>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW TURN TO THE FINAL CASE ON TODAY'S DOCKET, LOVE V. THE STATE OF FLORIDA.
GOOD MORNING.
>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, THIS COURT HAS ALWAYS HELD THAT BURDEN OF PROOF PROVISIONS ARE PROCEDURAL IN NATURE.
THE BURDEN MERELY PROVIDES A MEANS OR METHOD TO ADJUDICATING, ENFORCING AND LITIGATING UNDERLYING SUBSTANTIVE RIGHTS.
AS A RESULT, THE BURDEN OF PROOF PROVISION IN THIS CASE IS BOTH PROCEDURAL AND, THEREFORE, PRESUMPTIVELY RETROACTIVE TO ALL PENDING CASES.
THAT IS ESSENTIALLY WHAT THIS COURT RECOGNIZED IN BRETHERICK WHERE, CONSIDERING THE QUESTION OF WHICH PARTY SHOULD BEAR THE BURDEN OF PROOF AT A STAND YOUR GROUND IMMUNITY HEARING, THE COURT REPEATEDLY CHARACTERIZED THAT QUESTION AS BEING ONE INVOLVING PROCEDURE.
ON TOP OF THE FACT THAT THESE LEGISLATORS CLEARLY BELIEVED THAT WHAT THEY WERE DOING WAS ADOPTING CORRECTIVE LEGISLATION, THE PURPOSE OF WHICH WAS TO EFFECTIVELY PUT CRIMINAL DEFENDANTS IN THE POSITION THAT THEY WOULD HAVE BEEN IN BUT FOR THIS COURT'S DECISION IN BRETHERICK, AND THE ONLY WAY TO GIVE FULL EFFECT TO THAT LEGISLATIVE POLICY DETERMINATION WOULD BE TO APPLY THIS NEW LAW TO CASES LIKE MS. LOVE'S.
I'D LIKE TO START TODAY--
>> LET ME ASK YOU THIS, IF YOU JUST LOOK AT ALL THIS ON ITS FACE, THE LEGISLATURE PASSES A STATUTE THAT CHANGES THE BURDEN

OF PROOF OF PARTICULAR
PROCEEDINGS, AND THERE'S AN
EFFECTIVE DATE FOR THAT CHANGE,
ISN'T THE MOST COMMON SENSE WAY
TO UNDERSTAND THAT IS THAT THE
HEARINGS, THE PROCEEDINGS THAT
TAKE PLACE AFTER THAT EFFECTIVE
DATE WOULD BE PROCEEDINGS IN
WHICH THAT NEW BURDEN OF PROOF
WOULD APPLY?
I GET THAT-- I UNDERSTAND
THAT'S NOT WHAT YOU'RE ARGUING,
BUT THAT STILL GIVES YOUR CLIENT
WHAT YOUR CLIENT NEEDS ON THAT
QUESTION.
WHY WOULDN'T THAT BE THE MOST
COMMON SENSE WAY TO UNDERSTAND
SUCH A STATUTE?
>> IN FACT, CHIEF JUSTICE
CANADY, THE STATUTE ITSELF SAYS
IN A CRIMINAL PROSECUTION AT A
STAND YOUR GROUND IMMUNITY
HEARING.
SO WHEN THE JUDGE WOULD LOOK TO
DETERMINE WHAT'S THE BURDEN AT
THAT HEARING, IT WOULD LOOK AT
THE BURDEN IN EFFECT ON THE DAY
OF THE HEARING.
I THINK THAT MAKES A LOT OF
SENSE.
OUR POSITION IS SOMEWHAT
BROADER.
WE SAY ALL PENDING CASES, BUT
YOU CERTAINLY COULD RESOLVE THIS
CASE IN MS. LOVE'S FAVOR BY
SAYING IT APPLIES TO HEARINGS
THAT CAME AFTER THE DATE THE LAW
TOOK EFFECT--
>> LET ME PIGGYBACK ON THIS, AND
I WANT YOU TO EDUCATE ME ON
THIS.
WHAT'S THE PURPOSE OF THIS
PROCEDURAL SUBSTANTIVE DOCTRINE?
YOU DO A GREAT JOB IN YOUR BRIEF
ABOUT TALKING ABOUT THE
DIFFERENT PRESUMPTIONS THAT
ARISE, AND IT ALL SEEMS TO BE WE
REALLY KNOW WHAT THE
LEGISLATURE'S SAYING, SO WE'VE
DEVELOPED ALL THESE TESTS AND

PRESUMPTIONS THAT ARE THERE.
WHAT'S THE PURPOSE OF ALL OF
THIS?
>> I THINK WE KNOW WHAT THE
PURPOSE IS, JUSTICE LUCK, IT'S
TO PROTECT RELIANCE INTERESTS.
SO THE WAY YOU HAVE DEFINED THE
DIFFERENCE BETWEEN SUBSTANCE AND
PROCEDURE, SUBSTANCE IS-- UNDER
GARCIA, WHEN YOU DECLARE WHAT
ACTS ARE CRIMES, THAT'S
SUBSTANTIVE, AND PEOPLE ARE
GOING TO RELY--
>> I KNOW WHAT THEY-- I
UNDERSTAND THE TESTS.
>> I AM TRYING--
>> LET ME ASK YOU MORE
SPECIFICALLY, IS THERE A
CONSTITUTIONAL DIFFERENCE
BETWEEN SUBSTANCE AND PROCEDURE
FOR RETROACTIVITY PURPOSES, OR
WAS THIS JUST A TEST DEVELOPED
JUST SO WE WERE ABLE TO GIVE
SOME GUIDANCE ABOUT FINDING WHEN
SOMETHING IS PROCEDURAL, WHEN
SOMETHING IS SUBSTANTIVE OR
RETROACTIVE OR NOT.
>> YOU WOULD HAVE SAID IN OTHER
CASES THE DUE PROCESS CLAUSE
DOES--
>> THAT WOULDN'T AFFECT THIS
PARTICULAR CASE BECAUSE IT
INURES TO THE BENEFIT OF THE
DEFENDANT, CORRECT?
>> [INAUDIBLE]
>> EVEN UNDER DUE PROCESS.
IN OTHER WORDS, HE'S GETTING
MORE RIGHTS, NOT LESS RIGHTS--
>> THAT'S RIGHT.
>> THERE'S NO CONSTITUTIONAL--
I GUESS WHAT I'M ASKING IS, IT
SEEMS LIKE WE'RE WORKING
BACKWARDS.
WE'RE TRYING TO GUESS AT
SUBSTANCE PROCEDURE THROUGH
THESE DIFFICULT TESTS.
WE'VE TRIED TO DESCRIBE A LOT OF
DIFFERENT WAYS TO TRY TO GET AT
PRESUMPTIONS RATHER THAN DOING
WHAT JUSTICE CANADY JUST ASKED

WHICH IS LET'S LOOK AT THE
STATUTE.
IF THEY SAY RETROACTIVE, IF THEY
SAY START NOW, START LATER, WE
DO WHAT THEY TELL US TO DO AND
THEN ASK THE CONSTITUTIONAL
QUESTION.
>> SO I THINK TO THE ORIGINAL
QUESTION YOU POSE, THE REASON
THAT I WAS MENTIONING RELIANCE
INTERESTS IS BECAUSE THAT REALLY
DOESN'T FORM WHAT YOU CALL
SUBSTANCE AND WHAT YOU CALL
PROCEDURE.
IN THE CONTEXT OF THE CRIMINAL
LAW WHEN YOU DEFINE WHAT A CRIME
IS, PEOPLE WILL RELY ON THAT.
PEOPLE KNOW IF I DO THOSE
THINGS, I'LL BE HELD
ACCOUNTABLE, BUT IF I DO
SOMETHING ELSE, THAT'LL BE
PERFECTLY FINE.
THE LAW WILL ALLOW IT.
THAT WOULD BE UNFAIR TO CHANGE
THAT.
>> BUT THOSE KIND OF LINES OF
ANALYSIS REGARDING RELIANCE
INTERESTS OR VESTED RIGHTS,
THAT'S ALL KIND OF SWIRLING
AROUND THIS.
I STRUGGLE WITH UNDERSTANDING
HOW THAT MAKES ANY SENSE IN THIS
PARTICULAR CONTEXT WHERE WE'RE
TALKING ABOUT THE RIGHTS OF THE
STATE.
NOW, THE STATE HAS NO VESTED
RIGHTS THAT CAN'T BE TAKEN AWAY
BY THE STATE, BY THE
LEGISLATURE.
NOW, WE'VE GOT THIS
CONSTITUTIONAL PROVISION WHICH
IS A SEPARATE MATTER, ARTICLE X,
SECTION 9, WE LOOK AT THAT
SEPARATELY.
BUT IN TERMS OF VESTED RIGHTS OR
RETROACTIVITY, I'M JUST
STRUGGLING TO UNDERSTAND HOW
THAT MAKES SENSE IN A CONTEXT
LIKE THIS WHERE THE LEGISLATURE
CAN DECIDE WE'RE THE STATE,

WE'RE GOING TO FORGO THIS,
WHATEVER.
IT JUST SEEMS TO ME TO BE
BRINGING CONCEPTUAL CONFUSION
PARTICULARLY IN A CASE LIKE
THIS.
WHAT DO YOU SAY TO THAT?
[LAUGHTER]
>> I THINK THAT THAT'S A FAIR
WAY TO APPROACH IT, BUT WITHIN
THE EXISTING DOCTRINE THAT YOU
HAVE, YOU HAVE THESE SETS OF
DEFAULT RULES AGAINST WHICH THE
LEGISLATURE UNDERSTANDS THAT IT
ACTS.
SO WHEN IT'S A MATTER OF
SUBSTANCE, THAT'S GOING TO BE
FUTURE-LOOKING.
IF IT'S MERELY PROCEDURAL AND
ALL OF YOUR DECISIONS AND ALL OF
THE DISTRICT COURTS THAT HAVE
LOOKED AT IT, THIS COURT
PRESUMES THAT'LL BE PROCEDURAL.
SO EVEN SETTING APART THE FACT
THAT THE GOVERNMENT CAN ABROGATE
ITS OWN RIGHTS AT WILL, ONE WAY
OR ANOTHER UNDER EXISTING
DOCTRINE, IF THIS IS
PROCEDURAL-- AS WE BELIEVE IT
IS-- IT IS GOING TO
PRESUMPTIVELY--
>> DOESN'T THAT SEEM WE'RE
GETTING IT BACKWARDS?
WE SEEM TO BE ASKING THE
CONSTITUTIONAL QUESTION.
THE CHIEF JUSTICE JUST CALLED
IT, THOSE ARE CONSTITUTIONAL
QUESTIONS.
AND THEN WE'RE ANSWERING, WELL,
WHAT'S THE STATUTE SAY.
IT SEEMS LIKE WE'RE FLIPPING
THAT, TO ME.
SHOULDN'T WE ASK WHAT DOES THE
STATUTE SAY, AND ONLY IF THE
STATUTE IMPLICATES SOMETHING
LOOKING BACK OR CHANGING
SOMEONE'S RELIANCE OR VESTED
INTEREST, THEN WE ASK THE
CONSTITUTIONAL QUESTION.
I THINK AS I NOTED HERE, IT

SEEMS ODD TO ASK A
CONSTITUTIONAL QUESTION WHEN IT
ONLY INURES TO THE--
>> THAT MAKES SENSE TO ME.
WE HAVE BEEN OPERATING WITHIN
SORT OF THE CONFINES OF YOUR
EXISTING DOCTRINE ON LEGISLATIVE
INTENT.
>> I DON'T BELIEVE IN THE BRIEF,
I'M MERELY ASKING THESE
QUESTIONS BECAUSE MAYBE WE'RE
LOOKING AT IT WRONG.
MAYBE WE'VE BEEN ANALYZING THESE
THINGS IN A WAY THAT DOESN'T
REALLY MAKE SENSE AND HAS US
DECIDE VERY THORNY
CONSTITUTIONAL ISSUES BEFORE
ASKING THE QUESTION OF WHAT DOES
THE STATUTE ACTUALLY SAY.
>> WHAT'S THE ORIGINAL PUBLIC
MEANING OF ARTICLE X, SECTION 9?
>> I THINK THAT TO DERIVE THE
ORIGINAL PUBLIC MEANING, YOU
COULD LOOK AT THE WAY THAT
ARTICLE III, SECTION 32 WAS
INTERPRETED BY COURTS.
THAT WAS THE PREDECESSOR TO
ARTICLE X, SECTION 9.
AND IT HAD ALWAYS BEEN
UNDERSTOOD BY THIS COURT TO
ENCAPSULATE A DISTINCTION
BETWEEN SUBSTANCE AND PROCEDURE.
SO WHEN ARTICLE X SECTION 9
COMES ALONG, THE PUBLIC--
UNDERSTANDING THAT THAT HAS
ALWAYS BEEN HOW THE PREDECESSOR
WAS INTERPRETED-- THAT THE NEW
SAVINGS CLAUSE WOULD ALSO HAVE
THE DISTINCTION BETWEEN
SUBSTANCE AND PROCEDURE.
THE PURPOSE OF A SAVINGS CLAUSE
IS TO PREVENT THE LEGISLATURE
FROM DESTROYING CRIMES THAT
PREVIOUSLY EXISTED.
>> SO WHAT'S THE TEXTUAL BASIS
FOR THAT DISTINCTION THOUGH IN
TERMS OF THE ACTUAL LANGUAGE
HERE?
>> WELL, THE WAY THAT IT'S BEEN
UNDERSTOOD IS THAT THE SHALL NOT

AFFECT PROSECUTION MEANS IF YOU WERE TO DESTROY A CRIME THAT HAD BEEN COMMITTED, IF YOU WERE TO TAKE THAT OFF THE BOOKS, YOU CAN'T DO THAT RETROACTIVELY. THAT WOULD AFFECT PROSECUTION. BUT IN MANY CASES YOU HAVE SAID THAT ANYTHING LESS THAN THAT DEALING WITH MODES OF PROCEDURE, LIKE THE GLENDENING CASE, WHAT EVIDENCE CAN COME IN WITHIN THE CONFINES OF A PROSECUTION, THAT'S MERELY PROCEDURAL.
SO I DON'T KNOW IF THAT GETS TO YOUR QUESTION, BUT WHAT I CAN TELL YOU IS THAT THE CASE LAW LOOKING AT THE SAVINGS CLAUSE, WHICH FOR REASONS WE THINK IS NO LONGER APPLICABLE TO THIS CASE AT ALL, BUT YOUR CASES HAVE ALWAYS DRAWN THE DISTINCTION WE'VE POINTED YOU TO HERE.
IF I COULD SAY WHY WE BELIEVE THAT THEY ARE PROCEDURAL, LIKE THE SECOND DISTRICT SAID IN A.W., WHAT A BURDEN DOES IS NOT CHANGE THE ELEMENTS OF ANY CRIME OR THE AFFIRMATIVE DEFENSE OF A CRIME.
IT'S NOT LIKE SMILEY WHERE CONDUCT THAT PREVIOUSLY WAS UNLAWFUL THE DAY AFTER THE AMENDMENT BECOMES LAWFUL.
WHAT THE BURDEN DOES IS JUST PROVIDE A MEASURING DEVICE FOR USE BY A FACT FINDER WITHIN THE CONFINES OF A JUDICIAL HEARING.
AND THAT LOOKS LIKE, IN ALL RESPECTS, LIKE WHAT YOU HAVE SAID IS THE CLASSIC DEFINITION OF PROCEDURE, A LAW THAT ALLOWS MEANS AND METHODS, THE MODE, MACHINERY OF THE JUDICIAL PROCESS.
>> IF WE'RE LITERALLY READING OUR PRECEDENT THOUGH, IN OTHER WORDS, IF WE'RE GOING THAT ROUTE, HOW IS THE STATE WRONG TO SAY AND HOW IS THE THIRD DCA WRONG TO SAY THAT SMILEY SAID

NEW LEGAL BURDENS ARE PART OF
WHAT IS SUBSTANTIVE, AND HERE
IT'S A NEW LEGAL BURDEN SINCE
THE BURDEN IS NOW ON THE STATE
WHEN IT WASN'T BEFORE?
THAT SEEMS PRETTY LOGICAL
READING OF THAT.
HOW DO YOU BLAME THE THIRD FOR
READING IT THAT WAY, AND THE
STATE FOR THAT MATTER?
>> WE THINK WHAT THE THIRD
DISTRICT DID LOOKING AT SMILEY
WAS TO TAKE THOSE WORDS, NEW
LEGAL BURDENS, OUT OF CONTEXT.
EVERY TIME THIS COURT HAS USED
THAT PHRASE, IT WAS TRULY
TALKING ABOUT SOMETHING
SUBSTANTIVE.
CREATING A NEW ELEMENT OF A
CAUSE OF ACTION, ARROW AIR
CREATING A BRAND NEW CAUSE OF
ACTION, SMILEY CHANGING THE
ELEMENTS OF AFFIRMATIVE
DEFENSES.
SO THAT'S, WHEN THE TERM'S BEEN
USED, IT REALLY DID REFER TO
ACTUAL RIGHTS AND OBLIGATIONS OF
REAL FLORIDA CITIZENS AS THEY
OPERATE IN THE WORLD.
SORT OF WHEN THE LEGISLATURE
TELLS REAL PEOPLE HOW TO
INTERACT AND HOW TO BEHAVE IN
THEIR ACTUAL REAL WORLD
EXISTENCES, THAT'S SUBSTANCE.
BUT THIS COURT HAS NEVER
SUGGESTED THAT A BURDEN OF PROOF
WOULD BE ANYTHING BUT
PROCEDURAL.
AND, IN FACT, IN MULTIPLE CASES
YOU'VE SAID EXACTLY THAT, IT'S
PROCEDURAL.
I WOULD POINT YOU TO OUR
DECISION IN WALKER V. HALLIGAN,
ON THE ONE HAND, THE SUBSTANTIVE
RIGHT TO IMMUNITY AND, ON THE
OTHER HAND, THE BURDEN OF PROOF
THAT SIMPLY GOVERNS HOW YOU
DETERMINE IS A PERSON IMMUNE OR
NOT.
I'LL SAY ONE LAST THING AND THEN

I'LL SIT DOWN, WHICH IS THAT I
THINK YOU CAN TELL IN A BIG WAY
THAT THIS IS NOT SUBSTANTIVE
BECAUSE, HAD MY CLIENT-- THESE
ARE THE FACTS OF THE CASE--
WERE MY CLIENT AND HER DAUGHTER
ATTACKED OUTSIDE OF A NIGHTCLUB
BY TWO VERY LARGE, DETERMINED
AND AGGRESSIVE MEN, SHE WOULDN'T
HAVE THOUGHT TO HERSELF, OKAY, I
WANT TO ACT IN SELF-DEFENSE.
I WONDER WHAT'S THE BURDEN GOING
TO BE AT A LATER STAND YOUR
GROUND IMMUNITY HEARING TWO
YEARS LATER.
WHAT SHE WOULD HAVE ASKED TO
FIND OUT IF HER CONDUCT WAS
LAWFUL OR NOT WAS WHAT ARE THE
ACTUAL SUBSTANTIVE ELEMENTS OF A
CLAIM OF SELF-DEFENSE.
DID I REASONABLY FEAR DEATH OR
GREAT BODILY HARM.
>> SO I WANT TO ASK YOU ONE
QUESTION BEFORE YOU SIT DOWN.
>> YES.
>> I KNOW YOU ALL DON'T WANT TO
TALK ABOUT IT, BUT IN MY MIND,
IT'S AN OPEN QUESTION FOR ME,
AND I THINK IT NEEDS TO BE
ADDRESSED.
AT LEAST FOR ME.
THERE ARE TONS OF STATUTES, AS I
UNDERSTAND IT, WHERE THE
LEGISLATURE HAS SET OUT
BURDEN-SHIFTING AND SETS OUT A
STANDARD OF PROOF, WHETHER IT'S
BEYOND A REASONABLE DOUBT, CLEAR
AND CONVINCING OR WHAT NOT.
IF WE ARE TO FIND THOSE TO BE
PROCEDURAL, WHY ARE NOT ALL
THOSE SUSPECT FOR CONSTITUTIONAL
PURPOSES GIVEN THE TEST IS AT
LEAST SIMILAR, IF NOT THE SAME?
IF I LOOKED-- I HAVEN'T, BUT IF
I LOOKED-- I'M SURE SOME OF
THOSE LAWS WERE STAND-ALONE LAWS
WHERE THIS IS THE NUMBERED,
THAT'S IT.
NOT INTERTWINING IT WITH
SOMETHING ELSE AT THE TIME IT

WAS PASSED.
HOW DID THOSE LITANY OF STATUTES
NOT CAUSE CONSTITUTIONAL BURDEN
FOR US?
>> JUSTICE LUCK, WHEN WE WERE
LITIGATING THIS QUESTION AT THE
CIRCUIT COURT LEVEL, I LOOKED,
AND WE PUT TOGETHER THE VERY
LARGE LIST OF BURDEN OF PROOF
PROVISIONS.
FROM MY RECOLLECTION, NEARLY ALL
OF THEM, IF NOT ALL OF THEM,
WERE, IN FACT, INTERTWINED WITH
SUBSTANTIVE BILLS THAT ACTUALLY
CONVEYED RIGHTS TO CITIZENS.
SO I DON'T THINK THERE WOULD BE
MANY OUTLIERS.
BUT THE DOCTRINE AS YOU'VE
ANNOUNCED IT, AND I THINK THAT
THEN-JUDGE CANADY'S DECISION FOR
THE SECOND DISTRICT DECISION
REALLY LAYS THIS OUT NICELY,
UNDER YOUR PRECEDENT IF A
PROCEDURAL PROVISION PASSED BY
THE LEGISLATURE IS INTERTWINED
WITH SUBSTANTIVE RIGHTS MEANING
HERE IS A BILL WITH SUBSTANTIVE
PROTECTIONS AND HERE IS HOW THE
LEGISLATURE WANTED THEM TO BE
PROCESSED IN JUDICIAL
PROCEEDINGS, THEN THAT IS
PERFECTLY ACCEPTABLE.
>> BUT YOU WOULD AGREE IF THERE
IS A STAND-ALONE BILL, IN OTHER
WORDS, NOT LIKE WHAT HAPPENED IN
SMILEY OR IN CARTWRIGHT--
>> I THINK IF THERE WAS A
STAND-ALONE BURDEN OF PROOF
PROVISION THAT THAT WOULD VERY
LIKELY BE PROBLEMATIC.
BECAUSE, AS WE'VE SAID IT, THAT
WOULD BE PROCEDURAL.
>> SO DO YOU AGREE, I MEAN, THE
STATE SEEMS-- THEY SAY IN THEIR
BRIEF THAT, BASICALLY WE HAVE
TO, CAN DEEM OUT PROCEDURAL TO
SOLVE, TO ADDRESS THE ARTICLE X,
SECTION 9 AND DEAL-- AND
CONSIDER IT SORT OF
QUASI-SUBSTANTIVE TO AVOID, YOU

KNOW, THIS PROBLEM.
AND EVEN THEY CITE A CASE WHERE IT SAYS THAT SOMETHING CAN BE PROCEDURAL FOR ONE PURPOSE AND NOT FOR ANOTHER.
>> RIGHT.
>> SO, I MEAN, DO YOU AGREE WITH THEM THOUGH THAT WE WOULD HAVE TO SORT OF THREAD THAT BY SAYING THAT IT'S SUBSTANTIVE FOR ONE AND PROCEDURAL FOR ANOTHER?
>> NO, YOUR HONOR.
AND THE REASON FOR THAT IS BECAUSE THE TESTS TRULY ARE DISTINCT.
WHEN YOU'RE TALKING ABOUT LEGISLATIVE INTENT UNDER RETROACTIVITY, IT IS SUBSTANCE VERSUS PROCEDURE.
BUT IT'S NOT THAT SIMPLE WHEN YOU'RE TALKING ABOUT THE SEPARATION OF POWERS QUESTION.
THERE IT'S NOT ENOUGH THAT A LAW BE PROCEDURAL TO VIOLATE THE SEPARATION OF POWERS.
IT MUST ALSO BE A STAND-ALONE PROCEDURAL RIGHT THAT WAS CONVEYED.
WHAT YOU'VE ALL-- THE FORMULATION THAT YOU'VE USED IS THAT THE LEGISLATURE HAS THE AUTHORITY TO ADOPT PROCEDURAL PROVISIONS IF THEY ARE INTIMATELY RELATED TO OR INTERTWINED WITH SUBSTANTIVE RIGHTS IN THE BILL.
AND JUST LOOKING AT THE FACE OF THE STATUTE WE'RE TALKING ABOUT HERE, 776.032, YOU'LL NOTICE THAT SUBSECTION 1 IS THE SUBSTANTIVE RIGHT TO IMMUNITY, AND SUBSECTION 4 IS JUST A PART OF THAT, AND IT'S WRAPPED UP WITH THAT SUBSTANTIVE PROTECTION.
THAT DOESN'T MAKE IT SUBSTANTIVE ITSELF.
IT'S STILL CLEARLY PROCEDURAL WHEN YOU LOOK AT IT ALONE, BUT IT'S INTERTWINED.

>> AND IF WE LOOK AT IT THE WAY JUSTICE CANADY IS SUGGESTING-- WHICH I THINK IS KIND OF ECHOING THE SCALIA CONCURRENCE IN LAND GRAB-- IT BASICALLY TAKES THE SUBSTANCE AND PROCEDURE AND EVEN THE RETROACTIVE LABEL OFF THE TABLE AND JUST SAYS WHAT IS THE LEGISLATURE ACTUALLY LEGISLATING ON.
HERE THEY'RE NOT TALKING ABOUT THE UNDERLYING CONDUCT, THEY'RE TALKING ABOUT THIS, THESE HEARINGS.
THE HEARING HASN'T HAPPENED YET, THEREFORE, WE JUST APPLY IT.
AND WE DON'T NEED TO EVEN GET INTO THE WHOLE RETROACTIVITY THING BECAUSE NOTHING'S BEING APPLIED RETROACTIVELY IF YOU LOOK AT IN TERMS OF WHAT IT'S ACTUALLY GOVERNING.
SO IS IT TRUE THEN THE ONLY REASON WE NEED TO GET INTO THESE LABELS AND DISTINCTIONS IS TO DEAL WITH THE CONSTITUTIONAL ISSUES?
TO UNDERSTAND HOW WE SHOULD LOOK AT IT CONSTITUTIONALLY?
>> I THINK IT WOULD BE A VERY FAIR WAY TO LOOK AT IT.
THE REASON WE'VE TALKED ABOUT IT THAT WAY IN THE BRIEF IS BECAUSE YOUR CASES SAY EVEN UNDER THE LEGISLATIVE INTENT QUESTION, YOU DO DRAW THE DIVIDE.
THOSE AREN'T ALWAYS HELPFUL LABELS, BUT I AGREE IF YOU'RE-- WHENEVER YOU'RE TALKING ABOUT SOMETHING PROCEDURAL WHETHER YOU WANT TO CALL IT PROCEDURAL OR NOT, THE JUDGE AT THAT HEARING AFTER THE EFFECTIVE DATE IS JUST APPLYING-- HE'S NOT REACHING BACK AND CHANGING CONDUCT.
>> RETROACTIVE, IT'S A MISNOMER IN THAT SENSE.
>> I THINK THAT'S RIGHT.
THE ONLY REASON WE USE THE PHRASE RETROACTIVITY IS BECAUSE

IT'S A USEFUL SHORTHAND.
YOU'RE QUITE RIGHT THAT NOTHING RETROACTIVE HERE IS HAPPENING BECAUSE THE LEGALITY OF MY CLIENT'S CONDUCT IS NOT CHANGING ONE WAY OR THE OTHER.
POST-AMENDMENT, IF SHE ACTED IN SELF-DEFENSE UNDER THE SUBSTANTIVE PROVISIONS OF THE LAW, SHE ALSO ACTED IN SELF-DEFENSE AFTERWARDS AND VICE VERSA.
IF HER CONDUCT WAS ORIGINALLY UNLAWFUL AND NOW WE HAVE THE BURDEN OF PROOF CHANGE, IT'S STILL UNLAWFUL.
THE QUESTION IS HOW YOU PROVE IT WITHIN THE CONFINES OF A JUDICIAL HEARING WHICH IS CLASSICALLY WHAT YOU'VE CALLED PROCEDURAL.
>> YOU'RE NOW INTO YOUR REBUTTAL TIME.
>> THANK YOU.
THANK YOU SO MUCH.
>> GOOD MORNING, MR. CHIEF JUSTICE, AND MAY IT PLEASE THE COURT, SOLICITOR GENERAL AMIT AGARWAL APPEARING ON BEHALF OF THE STATE OF FLORIDA, AND I'M PLEASED TO BE JOINED BY CHRISTOPHER BOUND.
UNLESS THE COURT WOULD PREFER OTHERWISE, I'D LIKE TO START OUT BY ADDRESSING JUSTICE MUNIZ'S QUESTION TO OPPOSING COUNSEL ABOUT THE RELATIONSHIP BETWEEN THE CONSTITUTIONAL INQUIRY ON THE ONE HAND AND THE STATUTORY RETROACTIVITY ANALYSIS ON THE OTHER HAND.
AND I THINK THE ANSWER TO THAT QUESTION, YOUR HONOR, IS THAT ONE OF THE BIG DIFFERENCES BETWEEN OUR POSITION AND THE POSITION OF THE PETITIONER IN THIS CASE IS THAT, IN OUR VIEW, THIS COURT'S DECISION MAKING PROCESS SHOULD NOT BE DICTATED BY CONCLUSORY AND FORMALISTIC

LABELS LIKE SUBSTANCE AND
PROCEDURE THAT EMPLOY VAGUE AND
MALLEABLE TERMS THAT CAN BE
SELECTIVELY INVOKED SOMETIMES BY
THE SAME PARTY, IN THE SAME CASE
AND IN CONSISTENT WAYS IN THE
SAME BRIEF TO JUSTIFY PREFERRED
OUTCOMES IN DIFFERENT CONTEXTS.
>> WELL, IF THAT'S SO, WOULDN'T
THAT PUSH US TOWARD WHAT THE
LINE OF ANALYSIS THAT I STARTED
OUT REFERRING TO WHICH I-- IN
WHICH I DID NOT ECHO JUSTICE
SCALIA, BUT SHAMELESSLY PARROTED
HIM, WHAT HE SAYS IN HIS
CONCURRENCE IN LAND GRAB.
THAT-- SO THAT SEEMS TO ME WHEN
I LISTEN TO WHAT YOU'RE SAYING,
I'M SAYING THAT'S-- YOU'RE
CHANNELING WHAT JUSTICE SCALIA
SAID THERE.
BUT THAT DOESN'T SEEM ENTIRELY
CONSISTENT WITH WHERE YOU END
UP.
>> WELL, OUR POSITION IS WITH
RESPECT TO BOTH INQUIRIES, THE
CONSTITUTIONAL SEPARATION OF
POWERS ANALYSIS AND THE
STATUTORY RETROACTIVITY
ANALYSIS, WHAT OUGHT TO CONTROL
IS NOT THE LABEL, BUT A CLOSE
LOOK AT WHAT THIS LAW DOES IN
THE REAL WORLD, WHAT PRACTICAL
IMPACT IT HAS.
AND UNDER THIS COURT'S
ESTABLISHED JURISPRUDENCE, EVEN
IF A LAW CAN BE DEEMED
PROCEDURAL IN SOME RESPECTS,
SUBSTANTIVE IN ANOTHER RESPECT,
THAT DOESN'T DICTATE THE OUTCOME
OF EITHER THE CONSTITUTIONAL
ANALYSIS OR THE STATUTORY
ANALYSIS.
WHAT YOU DO IS YOU LOOK AT, AS A
PRACTICAL MATTER, WHETHER THIS
IS THE KIND OF LAW THAT
IMPLICATES THE CONCERNS THAT
ANIMATE THIS COURT'S
RETROACTIVITY JURISPRUDENCE AS
WELL AS THE SUPREME COURT OF THE

UNITED STATES' RETROACTIVITY
JURISPRUDENCE.
MAYBE THE BEST WAY--
>> BUT, AGAIN, I'M-- WHEN THE
STATE COMES IN AND TALKS ABOUT,
YOU KNOW, RETROACTIVITY, I'M
CONFUSED.
BECAUSE THE LEGISLATURE CAN
IMPOSE THINGS ON THE STATE.
THE LEGISLATURE IS THE STATE IN
AN IMPORTANT WAY.
SO I'M, WHEN WE LOOK AT THE
STATUTE THAT TALKS ABOUT THE
BURDEN OF PROOF IN IMMUNITY
HEARINGS AND IT HAS AN EFFECTIVE
DATE, I'M STRUGGLING TO
UNDERSTAND WHY WE WOULD NOT JUST
TAKE THE LEGISLATURE, WHAT THEY
SAY, AT FACE VALUE SO THAT AFTER
THE EFFECTIVE DATE OF THAT
STATUTE IF AN IMMUNITY HEARING
IS HELD THAT'S WITHIN THE SCOPE
OF THAT STATUTE, THAT THE NEW
BURDEN OF PROOF WOULD APPLY.
IT JUST SEEMS LIKE, TO ME, IF
THEY WANTED IT NOT TO APPLY, IF
THEY WANTED IT NOT TO APPLY TO
CASES THAT INVOLVED CONDUCT THAT
HAD OCCURRED BEFORE THE
EFFECTIVE DATE, THEY COULD HAVE
SAID THAT.
IF THEY WANTED IT TO APPLY EVEN
IN CASES WHERE THE HEARING HAD
ALREADY BEEN HELD BUT WEREN'T
FINAL AS THE SECOND DISTRICT
SAID, THEY COULD HAVE SAID THAT.
BUT THEY DIDN'T SAY.
THAT THEY JUST SAID EFFECTIVE,
AND THIS IS THE BURDEN OF PROOF.
I DON'T-- SO I'M JUST
STRUGGLING WITH WHY THAT SIMPLE
WAY OF LOOKING AT IT IS NOT
APPROPRIATE IN THIS CONTEXT.
>> I THINK THE REASON WHY IT'S
NOT ENTIRELY APPROPRIATE, YOUR
HONOR, IS BECAUSE THE QUESTION
AT THE END OF THE DAY IS NOT
WHETHER THE COURT USES THE WORD
RETROACTIVITY.
OUR ARGUMENT AT THE END OF THE

DAY IS NOT THAT THE STATUTE SHOULDN'T BE APPLIED RETROACTIVELY, OUR ARGUMENT IS THAT THE STATUTE SHOULD NOT BE APPLIED TO PRE-ENACT CLAIMS OF IMMUNITY THAT ARE PREDICATED ON PRE-ENACTMENT CONDUCT.
>> BUT THE LEGISLATURE IS NOT TALKING ABOUT PRE-ENACTMENT CONDUCT.
I MEAN, DIFFERENT THING, PERHAPS, IF THE LEGISLATURE WAS TALKING ABOUT THE CONDUCT.
BUT WHY, WHY IS THE RELEVANT INQUIRY, AS JUSTICE SCALIA SAYS, NOT THE RELEVANT ACTIVITY THAT THE RULE ANNOUNCED BY THE LEGISLATURE ACTUALLY REGULATES?
>> I THINK THERE'S LEGAL DOCTRINAL ANSWER TO YOUR HONOR'S QUESTION.
THERE'S MAYBE A MORE POLICY-BASED ANSWER TO YOUR QUESTION.
THE LEGAL DOCTRINAL ANSWER, AS WE UNDERSTAND IT, IS THAT THIS COURT'S PRIOR CASES HAVE CONCLUDED THAT IF A LAW SUBSTANTIALLY AFFECTS SUBSTANTIVE RIGHTS AND IMPOSES NEW LEGAL BURDENS, THEN YOU HAVE TO PROCEED ON THE ASSUMPTION THAT THE LEGISLATURE DID NOT INTEND THE LAW TO APPLY TO CLAIMS PREDICATED ON PRE-ENACTMENT CONDUCT UNLESS THE LEGISLATURE--
>> BUT THIS IS, DOESN'T THAT WHOLE LINE OF DOCTRINE ARISE IN A CONTEXT WHERE WE'RE CONCERNED ABOUT VESTED RIGHTS OF PRIVATE PARTIES?
>> I DON'T--
>> AGAIN, I'M HAVING THE CONCEPTUAL PROBLEM UNDERSTANDING HOW WE PULL THAT OVER INTO THIS CONTEXT WHEN WE'RE TALKING ABOUT THE STATE AND WHAT THE LEGISLATURE HAS SAID A BURDEN THAT THE STATE HAS TO MEET.

I DON'T THINK IT'S JUST ABOUT
THE VESTED RIGHTS OF PRIVATE
PARTIES IN THIS VERY CASE, FOR
EXAMPLE.
>> BUT HOW EXACTLY, WHAT REALLY
CHANGED HERE?
BECAUSE THE PERSON WHO IS BEING
CRIMINALLY PROSECUTED IS A
PRIVATE CITIZEN.
NOT THE STATE, OBVIOUSLY.
>> THAT'S RIGHT.
>> AND THE SUBSTANTIVE RIGHT IN
SECTION 1 REMAINS THE SAME,
WHICH IS THAT YOU ARE-- THE
ABILITY TO BE PROSECUTED, YOU'RE
IMMUNE FROM CRIMINAL PROSECUTION
IF YOU DID CERTAIN CONDUCT.
IF YOU ACT IN A WAY WHERE YOU
THOUGHT THAT YOU WERE BEING
THREATENED OR YOU REASONABLY
SHOULD HAVE KNOWN, SO THERE'S
CERTAIN STANDARDS THAT HAVE TO
BE MET.
SO THE ONLY THING THAT CHANGED
WAS SECTION 4 WHICH WAS THE
BURDEN OF PROOF AND THE QUANTUM
OF PROOF.
AND THAT ALL THEN CHANGED FOR
PURPOSES OF THE STATE.
BUT HOW EXACTLY IS THAT IMPOSING
A NEW LEGAL BURDEN ON A PRIVATE
CITIZEN?
>> SO I GUESS THE WAY I WOULD
PUT IT, YOUR HONOR, IS THAT THE
LAW CHANGES THE WHO, THE WHAT
AND THE HOW WITH RESPECT TO
ESTABLISHING A CLAIM OF COMPLETE
IMMUNITY FROM CRIMINAL
PROSECUTION.
AND SO THE SUBSTANTIVE RIGHT
THAT IS AFFECTED BY THIS
AMENDMENT IS WHAT THIS COURT IN
DENNIS V. STATE IDENTIFIED AS A
SUBSTANTIVE RIGHT TO IMMUNITY
NOT FROM CRIMINAL LIABILITY, BUT
FROM CRIMINAL PROSECUTION.
AND IF I MAY, PERHAPS I COULD
JUST WALK THROUGH THE WHO, THE
WHAT--
>> LET ME ASK A QUESTION FIRST.

I HAVEN'T GONE BACK AND
RESEARCHED HOW WE GOT HERE, BUT
MY GUESS IS THAT IT'S SORT OF
THE UNIQUE SAVINGS CLAUSE THAT
WE HAD UNTIL VERY RECENTLY IN
THE FLORIDA CONSTITUTION THAT
SAID AN AMENDMENT OF A CRIMINAL
STATUTE CANNOT AFFECT
PROSECUTION FOR CRIMES THAT
OCCURRED PRIOR TO THE EFFECTIVE
DATE OF THE STATUTE, OR
SOMETHING SIMILAR TO THAT.
AND THAT WOULD SEEM TO, I MEAN,
THE PLAIN LANGUAGE OF THAT, I
MEAN, THIS CERTAINLY WOULD
AFFECT YOUR PROSECUTION CHANGING
THE BURDEN OF PROOF--
>> YES.
>> AND SO I'M GUESSING THAT
THAT'S HOW WE GOT HERE.
AND YOU, IN YOUR BRIEF, ARE
RELYING ON THAT LANGUAGE.
DOES IT AFFECT THE ARGUMENT AT
ALL THAT THAT CONSTITUTIONAL
PROVISION HAS BEEN CHANGED AND
NO LONGER APPLIES?
I MEAN, NOW IT'S ONLY THE REPEAL
OF A CRIMINAL STATUTE THAT
CANNOT AFFECT PROSECUTION.
SO GIVEN THAT CHANGE IN THE
CONSTITUTIONAL LANGUAGE WHICH IS
THE ONLY CONSTITUTIONAL
PROVISION THAT I THINK THAT
COULD AFFECT OR DIRECT THE
UNDERLYING LAW IN THIS AREA, WHY
IS THIS AN ISSUE NOW?
>> WE THINK THE RECENT CHANGE TO
ARTICLE X, SECTION 9 DOESN'T
AFFECT OUR ARGUMENT OR THE
COURT'S ANALYSIS, BECAUSE WE
WERE RELYING ON IT FOR THE
PROPOSITION THAT IT HELPS TO
ASSESS WHAT THE LEGISLATURE'S
INTENT WAS AT THE TIME THAT IT
ENACTED THIS AMENDMENT.
AND THAT WAS ON THE BASIS OF THE
THEORY OF CONSTITUTIONAL--
>> YOU WOULD AGREE THAT WE
SHOULD LOOK AT WHAT THE STATUTE
SAYS BEFORE WE START ASKING WHAT

THE LEGISLATURE INTENDED.
>> ABSOLUTELY.
>> OKAY.
>> YEAH.
>> DOESN'T THE-- AND THIS GOES TO THE ANSWER YOU WERE GIVING TO CHIEF JUSTICE KENNEDY AND ALSO JUSTICE LAWSON, IT SEEMS LIKE IN THE BRIEF AT LEAST WE'RE FLIPPING THE ANALYSIS.
WE'RE ASKING IS THIS SUBSTANTIVE OR PROCEDURAL BECAUSE THERE ARE EVENTS THAT GO ALONG WITH IT, AND ONLY THE CLEAR LEGISLATIVE LANGUAGE CAN OVERCOME SOME OF THOSE PRESUMPTIONS.
I THINK THAT'S DIRECTLY FROM YOUR BRIEF.
AND I-- BUT IN ANSWERING JUSTICE LAWSON'S QUESTION WITH, I THINK I HEARD YOU SAY AND I THINK THAT'S PROBABLY CORRECT, NO, WE NEED TO LOOK AT THE LANGUAGE OF THE STATUTE FIRST BEFORE WE ENGAGE IN THIS CONSTITUTIONAL ANALYSIS OF PROCEDURE AND SUBSTANCE.
IS THAT RIGHT?
DO WE LOOK AT THE LANGUAGE FIRST AND THEN DECIDE PROCEDURE OR SUBSTANCE, OR DO WE DECIDE PROCEDURE, SUBSTANCE FIRST AND THEN LANGUAGE AND WHY?
>> WE TAKE THIS COURT'S CASE LAW AS WE FIND IT, AND THE COURT'S CASE LAW IS ENUNCIATED IN SMILEY V. STATE AND OTHER CASES THAT HAVE BEEN CITED IN OUR BRIEF.
>> YOU DON'T ALWAYS DO THAT.
[LAUGHTER]
FREQUENTLY, YOU SAY IT'S WRONG AND WE SHOULD LOOK AT THE LANGUAGE OF THE CONSTITUTION OR THE STATUTE.
>> CERTAINLY IF THERE WERE ANY KIND OF TENSION, YOUR HONOR, BETWEEN A DECISION AND A CONSTITUTIONAL REQUIREMENT, WE WOULD BRING THAT TO THE ATTENTION OF THE COURT.

I DON'T KNOW THAT THAT'S THE
CASE HERE.
AND OUR ARGUMENT WITH RESPECT TO
STATUTORY RETROACTIVITY DOES NOT
TURN ON ANY KIND OF
CONSTITUTIONAL ANALYSIS AT THE
END OF THE DAY.
>> I AGREE, BUT THE STATUTE
THOUGH DOES SEEM-- AND THIS
GOES, ALSO, BACK TO SOMETHING
CHIEF JUSTICE CANADY ASKED YOU.
THE STATUTE DOES SEEM TO
INDICATE-- I'LL READ IT.
ONCE A PRIMA FACIE CASE OF
IMMUNITY HAS BEEN RAISED AT THE
PRELIM POWER IN, AT THE PRETRIAL
IMMUNITY HEARING-- WHICH HAD
NOT YET TAKEN PLACE YET-- THEN
THE BURDEN WOULD BE ON THE STATE
BY CLEAR AND CONVINCING
EVIDENCE, AND IT SHALL TAKE
EFFECT IMMEDIATELY.
WHY IS THAT NOT EXACTLY ON POINT
TO INDICATE WHERE A PRIMA FACIE
CASE HAS BEEN RAISED AND THERE
HAS NOT YET BEEN THE PRETRIAL
HEARING, THAT IT SHALL TAKE
EFFECT BEFORE THE PRETRIAL
HEARING?
>> THAT'S ABSOLUTELY ONE WAY TO
READ THE STATUTE--
>> IS THERE ANOTHER REASONABLE
WAY TO READ IT?
>> THERE IS, BECAUSE UNDER THIS
COURT'S JURISPRUDENCE, CASE LAW
SETS OUT DEFAULT RULES AGAINST
WHICH THE LEGISLATURE ACTS--
>> MY QUESTION TO YOU IS
DIFFERENT THAN THAT, AND I
UNDERSTAND.
MY QUESTION TO YOU IS, IS THERE
ANOTHER REASONABLE WAY TO READ
WHAT I JUST READ.
NOT-- FORGET CASE LAW, FORGET
PRESUMPTIONS.
READING THE LANGUAGE AS WE DO
UNDER THE RULES OF CONSTRUCTION,
IS THERE ANOTHER WAY TO READ IT
THAT'S REASONABLE?
>> YOU CERTAINLY COULD BUT, YOUR

HONOR, WE THINK THAT STATUTES
THAT HAVE BEEN ENACTED BY THE
LEGISLATURE SHOULD BE
INTERPRETED ON THE ASSUMPTION
THAT THE LEGISLATURE KNEW WHAT
THIS COURT'S DECISIONAL LAW WAS
AT THE TIME.
THAT PROVIDES A CLEAR STATEMENT
AGAINST WHICH THE LEGISLATURE--
CLEAR BACKGROUND RULE AGAINST
WHICH THE LEGISLATURE CAN ACT.
AND IF I MAY--
>> THE LEGISLATURE, THOUGH,
WOULD HAVE TO-- WHEN THEY WROTE
THAT, THEY WOULD HAVE HAD TO BE
THINKING THAT THIS GOES INTO THE
ARROW AIR BOX AS OPPOSED TO THE
THINGS THAT HAVE BEEN
CHARACTERIZED AS PROCEDURAL.
I MEAN, IT DOES SEEM LIKE THE
ARGUMENT YOU GUYS ARE MAKE WHERE
THERE ARE NEW CAUSES OF ACTION
AND PEOPLE'S BEHAVIOR IS EITHER
LEGAL OR NOT, YOU KNOW,
DEPENDING ON WHAT THE STATUTE
SAYS, I MEAN, IT DOESN'T SEEM
LIKE THOSE CASES REALLY APPLY TO
THIS.
>> WELL, LET ME PUT IT THIS WAY,
YOUR HONOR, A LOT OF THOSE CASES
TALK-- AS OPPOSING COUNSEL
MENTIONED-- ABOUT CHANGING THE
ELEMENT OF A CLAIM.
AND WE THINK THAT WHEN YOU LOOK
PAST THE BURDEN OF PROOF LABEL
AND LOOK AT THE PLAIN LANGUAGE
OF SECTION 776.032, SUBSECTION
4, WHAT IT'S REALLY DOING IS NOT
JUST CHANGING THE BURDEN OF
PROOF, IT'S CHANGING THE
ELEMENTS OF A CLAIM FOR IMMUNITY
FROM CRIMINAL PROSECUTION IN
CONTRA DISTINCTION TO A CLAIM
FOR IMMUNITY FOR CRIMINAL
LIABILITY.
WHY DOES IT DO THAT.
AS I WAS SAYING BEFORE, THAT'S
BECAUSE THE AMENDMENT CHANGES
THE WHO, THE WHAT AND THE HOW
WITH RESPECT TO THIS CLAIM FOR

IMMUNITY.
IN TERMS OF THE WHO, UNDER THE OLD VERSION OF THE STATUTE, THE GOVERNMENT-- THE STATE-- DIDN'T HAVE TO PROVE ANYTHING.
NOW IT'S THE STATE THAT HAS NOT JUST A HIGHER QUANTUM OF PROOF OR A HIGHER BURDEN OF PROOF, IT'S THE STATE THAT HAS TO PROVE THAT THE DEFENDANT WAS NOT ENTITLED TO IMMUNITY.
SO THE WHO HAS CHANGED.
YOU HAVE A COMPLETE TRANSFER OF THE BURDEN OF PERSUASION FROM ONE PARTY TO ANOTHER.
THAT, IN OUR VIEW, IS NOT JUST CHANGING THE BURDEN OF PROOF, IT'S CHANGING THE LEGAL STANDARD THAT GOVERNS THE ADJUDICATION OF A CLAIM FOR IMMUNITY FROM PROSECUTION.
SO YOU CHANGE THE WHO, YOU ALSO CHANGE THE WHAT.
UNDER THE OLD STATUTE AS CONSTRUED BY THIS COURT IN BRETHERICK, THE WHAT THAT HAD TO BE PROVEN WAS THAT THE DEFENDANT WAS ENTITLED TO IMMUNITY BECAUSE THE DEFENDANT HAD JUSTIFIABLY USED FORCE.
NOW THE WHAT IS THAT THE DEFENDANT DID NOT JUSTIFIABLY USE FORCE.
THAT'S NOT JUST A SEMANTIC DISTINCTION BECAUSE PARTICULARLY WHEN THE EVIDENCE IS IN -- THAT'S CASE DISPOSITIVE.
NOT JUST ISSUE DISPOSITIVE, IT'S CASE DISPOSITIVE.
SO YOU'VE GOT A CHANGE TO THE WHO, YOU'VE GOT A CHANGE TO THE WHAT, AND THEN YOU'VE GOT A CHANGE TO THE HOW.
AND THAT IS TO SAY, TO THE STANDARD BY WHICH THESE ISSUES HAVE TO BE PROVEN CHANGING, OF COURSE, FROM A PREPONDERANCE OF THE EVIDENCE STANDARD UNDER BRETHERICK TO CLEAR AND CONVINCING EVIDENCE UNDER

776.032.
AND OUR SUBMISSION TO THE COURT AT THE END OF THE DAY IS THAT WHEN YOU CHANGE THE WHO, THE WHAT AND THE HOW WITH RESPECT TO A CLAIM OF COMPLETE IMMUNITY FROM CRIMINAL PROSECUTION, THAT IS NOT JUST ALTERING THE BURDEN OF PROOF.
THAT IS SAYING THAT SOMEONE WHO OTHERWISE MAY OR MAY NOT HAVE BEEN IMMUNE FROM CRIMINAL PROSECUTION NOW IS IN EXACTLY THE OPPOSITE SCENARIO.
AND WE KNOW THAT THAT'S EXACTLY THE CASE IN THIS VERY CASE BECAUSE--
>> FROM THE LEGISLATURE'S PERSPECTIVE, IT SEEMS LIKE IF YOU LOOK AT THE STATUTE AND YOU SEE THE EVOLUTION OF THE CASE LAW, IT WOULD BE REASONABLE FOR THE LEGISLATURE IN THIS CONTEXT TO THINK THAT WHATEVER IMMUNITY SOMEONE HAD FROM PROSECUTION IS WHAT WAS ESTABLISHED BACK IN '05 AND THAT THIS IS JUST SORT OF FLESHING OUT THE DETAILS THAT THE COURT HAD PREVIOUSLY DONE AND NOW, YOU KNOW, THE LEGISLATURE STEPPED IN AND CLARIFIED WHAT THAT ARGUABLY SHOULD HAVE BEEN FROM THE BEGINNING.
I MEAN, BECAUSE THERE ALWAYS WAS AN IMMUNITY FROM PROSECUTION.
AND THAT'S, I MEAN, ON ITS FACE THAT SUBSTANTIVELY DIDN'T CHANGE.
>> WHAT HAS CHANGED, IN OUR VIEW, IS THE NATURE AND SCOPE OF THAT IMMUNITY.
IN THIS CASE--
>> BUT ISN'T REALLY THE-- I MEAN, SUBSECTION 1 DIDN'T CHANGE, AND THAT'S REALLY A WHAT THE SUBSTANTIVE RIGHT IS FOR THE INDIVIDUAL.
WHAT THEY HAVE TO SHOW PRIOR TO SUBSECTION 4, WHAT THEY HAD TO

SHOW IN ORDER TO BE ABLE TO
ASSERT THAT DEFENSE.
SO THE QUESTION THOUGH IS, AND
IN BRETHERICK THIS QUESTION--
THIS COURT, IN ESSENCE, SAID THE
LEGISLATURE DIDN'T SPEAK ON THE
BURDEN OF PROOF, SO WE'RE GOING
TO SPEAK ON THE BURDEN OF PROOF,
AND THE BURDEN OF PROOF IS NOW
GOING TO BE X.
SO DIDN'T REALLY THE
LEGISLATURE, IN ENACTING
SUBSECTION 4, JUST SAY THAT
BURDEN OF PROOF IN THAT CASE IS
INCORRECT, AND THIS IS THE
BURDEN OF PROOF WE THINK IS THE
CORRECT ONE AND THE QUANTUM OF
PROOF IS CORRECT?
>> SO THE LEGISLATURE DID
STATUTORILY OVERRIDE THIS
COURT'S DECISION IN BRETHERICK,
THAT IS CERTAINLY TRUE.
THERE IS AN IMMUNITY BEFORE AND
AFTER THE AMENDMENT FROM
CRIMINAL PROSECUTION, THAT IS
TRUE.
THE NATURE OF THE IMMUNITY HAS
CHANGED BECAUSE THE BURDEN OF
PERSUASION HAS BEEN ENTIRELY
SHIFTED FROM ONE PARTY TO
ANOTHER.
AND, YOU KNOW, ONE WAY TO
ILLUSTRATE THAT IS TO LOOK AT
THE FACTS OF THIS PARTICULAR
CASE.
WE HAD THE TRIAL COURT SAYING
NEAR THE END OF ITS ORDER THAT,
UNDER THE OLD STANDARD OF PROOF,
PETITIONER LOVE WOULD BE
ENTITLED-- WOULD NOT BE
ENTITLED TO IMMUNITY FROM
PROSECUTION.
NOT JUST FROM LIABILITY, BUT SHE
COULDN'T BE SUBJECTED TO THE
BURDEN OF GOING TO TRIAL.
BUT IF AMENDMENT APPLIED THAT
SHE WOULD BE IMMUNE FROM
CRIMINAL PROSECUTION-- AND
BASICALLY WHAT THAT ILLUSTRATES
IS THE POLICY INTUITION

UNDERLYING THIS COURT'S
RETROACTIVITY JURISPRUDENCE.
THIS KIND OF GETS TO YOUR
QUESTION, JUSTICE CANADY, ABOUT
WHY ARE WE EVEN TALKING ABOUT
RETROACTIVITY DOCTRINE AND
RELATED CONCEPTS.
I THINK A BIG PART OF THAT
ANSWER IS THIS COURT'S
JURISPRUDENCE IN THAT AREA IS
INFORMED BY CERTAIN WIDELY-HELD
INTUITIONS OF FAIRNESS AND
INTUITIONS ABOUT HOW STATUTES
WORK.
AND ONE SUCH INTUITION IS THAT
IT WOULD BE UNFAIR FOR
IDENTICALLY-SITUATED CRIMINAL
DEFENDANTS WHO HAVE ENGAGED IN
EXACTLY THE SAME CRIMINAL
CONDUCT ON EXACTLY THE SAME DAY
TO BE SUBJECT TO DIFFERENT LEGAL
REGIMES BASED PURELY ON THE
ACCIDENT OF HOW RAPIDLY THEIR
CASES HAPPEN TO PROGRESS THROUGH
THE CRIMINAL JUSTICE SYSTEM.
AND INSTEAD THE INTUITION IS,
THAT ALL THINGS BEING EQUAL, YOU
WANT THE ADJUDICATION OF A
SUBSTANTIVE RIGHT TO TURN ON THE
STATE OF THE LAW THAT WAS IN
EFFECT AT THE TIME OF THE
UNDERLYING CONDUCT AND NOT AT
THE TIME THAT THE CASE HAPPENS
TO BE ADJUDICATED.
NOW, THE LEGISLATURE ABSOLUTELY
HAS POLICY DISCRETION TO SAY WE
RECOGNIZE THAT IT MIGHT BE
UNFAIR TO TRADE
IDENTICALLY-SITUATED DEFENDANTS
DIFFERENTLY, BUT WE WANT TO DO
THAT, WE WANT TO GO THERE.
AND THAT'S PRECISELY WHY THIS
COURT HAS ARTICULATED THE
JURISPRUDENCE THAT SAYS, LOOK,
WHEN YOU START TO AFFECT
SUBSTANTIVE RIGHTS, START TO
IMPOSE NEW LEGAL BURDENS, THAT'S
THE KIND OF THING THAT ANIMATES
RETROACTIVITY JURISPRUDENCE, AND
THE LEGISLATURE NEEDS TO SPEAK

CLEARLY.
THEY CAN DO IT, THEY CAN ACCEPT ALL THE CONSEQUENCES AND THE COSTS OF RETROACTIVITY OR IF APPLYING A NEW LAW TO PRE-ENACTMENT CONDUCT, BUT THEY HAVE TO SPEAK CLEARLY WHEN THEY TO THAT.
>> WELL, I AM PUZZLED CONCERNING WHY THEY HAVE NOT SPOKEN CLEARLY.
I MEAN, I THINK JUSTICE SCALIA WOULD SAY THEY'VE SPOKEN CLEARLY HERE.
AND, BUT LET ME-- I THINK WE'VE TALKED ABOUT ALL THAT QUITE A BIT.
LET ME ASK YOU ANOTHER QUESTION.
IF, IF WE DECIDE THAT WE DON'T ACCEPT THE STATE'S ARGUMENT HERE AND THAT INSTEAD WE CONCLUDE THAT LOVE WAS ENTITLED TO THE BENEFIT OF THE AMENDMENT TO THE IMMUNITY STATUTE AND THE STATUTE DOES NOT VIOLATE ARTICLE X, SECTION 9, IN YOUR VIEW, WHAT SHOULD HAPPEN NEXT IN THIS CASE?
>> IT SHOULD BE REMANDED BACK TO THE THIRD DISTRICT, AND IT SHOULD GO BACK TO THE TRIAL COURT.
WE'RE NOT ASKING THE COURT TO ADJUDICATE THE CONSTITUTIONAL SEPARATION OF POWERS QUESTION UNDER ARTICLE V, SECTION 2, SUBSECTION 8.
I SEE THAT MY TIME HAS RUN OUT.
I'M HAPPY TO A ANSWER ANY OTHER QUESTIONS THAT YOUR HONORS MIGHT HAVE.
THANK YOU.
>> SETTING ASIDE THESE FORMALISTIC LABELS OF SUBSTANCE AND PROCEDURE, WHAT THIS STATUTE ACTUALLY SAYS IS THAT AFTER ITS EFFECTIVE DATE, A JUDGE AT A STAND YOUR GROUND IMMUNITY HEARING, QUOTE, A PRETRIAL IMMUNITY HEARING, MUST APPLY THE NEW BURDEN OF PROOF.

THIS CIRCUIT COURT LOOKED AT
BOTH THE OLD STANDARD AND THE
NEW ONE, AND UNDER THE STANDARD
WE BELIEVE WAS THE CORRECT ONE,
CONCLUDED THAT MY CLIENT WAS
ENTITLED TO BE IMMUNE FROM
PROSECUTION.
WE THINK THAT THE APPROPRIATE
REMEDY AS A RESULT WOULD BE TO
QUASH THE DECISION BELOW AND
INSTRUCT THAT MY CLIENT BE
DISCHARGED ON REMAND SINCE WE
ALREADY HAVE THAT FACTUAL
FINDING.
IF THE COURT HAS NO FURTHER
QUESTIONS--
>> IT SEEMED LIKE THE ORDER WAS
KIND OF CONTRADICTORY ON THAT
POINT.
BECAUSE THE JUDGE SEEMED TO BE
SAYING THAT IT WASN'T REASONABLE
BASED ON HIS KIND OF DETAILED
RECITATION OR WHAT WAS GOING ON
HERE TO THINK THAT THERE WAS
ANY, THAT THERE WAS AN ACTUAL
THREAT TO LOVE.
BUT THEN HE SAYS THAT HE CAN'T
SAY WITHOUT HESITANCY THAT SHE
WASN'T RESPONDING TO A
REASONABLE BELIEF THAT HER
DAUGHTER WAS ABOUT TO SUFFER
GREAT BODILY HARM.
SO IT SEEMED LIKE IT WAS KIND OF
INTERNALLY INCONSISTENT.
>> JUSTICE, I THINK IN
HINDSIGHT HAD I LITIGATED THIS
CASE DIFFERENTLY IN THE THIRD
DISTRICT, WE PROBABLY WOULD HAVE
RAISED AN ARGUMENT THAT MY
CLIENT WAS ENTITLED TO IMMUNITY
UNDER ANY BURDEN OF PROOF GIVEN
THE FACTS.
HOWEVER, WHAT I WOULD SAY TO
THIS COURT IS THAT YOU TAKE THE
FACTS AS FOUND BY THE FACT
FINDER IN THIS CASE.
AND WHAT JUDGE FINE, THE CIRCUIT
JUDGE, WAS SAYING IS THAT I HAVE
HESITANCY ABOUT WHETHER OR NOT
THIS WAS A CRIME.

AND AS A RESULT, APPLYING NEW
STANDARD WOULD HAVE GRANTED--
>> IT SEEMED LIKE HE FOUND, HE
WAS KIND OF ADDRESSING THE SAME
QUOTE, SAME FACTUAL/MIXED
QUESTION OF FACT AND LAW, THE
SAME QUESTION, AND HE GAVE TWO
DIFFERENT ANSWERS TO THE SAME
QUESTION.
>> SO IT MAY BE TRUE THAT THERE
IS SOME TENSION WITHIN THE
CIRCUIT JUDGE'S TO ORDER.
AND I THINK THAT IF YOU WERE TO
READ THE STATE'S PLEADINGS IN
FRONT OF THE THIRD DISTRICT,
THEY ACTUALLY DID ARGUE THAT AS
A MATTER OF LAW ONE WAY OR THE
OTHER, THIS WAS NOT
SELF-DEFENSE.
I THINK THAT THE REASON THE
BURDEN OF PROOF WAS DISPOSITIVE
FOR THIS PARTICULAR FACT FINDER
WAS BECAUSE HE WAS LIMITED TO
LOOKING AT TWO SETS OF VIDEOS
AND COULD NOT SAY WITH CERTAINTY
THIS IS HOW THE SITUATION PLAYED
OUT, THIS IS WHAT SHE WOULD
BE AWARE OF, WOULD'VE SEEN.
AND BECAUSE OF THAT HESITATION,
FOUND THAT UNDER THE NEW
STANDARD MS. LOVE'S WOULD HAVE
BEEN ENTITLED TO IMMUNITY.
BUT AGAIN, THAT IS LARGELY A
QUESTION FOR THE FACT FINDER.
AND BECAUSE THE FACT FINDER HAS
ALREADY RESOLVED THAT QUESTION
IN OUR FAVOR, WE THINK THAT IS
DISPOSITIVE AND THAT MY CLIENT
WOULD BE IMMEDIATELY ENTITLED TO
DISCHARGE.
THANK YOU.
>> ALL RIGHT.
WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
THAT CONCLUDES TODAY'S SESSION.