No. SC18-747

In the Supreme Court of Florida

TASHARA LOVE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

* * *

On Discretionary Review from the Third District
Court of Appeal of Florida, DCA No. 3D17-2112
Cir. No. F15-24308

BRIEF OF *AMICI CURIAE* EVERYTOWN FOR GUN SAFETY AND THE BRADY CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Everytown for Gun Safety ("Everytown") and The Brady Center to Prevent Gun Violence (the "Brady Center") are two leading organizations devoted to advocating for responsible gun laws and reducing gun violence. Everytown's Litigation and Enforcement Team defends life-saving gun safety laws and regulations, challenges gun laws that undermine public safety, and advocates on behalf of individuals who were killed or injured because of dangerous, negligent or illegal actions by gun manufacturers or gun dealers. Everytown has more than 5 million supporters, including moms, mayors, students, survivors and everyday Americans who are fighting for evidence-based public safety measures that help save lives. The Brady Center is dedicated to reducing gun violence through education, research, and direct legal advocacy on behalf of victims and communities affected by gun violence. The Brady Center's Legal Action Project represents victims of gun violence and defends reasonable gun laws, with the goal of reducing gun violence.

Along with the citizens of Florida, Everytown and the Brady Center have a substantial interest in ensuring that state laws, including Florida's Stand Your Ground statute, are not interpreted or applied in a way that would jeopardize reasonable government action that helps to limit gun violence and, conversely,

opposes an interpretation or application of state laws that incentivize an increase in gun violence.

II. SUMMARY OF ARGUMENT

We submit this *amicus curiae* brief in support of Respondent's position that the Third District Court of Appeal's denial of Petitioner's petition for a writ of prohibition should be affirmed. We so do in agreement with the Respondent's position that Section 776.032(4) (also referred to herein as the Stand Your Ground ("SYG") Amendment), does not apply retroactively. We further submit that this Court should affirm on a separate ground, that the Florida Legislature exceeded its constitutional powers and unlawfully encroached on those of this Court when it enacted the Stand Your Ground Amendment for the specific purpose of abrogating this Court's decision in *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015). That ground was briefed and argued below, and formed the basis for the trial court's decision. It is also a ground implicated by the Court's decision two weeks ago in *DeLisle v. Crane Co.*, discussed further below.[1]

This case presents the question of whether the Legislature may, by simple majority, overturn a decision of this Court that establishes the burden of proof to be

[1] No. SC16-2182, 2018 WL 5075302, at *7 (Fla. October 15, 2018). In *DeLisle*, the State also urged the Court to decline jurisdiction and leave unaddressed the important constitutional relating to the Legislature's power to abrogate procedural rules of this Court. The Court rejected the State's jurisdictional arguments and found that the statute at issue was unconstitutional. *Id.* at *7, *14.

applied when adjudicating a motion to dismiss under Florida Rule of Criminal Procedural 3.190(b). Here, the Legislature has done so with regard to a particular category of cases under Rule 3.190(b): those where a defendant has moved to dismiss on the ground that she is entitled to immunity under Section 776.032. In *Bretherick*, this Court held simply that the same allocation of burden that is generally applicable to motions to dismiss brought under Rule 3.190(b)—on the defendant, by a preponderance of the evidence—applies to motions to dismiss under Rule 3.190(b) that invoke the immunity provision of Section 776.032. The Court in *Bretherick* concluded that placing the burden of proof on the defendant in pretrial motions invoking Section 776.032 immunity was "principled, practical, and supported by our precedent." *Id.* at 769.

It was this Court's constitutional prerogative to make clear that Section 776.032 cases are no exception to the rule the courts have fashioned governing the burden of proof for Rule 3.190(b) motions. The Florida Constitution grants this Court the exclusive power to "adopt rules for the practice and procedure in all courts." *See* Art. V, § 2(a), Fla. Const. Rule 3.190(b) is a procedural rule promulgated by the Court, and the Court's decisions regarding the burden of proof applicable to motions brought under that rule similarly implicate the Court's prerogative to adopt rules governing practice and procedure. The Constitution grants the Florida Legislature the power to repeal such rules, but only by a two-

thirds majority vote of the membership of each house of the Legislature. Art. V, § 2(a), Fla. Const.

In 2017, however, the Legislature voted by a simple majority to amend Section 776.032 with the specific intention of abrogating the rule adopted in *Bretherick*. The SYG Amendment shifts the burden of proof to the prosecution, after a defendant has raised a *prima facie* claim to immunity at a pretrial hearing, to prove by clear and convincing evidence that the defendant is not entitled to immunity. The Legislature has thus purported to create a different procedure for adjudicating motions to dismiss invoking SYG immunity than is applicable to that generally used by the courts for motions brought pursuant to Rule 3.190(b).

The SYG Amendment violates the Florida Constitution for two reasons. First, the amendment effectively repealed the procedure adopted in *Bretherick* without the required two-thirds vote, and thus violates Article V, Section 2(a) of the Florida Constitution. Just recently, in *DeLisle v. Crane Co.*, this Court held unconstitutional a statute enacted by the Legislature under the same circumstances, finding that a "procedural rule of this Court may be pronounced in case law." 2018 WL 5075302, at *7. Second, in the SYG Amendment, the Legislature purported to enact a new rule of procedure by establishing the quantum and burden of proof applicable to SYG motions filed under Rule 3.190(b). The Amendment thus violates Article II, Section 3 of the Florida Constitution, which provides that

"No person belonging to one branch [of the Florida State government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Article V, Section 2 grants this Court, not the Legislature, the power to adopt "rules for the practice and procedure" in the courts. Art. V, § 2(a), Fla. Const.

Finally, as further set forth below, should the Court determine that the SYG Amendment is constitutional, it should affirm based on the Third District's holding that the amendment does not apply retroactively.

III. ARGUMENT

A. The Court May Consider Whether The SYG Amendment Is Constitutional.

As a threshold matter, this Court may find the SYG Amendment to be unconstitutional even though Petitioner has not raised this issue in this Court. The separation-of-powers issue was raised and argued by the parties in the trial court, was the basis of the trial court's order denying Petitioner's motion, was briefed by the parties before the Third District (where both parties argued in favor of constitutionality), was addressed at length in the decision under review in this case, and has been now addressed by Respondent and *amici* in this Court.[2] Pet'r App. to

[2] While urging the Court to decline jurisdiction on this issue, Respondent simultaneously argues in its brief that the SYG Amendment is constitutional. Respondent's Brief at 37-39. *Amici curiae* in support of Petitioner, including United Sportsmen of Florida, Inc., Florida Public Defender Association, and

Initial Brief at 6, 29. Indeed, in invoking this Court's jurisdiction, Petitioner relied on the fact that the court below had expressly declared the SYG Amendment to be constitutional. Pet'r Jurisdictional Brief at 3. Given that this issue was raised and fully developed below,[3] the Court can and should consider the constitutionality of the SYG Amendment—particularly given that it involves the constitutionality of a statute that purports to abrogate a decision of this Court and undercut the rule-making power reserved to it by the Florida Constitution. *See Russell v. State,* 982 So. 2d 642, 645 (Fla. 2008) ("[H]aving granted jurisdiction, this Court may examine all issues raised and argued before the lower court."); *Wright v. City of Miami Gardens*, 200 So. 3d 765 (Fla. 2016) (holding statute to be unconstitutional despite no argument by either party on the issue).

Florida Association of Criminal Defense Lawyers, have also filed briefs arguing that the SYG Amendment does not violate the separation-of-powers provisions of the Florida Constitution. Brief for the United Sportsmen of Florida, Inc. ("USF") as Amicus Curiae Supporting Petitioner at 4, Love v. Florida, No. SC18-747 (Aug. 24, 2018) (No. 76954787); Brief for the Florida Public Defender Association and Florida Association of Criminal Defense Lawyers ("FPDA and FACDL") as Amici Curiae in Support of the Petitioner at 8, Love v. Florida, No. SC18-747 (Aug. 27, 2018) (No. 77079328).

[3] In none of the cases cited by Respondent or *amici* FPDA and FACDL, where the Court declined to consider issues that had not been raised by the parties, were the issues raised in the courts below, much less, as here, briefed and then addressed in the decision under review. FPDA and FACDL Br. at 5.

B. The SYG Amendment Violates Separation Of Powers Principles Of The Florida Constitution.

1. The SYG Amendment Unconstitutionally Abrogated The Rule Adopted In *Bretherick*.

In *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010), this Court determined that Florida Rule of Criminal Procedure 3.190(b)[4] is the appropriate procedure for asserting Section 776.032 immunity prior to trial. Five years later, in *Bretherick*, the Court considered whether, at an evidentiary hearing after a defendant moves pretrial pursuant to Rule 3.190(b) to dismiss charges on the basis of Section 776.032 immunity, it is the burden of the defendant to prove, or the prosecution to disprove, the application of that immunity. The issue before the Court in *Bretherick* thus was how to interpret and apply Rule 3.190(b) when a defendant has invoked immunity under the SYG statute. The Court concluded that the burden in the Stand Your Ground context is no different than it is in any other Rule 3.190(b) motion—it is on the defendant, to prove by a preponderance, that he is entitled to immunity. *Id.* at 775.

Contrary to Respondent's claim, the Court in *Bretherick* did not "engage[] in statutory interpretation to determine which procedure the Legislature intended to implement." Respondent Br. at 39 (emphasis omitted). Rather, the Court relied on

[4] Rule 3.190(b) provides: "All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense."

"numerous reasons," including prudential and precedential considerations. *Bretherick*, 170 So. 3d at 775. In particular, the Court considered (i) the "procedure[s]" adopted in analogous contexts by the highest courts in other states, *id*. at 775; (ii) the fact that, in Florida, "the procedures for pretrial motions to dismiss, based on this Court's precedent, all require the defendant to offer the evidence in support of the motion, rather than placing the burden on the State," *id*. at 777; and (iii) prudential concerns, including that placing the burden on the prosecution would "essentially result in two full-blown trials: one before the trial judge and then another before the jury," encourage the filing of potentially meritless motions in order to obtain discovery, *id*. at 777, and cause a "tremendous expenditure of time and resources," *id*. at 778. The Court further found that "there is nothing in the statutory scheme" or prior jurisprudence that would dictate placing the burden on the prosecution, *id*. at 778, and that placing the burden instead on the defendant was "both appropriate and consistent with the statutory scheme," *id*. at 771.

The Court's interpretation of Rule 3.190 in the context of SYG immunity was an exercise of its exclusive power under Article V, Section 2 of the Florida Constitution to "adopt rules for the practice and procedure in all [Florida] courts."[5] Art. V, § 2(a), Fla. Const. And whether one views *Bretherick* as interpreting an

[5] As this Court held in *DeLisle*, "[a] procedural rule of this Court may be pronounced in case law." 2018 WL 5075302, at *7.

existing rule (Rule 3.190) or establishing a new one (*i.e.*, that the general rule governing burdens of proof under Rule 3.190 applies to SYG pretrial immunity motions to dismiss), this Court was acting within its constitutionally prescribed role and fashioning a procedure based not merely on statutory interpretation, but on the kinds of concerns that it is best-positioned to weigh: precedent, consistency, and judicial efficiency.

Under Florida's Constitution, the Legislature is entitled to repeal a rule of practice or procedure adopted by the Court, but it must do so with a two-thirds majority in both houses. *See* Art. V, § 2(a), Fla. Const. ("[t]he supreme court shall adopt rules for the practice and procedure in all courts. … [r]ules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."). Petitioner does not dispute that a rule governing allocation of the burden of proof is procedural.[6] Nor does Petitioner dispute that the Legislature enacted the SYG Amendment in order to effectively repeal and replace the interpretation of Rule 3.190(b) and procedure adopted in *Bretherick*. In

[6] Pet'r Initial Br. at 1-2 ("Just like every other law allocating the burden of proof at a judicial hearing, section 776.032(4) is procedural. . . . A burden of proof affects only the means and methods of enforcing a substantive right, the classic definition of 'procedural law.'"); *see also Shaps v. Provident Life & Accident Ins. Co*., 826 So. 2d 250, 254 (Fla. 2002) ("[G]enerally in Florida the burden of proof is a procedural issue. . . . The burden of proof clearly concerns the means and methods to apply and enforce duties and rights…"); *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) ("Burden of proof requirements are procedural in nature.").

fact, as Petitioner highlights, the amendment's sponsors stated it was meant to "correct[] the error of the *Bretherick* decision," "reverse the effect of the FSC's holding in *Bretherick*," and adopt the "*Bretherick* dissent." Pet'r Initial Br. at 18-20. This was unlawful, just as it would have been unlawful for the Legislature, in the wake of *Bretherick*, to pass a law formally amending Rule 3.190(b), so as to provide that the burden of proof shall be on the State for all motions brought under the Rule and invoking SYG immunity.

While the Florida Constitution generally prohibits the Legislature from enacting procedural rules, *see infra* Section B(2), that prohibition is at its most absolute when such rules conflict with existing procedural rules of this Court. In *DeLisle*, the Court considered a statute enacted by the Legislature for the purpose of replacing the *Frye* standard for the admission of expert testimony, a standard which had been adopted by the case law of this Court. *DeLisle*, 2018 WL 5075302, at *7. The Court found that the statute was procedural because it "solely regulates the action of litigants in court proceedings," and did not "create, define, or regulate a right." *Id*. The statute conflicted with the *Frye* standard, a "procedural rule" that the Court had pronounced in its case law, but had not codified in the Florida Rules of Evidence. *Id*. The statute had not been passed with the required two-thirds majority (*id.* at *6), and was accordingly unconstitutional. *Id.* at *7. *DeLisle* thus affirmed a long line of precedents turning

back legislative encroachment upon the Court's constitutional rule-making authority.[7]

Here, as in *DeLisle*, the conflict between the Legislature's statute and the Court's rule is as stark as can be – the Legislature expressly targeted and sought to reverse the Court's rule in *Bretherick*. In addition, the SYG Amendment encroaches on the judiciary's prerogative to assess the administrative consequences of a procedural rule, threatening to create the very inefficiencies that the Court sought to avoid in *Bretherick* by allocating the burden of proof to the defendant. *See Bretherick*, 170 So. 3d at 778-79 (describing manner in which placing burden on the State would "cause a tremendous expenditure of time and resources."); *see also Jackson*, 790 So. 2d at 383 (describing the "administrative nightmare" that the Legislature's rule had imposed on "this Court and the judicial system as a whole").

It is critical that the judiciary be permitted to set procedural safeguards to ensure that SYG immunity is not abused by defendants who would seek to use it to improperly obtain discovery of the State's case, to require that the State prove its

[7] *See Jackson v. Fla. Dep't of Corr.*, 790 So. 2d 381, 386 (Fla. 2000) (holding that procedural elements of law that conflicted with procedural rules adopted by the Court were "unconstitutional as a violation of separation of powers and as a usurpation of our exclusive rulemaking authority"); *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("[W]here a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional.") (citing *Jackson*); *Allen v. Butterworth*, 756 So. 2d 52, 55 (Fla. 2000) (striking down procedural provisions of the Death Penalty Reform Act as unconstitutional because the Act "significantly changes Florida's capital postconviction procedures").

case twice, or to remove from the jury entirely the issue of whether their use of violence was justified. This Court is best positioned to establish appropriate procedural safeguards to ensure fair and efficient pretrial adjudication of immunity, as it did in *Bretherick*. Indeed, in doing so, the Court specifically rejected the proposal of placing the burden of proof on the State, which it concluded would create "a process fraught with potential for abuse." *Bretherick*, 170 So. 3d at 777 (internal citations omitted).

2. The Legislature Did Not Have Authority Under The Constitution To Create A New Rule Of Procedure.

The SYG Amendment is unconstitutional for an additional reason: In addition to purporting to repeal the rule in *Bretherick* without a two-thirds majority, it created a new rule of procedure to replace it. Under Florida's Constitution, the Legislature does not have the power to create rules of practice or procedure (even with a two-thirds majority), and, as Petitioner concedes, *supra* Section B(1), the burden of proof created by the SYG Amendment is a rule of procedure.

As noted in Section X, the Florida Constitution grants the Florida Supreme Court the authority to create rules for the practice and procedure, and grants the Legislature only the power to repeal procedural rules by a two-thirds majority vote. *See* Art. V, § 2(a), Fla. Const. Florida's Constitution also provides that when a power is granted to one of the three branches of government, the other two

branches are prohibited from encroaching on that power. Art. II, § 3, Fla. Const.[8]

Thus, only this Court has the power to create procedural rules. Following this principle, this Court has struck down procedural statutes enacted by the Legislature, even where those statutes were passed by a two-thirds majority. *See State v. Raymond*, 906 So. 2d 1045, 1052 (Fla. 2005) (holding that a procedural statute enacted by the Legislature by a unanimous vote was unconstitutional); *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976) (procedural statute enacted by the Legislature barring references to insurers was unconstitutional); *In re Clarification of Fla. Rules of Practice & Procedure*, 281 So. 2d 204, 205 (Fla. 1973) ("In other words, under the Constitution the Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature.").

In this case, while denying Petitioner's petition on other grounds, the Third District found that the SYG Amendment was constitutional because "the Legislature has the constitutional authority to enact procedural provisions in statutes that are intertwined with substantive rights." *Love v. State*, 247 So. 3d 609, 611 (Fla. 3d DCA 2018) (citation omitted), *review granted*, No. SC18-747, 2018 WL 3147946 (Fla. June 26, 2018). In support of this proposition, the Third

[8] *See also Raymond*, 906 So. 2d at 1048 ("It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm."); *Allen*, 756 So. 2d at 59 ("Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.").

District cited *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49 (Fla. 2000), which is also cited in Respondent's brief in this Court (Respondent Br. at 37).

Whatever the scope of the exception identified by this Court in *Caple*, that exception is not applicable here. In *Caple,* the plaintiff sought to foreclose on a mortgage and requested a court order requiring the defendant mortgagor, during the pendency of the litigation, to continue making mortgage payments, post a bond, or relinquish possession of the property. The plaintiff's request was made pursuant to a statute that simultaneously created the right to the remedy the plaintiff sought, and set forth the means by which a plaintiff could petition for that remedy. The defendant challenged the constitutionality of the statute on multiple grounds, including that it impermissibly "encroaches upon [the] Court's rulemaking authority." *Id.* at 51. The Court upheld the statute, concluding because the statute at issue "creates substantive rights and any procedural provisions are directly related to the definition of those rights, we hold that [the statute] does not infringe on this Court's rulemaking authority."[9] *Id.* at 55.

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[9] The Third District further noted "the well-established legislative practice of passing statutes allocating the burden of proof in judicial proceedings." *Love*, 247 So. 3d at 611. Respondent and *Amici* in support of Petitioner have similarly pointed to other statutes setting forth the burden of proof, and argued that striking down the SYG Amendment would open a "Pandora's Box" as to the validity of those provisions. FPDA and FACDL Br. at 3; Respondent Br. at 39. However, *amici* have not pointed to any purely procedural legislative enactment setting a burden of proof that, like the SYG Amendment, was passed subsequent to the substantive law in question, with the sole intention and effect of reversing a

The statute at issue in *Caple* – which simply incorporated a mechanism by which a plaintiff could petition for the substantive right created by the same statute – is a far cry from the SYG Amendment at issue here. The SYG Amendment was not enacted until 12 years after the creation of the substantive SYG immunity right to which it related, and 7 years after this Court in *Dennis* made clear that the right could be invoked prior to trial pursuant to the procedure set forth in Rule 3.190, a rule adopted by this Court. Indeed, the SYG Amendment is far more akin to the statutes that this Court struck down in *Massey*, a case decided subsequent to *Caple* that goes unmentioned in the briefs filed in support of Petitioner and the Respondent, and in *DeLisle*.

In *Massey*, as here, the provision at issue was a purely procedural supplement to a preexisting substantive law. In distinguishing the case from *Caple*, this Court noted that "where a statute does *not* basically convey substantive rights, the procedural aspects of the statute cannot be deemed 'incidental,' and that statute is unconstitutional." 979 So. 2d at 937 (emphasis in original) (quoting *Raymond*, 906 So. 2d at 1049). The statute creating the substantive right in *Massey*—which provided that expert witness fees shall be taxed as costs—was supplemented years later by a statute providing that such fees could only be awarded as costs where the party retaining the expert had complied with certain

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considered decision of this Court interpreting and applying a long-standing procedural rule, here Rule 3.190(b).

procedures. *Id*. at 939. Even though the subsequent procedural statute related to the substantive right and set forth procedures by which that right was to be enforced, the Court found that it impermissibly encroached on its rule-making power, and was therefore unconstitutional. Similarly, in *DeLisle*, the Court determined that even though "the Florida Evidence Code contains both substantive and procedural rights, this statute is one that solely regulates the action of litigants in court proceedings," and therefore exceeded the Legislature's power. 2018 WL 5075302, at *7. We respectfully submit that the Court's analysis in *Massey* and *DeLisle*, rather than that used previously in *Caple*, applies to this case.

C. Even If Constitutional, The SYG Amendment Should Not Be Applied Retroactively.

1. The SYG Amendment Presumptively Applies Prospectively Because It Imposes A New Legal Burden On The Prosecution.

As a separate basis for affirmance of the decision below, and if the Court holds that the SYG Amendment is constitutional, we respectfully submit that the Court should affirm the Third District on the basis urged below by Respondent in this case: the SYG Amendment does not have retroactive effect.

Generally, "substantive statute[s] [are] presumed to operate prospectively." *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). However, certain types of "remedial" statutes, *i.e.*, a statute that "did not create a new right or take away a vested right," *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 481 So. 2d

484, 485 (Fla. 1986), are treated as substantive statutes for the purpose of retroactive application. These include remedial statutes that "achieve[] a remedial purpose by … imposing new legal burdens"; such statutes are "treated as a substantive change in the law" for the purpose of retroactivity analysis. *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007) (*quoting Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994)) (holding that original Stand Your Ground law did not apply retroactively).

The SYG Amendment, if constitutional, falls in the latter category of remedial statutes that are presumed not to apply retroactively because they "impos[e] new legal burdens." Pet'r App. at 9. As explained by the Third District, the SYG Amendment poses a substantial new legal burden on the prosecution, requiring the State to prove pretrial "by clear and convincing evidence that the defendant was not justified in using or threatening to use force." *Id.* at 9. Indeed, this Court in *Bretherick* was cognizant of this burden and took it into account in its decision, noting that the SYG Amendment would "require the State to establish the same degree of proof twice—once pretrial and again at trial" and "would essentially result in two full-blown trials." 170 So. 3d at 777. The Third District correctly held that the new legal burden of the SYG Amendment should be treated as substantive for the purpose of retroactivity, and the presumption against retroactive application applies.

2. The Legislature Did Not Indicate That It Intended For The SYG Amendment To Apply Retroactively.

There is no indication in the statute that the Legislature intended that the SYG Amendment apply retroactively. On the contrary, the SYG Amendment has an effective date, an indicator that the Legislature intended it to apply prospectively. *See Ramcharitar v. Derosins*, 35 So. 3d 94, 98 (Fla. 3d DCA. 2010) ("The inclusion of this effective date rebuts the suggestion that the [statute] was intended to apply retroactively.") This Court has warned that effective dates do not overcome a "clearly expressed" intent that a statute apply retroactively, but here the effective date is the *only* evidence of intent. *See Metro. Dade Cty v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 502 (Fla. 1999) (rejecting the inclusion of an effective date as indicative of intent for the statute to apply prospectively where the Legislature "clearly expressed ... that the statute be applied retroactively."). The SYG Amendment does not overcome the presumption against retroactive application on the basis of legislative intent.

3. Applying The SYG Amendment Retroactively Would Violate The Savings Clause.

In determining whether retroactive application of the SYG Amendment would be constitutional, the statute "should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity." *State ex rel. Shevin v. Metz Constr. Co.*, 285 So. 2d 598,

600 (Fla. 1973). Article X, Section 9 of the Florida Constitution states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Art. X, § 9, Fla. Const. This Court in *Smiley* defined a criminal statute as "an act of the Legislature … defining crime, treating of its nature, or providing for its punishment or dealing in any way with crime or its punishment," and held that the Stand Your Ground law in effect at that time was a "criminal statute" because "it has a direct impact on the prosecution of the offense of 'murder' in Florida." *Smiley*, 966 So. 2d at 337 (*quoting Washington v. Dowling*, 92 Fla. 601, 610 (1926)).

The SYG Amendment would be unconstitutional if applied retroactively because, like in *Smiley*, it has a "direct impact on the prosecution of the offense of 'murder,'" among other offenses, in Florida. As discussed above, the Court in *Bretherick* highlighted this impact, and the SYG Amendment's effect of requiring the prosecution to try its case twice. Petitioner identifies *Summerlin v. Tramill*, 290 So. 2d 53 (Fla. 1973) and its progeny as holding that changes in burdens of proof should apply retroactively (Pet'r Initial Br. at 14-16), but the statutes in these cases changed the amount of evidence required to prove a claim, not the party bearing that burden. Because applying the SYG Amendment retroactively would cast grave doubts upon its constitutionality, the Court should apply the Amendment prospectively, if it determines that it is constitutional.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Third District Court of Appeal denying Petitioner's petition for a writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-filing Portal on this 29th day of October, 2018.

/s/ Darren A. LaVerne
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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

Undersigned counsel certifies that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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