME OF THE AMENDMENT’S ENACTMENT?

Martin, 2018 WL 2074171, at *4. On May 17, 2018, the State filed its notice to invoke the discretionary jurisdiction of this Court in *Martin*. *See State v. Martin*, No. SC18-789 (Fla.). On June 8, 2018, the State filed a brief asking this Court to grant review in *Martin* to resolve the same conflict raised by Love.

filed a notice to invoke the discretionary jurisdiction of this Court under Article V, Sections 3(b)(3) and 3(b)(4) of the Florida Constitution.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review this case because there exist irreconcilable holdings between two Districts on the same question of law on a matter implicating criminal prosecutions throughout the State. The Third District, in the case below, held that the Stand Your Ground amendment “does not apply retroactively”—in particular, that it does not apply to crimes committed before the amendment’s effective date. This holding expressly and directly conflicts with the Second District’s decision in *Martin*, which held that the amendment applies to immunity claims based on conduct that took place prior to the amendment’s effective date, even if the defendant was convicted at trial before the amendment took effect. The State has already filed a separate jurisdictional brief asking this Court to resolve the disagreement between the lower courts by granting review in *Martin*. Accordingly, the State respectfully recommends that this Court grant review in *Martin* and hold this petition pending its disposition of *Martin*.

ARGUMENT

I. THE THIRD DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A SECOND DISTRICT DECISION ON THE SAME LEGAL QUESTION.

The State agrees with Love that this Court has discretion to review this case because it “expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law.” Art. V, § 3(b)(3), Fla. Const. The Third District’s decision regarding the retroactive effect of Florida’s Stand Your Ground law cannot be reconciled with the Second District’s resolution of the identical question in *Martin*. This Court should resolve that conflict.

Specifically, the Third District held that it must treat Florida’s Stand Your Ground amendment “as a substantive change in the law” that “does not apply retroactively.” Pet. App. 9. The Third District relied in part on this Court’s decision in *Smiley v. State*, 966 So. 2d 330 (Fla. 2007), which explained that a statute “imposing new legal burdens” is “treated as a substantive change in the law.” *Id.* at 334 (quoted in Pet. App. 8 (emphasis omitted)). In the Third District’s view, the amendment “imposed a new legal burden on the State,” and should be treated as a substantive change that does not apply retroactively. Pet. App. 8-9.

Moreover, according to the Third District, Article X, Section 9 of the Florida Constitution prevented it from applying the Stand Your Ground Amendment retroactively. In the Third District’s view, the amendment “qualifies as a criminal

statute because it affects whether the State can prosecute a defendant in the same manner as before.” Pet. App. 9. Because applying the Stand Your Ground amendment retroactively would mean that criminal defendants “could not be prosecuted in the same manner as before,” the Third District reasoned that “article X, section 9 of the Florida Constitution does not allow” Florida’s Stand Your Ground amendment “to be applied retroactively.” *Id.* at 10.

The Second District, in contrast, found that Florida’s Stand Your Ground amendment “is a procedural amendment” that “can be applied retrospectively.” *Martin*, 2018 WL 2074171, at *2. It reasoned that, “[i]n Florida, statutory changes to the burden of proof . . . are invariably deemed procedural in nature for purposes of retroactive application.” *Id.* In its view, “[n]either the substantive rights of a successful claim of immunity nor the necessary elements of proof to establish a claim of immunity were altered by the . . . amendment.” *Id.*

The Second District found no impediment to its holding in Article X, Section 9 of the Florida Constitution. According to the Second District, this constitutional provision “relates to the offense itself, or the punishment thereof, and not to the remedy or procedure” *Id.* at *2 n.5 (quoting *Mathis v. State*, 12 So. 681, 687 (1893)). “Being bound to conclude that the amendment was

procedural in nature,” the Second District considered itself similarly “bound to reject the State’s” Article X, Section 9 argument. *See id.*

As a result, courts of the Third District are forbidden from applying Florida’s Stand Your Ground amendment retroactively, while courts of the Second District must apply it retroactively to all pending cases. This constitutes the requisite “express and direct conflict” that the Court’s conflict jurisdiction is designed to resolve. *See* Art. V, § 3(b)(3), Fla. Const.

II. CONTRARY TO LOVE’S ASSERTION, THE THIRD DISTRICT’S DECISION DOES NOT CONFLICT WITH ANY OTHER PRECEDENT.

Although the State agrees that the Court should resolve the split, Love’s alternative basis for conflict jurisdiction—that “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* Pet’r’s Br. 5-7—is mistaken. Properly understood, the law at issue here is one “affecting substantive rights.” *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994).

Here, the Stand Your Ground amendment does not just change the quantum of proof. Rather, it also changes the party bearing the burden of persuasion, with respect to an immunity claim that may be invoked as a complete defense to criminal liability. Taken together, those changes “affect[.]” the “substantive rights, liabilities, [and] duties” implicated by the Stand Your Ground law. *See Arrow Air*,

Inc., 645 So. 2d at 425. Indeed, they work a transformation of Florida’s statutory immunity defense. Accordingly, the amendment should be “presumed to operate prospectively” “[i]n the absence of clear legislative intent to the contrary.”

Ramcharitar v. Derosins, 35 So. 3d 94, 98 (Fla. 3d DCA 2010) (quoting *Old Port Cove Holdings v. Old Port Cove Condo Ass’n One*, 986 So. 2d 1279, 1284 (Fla. 2008)); see *Smiley*, 966 So. 2d at 336. For this reason, the State disagrees with Love’s assertion that this case conflicts with any decision other than *Martin*.

III. THE CONFLICT BETWEEN THE DISTRICT COURTS WARRANTS THIS COURT’S REVIEW.

This Court has jurisdiction to review the express and direct conflict between the Second and Third Districts regarding the retroactivity *vel non* of the Stand Your Ground amendment. That conflict warrants this Court’s review.

As the Second District recognized, the retroactivity question “could impact a significant number of criminal proceedings.” *Martin*, 2018 WL 2074171, at *4.

There are many criminal defendants asserting Stand Your Ground claims that arose before the Stand Your Ground amendment’s operative date but whose cases remain pending. Those fortunate enough to pass through the Second District will enjoy the benefit of the new pro-defendant burden of proof, while those with cases in the Third District must labor under the old standard. In many instances, the burden-of-proof question is case dispositive; indeed, many circuit court judges (including the

judge in this case), unsure of whether the Stand Your Ground amendment applies retroactively, have resorted to issuing alternative orders—*i.e.*, one denying immunity if the defendant bears the burden of proof, and one granting immunity if the State bears the burden. As such decisions illustrate, the conflict between the district courts is important enough to warrant this Court's review.

For the reasons set forth in its jurisdictional brief in *Martin*, the State respectfully recommends that this Court resolve the conflict between the lower courts by granting review in that case. As the Second District recognized, the Florida Legislature amended the Stand Your Ground law after *Martin* had been tried and convicted by a jury as charged. For that reason, *Martin* squarely presents the question whether the recent Stand Your Ground amendment should apply retroactively even if doing so would invalidate a jury verdict rendered *before* the amendment took effect. Accordingly, granting review in *Martin* would afford the Court the opportunity to determine the full extent to which—and not just whether—that amendment should be construed to apply retroactively.

CONCLUSION

This Court should resolve the express and direct conflict between the district courts of appeal by granting review in *Martin* and holding this petition pending the disposition of that case.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Edward M. Wenger

AMIT AGARWAL (FBN 125637)

Solicitor General

EDWARD M. WENGER (FBN 85568)

Chief Deputy Solicitor General

Office of the Attorney General

The Capitol, PL-01

Tallahassee, Florida 32399-1050

(850) 414-3681

(850) 410-2672 (fax)

amit.agarwal@myfloridalegal.com

edward.wenger@myfloridalegal.com

Marlon J. Weiss (FBN 49057)

Assistant Attorney General

Office of the Attorney General

One SE Third Avenue, Suite 900

Miami, Florida 33131

(305) 377-5441

(305) 377-5655 (fax)

marlon.weiss@myfloridalegal.com

Counsel for State of Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 11th day of June 2018, to the following:

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit
1320 N.W. 14th Street
Miami, Florida 33125

MARIA E. LAUREDO (FBN 59412)
Chief Assistant Public Defender
JEFFREY PAUL DESOUSA (FBN 110951)
JOHN EDDY MORRISON (FBN 72222)
Assistant Public Defender
appellatedefender@pdmiami.com
jdesousa@pdmiami.com
(305) 545-1960

/s/ Edward M. Wenger
Edward M. Wenger

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Edward M. Wenger _____
Edward M. Wenger