IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-1913

(Third DCA Case No. 3D10-856)

JOSE LAZARO RODRIGUEZ,

Petitioner,

vs.

MIAMI-DADE COUNTY

Respondent.

On Petition for Discretionary Jurisdiction to Review
Conflict Certified by Third District Court of Appeal

Amicus Curiae Brief in Support of Respondent, by the Florida Sheriffs Association, the Florida Association of Police Attorneys, the Miami-Dade County Association of Chiefs of Police, the Florida Police Chiefs Association, the Florida League of Cities, Inc., and the Florida Association of County Attorneys, Inc.

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STATEMENT OF IDENTITY OF AMICUS PARTIES AND THEIR INTEREST IN THE CASE

Pursuant to Florida Rule of Appellate Procedure 9.370(b), the amicus curiae parties provide this statement identifying themselves and their interest in the case.

The Florida Sheriffs Association was formed in 1893 and its membership includes all 67 Florida Sheriffs. It promotes the Office of Sheriff, statewide. The Florida Association of Police Attorneys, formed in 1976, is an organization of approximately 225 Florida attorneys who advise law enforcement agencies.

The Miami-Dade County Association of Chiefs of Police is an organization of 51 law enforcement agencies and over 500 individual members. It was founded in 1937 and is dedicated to public safety issues in Miami-Dade County. The Florida Police Chiefs Association was founded in 1952 and is now composed of more than 750 of the state's top law enforcement executives.

The Florida League of Cities, Inc., is a voluntary organization of 410 municipalities and one charter county rendering municipal services in the State of Florida. The Florida Association of County Attorneys, Inc., has 210 members from 64 counties and promotes the mutual interest of those attorneys who represent the boards of county commissioners across the State of Florida.

The amicus curiae parties file this brief in support of the position of Respondent Miami-Dade County.

SUMMARY OF ARGUMENT

The amicus curiae parties, representing all Florida Sheriffs and hundreds of Florida municipal law enforcement agencies, associated local governments, and their attorneys, urge the Court to affirm the holding of the Third District Court of Appeal in the instant case, and to clarify that certiorari review of a trial court's denial of sovereign immunity remains available. The amicus curiae parties further urge the Court to hold that the actions and choices of the officers in responding to the emergency in this case are fundamental to the executive branch and are therefore protected by sovereign immunity.

It is well settled that sovereign immunity is an immunity from suit, not just from liability. And, when incorrectly denied by a trial court, certiorari review to restore the immunity should be permitted. There is a dispute amongst the district courts on this point based on this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), with the Second and Fifth District Courts of Appeal holding that *Roe* effectively bars any sort of interlocutory appeal of a trial court denial of sovereign immunity, and the Third District Court of Appeal holding in the instant case that certiorari review is still available.

Certiorari review of a trial court's erroneous denial of sovereign immunity would serve a number of important public policy objectives and should be allowed. First, Florida law is clear that sovereign immunity is an immunity from suit, not

merely from liability, and erroneous denial of the immunity causes irreparable harm because the agency cannot be re-immunized from suit after the fact. Second, certiorari jurisdiction is employed to review denials of other immunities from suit and there is no reason to treat sovereign immunity differently. Third, the public functions of an agency defendant are disrupted when a trial court erroneously denies sovereign immunity. Pretrial appellate review can correct the error.

Moreover, allowing certiorari review of pretrial denials of sovereign immunity will not create an undue burden on the district courts. Certiorari jurisdiction is discretionary and is exercised only where there is a clear departure from the essential requirements of law. The district courts will exercise that discretion so as to rule on cases, like this one, where the immunity applies. On the other hand, the district courts may decline to entertain cases where there are fact conflicts or legal issues that preclude effective pretrial review.

As to the immunity in this case, society expects police officers to both deal with the emergency at hand *and* to protect themselves if threatened with a firearm. The choices officers make in such situations are inherently risky, are fundamental to the role of the executive branch, and are therefore entitled to judicial deference.

This Court should clarify that certiorari review is available when sovereign immunity is erroneously denied, and affirm the decision of the Third District Court of Appeal below to restore the immunity to Miami-Dade County.

ARGUMENT

I. Sovereign immunity is an immunity from suit and district courts of appeal should therefore be able to exercise certiorari review of a trial court's erroneous denial of the immunity.

The Second and Fifth District Courts of Appeal hold that this Court's decision in *Roe* effectively bars *all* avenues of pretrial review of a non-final order denying sovereign immunity. *Pinellas Suncoast Transit Auth. v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996); *Fla. A & M Univ. Bd. of Trs. v. Thomas*, 19 So. 3d 445, 446 (Fla. 5th DCA 2009). But, in the opinion below, the Third District Court of Appeal emphasized that sovereign immunity is an immunity from suit. That court held, therefore, that certiorari is available to review a trial court denial of sovereign immunity where it is clear that the immunity applies. *Miami-Dade County v. Rodriguez*, 67 So. 3d 1213, 1216-19 (Fla. 3d DCA 2011).

The amicus curiae parties urge this Court to approve the opinion below and to clarify that certiorari review is available to remedy a trial court's erroneous denial of sovereign immunity. An erroneous denial of the immunity results in irreparable harm to a governmental entity that is forced to defend a tort claim beyond the point at which it could be concluded that the immunity applies. Certiorari jurisdiction is properly invoked to review trial court orders denying other types of immunities from suit, and there is no logical reason why sovereign immunity should be treated differently.

In *Roe*, the Court expressed concern that allowing certiorari review of denials of sovereign immunity might unduly burden the district courts. *Roe*, 679 So. 2d at 758. But, certiorari jurisdiction is discretionary. In a given case where such review is problematic because of factual conflicts in the record or a lack of clarity in the legal application of the immunity to the case, a district court can simply deny the petition, just as it might in any other context where a court of appeal decides that it is inadvisable to exercise its jurisdiction. That threshold determination is simply not so onerous as to justify a categorical bar on such petitions.

A. Sovereign immunity is an immunity from suit, not just liability.

Sovereign immunity is a function of the doctrine of separation of powers. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009); *Rodriguez*, 67 So. 3d at 1216. The immunity "makes it improper for the judiciary to intervene in fundamental decision making of the executive and legislative branches of government." *Id*. (citing *Kaisner v. Kolb*, 543 So. 2d 732, 736-37 (Fla. 1989) and *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985)).

Under this doctrine, a plaintiff may not employ the civil tort system to second guess the executive's decisionmaking process. *Kaisner*, 543 So. 2d at 736-37 ("[I]t would be an improper infringement of separation of powers for the

judiciary, by way of tort law, to intervene in fundamental decisionmaking of the executive and legislative branches of government, including the agencies and municipal corporations they have created.")

Sovereign immunity has thus repeatedly been recognized as an immunity, not just from liability, but from suit itself. *Wallace*, 3 So. 3d at 1044-45 (distinguishing the question of whether there is a duty of care from the question of whether the defendant agency "remains sovereignly immune from suit …") (citing *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932-33 (Fla. 2004)); *Henderson v. Bowden*, 737 So. 2d 532, 535 (Fla. 1999) (referring to sovereign immunity as *barring* a claim based on an alleged breach of a duty); *Kaisner*, 543 So. 2d at 734 (same); 28 Fla. Jur. 2d Government Tort Liability §1 (sovereign immunity is "rooted in the ancient common law" and is an immunity from suit; in modern times is "more often explained as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions…")

Historically, "[t]he doctrine of sovereign immunity, which provides that a sovereign cannot be sued without its own permission, has been a fundamental tenet of Anglo-American jurisprudence for centuries and is based on the principle that 'the King can do no wrong.'" *American Home Assur. Co. v. National R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). The immunity was part of the

common law when the State of Florida was founded and has been adopted and codified by the Florida Legislature. *Id*.[1]

Relying on federal cases cited in *Roe*, Petitioner describes sovereign immunity is an immunity from liability, not from suit (Pet. Initial Brief, p. 19). This characterization of Florida's sovereign immunity should be rejected. First, it ignores well-settled Florida law, cited above, that sovereign immunity is indeed an immunity from suit. Second, the federal law upon which *Roe* relies has been called into question post-*Roe* and it is otherwise clear that federal sovereign immunity and state sovereign immunity are not truly comparable.

The *Roe* Court analogized Florida's sovereign immunity to federal sovereign immunity, noting that two federal circuit courts of appeal had disallowed interlocutory appeal of denials of the federal immunity. *Roe*, 679 So. 2d at 759 (citing *Alaska v. United States*, 64 F.3d 1352 (9th Cir. 1995) and *Pullman Constr. Indus., Inc., v. United States*, 23 F.3d 1166 (7th Cir. 1994)). However, since *Roe*, a split of authority has evolved on the pretrial appealability of a denial of federal sovereign immunity, as discussed in cases like *Pullman*.

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[1] The Florida Constitution preserves the immunity, but allows the people, via the Legislature, to waive it. *Id*.; citing art. x §13, Fla. Const. To the extent not waived by § 768.28, Fla. Stat., the immunity remains intact. *American Home Assur. Co.*, 908 So. 2d at 472; *Marion v. City of Boca Raton*, 47 So. 3d 334, 336 (Fla. 4th DCA 2010) ("[O]therwise, in determining liability questions the judicial branch would encroach on the other branches of government in violation of the separation of powers.").

For example, three years after *Roe's* citation to *Pullman*, a D.C. Circuit panel emphasized the narrow scope of *Pullman* and observed that "federal sovereign immunity is an immunity from suit, not simply a defense to liability on the merits." *In re Sealed Case No. 99-3901*, 192 F.3d 995, 999 (D.C. Cir. 1999) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *see also In re World Trade Center Disaster Site Litigation*, 521 F.3d 169, 191 (2d Cir. 2007) ("We are not convinced that *Pullman* or its progeny counsel us to disregard the statements of the Supreme Court that sovereign immunity encompasses a right not be sued.") (citing *FDIC v. Meyer; Minnesota v. United States*, 305 U.S. 382, 387 (1939)).

Pullman focused on the fact that there had been a specific statutory waiver of federal sovereign immunity in that case and was "based in large part on the premise that the Administrative Procedure Act waives sovereign immunity for equitable relief." *In re Sealed Case*, 192 F.3d at 999-1000. Characterization of Florida's sovereign immunity as merely immunity from liability based on the holdings in *Pullman* or *Alaska* is unwarranted given the narrow scope of those cases, the significant differences between the immunities, and this Court's otherwise consistent treatment of state sovereign immunity as immunity from suit.

B. This Court should clarify that the decision in *Roe* does not bar certiorari review of denials of sovereign immunity.

The analytical framework in *Roe* is a comparison between: a) interlocutory review of a denial of sovereign immunity to a state agency on a state law claim; and, b) denial of qualified immunity to an individual sued in a § 1983 case. The basis of interlocutory appeal of a denial of qualified immunity in the § 1983 context is purely case law driven, and it is a fairly recent development. *Roe*, 679 So. 2d at 758 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

Under *Mitchell* and related cases, the Supreme Court recognized that qualified immunity for the individual governmental official would effectively be lost if the individual were denied the immunity, forced to go to trial, and then had to seek review of the denial of the immunity later. The *Mitchell* Court pointed out that, while he was occupied with defending the § 1983 lawsuit, the defendant public official would be distracted from doing his job and remain under the threat of an adverse jury verdict and judgment, awaiting his chance post trial to appeal the denial of the immunity. *Mitchell*, 472 U.S. at 526-27.

This Court in *Roe* focused on the additional burden that certiorari review of state tort claims against state and local governments would place on district courts of appeal, as compared to the relatively few cases involving § 1983 individual capacity claims that would be heard in state court at any level. The Court concluded that "it cannot be said that suits against governmental entities grounded

upon the statutory waiver of sovereign immunity (Ch. 768.28) constitute a small class of cases. To the contrary, permitting interlocutory appeals in such cases would add substantially to the caseloads of the district courts of appeal." *Roe*, 679 So. 2d at 758. The Court went on to state that the distinction between discretionary and operational functions would often be fact-driven, such that in any given case a trial would likely be necessary so as to resolve the legal question of application of the immunity. *Id*.

The second point in *Roe* -- that many of the cases will be too fact driven -- effectively rebuts the first point in *Roe*-- that there will be "too many" cases. That is, in any given case where certiorari jurisdiction is sought, if the case is not one where the district court can efficiently and with confidence decide the issue, then it will simply decline to exercise its discretion to hear the case.

On the other hand, in cases where entitlement to the immunity is sufficiently established by the record so as to allow the district court to overrule denial of the immunity, then the district court can and certainly should exercise its discretion to grant review.[2] Application of well established prerequisites to certiorari jurisdiction would cull the number of such appeals to only those where entitlement to the immunity is clear and should be reinstated.

[2] As noted by the district court in this case, when applicability of the immunity is clear on the face of the record, the district court *should* restore the immunity. *Rodriguez*, 67 So. 3d at 1220.

When the certiorari criteria are met, review of a case is a matter of discretion by the district court; it is not automatic. 3 Fla. Jur. 2d Appellate Review § 465; *Sutton v. State*, 975 So. 2d 1073, 1080 (Fla. 2008) ("[C]ommon law certiorari is entirely discretionary with the court, as opposed to appeal which is taken as a matter of right."); *Orlando Regional Healthcare v. Alexander*, 932 So. 2d 598, 600-01 (Fla. 5th DCA 2006) (recognizing discretion to accept certiorari jurisdiction of order granting leave to amend where such amendment implicates defendant's claim of complete statutory immunity from civil liability; exercising discretion so as to give effect to the immunity.)

Factors which inform a district court as to whether to exercise its certiorari jurisdiction include whether the review would involve piecemeal consideration of the issues in a case, such that it will "impede the orderly administration of justice and serve only to delay and harass;" whether the prior decision represents adverse precedential error; and, whether a particular case is "fact-dependent or fact-specific." 3 Fla. Jur. Appellate Review § 465. Even where there has been an error by the trial court, a Florida district court will not exercise its certiorari jurisdiction unless the error is "sufficiently egregious or fundamental" so as to warrant intervention by the district court. *In re Asbesots Litigation*, 933 So. 2d 613, 616 (Fla. 3d DCA 2006).

The district court of appeal in this case found that the record before it was sufficient to resolve the question of whether Miami-Dade County was entitled to the immunity and that, therefore, it ought to exercise its discretion to review the case. *Rodriguez*, 67 So. 3d at 1220 ("[I]n those cases in which the conduct and the function at issue clearly do not fall within the tort liability waiver, we believe that we should exercise our jurisdiction to preclude prosecution of an action where the sovereign remains immune from suit.") Had the district court felt that the issues were too complex, or the record otherwise unclear as to applicability of the immunity, the court could simply have declined to entertain review of the case.

Exercise of certiorari discretion occurs in many contexts. Concern that review of denials of sovereign immunity would for some reason present a peculiarly undue burden on the district courts seems exaggerated, especially when weighed against the harm caused by the erroneous denial of sovereign immunity.

Sovereign immunity serves multiple public purposes, and protection of it justifies allowing certiorari review in appropriate cases:

> Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity. First is the preservation of the constitutional principle of separation of powers. *See Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979) (stating that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance"). Second is the protection of the public treasury. *See Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958) (explaining that "immunity of the sovereign is a part of the public policy of the state[, which] is enforced as a protection of the

> public against profligate encroachments on the public treasury"). Third is the maintenance of the orderly administration of government. *See State Rd. Dep't v. Tharp,* 146 Fla. 745, 1 So. 2d 868, 869 (Fla. 1941) ("If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.").

American Home Assur. Co., 908 So. 2d at 471.

As noted previously, an errant denial of sovereign immunity represents a violation of separation of powers. In addition, such a ruling, insulated from pretrial review, causes diversion of an agency's financial and human resources away from its public duties and towards trial. Moreover, the specter of trial and its attendant costs and burdens, where the immunity should have been granted but cannot be immediately reviewed, can place pressure on a defendant agency to settle a case where it might truly be entitled to sovereign immunity.

In the context of qualified immunity, this Court has recognized that a public official sued in his or her individual capacity for civil rights violations has the benefit of immunity from suit which is "effectively lost if a case is erroneously permitted to go to trial." *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (citing *Mitchell*, 472 U.S. at 526). But, it is not just the individual capacity defendant who "suffers the consequences from erroneously lost immunity." *Id*. (internal quotation marks omitted). As the *Tucker* Court noted:

> [S]ociety as a whole also pays the social costs of the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.

> Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties. Thus, if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Id. at 190. (internal quotation marks and citations omitted).

Based on these consequences to an individual defendant, as well as to his employing agency, the *Tucker* Court affirmed the exercise of certiorari jurisdiction to remedy the denial of qualified immunity to the individual. The amicus parties maintain that the same evils visited upon the individual employee *and* his employing agency when the employee is erroneously denied qualified immunity *also* apply to an agency when it is erroneously denied sovereign immunity. This is so because in both situations the agency and its employees must continue to litigate and prepare for and attend trial when an immunity from suit would bar the claim.

In cases involving an emergency response it may cause officers to worry that they will be second guessed for their difficult decisions in the field. And, in cases involving the exercise of executive discretion, once a trial court has ruled that a law enforcement agency does not have discretion to use certain police tactics, immediate review of that decision should be available by certiorari. Otherwise the agency may determine it no longer has discretion to use what it views as the best available tactic, at least until such appellate review occurs after trial.

C. Certiorari review of other immunities from suit is permitted and there is no reason to treat sovereign immunity differently.

This Court has consistently described sovereign immunity as an immunity from suit, most recently in *Wallace*. *Wallace*, 3 So. 3d 1044-45. Each of the District Courts of Appeal has determined that denials of other immunities from suit cause irreparable harm so as to justify certiorari review, and there is no logical reason to treat sovereign immunity any differently.

The First District Court of Appeal, for example, had held that errant denial of judicial immunity is subject to certiorari review *because* it is an immunity from suit. *Fuller v. Truncale*, 50 So. 3d 25, 28 (Fla. 1st DCA 2010) (granting petition for certiorari and quashing trial court order erroneously denying judicial immunity because it is an immunity from suit and "[b]ecause judicial immunity is intended to prevent a judicial party from becoming involved in a lawsuit, it would be compromised, and *irreparable harm sustained, simply by forcing a judicial party to become involved in litigation*, irrespective of its outcome.") (emphasis added) (footnote omitted). While that immunity is an absolute immunity, the *reason* that certiorari review is allowed is that it is an immunity from suit.

Similarly, the Second District Court of Appeal has granted certiorari review of an order denying tribal immunity. *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 357-58 (Fla. 2d DCA 2005) (granting petition for certiorari and quashing order denying tribal sovereign immunity from suit, stating that "[c]ertiorari

jurisdiction exists in this context because the inappropriate exercise of jurisdiction by a trial court over a sovereignly-immune tribe is an injury for which there is no adequate remedy on appeal. Tribal sovereign immunity, like the qualified immunity enjoyed in civil rights cases by public officials, involves *immunity from suit* rather than a mere defense to liability, which is an *entitlement that is effectively lost if a case is erroneously permitted to go to trial*.") (emphasis added) (citations and quotation marks omitted).

Likewise, the Third District has observed that denial of medical peer review is subject to certiorari review *because* it is an immunity from suit, *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009), the Fourth District has held that Eleventh Amendment immunity is an immunity from suit subject to review on petition for writ of certiorari, *Jenne v. Maranto*, 825 So. 2d 409, 414-15 (Fla. 4th DCA 2002), and the Fifth District has held that denial of qualified immunity is subject to pretrial appeal. *Stephens v. Geoghegan*, 702 So. 2d 517, 521 (Fla. 2d DCA 1997) (qualified immunity from suit "is lost if the defendant is required to go to trial; having been forced to defend the suit, *the public official cannot be re-immunized after-the-fact.*") (emphasis added)).[3]

[3] Such appeals are now permitted by rule. Fla. R. App. P. 9.130(a)(3)(C). If pretrial review of a denial of sovereign immunity is to be permitted, the question becomes the mechanism by which to allow it. This is not a new topic. It is the understanding of these amicus parties that a change to Florida Rule of Appellate Procedure 9.130 to expressly allow such appeals has been discussed in the past by

All of these other immunities are subject to certiorari review precisely because they, like sovereign immunity, are immunities from suit and irreparable harm is threatened when a trial court erroneously denies immunity. Sovereign immunity is as dignified as these other immunities because it is ingrained in both the common law and the very structure of Florida's government. There is simply no logical basis to permit certiorari review of denial of these immunities, but at the same time absolutely foreclose certiorari review of a denial of sovereign immunity.

II. Having appropriately exercised its discretion to grant certiorari review of this case, the Third District Court of Appeal properly reversed the trial court's denial of sovereign immunity.

Petitioner criticizes the officers' manner of initial response to the burglary scene, arguing that the officers' tactical approach to the burglary set in motion the events leading to the critical moment of decision for Officer Hernandez. The Third District Court of Appeal correctly rejected that argument, holding that the officers' tactical response to the burglary in progress, and Officer Hernandez' subsequent

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the Rules Committee, *see* amicus brief of the State of Florida, and discussed by the Court in reference to other pending cases, such as *Keck v. Eminisor,* 46 So. 3d 1065 (Fla. 1st DCA 2010), *rev. granted,* 54 So. 3d 973 (Fla. 2010). Certainly, such a rule change would clarify the appealability of such orders, and the amicus parties would welcome a clear pretrial avenue to contest denials of sovereign immunity where it appears appropriate to do so. That is a matter for the judgment of the Court, of course. As a threshold matter, however, the case at bar comes to the Court in the posture of whether a denial of sovereign immunity may be reviewed by writ of certiorari.

use of deadly force in self-defense, is so fundamental to the role of the executive branch in fighting crime that it is inappropriate for the judiciary to second-guess the officers' response by way of a tort claim.

One can always make the argument that officers responding to an emergency could have tried some other course of action so as to set in motion some other sequence of events. *Rodriguez*, 67 So. 3d at 1222 (explaining that speculation about alternative courses of action, after the fact, is endless). Petitioner argues in this case that an alternative tactical approach to responding to the burglary might have led to a scenario whereby Officer Hernandez would not have found himself face-to-face with Petitioner, with Petitioner pointing a gun at Officer Hernandez. Such criticism begs the sovereign immunity question, however, because the response to an emergency *always* exposes the officer and others to some level of risk, yet society expects the officer to take on that risk and to deal with the emergency. *Id*.

The opinion below cites a number of authorities which have declined to second-guess officers for those types of decisions. In addition to those authorities, a number of federal circuit courts of appeal have opined, in cases involving similar legal issues, that one should judge the reasonableness of a police officer's use of force based on the threat confronting him at the moment of decision, without

regard to whether the threat could have been avoided had the officer approached the situation differently.

In a recent case out of the Eleventh Circuit Court of Appeals, *Garczynski v. Bradshaw*, 573 F.3d 1158 (11th Cir. 2009), the Palm Beach County Sheriff and a number of his deputies were sued when deputies shot and killed a suicidal man sitting in his truck. In affirming the grant of summary judgment to the defendants, the court rejected claims from the Estate that the deputies could have staged their approach to the truck differently, or could have waited while the man spoke with family members and avoided the tragic outcome. *Id*. at 1167. *See also Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir. 1994) (rejecting claim that officer's use of force was unreasonable because a different tactical approach could initially have been used); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996) (same).

These are § 1983 cases which involve the constitutional reasonableness of use of deadly force and that aspect of use of force is not directly raised in the circumstances presented in this case. The point here is that the *reason* these courts will not fault an officer's use of force, when the argument is that it could have been avoided if some other initial tactical approach had been used, is that *all* such approaches to an uncertain and rapidly evolving situation carry risk.

After the fact, a plaintiff injured during the course of the event can hypothesize some alternative scenario that might not have resulted in injury to him,

but that ignores the fact that the alternative scenario would put someone else at risk. The Eleventh Circuit has explained that, in any case where an officer must use his firearm in self-defense during a rapidly escalating situation, "[r]econsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer." *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003) (internal quotation marks and citation omitted).

A police officer is sworn to investigate, to arrest, to inquire, to take action. *Plakas*, 19 F.3d at 1150. Those are his duties, the performance of which will necessarily involve substantial risk to someone. As the district court properly held in this case:

> No matter what choices the police officers made in this case, someone or some group would be put at risk. This is the type of fundamental law enforcement decision, about which the courts in this state have consistently said should be left to the expertise of law enforcement rather than being put to a referendum by the courts and juries.

Rodriguez, 67 So. 3d at 1222.

CONCLUSION

This Court should hold that the Third District Court of Appeal was correct in this case, first in exercising certiorari jurisdiction over the trial court's order denying sovereign immunity, and second in restoring the immunity to Respondent, Miami-Dade County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. Mail on this 30th day of March, 2012, to: Louis F. Hubener, Esquire and Diane G. DeWolf, Esquire, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; Barbara A. Silverman, Esquire, Curtis B. Miner, Esquire and Ervin A. Gonzalez, Esquire, Colson Hicks Eidson, 255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134; and Erica S. Zaron, Assistant County Attorney, Miami-Dade County Attorney's Office, Stephen P. Clark Center, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure in that it was prepared in Times New Roman 14-point font.

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