IN THE SUPREME COURT OF FLORIDA

ROBERT LEE SMILEY, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC06-1237
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S INITIAL BRIEF

On Review from the District Court of
Appeal, Fourth District, State of Florida

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

PAUL E. PETILLO
Assistant Public Defender
Attorney for Petitioner
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 508438
appeals@pd15.state.fl.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FLORIDA STATUES

FLORIDA CONSTITUTION

OTHER AUTHORITY CITED

STATEMENT OF THE CASE AND FACTS

The petitioner, Robert Smiley, Jr., is charged with first-degree premeditated murder of Jimmie Morningstar. *State's Emergency Petition for Writ of Certiorari, Exhibit 1*. The events leading to this charge occurred on November 6, 2004. *Id*.

Before trial, Mr. Smiley requested special jury instructions based on the 2005 Florida Legislature's creation of section 776.013, Florida Statutes (2005), and amendment of chapter 776, Florida Statutes. *See* ch. 2005-27, Laws of Fla. This legislation alters the way in which the jury is to determine the issue of self-defense. First, the legislation provides that a person who is not engaged in unlawful activity and is in a place he or she has the right to be has "no duty to retreat and may stand his or her ground and meet force with force if he or she reasonably believe 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." § 776.013(3), Fla. Stat. (2005). The legislation also creates two presumptions that apply when a person is attacked in his home or vehicle. The first presumption applies to the person who uses defensive force:

> 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.

§ 776.013(1), Fla. Stat. (2005).

The second presumption applies to the person against whom the defensive force was used:

> 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.

§ 776.013(4), Fla Stat. (2005).

Mr. Smiley asked for two special jury instructions. *State's Emergency Petition for Writ of Certiorari, Exhibit 2*. The first instruction tracks section 776.013(1), Florida Statute (2005), and instructs the jury to presume that Mr. Smiley held a reasonable fear of death or great bodily harm if the person against whom the defensive force was used was in the process of unlawfully and forcefully entering his vehicle, and Mr. Smiley knew or had reason to believe that the unlawful and forcible entry was occurring or had occurred:

DEFENSE REQUESTED JURY INSTRUCTION #1

> Robert Smiley is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself when using defensive force that is intended or likely to cause death 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, an occupied vehicle; and
> >
> > (B) Robert Smiley knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
> >
> > The presumption set forth above does not apply if:
> >
> > (A) The person against whom the defensive force is used has the right to be or is a lawful resident of the vehicle, such as an owner or lessee.

State's Emergency Petition for Writ of Certiorari, Exhibit 2, at p. 1.

The second requested instruction informs the jury that a person who is not engaged in an unlawful activity and is in a place where he or she has the right to be has no duty to retreat before using deadly force in necessary self-defense (tracking section 775.013(3), Florida Statutes (2005)); and it instructs the jury in accordance with section 776.013(4), Florida Statutes (2005), that "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":

DEFENSE REQUESTED JURY INSTRUCTION #2

> 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 reasonably 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.

State's Emergency Petition for Writ of Certiorari, Exhibit 2, at p. 2. A pretrial hearing was held to consider these instructions as well as a motion *in limine* filed by the State. *State's Emergency Petition for Writ of Certiorari, Exhibit 6.*

The State argued that Mr. Smiley's requested instructions should not be given for these reasons: Mr. Smiley's offense occurred before the October 1, 2005, effective date of the legislation (*see* ch. 2005-27, § 5, Laws of Fla.); the legislation is silent on whether it is to applied prospectively or retrospectively; a canon of statutory construction provides that substantive legislation should not be applied retrospectively; since this legislation eliminated in most cases the duty to retreat, it is substantive in nature and therefore may not be applied retrospectively. *Id*. at pp. 21-24.

Defense counsel argued that the legislation is remedial, not substantive. *Id*. at p. 29. Looking to the legislation's preamble,[1] defense counsel asserted that the legislation did not establish new rights, but provided a way to enforce old ones. *Id*. at 29-30. In addition, defense counsel argued that the statutory presumptions are procedural in nature, and changes in procedure apply retrospectively. *Id*. at pp. 33-34. Defense counsel also relied on *Weiand v. State*, 732 So.2d 1044 (Fla.1999), a case in which this Court applied a change in the duty to retreat rule for co-occupants to Ms. Weiand's case as well as all pending cases.[2] *Id*. at p. 33. And although the State did not assert its applicability, defense counsel also argued that article X, section 9, Florida Constitution,[3] did not apply because the Legislature had not repealed or amended a criminal statute. *Id*. at p. 30.

---

[1] The preamble to ch. 2005-27, Laws of Florida, provides the basis for the legislation, stating among other things, that "it is proper for law-abiding people to protect themselves," that the state constitution "guarantees the right of the people to bear arms in defense of themselves," and that "persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles...."

[2] *See Weiand*, 732 So.2d at 1058 ("This opinion and the instruction will be applicable in all future cases, and all cases that are pending on direct review, or not yet final.").

[3] Article X, section 9, Florida Constitution, provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

The trial judge agreed with defense counsel that the legislation is remedial in nature; therefore, he would give the requested instructions. *Id*. at pp. 37-42. The court entered a written order that stated it was "convinced that Florida Statute § 776.013 was intended to be remedial in nature and that consequently Florida Statute § 776.013 should have retrospective application, as it recognizes and codifies existing rights." *State's Emergency Petition for Writ of Certiorari, Exhibit 3*.

The State filed an emergency petition for writ certiorari asserting that the trial court departed from the essential requirements of law in agreeing to give Mr. Smiley's special jury instructions. *State's Emergency Petition for Writ of Certiorari*, pp. 1-2. The State asserted that chapter 2000-27, Laws of Florida, affected substantive rights, and therefore the provisions of that law may not be applied retrospectively absent clear legislative intent to the contrary. *Id*. at pp. 9-15.

The Fourth District Court of Appeal entered an order to show cause why the relief sought by the State should not be granted. The Court also ordered the parties to "include in their response and/or reply a discussion of the application of article X, section 9, of the Florida Constitution." In the same order, the court granted the State's motion to stay the proceedings in the lower court.

Defense counsel filed a response addressing both article X, section 9, and the substantive/remedial issue. *Response to Petition for Writ of Certiorari*, pp. 4-16. Defense counsel also cited *State v. Whiddon*, 554 So.2d 651, 653 (Fla. 1st DCA 1989),[4] for the proposition that the State may have waived the applicability of article X, section 9, Florida Constitution, by not asserting it in it in the lower court or in its petition. *Id.* at p. 4 n.1.

The State filed a reply urging application of article X, section 9, Florida Constitution. *Reply to Response to Emergency Petition for Writ of Certiorari*, at p. 2. The State also responded to defense counsel's assertion that it may have waived this argument. *Id*. at p. 3-4. The State asserted that it had preserved this issue in the trial court because the applicability of article X, section 9 is analyzed along the same lines as the substantive/remedial issue. *Id*. at p. 3. Alternatively, the State argued that the trial court's ruling is fundamental error. *Id*. at p. 4.

The Fourth District Court of Appeal granted the State's petition and quashed the trial court's order. *State v. Smiley*, 927 So.2d 1000 (Fla. 4th DCA 2006). The Court held that because the legislation attached new legal consequences to events completed before its enactment it may not be applied to Mr. Smiley's case. *Id*. at

[4] In *Whiddon*, the First District Court of Appeal stated that because "the applicability of Article X, Section 9, was neither brought to the attention of the trial court nor raised on appeal . . . the state has waived its right to urge its provision to the case at bar." *Whiddon*, 554 So.2d at 653.

1002. The Court also stated that "[n]othing in the legislation indicates an intent to apply the abrogation of the common law [duty to retreat] retroactively" and "if it did it would run afoul of article X, section 9 of the Florida Constitution...." *Id*. at 1003.

Smiley filed a timely motion for rehearing or certification of a question of great public importance. On June 1, 2006, the District Court of Appeal denied rehearing but certified the following question to be of great public importance:

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

State v. Smiley, 31 Fla. L. Weekly D1561(Fla. 4th DCA June 1, 2006).

Notice of discretionary review was filed June 21, 2006. This Court has jurisdiction under article V, section 3(b)(4), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).[5]

[5] Although not reflected by the record before this Court, Mr. Smiley's trial is currently scheduled for December 7, 2006 (the trial that took place after the District Court's decision ended in deadlock).

SUMMARY OF ARGUMENT

Florida case law established the general rule that a person has a duty to retreat before using deadly force in self-defense. As Courts have made exceptions to the duty-to-retreat rule, those exceptions have been applied to pending cases.

In 2004, Mr. Smiley was charged with murdering an occupant of his cab; his defense is self-defense. In 2005, the Legislature altered the way in which the jury is to determine the issue of self-defense. The Legislature provided that a person who is not engaged in unlawful activity and is in a place he or she has the right to be has "no duty to retreat and may stand his or her ground and meet force with force if he or she reasonably believe 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." § 776.013(3), Fla. Stat. (2005). The Legislature also established two presumptions: first, that a person attacked in his or her automobile is in fear of imminent peril of death or great bodily harm, and second, that the attacker is doing so with the intent to commit an unlawful act involving force or violence. Mr. Smiley wishes to have his jury instructed in accordance with this legislation. Is it proper to do so when the alleged crime occurred before the legislation was enacted?

It is proper. All of the evidence suggests that the Legislature intended that the law be applied to pending cases. The State has no vested interest in not

applying this law to pending cases. In fact the opposite is true. As the Legislature pointed out in its preamble, this legislation is necessary because "it is proper for law-abiding people to protect themselves . . . from intruders and attackers" and "persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles."

Nor does the alleged victim have a vested interest in not applying this law; if, as Mr. Smiley contends, the alleged victim was the attacker, he has "no vested right to do wrong." *Danforth v. Groton Water Co.*, 59 N.E. 1033 (Mass. 1901) (Holmes, C.J.)(citation omitted).

Nor does article X, section 9, Florida Constitution, apply. This article provides that "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision is in derogation of the common-law rule that repeal or amendment of a criminal statute nullifies proceedings under it on the theory that the sovereign power no longer desires the crime to be punished or regarded as criminal. Because this provision is in derogation of the common-law rule, it is strictly construed and limited to legislation that has a direct bearing on the statute that defines the crime or affects the punishment. The 2005 legislation does not have a direct bearing on either the statute that defines murder or the statutes that penalize the offense. This legislation modifies only the affirmative defense of self-defense, and "[a]n

affirmative defense does not concern itself with the elements of the offense at all; it concedes them." *State v. Cohen*, 568 So.2d 49, 52 (Fla.1990).

Mr. Smiley's jury should be instructed in accordance with Florida law.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT CHAPTER 2005-27, LAWS OF FLORIDA, DOES NOT APPLY TO PENDING CASES

Until 2005, the contours of Florida's duty-to-retreat rule was a product of case law. At the earliest common law, there was no duty to retreat: "Back in the days of Coke, Hale and Hawk, any man who was feloniously attacked without provocation could stand his ground anywhere, not retreat, and use deadly force if necessary to repel the attacker." *Cannon v. State*, 464 So.2d 149, 150 (Fla. 5th DCA 1985) (citations omitted). This continues to be the majority rule in this country. *Weiand v. State*, 732 So.2d 1044, 1049 n.4 (Fla.1999); Wayne R. LaFave, *Substantive Criminal Law* § 10.4(f), at 155 (2d ed. 2003).

Although Florida's early case law is not entirely clear, it appears that Florida at one time followed the majority rule. For example, in *Padgett v. State*, 40 Fla. 451, 24 So. 145, 146-47 (1898), this Court held that there was no error in refusing the defendant's broad no-duty-to-retreat instruction because it did not include the limitation that it applied to one who was not the original aggressor. And in *Kirby v. State*, 44 Fla. 81, 32 So. 836 (1902), this Court held that the trial court erred in instructing the jury that in order for the defendant to rely on self-defense "the defendant must either be without fault himself, or attempted to withdraw from the contest, if such withdrawal could have safely [been] done before firing the fatal

shot." *Kirby*, 32 So. at 838. This Court stated that the last clause of this charge should be omitted because "it is not in every case that a party assaulted is required to retreat before defending himself, where he is reasonably free from fault in bringing on the difficulty."

Nonetheless, in *Peaden v. State*, 46 Fla. 124, 35 So. 204 (1903), this Court held that the trial court correctly instructed the jury that Peaden was entitled to use deadly force in self-defense "'[p]rovided Peaden was not the aggressor in bringing on the difficulty, and used all reasonable means in his power, consistent with his own safety, to avoid the danger, and to avert the necessity of taking Mercer's life, and provided he did not take Mercer's life after all real or apparent necessity for doing so had ceased." *Peaden*, 35 So. at 208. The instruction given in *Peaden* was approved again in *Snelling v. State*, 49 Fla. 34, 37 So. 917, 918 (Fla.1905), and *Stafford v. State*, 50 Fla. 134, 39 So. 106, 106 (1905), and it became Florida's duty-to-retreat rule.

Over the years, the duty-to-retreat rule has been qualified. In *Pell v. State*, 97 Fla. 650, 122 So. 110 (1929), this Court held that the duty to retreat did not apply to a defendant attacked in his home ("castle") by a trespasser. In *Hedges v. State*, 172 So.2d 824 (Fla.1965), this "castle doctrine" was extended to a defendant attacked by an invitee. And in *Weiand v. State*, 732 So.2d 1044 (Fla.1999), the castle doctrine was extended even further to include a defendant attacked by a co-

occupant. In addition, the concept of the "castle" expanded: in *Redondo v. State*, 380 So.2d 1107 (Fla. 3d DCA 1980), the Third District provided that a person attacked in his place of business is excepted from the duty-to-retreat rule.[6]

As exceptions to the duty-to-retreat rule have been created, they have been applied to pending cases. In *Weiand*, this Court relied on the public policy of this state to reduce domestic violence and found that the duty to retreat from the home adversely effects victims of domestic violence by placing them at greater risk. This Court held that because of this policy, and the increased knowledge of the complexities of domestic violence, it was time to eliminate a co-occupant's duty to retreat. This Court applied the new rule to Ms. Weiand's case as well as all pending and future cases. *See Weiand*, 732 So.2d at 1058 ("This opinion and the instruction will be applicable in all future cases, and all cases that are pending on direct review, or not yet final."). *See also Kelly v. State*, 746 So.2d 1248, 1248 (Fla. 1st DCA 1999)("Although the appellant was tried before the supreme court's *Weiand* decision, the *Weiand* opinion expressly makes the instruction applicable to cases pending on direct review.").

[6] In *Baker v. State*, 506 So.2d 1056 (Fla. 2d DCA 1987), *rev. denied*, 515 So.2d 229 (Fla.1987), however, the Second District Court of Appeal declined to extend the castle doctrine to the automobile. Although not raised at the hearing, the privilege of nonretreat arguably applies to Mr. Smiley even without chapter 2005-27, Laws of Florida, because, although he was in his cab (i.e., an automobile), his cab is his place of business.

In 2005, the Legislature altered the way in which the jury is to determine the issue of self-defense. The Legislature provided that a person who is not engaged in unlawful activity and is in a place he or she has the right to be has "no duty to retreat and may stand his or her ground and meet force with force if he or she reasonably believe 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." § 776.013(3), Fla. Stat. (2005). The Legislature also created presumptions that apply when a person is attacked in his or her home or automobile. § 776.013(1) & (4), Fla, Stat. (2005). The Legislature provided an effective date of October 1, 2005. *See* ch. 2005-27, § 5, Laws of Fla.

The trial court agreed to give Smiley's special instructions based on these statutes even though the offense occurred before the effective date of the legislation. The Fourth District Court of Appeal granted the State's petition for writ of certiorari and quashed the order. The Court held that because the legislation attached new legal consequences to events completed before its enactment it may not be applied to Mr. Smiley's case. *State v. Smiley*, 927 So.2d 1000, 1002 (Fla. 4th DCA 2006). The Court also stated that "[n]othing in the legislation indicates an intent to apply the abrogation of the common law [duty to retreat] retroactively" and "if it did it would run afoul of article X, section 9 of the Florida

Constitution...." *Id*. at 1003. The Fourth District Court of Appeal erred in quashing the trial court's order.

Standard of Review

When reviewing a trial court's decision on jury instructions, the standard of review "turns on the nature of the error alleged." *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir.1997), *cert. denied*, 522 U.S. 968 (1997). For example, whether a trial court fundamentally errs by failing to give a complete and accurate jury instruction explaining justifiable and excusable homicide is a question of law reviewed *de novo*. *Beckham v. State*, 884 So.2d 969, 970 (Fla. 1st DCA 2004), *rev. denied*, 891 So. 2d 553 (Fla. 2004). Because the issue here–whether chapter 2005-27, Laws of Florida, applies to an offense that occurred before its enactment–is purely a legal matter, the standard of review is *de novo*. *See e.g. Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376, 377 (Fla. 5th DCA 1998) (judicial interpretation of statutes is "a purely legal matter and therefore subject to *de novo* review"); *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So.2d 1050, 1055 (Fla.2003) (whether a law is special or general "is a pure legal question subject to *de novo* review.").

Legislative Intent

Whether a statute applies prospectively or retrospectively is a question of legislative intent. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737

So.2d 494, 499 (Fla.1999). "In order to determine legislative intent as to retroactivity, both the terms of the statute and the purpose of the enactment must be considered." *Chase Federal*, 737 So.2d at 511.

When the legislature intends that a statute apply prospectively it often says so. *See e.g. White v. White*, 296 So.2d 619, 621 (Fla. App. 1974)("This act shall operate prospectively and not retrospectively and shall not affect the rights and obligations existing prior to the effective date of this act"); *American Motors Corp. v. Abrahantes*, 474 So.2d 271 (Fla. 3d DCA 1985)("This act shall take effect upon becoming a law and shall apply only to actions brought on or after the effective date."); *Thayer v. State*, 335 So.2d 815 (Fla. 1976)(use of word "henceforth" evinces intent to have prospective application only).

Here, the Legislature did not say that the statute is to be applied prospectively. Although the law includes an effective date of October 1, 2005, *see* ch. 2005-27, § 5, Laws of Fla., this Court has stated that the inclusion of an effective date in the legislation does not necessarily mean that the statute is prospectively applied. *Chase Federal*, 737 So.2d at 502.

In the absence of clear legislative intent, a law affecting substantive rights, liabilities, and duties is presumed to apply prospectively. *Chase Federal*, 737 So.2d at 499. Remedial legislation, on the other hand, is presumed to apply to pending cases in order to "fully effectuate the legislation's intended purpose."

Chase Federal, 737 So.2d at 500 n.9. However, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994).

Chapter 2005-27, Laws of Florida, applies to pending cases because none of the rationales for not applying statutes retrospectively are present in this case.

The Fourth District Court of Appeal, quoting from this Court's opinion in *Chase Federal*, 737 So.2d at 499 (which in turn quoted from *Landgraf*, 511 U.S. at 270), concluded that chapter 2005-27, Laws of Florida, should not be applied to pending cases because it "attaches new legal consequences to events completed before the enactment of section 776.013 and amendment to section 776.012." But the District Court overlooked that this is just the beginning of the analysis, not the end. As the Supreme Court pointed out, nearly every law attaches new legal consequences to acts that occurred before its passage:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards.

Landgraf, 511 U.S. at 270 n.24 (citations omitted).

As this passage shows, some new legal consequences are unfair and some are not. Therefore, the Court stated:

> The 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. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," *see Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 270.

As it turns out, none of the reasons why courts choose *not* to apply a law retrospectively are present in this case. Put another way, there is nothing unfair about the new legal consequences of chapter 2005-27, Laws of Florida. For example, in *McCord v. Smith*, 43 So.2d 704, 708 (Fla.1949), this Court held that a retrospective provision of a legislative act is not necessarily invalid: "It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed or an additional disability is created or imposed...." Similarly, the Supreme Court in *Landgraf* gave these reasons why some laws should not be applied retrospectively:

- Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. [*Landgraf*, 511 U.S. at 265].

- In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. [*Landgraf*, 511 U.S. at 266.]

- The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. [*Landgraf*, 511 U.S. at 270.]

- The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance. [*Landgraf*, 511 U.S. at 271.]

- The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights. [Landgraf, 511 U.S. at 296.]

Applying the provisions of chapter 2005-27, Laws of Florida, to Mr. Smiley's case does not implicate any of these rationales. The State has no vested right or interest in not applying this law to pending cases. In fact the opposite is true. As the Legislature pointed out in its preamble, this legislation is necessary because "it is proper for law-abiding people to protect themselves . . . from intruders and attackers" and "persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles."

Nor does the alleged victim have a vested right in not applying this law; if, as Mr. Smiley contends, the alleged victim was the attacker, he has "no vested right to do wrong." *Danforth v. Groton Water Co.*, 59 N.E. 1033 (Mass. 1901) (Holmes, C.J.)(c.o.).

In addition, the law imposes no new burdens on persons after the fact, and it affects no property or contractual rights. The law does not disrupt any settled

expectation, or, if it does disrupt a settled expectation, it is not an expectation worthy of recognition (the attacker's expectation that his victim is required to retreat).

Simply stated, chapter 2005-27, Laws of Florida, should be applied to pending cases, and the Legislature likely intended that it be applied to pending cases, because there are good reasons for doing so, ("it is proper for law-abiding people to protect themselves"), and no good reasons for not doing so.

Chapter 2005-27, Laws of Florida, applies to pending cases because it is remedial in nature.

As noted above, substantive laws are presumed to apply prospectively, remedial laws retrospectively. *Walsh v. Arrow Air*, 629 So.2d 144, 148 (Fla. 1993). This Court has stated that "[r]emedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, 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).

"Substantive rights are those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property and reputation. Remedial rights arise for the purpose of protecting or enforcing substantive rights." *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 65-

66 (Fla. 1972) (c.o.). Under the Florida Constitution, all natural persons enjoy the basic substantive rights to "enjoy and defend life and liberty[,]" to "keep and bear arms" and "to be let alone[.]" Article I, §§ 2, 8, & 23, Fla. Const.

Using force in self-defense is a remedial right, as it arises for the purpose of vindicating the substantive rights of personal safety, freedom, and autonomy. "The right to fend off an unprovoked and deadly attack is nothing less than the right to life itself, which [article 1, section 2] of our Constitution declares to be a basic right." *Perkins v. State*, 576 So.2d 1310,1314 (Fla. 1991)(Kogan, J., concurring), *cited with approval*, *Weiand*, 732 So.2d at 1057.

Because self-defense is a remedial right, any enlargement of that right may be applied retrospectively. Admittedly, "if a statute accomplishes a remedial purpose by creating new substantive rights or imposing new legal burdens, the presumption against retroactivity would still apply." *Chase*, 737 So.2d at 500 n.9. *See also*, *Landgraf*, 511 U.S. at 285 n.37 (remedial statute that imposes damages liability is not the kind of remedial statute presumed to apply to pending cases). But again, such a presumption may be overcome by examining the rationales for not applying legislation retrospectively. As explained above, none of the rationales for not applying legislation retrospectively are present in this case. Accordingly, if there is a presumption that this remedial legislation should not be applied

retrospectively, that presumption should give way in order to "fully effectuate the legislation's intended purpose." *Chase Federal,* 737 So.2d at 500 n.9.

The presumptions created in chapter 2005-27, Laws of Florida, apply to pending cases because they are remedial in nature.

The Legislature created two presumptions: first, that a person attacked in his or her home or automobile is in fear of imminent peril of death or great bodily harm, and second, that the attacker is doing so with the intent to commit an unlawful act involving force or violence. § 776.013(1) & (4), Fla, Stat. (2005).

The creation of presumptions can be remedial in nature and apply retrospectively. *Beeman v. Island Breakers, A Condominium, Inc.*, 577 So.2d 1341, 1346 (Fla. 3d DCA 1990)(Legislature's creation of a rebuttable presumption to assist courts in adjudicating unconscionability claims is remedial in nature and may be applied retrospectively). Both the expansion of a presumption and the abolition of a presumption have been held to be the type of changes that may be applied retroactively. *See Seminole County Sheriff's Office v. Johnson*, 901 So.2d 342, 343 (Fla. 1st DCA 2005), *rev. denied*, 914 So.2d 954 (Fla. 2005) (expansion); *Brown v. L.P. Sanitation*, 689 So.2d 332, 333 (Fla. 1st DCA 1997)(abolition). In *Brown*, the First District Court of Appeal stated: "Abolition of this rebuttable presumption changed only the procedural means and methods of establishing entitlement to

benefits or offsets which flow from substantive rights that have remained unchanged since the date of Mr. Brown's industrial accident." 689 So.2d at 333.

In addition, procedural statutes may be applied retroactively "because no one has a vested interest in any given mode of procedure." *State v. Kelley*, 588 So.2d 595, 597 (Fla. 1st DCA 1991). Evidentiary rules are procedural in nature and may be applied to conduct that occurred before they were enacted. *Glendening v. State*, 536 So. 2d 212 (Fla. 1988)(application of new hearsay exception to an offense occurring before effective date was not an ex post facto violation because evidence rule is procedural and does not alter substantial personal rights). Presumptions are a type of evidentiary rule. *See* § 90.301(1) (""[A] presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.").

Because the presumptions created by 2005-27, Laws of Florida, are remedial in nature, Mr. Smiley's jury should be instructed on them regardless of the offense date.

Mr. Smiley's requested instructions should be given because this Court approved similar standard jury instructions on May 25, 2006.

As previously noted, this Court in *Weiand* extended the castle doctrine to a defendant attacked by a co-occupant. This Court applied the new rule to Ms. Weiand's case as well as all pending and future cases. *Weiand*, 732 So.2d at 1058.

In addition, this Court adopted as an interim Standard Jury Instruction the instruction suggested by Justice Overton in his dissenting opinion in *State v. Bobbitt*, 415 So.2d 724, 728 (Fla.1982)(Overton, J., dissenting). *Weiand*, 732 So.2d at 1056 n.15. This interim instruction was later approved in *Standard Jury Instructions-Criminal Cases (Castle Doctrine)*, 789 So.2d 954 (Fla. 2000).

Even without the 2005 legislation, Smiley could have argued along policy lines, as Ms. Weiand did, that the castle doctrine should be extended to his case. For example, Mr. Smiley could have pointed to the rise in carjacking, *see e.g. U.S. v. Juvenile Male No. 1*, 86 F.3d 1314, 1321 (4th Cir.1996)("The penalties and the sense of urgency engendered by the national 'epidemic of motor vehicle theft' and the 'plague' of carjacking are strong indicators of more than a run of the mill federal interest in the problem."), as a policy ground for extension of the castle doctrine to the automobile, and especially to the taxicab, which is Smiley's place of business.[7] In *Weiand*, for example, this Court looked to growing awareness of the need for altering the rules for determining the issue of self-defense. This Court wrote: "The public policy of this State is clearly directed at reducing domestic

[7] As noted above, the castle doctrine extends to one's place of business, *Redondo v. State*, 380 So.2d 1107 (Fla. 3d DCA 1980), but not to the automobile. *Baker v. State*, 506 So.2d 1056 (Fla. 2d DCA 1987), *rev. denied*, 515 So.2d 229 (Fla.1987).

violence." *Weiand*, 732 So.2d at 1056. Similarly, the public policy of Florida is clearly directed at preventing carjacking and violent attacks on cab drivers.

If Mr. Smiley were successful in arguing along these policy lines, the new rule established would apply to Mr. Smiley's case as well as all pending cases. As it turned out, however, the Legislature beat Mr. Smiley to his argument by enacting 2005-27, Laws of Florida. But this does not mean that Mr. Smiley is not entitled to the instructions he seeks. Indeed, in response to this legislation, this Court on May 25, 2006, authorized the publication and use of instructions similar to those requested by Mr. Smiley. *In re Standard Jury Instructions In Criminal Cases (No. 2005-4)*, 930 So.2d 612 (Fla. 2006). This Court stated that the "instructions as set forth in the appendix shall be effective when this opinion becomes final." *Id*. at 614.[8]

Thus, as in *Weiand*, this Court has approved instructions on the castle doctrine that were not in effect at the time of the offense. And as in *Weiand*, these instructions should be applied to all pending cases, including Smiley's.

[8] The Fourth District Court of Appeal did not have the benefit of this Court's decision when it issued its April 12, 2006, opinion (this Court's decision was filed as supplemental authority while the case was on rehearing).

Article X, section 9, Florida Constitution, does not apply.

The common-law rule is that repeal or amendment of a criminal statute nullifies proceedings under it on the theory that the sovereign power no longer desires the crime to be punished or regarded as criminal. *Robertson v. Circuit Court for Highlands County*, 121 Fla. 848, 851, 764 So. 525, 526 (1935). But in Florida article X, section 9, Florida Constitution, provides:

> **Section 9. Repeal of criminal statutes.-**
> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Because this provision is in derogation of the common-law rule, it is strictly construed and should not be interpreted to displace the common law further than is necessary. *Robertson*, *supra*; *Tillman v. State*, 934 So.2d 1263, 1269 (Fla. 2006)("Statutes in derogation of the common law should be strictly construed, and should not be interpreted to displace the common law further than is necessary.").

The history of this provision is enlightening. In *Higginbotham v. State*, 10 Fla. 557 (1882), this Court invalidated a conviction of assault with intent to murder because the assault statute was repealed after the crime was committed but before the prosecution took place, and there was no savings clause in the statute to allow the then-pending prosecution to proceed. In reaction to this, article III, section 32, of the Florida Constitution (1885), the predecessor to article X, section 9, was adopted. *See State v. Watts*, 558 So2d 994, 999 (Fla. 1990) (explaining history of

the provision). This was intended to provide a savings clause for all criminal statutes in order to avoid the kind of result in *Higginbotham*.

Thus, this constitutional provision has been applied in cases where either the penalties or the elements of a crime are amended after the crime occurs. For example, in *Castle v. State*, 305 So.2d 794 (Fla. 4th DCA 1974), *approved*, 330 So.2d 10 (Fla. 1976), the court held that the defendant's sentence could not be reduced to comport with an amendment to the substantive criminal statute. In *Turner v. State*, 87 Fla. 155, 99 So. 334 (Fla. 1924), this Court approved a life sentence for second-degree murder despite an amendment passed prior to sentencing that limited the sentence to twenty-five years' imprisonment. And in *Plummer v. State*, 83 Fla. 689, 92 So. 222 (Fla. 1922), this Court held that the defendant could not benefit from the amendment to the larceny statute that took place after his crime.

But article X, section 9, Florida Constitution, has never been interpreted to prohibit all statutory changes that occur after the offense. In *Ex parte Pells*, 28, Fla. 67, 9 So. 833 (Fla. 1891), this Court reviewed a statutory provision, enacted after the defendant was sentenced, that limited the incarceration for failure to pay fines to 60 days. This Court held that the new law could be applied to *Pells*, despite the savings clause of article III, section 32. This Court found that the new statute did not repeal or amend the crime of assault for which Pells was convicted, nor did it

effect its punishment: "The same punishment may be inflicted, and the same form of sentence is to be entered..." *Pells*, 9 So. at 835. Therefore, while the statute had an impact on the time Pells would serve, the Court found that the new statute applied to him.

Likewise, in *State v. Watts*, *supra*, this Court held that an amendment to the Youthful Offender Act limiting sentences of youthful offenders to six years applied to defendants who received probationary split sentences for offenses committed prior to the amendment's effective date since it had no direct connection to the original conviction or sentence and therefore did not fall within the proscription of article X, section 9. This Court found that the amendment to the statute did not amend the statutes under which the defendants were originally convicted and punished. "Neither the definition of those offenses nor the original punishment authorized by statute were in any 'wise changed or affected' by the 1984 amendment..." *Watts*, 558 So.2d at 1000. *See also Hayes v. State*, 452 So.2d 656 (Fla. 2d DCA 1984) (statutory change that reduced length of time court exercised jurisdiction over defendant's sentence could be applied retroactively).

The 2005 legislation does not run afoul of article X, section 9, Florida Constitution, because the statutes that define and penalize murder are in no "wise changed or affected" by it. This legislation has no bearing on the elements or penalties of any crime. This legislation modifies the affirmative defense of self-

defense, and "[a]n affirmative defense does not concern itself with the elements of the offense at all; it concedes them." *State v. Cohen*, 568 So.2d 49, 52 (Fla.1990). Given the history of article X, section 9, Florida Constitution, and the strict construction that must be given to it, this provision does not apply in this case.

Finally, Smiley asserts that the State waived the article X, section 9, argument, by not raising it in the lower court or in its emergency petition for writ of certiorari. "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993).In *State v. Whiddon*, 554 So.2d 651, 653 (Fla. 1st DCA 1989), the First District Court of Appeal stated that because "the applicability of Article X, Section 9, was neither brought to the attention of the trial court nor raised on appeal . . . the state has waived its right to urge its provision to the case at bar."

CONCLUSION

Petitioner respectfully requests this Court to quash the Fourth District Court of Appeal's decision and remand with instructions to reinstate the trial court's order granting Smiley's requested jury instructions.

Respectfully Submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

_____
Paul E. Petillo
Assistant Public Defender
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 508438

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished to Assistant Attorney General Melanie Dale Surber, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Fla. 33401 by courier this 29th day of September, 2006.

_____
Paul E. Petillo
Fla. Bar. No. 508438

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210(a) (2). The font is Times New Roman, 14 point.

_____

Paul E. Petillo
Fla. Bar. No. 508438