IN THE SUPREME COURT OF FLORIDA

TASHARA LOVE,

Petitioner,

CASE NO. SC18-747

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICI CURIAE
FLORIDA PUBLIC DEFENDER ASSOCIATION
AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF THE PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Public Defender Association, Inc., ("FPDA") consists of elected public defenders who supervise hundreds of assistant public defenders and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members and staff have tremendous practical experience with clients in criminal cases. All FPDA members are deeply committed to promoting the interests of fairness and justice in the criminal law process. The FPDA has a particular interest in the petitioner's case because the outcome will have a significant impact on similar cases involving prosecutions in which there is a claim of immunity under section 776.032(4), Florida Statutes.

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization with more than 2,000 members, all of them criminal defense practitioners. FACDL is a nonprofit corporation with a purpose of assisting in the fair administration of the state's criminal justice system. Its participation in this case serves the organization's purpose by assisting the courts in reaching just results in cases involving defendants' claims of statutory immunity from prosecution for their lawful exercise of their right to self-defense.

SUMMARY OF THE ARGUMENT

I. The Court should disregard arguments by amicus groups asking this Court to rule section 776.032(4), Florida Statutes, unconstitutional. The provision's constitutional validity is not properly before the Court. Both in the district court and again here, the State has acknowledged that section 776.032(4) "passes constitutional muster." The Third DCA ruled the provision constitutional. No other district court has held to the contrary. Appellate courts uniformly decline to address issues raised by amici but rejected by the parties. Only the retroactivity of section 776.032(4) is properly before the Court. Expanding appellate litigation to encompass issues raised only by amici will impair courts' ability to fulfill their mission of resolving actual cases and controversy.

II. Section 776.032(4) does not infringe on this Court's constitutional authority to "adopt rules for the practice and procedure in all courts." Art. V, § 2(a), Fla. Const. The provision is an exercise of the Legislature's authority to prescribe procedures for implementing is substantive enactments. That power extends to apportioning burdens of proof, which the Legislature has done in dozens of statutes. Further, although section 776.032(4) abrogated *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015), which is constitutionally permissible, it did not conflict with any rule of court. Because the provision is a procedural enactment

intertwined with the substantive Stand Your Ground law enacted in 2005, it falls well within the scope of the Legislature's authority.

III. The FPDA and FACDL respectfully request this this Court approve the well-reasoned decision of the Second DCA and hold section 776.032(4) retroactive.

ARGUMENT

I. Because both parties agree with the Third District Court of Appeal that section 776.032(4), Florida Statutes, is a valid exercise of legislative authority, the constitutionality of the provision is not properly before the Court.

The Third DCA overturned the circuit court's ruling that the 2017 amendment creating section 776.032(4), Florida Statutes, violates the rulemaking authority vested in this Court by Article V, section 2(a) of the Florida Constitution. Although it argued in the circuit court that the provision is both nonretroactive and unconstitutional, the State abandoned the latter argument in the district court. It conceded there that "the recent amendment to the Stand Your Ground Law falls well within the scope of the Legislature's constitutional authority" and in this Court that the provision "passes constitutional muster." Resp. to Pet. for Writ of Proh., No 3D17-2112, at 1 (filed Nov. 27, 2017), Resp. Brief. on Jurisd. at 2 n.1 (filed June 11, 2018). The Third DCA agreed with Ms. Love's argument and the State's concession that the provision falls within the Legislature's constitutional power to legislate on procedural matters that are intertwined with substantive statutory provisions. As noted by the State in its jurisdictional brief in this Court, "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." Resp. Brief. on Jurisd. at 2 n.1.

In forgoing the constitutional challenge it mounted in the circuit court, the State has accepted the desire of the people of Florida, expressed through their elected representatives, that the courts vigorously enforce the Stand Your Ground law by placing the burden of proof in immunity hearings on the prosecution. Nonetheless, several groups have filed notices of intent to file amicus briefs asserting, contrary to the position of both parties, that the provision is unconstitutional.[1]

Appellate courts decline to address issues that the parties themselves have opted to forgo. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014); *Evans v. Georgia Reg'l Hosp.,* 850 F.3d 1248, 1257 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017); *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315 n.2 (Fla. 2016); *Reichmann v. State*, 966 So. 2d 298, 304 (Fla. 2007); *Michels v. Orange County Fire/Rescue*, 819 So. 2d 158, 159–60 (Fla. 1st DCA 2002). "Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented." *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994). As between the parties—including the State, which is party to every prosecution under Florida law—no controversy exists on the constitutionality of section 776.032(4).

1. The University of Miami School of Law Federal Appellate Clinic, the League of Prosecutors—Florida, Everytown for Guns Safety, and the Brady Center to Prevent Gun Violence.

Combined with the Third DCA ruling, the State's acknowledgement that section 776.032(4) is constitutional means that for offenses allegedly occurring after its June 9, 2017, effective date, trial judges statewide now require the prosecution to disprove prima facie immunity claims by clear and convincing evidence, presumably without objection. "[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). Regardless, this Court will receive amicus briefs which advance a position that is opposed by both parties, contrary to the holding of the only district court to reach the issue, and inconsistent with the burden of proof willingly borne by the State in immunity hearings now taking place throughout Florida on charges arising after June 9, 2017.

This Court rejected an attempt at a similar amicus intervention in *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015), the decision later abrogated by section 776.032(4). In *Bretherick*, amicus Florida Carry, Inc., argued that requiring a defendant to bear any burden in an immunity hearing under section 776.032 is unconstitutional. However, the issue was "not properly before" the Court because it was not raised by Bretherick. The Court adhered to the rule that an amicus "is not permitted to raise new issues that were not initially raised by the parties." *Id.* at 779 (citing *Reichmann*).

The arguments on the constitutionality of section 776.032(4) proposed by the amici groups whose briefs will follow the State's answer brief should receive the same treatment as Florida Carry's argument in *Bretherick.* Acceptance of amici's assertions will expand appellate litigation into a bloated smorgasbord of amicus interventions on matters tangential to the issues raised by the parties. In this case, Ms. Love will have to contend not only with the State on the retroactivity of section 776.032(4), but also with the amicus groups on the provision's constitutionality. Unless the focus of appellate litigation is limited to the issues as framed by the parties, appellate courts will be drafted into service as knights errant pulled away from their mission of resolving actual cases and controversies.

II. The Legislature's apportionment of the burden of proof in Stand Your Ground hearings is a valid exercise of its authority to implement its laws and does not violate this Court's constitutional authority to adopt rules regulating practice and procedure.

As explained above, the Court should decline to address the constitutionality of section 776.032(4) because neither party to this case is challenging the constitutionality of section 776.032(4). The discussion in this section of the brief is in the alternative and applicable only to the extent that the Court elects to depart from its previous practice of considering only the issues that have been presented by the parties.

As noted in the previous point, in finding section 776.032(4) constitutional, the Third DCA addressed an argument that the State made in the trial court but did not reprise on appeal—hence that court's concise analysis in reversing the trial court's decision that the provision violated this Court's exclusive authority to "adopt rules for the practice and procedure in all courts" under Article V, section 2(a) of the Florida Constitution. The Third DCA determined that the Legislature acted within its constitutional authority to (1) prescribe procedures governing the substantive right it established in enacting section 776.032 in 2005, (2) allocate the burden of proof in Stand Your Ground hearings, and (3) enact legislation free of

conflict with any rule of procedure. *Love v. State*, 2018 WL 2169980 (Fla. 3d DCA May 11, 2018), at *2.

All three facets of the Third DCA's holding comport with precedent. First, section 776.032(4) constitutes permissible procedural embroidery on the substantive Stand Your Ground law enacted in 2015. In *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010), and again in *Bretherick*, 170 So. 3d at 772, this Court recognized that the Stand Your Ground law adopted in 2005 created a substantive right of citizens to meet the threat of force with equal force without having to retreat. Section 776.032(1) creates immunity for persons lawfully standing their ground, and section 776.032(4) implements that right and is intertwined with it. "[T]he Legislature has the constitutional authority to enact procedural provisions that are intertwined with substantive rights." *Love*, 2018 WL 2169980, at *2 (citing *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000)). *See also Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987) (statutory provisions relating to settlement conferences, itemized verdicts, alternative methods for payment of future economic damages and attorney's fees were "directly related to the substantive statutory scheme and . . . do not violate the separation of powers clause of the Florida Constitution"); *Peninsular Properties Braden River, LLC v. City of Bradenton*, 965 So. 2d 160, 162 (Fla. 2d DCA 2007) ("Because the procedural tolling provision of subsection 70.51(10)(a) is intertwined with the remainder of

the statute, the circuit court erred in finding section 70.51(10)(a) unconstitutional."); *Kalway v. State*, 730 So. 2d 861, 862 (Fla. 1st DCA 1999) ("The procedural aspects of the law under examination in this case are minimal and do not void the statute, because they are intended to implement the substantive provisions of the law."). In each of those cases, the procedural aspects of a statute merely accompanied—and implemented—the substantive rights conferred by the statute.

Second, in enacting section 776.032(4), the Legislature exercised its authority to allocate burdens when implementing its enactments. In *State v. McEldowney*, 99 So. 3d 610 (Fla. 5th DCA 2010), the Fifth DCA upheld a provision specifying that production of a certificate that a speed measuring device used by a law enforcement officer was timely tested and working properly created a presumption to that effect. Although the provision appeared to affect the burden of production, it was "intimately intertwined with the legislature's substantive enactments" and therefore did not infringe on this Court's rulemaking authority. Legislation on burdens is commonplace. In her petition below, Ms. Love detailed "at least 100" statutes allocating the burden of proof in judicial proceedings, and many other statutes establishing rebuttable evidentiary presumptions, which also alter or shift the burden of proof. Pet. for Writ of Prohib., No. 3D17-2112, at 19, n.9 & 10 (filed Sept. 25, 2017).

Third, the Third DCA pointed to the lack of a court rule governing burdens of proof in immunity hearings under section 776.032. In the absence of legislation, *Bretherick* placed a burden of proof on the defendant to establish by a preponderance of the evidence entitlement to stand-your-ground immunity. However, the Court did not adopt a court rule. It does so rarely in non-rules cases (i.e., cases that are not before the Court pursuant to a proposed amendment to the Florida rules of procedure), and then explicitly and subject to revision following a comment period. *See, e.g., Kinney Sys., Inc. v. Cont'l Ins. Co.,* 674 So. 2d 86, 93 n. 6 (Fla. 1996) (adopting rule 1.061, "Forum Non Conveniens," as "a significant departure in existing court procedure"); *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993) (adopting rule 3.201 requiring notice of intent to rely on battered-spouse syndrome).

Thus, the Third DCA correctly followed controlling precedent in ruling the circuit court erred in finding that section 776.032(4) violates this Court's rulemaking power under Article V, section 2(a) of the Florida Constitution. If this Court reaches the issue despite the parties' continuing agreement that the provision is constitutional, it should hold that section 776.032(4) is a valid exercise of the Legislature's authority to implement substantive provisions in its enactments by apportioning burdens of proof.

III. The Second DCA correctly concluded in *Martin* that section 776.032(4) applies retroactively to all nonfinal cases.

This Court granted review to resolve certified interdistrict conflict on the retroactivity of section 776.032(4). The Second DCA ruled that the provision is a procedural change that applies retroactively to pending cases, including those on appeal. *Martin v. State*, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018), *stayed*, No. SC18-789 (June 18, 2018). In *Love*, the Third DCA held that the amendment applied only prospectively, that is, to prosecutions for crimes allegedly committed on or after its effective date. The FPDA and FACDL respectfully request that this Court approve the well-reasoned decision of the Second DCA in *Martin* and quash the Third DCA's decision in *Love*.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the FPDA and FACDL request that this Honorable Court reject fellow amici's constitutional challenge to section 776.032(4), quash the decision of the Third DCA in this case, and approve the determination of the Second DCA in *Martin* that the provision applies retroactively in nonfinal cases.

CERTIFICATES OF SERVICE AND FONT SIZE

Undersigned counsel certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Jeffrey Paul DeSousa, Esquire, 1320 N.W. 14th St., Miami, FL 33125; Amit Agarwal, Esquire, and Edward Wenger, Esquire, The Capitol, PL-01, Tallahassee, FL 32399-1050, and Marlon Weiss, Esquire, One S.E. Third Ave., Ste. 900, Miami, FL 33131, this 27th day of August, 2018. Undersigned counsel also certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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