IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner is the defendant and Respondent is the prosecution. 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 Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as they appear in the Initial Brief on the Merits.

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.

The gravamen of the Respondent's argument is that this Court should approve the holding of *Dennis v. State*, which is predicated upon the rationale of *Velasquez v. State*, 9 So.3d 22 (Fla. 4th DCA 2009), that a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact.

In support of its argument, Respondent argues the following, which Petitioner contends are without merit:

1. Respondent erroneously argues that §776.032 should be implemented in conjunction with rule 3.190(c)(4).

Respondent argues that "the substance of §776.032, in conjunction with 3.190(c)(4), offers a workable and fair determination regarding immunity." (AB-8).

By arguing that this Court should approve such a statutory construction, Respondent asks this Court to *presume* that the legislature intended that §776.032 be implemented through the vehicle of Florida Rule of Criminal Procedure 3.190(c)(4). There is no evidence to suggest that the legislature intended such a statutory construction. On the contrary, such a construction would defeat the purpose of the statute by reducing the true immunity intended by our legislature in §776.032, to a

mere affirmative defense. *See* Ch. 2005-27, at 200, Laws of Fla.; *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008).

As Chief Judge Robert Gross, of the Fourth District Court of Appeal, wrote in his specially concurring opinion in *Govoni v. State*, 17 So.3d 809 (Fla. 4th DCA 2009):

> A motion to dismiss under rule 3.190(c)(4) is not well-suited to resolve a claim of "true immunity" from prosecution. In most cases, where a prosecutor has elected to file charges, there will be a factual dispute about whether section 776.032 immunity applies. Rule 3.190(c)(4) is structured to avoid a judge's resolution of factual disputes, leaving those matters to the finder of fact at a trial. A rule 3.190(c)(4) motion to dismiss is similar to a motion for summary judgment in a civil case, and as such "[b]oth should be granted sparingly" *State v. Bonebright*, 742 so.2d 290, 291 (Fla. 1st DCA 1998); see *State v. Kalogeropolous*, 758 So.2d 110, 111 (Fla. 2000). **Yet, forcing disputed immunity claims to trial undercuts the concept of immunity adopted by the legislature.** (Emphasis added).

Respondent argues that Judge Gross' reasoning is "untrue"(AB22-23):

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

Respondent argues that law enforcement officers and prosecutors should be the authorities to initially determine if immunity attaches in a criminal case, and that any

further attempt by a defendant to seek immunity pursuant to §776.032 must be addressed through a 3.190(c)(4) motion to dismiss, (which the court would be compelled to deny upon the mere filing of a traverse by the State). (AB 5-6,9-11).

Petitioner contends that the procedure suggested by Respondent would totally usurp the power of the court in determining whether a defendant is entitled to immunity, and would render the statute on immunity meaningless. Such a result was surely not the intention of our legislature in promulgating §776.032.

2. Respondent erroneously argues that §776.032 is analogous to qualified immunity or sovereign immunity in a civil rights violation law suit. (AB 19-20).

In furtherance of its argument that a motion to dismiss pursuant to rule 3.190(c)(4) is the correct vehicle for seeking immunity under §776.032, Respondent argues that in a civil rights violation lawsuit, law enforcement officers may seek qualified or sovereign immunity, which is analogous to §776.032, only through a motion for summary judgment, and that such a motion must be denied if there are material factual disputes.

Respondent overlooks an important difference between civil and criminal cases. In civil cases, both sides have a constitutional right to a jury trial; in state court this right is protected by article I, section 22, of the Florida Constitution, and in federal court it is protected by the Seventh Amendment. This is why trial courts may not grant summary judgment when there are material disputed facts.

As this Court explained in *Williams v. City of Lake City*, 62 So.2d 732 (Fla. 1953):

> The right to a jury trial is a very sacred part of our system of jurisprudence and, while we have held that the granting of a summary judgment does not infringe upon such constitutional right, that very holding carries with it the idea that such judgments should be sparingly granted and only in those cases where there remains no *genuine* issue of any *material* fact. To put it another way, such motion should be granted only where the moving party is entitled to a judgment as a matter of law. It was never intended by this rule that cases should be tried by affidavit or that affidavits, interrogatories or depositions or similar evidence, could be used as substitutes for a jury trial. To sum it all up, if there are issues of fact and the slightest doubt remains, a summary judgment cannot be granted.

Williams, 62 So.2d at 733 (emphasis in the original).

Federal courts have made the same point about summary judgment and the Seventh Amendment. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 622 (1973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment. ." (c.o.)); *Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997) ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a

material issue of fact, the Seventh Amendment,[1] require submission to a jury."). Indeed, at least one commentator argues that the entire summary judgment procedure is unconstitutional under the Seventh Amendment. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va. L. Rev. 139 (2007).

Although a criminal defendant has both a federal and state constitutional right to a jury trial *the State has no such constitutional right in a criminal case.* While the State's consent to a non-jury trial is required under Florida Rule of Criminal Procedure 3.260, this is not constitutionally required. This rule is based on Federal Rule of Criminal Procedure 23(a),[2] and there is no constitutional impediment to changing it. *See United States v. Reyes*, 8 F. 3d 1379, 1390 (9th Cir. 1993) ("Though the Government does not have the constitutional right to insist on a jury trial, neither does a defendant have a Sixth Amendment right to waiver." *citing Singer v. United States*, 380 U.S. 24, 36-37 (1965)). *See also* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial; a Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 365 n. 12 (1993) ("[E]very respected commentator has agreed that amending Rule 23(a) to provide a defendant with an absolute right to a bench trial would be constitutional." citing 2

[1] U.S. Const. Amends. VI, XIV, U.S. Const. article III, § 2, cl. 3; art. I, § 16(a), Fla. Const.

[2] *See* Rule 3.260, Committee Notes, 1968 Adoption.

Charles A. Wright, *Federal Practice and Procedure: Criminal 2D* (2d ed. 1982), § 372 at 300).

Nor does article I, section 22, Florida Constitution ("The right of trial by jury shall be secure to all and remain inviolate."), provide the State a constitutional right to jury trial in criminal cases. Historically, the Supreme Court has taken a "narrow view of the right to trial by jury set forth in article I, section 22" and applied it "only those cases in which the right was recognized at the time of the adoption of the State's first constitution." *State v. Webb*, 335 So.2d 826, 828 (Fla. 1976). Petitioner has found nothing to suggest that the State has ever had a right under the Florida Constitution to a jury trial in a criminal case. *See Reed v. State*, 470 So.2d 1382, 1386 (Fla. 1985) (Shaw, J., concurring) ("What this shows, however, is that article I, section 6 and its successors [i.e., section 22] are the state counterpart to the seventh amendment but neither adds to nor detracts from the right enjoyed in criminal prosecutions which is protected elsewhere.").

Because the State, unlike a civil litigant, has no constitutional right to a jury trial, the Respondent's summary judgment analogy is inappropriate. There is no rule or constitutional provision that precludes the trial court from deciding at a pretrial hearing that a defendant is entitled to statutory immunity.

3. Respondent erroneously argues there is no procedural rule in Florida which would allow for the procedure set forth in *Peterson*. (AB21).

In *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008), the court specifically rejected a procedure that would deny a motion to dismiss based on §776.032 simply because factual disputes exist. The procedure set forth in *Peterson* requires that when the trial court is faced with a factual conflict, the court must hold a hearing to confront and weigh the factual disputes, so that it can "determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches."

There is, in fact, a procedural rule in Florida which would allow for the procedure set forth in *Peterson*, as explained by Fourth District Court of Appeal Chief Judge Robert Gross in *Govoni*:

> I write to note that the current version of Rule 3.190 allows the procedure contemplated in *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008).
>
> * * * * * * * * *
>
> [R]ule 3.190(d) expressly contemplates hearings to resolve disputed issues of fact when it says, "[t]he court may receive evidence on any issue of fact necessary to the decision of the motion."
>
> **For these reasons, I do not believe that we were correct in Velasquez when we said that *Peterson* created "a process sanctioned neither by statute nor existing rule**." *Velasquez*, 9 So.3d at 24. *Peterson* rejected the proposition that rule 3.190(c)(4) should exclusively control the determination of a section 776.032 immunity claim. 983 So.2d at 29. The first district held that "when immunity under this law is properly raised by a defendant," the trial court "may not deny a motion [to dismiss] simply because factual disputes exist." *Id*. Faced with a factual conflict, a

> court must hold a hearing to confront and weigh the factual disputes, so that it can "determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches." *Id*. ***Peterson*'s procedure for a contested evidentiary hearing fits within the framework of rule 3.190.** (Emphasis added).

Notwithstanding that there is a procedural rule in Florida which would allow for the procedure set forth in *Peterson*, the Second District Court of Appeal upholds *Peterson* on additional grounds: In its decision in *Horn v. State*, 17 So.3d 836 (Fla. 2d DCA 2009), the court not only agrees that rule 3.190(c)(4) is inappropriate for determining immunity under §776.032, but, also, holds that a motion for immunity falls under the general authority granted to trial courts to hear and rule upon motions necessary to resolve criminal cases.

In its decision, (published only one week after *Govoni*), the *Horn* court states:

> We agree with the Fourth District that a district court has no authority to create a rule of criminal procedure. However, unlike the Fourth, we do not think rule 3.190(c)(4), setting forth the procedure for a motion to dismiss, is appropriately applied to a motion or petition to determine immunity under section 776.032. **Instead, we hold that such a motion falls under the general authority granted to trial courts to hear and rule upon motions necessary to resolve criminal cases. FN4.**
>
> > FN4. In *State v. Ford*, 626 So.2d 1338, 1345 (Fla. 1993), the Florida Supreme Court held, " 'All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws and

> constitutional provisions.' " (quoting Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. Miami L. Rev. 257, 263 (1985)). In that case, the court stated that the trial court would have been within its authority to use an unauthorized procedure to protect a child witness, had it not conflicted with the defendant's constitutional rights. *Id*.

* * * * * * * *

We agree with the First District that our legislature intended to create immunity from prosecution rather than an affirmative defense and, therefore, the preponderance of the evidence standard applies to immunity determinations. *See Peterson*, 983 So.2d at 29. (Emphasis added).

CONCLUSION

The First District's holding in *Peterson* properly construes §776.032, Florida Statutes, 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.

Based on the legal authority and arguments set forth in Petitioner's Initial and Reply Briefs, Petitioner respectfully urges this Court to quash the opinion of the Fourth District in *Dennis v. State*, 17 So.3d 305 (Fla. 4th DCA 2009) and approve the holding in *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Initial Brief has been furnished to: Celia Terenzio and Melanie Dale Surber, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this 8th day of December, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared I compliance with the font standards required by Fla. R. App. P. 9.210(a)(2). The font is Time New Roman, 14 point.

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