IN THE SUPREME COURT OF FLORIDA

CLARENCE DENNIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-941
	)	LOWER TRIBUNAL NO. 4D07-3945
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

PETITIONER'S INITIAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Petitioner was originally charged by information with attempted first degree murder. (R22). The information was subsequently amended, and the charge was reduced to aggravated battery, contrary to section 784.045(1)(a), Florida Statutes. (R104).

Prior to trial, Petitioner filed a sworn motion to dismiss pursuant to section 776.032, Florida Statutes, alleging that he was immune from prosecution because his action constituted the justifiable use of force. (R63-92).

Petitioner's motion to dismiss alleged that Petitioner and Gloria McBride argued at the home of Richard Morris, and that Gloria McBride, a large woman, struck Petitioner in the head with a beer bottle, and then threatened Petitioner in a menacing fashion with the jagged, broken end of the long-necked bottle. Consequently, Petitioner defended himself, and during the struggle which ensued, Gloria McBride was injured with the same beer bottle which was still in her hand. (R63-79).

Petitioner's motion provided written corroboration of the altercation through the statements of eyewitnesses Joema Washington (R69), and George Daniels, both of whom saw Gloria McBride strike Petitioner in the head with a beer bottle. Further corroboration of the motion consisted of a transcript of Petitioner's bond hearing, in

which Petitioner testified that he was forced to defend himself after Gloria McBride struck him in the head with a beer bottle, causing him to bleed extensively, (R72-79), as well as a sworn police report, which stated that Petitioner sought out Deputy Baker and advised him that Gloria McBride had hit him with a beer bottle, and that he had defended himself. (R8-9, 64-65).

The State filed a Traverse and Demurrer, alleging that the facts of the case were in dispute. (R98-99).

The trial cour denied Petitioner's motion to dismiss without an evidentiary hearing, finding that the disputed facts of the case were a question for the jury to resolve. (T3, 8-10,13, 21, 24-27).

Petitioner proceeded to jury trial, was convicted of the lesser included offense of felony battery, and was sentenced to 60 months in the Department of Corrections. (R108, 146-148).

Petitioner appealed the judgment and sentence, arguing that the trial court erred in denying his motion to dismiss on the issue of statutory immunity from prosecution without conducting an evidentiary hearing.

The Fourth District affirmed Petitioner's conviction and sentence, finding no error in the trial court's decision to deny the motion to dismiss. Citing *Velasquez v.*

State, 9 So.3d 22 (Fla. 4th DCA 2009), the Court held that a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. *Dennis v. State*, 34 Fla. L. Weekly D537 (Fla. 4th DCA March 11, 2009).

In its order of May 20, 2009, the Fourth District denied Petitioner's motion for rehearing and/or clarification, but certified conflict with the decision of the First District in *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008).

Petitioner filed Notice to Invoke Discretionary Jurisdiction on May 22, 2009.

SUMMARY OF THE ARGUMENT

This Court is asked to resolve a conflict between the Fourth and First Districts regarding what procedure must be followed by the trial court when ruling on a motion for statutory immunity filed under section 776.032, Florida Statutes. Although the issue is moot as to Petitioner's case, the issue is capable of repetition, yet may otherwise evade review, and, therefore, is ripe for this Court's determination.

The Fourth District's opinion, holding that a motion to dismiss pursuant to section 776.032 "is properly denied when there are disputed issues of material fact", eviscerates the statute and renders it meaningless. It was not the intent of the Legislature in promulgating section 776.032 to enact a statute which would be merely superfluous to Florida Rule of Criminal Procedure 3.190(c)(4), but, rather, to enact legislation that would provide immunity from prosecution to the citizens of Florida in cases of justified self defense. Therefore, interpretation of section 776.032 should be construed to give effect to that intention, rather than to render the statute potentially meaningless.

The First District's holding in *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008), in accordance with holdings of the Colorado Supreme Court, and the Georgia Court of Appeals, properly construes the statute on immunity from prosecution to

require that the trial court determine pretrial whether the defendant has established entitlement to statutory immunity by a preponderance of the evidence, and, if so, to dismiss the criminal charges.

Accordingly, this Court should reverse the holding of the Fourth District in Dennis, and approve the holding of the First District in *Peterson*.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS, WHICH SOUGHT IMMUNITY FROM PROSECUTION, PURSUANT TO SECTION 776.032, FLORIDA STATUTES, WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

A. The Issue

This Court is asked to resolve a conflict between the Fourth and First Districts regarding what procedure must be followed by the trial court when ruling on a motion to dismiss filed under section 776.032, Florida Statutes.

B. The Conflict

The Fourth and First Districts have conflicting opinions as to what this procedure should be.

In the instant case, the Fourth District affirmed the trial court's summary denial of Petitioner's motion to dismiss, which sought immunity from prosecution under section 776.032. The court, citing *Velasquez v. State*, 9 So.3d 22 (Fla. 4th DCA 2009), held that a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. *Dennis v. State*, 34 Fla. L. Weekly, D537 (Fla. 4th DCA March 11, 2009).

In *Peterson v. State,* 983 So.2d 27 (Fla. 1st DCA 2008), the First District rejected a procedure that would deny a motion simply because factual disputes exist:

> We now hold that when immunity under the law is properly raised by the defendant, the trial court must decide the matter by confronting and weighing only factual disputes. **The court may not deny a motion simply because factual disputes exist. 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.** (Emphasis added).

C. Nature of Relief Sought

This appeal seeks reversal of the Fourth District's holding in Dennis, and approval of the First District's holding in Peterson, which is in accordance with decisions of the Colorado Supreme Court and the Georgia Court of Appeals on the issue of statutory immunity.

D. The Issue is Not Moot

The issue appears to be moot for Petitioner, who, unfortunately, was denied an opportunity to prove entitlement for immunity when his pre-trial motion under section 776.032 was denied without an evidentiary hearing. Subsequently, Petitioner was convicted by a jury. This injustice cannot now be redressed, as immunity is more than being granted a defense; rather, immunity is "an entitlement not to stand trial or face the burdens of litigation", and, is "effectively lost if a case is erroneously permitted to

go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). See also *Scott v. Harris*, 550 U.S. 372 (2007).

Notwithstanding that Petitioner's case is moot, the issue is ripe for this Court's determination, as the issue is capable of repetition, yet may otherwise evade review. *Nebraska Press Association et al v. Stuart*, 427 U.S. 539 (1976); *Sims v. State*, 998 So.2d 494 (Fla. 2008).

This Court's resolution of what procedure must be followed by the trial court when ruling on a motion to dismiss under section 776.032, will ensure that future litigants throughout Florida who may be entitled to statutory immunity, will have the opportunity to pursue this right, as intended by the Legislature.

E. Argument

Under Florida law, a person who is not engaged in unlawful activity and is in a place he or she has the right to be has "no duty to retreat and may stand his or her ground and meet force with force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony." § 776.013(3), Fla. Stat. (2006). In addition, a person who justifiably uses deadly force in self-defense or defense of another enjoys immunity from prosecution:

> A person who uses force as permitted in s. 776.012, s. 776.013, or 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force.... As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

§ 776.032(1), Florida Statute (2006).

Petitioner lost the opportunity to prove his entitlement to immunity when the trial court summarily denied his motion to dismiss." (R100).

The Fourth District's opinion, affirming the trial court's ruling and holding that a motion to dismiss under section 776.032 "is properly denied when there are disputed issues of material fact", in essence, determines that the criteria for deciding a motion to dismiss filed under section 776.032, is no different than the criteria for deciding a motion to dismiss filed under Florida Rule of Criminal Procedure 3.190(c)(4). This holding defeats the purpose of the statute, and renders it meaningless, as, almost inevitably, cases involving physical confrontation that give rise to claims of self-defense have disputed issues of material fact. It is for this reason that Florida case law holds that self-defense is not appropriately decided by a rule 3.190(c)(4) motion. *State v. Williams*, 400 So.2d 1326 (Fla. 4th DCA 1981); *State v. Hull*, 933 So.2d 1279 (Fla. 2d DCA 2006); *State v. Milton*, 488 So.2d 878 (Fla. 1st DCA 1986).

By affirming the ruling of the trial court, the Fourth District denies the litigant a procedure by which to implement a claim of statutory immunity under section 776.032. The trial court had the authority and duty to establish a procedure for litigating the right of immunity, since without a procedure the right will have no meaning. This Court now has the same authority and duty. Absent the establishment of a procedure, a person's "fundamental rights are neglected; their vindication postponed." *Hill v. State*, 358 So.2d 190, 204 (Fla. 1st DCA 1978).

In Hill, the First District was faced with the question of what is the appropriate procedure for an insanity acquitee to gain release from commitment. In deciding the procedure (subsequently changed by statute), the Court held:

> We must consider whether a district court of appeal has power to authorize and require remedies which implicate the circuit court, the public prosecutor and defender, and agencies of the executive branch. We do not casually assume that power. This court has neither the discretion of a circuit judge nor the rulemaking authority of the Supreme Court. Yet there is a hiatus between the procedures required to resolve these cases properly and those that have thus far been provided by rules and decision of the Supreme Court. In that hiatus, the acquitees fundamental rights are neglected; their vindication is postponed.
>
> ***
>
> Our lack of rulemaking power is no impediment. The Supreme Court has prescribed procedures essential to the rule of law not only by its constitutional rulemaking power, in which function we do not participate, but also by

> decision, in which we do.... The court's power to fashion remedies in the realm of criminal justice is unquestioned.

Hill, 358 So.2d at 204-05 (citations omitted).

In promulgating section 776.032, the intent of the Legislature was not to enact a statute which would be merely superfluous in function to Florida Rule of Criminal Procedure 3.190(c)(4), but, rather, to enact legislation which would provide immunity from prosecution to the citizens of Florida in cases of justified self defense.

The preamble to the law makes this point explicitly:

> [T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others....

Ch. 2005-27, at 139, Laws of Fla.

The rules of statutory construction disallow statutory interpretation that would render a statute meaningless:

> Questions of statutory interpretation are reviewed de novo. The cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute. It is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially meaningless. [S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose.

Reeves v. State, 957 So.2d 625 (Fla. 2007).

Accordingly, section 776.032 must be interpreted "so as to accomplish rather than defeat" its intended purpose. *Reeves, supra*. Moreover, the senate staff analysis reflects that the Legislature contemplated that the trial court would decide the immunity issue pretrial: "Section 4 of the bill provides immunity from criminal prosecution and civil action in cases where it is found by the court that the defendant's actions constituted justifiable use of force." Fla. S. Comm. on Crim. Just., CS for SB 436 (2005) Staff Analysis 7 (Feb. 10, 2005) (emphasis added).

Colorado and Georgia have already tackled this issue. In 1985, the Colorado General Assembly passed a law that provided that "any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force." § 18-1-704.5(3), C.R.S.

In *People v. Guenther*, 740 So.2d 971 (Colo. 1987), the Colorado Supreme Court first interpreted this statute, and it applied rules of statutory construction similar to Florida's. "Our primary task in construing a statute is to ascertain and give effect to the intent of the General Assembly." *Guenther*, 740 P.2d at 975 (c.o.). "It must be presumed that the legislature has knowledge of the legal import of the words it uses, and that it intends each part of a statute to be given effect." Id. at 976 (c.o.). The

Colorado Supreme Court also consulted legislative history, which, it said, "supports the inference that the General Assembly understood, and obviously intended, that the immunity provision of section 18-1-704.5(3) would protect a home occupant from the burden of defending a criminal prosecution when it was determined that the conditions for statutory immunity were established." *Id*. Accordingly, the Court held as follows:

> We therefore hold that where, as here, a defendant is charged with crimes arising out of circumstances colorably within the scope of section 18-1-704.5, subsection (3) of this statute confers authority on a court to conduct a pretrial hearing on whether the statutory conditions for immunity from prosecution have been established and, if so established, to dismiss the criminal charges.

Guenther, 740 P.2d at 976. The Court went on to hold that the burden would be on the defendant to establish by a preponderance of evidence, entitlement to immunity under the statute. *Guenther*, 740 P.2d at 980-81.

In *Boggs v. State*, 581 S.E.2d 772 (Ga. App. 2003), the Georgia Court of Appeals used essentially the same analysis and came to the same conclusion. The Georgia statute provided that "[a] person who uses threats or force in accordance with Code Section 16-3-23 or 16-3-24 shall be immune from criminal prosecution therefor." *Id*. at 723. The Court applied Georgia's rules of statutory interpretation, which, like Colorado's, are similar to Florida's:

> When we construe a statute, our goal is to determine its legislative purpose. In this regard, a court must first focus on the statute's text. If the plain language of the statute is susceptible of only one meaning, courts must follow that meaning unless to do so would produce contradiction or absurdity. If the statute is plain and unambiguous, we must give its words their plain and ordinary meaning, except for words which are terms of art or have a particular meaning in a specific context.

Boggs, 581 S.E.2d at 723 (footnote, citations, and quotation marks omitted).

Applying these rules and considering the definition of immunity, the Court held as follows:

> Therefore, by the plain meaning of these terms and the other language in the statute, the statute must be construed to bar criminal proceedings against persons who use force under the circumstances set forth in OCGA § 16-3-23 or § 16-3-24. Further, as the statute provides that such person "shall be immune from criminal prosecution," the decision as to whether a person is immune under OCGA § 16-3-24.2 must be determined by the trial court before the trial of that person commences.

Boggs, 581 S.E.2d at 723.

F. CONCLUSION

The intent of the Legislature has been clearly expressed in the language of section 776.032, Florida Statutes, which should be construed so as to give effect to that intent, rather than to render the statute potentially meaningless.

Accordingly, this Court should reverse the decision of the Fourth District in *Dennis v. State*, and approve the decision of the First District in *Peterson v. State*, which, in accordance with decisions of the Supreme Court of Colorado and the Georgia Court of Appeals, construes the statute on immunity from prosecution to require that the trial court conduct a pretrial hearing to determine whether the defendant has established entitlement to immunity by a preponderance of evidence, and, if so, to dismiss the criminal charges.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Petitioner's Initial Brief has been furnished to Heidi Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 by hand delivery, and to Petitioner, Clarence Dennis, #0794493, Moore Haven Correctional Institution, P.O. Box 718501, Moore Haven, FL 33471-8837, by U.S. Mail, this 13th day of August, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

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