IN THE SUPREME COURT OF FLORIDA

CLARENCE DENNIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-941
	)	L.T. CASE NO. 4D07-3945
STATE OF FLORIDA,	)	2006-CF-625A
	)	
Appellee.	)	
_____	)	

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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

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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 set forth in Petitioner's Initial Brief.

ARGUMENT

EVEN THOUGH PETITIONER WAS CONVICTED OF FELONY BATTERY AFTER A JURY TRIAL, HE IS STILL ENTITLED TO AN EVIDENTIARY HEARING BEFORE A JUDGE ON HIS CLAIM THAT HE WAS ENTITLED TO IMMUNITY, AND TO DISMISSAL OF THE CHARGE.

The gravamen of Respondent's argument on the issue of remedy is that the remedy sought by Petitioner (as set forth in *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009)), creates a "beyond absurd result". . . . (SBR-4), and, "not only is Petitioner's request illogical, he is procedurally barred from doing so." (SBR-6). In support thereof, Respondent sets forth the following arguments which Petitioner contend are without merit:

1. Respondent erroneously argues that Petitioner is not entitled to relief because he failed to seek review of the trial court's ruling until after trial. (SBR,6-7).

Petitioner initially sought statutory immunity, pursuant to §776.032, Florida Statutes, on April 17, 2007. The trial court's denial of Petitioner's Motion to Dismiss on July 2, 2007, predated *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), which outlines a procedure to implement §776.032. The procedure in *Peterson* is currently approved by the First, Second, Third and Fifth District Courts of Appeal.[1] In the

[1] *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008); *Horn v. State*, 17 So. 3d 836 (Fla. 2d DCA 2009); *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009); *State v. Yaqubie*, WL 2382583 (Fla. 3rd DCA 2010); *Gray v. State*, 13 So. 3d 114 (Fla. 5th DCA 2009).

absence of any legal authority in Florida in 2007, which might have served as a guide to the procedural implementation of §776.032, Petitioner acted reasonably in not seeking review of the trial court's order prior to trial.

2. Respondent erroneously argues that it would be "illogical" for a trial court to find that Petitioner had proven his entitlement to immunity in an evidentiary hearing conducted on remand after a jury verdict of guilt. (SBR2)

Such is not the case. Trial judges are frequently required to "rehear" evidence and make rulings in cases under a variety of circumstances which require that the court maintain its impartiality. This Court has consistently held that the fact that a judge has previously heard the evidence or made adverse rulings in a case is not an adequate ground for disqualification. *Kokal v. State*, 901 So. 2d 766 (Fla. 2005); *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000); *Jackson v.* State, 599 So. 2d 103, 107 (Fla. 1992).

Further, Respondent erroneously asserts that "It is important to remember the only difference between a defendant's argument raised, and proof presented, under a pre-trial claim of immunity, and raising an affirmative defense of self-defense at trial, is the time of the same. (SBR 7-8). Again, such is not the case. As the trier of fact in the determination of immunity, the trial judge assesses the credibility of the evidence presented. The trial court's view of the evidence, therefore, could be completely different from the jury's view of the same evidence.

3. Finally, Respondent erroneously argues that approving the remedy requested "would open the courts below up to the classic ambush scenario".

As previously discussed, Petitioner comes before this Court in a unique posture, as there was no legal authority in Florida in 2007, to serve as precedent in seeking review of the trial court's denial of Petitioner's pre-trial motion for immunity. There was no "ambush scenario" intended on the part of Petitioner. On the contrary, Petitioner, unfortunately, had no recourse but to proceed to trial without an opportunity to seek review of the trial court's order. Petitioner now seeks only a fair and just remedy, as is set forth in *McDaniel v. State*, 24 So.3d 654 (Fla. 2d DCA 2009).

This Court has the power and the opportunity to fashion a procedure (and remedy) which will best implement §776.032, Florida Statutes, in accordance with the intent of the Florida legislature. And if this Honorable Court so chooses, it will undoubtedly be able to achieve this important goal without "opening the courts below up to the classic ambush scenario", as Respondent suggests.

CONCLUSION

Petitioner urges this Court to approve the remedy set forth in *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009). Petitioner's conviction should be reversed and his case should be remanded for an evidentiary hearing to determine whether Petitioner can prove, by a preponderance of the evidence, that he is entitled to immunity. If Petitioner can meet this burden, the information should be dismissed with prejudice. If Petitioner cannot prove his entitlement to immunity, his conviction should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Supplemental Reply Brief has been furnished to Diana Kay Bock, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, by First-Class U.S. Mail, this 8th day of July, 2010.

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BARBARA J. WOLFE
Attorney for Clarence Dennis

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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