IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF

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

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ARGUMENT

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

In Petitioner's initial brief, he argued that article X, section 9, Florida Constitution, did not apply for two basic reasons. First, this constitutional provision is in derogation of the common law rule and it is therefore strictly construed. *Robertson v. Circuit Court for Highlands County*, 121 Fla. 848, 851, 764 So. 525, 526 (1935). Second, given the history of article X, section 9 (it was first passed in reaction to the case of *Higginbotham v. State*, 10 Fla. 557 (1882)), this Court has interpreted the provision to apply only to law changes that have a direct bearing on the definition of the crime or the scope of punishment. *See State v. Watts*, 558 So2d 994, 999 (Fla. 1990). The legislation at issue here, however, has no bearing on the elements or penalties of any crime. The 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).

The State does not address these arguments. Instead, the State argues that section 776.013, Florida Statutes (2005), is a "criminal statute" and that all "criminal statutes" apply prospectively only under article X, section 9, Florida Constitution.

But article X, section 9, Florida Constitution, has not been interpreted so broadly. For example, in *Watts*, *supra*, this Court discussed the case of *Ex parte Pells*, 28, Fla. 67, 9 So. 833 (Fla.1891). Retroactive application of a beneficial statute was permissible in *Pells*, this Court said, because "the change of law had no direct bearing on the statute that defined the crime, nor did it directly affect the statute that determined the original sentence to which Pells was exposed." *Watts*, 558 So.2d at 999. And in *Watts*, this Court retroactively applied the law limiting the sentence for youthful offender community control violators to six years because "[t]he amendment to section 958.14 in no wise amended or directly affected sections 812.13 and 958.10, under which Watts and Smith were originally convicted and punished." *Watts*, 558 So.2d at 1000.

Like the laws in question in *Pells* and *Watts*, the legislation here in no way amends or directly affects the murder statute or sections 775.082, 775.083, or 775.084, Florida Statutes (the penalty statutes). Here, as in *Watts*, the "statutes that defined the original offense and sentence in the instant case . . . have not been amended." *Watts*, 558 So.2d at 999. Therefore, the legislation at issue here does not fall within the proscription of article X, section 9.

The State argues that: "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." *Answer Brief at p. 15.* But as the petitioner

noted in his initial brief, this Court has stated that the inclusion of an effective date in the legislation does not necessarily mean that the statute is prospectively applied. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 502 (Fla.1999). *See also Watts*, 558 So.2d at 997 (legislation applied retroactively notwithstanding July 1, 1985, effective date).

The State argues that the legislation is substantive in nature "[s]ince 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 . . . ." *Answer Brief at p. 18.* But the ability to use force is not a substantive right; it is a remedial right. Just as there is no substantive right to appeal for the sake of appealing, *see State v. Kelley*, 585 So.2d 595 (Fla. 1st DCA 1991), there is no substantive right to use force for the sake of using force. But an innocent person does have the remedial right to use force in necessary self-defense in order to vindicate the substantive rights of personal safety, freedom, and autonomy. "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). Since self-defense is a remedial right, the changes enacted to that defense apply to pending cases regardless of offense date.

The State also tries to draw a parallel between the legislation at issue here and section 775.051, Florida Statute (1999), which abrogated the affirmative defense of voluntary intoxication. But there is no parallel. Section 775.051 does not apply retroactively because of specific case law interpreting the *ex post facto* clause. *Collins v. Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense" violates the Ex Post Facto Clause); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) ("[Any] statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto"). The *ex post facto* clause does not apply here.

There is no bar to instructing petitioner's jury in accord with the will of the Legislature.[1] The Fourth District's decision should be quashed.

[1] "When a court, then, fails wholeheartedly to enforce a statute, it sets itself against our constitutional scheme, acts undemocratically." Jerome Frank, *Courts on Trial* 292.

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,

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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 _____ day of November, 2006.

_____
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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.

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