IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-941

CLARENCE DENNIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections, clarifications, and/or modifications contained below.

On August 18, 2006, Petitioner was charged by Information with attempted first degree murder (R22). Petitioner filed a corrected motion to dismiss, pursuant to Fla. R. Crim. P. 3.190(c)(3) on June 1, 2007 alleging that he was immune from prosecution (87-92). On July 2, 2007 the state filed a Traverse and Demurrer denying the facts alleged in the motion to dismiss and listing the facts that were in material dispute, including Petitioner's own statements (R. 98-99). The trial court denied the motion to dismiss finding that

the facts were in material dispute and cited State v. Norman B. Borden, 14 F.L.W. Supp. 641(a) (5th Jud. Cir. 2007) (R. 100). At the hearing on the motion to dismiss, the trial court considered the traverse filed by the state, as well as the facts adduced at the bond hearing (T. 12). Petitioner also argued that the trial court should hold an evidentiary hearing to determine his immunity, and the trial court denied his request (T. 17-26). Petitioner did not seek extraordinary relief in the appellate court.

Petitioner proceeded to a jury trial before the Honorable Sherwood Bauer, of the Nineteenth Judicial Circuit on August 27, 2007. On August 30, 2007, the jury returned a verdict of guilty to the lesser included charge of felony battery (R108). The Fourth District Court of appeal affirmed the conviction and sentence and found as follows:

> Only one of the issues warrants discussion; that is, whether the trial court erred in denying Dennis's motion to dismiss on his claim of statutory immunity brought under section 776.032, Florida Statutes, because there were disputed issues of material fact. We find no error in the trial court's decision to deny the motion to dismiss. As we recognized in Velasquez v. State, 34 Fla. L. Weekly D266, --- So.2d ----, 2009 WL 223109 (Fla. 4th DCA Feb. 2, 2009), a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. Accordingly, we affirm.

Dennis v. State, --- So.2d ----, 2009 WL 605356 (Fla. 4th DCA 2009), *conflict certified on reh'g*, Dennis v. State, 34 Fla. L. Weekly D 1000 (Fla. 4th DCA 2009).

SUMMARY OF THE ARGUMENT

As a preliminary matter the issue with respect to this case is moot and the case must be dismissed. As for the merits, the lower courts found properly that a Defendant's claim of immunity pursuant to §776.032 is properly raised and resolved under Fla. Rule Crim. P. 3.190(c)(4). Hence, the trial court properly denied the motion to dismiss as there was a conflict in the material evidence regarding the element of immunity.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS PURSUANT TO FLA. R. CRIM P. 3.190(c)(4) (RESTATED).

The issue to be decided in this appeal involves how to interpret and consider the substantive right of immunity now codified in Fla. Stat. § 776.032 (2005).[1] In the case *sub judice,* Dennis filed a motion to dismiss his charges based on the claim that he is immune from prosecution. Applying Fla. R. Crim. P. 3.190,(c)(4), the trial court denied the motion because there were material facts at issue. Dennis sought relief in the Fourth

1 Upon a survey of states that have enacted a "Stand Your Ground Law", thirty two (32) states have codified and/or expanded the Castle Doctrine beyond the home. Ten (10) of those states, including Florida, have provided immunity from criminal prosecution if the defendant has properly acted in self defense. The other nine (9) states are; Alabama (AL ST § 13A-3-23), Colorado (C.R.S.A. § 18-1-704.5), Georgia (Ga. Code Ann. § 16-3-24.2), Kansas (K.S.A. § 21-3219), Kentucky (K.R.S. § 503.085), Oklahoma (21 Okla. St. Ann. § 1289.25), South Carolina (SC ST § 16-11-450), Michigan (MCLA § 780.961), and Idaho (I.C. § 19-202A). **The following five (5) states have the identical immunity provisions as Florida**; Alabama, Kentucky, South Carolina, Oklahoma, and Kansas. In State v. Bolin, 381 SC 557 (SC 2009), the court determined that the statute was not retroactive, no cases have addressed the procedure to be followed when a defendant claims immunity from prosecution. In Rodgers v. Commonwealth, 285 S.W. 3d 740 (Ken. 2009), Kentucky follows the same procedure to determine immunity as Florida as will be discussed below. Finally, in McCracken v. Kohl, 286 Kan. 1114 (Kan. 2008), the Kansas Supreme Court found that McKracken had proven by a preponderance of the evidence, after an evidentiary hearing, that he was immune from prosecution. As discussed below, Georgia follows the Colorado decision of People v. Guenther, 740 P.2d 971 (Colo.1987). Alabama and Oklahoma have not yet addressed their immunity provisions in case law.

District Court of Appeals arguing that under Peterson v. State, 983 So. 2d 27 (Fla. 1st DCA 2008) a trial court must hold a mini-trial, resolve any conflicts in the evidence and grant or deny a defendant's entitlement to absolute immunity. In upholding the trial court's application of 3.190 (c)(4), the district court rejected Dennis's reliance on Peterson and instead relied on its earlier pronouncement in Velasquez v. State, 34 Fla. L. Weekly D266, --- So.2d ----, 2009 WL 223109 (Fla. 4th DCA Feb. 2, 2009). [2], The Court stated:

> Clarence Dennis appeals his conviction and sentence for felony battery. He raises two issues on appeal, and we affirm as to both issues. Only one of the issues warrants discussion; that is, whether the trial court erred in denying Dennis's motion to dismiss on his claim of statutory immunity brought under section 776.032, Florida Statutes, because there were disputed issues of material fact. We find no error in the trial court's decision to deny the motion to dismiss. As we recognized in Velasquez v. State, 34 Fla. L. Weekly D266, --- So.2d ----, 2009 WL 223109 (Fla. 4th DCA Feb. 2, 2009), a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. Accordingly, we affirm.

Dennis, supra.

In Velasquez, the district court explained its rejection of Peterson as follows:

> The statute then provides for law enforcement to make an initial determination of whether there was probable cause that the force used was unlawful. § 776.032(2), Fla. Stat. This allows law enforcement officers to determine a suspect's immunity prior to making an arrest.

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2 Velasquez v. State 34 Fla. L. Weekly D266, --- So.2d ----, 2009 WL 223109 (Fla. 4th DCA Feb. 2, 2009), has been followed by McTigue v. State, 2009 WL 2949307 (Fla. 4th DCA Sept. 16, 2009), and Govoni v. State, 34 Fla. L. Weekly D1688 (Fla. 4th DCA 2009).

> By defining "criminal prosecution" to include the arrest, detention, charging, or prosecution of the defendant, the statute allows for an immunity determination at any stage of the proceeding. Created to eliminate the need to retreat under specified circumstances, the statute authorized the immunity determination to be made by law enforcement officers, prosecutors, judges, and juries. In enacting the statute, however, the legislature did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process.
>
> When rule 3.190(c)(4) is used as the vehicle to raise the issue of immunity under section 776.032(2), that rule provides the procedural framework by which the court makes its determination. That rule mandates the denial of a motion to dismiss when as here, the facts are in dispute. Thus, the trial court properly denied the motion.
>
> In Peterson, the First District held that the procedure established by rule 3.190(c) does not control the immunity determination. 983 So.2d at 28-29. Instead, the Peterson court found guidance in People v. Guenther, 740 P.2d 971 (Colo.1987). Id. at 29. There, the Colorado Supreme Court held that a defendant, raising an immunity defense under a similar statute, had the burden of proving the entitlement to immunity by a preponderance of the evidence. To do so, the trial court was authorized to weigh conflicting evidence. Following Guenther, the Peterson court held "that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches." Id.
>
> We recognize the efficacy of the procedure outlined in Peterson, but disagree that it is within our province to create a process sanctioned neither by statute nor existing rule.

Velasquez, 9 So. 3d at 24. Notably, in Peterson, the First District did not offer any rationale for its rejection of relevant Florida law in favor of its reliance on a case from Colorado,

People v. Guenther, 740 P.2d 971 (Colo. 1987):

> We reject any suggestion that the procedure established by rule 3.190(c) should control so as to require denial of a motion whenever a material issue of fact appears.

Peterson, 983 So. 2d at 29-30. The Peterson Court simply embraced the complete rationale of Guenther, holding that a trial court is required to take evidence and resolve factual disputes in order to rule on a motion to dismiss. At this hearing, a defendant need only establish by a preponderance of the evidence his entitlement to the immunity. In opting for this procedure, the district court noted that trial courts routinely hold evidentiary hearings to resolve motions for post conviction relief and motions to suppress, therefore, conducting an evidentiary hearing in this instance would be permissible. Peterson, 983 So. 2d at 29. The Fourth District certified conflict with Peterson. This Court must now resolve the conflict.

As a preliminary matter, petitioner's claim is moot and the instant case must be dismissed. Petitioner recognizes that he has no remedy in this case (IB p. 7). Below, the motion to dismiss was denied and petitioner failed to request a stay of proceedings and/or file a Petition for Writ of Prohibition in the Fourth District Court of appeal. Rather, petitioner chose to proceed to trial and forego the immunity. Petitioner has argued the issue before this Court is capable of repetition yet evading review,

however, the petitioner is mistaken. In a case such as Govoni v. State,--- So.3d ----, 2009 WL 2516939 (Fla. 4th DCA August 19, 2009), wherein the District Court denied the Writ of Prohibition yet certified conflict as it did in the instant case, a petitioner may ask this court to review a denial of a Writ of Prohibition. In Govoni, the defendant has not yet proceeded to trial. Hence, because the issue is not evading review, this case must be dismissed as moot.

As for the merits, respondent urges this Court to adopt the reasoning of Velasquez and find that Florida law does not permit the ill advised procedure outlined in Peterson. As will be explained more fully below, the procedure adopted in Colorado is based on a statute which is substantively different than Florida's. In fact, Colorado's statute, unlike Florida's, is very vague and offers absolutely no guidance to courts regarding the substance of the immunity statute. In contrast, the substance of § 776.032 in conjunction with 3.190 (c)(4), offers a workable and fair determination regarding immunity. This Court must reject the unorthodox and unauthorized action taken by the First District in Peterson, and adopt the rationale of Velasquez.

F.S. § 776.032, now commonly referred to as the "Stand Your Ground" defense, provides for immunity from prosecution in the following manner:

(1) A person who uses force as permitted in s.

> 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
>
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

It is clear that the legislature's intent was to afford citizens not only an affirmative defense but complete immunity from prosecution under the requirements of the "Stand Your Ground Law." It is also clear that the legislature **expressly** maintained the status quo with regards to how law enforcement will investigate whether immunity exists which would then preclude a finding of probable cause that a crime occurred. See Bartlett v. State , 993

So. 2d 157, 161 (Fla. 1st DCA 2008)(explaining that §776.032(2), "is not a substantive change in how the police investigate a case. Before any police officer can sign a criminal complaint, the officer must have probable cause to believe a crime has been committed"). In other words, the state, whether through law enforcement or a prosecutor, possess the same obligations and duties as it would during any criminal investigation and/or prosecution. [3].

Also **explicit** in the statute is that an assessment of whether immunity exists to preclude prosecution may be made at any point in the criminal process. In Velasquez, 9 So.3d at 24, the district court noted that the legislature did not restrict the time frame for determining immunity, and instead provided for a continuum throughout the process. It commences with law enforcement, it remains a concern throughout the prosecutor's charging decisions, and ultimately it may rest with a judge. Because immunity may be assessed at any point in the process, and because the statute only refers to one standard for assessment of immunity, i.e., probable cause, logic dictates that the probable cause standard remains the measuring stick throughout the continuum.[4] *A fortiorari* the appropriate vehicle to challenge probable cause would be a motion

3 It has long been the law in Florida that the police must have probable cause to arrest. Shriner v. State, 386 So.2d 525 (Fla. 1980.)

4 Consistent with the absence of any time limitation in the statute, motions to dismiss pursuant to 3.190(c)(4) may also be

to dismiss pursuant to 3.190 (c)(4).[5] The rule is specifically designed to scrutinize whether there is probable cause to proceed as the state must demonstrate that the factual theory of prosecution presents a prima facie case. There is no justification to look beyond Florida law in this instance.[6] Respondent asserts that by **reaffirming law enforcement's authority** to investigate the applicability of the immunity statute pursuant to a probable cause finding, and by allowing for an **immunity determination to be made at any step in the criminal process**, Peterson's refusal to apply Rule 3.190 is not well taken.

In contrast to Florida law, the Colorado statute neither includes an express recognition of law enforcement's use of the probable cause standard to assess the existence *vel non* of probable

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filed at any time.

5 3.190 (c) (4) Time for Moving to Dismiss. Unless the court grants further time, the defendant shall move to dismiss the indictment or information either before or at arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time hereinabove provided shall be considered waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:

> 4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.

6 If a defendant is alleging that he is immune from prosecution pursuant to F.S. § 776.032, the state cannot establish a prima facie case of guilt unless the state's evidence specifically refutes the claim of immunity.

cause in light of the potential immunity; nor does the Colorado statute provide a time continuum in which to make the immunity assessment. Guenther, supra. Rather Colorado's immunity statute is void of substantive guidance regarding the statutory defense of immunity. Consequently, out of necessity, the Colorado Supreme Court filled in the blanks by relying on other instances where judges must make other pre-trial determinations. The Colorado Court noted:

> The immunity created by section 18-1-704.5 is a conditional immunity in the sense that it applies only if certain factual elements are established. Determining whether, in the context of a pending criminal prosecution, a sufficient factual predicate exists for the application of the statutory bar is no different from other forms of adjudication requiring the application of a statutory standard to the facts as found by the court. A court, for example, performs a similar function when it conducts a pretrial hearing to determine whether the statute of limitations bars the prosecution of a charge, § 16-5-401, 8A C.R.S. (1986), whether a pending prosecution would violate statutory prohibitions against double jeopardy, §§ 18-1-301 to -304, 8B C.R.S. (1986), or whether the prosecution is barred by reason of an asserted violation of the accused's right to a speedy trial, § 18-1-405, 8B C.R.S. (1986). The adjudicatory role of the court in these situations is no different from the court's adjudicatory role contemplated by section 18-1-704.5(3) in resolving whether a person accused of a crime must be immunized from further prosecution.

Guenther , 740 P.2d at 977(emphasis added).

Respondent asserts that the Colorado Supreme Court's examples of other pre-trial evidentiary hearings further supports the argument that Colorado's procedure is distinguishable and does not

offer the appropriate guidelines herein. The three areas listed in Guenther that are determined by a judge pre-trial include alleged violations of double jeopardy; statute of limitations, and speedy trial. All of those issues are jurisdictional in nature, and therefore do not implicate in any manner whatsoever, the sufficiency of the evidence to support probable cause. And while those examples may be "bars" to prosecution, they are qualitatively different than the immunity "bar" to prosecution as established in Florida's statute. As written, the substantive right to immunity is interrelated with the probable cause finding in the first instance, see § 776.032(2), and therefore a determination of absolute immunity defeats the existence of a prima facie case to proceed. Consequently, 3.190 (c)(4) is the proper legal vehicle to test the sufficiency of the evidence.

A review of the Colorado Rules of Criminal Procedure reveals that there is no rule similar to Fla. R. Crim. P. 3.190.[7] Colorado rules of procedure clearly give the trial courts discretion regarding the procedures to follow with respect to holding a pre-trial hearing. Fla. R. Crim. P. 3.190 does not afford the trial

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7 Col. R. Crim P. 12 (b)(4) states:

> Hearing on Motion. A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue except as provided in Rule 41. An issue of fact shall be tried by a jury if a jury trial is required by the Constitution or by statute. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other

courts the same discretion as Col. R. Crim P. 12 (b)(4).

In further support of this position, respondent relies on Rodgers v. Commonwealth, 285 S.W. 3d 740 (Ken. 2009). Kentucky's immunity provision is **identical to Florida's** and states as follows:

> **Justification and criminal and civil immunity for use of permitted force; exceptions**
>
> (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
>
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

K.R.S. § 503.085.(emphasis added). Rodgers was charged with

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manner as the court may direct.

manslaughter following the death of the victim during a barbecue in the victim's backyard. Rodgers filed a motion to dismiss based on the immunity statue. The trial court denied the motion finding that the assertion of self-defense was "significantly controverted." Rodgers, 285 S.W. at 750.

Rodgers appealed contending that pursuant to Guenther, he was entitled to a pre-trial evidentiary hearing wherein he would bear the burden of proving by a preponderance of the evidence that his use of force was justifiable. Id. at 754. The Kentucky Supreme Court disagreed. While appreciating that Kentucky's General Assembly clearly intended to create "a true immunity" and not just a defense, the Court also recognized that the law explicitly reaffirmed that the standard of proof, as in all criminal matters, remains one of "probable cause". The Court explained as follows:

> The trial judge's uncertainty regarding how to implement the immunity provision is understandable because the statute offers little guidance. Indeed, the only express indication of legislative intent is in KRS 503.085(2) which provides that immunity must be granted pre-arrest by the law enforcement agency investigating the crime unless there is "probable cause that the force used was unlawful." Because the statute defines the "criminal prosecution" from which a defendant justifiably acting in self-defense is immune to be "arresting, detaining in custody and charging or prosecuting," we can infer that the immunity determination is not confined to law enforcement personnel. Instead, the statute contemplates that the prosecutor and the courts may also be called upon to determine whether a particular defendant is entitled to KRS 503.085 immunity. Regardless

> of who is addressing the immunity claim, we infer from the statute that the controlling standard of proof remains "probable cause." Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.
>
> Probable cause is a standard with which prosecutors, defense counsel and judges in the Commonwealth are very familiar although it often eludes definition. Recently, in Commonwealth v. Jones, 217 S.W.3d 190 (Ky.2006), this Court noted the United States Supreme Court's definition in Illinois v. Gates, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful. If such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed.

Rodgers, 285 S.W.3d at 754.

In addition to interpreting the mechanics of the immunity statute under the polestar of legislative intent, the Court also provided insight into why the Guenther procedure was unworkable and contrary to basic principles of Kentucky law. First, the Court rejected Guenther's rationale that because trial court's hold

evidentiary hearings on a host of pre-trial issues, such a hearing on the immunity defense is not unusual. The Court stated:

> First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to Miranda warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial. In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

Id.at 755. Second, the Court noted the significant differences between the Colorado and Kentucky immunity states:

> As for the Colorado Supreme Court's adoption of an evidentiary hearing approach, there are several fundamental differences in the Colorado statute and KRS 503.085. The Colorado statute in essence, if not in express words, provides “there shall be immunity in home

> invasion cases." *756 People v. Guenther, 740 P.2d at 975. The statute contains no reference to an immunity determination by law enforcement or the prosecutor, no reference to a standard of proof and no reference to how the courts should proceed to determine immunity. Writing on a blank slate and crafting a judicial procedure to be used only in home invasion cases (as opposed to all assaults and homicides wherein self-defense is raised as here in Kentucky), the Colorado court opted for an evidentiary hearing. Given the large volume of Kentucky cases for which immunity may be an issue, the probable cause standard expressly stated in KRS 503.085, and Kentucky's strong preference for jury determinations in criminal matters, we do not find the Colorado court's approach appropriate.

Id. Respondent asserts that the reasoning of the Kentucky Supreme Court is consistent with the Fourth District's approach herein and the same rationale and distinctions must be applied in Florida as F.S. § 776.031 is the mirror image of Kentucky's immunity statute.

For instance, in Peterson, the Court justified the holding of a "mini-trial"[8] by pointing to other instances where trial courts hold evidentiary hearings. Peterson, 983 So. 2d at 29. However, as clearly explained above those types of evidentiary hearings do not involve **credibility** determinations of **elements** of a crime as

8 The respondent recognizes that according to Fla. R. Crim P. 3.190(d), the trial court may take evidence, on any issue of fact, however, recently in Taylor v. State, --- So.3d ----, 2009 WL 2632149 (Fla. 5th DCA, August 28, 2009) the Fifth District Court of Appeal found that generally such a proceeding pursuant to Fla. R. Crim P. 3.190 is not designed to create a trial by affidavit, or a "dry run" of a trial on the merits.

envisioned herein.[9] In Florida, like Kentucky, there is a strong preference for **jury determinations** in criminal matters as evidenced by the fact that a defendant cannot unilaterally waive a jury trial. Such a waiver can only occur with the **consent** of the State. See Fla. R. Crim P. 3.260 (Emphasis added) [10]. To adopt the procedure in Peterson would essentially allow a judge to "acquit" a defendant based on a unilateral finding of immunity which would run afoul of R. 3.260.

As for further guidance, respondent submits that the immunity provided for by F.S. § 776.032 is akin to the qualified immunity and/or sovereign immunity from suit provided to a law enforcement officer, sued for a civil rights violation. In such cases, the only procedure open to the officer is a summary judgment motion under state or federal rules of procedure, and such a motion must be denied if there are material factual disputes. Murray v.

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9 Under § 776.032, a finding of immunity from prosecution, necessarily negates the elements of an offense by operation of law.

10 Petitioner also relies upon and argues that Boggs v. State, 581 S.E. 2d 722 (Ga. App. 2003) applied the same analysis as Colorado, however, petitioner is mistaken. In Boggs, there was no pre-trial evidentiary hearing. Rather, the trial court reviewed the motion to dismiss, along with the discovery package, which included Boggs's statements, witness interviews, and police summaries, and arguments from counsel and denied the motion on its face. Id. At 723. However, undersigned recognizes that in Bunn v. State, 667 S.E. 2d 605 (Ga. 2008), the Georgia Supreme Court followed the procedure announced in Guenther, however, the same distinctions apply because Georgia's immunity law contains no reference to an immunity determination by law enforcement or the prosecutor, no reference to a standard of proof and no reference to how the courts should proceed to determine immunity. See OCGA § 16-3-24.2.

Rosati, 929 So.2d 1090, 1092 (Fla. 4DCA 2006) (although state officers may enjoy an immunity defense, they cannot prevail pretrial if the defense is based on disputed material facts). Furthermore, in Thompson v. Douds, 852 So. 2d 299 (Fla. 2nd DCA 2003), the plaintiff asserted a civil rights violation for the alleged use of excessive force by the defendant police officers. The officers filed a motion for summary judgment which was granted by the court. In reversing the trial courts order the second district court of appeal stated as follows:

> "The parties do not dispute that the sovereign immunity statute, section 768.28(9)(a) Florida Statutes (1997), generally protects government officials from individual liability for damages. However, an exception to this statutory immunity applies when the governmental official 'acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.' § 768.28(9)(a). Here, while there is no evidence that the individual officers acted in bad faith or with a malicious purpose, there is a genuine issue of material fact as to whether the individual officers' actions constituted a wanton and willful disregard of human rights. Therefore, the trial court erred in granting final summary judgment on this basis."

Id. Florida Courts have found that Fla. Rule Crim. P. 3.190(c)(4) is analogous to a motion for summary judgment. See Dorelus v. State, 747 So. 2d 368(Fla. 1999); State v. Jones, 642 So. 2d 804, 805 n.2 (Fla. 5th DCA 1994); State v. Diaz, 627 So. 2d 1314, 1315 (Fla. 2d DCA 1993). State v. Bonebright, 742 So.2d 290, 291 (Fla. 1st DCA 1998); Kalogeropolous, 758 So.2d at 111.

Additionally, in considering such a motion, the trial court is not permitted to make factual determinations nor consider either the weight of the conflicting evidence or the credibility of the witnesses. Fetherolf, 388 So.2d at 39 (stating that "[i]t is not proper [on a rule 3.190(c)(4) motion] for the court to determine factual issues, consider weight of conflicting evidence, or credibility of witnesses."). See also State v. Gutierrez, 649 So.2d 926, 928 (Fla. 3d DCA 1995) ("On a motion to dismiss, if the affidavits and depositions filed in support of or in opposition to the motion create materially disputed facts, it is improper for the trial court to determine factual issues and consider the weight of conflicting evidence of credibility of witnesses.").

There is no procedural rule in Florida which would allow for the procedure set forth in Peterson. Rather, the Florida Rules of Criminal procedure sets forth a clear and unambiguous procedure to follow when motions to dismiss are filed:

> (d) Traverse or Demurrer. The state may traverse or demur to a motion to dismiss that alleges factual matters. Factual matters alleged in a motion to dismiss under subdivision (c)(4) of this rule shall be considered admitted unless specifically denied by the state in the traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under subdivision (c)(4) of this rule **shall** be denied if the state files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss. The demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

Emphasis added. Hence, People v. Guenther, 740 P.2d 971 (Colo.1987) is inapplicable because the procedural rules in Colorado are not comparable to the procedural rules in Florida.

Finally, in his concurring opinion in Govoni v. State, --- So.3d ----, 2009 WL 2516939 (Fla. 4th DCA 2009), Judge Gross noted that the current version of Rule 3.190 allows the procedure contemplated in Peterson v. State, 983 So.2d 27 (Fla. 1st DCA 2008). He argues that 3.190 (b) permits the type and scope of hearing envisioned in Peterson. 9 So.3d at 24. Judge Gross is in error as motion filed pursuant to 3.190 (b) are generally reserved for constitutional challenges to statutes and they do not require that the motion be sworn to. State v. Globe Communications Corp., 622 So. 2d 1066, 1070 (Fla. 4th DCA 1993) *citing* Miller, Rule 3.190(c)(4) Motions-A Fall From Grace, 13 FLA.STATE L.REV. 257, 263 (1985))(explaining that constitutional issues properly raised in Fla. R. Crim. P. 3.190(b)); *see also* State v. Coleman, 937 So.2d 1226 (Fla. 1st DCA 2006)(same). In fact, Globe Communication, supra the court noted that a motion to dismiss filed pursuant to Fla. R. Crim. P. 3.190(c)(4) is appropriate when a defendant is alleging that his or her actions constitute, "an exception in the statute defining the crime" Id. Clearly, Dennis's reliance on § 776.032 immunity constitutes "an exception" to the crime at issue.

Judge Gross also reasoned that immunity from prosecution would be "relegated" to an affirmative defense should 3.190 (c)(4) apply.

That is simply untrue. As previously argued, an assessment of whether immunity will bar prosecution commences at the investigating stage, See § 776.032(2), and continues forward throughout the process.[11] For Judge Gross's argument to be true, one would have to assume that law enforcement as well as prosecutors do not follow the law and in this instance they would ignore the appropriate application of immunity in violation of the law. There simply is no basis for that assumption. [12] See Cruse v. State, 522 So.2d 90, 91 (Fla. 1st DCA 1988) (explaining "a

11 In fact there is empirical evidence that since the enactment of F.S. § 776. 032, the law has in fact acted as an immunity to prosecution or has resulted in reduced charges being filed. Zachary L. Weaver, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. Miami L. Rev 395, 406-407 (2008).

12 Pursuant to Florida Bar. Rule 4-3.8: Special responsibilities of a prosecutor:

The prosecutor in a criminal case shall:

> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing;
>
> (c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a

prosecutor's obligation is to secure justice, not victory at any cost."; see also Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)(explaining that prosecutors must, "refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one"); Pendarvis v. State, 752 So.2d 75, 77 (Fla. 2d DCA 2000)(recognizing that prosecutors also "properly functions in a quasi-judicial capacity with reference to the accused ... to see that the accused is accorded a fair and impartial trial."); Martin v. State, 411 So.2d 987, 990 (Fla. 4th DCA 1982)(explaining that prosecutors must "be ever mindful of their awesome power and concomitant responsibility ... [to] reflect a scrupulous adherence to the highest standards of professional conduct."); *see also* DeFreitas v. State, 701 So.2d 593, 600 (Fla. 4th DCA 1997) (recognizing that a prosecutor must seek justice "with the circumspection and dignity the occasion calls for");Briggs v. State, 455 So.2d 519, 521 (Fla. 1st DCA 1984)(acknowledging that a prosecutor is duty-bound to remember that "obtaining a conviction at the expense of a fair trial is not justice.").

Although motions to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4) are meant to be sparingly granted, they are not "rubber stamp" type orders, rather, the trial courts must consider the pleadings before them and decide if the facts are in material

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protective order of the tribunal.

dispute. Particularly, in this case, the trial judge grappled with his decision and considered the arguments of both sides, but found that the facts of this case were in material dispute (T. 18-27). The trial court found that the Petitioner's own statements to the police gave rise to disputed facts (T. 20). It must be remembered, that the person who has used force against another is seeking **complete absolution** from prosecution. The entitlement to such an **immunity**, must withstand the rigorous scrutiny and investigation as any other criminal investigation. The substantive right created by the legislature for those who qualify under the statute does not justify an abandonment of the basic and well established rules of procedure.

Judge Gross, incorrectly relies on the determination of **transactional** immunity codified in 3.190 (c)(3) as further support for the Peterson hearing herein. The fallacy of this argument is that a judge, when deciding whether there is use immunity pursuant to 3.190(c)(3), does not make **credibility findings** regarding conflicting evidence. Once the state **points to** other evidence, the claim of use immunity is defeated. State v. McSwain, 440 So. 2d 502 (Fla. 2nd DCA 1983). Hence, the type of hearing held on a 3.190(c)(3) motion is in fact comparable to the type of hearing held on a (c)(4) motion and does not provide for the procedure called for in Peterson.

Thus, the procedure outlined in Peterson, is not justified nor

sanctioned under Florida law. The procedures already in place serve the dual concerns of affording immunity to those who qualify while ensuring that genuine factual disputes be resolved by a jury. Thus, the Defendant's claim of immunity pursuant to F.S. § 776.032 is more properly raised under Fla. Rule Crim. P. 3.190(c)(4) wherein the trial court must only decide if the pleadings and/or evidence create a materially disputed fact. This court must affirm the decision of the Fourth District Court of Appeal in Dennis v. State, --- So.2d ----, 2009 WL 605356 (Fla. 4th DCA 2009), *conflict certified on reh'g*, Dennis v. State, 34 Fla. L. Weekly D 1000 (Fla. 4th DCA 2009) and quash the decision in Peterson.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Merits Brief" has been furnished to: Barbara Wolfe, Esq, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401____ day of _____, 2009

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MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

MELANIE DALE SURBER

APPENDIX