

WE MOVED TO THE SECOND CASE,  
STATE OF FLORIDA VERSUS PETER  
PERAZA.

JUSTICE LEWIS IS UNABLE TO  
ATTEND BUT HE WILL BE  
PARTICIPATING IN THE DECISION IN  
THESE CASES.

>> MAY IT PLEASE THE COURT,  
MELANIE SURBER ON BEHALF OF THE  
STATE OF FLORIDA, THIS CONCERNS  
DIFFERENT ACTORS OPERATING IN  
DIFFERENT CAPACITIES THAT RAN  
ACTED BY DIFFERENT LEGISLATIVE  
BODIES BASED UPON DIFFERENT  
POLICY RATIONALES.

THE IMPORTANCE OF THAT STATEMENT  
IS THE DECISION.

THE DECISION EYESIGHT IN THAT  
LINE IS BECAUSE WE ARE DEALING  
WITH TWO COMPLETELY DIFFERENT  
LAWS THAT WERE AND ACTED BY  
DIFFERENT LEGISLATIVE BODIES.

77605 WAS ENACTED IN 1974.

IT HAD CODIFIED THE LONG  
RECOGNIZED DUTY THAT AN OFFICER  
NEVER HAD TO RETREAT.

STAND YOUR GROUND WAS ENACTED  
FOR A DIFFERENT REASON IN 2005.

IT CODIFIED THE ABROGATION OF  
THE AVERAGE CITIZEN'S DUTY TO  
RETREAT.

THE AVERAGE CITIZEN NO LONGER  
HAD TO RETREAT IN THE FACE OF  
DANGER.

THAT IS IMPORTANT BECAUSE IN  
THIS CASE, THE FOURTH DCA  
STOPPED AT THE GENERAL  
PROPOSITION THAT PERSON  
ENCOMPASSED EVERYONE.

BUT THAT IS NOT THE ONLY WAY TO  
LOOK AT THE HISTORY OF THE  
STATUTE OR THE PLAIN LANGUAGE OF  
THE STATUTE.

>> IF YOU JUST SAY PERSON THAT  
ENCOMPASSES EVERYBODY.

I SEE THE FACT THAT POLICE  
OFFICERS HAVE NO DUTY TO RETREAT  
SO THE WHOLE NOTION OF THE  
STATUTE WOULD NOT BE APPLICABLE.  
HOW DO YOU GET AROUND A LAW

ENFORCEMENT OFFICER OBVIOUSLY IS  
A PERSON AND IT DIDN'T SAY A  
CITIZEN, DIDN'T SAY A PERSON.  
I DON'T KNOW IF IT IS PLAIN BUT  
WHAT ELSE DO YOU GO TO.

ARE YOU SAYING YOU READ THE  
STATUTE?

>> YOU HAVE TO LOOK AT THE  
ENTIRE 776.

>> THE WHOLE STATUTE, NOT JUST  
PERSON.

>> NOT JUST THE STAND YOUR  
GROUND LAW.

YOU HAVE THE ENTIRE STATUTE 776  
WHICH IS 776032 WHICH WAS  
ENACTED IN 2005.

77605 IS THE LAW ENFORCEMENT  
STATUTE, THAT IS PART OF THE  
SAME SECTION.

WHEN THERE'S A SPECIFIC STATUTE  
THAT COVERS THE ACTIONS THAT  
COULD BE SIMILAR THE SPECIFIC  
CONTROL --

>> THAT WOULD BE GENERALLY TRUE.  
I AM PATHETIC TO THE ARGUMENT,  
LAW ENFORCEMENT OFFICER INDICTED  
FOR MANSLAUGHTER, I DON'T KNOW  
THE FACTS BUT THAT IS QUITE AN  
UNUSUAL SITUATION AND SO WHAT IS  
IT THAT SAYS THE SPECIFIC  
CONTROLS OVER THE GENERAL,  
UNLESS THERE IS AMBIGUITY IN THE  
GENERAL STATUTE?

>> NOT THAT THERE IS AMBIGUITY.  
WHEN YOU LOOK AT THE STATUTORY  
CONSTRUCTION AS A WHOLE IT  
DOESN'T STOP WITH WE HAVE ANY  
PERSON.

THE PLANE LANGUAGE, IF THERE IS  
A SPECIFIC STATUTE THAT COVERS  
THE SAME CONDUCT OR SIMILAR  
CONDUCT, THEN THE SPECIFIC  
STATUTE CONTROLS.

IT IS NOT GOING TO LEGISLATIVE  
INTENT.

>> LAW ENFORCEMENT OFFICERS GET  
TOO PROTECTIVE.

THEY GET THIS PROTECTION AND  
THEY GET THAT PROTECTION.

WHAT IS IT THAT WOULD SAY THE

LEGISLATURE WASN'T INTENDING TO GIVE THIS LAW THE BROADEST SWEEP AS OPPOSED TO A NARROWER SWEEP.

>> IF IT BECOMES WHAT THE LEGISLATURE INTENDED IS CONFUSION ABOUT THE STATUTE, WE LOOK TO THE LEGISLATIVE HISTORY AS I CITED.

IN 2005 WHEN THIS LAW WAS ENACTED, IT WAS THE FEBRUARY 10, 2005, SENATE BILL CITED IN THE BRIEFS, CS FOR SB 456.

USE OF FORCE BY LAW ENFORCEMENT, YOU SEE WHEN COMMITTEES WERE REVIEWING WHAT WAS GOING ON IN THE ENTIRE STATUTE 776 AS A WHOLE, THEY RECOGNIZE THAT LAW ENFORCEMENT OFFICERS WERE COVERED UNDER 77605.

THEY CALLED IT LIMITED LIABILITY AND WHEN YOU LOOK AT THAT LEGISLATIVE HISTORY, THOSE COMMITTEE NOTES, WHEN THE LAW WAS AND ACTED.

>> LEGISLATIVE HISTORY, CAN I GET YOU TO ANSWER A COUPLE QUESTIONS SO WOULD YOU AGREE THE NEW LAW DOES AT LEAST TWO SIGNIFICANT THINGS, THE FIRST OF WHICH WOULD BE TO DO AWAY WITH THE NEED TO RETREAT FOR NON-LAW ENFORCEMENT OFFICERS OUTSIDE THEIR HOME, THAT IS ONE OF THE SIGNIFICANT THINGS.

THE SECOND SIGNIFICANT THING IS IT CREATED AN ABSOLUTE IMMUNITY THAT COULD BE RAISED FREE TRIAL, CORRECT?

THAT IS A RIGHT THAT DIDN'T EXIST BEFORE FOR ANYBODY. CORRECT?

>> FOR THE AVERAGE CITIZEN.

>> NOBODY HAD ABSOLUTE IMMUNITY TO RAISE SELF-DEFENSE PRETRIAL.

>> I DISAGREE.

UNDER THE LAW ENFORCEMENT STATUTES, WE ARE MINCING WORDS WHEN WE TALK ABOUT ABSOLUTE IMMUNITY, QUALIFIED IMMUNITY, LOOKING AT THE HISTORY OF WHAT

QUALIFIED IMMUNITY MEANS.  
>> FACTFINDER CAN RESOLVE  
DISPUTES OF FACT AND DETERMINE  
FACTUALLY EVEN DISPUTES REALLY  
-- A DISPUTED FACTUAL SITUATION  
THIS IMMUNITY APPLIES.

THAT IS A NEW THING AND IS  
SIGNIFICANT.

>> THAT IS SIGNIFICANT BUT THAT  
WAS NOT PART OF THE STATUTE,  
THAT IS DECISIONAL LAW THAT  
CREATED THE PROCESS OF HOW THE  
IMMUNITY WOULD BE RAISED UNDER  
THE STAND YOUR GROUND LAW.  
THAT CAME OUT OF THIS COURT IN  
DENNIS.

>> OUR DECISION WAS THAT WAS  
WHAT THE STATUTE DID.

>> FOR THE AVERAGE CITIZEN.  
WHEN YOU LOOK AT THE HISTORY.

>> I DON'T THINK WE ADDRESSED  
TO, WHETHER IT WAS LIMITED TO  
THE AVERAGE CITIZEN AS OPPOSED  
TO LAW ENFORCEMENT OFFICER IS  
NOT ADDRESSED IN THAT DECISION,  
WAS IT?

>> KNOW.

HOWEVER --

>> SO YOU AGREE THE STATUTE DID  
SOMETHING SIGNIFICANT IN  
CREATING ABSOLUTE IMMUNITY AND  
BY THAT, YOU CAN GET A HEARING  
AND HAVE A FACTUAL DETERMINATION  
BEFORE TRIAL WHETHER YOU ARE  
ENTITLED TO IMMUNITY UNTIL YOU  
GO TO TRIAL AND THAT IS A NEW  
THING, CORRECT?

LAW ENFORCEMENT OFFICERS, NOBODY  
HAD THAT RIGHT BEFORE, IS THAT  
CORRECT?

>> KNOW.

THIS ISN'T A CASE THAT COMES UP  
ALL THE TIME.

WHEN YOU DO THE RESEARCH WITH  
RESPECT TO LAW ENFORCEMENT  
OFFICERS PARTICULARLY WITH THE  
STATUTE THERE'S 22 CASES THAT  
COME UP.

>> OF THE OLD STATUTE PROVIDED  
THE SAME OPPORTUNITY FOR

PRETRIAL DETERMINATION, WHY ARE WE HERE?

WHY CAN'T WE JUST TAKE THE JUDGE'S FINDINGS OF FACT THAT THE OFFICER WAS ACTING IN SELF-DEFENSE AND GET IMMUNITY UNDER THE OLD STATUTE?

YOU SAY THEY HAD THE RIGHT.

>> THEY HAD THE RIGHT TO CLAIM IMMUNITY.

IT IS CALLED QUALIFIED IMMUNITY, DEFENSE QUALIFIED IMMUNITY.

I RECOGNIZE THERE IS MINCING OF TERMS.

HOWEVER, THERE HAS NEVER BEEN A BAR TO RAISING THE DEFENSE PRETRIAL.

>> THEN WHY ARE WE HERE?

>> BECAUSE THE FOURTH DISTRICT FOR SOME REASON DIDN'T TAKE THE NEXT STEP AND LOOK AT WHETHER OR NOT THIS WAS A SPECIFIC VERSUS THE GENERAL ISSUE.

THEY SAID WE STOPPED WITH PERSON MEANS EVERYONE.

>> LET ME ASK YOU A QUESTION.

>> YOU ARE CONCEDED THAT BASED ON THE TRIAL'S FINDINGS OF FACT THAT THE OFFICER BECAUSE FINDING OF FACT IS HE WAS ACTING IN SELF-DEFENSE SO HE IS IMMUNE UNDER THE PRIOR STATUTE AND THERE IS NO TRIAL.

THE CASE SHOULD BE DECIDED.

>> THE ARGUMENT IS THE OFFICER DOESN'T GET THE LESS RIGID STANDARD WE ARGUED APPLIES TO THE AVERAGE CITIZEN BASED ON THE ENACTMENT OF STAND YOUR GROUND.

WHAT THE OFFICER GETS IS THE QUALIFIED IMMUNITY, THEY CAN RAISE, THE ONLY EXAMPLES WE HAVE AS REFERENCED ARE LAW

ENFORCEMENT OFFICERS RAISING THIS TYPE OF IMMUNITY IN 1983 ACTIONS BUT THERE'S ALWAYS A PROCESS FOR THAT.

IT HAS ALWAYS BEEN DONE BY SUMMARY JUDGMENT MOTIONS.

WE HAVE A SIMILAR MOTION.

>> WE KNOW THAT SUMMARY JUDGMENT IS DIFFERENT THAN WHAT IS AVAILABLE UNDER THE NEW LAW. WE KNOW UNDER SUMMARY JUDGMENT IF THERE ARE DISPUTED ISSUES OF MATERIAL FACT THERE IS NO SUMMARY JUDGMENT AND ISN'T THAT CORRECT?

I AM SOMEWHAT MYSTIFIED BY YOUR SUGGESTION THAT THERE IS NO DIFFERENCE.

HELP CLEAR UP MY MYSTIFICATION.

>> THERE IS A DIFFERENCE, IT IS TWO DIFFERENT LAWS WITH TWO DIFFERENT PROCEDURES AND THAT IS WHAT THIS FIGHT COMES DOWN TO, WHICH PROCEDURE APPLIES.

THIS POSITION IS --

>> WHO DOES THE NEW STATUTE SAY IT'S PROCEDURE APPLIES TO?

IT SAYS ANY PERSON.

>> IT SAYS ANY PERSON.

HOWEVER.

>> LET ME SEE IF I CAN PARSE OUT WHAT YOU ARE TRYING TO SAY.

CORRECT ME IF I AM WRONG.

IT SEEMS TO ME YOUR ARGUMENT BREAKS DOWN TO ANY PERSON, ANY CITIZEN INCLUDING A POLICE OFFICER EXCEPT IF THE POLICE OFFICER IS OPERATING IN HIS OR HER OFFICIAL CAPACITY.

CORRECT ME AS I GO.

ANY PERSON CAN USE THE STATUTE BUT IF A POLICE OFFICER IS ACTING IN HIS OR HER OFFICIAL CAPACITY, THEN THE STATUTE CONCERNING POLICE OFFICERS IS A STATUTE THAT COVERS.

>> THAT IS SO BECAUSE OFFICERS ACTING IN OFFICIAL CAPACITY HAVE ALWAYS BEEN PROTECTED UNDER THIS OFFICER STATUTE.

IT WAS CODIFIED IN THE 70s BUT CASE LAW, LAW ENFORCEMENT OFFICERS DUTIES TO INVESTIGATE THE CRIME.

THEY HAVE TO GO TO THE CRIME.

IT IS PART OF THEIR JOB TO DO THIS.

>> IF THAT IS THE CASE, WHEN THE POLICE OFFICER IS ACTING IN HIS OR HER OFFICIAL CAPACITY, DOES THE PART OF THE STATUTE THAT TALKS ABOUT IMMUNITY OR HAVING A HEARING TO DETERMINE IF YOU ARE GOING TO HAVE A TRIAL, IS THAT PART OF IT APPLICABLE EVEN THOUGH IT IS NOT UNDER THE SPECIFIC LAW ENFORCEMENT STATUTE?

>> KNOW.

WHEN YOU LOOK AT THE ENACTMENT OF THE STAND YOUR GROUND LAW 776032 IS THE IMMUNITY STATUTE, 012013, THERE IS A THIRD, 31. THOSE ARE THE 3 LISTED STATUTES THE LEGISLATURE PUT IN THAT ALLOW THE IMMUNITY WHICH HAS BEEN TURNED ABSOLUTE IMMUNITY. IMMUNITY IS IMMUNITY. I THINK THAT IS WHAT HAPPENED HERE.

WHEN YOU LOOK AT THE US SUPREME COURT CASE LAW DEFINING QUALIFIED IMMUNITY VERSUS WHAT THIS COURT HAS DEFINED AS ABSOLUTE IMMUNITY IN DENNIS, IT IS TO PREVENT THE TRIAL FROM HAPPENING.

THE STATE HAS SAID THE OFFICER CAN RAISE IT BUT IT IS A DIFFERENT PROCESS, ALWAYS HAS BEEN.

THAT IS THE PROCESS THAT COMES OUT.

>> LET ME ASK YOU THIS BECAUSE I'M CONFUSED.

ASSUMING YOU ARE CORRECT AND THERE ARE STATUTES THAT PROVIDE IMMUNITY, WHEN IS THE FIRST TIME AN OFFICER CAN RAISE THAT, A POLICE OFFICER?

IS A DEFENSE LATER ON?

WHEN DOES IT RAISE?

>> THEY CAN RAISE IT IN A MOTION TO DISMISS.

UNDER 3.190.

A COMPARABLE MOTION HAS BEEN RAISED.

>> HAS THAT BEEN DONE IN A STATE?

>> THERE IS NO CASE.  
THE CASES I HAVE CITED INVOLVE A CRIMINAL CASE INVOLVING STATUTE BUT THAT HAD GONE TO TRIAL. THERE IS NO COMMITTAL CASE. NOTHING PREVENTS THAT FROM BEING RAISED.

THE ONLY GUIDANCE WE HAVE OUR 1983 ACTIONS BECAUSE LAW ENFORCEMENT OFFICERS ARE NOT THE SAME.

>> STAND YOUR GROUND STATUTE HAS BEEN AROUND A FEW YEARS NOW AND SEEMS EVERY SINGLE YEAR THERE IS A CERTAIN CHANGE IN LEGISLATURE. IF THE LEGISLATURE INTENDED TO INCLUDE POLICE OFFICERS ON STAND YOUR GROUND STATUTE, WHY DON'T THEY SAY SO?

THEY HAD AMPLE OPPORTUNITY.

>> THEY DID WHEN THEY AND ACTED THE STATUTE.

THAT STATUTES DOESN'T INCLUDE 776.

>> COULD HAVE SAID THE STATUTE INCLUDES POLICE OFFICERS. IT HAS SAID THAT, YOU WOULDN'T BE HERE TODAY.

MAYBE.

>> 776032 IS THE IMMUNITY STATUTE.

IT SO THE PERSON WHO USES OR THREATENS TO USE FORCE IS PERMITTED IN 776012776013, 776031.

THAT IS A CLEAR STATEMENT AS TO WHAT STATUTES IMMUNITY APPLIES IN.

>> COULD HAVE SAID A PRESENT DOES NOT INCLUDE A POLICE OFFICER IS WOULD -- IT WOULD SOUND SILLY BUT THEY COULD HAVE SAID THAT.

>> IF THERE IS CONFUSION, THAT IS WHY, THE COMMITTEE, THE COMMITTEE NOTES THAT I REFERENCED, ARE IMPORTANT BECAUSE THEY NOTED THERE ARE

OTHER STATUTES, THEY WERE TALKING IN THOSE COMMITTEE NOTES, GOING THROUGH DIFFERENT STATUTES THAT WEREN'T INCLUDED UNDER THE IMMUNITY LAW TO EXPLAIN, THIS IS WHERE THIS PROTECTION --

>> IN YOUR REBUTTAL, I NEED TO GO BACK TO YOU ARE SEEING, 7760.5 THAT IS SPECIFIC.

>> YES.

>> THAT ONLY COVERS WHERE LAW ENFORCEMENT OFFICER IS MAKING AN ARREST.

HERE YOU HAVE A SITUATION WHERE IT WAS THEY WERE RESPONDING TO AN EMERGENCY, SO 7760.5 EVEN APPLIES, NUMBER ONE.

NUMBER TWO, WE ARE TALKING ABOUT A SIGNIFICANT IMMUNITY.

A DEFENDANT WAS CHARGED WITH MANSLAUGHTER.

THERE IS NOTHING IN 776.5 WHICH WOULD ALLOW THE DISMISSAL OF A MANSLAUGHTER CHARGE BECAUSE OF A FACTUAL FINDING THAT THERE WAS, THAT THE FORCE THAT WAS EXERTED WAS NECESSARY.

IN FACT IT IS CONTRARY TO THE INDICTMENT WHICH MUST HAVE FOUND SINCE IT IS MANSLAUGHTER THAT IT WASN'T NECESSARY.

WHERE IS, WHERE IS THE COMPARABLE, NOT ONLY IMMUNITY, BUT FROM IMMUNITY FROM PROSECUTIONS AS OPPOSED TO CIVIL LIABILITY.

THAT IS WHAT 1983 IS.

>> THAT IS WHERE IT COMES FROM.

>> WHAT COMES FROM?

77 -- IT DOESN'T APPLY OTHER THAN WHEN MAKING AN ARREST, NUMBER ONE, SO IT IS LIMITED, AND IT DOESN'T SEEM TO PROVIDE ANY OUT FOR A PRETRIAL DISMISSAL FOR IMMUNITY.

I NOT SEEING IT.

>> THE ISSUE HERE IS THE FACT THAT DID COME OUT, THERE ARE FACTUAL FINDINGS MADE BUT OUR

ARGUMENT IS THEY ARE DISPUTED  
FACTS IN THIS CASE AND EFFORTS  
TO MAKE A LAWFUL ARREST BECAUSE  
OF RESISTANCE OR THREATENED  
RESISTANCE.

>> GETTING INTO THE FACT WE  
WON'T GET THERE.

WHETHER THIS WAS THE PROPER CASE  
TO ACTUALLY FIND IMMUNITY I  
DON'T SEE HOW WE GET INTO THE  
FACT.

>> BECAUSE THE JUDGE FOUND  
DISPUTED FACTS BELOW AND THAT IS  
NOTED THROUGH THE ORDER THAT AS  
A MATTER OF LAW THIS CASE WOULD  
GO TO TRIAL, DOESN'T GO BACK  
THROUGH A NEW QUALIFIED IMMUNITY  
PLEASE DEAL.

>> WOULD YOU CONCEDE THAT IN A  
CASE WHERE IT WAS UNDISPUTED  
THAT THE OFFICER WAS NOT MAKING  
AN ARREST AND THAT THE OTHER  
CONDITION IN 05 DID NOT OBTAIN  
THAT THERE WAS NO -- YES.

OKAY.

THAT CONDITION -- WOULD YOU  
CONCEDE IN THOSE CIRCUMSTANCES  
THE STAND YOUR GROUND LAW WOULD  
APPLY?

>> IT IS UNDISPUTED FACTS THAT  
THE OFFICER WAS ACTING PROPERLY  
UNDER HIS AUTHORITY THAN 77605  
EMOTION WOULD GET GRANTED.

>> THAT IS NOT MY QUESTION.  
SPECIFICALLY ASKING IF THERE IS  
NO DISPUTE CONCERNING THE FACT  
THE OFFICER WAS NOT MAKING AN  
ARREST, OKAY?

THAT IS NOT IN DISPUTE.

CIRCUMSTANCES WERE IT COULD NOT  
BE THE OFFICERS MAKING AN  
ARREST, THERE'S A CONFRONTATION  
THAT DOESN'T INVOLVE THAT.

WOULD YOU THEN CONCEDE THE STAND  
YOUR GROUND LAW WOULD APPLY?

>> OF THE STAND YOUR GROUND LAW  
DOES APPLY THEN WE KNOW ONCE THE  
JUDGE HAS MADE FINDINGS OF FACT

--

>> ARE YOU GOING TO ANSWER MY

QUESTION?

>> YES.

>> WOULD YOU ANSWER IT?

>> IF THE LAW APPLIES.

>> WOULD IT APPLY?

THAT IS THE QUESTION.

>> YES.

STAND AROUND LAW APPLIES.

>> CIRCUMSTANCES WHERE THE STAND  
YOUR GROUND LAW WOULD APPLY TO A  
LAW ENFORCEMENT OFFICER.

>> YES, THERE ARE.

>> THANK YOU.

>> I WILL SAVE ONE MINUTE AND 55  
SECONDS.

>> UNDER ANY REASONABLE  
DEFINITION OF THE ENGLISH  
LANGUAGE, A LAW ENFORCEMENT  
OFFICER IS A PERSON.

LAW ENFORCEMENT OFFICERS ARE  
PEOPLE TOO.

MAY IT PLEASE THE COURT, ERIC --  
ERIC SCHWARTZREICH AND DEPUTY  
PARADA SO WHO IS HERE AS A  
LAW-ENFORCEMENT OFFICER AND A  
PERSON.

LAW ENFORCEMENT OFFICERS ARE  
PEOPLE TOO.

>> OBVIOUSLY AND WE APPRECIATE  
THAT.

THE ISSUE IS WOULD YOU AGREE THE  
OVERARCHING PURPOSE OF THE STAND  
YOUR GROUND LAW WHEN IT WAS  
ENACTED WAS TO REMOVE FROM THE  
COMMON-LAW A COMMON-LAW DUTY TO  
RETREAT WHICH POLICE OFFICERS  
ACTING IN THEIR OFFICIAL  
CAPACITY NEVER HAD A DUTY TO  
RETREAT.

IT IS THE EXACT OPPOSITE OF WHAT  
POLICE OFFICERS BRAVELY AND  
COURAGEOUSLY DO EVERY DAY.

IF YOU LOOK, FORGET 776.05, IF  
YOU LOOK AT THE WHOLE STATUTORY  
SCHEME, WHICH JUST PERSON, LOOK  
AT IT SINCE THERE WASN'T A DUTY  
TO RETREAT, HOW CAN IT APPLY TO  
LAW ENFORCEMENT OFFICERS IN  
THEIR OFFICIAL CAPACITY.

>> JUSTICE PARIENTE, I AGREE

WITH YOU IN PART.

THE INTENTION IS TO AGGREGATE MEANING TO RETREAT BUT I DON'T AGREE WITH THE PROPOSITION THAT LAW ENFORCEMENT OFFICERS NEVER HAD THE DUTY TO RETREAT.

THEY HAVE A DUTY TO RETREAT DURING THE COURSE OF LAWFUL ARREST OR NOW THE EXECUTION OF LAWFUL DUTY.

SO IF YOU HAVE A SCENARIO --

>> YOU SAID THEY HAVE A DUTY TO RETREAT DURING LAWFUL ARREST?

>> YES.

776.05, THE ARREST STATUTE, SAYS A LAW-ENFORCEMENT OFFICER HAS A DUTY TO RETREAT FROM THE COURSE OF A LAWFUL ARREST OR EXECUTION OF A LEGAL DUTY.

>> THEY NEED NOT RETREAT.

>> NEED NOT RETREAT.

>> YOU SAID RETREAT, DUTY TO RETREAT.

THAT IS THE QUESTION.

THE VERY OPPOSITE OF THE DUTY TO RETREAT, THEY DON'T HAVE TO RETREAT.

>> I SHOULD BE A BETTER WORDSMITH HAVE AN ATTORNEY, I APOLOGIZE.

I MIXED THAT UP.

MY POINT IS THEY DON'T ALWAYS HAVE NO DUTY NOT TO RETREAT.

DID I GET THAT RIGHT?

>> I DON'T KNOW.

>> THE POINT IS IT IS NOT ABSOLUTE.

>> AS A LAW-ENFORCEMENT OFFICER--

>> TELL ME A CIRCUMSTANCE WHEN A LAW ENFORCEMENT OFFICER, IN THE EXERCISE OF HIS OR HER DUTIES, HAS A DUTY TO RETREAT.

>> WHEN HE'S MAKING-- HAS A DUTY TO RETREAT WHEN--

>> HAS A DUTY TO RETREAT.

>> ACCORDING TO 776.05 IF AN OFFICER IS MAKING A LAWFUL ARREST OR IN THE EXECUTION OF A LAWFUL DUTY, THEN HE HAS NO DUTY

TO RETREAT.

A CIRCUMSTANCE THAT I CAN THINK OF AS I STAND HERE WOULD BE, LET'S SAY, AN OFFICER MAKES AN ARREST OUTSIDE HIS JURISDICTION, AND THERE'S NO PACs BETWEEN DIFFERENT POLICE AGENCIES.

AND SOMEHOW IT'S DETERMINED, IF WE'RE GOING WITH THAT STATUTE, THAT IT'S NOT A LAWFUL ARREST, THEN UNDER THAT SITUATION IF YOU READ THE PLAIN MEANING OF 776.05, THAT OFFICER WOULD HAVE A DUTY TO RETREAT.

SO UNDER THAT CIRCUMSTANCE, THAT'S WHERE I MAKE THAT ARGUMENT.

BUT MORE IMPORTANTLY HERE, WHAT I THINK WE HAVE IS APPLES AND ORANGES.

>> LET ME ASK YOU, MY CONCERN-- I DON'T HAVE MY MICROPHONE ON.

[LAUGHTER]

THE, CAN YOU TELL US OF A CASE WHERE A PROCESS HAS BEEN ESTABLISHED THAT PROVIDES FOR A PRETRIAL HEARING ON THE QUESTION OF IMMUNITY FOR AN OFFICER?

>> THE DENNIS CASE.

DENNIS AND PETERSON, WHICH WAS HELD BY THE SUPREME COURT OR BY YOUR JUSTICES, WHERE YOU OUTLINED THE PROCEDURE.

NOW, THE BURDEN HAS SINCE SHIFTED BECAUSE THE LEGISLATURE-- I WON'T GET INTO A SEPARATION OF POWERS ARGUMENT--

>> MAYBE I MISTOOK.

I'M TALKING ABOUT UNDER THE PROCEDURE OF THE PRE-EXISTING STATUTES BEFORE THE STAND YOUR GROUND STATUTES.

STATES CLAIMING THAT UNDER THOSE STATUTES POLICE OFFICERS HAVE ALWAYS BEEN ENTITLED TO ARGUE THIS SORT OF IMMUNITY.

CAN YOU TELL US OF A SITUATION OR A PROCESS IN PLACE THAT PROVIDED FOR THAT IN COURT?

>> I DON'T AGREE WITH THE ARGUMENT OF THE OFFICE OF THE ATTORNEY GENERAL, BECAUSE WHAT THEY'RE ARGUING IS THAT IT SHOULD, THAT 776.05, THAT THE VEHICLE WHICH THAT'S AN AFFIRMATIVE DEFENSE, NOT ABSOLUTE IMMUNITY, THEIR ARGUMENT IS THAT THE VEHICLE SHOULD HAVE BEEN A C4 SWORN MOTION TO DISMISS WHICH WE ALL KNOW IF THE FACTS ARE IN DISPUTE IF THEY MAKE AN ANALOGY, IT'S SIMILAR TO A JUDGMENT IN A CIVIL CASE, THAT IF THE FACTS ARE IN DISPUTE, IT'S GAME OVER.

>> SO THE ONLY PROCESS IN PLACE WOULD HAVE BEEN A C4 MOTION.

>> WOULD HAVE BEEN A C4 MOTION. AND AS SOMEONE WHO'S BEEN A CRIMINAL DEFENSE ATTORNEY FOR 20 YEARS, IT'S NOT PRACTICE OR PROCEDURE TO FILE A C4 MOTION LIKE THIS ON AFFIRMATIVE DEFENSE ESPECIALLY WHEN IT'S SWORN TO WHEN YOU'RE FORCED TO GIVE UP YOUR FIFTH AMENDMENT, ANOTHER THING ON THAT MOTION THAT'S SWORN TO.

SO WE'RE DEALING WITH OTHER CONSTITUTIONAL AMENDMENTS.

>> JUST STICK WITH THE-- I'M CONCERNED ABOUT THE PROCESS AND PROCEDURE, WHETHER SUCH A THING EXISTED.

A C4 MOTION WOULD NOT PROVIDE FOR AN EVIDENTIARY HEARING.

>> CORRECT.

>> IT WOULD BE BASED ONLY ON THE FILING OF A SWORN MOTION TO DISMISS.

>> YOU'RE ABSOLUTELY CORRECT, JUSTICE LABARGA.

>> AS OPPOSED TO A STAND YOUR GROUND PRETRIAL HEARING THAT WOULD REQUIRE EVIDENCE TO BE PRESENTED.

>> YOU'RE ABSOLUTELY CORRECT.

>> OKAY.

SO AGAIN, MY QUESTION IS DO YOU

KNOW OF ANY PROCESS IN PLACE BEFORE THE STAND YOUR GROUND STATUTES TO THE FACT THAT WOULD HAVE PROVIDED FOR SUCH AN EVIDENTIARY HEARING PRIOR TO TRIAL WHERE A JUDGE, FROM HEARING EVIDENCE, WOULD DECIDE WHETHER OR NOT IMMUNITY APPLIES OR NOT?

>> THE ANSWER TO THAT QUESTION IS, NO, I DO NOT.

>> THANK YOU.

>> AND THE REASON I MAKE THAT ARGUMENT HERE IS THE LEGISLATURE'S INTENT WHEN THEY DRAFTED FLORIDA STATUTE 776.021 AND 776.032, COLLECTIVELY KNOWN AS THE FLORIDA STAND YOUR GROUND STATUTES, THEIR INTENTION WAS ABSOLUTE IMMUNITY.

WHAT THE STATE ATTORNEY'S OFFICE AND THE ATTORNEY GENERAL'S OFFICE HAS BEEN ARGUING, I MEAN, ARE TWO SEPARATE THINGS.

AND, YOU KNOW, THEY WANT TO MAKE THIS ARGUMENT THAT THEY'RE TWO SEPARATE ACTORS.

THE PROBLEM WITH TRAVELING UNDER 776.05, AND WE WERE AWARE OF THE SECOND DISTRICT COURT OF APPEALS' RULING IN KEY MONO, WE FILED OUR MOTION UNDER BOTH.

AND, IN FACT, JUSTICE USAN WHO ISSUED THE ORDER, HE GRANTED OUR MOTION NOT ONLY PURSUANT TO THE FLORIDA STAND YOUR GROUND STATUTES, BUT ALSO PURSUANT TO FLORIDA-- TO THE FLORIDA USE OF OFFICER'S FORCE DURING THE COURSE OF AN ARREST.

>> WELL, THEN IF THAT'S THE CASE, YOU'RE-- EVEN IF WE WERE TO RULE AND SAY THAT THE SECOND DISTRICT GOT IT RIGHT, YOU HAVE-- I THOUGHT YOU HAVE A DISMISSAL UNDER 776.05?

>> WE WANTED TO COVER OUR BASES.

>> I JUST WANT-- COULD YOU JUST ANSWER THAT?

>> YES, JUDGE, WE DO.

>> OKAY.

THE OTHER QUESTION I HAVE THEN IS SO WHEN, SO UNDER WHAT VEHICLE AS JUSTICE LABARGA WAS ASKING, UNDER WHAT VEHICLE UNDER 776.05 COULD YOU GET A DISMISSAL?

THERE WAS AN EVIDENTIARY HEARING UNDER BOTH, IS THAT CORRECT?

>> YES, JUDGE.

>> THE SECOND DISTRICT OPINION CAME OUT IN WHAT YEAR?

>> I BELIEVE IT WAS KIMONO YOU'RE REFERRING TO, I DON'T WANT TO MISSPEAK, BUT I BELIEVE-- I CAN APPROXIMATE ABOUT MAYBE 2011, 2010?

>> OKAY.

SO, AND WE'D HAVE TO USE THIS CANON IF WE FIND AMBIGUITY. BUT THE LEGISLATURE TWICE AFTER THAT DECISION AMENDED THE STATUTE AND NEVER CLARIFIED THAT IT INTENDED STAND YOUR GROUND TO INCLUDE LAW ENFORCEMENT OFFICERS IN THEIR OFFICIAL CAPACITY. IS THAT CORRECT?

>> THAT'S CORRECT.

>> OKAY.

SO IT'S REALLY, WOULD YOU AGREE THAT IF WE LOOK AT BOTH THAT PLUS THE FACT THAT THERE WAS NEVER A COMMON LAW DUTY FOR POLICE OFFICERS ACTING IN THEIR LAWFUL CAPACITY TO RETREAT ARE, IT WOULD SEEM ODD THAT THE LEGISLATURE WOULD HAVE INTENDED THIS STATUTORY SCHEME TO APPLY TO A LAW ENFORCEMENT OFFICER IN THE COURSE OF THEIR OFFICIAL DUTIES.

>> I WOULDN'T AGREE WITH THAT. I WOULD MAKE THE FOLLOWING STATEMENT: IF THE LEGISLATURE WANTED THE STAND YOUR GROUND LAWS NOT THE APPLY TO LAW ENFORCEMENT OFFICERS, SPECIFICALLY MY CLIENT DEPUTY PERAZA, THEY WOULD HAVE SAID THE PLAIN MEANING OF THE STATUTE,

ANY PERSON EXCEPT LAW  
ENFORCEMENT.  
THE STATUTE WOULD HAVE BEEN  
AMENDED.

I MEAN, WHAT WE'RE DEALING HERE  
WITH AND WHY THE KIMONO CASE IN  
THE SECOND DISTRICT COURT OF  
APPEAL, IN MY OPINION, AND THE  
FOURTH DISTRICT COURT OF APPEALS  
GOT IT WRONG IS BECAUSE THEY  
SHOULD HAVE NEVER GOTTEN INTO  
THE THEORY OF STATUTORY  
CONSTRUCTION BECAUSE OF THE  
PLAIN LANGUAGE MEANING.  
THE TERM "PERSON."

>> WHEN YOU FILED A MOTION  
PURSUANT TO 776.05, DID YOU  
ALLEGE OR HAVE A SWORN AFFIDAVIT  
THAT THE CLIENT WAS IN THE  
PROCESS OF MAKING AN ARREST?

>> DID NOT FILE A SWORN  
AFFIDAVIT, BECAUSE I WASN'T SURE  
HOW IT WAS GOING TO BE  
INTERPRETED.

I WAS AWARE OF THE KIMANO CASE,  
BUT I WAS AWARE OF THIS COURT'S  
RULING IN DENNIS AND PETERSON  
AND THE PROCEDURAL OUTLINE.  
KEEP IN MIND, OUR CASE WAS FROM  
2013, AND DEPUTY PERAZA, WE HAD  
THE BURDEN OF PROOF IN THIS  
CASE.

BUT MY THINKING AT THAT TIME WAS  
I'M NOT SURE HOW THIS IS GOING  
TO BE INTERPRETED.

SO IF WE EVER GOT THAT FAR, THEN  
I WOULD ATTEMPT TO HARMONIZE  
BOTH STATUTES AND THAT WE WOULD  
USE THE VEHICLE AS OUTLINED IN  
DENNIS AND PETERSON AND NOT  
DOING IT PURSUANT TO A C4 SWORN  
MOTION.

>> I THOUGHT YOUR POSITION WAS  
HE WAS NOT MAKING AN ARREST.

>> HE WAS NOT MAKING AN ARREST.  
IT WAS AN INVESTIGATORY STOP.  
BUT I FILED IT UNDER BOTH,  
BECAUSE I WAS CONCERNED WITH THE  
KIMANO CASE.

I NEVER AGREED WITH THE KIMONO

CASE.

I UNDERSTOOD AN ARGUMENT COULD BE MADE.

MY POSITION HAS ALWAYS BEEN THAT IT'S INVESTIGATORY STOP, THERE'S THREE TYPES OF--

>> YOU DID IT IN CASE IT WAS SOMEHOW FOUND BY A COURT OTHERWISE, THAT HE WAS IN THE PROCESS--

>> IT BRINGS UP, JUSTICE POLSTON, IF I MAY, AN INTERESTING QUESTION.

WE HAVE THREE IN THE LAW OUTLINED BY THE SUPREME COURT IN POPPELL CONSENSUAL ENCOUNTERS, INVESTIGATORY STOPS AND ARRESTS. LAW ENFORCEMENT OFFICERS, LAWYERS AND SOME JUDGES GET CONFUSED WHEN AN ACTUAL ARREST HAPPENS VERSUS A CONSENSUAL ENCOUNTER OR A TERRY STOP. AND IF WE WERE TO HAVE SOME BRIGHT-LINE RULE AND IT WAS JUSTICE CANADY THAT ASKED THIS QUESTION TO MS. SURBER, ARE YOU SAYING THAT LAW ENFORCEMENT OFFICERS CAN USE STAND YOUR GROUND WHEN IT'S NOT DURING THE COURSE OF AN ARREST, AND THAT'S THEIR ARGUMENT.

AND THAT'S A DANGEROUS ARGUMENT, THAT A LAW ENFORCEMENT OFFICER WHO HAS A DANGEROUS JOB IS MAKING THESE CALCULATIONS TO PROTECT AND TO SERVE.

AND IF THERE'S A BAD GUY AND WHAT'S GOING ON, THEN HE'S GOT TO WORRY, WELL, IF THIS IS AN ARREST, IF I POINT A WEAPON OR IF I DO THIS, I'M NOT GOING TO BE ABLE TO USE THE SAME LAWS AS A PERSON.

WHEN DEPUTY PERAZA GOT ARRESTED, HE'S A DEPUTY.

BUT HE WASN'T KNOWN AS DEPUTY DEFENDANT.

WHEN A DOCTOR GETS ARRESTED, IT'S NOT DOCTOR DEFENDANT, IT'S THE DEFENDANT.

WHY SHOULDN'T ANY DEFENDANT,  
ANYONE WHO'S IN THE CRIMINAL  
JUSTICE SYSTEM WHEN THERE'S LIFE  
AND LIBERTY, DEPUTY PERAZA WAS  
DOING HIS JOB AND WAS FACING 30  
YEARS, WHY SHOULD HE NOT BE  
ALLOWED TO USE ALL THE STATUTES  
AVAILABLE IN PARTICULAR WHEN THE  
FLORIDA LEGISLATURE SAID "ANY  
PERSON"?

I DON'T THINK THE SECOND  
DISTRICT COURT SHOULD HAVE EVER  
GOTTEN INTO IN PARI MATERIA.  
BUT IF THEY DID, MR. BRUNO AND I  
WOULD FILE MOTIONS.

WE WERE TRYING TO COVER ALL  
BASES ON BEHALF OF OUR CLIENT  
BECAUSE WE DIDN'T KNOW HOW THIS  
WOULD BE INTERPRETED.

BUT WE KNEW BASED ON THE FACTS  
OF THIS CASE AND THE COMPETENT,  
SUBSTANTIAL EVIDENCE THAT WAS  
THE 31 WITNESSES THAT WERE  
CALLED AND WHAT HAPPENED IN THIS  
CASE AND THAT A MAN-- AND THIS  
CASE IS A TRAGEDY FOR THE  
DECEDENT AS WELL.

BUT FOR THE MAN WHO WAS SHOT, I  
MEAN, HE WAS MARCHING DOWN DIXIE  
HIGHWAY, A VERY POPULAR HIGHWAY  
IN BROWARD COUNTY, WITH A RIFLE  
ON HIS SHOULDERS AND WAS GIVEN  
COMMANDS.

BSO, BROWARD'S SHERIFF'S OFFICE,  
STOP, DROP.

>> YOU'RE GETTING INTO FACTS  
WHICH, AGAIN, MOST RESPECTFULLY,  
WAS THIS AN INDICTMENT OR AN  
INFORMATION?

>> IT WAS AN INDICTMENT.

>> OKAY.

SO A GRAND JURY HEARD THE  
TESTIMONY, AND WHEN YOU SAY  
THERE'S VERY FEW CASES, I MEAN,  
MOST TIMES IN THESE SHOOTINGS  
WHERE A POLICE OFFICER HAS TO  
SHOOT A CITIZEN THERE ISN'T AN  
INDICTMENT.

SO WHEN YOU'RE GIVING THE FACTS,  
YOU'RE NOW GIVING THEM IN THE

LIGHT MOST FAVORABLE TO YOUR CLIENT.

BUT A GRAND JURY DISAGREED AND MADE THE VERY RARE DECISION TO INDICT THIS DEPUTY FOR MANSLAUGHTER.

SO THERE MUST BE SOME OTHER FACTS THAT THE GRAND JURY HEARD THAT ISN'T RIGHT NOW IN YOUR RECITATION.

>> ACTUALLY, JUSTICE PARIENTE, I'VE HAD THIS CASE FOR FIVE YEARS.

I WAS PRESENT WITH DEPUTY PERAZA WHEN WE WENT IN FRONT OF THE GRAND JURY.

I HAVE-- PERHAPS I REGRET, AND I'LL EXPLAIN WHY TAKING HIM IN FRONT OF THE GRAND JURY, BUT I HAVE NO REGRETS ABOUT WHAT DEPUTY PERAZA DID THAT DAY. STAND YOUR GROUND IS A HOT BUTTON TOPIC ISSUE ON BOTH SIDES.

DEPUTY PERAZA WENT IN FRONT OF THE GRAND JURY WITH THE SAYING, AND I DON'T WANT TO BE HOKEY HERE--

>> IS THAT IN THE TRANSCRIPTS?

>> THERE'S RECORD.

DEPUTY PERAZA, THE AGENCY'S OFFICE IS MAKING THE ARGUMENT HE NEVER HAD A DUTY TO RETREAT. WHILE HE WAS IN FRONT OF THE GRAND JURY, HE WAS ASKED QUESTIONS AKIN TO WHY DIDN'T HE RETREAT, WHY DIDN'T HE DUCK AND HIDE BEHIND A CAR.

IT IS OUR POSITION THAT--

>> CAN I REFOCUS US--

>> YES, JUDGE.

>>-- I JUST WANT TO MAKE SURE I'M CORRECT IN MY UNDERSTANDING THAT THERE'S A SUBSTANTIVE STANDARD IN EACH STATUTE THAT DETERMINES WHETHER THE IMMUNITY APPLIES, RIGHT?

AND THEN THERE'S THE EXTENT OF IMMUNITY WHICH IS, APPARENTLY, HAS BEEN INTERPRETED DIFFERENTLY

FOR EACH STATUTE.  
BUT I'M INTERESTED IN THE  
SUBSTANTIVE STANDARD FOR WHEN  
THE IMMUNITY APPLIES AND THE  
DIFFERENCE BETWEEN THE TWO  
STATUTES.

AND AS I UNDERSTAND IT, THE LAW  
ENFORCEMENT STATUTE 776.051 IS  
BROADER IN THAT THE NEWER  
STATUTE PROVIDES AN IMMUNITY FOR  
SOMEONE WHO REASONABLY BELIEVES  
THAT FORCE IS NECESSARY TO  
PREVENT IMMINENT DEATH OR GREAT  
BODILY HARM.

RIGHT?

WHICH IS-- AND THEN THE LAW  
ENFORCEMENT STATUTE APPLIES WHEN  
THE LAW ENFORCEMENT OFFICER IS  
ACTING IN THE CAPACITY DISCUSSED  
IN THE STATUTE AND REASONABLY  
BELIEVES THAT THE FORCE IS  
NECESSARY TO DEFEND AGAINST  
BODILY HARM.

SO IT'S, IT'S A LESSER, IT'S A  
STANDARD THAT PROVIDES IMMUNITY  
EVEN WHEN YOU'RE NOT FACING  
GREAT BODILY HARM OR POTENTIAL  
DEATH.

SO THAT'S A BROADER STANDARD  
THAT WOULD A APPLY IN MORE  
CASES, IS THAT RIGHT?

>> IT DOES.

IN FACT, IT GIVES THE A LAW  
ENFORCEMENT OFFICER THE TERM IS  
ANY FORCE AS OPPOSED TO DEADLY  
FORCE AND IMMINENT THREAT.  
THERE WAS A WITNESS IN THIS CASE  
THAT SAID THIS WAS MORE THAN AN  
IMMINENT THREAT, THIS IS AN  
IMMEDIATE THREAT.

THAT MEANS SOMETHING WAS ABOUT  
TO HAPPEN.

>> SO IN A CASE LIKE THIS WHERE  
THE FINDING, I MEAN, WE'VE  
ALREADY HAD A HEARING, THE  
FINDING IS THAT THIS OFFICER  
REASONABLY BELIEVED THAT HE WAS  
FACING DEATH OR IMMINENT BODILY  
HARM, THAT WOULD MEET BOTH  
STANDARDS.

EITHER ONE WOULD APPLY, CORRECT?

>> YES, JUDGE.

>> OKAY.

WHY WOULDN'T THE WAY TO HARMONIZE THESE STATUTES BE THAT THE ANY PERSON STATUTE WILL APPLY IN CIRCUMSTANCES WHERE THE PERSON MEETS THAT STANDARD WHICH WOULDN'T NECESSARILY BE TRUE IN ALL ARRESTS, THAT THAT STATUTE WOULD APPLY?

AND THEN IF THAT STATUTE DOESN'T APPLY, THE PERSON DOESN'T REASONABLY BELIEVE THAT THEY'RE FACING DEATH OR IMMINENT BODILY HARM, BUT THEY ARE AN OFFICER MAKING AN ARREST AND THINK THEY FACE BODILY HARM, WHY WOULDN'T THE STATUTE THEN APPLY TO THOSE CASES THAT ARE COVERED BY THE LAW ENFORCEMENT STATUTE BUT ARE NOT COVERED BY THE ANY PERSON STATUTE?

>> JUSTICE LAWSON, I THINK YOU CAN.

THERE'S MANY WAYS TO PUT THE HORSE IN THE BARN HERE.

YOU CAN HARMONIZE, IF I'M UNDERSTANDING YOUR QUESTION, THE STATUTES THAT WAY, AND YOU CAN READ THEM THAT WAY IF IT'S DETERMINED THAT YOU GET PAST THE PLAIN MEANING OF THE STATUTE WHICH IS ANY PERSON.

>> YEAH.

>> YOU KNOW, IF I CAN POINT SOMETHING OUT, WE'RE TALKING ABOUT 776.05, AND I WANT TO TALK ABOUT SOME PREPOSTEROUS THING THAT WOULD NEVER BE THE INTENT OF THE LEGISLATURE.

IT SAYS A LAW ENFORCEMENT OR ANY PERSON-- THERE'S THAT TERM, "PERSON," AGAIN-- WHOM THE OFFICER HAS SUMMONED OR DIRECTED TO ASSIST HIM OR HER NEED NOT RETREAT OR DESIST.

SO LET'S SAY WE HAVE A SCENARIO WHERE DEPUTY SMITH SUMMONS CITIZEN JONES TO HELP HIM

ARRESTING A BAD GUY.  
AND IN THAT SCENARIO, THE GUN  
GETS LOOSE-- AND IT'S THE TERM  
"REASONABLE"-- THE CITIZEN  
SHOOTS THE BAD GUY, AND THE BAD  
GUY DIES.

DID THE LEGISLATURE INTEND THAT  
UNDER THAT SCENARIO THAT AT A  
JURY TRIAL, WHICH IS PAST THE  
IMMUNITY STAGE, THAT THAT  
CITIZEN, THAT ANY PERSON--  
BECAUSE THEY'RE ARGUING IT'S A  
CITIZENRY STATUTE-- WOULD ONLY  
GET TO ARGUE THE AFFIRMATIVE  
DEFENSE BUT WOULDN'T GET TO USE  
THE STAND YOUR GROUND STATUTE AS  
WELL?

BECAUSE THE 776.05, IF YOU DELVE  
INTO IT, ALSO AGAIN DEALS WITH  
ANY PERSON.

AND THAT CERTAINLY WOULD NEVER  
HAVE BEEN THE INTENT OF THE  
LEGISLATURE WHEN THEY DRAFTED  
THAT LAW.

>> DOES THE RULE OF LENITY APPLY  
AT ALL?

>> IT SHOULD, BUT I DON'T KNOW  
IF WE GET THERE, JUSTICE  
POLSTON.

IF THERE'S ANY AMBIGUITY, IT  
WOULD APPLY IN THE FAVOR OF  
DEPUTY PERAZA.

BUT I CAN'T GET PAST, AND WITH  
ALL DUE RESPECT TO THE STATE  
ATTORNEY'S OFFICE, I'VE NEVER  
BEEN ABLE TO WRAP MY HEAD-- I  
GUESS WITH RESPECT TO THE SECOND  
DISTRICT COURT OF APPEALS TOO--  
BUT I'VE NEVER BEEN ABLE TO WRAP  
MY HEAD AROUND THE MARKET THAT  
WHEN A STATUTE SAYS ANY PERSON  
CAN USE THIS THAT SOMEHOW DEPUTY  
PERAZA OR ANY LAW ENFORCEMENT  
OFFICER IS PRECLUDED FROM USING  
ANY DEFENSE.

ALL DEFENDANTS SHOULD BE  
ENTITLED TO USE EVERY DEFENSE.  
I'M GOING TO ASK-- MY TIME IS  
RUNNING OUT, JUSTICES, SO I  
WOULD ASK THAT YOU CONTINUE TO

FIND THAT DEPUTY PERAZA WAS AT AN INVESTIGATORY STOP NOT AN ARREST, WHICH WOULDN'T PUT THIS INTO PLAY.

BUT MORE IMPORTANTLY, IN THIS DAY AND AGE WHEN PEOPLE NEED MORE PROTECTION THAN EVER, I'M GOING TO ASK THAT THERE'S LAW ENFORCEMENT OFFICERS ARE ALLOWED THE USE YOUR STAND YOUR GROUND LAW, BECAUSE THAT WAS THE INTENTION OF THE LEGISLATURE AND THAT YOU UPHOLD THE CIRCUIT COURT RULING AND THE FOURTH DISTRICT COURT OF APPEALS' RULING.

THANK YOU VERY MUCH FOR YOUR TIME TODAY.

>> THANK YOU.

>> YOU HAVE CONSUMED MOST OF YOUR REBUTTAL TIME.

HOWEVER, I WILL GIVE YOU FIVE MINUTES.

>> THANK YOU, YOUR HONOR.

I WANT TO START WITH THE STATE DISPUTE THAT THE DEFENDANT IS IMMUNE NO MATTER WHAT UNDER THIS CASE BECAUSE WE'RE ARGUING THAT THE PROCEDURE IS A 3.190, AND THAT IS A DISPUTED FACTS PROCEDURE.

IF THERE ARE DISPUTED FACTS WHICH ARE REFERENCED IN THE TRIAL JUDGE'S WRITTEN ORDER AS WELL AS THE FOURTH DCA OPINION IN CERTIFYING THE CONFLICT AND RECOGNIZING THEIR CONFLICT OR EVIDENCE THAT SUPPORTS--

>> WAS THIS, WAS THIS ACTUALLY IN THE-- WAS THE POLICE OFFICER ACTUALLY IN THE PROCESS OF AN ARREST HERE?

AND WAS THERE ANY FINDING TO THAT EFFECT?

>> THE TRIAL JUDGE FOUND THAT THE FACTS SUPPORTED THAT THEORY. HOWEVER, IF YOU READ THE FOURTH DISTRICT'S OPINION, THE FOURTH ALSO SAID THAT THE FACTS SUPPORT THE THEORY THAT THE OFFICER WAS

BEING, WAS IN THE COURSE OF  
ARREST.

IF YOU'RE ASKING NOT IN THE  
COURSE OF ARREST--

>> I'M SAYING-- NO.

IS IT IN THE COURSE OF ARREST.

>> IN THE COURSE OF AN ARREST.

THE FOURTH DISTRICT COURT OF  
APPEAL IN THE OPINION IN  
EVALUATING THE FACTS ADDUCED  
SAID THAT THE FACTS COULD  
SUPPORT BOTH THEORIES.

AND THAT--

[INAUDIBLE CONVERSATIONS]

>> WHAT DID THE TRIAL COURT  
FIND?

>> THE TRIAL COURT FOUND THAT  
THE FACTS SUPPORTED THE THEORY  
OF ARREST.

>> AND SO--

>> AND THAT'S WHAT DISTINGUISHED  
IT FROM KIMANO.

THAT IS WHY THIS CASE PROCEEDED  
ON THE CONFLICT AND IF THERE WAS  
A FACTUAL DISTINCTION WITH  
KIMANO ON THE CERTIFIED  
QUESTION.

>> WOULD YOU AGREE, WOULD YOU  
AGREE THAT IF IT WAS NOT IN THE  
COURSE OF AN ARREST, THEN 776.05  
WOULD NOT BE APPLICABLE?

>> IF THE FACTS ARE UNDISPUTED  
THAT IT WAS NOT IN THE COURSE OF  
AN ARREST.

AND THE REASON I SAY THAT IS  
BECAUSE IN LOZANO THERE WAS SOME  
LANGUAGE FROM THAT CASE THAT THE  
FACT OF AN ARREST CAN BE A  
QUESTION OF FACT FOR THE JURY.

IT SIMPLY, IT COMES DOWN TO--

AND I DON'T MEAN TO COME BACK TO  
THE FIRST THING I SAID, BUT THIS  
COURT'S REASONING IN BRED RICK.

I UNDERSTAND IT'S STILL A  
CRIMINAL SCENARIO.

BUT AGAIN, WE HAVE LAW  
ENFORCEMENT OFFICERS WITH A  
STATUTE THAT WAS ENACTED IN THE  
1970s WHICH CODIFIED THE FACT  
THAT OFFICERS DID NOT HAVE A

DUTY TO RETREAT.

THAT CASE LAW GOES BACK TO 1928.  
IT IS CITED IN THE REPLY BRIEF.  
SO THAT IS WHY WE'RE ARGUING YOU  
HAVE TO SEPARATE THE TWO,  
BECAUSE THIS COURT MANDATES WHEN  
LOOKING AT IT YOU NEED TO  
DETERMINE WHAT ARE THESE  
STATUTES ADDRESSING.

AND BECAUSE THERE SEEMS TO BE  
SOME CONFUSION WHAT A "PERSON"  
MIGHT MEAN, THE LEGISLATIVE  
HISTORY OF THE STAND YOUR GROUND  
STATUTE SPEAKS DIRECTLY TO THAT  
WHEN IT REFERENCES THAT LAW  
ENFORCEMENT WERE ALREADY  
PROTECTED FROM LIABILITY UNDER  
776.05.

AND TO GO BACK TO WHAT JUSTICE  
LABARGA WAS SAYING, EXCUSE ME,  
BEFORE STAND YOUR GROUND WAS  
ENACTED, YOU KNOW, WE'RE TRYING  
TO ALMOST FIT A ROUND PEG INTO A  
SQUARE HOLE.

BEFORE THE STAND YOUR GROUND LAW  
WAS ENACTED, THE ONLY PROCEDURE  
AVAILABLE WAS A C4 MOTION.

THERE'S NOT A LOT OF CASES.  
I THINK JUSTICE PARIENTE HIT THE  
NAIL ON THE HEAD.

THESE CASES ARE NOT GOING TO BE  
CHARGED ALL THE TIME.

YOU DON'T SEE A LOT OF  
INFORMATION.

IT IS RARE THAT INDICTMENTS  
HAPPEN.

AND, YOU KNOW, WITH THE  
POLITICAL CLIMATE SURROUNDING  
THIS CASE IN THE LAST FEW YEARS,  
I THINK WE KNOW IT IS A BIG  
DEAL.

>> HERE'S THE THING, THAT'S--  
THOSE ARE ALL GREAT POLICY  
ARGUMENTS.

IT'S NOT A LEGAL STATUTORY  
CONSTRUCTION ARGUMENT.

AND IF OFFICER WAS NOT IN THE  
COURSE OF MAKING AN ARREST, THEN  
776.05 DOESN'T APPLY.

>> IF IT'S UNDISPUTED.

>> WELL, BUT LET'S ASSUME IT'S UNDISPUTED THAT HE WASN'T. THEN THAT STATUTE DOESN'T APPLY. THEN THERE'S-- IS THERE ANY OTHER STATUTE UNDER 776 THAT COVERS THE OFFICER'S DEFENSES, SO TO SPEAK?

>> WELL, AND THAT'S WHAT GOES TO THE QUESTION THAT STAND YOUR GROUND MAY APPLY IN SOME CIRCUMSTANCES.

BUT IN THIS--

>> WELL, THIS IS, THIS IS LOGICALLY WHAT I DON'T UNDERSTAND.

WHY WOULD YOU SAY THERE ARE TWO STATUTES THAT MAY APPLY, AND SO WE'RE GOING TO TAKE THE ONE THAT APPLIES WHEN MAKING AN ARREST-- WHICH WE CAN'T DETERMINE PRETRIAL, BUT ASSUMING THAT MIGHT APPLY, THEN THAT'S GOING TO TRUMP THE OTHER STATUTE?

WHY WOULDN'T YOU INSTEAD SAY LET'S SEE IF THE STATUTE APPLIES TO ANY PERSON APPLIES, AND IF IT DOES, THEN THAT PERSON GETS THE BENEFIT OF THAT STATUTE?

AND IF IT DOESN'T, THEN, YOU KNOW, WE GO TO TRIAL AND WE FIGURE OUT WHETHER IT WAS AN ARREST OR WASN'T AN ARREST WHEN THOSE THINGS HAVE TO BE DETERMINED.

WHY WOULDN'T YOU APPROACH IT BY STARTING WITH THE ANY PERSON STATUTE AND SAYING DOES THAT APPLY RATHER THAN THE SPECIALTY STATUTE?

>> BECAUSE THE LAW ENFORCEMENT STATUTE HAS BEEN IN EFFECT MUCH LONGER, AND WE KNOW THAT IF THAT STATUTE APPLIES, OFFICERS OR A SUBJECT--

>> IS THERE SOME PRINCIPLE OF LAW THAT THE FIRST STATUTE THAT'S ENACTED IS THE ONE YOU LOOK AT FIRST?

>> THE MORE SPECIFIC STATUTE.

>> THIS SPECIFICALLY APPLIES TO

ANY PERSON.

THAT'S PRETTY SPECIFIC.

>> BUT I THINK, AGAIN, WE'RE GETTING INTO WHETHER THE PLAIN MEANING OF A STATUTE.

IT'S NOT JUST WHAT IS THE PLAIN MEANING--

>> IF YOU'RE LOOKING AT THE TIME--

>> I'M SORRY.

>> I'M NOT TALKING ABOUT THAT TIME.

I WILL IN A MINUTE THOUGH.

IF YOU'RE TALKING ABOUT THE TIME OF THE STATUTE, ISN'T THE GENERAL RULE THAT THE MORE RECENT STATUTE WOULD APPLY, NOT THE ONE THAT'S BEEN IN FORCE A LONG TIME?

>> NO.

I UNDERSTAND, BUT WE'RE NOT JUST LOOKING AT--

>> I UNDERSTAND.

BUT IF YOU WERE LOOKING AT TIME. YOU TALKED ABOUT TIME.

[LAUGHTER]

YOU'RE THE ONE THAT TALKED ABOUT TIME.

>> BECAUSE THAT'S SIGNIFICANT IN LOOKING AT-- THE LEGISLATURE KNOWS WHEN IT ENACTED THE NEW STATUTE THAT THE LAW ENFORCEMENT STATUTE WAS IN EXISTENCE, AND THEY NOTED THAT.

AND YOU THEN HAVE TO LOOK AT THE PLAIN LANGUAGE OF THE STATUTE IN CONJUNCTION WITH GENERAL VERSUS SPECIFIC.

BOTH TESTS HAVE TO BE LOOKED AT. THAT IS UNDER FLOYD.

>> IF THEY-- WHY ARE WE ASSUMING THAT IF THEY KNEW ABOUT THE STATUTE AND HAD IT IN MIND AND THEY DID NOT WANT THE STATUTE THAT APPLIED TO ANY PERSON TO APPLY IN THOSE CIRCUMSTANCES, WHY WOULDN'T THEY DRAFT A STATUTE AS JUSTICE LABARGA SUGGESTED THAT SAYS ANY PERSON EXCEPT A LAW ENFORCEMENT

OFFICER PURSUING UNDER THE OTHER STATUTE, I MEAN?

>> THEY ESSENTIALLY DID THAT WHEN THEY ASSIGNED THE THREE STATUTES UNDER WHICH THE 032 STATUTE COULD APPLY.

>> LET ME JUST ASK-- I KNOW YOU'RE INTO YOUR ADDITIONAL TIME.

>> I APOLOGIZE.

>> IF WE AGREE THAT THE STAND YOUR GROUND APPLIES, THEN DOES IT-- IS THERE ANY REASON TO HAVE 776.05?

DOESN'T IT NULLIFY THAT?

>> UNDER THE KIMANO DECISION, IT WOULD SEEM IN THIS SCENARIO IT WOULD NULLIFY IT.

>> I MEAN, I DON'T HEAR THAT ARGUMENT BEING MADE, BUT IT SEEMS THAT THAT STATUTE WOULD OVERRIDE AND MAKE 776.05 UNNECESSARY.

>> BUT WHAT, BUT HOW TO DO YOU RESPOND-- IN CONNECTION WITH THAT, HOW DO YOU RESPOND TO WHAT JUSTICE LAWSON SAID ABOUT THE DIFFERENT SCOPE OF THOSE STATUTES AND THE FACT THAT THE SCOPE OF THE LAW ENFORCEMENT STATUTE IS ACTUALLY BROADER IN TERMS OF THE--

>> THAT'S A GOOD-- RIGHT. AND THAT'S A GOOD-- SO THAT ANSWERS MY QUESTION.

>> WELL, I'M GLAD TO DO THAT.  
[LAUGHTER]

>> THANK YOU.

I THINK THAT ALSO SHOWS THE LEGISLATURE, IN ENACTING THE LAW ENFORCEMENT STATUTES, ENVISIONED BROADER PROTECTIONS UNDER THAT STATUTE FOR LAW ENFORCEMENT.

I MEAN, YOU DO HAVE OTHER STATUTES THAT ADDRESS OTHER TYPES OF FORCE, SO I THINK WE DO NEED TO LOOK AT THEM ALL TOGETHER.

AND IF THERE ARE NO FURTHER QUESTIONS, WE WOULD ASK THAT YOU

REVERSE THE DECISION OF FOURTH  
DISTRICT COURT OF APPEAL.

>> THANK YOU.

>> THANK YOU.

>> WE THANK YOU BOTH FOR YOUR  
ARGUMENTS.

THE COURT WILL NOW STAND IN  
RECESS FOR ABOUT TEN MINUTES.

>> ALL RISE.