IN THE SUPREME COURT FOR THE STATE OF FLORIDA

**FLORIDA DEPARTMENT OF LAW ENFORCEMENT,**

**Petitioner,**

**vs.**

**Case No. 87, 172**

**SHARON HOUSE and SBJM, INC. d/b/a QUINCY PAWN AND GUN SHOP,**

**Respondents.**

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ANSWER BRIEF OF
RESPONDENT, SHARON HOUSE, et al.

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## TABLE OF CONTENTS


PAGE

TABLE OF AUTHORITIES . . . . . ii

PRELIMINARY STATEMENT . . . . . vi

STATEMENT OF THE CASE AND OF THE FACTS . . . . . 1

SUMMARY OF ARGUMENT . . . . . 4

ARGUMENT . . . . . 6

ISSUE I . . . . . 6

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT IT DID NOT HAVE JURISDICTION TO REVIEW AN ORDER DENYING A MOTION TO DISMISS BASED ON A CLAIM OF SOVEREIGN IMMUNITY.

POINT I . . . . . 6

Interlocutory review of an order denying a motion to dismiss based upon the defense of a sovereign immunity is not permissible. The First District did not err in determining that it lacked jurisdiction to review an order denying a motion to dismiss based on the defense of sovereign immunity.

POINT II . . . . . 18

There is not public policy justification for modification of the Final Judgment Rule to allow interlocutory appeal of orders denying motions to dismiss based upon sovereign immunity.

ISSUE II . . . . . 5, 24

WHETHER A CAUSE OF ACTION UNDER FLORIDA'S CRIMINAL HISTORY CHECK LAW IS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

POINT I . . . . . 24

It cannot be concluded as a matter of law, at this juncture, whether FDLE is immune from suit

CONCLUSION . . . . . 31

CERTIFICATE OF SERVICE . . . . . 32

## TABLE OF AUTHORITIES

**Cases** **Page**

In RE: Avers,
123 U.S. 443, 505, 8 S.Ct. 164, 182, 31 L.Ed. 216 (1887) . . . . . 9

City of Houston v. Kilburn,
849 S.W.2d 810 (Texas 1983) . . . . . 19

Cohen v. Beneficial Industrial Loan Cor.,
337 U.S. 541 (1949) . . . . . 7, 10, 12, 13, 14, 15, 17

Combs v. State, 436 So. 2d 93 (Fla. 1983) . . . . . 25

Decker v. Gibson Products Co. Of Albany, Inc.,
679 F.2d 212 (11th Cir. 1982) . . . . . 26

Department of Education v. Roe,
656 So.2d 507 (Fla. 1st DCA 1995) . . . . . 3

Department HRS v. B.J.M.,
656 So. 2d 906 (Fla. 1995) . . . . . 29

Department of Transportation v. Wallis,
659 So. 2d 429 (Fla. 1st DCA 1994) . . . . . 3, 21, 24

Digital Equipment, -- U.S. --, 114 S.Ct. At 1989 . . . . . 10, 13, 15

Employers Overload of Dade County v. Robinson,
642 So. 2d 72 (Fla. 1st DCA 1994) . . . . . 20

Florida Dept. Of Highway Safety v. Desmond,
568 So. 2d 1354 (Fla. 2d DCA 1990) . . . . . 6

Florida Med. Malpractice v. Indem. Ins.,
652 So. 2d 1148 (Fla. 4th DCA 1995) . . . . . 19

Hetherton v. Sears, Roebuck, & Co.,
593 F.2d 526 (Fla. 2d Cir. 1979) . . . . . 26

Johnson v. Jones, -- U.S. --, 115 S.Ct. 2151,
132 L.Ed.2d 238 (1995) . . . . . 21

Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989) . . . . . 26

Kmart Enterprises of Florida, Inc. V. Keller,
439 So. 2d 283 (Fla. 3d DCA 1983) . . . . . 26

Martin-Johnson v. Savage,
509 So. 2d 1097 (Fla. 1987) . . . . . 19

McCain v. Florida Power Corp.,
593 So. 2d 500 (Fla. 1992) . . . . . 26

Midland Asphalt Corp. v. United States, 489 U.S. 794,
801, 109 S.Ct. 1494, 1499, 102 L.Ed.2d 879 (1989) . . . . . 9

Mitchell v. Forsyth, 472 U.S. 511,
105 S. Ct. 2806, 86 L.Ed.2d 411 (1983) . . . . . 6, 7, 16, 17

Murthy v. Singha Corp.,
644 So. 2d 983 (Fla. 1994) . . . . . 27

Office of the State Attorney v. Parrotino,
628 So. 2d 1097 (Fla. 1993) . . . . . 16, 18

Page v. Ezell, 452 So. 2d 582
(Fla. 3d DCA 1984) . . . . . 6

Pennsylvania Turnpike Commission v. Jellig,
563 A.2d 202 (Comm. Ct. Pa. 1989) . . . . . 18

Pullman Construction Industries v. United States of America,
23 F. 3d 1166 (7th Cir. 1994) . . . . . 8, 11, 13, 14, 17, 18

St. Petersburg Bank and Trust Co. v. Hamm,
414 So. 2d 1071 (Fla. 1981) . . . . . 28

Sebring Utilities Commisssion v. Sicher,
509. 2d 968 (Fla. 2d DCA 1987) . . . . . 19

Seguine v. City of Miami, 627 So. 2d 14
(Fla. 3d DCA 1993) . . . . . 25

Skinner v. Ochiltree, 5 So. 2d 605 (Fla. 1941) . . . . . 27

S.L.T. Warehouse Co. V. Webb,
604 So. 2d 97 (Fla. 1974) . . . . . 20

State of Alaska v. United States of America,
64 F.3d 1352 (9th Cir. 1995) . . . . . 10, 11, 12, 13, 14, 17, 18, 19, 21

State Road Department v. Brill,
171 So. 2d 229 (Fla. 1st DCA 1964) . . . . . 6

Thayer v. State, 335 So. 2d 815 (Fla. 1976) . . . . . 28

Travelers Insurance Company v. Bruns,
443 So. 2d 959 (Fla. 1984) . . . . . 22

Trianon Park Condominium Association v. City of Hialeah,
468 So. 2d 912, 918 (Fla. 1985) . . . . . 30

Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) . . . . . 4, 6, 7, 9, 16, 19

Van Cauwenberge v. Biard, 486 U.S. 517,
524, 108 S. Ct. 1945, 100 L.Ed.2d 517 (1988) . . . . . 11, 14

Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1992) . . . . . 28

## OTHER AUTHORITIES


§39.455, Florida Statutes . . . . . 29
§626.989(6), Florida Statutes . . . . . 22
§627.737, Florida Statutes . . . . . 22
§718.116(8)(a), Florida Statutes . . . . . 22
§766.101, Florida Statutes . . . . . 22
§768.13, Florida Statutes . . . . . 22
§768.28. Florida Statutes . . . . . 4, 10, 13
§790.065, Florida Statutes . . . . . 1, 2, 24, 27, 30
§790.065(2)(b), Florida Statutes . . . . . 27
§790.065(7), Florida Statutes . . . . . 30
§790.065(11), Florida Statutes . . . . . 3, 22, 27, 30
§790.23, Florida Statutes . . . . . 1, 26, 29
§790.23(1), Florida Statutes . . . . . 26
§812.015, Florida Statutes . . . . . 22

Rule 9.130, Fla.R.App.Proc. . . . . 19

42 Pa. C.S. §702(b) . . . . . 18

Colorado Statutes, §24-10-108 . . . . . 19

Texas Civil Practice & Rem Code §51.014 . . . . . 19

Texas Civil Practice & Rem Code §51.014(5) . . . . . 19

## PRELIMINARY STATEMENT *

Respondents Sharon House, individually, and Gregory House, Jr., Sharica L. House and Lakemia House, are plaintiffs in the lower court. All shall be collectively referred to as "House."

Petitioner herein, The Florida Department of Law Enforcement, is a defendant in the lower court. Petitioner will be referred to as "FDLE."

Reference to the record on appeal shall be by "R" followed by the appropriate page citation.

* It should be disclosed and noted that Ms. House borrows heavily, and in some cases, fully adopts, the position of SBJM, Inc., as set forth in their brief, especially with regard to the legal and factual analysis of sovereign vs. Qualified immunity, etc. Full credit is here, and should be extended to counsel for SBJM, Inc., where appropriate. In addition, the attorney for Roe, in DOE v. Sally Roe, 86,061, argued the "Cohen" matters in his brief of January, 1996, and those materials were used or quoted as indicated herein. Counsel for Ms. House claims responsibility for the content here, but certainly not credit for the extensive legal research and writing.

## STATEMENT OF THE CASE AND OF THE FACTS

At a time prior to June 9, 1993, Gregory House, a convicted and well-known violent felon, purchased a handgun from the Respondent SBJM. Prior to delivery of the firearm, Gregory House submitted application paperwork. FDLE approved the handgun sale due to negligence and/or inattention. It also appears that SBJM delivered the gun before the negligent approval (in violation of state and/or federal law) or that they delivered the gun -- and later even sold ammunition -- to Gregory House when they had come to know, or should have known, that he was a dangerous, violent felon.

In her complaint, Sharon House alleged that she was at home with her husband, Gregory House, Sr., on June 19, 1993 (R 4). Mr. House retrieved a handgun from the rear of the home and shot her three times (R 4). The shooting was unprovoked and permanently injured Ms. House (R 4). Mr. House was a convicted felon and therefore he was prohibited from receipt or possession of a firearm pursuant to Section 790.23, Florida Statutes (R 3, 5).

Ms. House further alleged that the Quincy Gun & Pawn Shop sold the firearm to Mr. House shortly before the shooting (R 4). As a part of the transaction, Mr. House gave the shop his name, date of birth, and social security number (R 4). Pursuant to Section 790.065, Florida Statutes, the shop provided the information to FDLE for purposes of a criminal history records check of Mr. House (R 4-5). FDLE approved Mr. House as a firearm purchaser (R 4-5).

Ms. House alleged that FDLE was negligent in approving the sale of the firearm to Mr. House (R 5). Ms. House stated that Section 790.065, Florida Statutes, imposed a duty on FDLE to the citizens of the State generally and to the plaintiffs individually "to prevent the sale of firearms to those who might use them to injure others" (R 5). House alleged that plaintiffs are

members of the class of persons contemplated by the Florida Legislature to be protected by enactment of Section 790.065, Florida Statutes (R 5).

The facts have not been fully developed; there has been little or no discovery of any meaningful nature. This case has been procedurally stymied for years. However, it is clear that the above events took place, to one degree or another, and that eventually a violent felon took the gun in question and shot Sharon House three times (with five exit wounds), leaving her crippled, destitute, and jobless.

From this fact situation, FDLE wishes this Court to subscribe to the viewpoint that they are either to busy, or too important, to answer for being "asleep at the switch."

Sharon House and her children brought this action alleging negligence. FDLE moved for dismissal, denying a duty of care (Section 790.065, Florida Statutes) under statute or common law.

Ms. House filed a memorandum of law in opposition to the motion to dismiss (R 11). Ms. House alleged that the legislature, by enacting Section 790.065, intended to protect anyone who might come into contact with an armed convicted felon and that FDLE had a common law duty to protect them (R 13, 15). Ms. House further alleged that the cause of action was not barred by sovereign immunity because the act of conducting background checks was operational, not discretionary (R 18).

FDLE filed a memorandum of law in support of its motion to dismiss, arguing that Ms. House failed to show a duty of care under the common law or the statute (R 22). FDLE argued that the duty to approve firearm transactions was a public safety or licensing function, i.e., the clearance provided to the dealer was a license or permit to sell the firearm (R 24). FDLE stated

that the licensing and police power functions of government are covered by the doctrine of sovereign immunity at common law (R 24-25). FDLE further argued that the statute does not create a duty of care to individual plaintiffs, but rather, protects the public generally (R 26-27). FDLE asserted that Section 790.065(11), Florida Statutes, expressly provides immunity to FDLE and its personnel (R 28).

The trial court denied FDLE's motion to dismiss (R 30). FDLE filed its notice of appeal to the First District pursuant to Dept. Of Education v. Roe, 20 Fla. Law Weekly D686, D686-87 (Fla. 1st DCA Mar. 14, 1995) ("Roe I"). In that case, the First District held that it had jurisdiction under Fla.R.App.P. 9.130(a) over an appeal from a non-final order denying a motion to dismiss based on a claim of sovereign immunity. After FDLE filed its initial brief, the First District ordered FDLE to show cause why the appeal should not be dismissed for lack of jurisdiction. The First District then withdrew its decision in Roe I, and held that it did not have jurisdiction over an appeal from the denial of a motion to dismiss based on a claim of sovereign immunity. Dept. of Education v. Roe, 656 So.2d 507 (Fla. 1st DCA 1995) ("Roe II").

The First District dismissed the instant appeal for lack of jurisdiction, noting that its decision was "in contradiction" with Dept. of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995). FDLE moved for certification of conflict with Wallis, which the court granted. On January 12, 1996, FDLE filed a notice to invoke the discretionary jurisdiction of this Court, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi).

## SUMMARY OF ARGUMENT

## ISSUE I

**POINT I:** The gravamen of the FDLE's position is, essentially, that qualified immunity is just like sovereign immunity, i.e., they are too busy and important to be bothered litigating with the destitute mother of three children, left jobless, disabled, and in poverty due to FDLE's negligence and carelessness. FDLE (with good reason) does not want actual litigation of the facts, because they are bad facts. To allow them to hide behind the false shield of sovereign immunity, while using an unrelated qualified immunity case to bolster their position, compounds bad facts -- it makes bad facts law. The waiver of sovereign immunity, so well briefed by respondent SBJM, and the law of those cases, clearly establishes that when the state makes a terrible mistake like this, and a member of the class intended to be protected suffers damaged, then they will answer for it. FDLE doesn't want to avoid liability (which is what sovereign immunity is all about), but they don't even want to bother with being sued, because it inconveniences government and interferes with government employees doing their jobs! A fortiori, had they been doing their jobs, we wouldn't be here. However, it hardly makes any sense at all that they can escape even standing trial for their negligence!

Further, that position is contrary to law. For example, Tucker v. Resha, 648 So.2d 1187 (Fla. 1994) does not create law regarding interlocutory review of orders denying motions to dismiss based upon sovereign immunity. Sovereign immunity is not an absolute immunity, and the State of Florida has consented to suit in its own courts pursuant to Section 768.28, Florida Statutes. Sovereign immunity in Florida is immunity from liability or the payment of damages. Sovereign immunity in Florida is not immunity from suit.

**POINT II:** As stated and briefed by respondent SBJM, there is no overriding public policy requiring modification of the "Final Judgment Rule," to allow for interlocutory review of orders denying motions to dismiss based upon sovereign immunity.

## ISSUE II

**POINT I:** It is not possible to conclude, at this juncture, that FDLE is immune from suit. This sovereign immunity issue is fact sensitive and cannot be resolved as a matter of law at this time.

## ARGUMENT

### ISSUE I

Whether the First District Court of Appeal erred in determining that it did not have jurisdiction to review an order denying a motion to dismiss based on a claim of sovereign immunity.

### POINT I

Interlocutory review of an order denying a motion to dismiss based upon the defense of a sovereign immunity is not permissible. The First District did not err in determining that it lacked jurisdiction to review an order denying a motion to dismiss based on the defense of sovereign immunity.

This matter was originally before the First District Court on Respondent FDLE's Notice of Appeal (A 12-14). This was a notice of appeal concerning denial of a motion to dismiss, based on sovereign immunity. The trial court denial of Petitioner FDLE's motion to dismiss based upon the defense of sovereign immunity could be reached on plenary appeal, not as an interlocutory proceeding.

Denial of a motion to dismiss is not one of the enumerated non-final orders set forth in Rule 9.130, Florida Rules of Appellate Procedure, and which qualify for interlocutory review. An order denying a motion to dismiss based upon the defense of sovereign immunity is not a proper subject for interlocutory appeal in this state. Page v. Ezell, 452 So.2d 582 (Fla. 3d DCA 1984); State Road Department v. Brill, 171 So.2d 229 (Fla. 1st DCA 1984). Accord, Florida Dept. of Highway Safety v. Desmond, 568 So.2d 1354 (Fla. 2d DCA 1990).

Tucker relies upon, most notably, Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86

L.Ed.2d 411 (1986), and (implicitly) Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1258 (1949). These cases do not support the FDLE position.

The certified question reached and answered by this Court in Tucker v. Resha was the following:

> Is a public official asserting qualified immunity as a defense to a federal civil rights claim entitled in the Florida Courts to the same standard of review of denial of her motion for summary judgment as is available in federal court?

648 So.2d at 1187. That question was answered in the affirmative. The case at bar has nothing at all to do with qualified immunity or summary judgment!

Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949), created the "collateral order doctrine," which allows interlocutory appeals from:

> a small class [of orders] which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself.

Cohen at 337 U.S. 546. The doctrine applies only to:

> those district court decisions [1] that are conclusive, [2] that resolve important questions completely separate from the merits, and [3] that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action.

Both Tucker and Mitchell relied heavily on the principle that qualified immunity of public officials involves "*immunity from suit* rather than a mere defense to liability." Mitchell at 472 U.S. 526; Tucker at 648 So.2d 1189. Since the right not to be sued would be thus unreviewable on appeal the third requirement of the Cohen analysis is met.

The question is, does sovereign immunity involve "immunity from suit" or "a mere defense to liability."

* The United States Court of Appeals considered this issue in Pullman Construction Industries, Inc. v. United States, 23 F.3d 1166 (7th Cir. 1994). In that case, the government argued that:

> an opinion denying a motion asserting the sovereign immunity of the United States may be appealed as a collateral order under a series of cases permitting interlocutory appeal when the defendant asserts a "right not to be sued."

Id. at 1167.

In analyzing whether the collateral order doctrine applied to federal sovereign immunity, the Court noted "the newfangled nature of the doctrine permitting appeals based on claims of rights to be free from litigation." Id. at 1168 (emphasis added).

The Court then rhetorically asked, "Does the word 'immunity' in 'sovereign immunity' itself support interlocutory appeal?" Id. at 1169. And the Court's answer to its own question was, "Surely not. . . ." Id. at 1169. Explaining, the Court said,

> Sometimes the word connotes a right not to be tried, which must be vindicated promptly. *Sometimes the word means only a right to prevail* at trial -- a right to win, indistinguishable from all the other reasons why a party may not have to pay damages. Confusing the two would undermine the final decision requirement.

Id. at 1169 (emphasis in original).

* This section was argued by counsel for Roe, Thomas Powell, in the Roe answer brief in case #86,061, filed in January, 1996, and is excerpted therefrom.

The Court noted that, "Only an 'explicit statutory or constitutional guarantee that trial will not occur' creates the sort of right that supports immediate review." Id. at 1169, quoting from Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 102 L.Ed.2d 879 (1989). The Court observed that, "Congress has consented to litigation in federal court seeking equitable relief from the United States," and "in limited circumstances to litigation seeking money." Id. at 1168. The Court went on to point out that

> The United States Code is riddled with statutes authorizing relief against the United States and its agencies -- the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80; the Tucker Act, 28 U.S.C. §§ 1346(a), 1491(a); the whole jurisdiction of the Court of Federal Claims, 28 U.S.C. §§ 1491-1509; dozens if not hundreds of sue-and-be-sued clauses; the list can be extended without much effort.

Id. at 1168.

In analyzing the difference between the "right not to be sued" and "the right to prevail," the Court compared federal sovereign immunity with other immunities, such as that granted by the Eleventh Amendment, saying, "the very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive power of judicial tribunals at the instance of private parties." Id. at 1169, quoting from In re Avers, 123 U.S. 443, 505, 8 S.Ct. 164, 182, 31 L.Ed. 216 (1887). Contrasting federal sovereign immunity, the Court said, "We have demonstrated that the Congress, on behalf of the United States, has surrendered any comparable right not to be a litigant in its own courts." Id. at 1169.

Accordingly, the Court dismissed the government's attempted interlocutory appeal "for

want of jurisdiction." Id. at 1170.

The analysis of federal sovereign immunity by the Court of Appeals applies equally to the sovereign immunity of the State of Florida. At the risk of stating the obvious, Florida has "surrendered any . . . right not to be a litigant in its own courts."

The Florida Statutes are "riddled with statutes authorizing relief against" the State of Florida and its agencies. Such statutes include general tort claims (F.S. 768.28); civil rights violations (F.S. 760.11); taxpayer actions (F.S. 213.015); damage to underground utilities (F.S. 556.106); suits against Spaceport Florida Authority (F.S. 331.328); pollution of waters (F.S. 387.10); and suits against solid waste management facilities (F.S. 403.706).

In State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995), a different federal appeals court considered whether federal sovereign immunity is subject to the collateral order doctrine. The Court began its analysis by observing that:

> At first glance, federal sovereign immunity seems to fit comfortably among the types of immunities for which immediate appeal is appropriate. In Digital Equipment, the Supreme Court observed that "orders denying certain immunities are strong candidates for prompt appeal under § 1291." _____ U.S. _____, 114 S.Ct. at 1998. This is because certain immunities are more likely to meet the third prong of the Cohen analysis: where the immunity guarantees a "right not to stand trial," that right may be "irretrievably lost" if immediate review is not available. The Supreme Court in Digital Equipment hastened to add, however, that "a party's ability to characterize a district court's decision as denying an irreparable 'right not to stand trial' altogether is [not] sufficient . . . for a collateral order appeal," because virtually every right or procedural step that can be enforced by pretrial dismissal could be characterized as a right not to stand trial.

Id. at 1355.

The appeals court then went on to hold that "despite the label 'immunity' federal immunity

is not best characterized as a 'right not to stand trial altogether.'" Id. Explaining this conclusion, the Court said:

> Federal sovereign immunity does not implicate the sovereign concerns that motivate immediate appeal of orders denying Eleventh Amendment immunity or foreign sovereign immunity. Likewise, denial of federal sovereign immunity need not be reviewed with the same urgency as the denial of official immunity or double jeopardy claims. The interest served by federal sovereign immunity (the United States' freedom from paying damages without Congressional consent) may be served equally well if review follows a final judgment on the merits.

Id.

As did the Pullman court, the Court of Appeals for the Ninth Circuit found that:

> Federal sovereign immunity is readily distinguishable from the states' immunity under the Eleventh Amendment and foreign governments' under the Foreign Sovereign Immunities Act. The latter two doctrines allow one sovereign entity the right to avoid, altogether, being subjected to litigation in another sovereign's courts. [Citation omitted.] Similar sovereignty concerns are not implicated by the maintenance of suit against the United States in federal court.

Id. at 1355, 1356.

The Alaska court rejected the government's argument that its claim of sovereign immunity would be "effectively unreviewable" at a later point, saying

> The only foreseeable hardship inflicted on the United States by postponing review of sovereign immunity issues is the need to prepare for trials. That hardship alone is generally not sufficient to justify immediate appeal . . . .

Id. at 1356, 1367.

As the Supreme Court pointed out in Van Cauwenberge v. Biard, 486 U.S. 517, 524, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988):

> Admittedly, there is value . . . in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage of a litigant in winning his claim sooner) should be resolved before trial.

The Seventh Circuit concluded that the substance of the rights entailed

> . . . is not urgent in the context of claims of federal sovereign immunity. In this respect, claims of sovereign immunity contrast sharply with claims of double jeopardy or official immunity. In the latter type of cases, the judicial inquiry itself, rather than just a merits judgment, causes the disruption that the doctrine of immunity was designed to prevent. [Citations omitted.] The concept of qualified immunity is animated by concern about the burden of discovery and the need for government officials to act "with independence and without fear of consequences." [Citations omitted.] Immediate appeals are permitted because if officials were unable to obtain prompt review of denials of qualified immunity, the substance of the immunity would be lost. That concern is not the foundation of federal sovereign immunity. Suits that, for a technical reason, do not satisfy the strict requirements of statutes waiving sovereign immunity are no more fundamentally burdensome or disruptive than suits that do not satisfy those requirements.
>
> The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States than is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or *res judicata*, both of which have been held to be effectively reviewable following trial.

Alaska v. U.S., supra, at 1357 (emphasis added).

The analysis of federal sovereign immunity by two federal Circuit Courts of Appeals applies equally to the analysis of Florida's state sovereign immunity. First, an order denying sovereign immunity does not meet the three-part Cohen test for the "collateral order doctrine" because state sovereign immunity, having been broadly waived, does not constitute absolute

freedom from suit, but merely a limitation on suit based on the factual circumstances of the case. Second, the "hardship" inflicted on the state by postponing review of sovereign immunity issues is not significant. As the Supreme Court said, "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third Cohen requirement. Digital Equipment, _____ U.S. at _____, 114 S.Ct. at 1998. The interest that would be lost must also be "weightier than the societal interests advanced by the ordinary operation of final judgment principles." Id. at _____, _____, 114 S.Ct. at 2001, 2002. "No such weighty interest is presented in orders denying sovereign immunity." Alaska v. U.S., supra, at 1356.

Thus, the specific issue raised by FDLE in this matter has been reached by other courts. The consensus is that the nature of orders denying motions to dismiss on the basis of sovereign immunity are so far theoretically removed from orders denying review on other theories as to be inapplicable here. Further, Pullman is directly analogous to the present case. The State of Florida has consented to a limited waiver of sovereign immunity by enacting Section 768.28, Florida Statutes. Surely the state is no stranger to litigation in its own courts. There is nothing in the clear and ambiguous language of Section 768.28, Florida Statutes, which even remotely suggests that sovereign immunity is a right to be free from suit[1] as opposed to a right to prevail at trial. Instead, the sovereign immunity law specifies that such immunity is a right to be free from liability as opposed to a freedom from suit. Section 768.28 states the following:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent

[1]FDLE asserts that sovereign immunity claims under Florida law "unquestionably are premised upon a right not to stand trial." (Petitioner's Brief, p. 15.) FDLE cannot follow this assertion with a single reference to even one Florida appellate decision on point.

specified in this act. [Emphasis added.]

The present issue was again raised and squarely faced in State of Alaska v. United States of America. In relying upon Pullman and extending its analysis further, the Ninth Circuit held that sovereign immunity is not freedom from suit, and the fact that an order denying federal sovereign immunity imposed a hardship on the federal government of having to prepare for trial did not justify immediate appeal of the order under the collateral order doctrine. Instead, the Ninth Circuit held that:

> We hold that, despite the label "immunity," federal sovereign immunity is not best characterized as a "right not to stand trial altogether." The only other case to consider the issue, Pullman Construction, concluded that federal sovereign immunity was more accurately considered a right to prevail at trial, i.e., a defense to payment of damages. 23 F.3d at 1169. Like immunity from service of process (leading to lack of personal jurisdiction), federal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial. See Van Cauwenberghe v. Biard, 486 U.S. 517, 524, 108 S.Ct. 1945, 1950, 100 L.Ed.2d 517 (1988).
>
> * * * *
>
> Federal sovereign immunity does not implicate the sovereignty concerns that motivate immediate appeal of orders denying Eleventh Amendment immunity or foreign sovereign immunity. Likewise, denial of federal sovereign immunity need not be reviewed with the same urgency as the denial of official immunity or double jeopardy claims. The interest served by federal sovereign immunity (the United States' freedom from paying damages without Congressional consent) may be served equally well if review follows a final judgment on the merits. Because there is no sufficiently important interest in immediate review, the third prong of the Cohen test is not satisfied, and the order denying federal sovereign immunity is not an immediately appealable collateral order. This result is confirmed when one considers the relative inefficiency of applying the collateral order doctrine to federal sovereign immunity cases.

* * * *

Because federal sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed. The United States argues that this is not the case and that its claim would, in fact, be "effectively unreviewable" at a later point: If this case goes to trial, the United States will have to decide whether to claim or disclaim the lands in question. According to the United States, doing so will moot the argument that the courts lack jurisdiction because the United States has never claimed or disclaimed the lands. The United States claims that the essence of its sovereign immunity is freedom from having to appear in court and take a position, and hence the benefits of immunity will be irretrievably lost if immediate appeal is denied.

This argument fails for two reasons. First, the argument is too particularized to affect our inquiry. "[T]he issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." Digital Equipment, _____ U.S. at _____, 114 S.Ct. at 1996 [internal quotation omitted]. The issue, therefore, is whether denial of federal sovereign immunity in general is immediately appealable, not whether immediate appeal is appropriate when construing the waiver embodied in the Quiet Title Act.

Second, "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third Cohen requirement." Id. at _____, 114 S.Ct. at 1998. The interest that would be lost must also be "important," which in this context means "weightier than the societal interests advanced by the ordinary operation of final judgment principles." Id. at _____, _____, 114 S.Ct. at 2001, 2002. No such weighty interest is present in orders denying sovereign immunity.

The only foreseeable hardship inflicted on the United States by postponing review of sovereign immunity issues is the need to prepare for trials. That hardship alone is generally not sufficient to justify immediate appeal, as the Supreme Court has pointed out:

> Admittedly, there is value . . . in triumphing before trial, rather than after it, regardless of the substance

> of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.
>
> Van Cauwenberghe, 486 U.S. at 524, 108 S.Ct. at 1951 (quoting United States v. MacDonald, 435 U.S. 850, 860 n.7, 98 S.Ct. 1547, 1552 n.7, 56 L.Ed.2d 18 (1978)).
>
> * * * *
>
> The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States that is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or *res judicata*, both of which have been held to be effectively reviewable following trial. See United States v. Weiss, 7 F.3d 1088 (2d Cir. 1993) (statute of limitations); In re Corrugated Container Antitrust Litigation, 694 F.2d 1041 (5th Cir. 1983) (*res judicata*).
>
> * * * *
>
> For the reasons above, we hold that the district court's order denying the United States' motion to dismiss based on sovereign immunity is not immediately appealable under the collateral order doctrine. [Emphasis added.]

There is no legal or logical reason to agree with FDLE's conclusion that any "absolute immunity" including qualified immunity of an individual can somehow be equated with the sovereign immunity of the state because it just is not so. That view has never been adopted by any court and, in fact, that the two are separate and apart from each other is a view apparently adopted by this Court. Office of State Attorney v. Parrotino, 628 So.2d 1097 (Fla. 1993). Qualified immunity of public officials involves immunity from suit rather than a mere defense to liability. Tucker v. Resha, citing Mitchell v. Forsyth, 648 So.2d 1187. Sovereign immunity is a

defense to liability rather than a right to be free from suit. State of Alaska; Pullman Construction Industries. In qualified immunity matters, officials are sued in their individual capacities. This is not so in tort actions against the state. FDLE's assertion that social and personal costs in either instance are no different is presumptive and speculative at best, and irrelevant at worst.

None of the FDLE cases cited stand for the proposition that interlocutory review of claims of sovereign immunity are permitted. While review of orders denying summary judgment have been permitted review, that is not the issue here at all.

Mitchell and Cohen are, then, not supportive of the FDLE position at all.

## POINT II

No public policy justifies modification of the Final Judgment Rule to allow for interlocutory appeal of orders denying motions to dismiss based upon sovereign immunity.

The application of sound legal reasoning as set forth by Pullman and State of Alaska suggests that granting interlocutory review of orders denying motions to dismiss based upon sovereign immunity is not appropriate, as noted in Point I above. If sovereign immunity is separate and distinct from those "absolute" immunities such as judicial immunity, prosecutorial immunity or even qualified immunity, a view apparently adopted by this court in Parrotino, this confirms that allowing for interlocutory review of such orders lacked justification under the law.

FDLE has argued that two (2) jurisdictions actually allow for such interlocutory review, Colorado and Mississippi. It has also been pointed out, above, that such review in Mississippi is really premised upon particular rules of appellate procedure which are not directly related to interlocutory review of sovereign immunity denials, per se. Additional research indicated the Pennsylvania has a similar appellate provision, which also allows for interlocutory appeals be permission on controlling questions of law (and not relating to interlocutory review of orders denying motions to dismiss based upon sovereign immunity or any other specific defense). See 42 Pa. C.S. § 702(b) and Pennsylvania Turnpike Commission v. Jellig, 563 A.2d 202 (Comm. Ct. Ps. 1989). [2] These types of court rules appear to be in a distinct minority. Respondent HOUSE would respectfully suggest that application of such rules lead to review of various questions on an ad-hoc basis, something not preferable and better avoided.

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[2]It should be noted that the argument under Point II is adopted from and entirely attributable to counsel for SBJM, as disclosed in the Preliminary Statement.

A related procedure exists in Texas but is unrelated to a motion to dismiss. Instead, under Tex. Civ. Prac. & Rem. Code § 51.014, a person may appeal from an interlocutory order that denies a motion for summary judgment based upon an assertion of "immunity" by an individual who is an officer of employee of the state or a political subdivision of the state. However, § 51.014(5) makes it clear that the "immunity" mist be am assertion of "qualified immunity". See also City of Houston v. Kilburn, 849 S.W. 2d 810 (Texas 1983) which indicated, consistent with Tucker v. Resha, that qualified immunity is an affirmative defense available for governmental employees sued in their individual capacities. 849 S.W. 2d 811, fn. 4.

The Colorado statute (§ 24-10-108) indicates that sovereign immunity is to be equated with subject matter jurisdiction, a view not yet universally adopted in Florida. Compare Florida Med. Malpractice v. Indem. Ins., 652 So. 2d 1148 (Fla. 4th DCA 1995) with Sebring Utilities Commission v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). Regardless, nonfinal orders which concern the presence or absence of subject matter jurisdiction are not within the list of those enumerated nonfinal orders subject to interlocutory review under Rule 9.130, Fla.R.App.P.

FDLE argues that there is policy justification for interlocutory review of orders denying motions to dismiss based upon sovereign immunity, and that that policy is one related to the expense of litigation imposed upon the state and its subdivisions. State of Alaska rejects expense as a basis sufficient to allow for interlocutory review of orders denying motions to dismiss based upon the sovereign immunity. 64 F. 3d at 1356.

Regarding review by writ of certiorari, this court has likewise stated that the expense of litigation is not a sufficient basis to grant certiorari review. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987). If that is so (ans it is ) then there is no reasonable

justification for the position that expense and the other hardships of litigation on the State of Florida should allow it to obtain interlocutory review.

There clearly is expense involved to all public and private persons involved in meritorious as well as nonmeritorious litigation. Substantial expense is also incurred by the judiciary at t he trial court and appellate levels.

FDLE goes so far as to argue that the right to interlocutory appeal in this context "rationally should have the effect of decreasing the work of both trial and appellate courts." (Petitioner's Brief, p. 14) This is not only a cavalier statement, it is one not justified by any available data and it certainly does not appear to have any logical appeal, either.

In reality, what FDLE requests is more ab attempt to shift expense from the executive branch of government to the judiciary. It is neither wise nor a savings of judicial resources to review orders denying motions to dismiss, including those based upon the grounds of sovereign immunity. Unquestionably, the State of Florida, its agencies and subdivisions are involved at all times in an enormous volume of tort litigation. As a matter of course, sovereign immunity is raised as an affirmative defense, and just as invariably the state (or whomever) moves for a dismissal on the very same grounds. Review of orders denying motions to dismiss based upon sovereign immunity will simply flood all if the appellate districts at an early stage in litigation where the underlying facts have yet to be fully developed. The "final judgment rule" is specifically adhered to, to avoid just such an expenditure of judicial resources and to avoid the wasteful pitfalls of piecemeal litigation and piecemeal appellate review. See S.L.T. Warehouse Co. V. Webb, 304 So. 2d 97 (Fla. 1974); Employers Overload of Dade County v. Robinson, 642 So. 2d 72 (Fla. 1st DCA 1994); BE&K, Inc. V. Seminole Kraft Corp., 583 So. 2d 361 (Fla. 1st DCA

1991).

In reviewing the specific question at issue, the Ninth Circuit in State of Alaska observed:

> Appellate courts might routinely be asked to review the same basic claim at two different times with reference to two different sets of facts: once on immediate appeal, assuming the facts on the face of the complaint, and (if dismissal is unwarranted on those facts) again after trial on appeal of the denial of a motion for judgement as a matter of law.

State of Alaska, at 1357-58.

In Johnson v. Jones, -- U.S. --, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), the United States Supreme Court stated:

> . . .[R]ules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job -- supervising trial proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it beings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

In her dissenting opinion in Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995), Judge Sharpe opined that:

> If anything, the Court in Tyson restricted its opinion in Mitchell and stepped back from its broad justification for appealability in that case, which was based on "the need to protect officials against the burdens of further pre-trial proceedings and trial"...It held in Tyson that only cases posing "neat abstract issues of law" should be allowed to be appealed prior to a final judgment. Appeal should not be allowed if the issue involved controversy about facts, sufficiency of factual evidence, and issues which are inseparable from those that underlay the basic case. Id. At 432.

This court has long recognized the danger of squandering judicial resources inherent in a

overly permissive rule allowing interlocutory appeals. As the court stated in Travelers Insurance Company v. Bruns, 443 So. 2d 959, 961 (Fla. 1984):

> The thrust of Rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delays final judgment.

If interlocutory review is allowed for sovereign immunity claims, not an absolute immunity, then there is little to recommend against similar review of other immunity claims under Florida law, which are also not regarded as absolute. A short list might include the following:

1. Interspousal immunity.

2. Interfamily immunity.

3. Merchants/Retailers immunity under §812.015, Fla. Stat.

4. Good Samaritan immunity under §768.13, Fla. Stat.

5. Immunity granted to retailers of firearms under §790.065(11), Fla. Stat.

6. Immunity granted under the "condominium" statute, §718.116(8)(a) and (b), Fla. Stat.

7. Limited tort immunity under §627.737, Fla. Stat.

8. Insurance company reporting immunity under §626.989(6), Fla. Stat.

9. Immunity granted to review committee members under §766.101, Fla. Stat.

This list is hardly exhaustive. Review of the term "immunity" in the General Index to the Florida Statutes (1993) lists no less that seven (7) full columns of specific statutory entries relative to immunities provided for by statute under Florida law. There are literally hundreds of different

immunities provided for in the Florida Statutes relative to civil liability. This list is incorporated in Respondent's Appendix (A 15-19).

This court has the absolute, unfettered right to do what FDLE requests, by court rule. However, there is no overriding policy justifying the present request for interlocutory review. There is no reason to vary from the present "final judgment rule."

## ISSUE II *

### POINT I

> It cannot be concluded as a matter of law, at this juncture, whether FDLE is immune from suit.

Whether or not FDLE is immune from suit, or really whether a cause of action exists and is barred by sovereign immunity cannot be known until facts are known. Facts cannot be discovered while FDLE troops this case up and down the appellate turnpike (presumably without paying tolls). The record is barren of the kind of facts needed. The present record, which for all intents and purposes, consists of a complaint and FDLE's Motion to Dismiss and no factual development whatsoever. In the well reasoned dissent of Judge Sharpe in Department of Transportation v. Wallis, 659 So. 2d 429, 431 (Fla. 5th DCA 1995) this importance of factual development is made clear.

> Finally, it is not clear at this stage in the proceeding (Motion to Dismiss addressed to the complaint) whether the issue is purely and simply a question of law. Indeed, most of the kinds of cases involve the resolution of the factual issues. See Ralph v. City of Daytona Beach, 471 S. 2d 1 (Fla. 1983).

(emphasis in original).

In the present case the facts alleged in the Complaint of Respondent House (A 1-8), do not necessarily relate to FDLE's decision to respond to SBJM's inquiry under Section 790.065, Fla. Stat., as to whether this firearm could lawfully be sold and transferred to Gregory House. Rather, the Complaint can certainly be read to suggest that once FDLE made the decision to

* Also adopted from or quoted from the SBJM, Inc. Brief here.

confirmed that the firearm could be sold to a convicted felon. SBJM's negligence and factual involvement remains and issue, as well.

The evaluation of the activities of government to determine whether they are planning level, discretionary activities or operational activities must proceed on a case by case basis. Yamuni at 259. FDLE cannot cite a single case which is on point with the facts alleged in houses' Complaint, or which compels the conclusion that the activities alleged were or were not exclusively discretionary. The determination of whether sovereign immunity is applicable as a defense to a particular claim is complex and requires "minute examination of the alleged negligent actions of the governmental unit to determine if they are operational or planning level as each case comes to court." Yamuni, 260. See also Seguine v. City of Miami, 627 So. 2d 14, 16 (Fla. 3d DCA 1993) ("Florida law on sovereign immunity is immensely complex, has lent itself to multifaceted formulations and rules over the years, and has generally been developed by the courts on a case-by-case basis depending on the particular fact pattern and policy concerns presented.")

FDLE cannot, based on nothing more than the allegations stated in Houses' Complaint, establish that it is shielded from liability under the doctrine of sovereign immunity because its activities were discretionary as a matter of law. Consequently, FDLE has not shown that, in this respect, the trial court's order violated "A clearly established principle of law resulting in a miscarriage of justice." Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

Further, FDLE has also failed to show that, under a "clearly established principle of law," it had no duty to properly investigate the applicant for purchase of this firearm or to properly inform SBJM that it could not sell and transfer this firearm to Mr. House, when a proper investigation would have revealed that Gregory House was a convicted felon.

It is well established that a governmental agency is not liable in tort if "no duty of care existed," Kaisner, 543 S. 2d at 734. However, the allegations of the Complaint taken as true, are sufficient to establish the "minimal threshold legal requirement for opening the courthouse doors" with respect to the duty element of a negligence cause of action. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (footnote omitted). In McCain, in the court cited Kaisner when it held that a duty exists when "the defendant's conduct foreseeably create[s] a broader 'zone of risk' that poses a general threat of harm to others." Id. This applies as well to the failure to act reasonably to protect others from harm. Id.

Indeed §790.23, Fla. Stat., specifically prohibits convicted felons from possessing or controlling firearms[3], and Florida courts, among others, have specifically found that a viable cause of action exists where gun control statutes have been violated, and innocent persons have been harmed as a result of the statutory violation. E.g. KMArt Enterprises of Florida, Inc. V. Keller, 439 So. 2d 283 (Fla. 3d DCA 1983); Decker v. Gibson Products Co. Of Albany, Inc., 679 F.2d 526 (2d Cir. 1982); Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (2d Cir. 1979.)

In the present matter, when a licensed firearm dealer seeks to complete a transaction, it must contact FDLE and obtain a "unique approval number" before the transaction can lawfully be

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[3]Section 790.23(1), Florida Statutes, states:

> It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States which is designated as a felony or convicted of an offence in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or tho have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

consummated. FDLE is statutorily required to review criminal history records, to determine if the buyer is prohibited from obtaining the firearm, pursuant to state or federal law. Even if the purchase is prohibited, FDLE is required to provide the licensed firearm dealer a "nonapproval number" which negated the transaction. Section 790.065(2)(b), Fla. Stat. Firearms are considered dangerous instrumentalities in Florida. Skinner v. Ochiltree, 5 So. 2d 605 (Fla. 1941).

FDLE argues in pages 31-36 if its Brief that no private cause of action exists under §790.065, Fla. Stat. Its analysis is faulty and thus leads to an erroneous conclusion. In Murthy v. N. Singha Corp., 644 So. 2d 983 (Fla. 1994), it was held that legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a stature does not expressly provide for one. 644 So. 2d at 985. FDLE gives lip service to this standard (Petitioner's Brief, p. 32-33), and then brushes it aside by citing pre-Murthy cases implementing the "class benefit" analysis in determining whether a statute provides for a private cause of action.

However, under a proper Murthy analysis, focusing on legislative intent, a sound argument can be advanced that a private cause of action exists for FDLE's violation of §790.065, Fla. Stat. The clear wording of §790.065(11), Fla. Stat., is the following:

> (11) Compliance with the provisions of this chapter shall ve a complete defense to any claim or cause of action under the laws of ant stat for liability for damages arising from the importation or manufacture, or the subsequent sale or transfer to any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year, of any firearm which has been shipped or transported in interstate or foreign commerce. The Department of Law Enforcement, its agents and employees shall not be liable for any claim or cause of action under the laws of any state for liability for damages arising from its actions in lawful compliance with this section.

(emphasis added).

It is axiomatic that the intent of a statute is determined primarily from the language of the statute. The plain meaning of the statutory language is the first consideration. Zuckerman v. Alter, 615 So. 2d 661 (Fla, 1992); St. Petersburg Bank and Trust Co. V. Hamm, 414 S. 2d 1071 (Fla. 1981); Thayer v. State, 335 So. 2d 815 (Fla. 1976).

In the present instance it is reasonably clear that the legislature intended that FDLE would not be civilly liable for any damages "arising from its actions in lawful compliance with this section." In other words, that FDLE made an investigation and a proper determination under the unique responsibility it is granted under Chapter 790, and did not allow for a prospective purchaser to lawfully obtain a firearm, would appear to be acts, decisions and determinations free from liability. A prospective purchaser who could not obtain a firearm, for example, could not properly sue FDLE for defamation or slander when he/she is turned down on the sale and transfer. Of it the prospective purchaser could not lawfully obtain a firearm and was injured or damaged because he/she could not defend himself/herself, the FDLE would remain immune from civil suit.

However, the phrase "in lawful compliance" likely has some reason to be in this subsection. And it is likewise apparent that the alternative also exists. If FDLE's actions are not "in lawful compliance with this section" then FDLE does not have civil immunity and a private cause of action can ensue. If the legislature had intended for FDLE to remain immune from suit for its operational acts under Chapter 790, then presumably the legislature would have so stated. Instead, the legislature chose to qualify the blanket grant of immunity to those actions "in lawful compliance with this section."

Whatever "lawful compliance" may mean, certainly being in the unique and sole position

of either allowing or disallowing sale and transfer of a firearm by a licensed firearms dealer to a prospective purchaser and then in positively allowing for that sale and transfer to a convicted felon, in direct contravention of §790.23, Fla. Stat., is not an action "in lawful compliance" with Chap. 790. It is a fact that FDLE is required by statute to provide a licensed firearms dealer with a non-approval number under the circumstances set forth in Respondent Houses' Complaint.

Department HRS v. B.J.M., 656 So. 2d 906 (Fla. 1995) is right on point. In B.J.M., HRS was found to be immune from a negligence cause of action because placement of a juvenile with a particular residential treatment facility was a discretionary function of government. Germane to that case, §39.455, Fla. Stat., stated:

> **39.455. Immunity from liability**
>
> (2) The inability or failure of the social service agency or the employees or agents of the social service agency to provide the services agreed to under the performance agreement of permanent placement plan shall not render the state or the social service agency liable for damages unless such failure to provide services occurs in a manner exhibiting wanton or willful disregard of human rights, safety, or property.

Notable, this court pointed out that the above-cited language did not absolutely bar a civil action for damages:

> Rather, these statutory provisions implicitly bar any action against HRS and its employees except where the agency or its employees act willfully or wantonly.

656 So. 2d at 917 (emphasis in original). This was so despite the obvious lack of any specific enabling legislation vis-a-vis the right to bring a civil action against the agency for violation of this statutory provision.

FDLE also asserts that its actions are discretionary governmental functions for which no

liability can attach. FDLE applies the categories set out by this court in Trianon Park, and argues that its actions in this case were licensing or law enforcement functions.

Yet, Categories I and II of the Trianon analysis relating to licensing and law enforcement functions are directed only towards discretionary activities in those areas. 468 S. 2d at 919. There is not the most remote possibility in this case that FDLE has discretion in determining whether a convicted felon may purchase and possess a firearm. Such operational decisions are not immune from suit.

Moreover, §790.065(11), Fla. Stat., appears to set out a statutory duty of care. That duty of care, applicable to FDLE and possibly breached in this case, is that FDLE act, at all times, "in lawful compliance" with §790.065, Fla. Stat. Not only did FDLE act in something other than "lawful compliance" when it gave its approval for sale and "unique confirmation number," it also totally breached its statutory obligations under §790.065(7):

> 7. The department shall continue its attempts to obtain the disposition information and may retain a record of all approval numbers granted without sufficient disposition information. If the department later obtains disposition information which indicates:
> a. That the potential buyer is not prohibited from owning a firearm, it shall treat the record of the transaction in accordance with this section; or
> b. That the potential buyer is prohibited from owning a firearm, it shall immediately revoke the conditional approval number and notify local law enforcement.

(emphasis added).. There is nothing discretional in the above-cited statutory language.

For all of the foregoing reasons, Respondent House respectfully requests that trial court order denying FDLE's motion to dismiss be affirmed.

## CONCLUSION

FDLE is not too important, nor too busy to be sued for the horror they had a part in visiting upon Sharon House and her children.

Sovereign immunity is not an absolute immunity from suit. Instead, sovereign immunity in the present context is an immunity from liability. As a result, FDLE is not entitled to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity.

There is no overriding public policy which justifies circumvention of the "final judgment rule" and the application of a new court ruling allowing interlocutory review of orders denying motions to dismiss on the defense of sovereign immunity or any other immunity (except for immunities regarded as "absolute"). Allowing interlocutory appeals under the present circumstances shifts substantial expense from the executive branch of government to the judiciary.

Before sovereign immunity can be assessed, or a decision on existence of a cause of action can be made, this lawsuit must develop factually. It cannot be concluded in this case that FDLE is sovereignly immune as a matter of law, especially in view of ongoing factual development of this particular lawsuit.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to:

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Tallahassee, FL 32302

Wendy S. Morris, Esquire
Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050

this 13 day of May, 1996.

L. William Porter II