IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 06-1237

ROBERT LEE SMILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged via indictment with one count of First Degree Murder with a Firearm arising from an incident which occurred on November 6, 2004 (Emergency Petition, Exhibit 1). On January 31, 2006 the Petitioner filed a written request for a Jury Instruction that stated as follows:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he reasonable believes it is necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

> A person who unlawfully and by force enters or attempts to enter a person's occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(Emergency Petition, Exhibit 2).

On February 2, 2006, prior to trial, the trial court in this case heard various motions in limine (Emergency Petition, Exhibit 6). At the hearing, the trial court heard the Petitioner's request for the instruction pursuant to newly enacted F.S. § 776.013. The State argued that F.S. § 776. 013(2005) was inapplicable as the crime occurred before the legislation was enacted on October 1, 2005, and that the statute was not intended to be applied retroactively as it is a substantive change in the law (Emergency Petition, Exhibit 6 pp. 20-22, 25-26). The trial court noted that his question is that usually when a statute is created to prohibit something it is prospectively applied, but when there is a statute that grants additional rights, it may very well be remedial in nature (Emergency Petition, Exhibit 6 p. 26). The Petitioner argued that the new law is remedial in nature (Exhibit 6 p. 29). Petitioner stated that looking at the Bill itself, the whereas clause specifically recognizes the right to law abiding people protecting themselves, and that the constitution guarantees them the right to bear arms in defense of themselves (Emergency

Petition, Exhibit 6 p. 29). Petitioner reasoned that in light of these clauses in the law, it is clear that the legislature's complete abrogation of the common law duty to retreat is simply remedial in that it clarifies the existing law on the protection of persons and property (Emergency Petition, Exhibit 6 pp. 29-31). Petitioner also pointed out that before October 1, 2005 the old statutes did not have any language regarding a duty to retreat, (Emergency Petition, Exhibit 6, p.31). After hearing argument, the trial court found that the change in the law was remedial in nature, hence it could be applied retroactively and granted the defendant's requested instruction. Specifically, the court found as follows:

> The question before the court is, is whether this is remedial in nature or changes, which would make it applicable prospective–excuse me, retrospectively, or is it substantive in nature which would make it inapplicable to apply to this case. While the Court is influenced by the decisional law, the court finds that the findings of the legislature is the, is the most important part or influential part of -- as to the court's ruling. And I'll quote them:
>
> > "Whereas the legislature finds that it is proper for law-abiding people to protect themselves, their families and others from intruders and attackers without fear and prosecution or civil action or acting in defense of themselves and others."

> That’s a very powerful statement it goes on to state: Whereas the Castle Doctrine is a common law doctrine of ancient origins which declares that a person’s home ,and I think we can also read a vehicle because it is specifically stated thereafter, is his or her castle, and whereas section 8 of article 1 of the State Constitution guarantees the right of people to bear arms in defense of themselves, and whereas the persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles, and whereas no person or victim of a crime should be required to surrender his or her safety to a criminal. Nor should a person or victim be required to needlessly retreat in the face of intrusion or attack, Now. Therefore, and it goes on to modify the statute.
>
> It does not delineate who is the victim and who is the criminal. It just says everyone. Thus this is equally applicable to Mr. Morningstar as it is to the defendant, Mr. Smiley. And the court finds this verbiage is, if not persuasive--excuse me, is if not binding, certainly exceedingly persuasive. This is the legislature, the representatives of the people making the law. And it is clearly their intent that they are essentially not making new law. They are recognizing the law that has existed since ancient times.
>
> And the court finds that it is absolutely--that it essentially has no choice but to grant the defendant’s motion in light of the -- these, very strong assertions on behalf of the people; recognizing of course the legislature as the direct representatives of the people under our checks and balances. And accordingly the defense’s motion is granted.

(Emergency Petition, Exhibit 6 pp. 40-42).

On February 3, 2006, the trial court entered a written order finding as follows:

> This Court is Convinced by the Committee Substitute for Senate Bill #436 (Exhibit 8), and other argument of Counsel that Florida Statute § 776.013 was intended to be remedial in nature and consequently Florida Statute § 776.013 should have retrospective application, as it recognizes and codifies existing rights.

(Emergency Petition, Exhibit 3). On February 3, 2006 the State filed a motion for stay and extension of speedy trial pending final disposition of the petition for writ of certiorari (Emergency Petition, Exhibit 4), which was denied on February 3, 2006 (Emergency Petition, Exhibit 5).

On February 8, 2006 the Fourth District Court of Appeal issued an order to show cause requiring a response and a reply (R. 106). On February 13, 2006 Petitioner filed a response arguing that Article X, Section 9 of the Florida Constitution does not prevent the retroactive application of F.S. § 776.013 (2005) (R. 107-103). Petitioner further argued that F.S. § 776.013 (2005) was remedial in nature and must be applied retroactively. Id.

The State filed a Reply on February 16, 2006 (R. 124-134). On April 12, 2006 the Fourth District Court of Appeal issued an opinion granting the State's emergency petition (R. 135-139). Petitioner filed a motion for rehearing and request for

certification of question of great public importance on April 26, 2006 (R. 140-147). The State filed a reply on May 8, 2006 (R. 148-154). On June 1, 2006 the Fourth District Court of Appeal denied rehearing but certified the following question as one of great public importance:

> DOES SECTION 776.013, FLORIDA STATUTES (2005), APPLY TO CASES PENDING AT THE TIME THE STATUTE BECAME EFFECTIVE?

(R. 342). Mandate issued on June 1, 2006 (R. 340).

SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the negative because Article X, Section 9 of the Florida Constitution provides that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed. Additionally, Petitioner's claims that the statute in question is remedial in nature are simply wrong. In this case, the enactment of F.S. ' 776.013 (2005) abrogated the common law duty to retreat, thereby completely changing the law regarding a persons' duty. Petitioner asserts that the newly enacted statute is remedial in nature because it was intended to vindicate and/or enforce the substantive rights of self defense, which were already in existence under the Florida Constitution. Although the Florida Constitution guarantees the right of the people to bear arms in defense of themselves, said right is not furthered by the abrogation of a common law duty to retreat. The new legislation clearly states that a person no longer has a duty to retreat before using deadly force. Such a change in the law does not further the right to self defense, it provides a new affirmative defense to justify use of deadly force.

ARGUMENT

F.S. § 776.013 (2005) DOES NOT APPLY TO CASES PENDING AT THE TIME THE STATUTE BECAME EFFECTIVE (RESTATED).

Petitioner argues that the legislature intended that F.S. ' 776.013 (2005) be applied retroactively. Petitioner also argues that Article X, Section 9 of the Florida Constitution does not apply because F.S. ' 776.013 (2005) is not a criminal statute. The Fourth District Court of Appeal properly ruled that the trial court departed from the essential requirements of the law when it found that the legislature expressly intended F.S. ' 776.013, which was enacted on October 1, 2005, to apply retroactively. Additionally, the Fourth District Court of Appeal properly reasoned that even if the legislature had indicated an intent to apply the abrogation of the common law duty to retreat retroactively, such an intent would run afoul of Article X, Section 9 of the Florida Constitution. On June 1, 2006, the Fourth District Court of Appeal issued an order denying Petitioner's rehearing but certifying the following question of great public importance:

> Does Section 776.103, Florida Statutes (2005), apply to cases pending at the time the statute became effective?

This Court should answer the certified question in the negative because Article X, Section 9 of the Florida

Constitution provides that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed. Additionally, Petitioner's claims that the statute in question is remedial in nature are simply wrong.

Legal questions are reviewed de novo. Under the de novo standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the de novo standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. The reason for de novo review of legal questions is obvious enough: appellate courts are in a better position than trial courts to resolve legal questions because appellate courts are not encumbered by the vital, but time consuming, process of hearing evidence. Moreover, appellate courts see many legal issues repeatedly, giving them a greater familiarity with these issues. Additionally, appellate courts have the advantage of sitting in panels which allows the appellate judges to discuss issues with each other which the trial court must decide alone. Indeed, an appellate court's principal mission is to resolve questions of law and to refine, clarify, and develop legal doctrines. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en

banc), *adopted by* Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994) (holding the issue is a question of law, not one of legal facts, which is reviewed de novo on appeal).

Article X, Section 9 of the Florida Constitution provides that repeal or amendment of a **criminal statute** shall not affect prosecution or punishment for any crime previously committed (emphasis added). "The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law." Raines v. State, 42 Fla. 141, 28 So. 57, 58 (1900). See Plummer v. State, 83 Fla. 689, 92 So. 222, 223 (1922) (dicta); Bradley v. State, 385 So. 2d 1122, 1123 (Fla. 1st DCA 1980); State v. Pizarro, 383 So. 2d 762, 763 (Fla. 4th DCA 1980) ("In fact, retroactive application of an amended or repealed statute affecting prosecution or punishment is unconstitutional. Article X, Section 9, Florida Constitution.").

Petitioner asserts that this argument was never properly

raised below by the State and has been waived [1]. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985).

Article X, Section 9 of the Florida Constitution has been interpreted as meaning that a substantive change to a criminal statute must be applied prospectively. Below, the State specifically argued to the trial court that the newly enacted F.S. § 776.013 affected substantive rights, hence it must be applied prospectively (Emergency Petition, Exhibit 6, p. 23). Moreover, in rebuttal, the Petitioner in fact argued that, Article X, Section 9 of the Florida Constitution did not apply to this case (Emergency Petition, Exhibit 6 p. 30). Hence, it is clear that the applicability of Article X, Section 9 of the Florida Constitution was in fact brought to the attention of the trial court and the claim has not been waived.

Alternatively, the error in this case was fundamental.

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1 Petitioner also argues that this claim is waived as it was not raised by the State in the emergency petition, however it is noteworthy that the Fourth District Court of Appeal specifically requested that the parties address the constitutional implications of Article X, Section 9 in the

Fundamental error "is error which goes to the foundation of the case or goes to the merits of the cause of action." Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984) quoting Clark v. State, 363 So. 2d 331, 333 (Fla. 1978). It has been held that "issuance of an incomplete and inaccurate instruction on the law is fundamental error where the error relates to the elements of the criminal offense." Hubbard v. State, 751 So. 2d 771, 772 (Fla. 5th DCA 2000). To constitute fundamental error, a jury instruction omission or misstatement must concern a critical and disputed jury issue in the case. In this case, the jury instruction at issue would have been an inaccurate explanation of the law as it pertained to the justifiable use of deadly force, as it was not the law in effect at the time the defendant committed the crime thereby completely undermining the very foundation of the State's case. Hence, this Court may properly review this claim.

Turning to the merits, Petitioner argues that the elements of first degree murder are not affected by newly enacted 776.013, thereby the enactment does not constitute a substantive change to the law regarding murder and is not a criminal statute. However, this is clearly a misinterpretation because F.S. § 776.013 provides an affirmative defense to the crime of

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response and the reply (R. 106).

first degree murder and the affirmative defense has been substantively changed by the enactment.

Criminal statutes are acts dealing with crime or its punishment (emphasis added). Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926). The Fourth District Court of Appeal has stated that a number of **criminal statutes** afford a defendant an affirmative defense (emphasis added). Habie v. Krischer, 642 So. 2d 138 (Fla. 4th DCA 1994). Notably, in Habie, this court cited F.S. § 776.012, justifiable use of force, as an example of one such **criminal statute** (emphasis added). Id. at 140. Here, exactly as in Habie, F.S. § 776.013, regarding the justifiable use of force, is a criminal statute affording the Petitioner an affirmative defense.

Unlike the previous statute regarding justifiable use of deadly force, the relevant portions F.S. § 776.013, specifically states:

> (3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

The enactment substantively changed the affirmative defense

of justifiable use of deadly force by abrogating a person's common law duty to retreat. This substantive change in the law affects the prosecution for the crime of first degree murder and also changes the defense to such a crime. This is exactly the type of amendment that must be applied prospectively pursuant to Florida Constitution Article X, Section 9.

Notwithstanding the aforementioned argument that the Florida Constitution prohibits the retroactive application of F.S. ' 776.013, the undersigned will also address Petitioner's claim that the newly enacted statute is remedial in nature. Petitioner asserts that the newly enacted statute is remedial in nature because it was intended to vindicate and/or enforce the substantive rights of self defense, which were already in existence under the Florida Constitution. The undersigned recognizes that although it is clear that the Florida Constitution guarantees the right of the people to bear arms in defense of themselves, said right is not furthered by the abrogation of a common law duty to retreat. The new legislation clearly states that a person no longer has a duty to retreat before using deadly force. Such a change in the law does not further the right to self defense, it provides a new affirmative defense to justify use of deadly force.

F.S. § 776.013(2005) as enacted states as follows:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(2) The presumption set forth in subsection (1) does not apply if:

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

(b) The person or persons sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a law enforcement officer, as defined in s. 943.10(14), who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(5) As used in this section, the term:

(a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

(b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(c) "Vehicle" means a conveyance

> of any kind, whether or not motorized, which is designed to transport people or property. (Emphasis added).

Nothing in the law as enacted indicates that it was intended to be applied retroactively. Rather, the Legislature provided for a specific effective date of October 1, 2005. State v. Smiley, 927 So. 2d 1000, 1002 (Fla. 4th DCA 2006).

It is a well established rule of statutory construction that, in the absence of an express legislative statement to the contrary, an enactment that affects substantive rights or creates new obligations or liabilities is presumed to apply prospectively. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994). Florida courts have made a distinction between statutes affecting substantial rights and statutes affecting procedure, those affecting procedure in some instances being permitted to have retrospective operation. Lee v. State, 128 Fla. 319, 174 So. 589 (1937); Lovett v. State, 33 Fla. 389, 14 So. 837 (1894); Mathis v. State, 31 Fla. 291, 12 So. 681 (1893); State v. Pizarro, 383 So.2d 762 (Fla. 4th DCA 1980).

In Metropolitan Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 (Fla. 1999), this Court has stated that the presumption in favor of prospective application generally does not apply to "remedial" legislation; rather, whenever possible, such legislation should be applied to pending cases in order to

fully effectuate the legislation's intended purpose. Arrow Air, 645 So. 2d at 425. However, this Court further found that if a statute accomplishes a remedial purpose by creating new substantive rights or imposing new legal burdens, the presumption against retroactivity would still apply. This Court has previously questioned this substantive-remedial dichotomy:

> Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that 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 Dep't of Transp. v. Knowles, 402 So. 2d 1155, 1158 (Fla. 1981), quoted in Department of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 30 (Fla. 1990).

A remedial statute is one which confers a remedy and the means employed in enforcing a right or in redressing an injury. Grammar v. Roman, 174 So. 2d 443, 446 (Fla. 2d DCA 1965). Because remedial statutes "do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, [they] do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes." City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961); State

v, Kelley, 588 So. 2nd 595 (Fla. 1st DCA 1991). The policy rationale behind this rule of construction is that the retroactive operation of statutes can be harsh and implicate due process concerns. See, e.g., Arrow Air, 645 So. 2d at 425; Knowles, 402 So. 2d at 1158. The presumption against retroactivity is an established principle of statutory construction founded on notions of fairness and separation of powers concerns. See Landgraf v. USI Film Prods., 511 U.S. 244, 266-68, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994); Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994).

In this case, a review of the February 25, 2005 Senate Staff analysis of Senate Bill #436 (Emergency Petition, Exhibit 7), establishes that the legislature intended to abrogate the common law duty to retreat, thereby completely changing the law regarding a persons duty. Specifically, the Senate Judiciary Committee stated as follows:

> Abrogation of Florida Common Law Duty to Retreat
> Under Florida common law, a person has a duty to retreat, if outside his or her home or place of business, before resorting to deadly force reasonably believed necessary to prevent imminent death or great bodily harm. A person attacked within his or her home by a co-occupant or invitee must also retreat, if possible, within the home, but not from the home, before resorting to deadly force. Under the committee substitute, a person will no longer have any duty to retreat, unless the person is not in

> a place where he or she is lawfully entitled to be.

(Emergency Petition, Exhibit 7). Since here the new legislation was clearly intended to abrogate the common law duty to retreat, rather than confer a means to enforce a right or redress an injury, F.S. § 776.013 must be applied prospectively in the absence of express legislative intent to the contrary.

Additionally, the abrogation of the duty to retreat as it relates to the justifiable use of deadly force, as set out in F.S. § 776.013, is comparable to the abrogation of the affirmative defense of voluntary intoxication in chapter law 99-174, F.S. § 775.051 (1999). Committee Substitute for House Bill 421, Chapter 99-174, regarding voluntary intoxication states as follows:

> Be It Enacted by the Legislature of the State of Florida:
>
> Section 1.VOLUNTARY INTOXICATION; NOT A DEFENSE; EVIDENCE NOT ADMISSIBLE FOR CERTAIN PURPOSES; EXCEPTION.--VOLUNTARY INTOXICATION RESULTING FROM THE CONSUMPTION, INJECTION, OR OTHER USE OF ALCOHOL OR OTHER CONTROLLED SUBSTANCE AS DESCRIBED IN CHAPTER 893, FLORIDA STATUTES, IS NOT A DEFENSE TO ANY OFFENSE PROSCRIBED BY LAW. EVIDENCE OF A DEFENDANT'S VOLUNTARY INTOXICATION IS NOT ADMISSIBLE TO SHOW THAT THE DEFENDANT LACKED THE SPECIFIC INTENT TO COMMIT AN OFFENSE AND IS NOT ADMISSIBLE TO SHOW THAT THE DEFENDANT WAS INSANE AT THE TIME OF THE OFFENSE, EXCEPT WHEN THE CONSUMPTION, INJECTION, OR USE OF A CONTROLLED SUBSTANCE UNDER CHAPTER 893, FLORIDA STATUTES, WAS PURSUANT TO A

> LAWFUL PRESCRIPTION ISSUED TO THE DEFENDANT BY A PRACTITIONER AS DEFINED IN S. 893.02, FLORIDA STATUTES.
>
> Section 2. This act shall take effect October 1, 1999.

(Emergency Petition, Exhibit 9).

It is apparent from the language of the chapter law that ch. 99-174, completely abrogated the defense of voluntary intoxication, thus under the rules of construction the statute must be, and has been applied prospectively. See Rudolf v. State, 851 So. 2d 839(Fla. 2nd DCA 2003)(reasoning that 99-174 abrogates the voluntary intoxication as a defense); See McCann v. State, 854 So. 2d 788 (Fla. 2nd DCA 2003) (we note that section 775.051, Florida Statutes (1999), abolished the voluntary intoxication defense in Florida effective October 1, 1999. Ch. 99-174, § 2, at 968, Laws of Fla. This statute was not in effect at the time of the subject crimes and is not applicable in this case.). Such an abrogation is comparable to the abrogation of the common law duty to retreat under F.S. § 776.013.

Moreover, Petitioner relies upon Weiand v. State, 732 So. 2d 1044 (Fla. 1999), which is decisional law that applies the castle doctrine, it does not discuss the retroactivity of statutory changes in the law. Such reliance is misplaced, as there is a clear difference between decisional changes in the

law versus statutory changes. Any decision of the Florida Supreme Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Smith v. State, 598 So. 2d 1063 (Fla. 1992). The retroactivity of decisional law does nothing to show whether or not F.S. § 776.013 should be retrospectively applied.

Lastly, Petitioner has suggested that because this Court approved instructions on May 25, 2006, the specially requested instructions should be given below. Petitioner suggests that he **could have** argued a rise in carjacking dictates that there is a policy ground to extend the castle doctrine to petitioner's taxi cab (emphasis added). Petitioner again cites to Weiand and argues that in that case, this Court looked at a growing awareness of the need to alter the rules of self defense and adopted an interim instruction to be applied to all pending and future cases. Again Weiand is a decisional application of the castle doctrine, not a response to a statutory change in the law. Moreover, Petitioner himself recognizes that prior to the enactment of F.S. ' 776.013 the castle doctrine has not been extended to the automobile. See Baker v. State, 506 So. 2d 1056 (Fla. 2d DCA 1987) rev. denied, 515 So. 2d 229 (Fla. 1987).

Hence, the rationale simply does not apply in this case. Furthermore, Petitioner has never raised this policy argument below and it is therefore not properly before this Court.

Hence, this Court must answer the certified question in the negative and affirm the decision of the Fourth District Court of Appeal that F.S. ' 776.013(2005) does not apply retroactively.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court answer the certified question in the negative and affirm the decision of the Fourth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished to: Paul E. Petillo, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this____ day of _____, 2006

_____
MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

_____
MELANIE DALE SURBER

APPENDIX