

**IN THE SUPREME COURT OF FLORIDA**

**TASHARA LOVE,**

**Petitioner,**

**v.**

**STATE OF FLORIDA,**

**Respondent.**

**Case No. SC18-747**

**Third District Court of Appeal Case No. 3D-2112**

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**ON DISCRETIONARY REVIEW FROM  
THE THIRD DISTRICT COURT OF APPEAL**

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**SUPPLEMENTAL RECORD TO BRIEF OF AMICUS CURIAE LEAGUE  
OF PROSECUTORS - FLORIDA  
IN SUPPORT OF NEITHER PARTY ON THE ISSUE OF THE  
CONSTITUTIONALITY OF § 776.032(4), FLORIDA STATUTES (2017)  
AND IN SUPPORT OF THE RESPONDENT ON THE ISSUE OF THE  
RETROACTIVITY OF § 776.032(4), FLORIDA STATUTES (2017)**

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**Penny H. Brill  
Florida Bar No. 0305073  
Theodore F. Brill, PA  
8201 Peters Road, Suite 1000  
Plantation, FL 33324  
(954) 370-0800  
[penny.brillpa@gmail.com](mailto:penny.brillpa@gmail.com)**

**Counsel for League of Prosecutors – Florida**

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Respectfully submitted,

/s/ Penny H. Brill

PENNY H. BRILL  
Florida Bar No. 0305073  
Theodore F. Brill, PA  
8201 Peters Road, Suite 1000  
Plantation, FL 33324  
(954) 370-0800  
penny.brillpa@gmail.com  
Counsel for League of Prosecutors – Florida

**CERTIFICATE OF SERVICE**

Undersigned counsel certifies that a true and correct copy of the Supplemental Record on Appeal has been furnished by electronic service through the Florida Courts E-filing Portal on this 25th day of October, 2018 to the following:

Public Defender  
Eleventh Judicial Circuit of Florida  
1320 NW 14<sup>th</sup> Street  
Miami, FL 33125  
Maria F. Laredo  
Chief Assistant Public Defender  
Jeffrey Paul DeSousa  
Assistant Public Defender  
[appellatedefender@pdmiami.com](mailto:appellatedefender@pdmiami.com)  
[jdesousa@pdmiami.com](mailto:jdesousa@pdmiami.com)  
*Counsel for Petitioner*

Amit Agarwal  
Solicitor General  
[Amit.agarwal@myfloridalegal.com](mailto:Amit.agarwal@myfloridalegal.com)  
Edward M. Wenger  
Chief Deputy Solicitor General  
[Edward.wenger@myfloridalegal.com](mailto:Edward.wenger@myfloridalegal.com)  
Christopher J. Baum  
Deputy Solicitor General  
[Christopher.Baum@myfloridalegal.com](mailto:Christopher.Baum@myfloridalegal.com)  
Office of the Attorney General  
The Capitol, PL-01  
Tallahassee, FL 32399  
*Counsel for Respondent*

Marlon Weiss  
Assistant Attorney General  
[crimappmia@myfloridalegal.com](mailto:crimappmia@myfloridalegal.com)  
[marlon.weiss@myfloridalegal.com](mailto:marlon.weiss@myfloridalegal.com)  
Criminal Appeals Bureau  
Office of the Attorney General  
One SE Third Avenue, Suite 900  
Miami, FL 33131  
*Counsel for Respondent*

Harley Proctor, Esquire  
Davis Cooper, Esquire  
David H. Thompson, Esquire  
Cooper & Kirk, PLC  
1523 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
[hproctor@cooperkirk.com](mailto:hproctor@cooperkirk.com)  
[pdcooper@cooperkirk.com](mailto:pdcooper@cooperkirk.com)  
[dthompson@cooperkirk.com](mailto:dthompson@cooperkirk.com)  
*Counsel for Amicus Curiae*  
*NRA Freedom Action Foundation*

Jason Gonzalez, Esquire  
Shutts & Bowen LLP  
215 South Monroe Street, Suite 804  
Tallahassee, FL 32301  
[jasongonzalez@shutts.com](mailto:jasongonzalez@shutts.com)  
Stephen P. Halbrook, Esquire  
3925 Chain Bridge Road Suite 403  
Fairfax, VA 22030  
[protell@aol.com](mailto:protell@aol.com)  
*Counsel for Amicus Curiae*  
*Unified Sportsmen of Florida, Inc.*

Glen P. Gifford  
Assistant Public Defender  
301 Monroe Street, 32301 Suite 401  
Tallahassee FL 32301  
[Glen.gifford@flpd2.com](mailto:Glen.gifford@flpd2.com)  
Michael Ufferman, Esquire  
Michael Ufferman Law Firm, P.A.  
2022-1 Raymond Diehl Road  
Tallahassee, FL 32308  
[ufferman@uffermanlaw.com](mailto:ufferman@uffermanlaw.com)  
*Counsel for Amicus Curiae*  
*Florida Public Defenders Association and*  
*Florida Association of Criminal Defense Lawyers*

Ricardo J. Bascuas, Esquire  
Federal Appellate Clinic  
University of Miami School of Law  
1311 Miller Drive  
Coral Gables, FL 33146  
[r.bascuas@miami.edu](mailto:r.bascuas@miami.edu)  
*Counsel for Amicus Curiae*  
*University of Miami School of Law*  
*Federal Appellate Clinic*

Darren A. LaVerne, Esquire  
Daniel M. Ketani, Esquire  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, New York 10036  
[dlaverne@kramerlevin.com](mailto:dlaverne@kramerlevin.com)  
[dketani@kramerlevin.com](mailto:dketani@kramerlevin.com)  
*Counsel for Amicus Curiae*  
*Everytown for Gun Safety and*  
*Brady Center to Prevent Gun Violence*

Sean R. Santini, Esquire  
Santini Law  
1001 Brickell Bay Drive, Suite 2650  
Miami, FL 33131  
[ssantini@santinilawfirm.com](mailto:ssantini@santinilawfirm.com)  
*Counsel for Amicus Curiae*  
*Everytown for Gun Safety and*  
*Brady Center to Prevent Gun Violence*

Glenn Burhans, Jr., Esquire  
Kelly A. O'Keefe, Esquire  
Sterns Weaver Miller Weissler Alhadeff & Sitterson, P.A.  
Highpoint Center  
106 East College Avenue – Suite 700  
Tallahassee, FL 32301  
[gburhans@sternsweaver.com](mailto:gburhans@sternsweaver.com)  
[kokeefe@sternsweaver.com](mailto:kokeefe@sternsweaver.com)  
*Counsel for Amicus Curiae*  
*Giffords Law Center to Prevent Gun Violence*

Respectfully submitted,

/s/Penny H. Brill

Penny H. Brill, Esquire

Florida Bar No. 0305073

Theodore F. Brill, P.A.

8201 Peters Road, Suite 1000

Plantation, FL 33324

(954) 370-0800

penny.brillpa@gmail.com

*Counsel for Amicus Curiae League of  
Prosecutors – Florida*

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

**STATE OF FLORIDA,**

**CASE NO. F16-12827**

**Plaintiff,**

**v.**

**LILETHA RUTHERFORD,**

**Defendant.**

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**ORDER ON “STAND YOUR GROUND” HEARING**

**I. Introduction**

Defendant Liletha Rutherford, charged with the crimes of aggravated assault with a firearm and grand theft, seeks to assert that form of immunity commonly referred to as “Stand Your Ground.” For that purpose she demands a pretrial hearing; and claims that, at such a hearing, the burden of proof must be borne by the prosecution, and borne by clear and convincing evidence, to disentitle her to immunity. Before conducting such a hearing, I am obliged to consider whether the recent legislative changes purporting to alter the burden of proof at such hearings<sup>1</sup> are unconstitutional as violative of the doctrine of separation of powers.

**II. Florida’s “Stand Your Ground” Law**

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<sup>1</sup> Newly-enacted subsection (4) of Fla. Stat. § 776.032 provides:

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).

As I have written elsewhere:

Few legal principles are so venerable, or so universally accepted in the Anglo-American law, as that known as the “duty to retreat.” *See gen’ly Regina v. Smith*, (1837) 173 Eng. Rep. 441 (K.B.); *Regina v. Bull*, (1839) 173 Eng. Rep. 723 (K.B.). Of course the law recognizes every man’s right of self-defense, but “[t]he law of self-defense requires everyone to avoid killing when possible and to retreat, if necessary and consistent with his own safety[,] before taking life.” *Harris v. State*, 104 So.2d 739, 743 (Fla. 2d DCA 1958). Although “a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm,” *Weiland v. State*, 732 So.2d 1044, 1049 (Fla. 1999), “a person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger, including retreat.” *Id.* The reason for the rule is so apparent that it is seldom stated: Retreating from the prospect of combat may cause a man to think less of himself, or cause others to think less of him; but not retreating may cause permanent injury or death. As between the two outcomes, the common law was more concerned with wounded bodies than with wounded feelings.

*State v. Wyche*, 19 Fla. L. Weekly Supp. 463a, \*1 (Fla. 11th Cir. 2012) (fn. omitted), (citing *State v. Shaw*, 441 A.2d 561, 565 (Conn. 1981); *People v. Canales*, 624 N.W.2d 918, 919 (Mich. 2001) (citing *Pond v. People*, 8 Mich. 150 (1860))).

To the duty to retreat the common law made an exception. “Florida has long recognized the venerable ‘castle doctrine’ ... [*i.e.*,] that a person’s dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection.” *Falco v. State*, 407 So.2d 203, 208 (Fla. 1981) (citing *Peele v. State*, 20 So.2d 120 (Fla. 1944); *Russell v. State*, 54 So. 360 (Fla. 1911); *Wilson v. State*, 11 So. 556 (Fla. 1892)); *see also Alday v. State*, 57 So.2d 333 (Fla. 1952); *Danford v. State*, 43 So. 593 (Fla. 1907). “It is not now and never has been the law that a man assailed in his own

dwelling is bound to retreat. If assailed there, he may stand his ground.” *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (Cardozo, J.) This is so because retreat “is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.” *Tomlins*, 107 N.E. at 497.

In a sharp break with these time-honored principles, “the Florida Legislature enacted in 2005 what has been popularly ... referred to as the ‘Stand Your Ground’ law.” *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008). “This law, as codified [in Fla. Stat. § 776.032], provides that a person who uses force as permitted in § 776.01[2] is justified in using such force and is immune from criminal prosecution as well as civil action for the use of such force.” *Peterson*, 983 So.2d at 29.

In the situations to which it applies, the ‘Stand Your Ground’ law abrogates the duty to retreat. In effect, it moves the ‘castle doctrine’ out of the castle and into the street. The neighborhood bar, the street corner, the left-field bleachers of the ballpark – all these become every man’s castle, where he may stand his ground and meet force or the threat of force with force.

*Wyche*, 19 Fla. L. Weekly Supp. at \*2.

Apart from abrogating the duty to retreat in cases to which it applies, the “Stand Your Ground” law worked another profound change with respect to claims of self-defense. Traditionally such defenses, like all recognized defenses to crimes, were presented to the trier of fact at trial. But the “Stand Your Ground” law contemplates that the defendant who asserts it may never be tried at all. Her claim, if meritorious, vests her with transactional immunity from prosecution. Although

Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, § 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial.

Section 776.032(1) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.

*Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010). In *Dennis*, the Supreme Court held that the procedural vehicle by which a defendant may vindicate his “substantive right to not be arrested, detained, charged, or prosecuted” is a pretrial motion<sup>2</sup> and hearing. In *Bretherick v. State*, 170 So.3d 766 (Fla. 2015), the Supreme Court filled in the procedural particulars of how that hearing is to be conducted.

*Bretherick* came before the court on a certified question of great public importance from the Fifth District: “Once the defense satisfies the initial burden of raising the [Stand Your Ground] issue, does the state have the burden of disproving a defendant’s entitlement to self-defense immunity at a pretrial hearing as it does at trial?” *Bretherick*, 170 So.3d at 768. The

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<sup>2</sup> Dennis’s motion was “filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(3).” *Dennis*, 51 So.3d at 458. Rule 3.190(c)(3) provides that a defendant in a criminal case may at any time make, and the “court may at any time entertain[,] a motion to dismiss” on the grounds that the “defendant is charged with an offense for which the defendant previously has been granted immunity.” The defendant who makes a “Stand Your Ground” claim asserts that, as a matter of statute law, he “previously” – *i.e.*, by previous legislative enactment – “has been granted immunity.”

Later in *Dennis* there is *dictum* suggesting that “Stand Your Ground” motions are brought pursuant to Rule 3.190(b). If that is so, the defendant’s present motion, and likely all “Stand Your Ground” motions, will be denied as waived. Fla. R. Crim. P. 3.190( c) provides that, “Unless the court grants further time, the defendant shall move to dismiss ... either before or at arraignment” and that “every ground for a motion to dismiss that is not presented by a motion to dismiss [at arraignment, or within such time as is granted by the court at arraignment] shall be considered waived.” In the case at bar, as is typical in such cases, months passed between the time of defendant’s arrest (which occurred in September of last year) and the filing of his “Stand Your Ground” motion (in May of this year). If “Stand Your Ground” motions are *not* brought pursuant to Rule 3.190( c), they will often be – and the motion in the present case surely is – untimely.

court concluded that, “the defendant bears the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing.” *Id.*

This was entirely in keeping with settled practice. The law invariably places the burden of establishing entitlement to any form of immunity on the claimant, rather than placing the burden of establishing disentitlement to immunity on the opponent of the claim. *Id.* at 769 (placing burden on “Stand Your Ground” claimant consistent “with the procedure for resolving motions to dismiss involving other types of statutory immunity”). *See, e.g., United States v. Noriega*, 746 F. Supp. 1506, 1522 (S.D. Fla. 1990) (with respect to assertion of sovereign immunity, “Defendant [bears the] burden of proof on the issue”); *Junior v. Reed*, 693 So.2d 586, 589-90 (Fla. 1st DCA 1997) (citing *Butz v. Economou*, 438 U.S. 478 (1978) and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)) (“The burden of establishing a claim of absolute immunity [to suit under 42 U.S.C. 1983] is on the public official claiming the immunity”); *Diallo v. State*, 994 A.2d 820, 829 (Md. Ct. App. 2010) (citing *Burns v. Reed*, 500 U.S. 478 (1991)) (“The individual claiming [diplomatic] immunity from prosecution bears the burden of showing that he or she is entitled to immunity”); *Carnell v. Arkansas Elder Outreach of Little Rock, Inc.*, 425 S.W.3d 787, 792 (Ark. Ct. App. 2013) (“The burden of pleading and proving ... charitable immunity, is on the party asserting it”). “Stand Your Ground” excepted, Florida law no longer recognizes transactional immunity. *See Fla. Stat. § 914.04; Novo v. Scott*, 438 So.2d 477 (Fla. 3d DCA 1983) (Florida law presently recognizes use and derivative use immunity only). But four decades and more ago, transactional immunity was the norm in Florida – and the burden of proof with respect to it was always placed on the claimant. *See, e.g., State v. Toogood*, 349 So.2d 1203 (Fla.

2d DCA 1977); *State v. Montgomery*, 310 So.2d 440 (Fla. 3d DCA 1975).

The *Bretherick* court found that the traditional procedure of placing the burden of proof on the party asserting a form of immunity was appropriate, perhaps especially so, with respect to “Stand Your Ground” immunity:

Placing the burden on the State beyond a reasonable doubt would provide no disincentive for a defendant to file a motion to dismiss in order to obtain a complete preview of the State’s entire case, including its rebuttal of the defendant’s potentially meritless argument – which may not be supported by any evidence – that the use of force was justified. If, at the pretrial stage of litigation, the State did not possess all the evidence to refute the alleged justifications for a defendant’s use of force, the defendant would be found immune from prosecution because the State could not disprove the justifications for the use of force beyond a reasonable doubt. The State has aptly described the result: “a process fraught with potential for abuse.”

Requiring the State to prove its case twice would also cause a tremendous expenditure of time and resources. Undoubtedly, interests in practicality, expense, and judicial economy do not outweigh the defendant’s right to a fair determination of guilt or innocence. ... However, the defendant’s opportunity for a fair determination of guilt or innocence is not diminished by placing upon him or her the burden of proof at the pretrial stage, as the State still has to prove its case and all of the elements of the crime beyond a reasonable doubt at trial.

*Bretherick*, 170 So.3d at 777-78.

The procedural law created by the Supreme Court in *Bretherick* is readily understood and applied, and has been in place continuously since *Bretherick* was decided.<sup>3</sup> The statutory change at issue here, however, displaces that law. It purports to shift the burden of proof at a pretrial hearing on a “Stand Your Ground” claim from the defendant to the prosecution; and to elevate

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<sup>3</sup> Actually, it was in place well before *Bretherick* was decided. See *infra* at n. 4.

that burden to require clear and convincing evidence.

### III. Florida's version of separation of powers

The version of the doctrine of separation of powers reflected in Florida's constitution differs in a number of respects from that implied by the Constitution of the United States. One instance of that difference is found in Art. V § 2(a), which provides:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The foregoing language is generally understood to mean that the legislature makes substantive law, but that the judiciary makes procedural law. *See, e.g., Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000) (“Generally, the Legislature has the power to enact substantive law, while the [Florida Supreme] Court has the power to enact procedural law”).

The legislative changes at issue here purport to alter in two ways the burden of proof at a “Stand Your Ground” hearing. The burden of persuasion is shifted from the movant – the criminal defendant claiming immunity – to the State. And the quantum of proof is altered from mere preponderance of the evidence to clear and convincing evidence. Because questions of burden of proof are procedural rather than substantive, however, I necessarily find the demised

legislative changes to be unconstitutional. *See* Fla. Const. Art. II § 3 (prohibiting one branch of government from exercising powers consigned to another branch).

### Substantive law

has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure “encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.” It is the method of conducting litigation involving rights and corresponding defenses.

*Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla.1991) (quoting *In re Fla. Rules of Crim. Pro.*, 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring))

“Conceptually speaking, a burden of proof is the measurement by which a fact-finder processes evidence to determine whether the elements of a crime, claim, or defense have been proven.” *In the Interest of A.W. and S.W.*, 184 So.3d 1179, 1182 (Fla. 2d DCA 2015). Florida courts universally recognize that, “[b]urden of proof requirements are procedural in nature.” *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239, 243 (Fla. 1977) (quoting *Ex parte Collett*, 337 U.S. 55, 71 (1949)); *Kenz v. Miami-Dade County*, 116 So.3d 461, 464 (Fla. 3d DCA 2013) (“under Florida case law, issues relating to a party’s burden of proof are generally procedural matters”). *See also Shaps v. Provident Life & Accident Ins. Co.*, 826 So.2d 250, 254 (Fla. 2002).

The issue at bar illustrates the point. As noted *supra*, in *Dennis*, the Supreme Court of Florida explained that the “Stand Your Ground” law “expressly grants defendants a substantive

*right* to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.” *Dennis*, 51 So.3d at 462 (emphasis added). The legislature having thus engaged in the making of substantive law, the Supreme Court very properly engaged in the making of procedural law to afford means to vindicate the substantive right. That procedural law directed a “Stand Your Ground” movant to proceed by pretrial motion and hearing, at which hearing he was to shoulder the burden of proof by a preponderance of the evidence to show that he was entitled to the immunity contemplated by the statute. The immunity itself is substantive. The allocation of the burden of proof is procedural. That allocation has been in place since at least the time of the *Bretherick* decision in mid-2015.<sup>4</sup>

As noted, the legislature’s law-making power is as to substantive law. Other than by the means provided in Art V § 2(a), *viz.*, a two-thirds supermajority override, it cannot make procedural law or countermand the judicial branch’s procedural law-making. And this is true whether a judicially-propounded procedural “rule” actually takes the form of a rule – *e.g.*, an addition or amendment to the Florida Rules of Criminal Procedure – or comes in the form of decisional law. This point was recently illustrated in connection with the law governing the admissibility of scientific or expert evidence in the courts of Florida.

The so-called “*Frye* standard” for the admission of novel scientific evidence, *see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), has been the accepted law in Florida since at least

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<sup>4</sup> Arguably the allocation of burden of proof has been in place since *Dennis*, decided in 2010. As the court noted in *Bretherick*, it was doing no more than “mak[ing] explicit what was implicit in *Dennis* – the defendant bears the burden of proof by a preponderance of the evidence at the pretrial evidentiary hearing. This is the conclusion reached by every Florida appellate court to consider this issue both before and after *Dennis*,” *Bretherick*, 170 So.3d at 768-69, including *Peterson*, *supra*, decided in 2008.

the 1980's, *see, e.g., Stokes v. State*, 548 So.2d 188 (Fla. 1989); *Bundy v. State*, 471 So.2d 9 (Fla. 1985), and arguably longer even than that.<sup>5</sup> In 2013, the Florida legislature amended the Florida Evidence Code to adopt instead the “*Daubert* standard,” *see Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Ch. 2013-107, Law of Florida, amending Fla. Stat. §§ 90.702 and 90.704. In *In Re: Amendments to the Florida Evidence Code*, \_\_\_ So.3d \_\_\_ (Fla., Feb. 16, 2017), however, the Florida Supreme Court “declined to adopt, to the extent they are procedural, the changes to sections 90.702 and 90.704 of the Evidence Code made by the *Daubert* Amendment.” *Id.* at \_\_\_.

Although *Frye* had long been the law of Florida, it had never been formally codified in any rule of procedure. Sections 90.702 and 90.704 of the Evidence Code made no reference to *Frye*. But *Frye* was nonetheless part of the procedural law of Florida. To the extent that changes made to statute law by the *Daubert* amendment were procedural in nature, the Florida Supreme Court could, and did, reject those changes.

The analogy to the case at bar, although imperfect, is apt. True, *Frye* had been in place for decades, while the Supreme-Court-created procedure for the adjudication of “Stand Your Ground” claims has been in place for only a few years. But Art. V of the Florida Constitution does not bar the legislature from altering *ancient* procedural law – it bars the legislature from altering procedural law, ancient or otherwise. And if the extent of reliance on a settled mode of

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<sup>5</sup> *Frye* made its first appearance in Florida law in *Kaminski v. State*, 63 So.2d 339 (Fla. 1953). *Kaminski* involved the question whether a witness could be asked if he had taken, or been willing to take, a lie detector test. In the course of resolving that question, the Court made reference to *Frye* for the proposition that lie-detector test results themselves were inadmissible. *Kaminski*, 63 So.2d at 340. Prior to the 1980's, *Frye* had been cited three times in Florida jurisprudence: in *Kaminski*, in *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), and in *Johnson v. State*, 166 So.2d 798 (Fla. 2d DCA 1964).

procedure is the issue, it is almost certainly the case that hundreds and hundreds of “Stand Your Ground” claims have been litigated in Florida pursuant to the practices set forth in *Dennis* and *Bretherick*. The judges of Florida’s criminal courts received few *Daubert* challenges and receive few *Frye* challenges; but “Stand Your Ground” motions are a staple of the criminal docket.

True, the Supreme Court rejected the *Daubert* amendment not merely because it was procedural in nature, but because it may be unconstitutional on other grounds as well. But Art. II § 3, which bars one branch of government from exercising powers consigned to another branch, applies whether the law change contemplated by the overreaching branch of government is constitutional in its content or otherwise. It applies whether the purposes of the overreaching branch of government are benign or otherwise. It applies even when its application prevents a seemingly salutary change in law from becoming law. It applies in such cases because experience with government has shown that any momentary benefit expected from a change in law is usually outweighed by the lasting detriment resulting from a change in our constitutional system of checks and balances. It applies in such cases because the principle of separation of powers protects Floridians from those centripetal forces that might otherwise enable one branch of government from trenching first upon the powers of the other branches, and then upon the rights of the people. Exaggerating for effect, Madison wrote, “The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”

James Madison, Federalist No. 48.<sup>6</sup>

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<sup>6</sup> *And see* Federalist No. 47: “The accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” For a more modern expression of the same concern, see Colette Spanyol, *Harry Potter and the Separation of Powers: A Law and Literature Review of J.K. Rowling’s Harry Potter and the Order of the*

True, the opinion of the Florida Supreme Court in *In Re: Amendments to the Florida Evidence Code* is cast in conditional language. A final determination of the rejection of *Daubert* and the preservation of *Frye* will have to await an actual case. But there is no such limitation here. The case at bar presents forthrightly the issue whether the newly-enacted subsection (4) of Fla. Stat. § 776.032 is unconstitutional because procedural, in that it purports to re-allocate the burden and quantum of proof.

Whatever the merits or demerits of the *Frye/Daubert* analogy to the issue at bar, it is irrefragably settled that forms of practice and procedure put in place by the Supreme Court of Florida, whether formally reduced to a numbered rule of criminal procedure or not, are procedural for purposes of the distinction between substantive and procedural law-making powers codified in Fla. Const. Art. V § 2. On any number of occasions the Supreme Court has announced a change in adjective law that was later, sometimes much later, formalized as a rule of criminal, or civil, procedure. In *State v. Harris*, 881 So.2d 1079 (Fla. 2004), for example, the Supreme Court held that the change-of-plea colloquy appearing in Fla.R.Crim.P. 3.172 should be modified to include an advisement to defendants of the prospect of civil commitment for sex crimes. *Harris*, 881 at 1085 n.5. From and after the decision in *Harris*, Florida trial-level judges included such an advisement in their change-of-plea colloquies. But the rule itself was not amended till the following year. See *In Re Amendments to Fla.R.Crim.P. 3.172*, 911 So.2d 763 (Fla. 2005). Surely no one would claim that between the time *Harris* issued and the time the rule change was formalized, the change in law was substantive and within the competence of the

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*Phoenix*. Hertfordshire Law Journal 3(1), 12-16  
<http://www.law.leeds.ac.uk/assets/files/events/spanyol-hp.pdf> .

legislature to alter, but that from and after the rule amendment the change was procedural and within the exclusive bailiwick of the court. Long before *Padilla v. Kentucky*, 559 U.S. 356 (2010) the Florida Supreme Court had determined that defendants pleading guilty (or *nolo contendere*) should be informed of the potential deportation consequences of their pleas. *State v. Ginebra*, 511 So.2d 960 (Fla. 1987). Rule 3.172 was later amended to reflect that ruling. *In Re Amendments to Florida Rules of Criminal Procedure*, 536 So.2d 992, 992 (Fla. 1988). But the amendment did not transform something that had been substantive into something that was procedural. *Ginebra* was as much the *procedural* law of Florida before the amendment to the rule as it was afterward. To the same effect see *State v. Bowen*, 698 So.2d 248, 252 (Fla. 1997) (Wells, J., concurring); *Kinney System, Inc. v. Continental Insurance Co.*, 674 So.2d 86 (Fla. 1996) (creating, as a temporary measure, the procedure that would later be permanently codified as Fla.R.Civ.P. 1.061); *State v. Hickson*, 630 So.2d 172 (Fla. 1994) (creating, as a temporary measure, the procedure that would later be permanently codified as Fla.R.Crim.P. 3.201). In 1969 the Florida Supreme Court clarified the procedures to be employed for service of process when a party challenges a statute on the grounds of violation of the “single subject” provision of Fla. Const. Art. III § 6 (“Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title”). *Mayo v. National Truck Brokers, Inc.*, 220 So.2d 11 (Fla. 1969). The doctrine of *Mayo* was codified as Fla.R.Civ.P. 1.071 in 2010 – some *four decades later*. But that codification did not change that doctrine’s place on the substantive/procedural axis. It was procedural (albeit decisional) law when the Supreme Court propounded it in 1969, and it remained procedural (albeit rule-based) law when it was codified in 2010.

The procedure formulated by Florida courts for the adjudication of “Stand Your Ground” claims – formulated in *Peterson* in 2008, in *Dennis* in 2010, and in *Bretherick* in 2015 – although never formally reduced to a numbered rule is nonetheless procedural for purposes of Art. V § 2. As a matter of constitutional separation of powers, that procedure cannot be legislatively modified.<sup>7</sup>

#### IV. Conclusion

The statutory alterations in the burden and standard of proof in “Stand Your Ground” cases are, as set forth hereinabove, unconstitutional. The hearing in the case at bar will be conducted according to the procedural law propounded by the Florida Supreme Court, *viz.*, the burden of both production and persuasion will be on the claimant to establish by a preponderance of the evidence her entitlement to “Stand Your Ground” immunity.

SO ORDERED, in chambers in Miami, Miami-Dade County, Florida, this 3 day of July, 2017.

  
MILTON HIRSCH  
CIRCUIT COURT JUDGE

Copies to:  
All counsel of record

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<sup>7</sup>The Supreme Court’s enactment of procedural law can be overruled by a supermajority vote of two-thirds of each house of the legislature. Fla. Const. Art. V. § 2(a). The legislative changes at issue here, however, were not the product of such a supermajority vote. See [http://www.flsenate.gov/Session/Bill/2017/128/Vote/SenateVote\\_s00128e1062.PDF](http://www.flsenate.gov/Session/Bill/2017/128/Vote/SenateVote_s00128e1062.PDF) (senate) and [http://www.flsenate.gov/Session/Bill/2017/128/Vote/HouseVote\\_s00128e1098.PDF](http://www.flsenate.gov/Session/Bill/2017/128/Vote/HouseVote_s00128e1098.PDF) (house).

IN THE CIRCUIT COURT OF THE 11<sup>th</sup>  
JUDICIAL CIRCUIT IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

RENE C. TOIRAN,

Defendant.

CRIMINAL DIVISION  
CASE NO.: F15-000836

**ORDER RE: STAND YOUR  
GROUND IMMUNITY**

**I. INTRODUCTION**

On February 3, 2015 Defendant René Toiran (“Defendant” or “Toiran”) was charged by information with the crime of murder in the second-degree. The crime alleged occurred on January 1, 2015. Toiran claims “stand your ground” immunity and has moved for dismissal pursuant to §776. 032, Fla. Stat. (2015).

As part of its 2017 session the Legislature passed CS/SB128, a bill that was signed into law by the Governor on June 9, 2017, and which became effective on that date. This legislation adds a new subsection (4) to Florida Statute §776. 032, which provides:

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).

This newly added provision was clearly intended to override and displace the majority opinion in *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015), holding that the burden of proof in pretrial immunity hearing rests within the defendant who is required to demonstrate an entitlement to immunity by a preponderance of the evidence, and in accordance with the procedure set forth in Fla. R. Crim. P. 3.190. The newly enacted statute now mandates that: (a) the “burden of proof” be borne by the prosecution; and (b) that the prosecution prove – by “clear and convincing evidence” – that a defendant is *not* entitled to immunity.”<sup>1</sup>

Defendant insists that his pending “stand your ground” dismissal motion should be decided at a hearing employing the protocol adopted pursuant to this new legislation, and that the State should be put to the task of proving – by clear and convincing evidence – that he is undeserving of immunity. The State disagrees and insists that the statute cannot be applied in the prosecution of a crime committed before its effective date, and that the statute is unconstitutional as violation of the separation of powers doctrine.<sup>2</sup> The parties have thoroughly briefed these issues and the Court entertained oral argument on July 3, 2017. The matter is now ripe for

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<sup>1</sup> Clear and convincing evidence is defined as an “intermediate level of proof [which] entails both a qualitative and quantitative standard. The evidence must be credible, the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy” *Inquiry Concerning Davey*, 645 So. 2d 398 (Fla. 1994).

<sup>2</sup> This latter claim was recently embraced by the Honorable Milton Hirsch. See *State v. Rutherford*, Case No. F16-12827, “Order on ‘Stand Your Ground’ Hearing.” For reasons discussed in *infra*, this Court does not agree with its esteemed colleague and believes that this garden variety “burden of proof” provision – imbedded within and implementing the substantive “stand your ground” statute – is constitutional.

disposition. For reasons explained herein, the Court concludes that while this newly enacted amendment is constitutional, it may not be applied in a case – such as this – which is based upon events that antedate its enactment.

## **II. FLORIDA STAND YOUR GROUND IMMUNITY**

In 2005 our Legislature enacted what is colloquially referred to as the “stand your ground” statute. Codified in Florida Statute §776. 032, the statute provides immunity from prosecution, as well as from civil liability, to any person justified in using force as permitted by §776.01(2). The statute alters the common law in two material respects. First, where applicable it abrogates the common law “duty to retreat,” thereby extending the so-called “castle doctrine” beyond the confines of one’s home. *See, e.g., Falco v. State*, 407 So. 2d 203 (Fla. 1981) (“Florida has long recognized the venerable ‘castle doctrine’ which stands for the proposition that a person's dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection”). Secondly, the “stand your ground” statute provides more – indeed far more – protection to an accused than does a traditional claim of self-defense; the reason being that the stand your ground law – when triggered – grants a defendant “a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force,” *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010); a right that can be vindicated via a pretrial motion. *Id.*

Though the Legislature's desire to provide certain actors immunity from prosecution was clear, it left a gaping statutory hole by ignoring the related questions of: (a) which party would bear the burden of proof on the issue of self-defense immunity, and (b) what quantum of evidence the party bearing that burden would be required to present. As the statute was silent on these obviously material points, those issues were quickly litigated. Eventually the first question (who bore the burden of proof) was presented to our Supreme Court on a certified question of great public importance: "once the defense satisfies the initial burden of raising the issue, does the state have the burden of disproving a defendant's entitlement to self-defense immunity at a pretrial hearing as it does at trial." *Bretherick at 170 So. 3d 768.*

In addressing this question our Supreme Court initially – and repeatedly – observed that it was required to fill this gaping hole by default because the Legislature had abjectly failed to do so. Then, and *only* after recognizing "that the statute was silent as to how to best effectuate the defendant's substantive right to this immunity," and that no indicia of legislative intent could be found, the court held that pretrial motions to dismiss based upon immunity should be treated the same as other pretrial motions to dismiss brought under Fla. Crim. P. 3.190(c)(3), and that the party asserting the defense (i.e., the accused) should bear "burden to proof... by a preponderance of the evidence at the pretrial evidentiary hearing." *Bretherick, 170*

So. 3d at 772, 779. This protocol was appropriate – according to the *Bretherick* majority – because:

Placing the pretrial burden on the State beyond a reasonable doubt would provide no disincentive for a defendant to file a motion to dismiss in order to obtain a complete preview of the State's entire case, including its rebuttal of the defendant's potentially meritless argument—which may not be supported by any evidence—that the use of force was justified. If, at the pretrial stage of litigation, the State did not possess all the evidence to refute the alleged justifications for a defendant's use of force, the defendant would be found immune from prosecution because the State could not disprove the justifications for the use of force beyond a reasonable doubt. The State has aptly described the result: “a process fraught with potential for abuse.”

Requiring the State to prove its case twice would also cause a tremendous expenditure of time and resources. Undoubtedly, interests in practicality, expense, and judicial economy do not outweigh the defendant's right to a fair determination of guilt or innocence. *See State v. Williams*, 453 So.2d 824, 825 (Fla.1984). However, the defendant's opportunity for a fair determination of guilt or innocence is not diminished by placing upon him or her the burden of proof at the pretrial stage, as the State still has to prove its case and all of the elements of the crime beyond a reasonable doubt at trial.

*Bretherick*, 170 So. 3d 777-778. Justice Canady disagreed, writing that:

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. There is no reason to believe that the Legislature intended for a defendant to be denied immunity and subjected to trial when that defendant would be entitled to acquittal at trial on the basis of a Stand Your Ground defense. But the majority's decision here guarantees that certain defendants who would be entitled to acquittal at trial will nonetheless be deprived of immunity from trial.

*Id.* at 780.

The legislature obviously found Justice Canady more persuasive and passed § 776.032(4) in order to align the stand your ground statute with his dissent. And the newly enacted amendment could not be clearer in shifting the burden to the State and in requiring it to prove – by clear and convincing evidence – that an accused is undeserving of immunity.

As the majority opinion and dissent in *Bretherick* illustrate, the questions answered by the new amendment to our stand your ground statute are no doubt fairly debatable. Many would argue – perhaps persuasively – that it is “unfair” to place this extraordinary burden of proof on the State, as in many stand your ground cases the critical facts bearing on a claim of immunity are known only to the defendant, particularly if the alleged victim is deceased. But the wisdom of this legislation is not subject to judicial hindsight or second-guessing. *See* Benjamin N. Cardozo, *The Paradoxes of Legal Science* 125 (1928) (“[W]hen the legislature has spoken, and declared one interest superior to another, a court must subordinate her personal belief to that so declared”); *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (“[a]s we have said time and again, the making of social policy is a matter within the purview of the legislature—not this Court”). This Court’s duty is to apply the law – as plainly written – *unless* it does not attach in a case involving a crime that predates its enactment, or it is otherwise unconstitutional.

### **III. RETROACTIVITY**

#### **A. The Parties' Positions**

The State first argues that the recently enacted amendment “does not apply retroactively and does not affect pending cases where the crimes were committed prior to its enactment.” *See* State Memorandum, p. 3. This is so – says the state – because “the legislative enactment has not expressed intent for the retroactive application thereof,” and that while “[b]urden of proof standards are normally considered procedural,” even if “deemed remedial or procedural... a statute that acknowledges a ‘remedial purpose by creating substantive new rights or imposing new legal burdens’ is treated as a substantive change in the law” and may not be given retroactive application. *Id.* pp 3-4. Put simply, the State maintains that even though the new statute is “procedural” (a position it must assert in order to advance the claim the statute violates the separation of powers doctrine and is thus unconstitutional) it should be “treated as substantive” for the “purpose of determining retroactive application.” *Id.* p. 5, citing *Smiley v. State*, 966 So. 2d 330 (Fla. 2007).

Defendant likewise suggests that this newly enacted amendment is “procedural.” But in his view it should be found “immediately applicable to pending cases” because “[n]o one has a vested right in any given mode procedure.” Defendant’s Memoradum, p. 6, citing *Vill. of El Portal v. City of Miami Shores*, 362

So. 2d 275 (Fla. 1978). According to Defendant this “amendment” is “procedural law” because it does not create, define or regulate rights, or declare what acts are crimes or prescribe punishment. Rather, it is merely part of “the legal machinery by which substantive law is made effective.” Def. Memo, p. 6, citing *State v. Garcia*, 229 So. 2d 236 (Fla. 1969). So this amendment is – says the Defendant – the type of statute that is generally held applicable to all pending cases. See *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985).

### **B. Governing Law**

In this Court’s opinion there are few areas of jurisprudence more esoteric and confusing than the question of when a statute should be applied in a case that factually matured prior to its enactment. Indeed, navigating these waters can – to put it bluntly – test the judicial resolve.

As an initial matter, and as the United States Supreme Court emphasized in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment,” and “deciding when a statute operates ‘retroactively’ is not always a simple or mechanical task.” *Id.*, 268, 269. Rather, application of a statute should only be deemed to be *retroactive* if the “the new provision attaches new legal consequences to events completed before its enactment,” and “[t]he conclusion that a particular rule operates ‘retroactively’

comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” *Id.* Our Supreme Court agrees. *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494 (Fla. 1999) (citing *Landgraf* and observing that “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment”).

The point made in *Landgraf* and *Metro. Dade County* is that a statute is not necessarily being applied *retroactively* simply because it is utilized in a case involving events that predate its enactment. Rather, the application of a statute should only be deemed *retroactive* if the law “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past....” *Landgraf* at 269, citing *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CCNH 1814) (Story, J).

Notwithstanding *Landgraf* and *Metro. Dade County*, our appellate courts continue to approach the question of *retroactivity* from a slightly different angle. They often assume that any statute applied in a case based upon events occurring prior to its enactment is – *ipso facto* – being given *retroactive* effect. So in the civil context our appellate courts presume that a law enacted after a cause of action accrues is one that – if applied – is being used *retroactively*. *See, e.g., Ramcharitar*

*v. Derosins*, 35 So. 3d 94 (Fla. 3d DCA 2010) (amendment to worker's compensation law enacted after plaintiff was injured does not apply retroactively); *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011) (Florida Asbestos and Silica Compensation Fairness Act could not be applied to abolish a cause of action that accrued prior to its enactment). Similarly, in the criminal context our appellate courts consider a statute's application *retroactive* if the law is applied in a case where the alleged crime occurred pre-enactment. *See, e.g., Smiley v. State*, 966 So. 2d 330 (Fla. 2007) (Florida Statute § 776.013 does not apply to a criminal charge based on conduct that allegedly occurred prior to statute's effective date). Then, after *assuming* that application of a law to a case involving facts predating its enactment is by definition *retroactive*, our appellate courts turn to the real question: can the law be properly applied in a case based upon events that transpired prior to its effective date.

The bottom line is that some courts say that a statute is not being applied *retroactively* at all unless employing it abridges a party's vested rights. Others assume that *anytime* a statute is applied in a case that factually matured prior to its enactment the law is – by definition – being given retroactive effect, and then proceed to determine whether such *retroactive* application is permissible. This difference in approach is immaterial because at the end of the day the critical question is always whether the Legislature intended the newly enacted law to apply

in cases based upon facts predating its enactment and, if so, would applying the new statute impair vested “contractual or property rights, matters in which predictability and stability are of prime importance.” *Landgraf, supra* at 270. *See also, Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011) (to address a claim of retroactivity a court must first ascertain legislative intent and, if such intent to apply the law retroactively is clearly expressed, the court must then determine “whether retroactive application would violate any constitutional principles”). This is the critical inquiry because, as all courts agree, “[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.” *Id.* *See also, Metro. Dade County, supra* at 449. (The rule of construction that a law affecting substantive rights, liabilities and duties is presumed to apply prospectively is based upon a recognition that “the retroactive operation of statutes can be harsh and implicate due process concerns”).

To assess whether a law should be applied in a case based upon events (i.e., a cause of action or crime) that antedate its enactment, our appellate courts also have traditionally employed the “substantive v. procedural” dichotomy. Broadly speaking, [t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively”). *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494,

497 (Fla. 1999). This presumption attaches unless there is clear legislative intent to apply the law retroactively, and retroactive application is constitutionally permissible. The “presumption against retroactivity will generally coincide with legislative and public expectations.” *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) (quoting *Landgraf*). But there is no presumption against retroactive application when the statute in question is “solely remedial or procedural.” *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So. 2d 1157, 1165 (Fla. 3d DCA 1984); *Grammer v. Roman*, 174 So. 2d 443, 446 (Fla. 2d DCA 1965) (remedial statutes are exceptions to the rule that statutes are addressed to the future, not the past); *Landgraf, supra* at 275 (“[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive”).

In this Court’s view the “substantive/procedural” test is nothing more than an imprecise and shorthand tool used to ascertain whether retroactive application is permissible, as courts generally presume that if a law is “substantive” its application to a case based upon facts which predate enactment will impair vested rights, whereas if a law is “procedural” or “remedial” its application in such cases will not impair any such vested rights and – as a result – applying the new law will not be *unfair* or defeat public expectations. This of course then begs the question of whether

the law at issue is “substantive,” as opposed to “procedural” or “remedial”; a question that is often difficult to answer. *See, e.g., Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000) (“[t]he distinction between substantive and procedural law is neither simple nor certain”). The answer to this question can be elusive for two reasons.

First, the “substantive/procedural” rivalry rears its head in a number of different legal contexts. For example, the question of whether a given law is “substantive” or “procedural” often arises in “choice of law” jurisprudence. *See, e.g., Shaps v. Provident Life & Acc. Ins. Co.*, 826 So. 2d 250 (Fla. 2002) (finding that “burden of proof is a procedural issue for conflict-of-laws purposes”); *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 (Fla. 1984) (Florida conflict of laws jurisprudence directs that procedural issues are governed by the law of the forum); *Strauss v. Sillin*, 393 So. 2d 1205, 1206 (Fla. 2d DCA 1981) (“[i]n conflict of laws situations, matters of procedure are generally resolved by the law of the state in which the action has been instituted”); *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1542 (S.D. Fla. 1989) (pleading requirements of §768.72 are “substantive in nature” and should therefore be applied by federal court sitting in diversity). The “substantive/procedural” dichotomy also, as this case amply demonstrates, is implicated when confronting the issue of retroactivity, and in considering whether a statute encroaches upon the Supreme Court’s exclusive

authority to regulate matters of “practice and procedure.” *See, e.g., Haven Fed. Sav. & Loan Ass’n v. Kirian*, 579 So. 2d 730 (Fla. 1991). So the issue of whether a law is deemed “substantive” or “procedural” can depend upon context, as a law may very well be “substantive” for certain purposes yet “procedural” for others. *See, e.g., Sch. Bd. of Broward County v. Price*, 362 So. 2d 1337 (Fla. 1978) (“[t]he prohibition of the statute is surely procedural, just as it is substantive”). Secondly, not all laws fall comfortably into either the “substantive” or “procedural” basket. As now Justice Canady eloquently explained in *In re Commitment of Cartwright*, 870 So. 2d 152 (Fla. 2d DCA 2004):

The complexity and uncertainty surrounding the substance/procedure distinction arises in part from the circumstance that the distinction is applied in different contexts in different ways. “Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.” *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988); *see also In re Fla. Rules of \*161 Crim. P.*, 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring) (“The entire area of substance and procedure may be described as a ‘twilight zone[,]’ and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.”). Accordingly, a measure which is substantive for one purpose, may be procedural for another. For example, a statute may be deemed procedural for purposes of Ex-Post-Facto-Clause analysis, while the same statute is deemed substantive for purposes of analysis under article V, section 2(a).

*Id.* This Court could not agree more, and would point out that our Supreme Court has itself questioned this “substantive/procedural” dichotomy, suggesting that

“[d]espite formulations hinging on categories such as ‘vested rights’ or ‘remedies’... the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.” *State, Dept. of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981). This Court again agrees.

In any event, for “retroactivity” purposes our Supreme Court has generally defined a “substantive” law as one that adversely affects or destroys vested rights; impose or create a new obligation a duty in connection with a previous transaction or consideration; or imposes new penalties. *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass’n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013); *Haven, supra* at 732 (“[s]ubstantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer”); *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981) (“substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property”); *State v. Garcia*, 229 So. 2d 236 (Fla. 1969) (laws in the criminal context substantive law is that which declares what acts are criminal and prescribes punishment). In contrast, “procedural” or “remedial” laws are generally described as those statutes or rules which “encompass the course, form, manner, means, method, mode, order, process

or steps by which a party enforces substantive rights or obtains redress for their invasion. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof.” *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000).

Aside from the fact that it is often difficult to label a law “substantive” or “procedural,” the assumption that retroactive application of “substantive” law will necessarily impair vested rights is not always correct, and in some instances even so-called “substantive” statutes are applied retroactively because: (a) doing so furthers an important legislative policy; and (b) no one’s ox is gored by applying the law to a case that matured pre-enactment. Or, in more legal parlance, no substantial vested rights are being abridged. *See, e.g., City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (recognizing that while “procedural/substantive analysis often sheds light on the propriety of retroactively applying a statute... the dichotomy does not in every case answer the question,” and applying a newly enacted substantive “exemption” to Public Records Act retroactively); *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996) (finding remedial and applying retroactively the newly enacted work product exemption).

As the Court said earlier, this is a difficult area of the law and reconciling and applying precedent is no easy task. But at the end of the day the questions that must be answered as part of any retroactivity analysis are whether the Legislature intended

to statute to attach to disputes that matured before its passage and, if so, can the statute be constitutionally applied. *Devon, supra*.

### C. Analysis

Mindful of these overarching – and to say the least vexing – legal precepts, this Court is of the opinion that the Legislature intended that this amendment to the “stand your ground” statute apply to *all* future immunity hearings, and that utilizing the protocol demanded by this amendment in all pending cases is permissible under common law retroactivity principles. In fact, this Court cannot envision a more compelling case for application of a statute in a proceeding that factually matured prior to its enactment.

First off, and as the *Landgraf* court pointed out, “[e]ven absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations,” such as “[w]hen the intervening statute authorizes or affects the propriety of prospective relief,” *see Landgraf, supra* at 273; *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) (applying intervening statute to determine propriety of injunctive relief under Clayton Act “because relief by injunction operates *in futuro*”). The legislative amendment at issue here was enacted on the heels of the Supreme Court’s opinion in *Bretherick*; the Legislature indicated that the amendment would be effective immediately upon becoming law, and the amendment’s purpose was to fill

a gap left in the initial statute. *See, e.g., Lowry v. Parole & Prob. Com'n*, 473 So. 2d 1248 (Fla. 1985) ( recognizing that when “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”). The amendment also dictates a protocol to be used during events that would – by definition – transpire after its enactment (i.e., immunity hearings) and hence arise *in futuro*. There is also no reason to believe that the Legislature intended that only those defendants who claimed to have “stood their ground” after June 9, 2017 would benefit from the amendment.

Furthermore, whether this new amendment is labeled as “substantive,” “procedural” or “remedial,” one thing is clear: Applying it in all future immunity hearings will not impair any right – let alone significant vested right – of the State, as its prosecutors enjoy no entitlement to a “less burdensome” conviction. Put differently, there is nothing unfair or harsh about applying this law to all pending cases and, for this reason, the policy underlying the presumption against retroactivity is not even remotely implicated here. In fact, the executive branch’s resistance to this law is somewhat bewildering given that the State itself – through representatives elected by the ultimate sovereign (i.e., its citizens) – voluntarily assumed the heightened obligations imposed by this amendment, and the Governor then enthusiastically signed it into law. So applying the amendment to all future stand

your ground hearings does no more than put the State to a burden it itself agreed to shoulder. There is simply nothing “unfair” about applying the law in that manner.

Because application of this law in all future stand your ground hearings does not take away or impair any vested right acquired by the State under existing law this Court – consistent with *Landgraf* and *Metro. Dade County* – would conclude that applying it here is not a *retroactive* application at all, and certainly not an impermissible *retroactive* application. This may indeed be one of those “hard cases” leaving “room for disagreement.” *Landgraf, supra* at 270. But as the Supreme Court observed in *Landgraf*, retroactivity is a matter of which judges tend to have “sound ... instinct[s],” and this Court’s judicial instincts tell it that there is absolutely no reason why this amendment should not govern all future stand your ground hearings.

Despite this Court’s opinion on the application of common law *retroactivity* principles, there nevertheless exists an insurmountable obstacle to applying the amendment in this case. Article X, section 9 of the Florida Constitution commands that the:

**Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.**

This constitutional edict – as plainly written – draws no distinction between “amendments” that benefit a defendant as opposed to the State.<sup>3</sup> *See B.H. v. State*, 645 So. 2d 987 (Fla. 1994) (“[w]hat the Constitution's plain language says on this subject is what the courts of Florida enforce”). It also does not distinguish between criminal statutes that may be “substantive,” “procedural” or “remedial.” Nor has our Supreme Court, through judicial gloss, engrafted common law retroactivity principles on to this constitutional provision, or otherwise circumscribed its breadth. To the contrary, to fall within the scope of this constitutional provision our Supreme Court has required *only* that the law at issue be a “criminal statute,” defined broadly as all “those acts of the Legislature, as an organized body, which deal in any way with crime or its punishment.” *Washington v. Dowling*, 109 So. 591 (Fla. 1926). Thus, in *Smiley* the Supreme Court held that the initial stand your ground law could not constitutionally be applied in a case based upon pre-enactment conduct because it was a “criminal statute” that “has a direct impact on the prosecution of the offense of ‘murder’ in Florida.” *Smiley, supra* at 337.

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<sup>3</sup> In this respect our constitution is contrary to the common law rule holding that repeals or amendments that removed a burden on private rights by eliminating a penal provision “were understood to preclude punishment for acts antedating the repeal.” *Landgraf, supra* at 271. This amendment was in fact adopted because “many persons charged with crime under statutes in force at the time of the commission of such crime escaped punishment because of the repeal or amendment of such statutes without any specific or implied saving clause....” *Washington v. Dowling*, 109 So. 588, 591 (Fla. 1926).

The same is true here. The recently enacted amendment will obviously have a direct and material impact on criminal prosecutions. Which party bears the burden of proof on a contested issue – and the quantum of proof that must be adduced in order to meet that burden – are not insignificant or trivial housekeeping matters. To the contrary, such legislative burden allocations can often be – and undoubtedly will be – outcome determinative, particularly in close cases. There is thus no doubt that this new statute will have a profound practical impact on pending and future criminal prosecutions, and many defendants who would otherwise proceed to trial will secure immunity simply because the State will be unable to prove its absence by clear and convincing evidence. For this reason the Court cannot – faithful to *Smiley* – apply this amendment in cases involving charges based on conduct occurring prior to its enactment, even though it would be inclined to do so if not constrained by article X, section 9 of our constitution.

#### IV. CONSTITUTIONALITY

Article II, section 3 of the Florida Constitution provides that our state government shall be divided in three (3) separate branches and “that no branch may encroach upon the powers of another.” *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991). This preservation of each branch’s powers, “free of encroachment or infringement by one upon the other, is essential to the effective

operation of our constitutional system of government.” *In re Advisory Opinion to Governor*, 276 So. 2d 25, 30 (Fla. 1973).

Article II, Section 2(a) of our constitution vests in the Supreme Court the authority to adopt rules of practice and procedure, and article II, section 3 provides that “powers constitutionally bestowed upon the courts may not be exercised by the Legislature.” It is therefore “a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm.” *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005). For purposes of constitutional analysis, and as this Court discussed earlier, matters of procedure are generally understood to “encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion,” and “may be described as the machinery of the judicial process as opposed to the product thereof.” *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972).

In determining whether a statute runs afoul the so-called “separation of powers doctrine” the first question then is obviously whether it is “procedural” for purposes of article V, section 2(a). This is so because a statute will be deemed “an unconstitutional invasion” of the Supreme Court’s rulemaking authority only if it is “purely procedural.” *Raymond*, at 1049. And as the Court pointed out earlier, a statute may be “procedural” for certain purposes, yet “substantive” for others. *See*

*Cartwright*, 870 Sol. 2d at 160 (“the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy,” and “a statute may be deemed procedural for purposes of Ex-Post-Facto-Clause analysis, while the same statute is deemed substantive for purposes of analysis under article V, section 2(a)”).

For this reason, the fact that “the burden of proof is a procedural issue for conflict-of-laws purposes” *Shaps, supra* at 254, 255, does not – *a fortiori* – mean that such legislation is also “procedural” for purposes of a separation of powers analysis. *Bates v. Cook, Inc.*, 509 So. 2d 1112 (Fla. 1987) (statutes of limitation, though traditionally considered procedural, should be considered substantive for purposes of applying our so-called “borrowing” statute). In this Court’s opinion the newly enacted amendment – which will in many cases be outcome determinative – should be deemed “substantive” for “purposes of analysis under article V, section 2(a).” *Cartwright, supra*. This statute imposes a new and substantial of burden of proof upon the State, and it does not, in this Court’s view, merely regulate form. *See, e.g., Booker v. State*, 397 So. 2d 910 (Fla. 1981) (statutory provision permitting the consideration of otherwise inadmissible hearsay evidence in capital sentencing proceedings did not violate article V, section 2(a)); *Cartwright, supra*, 870 So. 2d 152 (statute permitting hearsay in sexually violent predator proceedings did not unconstitutionally infringe on powers of the judiciary to determine matters of procedure).

The Court's opinion that this amendment should be deemed "substantive" is informed not only by the significance of this statute, but because the amendment at issue here bears no resemblance to those laws which have been found to be the type of "purely procedural" enactments that encroach upon our Supreme Court's rule making authority. *See, e.g., Kirian, supra*, (severance provision related to practice and procedure of courts); *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005) (§ 907.041(4)(b) restricting non-monetary pretrial release was "purely procedural"); *Jackson v. Florida Dept. of Corr.*, 790 So. 2d 381 (Fla. 2000) (copy requirement of prison indigency statute was procedural and conflicted with "this Court's own rule regulating the procedure for indigency determinations"); *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (establishment of time limitation for the writ of habeas corpus is a matter of practice and procedure and the judiciary is the only branch of government authorized to set such deadlines). To the contrary, the amendment in question *sub judice* is virtually identical in import and effect to the evidentiary enactments upheld against a separation of powers challenge in *Booker* and *Cartwright*.

Furthermore, even assuming this amendment was found to be "procedural" for purposes of a separation of power inquiry, "there are also circumstances where a legislative provision which would be deemed procedural if viewed in isolation will nonetheless be upheld against a challenge under article V, section 2(a) because of

the connection between that provision and substantive provisions adopted by the legislature.” *Cartwright*, 870 So. 2d at 158. Indeed, a statute can “have both substantive provisions and procedural requirements,” *Jackson, supra* at 384, and “burden of proof” provisions are commonplace in both civil and criminal statutory schemes. *See, e.g.*, § 768.72, Fla. Stat. (2017) (entitlement to punitive damages must be established by “clear and convincing evidence”); § 772.11, Fla. Stat. (2017) (civil RICO claim must be proven by “clear and convincing evidence”); § 559.77, Fla. Stat. (2017) (affording immunity against consumer collection claims to a defendant who shows – by a “preponderance of the evidence” – that a violation of the Act was not intentional); § 907.041(4)(c),(g), Fla. Stat. (2017) (the state attorney has the burden of showing the need for pretrial detention and proving a “substantial probability” that one of the statutory enumerated circumstances permitting pretrial confinement is present). Such run of the mill “burden of proof” provisions contained within substantive enactments are not constitutional infirm unless, perhaps, they *directly* conflict with and impair a specific and previously promulgated rule of procedure. *See, e.g., Kalway v. State*, 730 So. 2d 861 (Fla. 1st DCA 1999) (although section 57.085 had procedural aspects the “thrust” of the statute involved an undoubtedly substantive matter and, as a result, the minimal procedural provisions did not impermissibly intrude upon or conflict with any existing court rule); *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005) (§ 907.041(4)(b), Fla. Stat. (2017) - which

regulated “merely” the timing of eligibility for pretrial release – served “no substantive purpose” and was thus “purely procedural”); *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49 (Fla.2000) (holding that the statute at issue creates substantive rights and any procedural provisions were merely incidental to those rights); *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1092 n. 10 (Fla. 1987) (finding that when procedural sections are directly related to the substantive statutory scheme, then those provisions do not violate the separation of powers clause of the Florida Constitution); *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So.2d 880, 883 (Fla. 1983) (holding that statute that prohibited joinder of insurers was within the Legislature's power to regulate insurance industry, though it affected joinder of parties in courts).

Here, the newly enacted “burden of proof” provision is incidental to, and clearly implements, the substantive immunity afforded by the stand your ground law. The amendment is not a standalone enactment untethered to a substantive statutory provision. *See, e.g., Raymond, supra* at 1049 (“...where there is no substantive right conveyed by the statute, the procedural aspects are not incidental...”). Nor does this amendment conflict with any promulgated rule of procedure. Rather, it conflicts with a common law decision (*Bretherick*) which established procedures by default because – and *only* because – the Legislature initially failed to do so. The Legislature has now filled this procedural gap in order to implement the substantive immunity

statute, and in this Court's view it was constitutionally authorized to do so. In fact, the Legislature – if it desired - could go even further and make the absence of facts that would warrant immunity affirmative elements of all crimes. *Rusaw v. State*, 451 So. 2d 469, 470 (Fla. 1984) (“[i]t is well settled that the legislature has the power to define crimes and to set punishments”).

The bottom line is that the Legislature has the prerogative to decide what is a crime, prescribe punishment, and grant immunity to those it believes to be deserving of such protection. It thus follows that the Legislature has the constitutional authority to define the parameters of the protection it chooses to afford, and dictate the manner in which the “immunity” claims it sanctioned will be adjudicated.

## V. CONCLUSION

For the foregoing reasons it is hereby **ORDERED**:

1. Because the newly enacted amendment to the stand your ground law may not be applied in a case – such as this – which matured prior to its enactment, Defendant's stand your ground motion will be adjudicated at a pretrial hearing conducted in accordance with the Supreme Court's decision in *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015).

2. Florida Statute § 776.032(4) does not violate article V, section 2, of the Florida Constitution and is in all respects constitutional.

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida this

6<sup>th</sup> day of July, 2017.



**MICHAEL A. HANZMAN**  
Circuit Court Judge

Fariba N. Komeily  
Assistant State Attorney  
Legal Division  
[FaribaKomeily@MiamiSao.com](mailto:FaribaKomeily@MiamiSao.com)

David A. Donet, Jr.  
Donet, McMillan & Trontz, P.A.  
3250 Mary Street, Suite 406  
Coconut Grove, FL. 33133  
[www.dmt-law.com](http://www.dmt-law.com)

ASA Sonali N. Desai  
Felony Division Chief—Div. 05 (Zilber)  
Miami-Dade State Attorney's Office  
[SonaliDesai@MiamiSAO.com](mailto:SonaliDesai@MiamiSAO.com)

Division 19 Assistant State Attorneys  
Division 19 Assistant Public Defenders