IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1913
(Lower Tribunal Case No. 3D10-856)

JOSE LAZARO RODRIGUEZ,

Petitioner,

vs.

MIAMI-DADE COUNTY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM A
DECISION OF THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The Third District Court of Appeal ("Third District") exercised its common law certiorari jurisdiction to review the trial court's order denying Miami-Dade County's ("County") Motion for Summary Judgment. The Third District found that the denial of the County's sovereign immunity could not be remedied on appeal because sovereign immunity, which is grounded in the principles of separation of powers, is an immunity from suit. The court also found that the trial court's error qualified as a departure from the essential requirements of law because the record provided an unequivocal account of the events entitling the County to immunity from suit. The Third District's opinion (the "Opinion"), App. Ex. K, accurately describes the factual background, which consists of: (1) unchallenged portions of the officer's sworn testimony, App. Exs. D & E;[1] and (2) images captured by a security video of the thirteen seconds leading up to, and including, the shooting, App. Exs. B & C.

On February 14, 2008, Officer Jesus Hernandez was riding in a two-man unit with Officer Javier Albite ("Officer Albite") when he received a call from dispatch about an audible alarm at AT Electronics & Tints (the "Business")—an automotive detailing business owned by Jose Lazaro Rodriguez ("Petitioner").

[1] The Appendix to this Answer Brief has been filed separately. It will be referred to as "App. Ex.__: pg__", and includes only those portions of the record relevant to the factual background of the case.

App. Exs. D: 3-4, E: 29. Officer Hernandez's police vehicle arrived at the intersection that the Business faces at 2:19:47 a.m.[2] App. Exs. B & C. At that moment, Officer Hernandez could see an individual breaking into the Business. App. Ex. E: 41, 43. Officer Hernandez jumped from the vehicle to apprehend the individual. App. Ex. E: 45. Officer Albite, meanwhile, sped off in the patrol car to pursue two other subjects he noticed down the street. App. Exs. D: 7, E: 44-46. Almost exactly contemporaneously, Petitioner appeared on the scene to attend to the burglary of his business. App. Ex. A: ¶¶ 10, 11. Thus, at 2:19:56 a.m.—only nine seconds after officers first appeared on the scene—Officer Hernandez was traversing the perimeter of the Business's parking lot as Petitioner was emerging from his vehicle with a firearm in hand. App. Exs. B & C. Two seconds after that, at 2:19:58 AM, Officer Hernandez and Petitioner were face-to-face. *Id.* Petitioner's revolver was pointed in Officer Hernandez's direction. *Id.* In response to that deadly threat, Officer Hernandez immediately discharged his own firearm in Petitioner's direction, striking him. App. Ex. E: 53.

The entire incident—from the time Officer Hernandez first drove up to the scene, got out of his car, and fired his weapon, until Plaintiff began falling to the ground—took less than thirteen seconds. Petitioner filed a claim against the

[2] The timeframe, as referenced in the record, connotes the day's hour, minutes and seconds.

County for negligence based on Officer Hernandez's actions.[3] The County moved for summary judgment on the grounds that Officer Hernandez owed no duty to Petitioner and that the County had sovereign immunity for his actions in responding to an ongoing emergency. App. Ex. F.

Judge William Thomas issued an order denying the County's Amended Motion for Summary Judgment. App. Ex. J. The County filed a petition for writ of certiorari to the Third District Court of Appeal ("Third District") seeking review of the trial court's order on two grounds: (1) the County owed no duty to the Petitioner; and (2) sovereign immunity barred Petitioner's claim in this case. The Third District granted the petition on grounds that the County had sovereign immunity for Officer Hernandez's actions, and that sovereign immunity was immunity from suit. *Miami-Dade County v. Rodriguez*, 67 So. 3d 1213, 1223 (Fla. 3d DCA 2011). The Third District certified conflict with *Florida A & M Univ. Bd. of Trs. v. Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009) and *Pinellas Suncoast Transit Auth. v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996), on the question of whether certiorari review is appropriate when a governmental entity asserts

[3] The Second Amended Complaint, which is the pleading at issue, alleges negligent failure to provide timely medical assistance against the County, but that claim was withdrawn by counsel for Petitioner at the hearing on the County's Amended Motion for Summary Judgment. App. Ex. I: 28. Petitioner also alleged a claim for negligent retention and supervision. The trial court granted the County's Amended Motion for Summary Judgment as to this count in its order. App. Ex. J. Petitioner has not sought review of this portion of the trial court's order.

sovereign immunity. *Rodriguez*, 67 So. 3d at 1223. This Court accepted jurisdiction of this case on December 1, 2011.

SUMMARY OF ARGUMENT

Common law certiorari review is an important vehicle that gives litigants the ability to correct a clear and substantial error by the trial court when they otherwise could not seek review as a matter of right. The Third District recognized correctly that *Roe v. Dep't of Educ.*, 679 So. 2d 756 (Fla. 1996), does not categorically prohibit district courts of appeal from exercising this important form of relief where, as here, a trial court has improperly denied a governmental entity's sovereign immunity from suit. Petitioner's contention to the contrary is misguided. First, *Roe* dealt only with the limited question of whether a litigant could seek immediate appeal of a non-final order denying sovereign immunity. It did not, by contrast, address the ability of district courts of appeal to exercise their common law certiorari jurisdiction to review a denial of sovereign immunity—the central issue here. Second, the availability of certiorari review, unlike interlocutory appeal, is considered on a case-by-case basis. *Roe* does not support a categorical prohibition against certiorari review in all cases where the denial of sovereign immunity is at issue.

The Third District's exercise of certiorari review in this case was proper. Certiorari review is available only where: (1) irreparable harm will ensue if the

non-final order is not corrected before trial; and (2) the trial court's error rises to the level of a departure from the essential requirements of law. Those two conditions are easily satisfied here. First, under Florida law, a litigant suffers irreparable harm when it is wrongfully denied immunity from suit. The loss is irreparable because immunity from suit is intended to protect the litigant from having to defend itself at trial. And one cannot, of course, be re-immunized after-the-fact. Because the immunity at issue here emanates from the constitutional principle of separation of powers, it is immunity from suit. Forcing the County to defend itself at trial would thus violate the foundational separation of powers principle that the judiciary should not second-guess a sovereign's discretionary decision-making.

Petitioner's contention to the contrary—that sovereign immunity is immunity from liability only—ignores the doctrine's rich history and recent decisions of this Court. Petitioner also errs in interpreting the limited waiver of sovereign immunity found in Florida Statutes, section 768.28 as eradicating the concept of sovereign immunity from suit. Section 768.28 merely codifies a waiver of that immunity under certain circumstances. In instances where the waiver does not apply—for instance, where the governmental entity is sued for discretionary conduct—sovereign immunity from suit remains the rule.

It is well-settled that governmental entities are immune for decisions made by their law enforcement officers in response to emergencies thrust upon them by external sources. The sensitive judgments officers must make in such situations require that they have the necessary flexibility to act on their professional judgment, experience, and training without fear that their decisions may subject their employers to a private lawsuit. This exception to section 768.28's immunity waiver exists to preserve the separation of powers principles that underlies the County's sovereign immunity.

Furthermore, if an officer's judgment in the midst of an emergency can be second-guessed by a jury without any avenue for earlier review, there are additional risks of irreparable harm that justify certiorari review, even beyond the loss of immunity from suit. The notion that officers have to defend the manner in which they neutralize an emergency, would likely deter able citizens from engaging in police work and dampen the responsiveness of those already engaged in such work. The County and the public are not well-served when officers do not pursue crime-fighting vigorously. The trial court's denial of the County's sovereign immunity from suit thus poses multiple threats of irreparable harm that more than satisfy the first criteria for certiorari review.

The second prerequisite to certiorari review is also satisfied here. The record conclusively establishes that the trial court erred in denying the County's

immunity from suit. The record consists almost exclusively of a video-footage account of the material facts in this case. It provides a detailed account of: (1) officers arriving on scene; (2) Petitioner arriving on scene; (3) Petitioner emerging from his truck with his revolver in hand; (4) Petitioner raising his revolver towards Officer Hernandez; and (5) Officer Hernandez's shooting in response. Petitioner's attempt to insert a new issue of fact at this stage of the proceedings—that he was shot in the left buttock—fails both factually and legally. First, his new account contrasts markedly with the images on the security video, which clearly show that Petitioner fell to the ground ***only after*** pointing his weapon at Officer Hernandez. But even if his version of the facts were credited, Petitioner's attempt to manufacture a dispute of fact still fails. His description of Officer Hernandez's alleged conduct qualifies as an intentional act that can only be the basis of an intentional tort (such as battery), not a negligence action. There is no such claim for an intentional tort in this case. And regardless, Petitioner abandoned any argument based on these novel facts since he did not raise it to the trial court below.

In sum, the Third District correctly found that the County was immune from Petitioner's negligence claim under the emergency exception to the waiver of sovereign immunity. It properly exercised its certiorari jurisdiction, recognizing that the loss of such immunity would cause the County irreparable harm and that

the trial court record clearly demonstrated a departure from the essential requirements of law. This Court should affirm the Opinion in its entirety.

ARGUMENT

I. THE THIRD DISTRICT'S EXERCISE OF ITS COMMON LAW CERTIORARI REVIEW IN THIS CASE WAS PROPER, AS *ROE* ADDRESSED ONLY THE NARROW QUESTION OF WHETHER A GOVERNMENTAL ENTITY COULD SEEK IMMEDIATE APPEAL OF A NON-FINAL ORDER DENYING SOVEREIGN IMMUNITY

The question presented in *Roe* was narrow: whether an order rejecting a claim of sovereign immunity is subject to interlocutory review as a matter of right. *Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 (1996).[4] The Court set out only to resolve the conflict between the First and Fifth District Courts of Appeal regarding whether a denial of sovereign immunity should be treated as a "reviewable appeal of a non-final order." *Dep't of Transp. v. Wallis*, 659 So. 2d 429, 430 (Fla. 5th DCA 1995); *cf. Dep't of Educ. v. Roe*, 656 So. 2d 507 (Fla. 1st DCA 1995). It is thus unsurprising that *Roe* never mentions the certiorari review standard or analytical framework.

Nevertheless, Petitioner's view is that post-*Roe*, district courts of appeal are categorically prohibited from exercising their discretion to grant certiorari review

[4] Petitioner's brief in *Roe* framed the question presented as: "Whether an order rejecting a claim of sovereign immunity is subject to interlocutory review as a matter of right, where the order turns strictly on an issue of law." *See* Pet'r Reply Br., *Dep't of Educ. v. Roe*, No. 86061, 1996 WL 33416969, at *2 (Fla. Feb. 16, 1996).

of a denial of sovereign immunity.[5] This Court has never made such a sweeping conclusion about the availability of certiorari jurisdiction, and it is certainly not appropriate here.

Roe is best understood as answering the question this Court left unanswered in *Tucker v. Resha*, 648 So. 2d 1187, 1189-90 (Fla. 1994): whether a denial of sovereign immunity can be reviewed as of right before final judgment. *Tucker* held only that a denial of qualified immunity at summary judgment is a candidate for interlocutory review. *Id.* at 1190. To further that end, the *Tucker* Court requested that the Florida Bar amend the Florida Rules of Appellate Procedure to include orders denying qualified immunity as one of the non-final orders that are immediately appealable. *Id.* Importantly, *Tucker* does not require a litigant appealing a denial of qualified immunity to satisfy the certiorari criteria in order to obtain immediate review of that order.

Likewise, *Roe* did not address certiorari review when considering whether the reasons given in *Tucker* for allowing a denial of qualified immunity to be

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[5] Petitioner seemingly contends that *Roe* decided the availability of certiorari because of the procedural history of the case in the lower courts. He argues that because the First District Court of Appeal in *Roe* decided that certiorari jurisdiction was unavailable, that this Court considered it too when it "did ***not*** hold that the district court's conclusion that certiorari review was unavailable was in error." Pet'r Br. 18 (emphasis added). Petitioner's reasoning is strained. He asks this Court to recognize a holding on a question of law it did not address. The fact that Petitioner uses this kind of double-negative, tortuous reasoning to arrive it at its conclusion demonstrates his conclusion unfounded.

appealed *as of right* applied to the sovereign immunity context. While *Roe* ultimately disagreed with the Department of Education that *Tucker* did not extend to reach the sovereign immunity context, the court went no further. *Id.* at 759. Petitioner's contention that *Roe* also touched on the availability of certiorari review extends *Roe* far beyond its modest holding.

As further support that the *Roe* decision relates to the availability of interlocutory appeal—as opposed to certiorari review—of denials of sovereign immunity, this Court need only consider the specific conflict that *Roe* resolves. The Court in *Roe* expressly set out to resolve a conflict between the First District Court of Appeal's decision below, and the Fifth District Court of Appeal's decision in *Wallis*. *Wallis* held that *Tucker* required that a denial of a sovereign immunity "be treated as a ***reviewable appeal*** of a non-final order." 659 So. 2d at 430 (emphasis added). The *Roe* Court disagreed with the Fifth District and refused to "extend *Tucker* beyond the circumstances of that case to create yet another nonfinal order for which review is available." *Id.* at 759. In other words, the holding in *Roe* is that a litigant denied a sovereign immunity defense in a nonfinal order does not have an immediate right to appeal, contrary to the holding in *Wallis*.

The question presented in *Roe* and the conflict it granted certiorari to resolve make unmistakable the limited reach of its holding. The idea that *Roe* eliminates the availability of certiorari review in all cases where sovereign immunity is denied

also does not find support anywhere in the text of this Court's opinion. *Roe* thus does not dictate the answer to the broader question presented here: whether district courts of appeal may, in the appropriate case, exercise their discretion to review under certiorari jurisdiction a denial of sovereign immunity.

Furthermore, contrary to Petitioner's contention, permitting certiorari review in sovereign immunity cases would not "add substantially to the caseloads of the district courts of appeal," Pet'r Br. 16. Common law certiorari review serves a very important—albeit limited—role in Florida's adjudicatory framework: "the writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists." *Broward County v. G.B.V. Int'l., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (citation omitted). But because it serves only this very limited reviewing function, it is not every case that qualifies for certiorari review. A party is entitled to certiorari review only where there has been a departure from the essential requirements of law and the challenged order caused harm that cannot be remedied on appeal. *Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000). These requirements ensure two things: first, only truly important questions will be reviewed on certiorari; second, the longstanding policy against piecemeal appeals is preserved. Allowing district courts of appeal to exercise certiorari review of denials of sovereign immunity,

where appropriate, would thus not overburden their dockets as Petitioner claims. Pet'r Br. 16.

The fact that there are two demanding hurdles to clear before a case may be a viable candidate for common law certiorari review deflects many would-be petitions for a writ of certiorari. Where review is granted as of right, in contrast, litigants are undoubtedly more active in their attempts to seek a second layer of review. Moreover, district courts of appeal will use their certiorari jurisdiction to reach the merits of a case only upon acceptance that, as here, there is no dispute of fact and the trial court's error is immediately apparent.

Also, unlike the categorical rule the petitioner sought in *Roe*, certiorari review is undertaken only on a case-by-case basis. Thus, in the sovereign immunity context, district courts of appeal reach the immunity question only if the two certiorari requirements are met—review is not as of right. And even then, the district court of appeal can exercise its discretion and deny a petition on its face where, for instance, the sovereign immunity question is too bound up in the facts of the case. In that scenario, the district court of appeal may think it is best to first allow the fact finder to exercise its institutional competency. Thus, contrary to Petitioner's contention, Pet'r Br. 16 (citing *Roe*, 679 So.2d at 758), whether or not the sovereign immunity question is "inextricably tied to the underlying facts, requiring a trial on the merits," is not a concern in the certiorari context because

courts are free to decline certiorari jurisdiction when the facts are too intertwined with the merits.

II. THE THIRD DISTRICT PROPERLY GRANTED CERTIORARI REVIEW BECAUSE THE TRIAL COURT'S ORDER DENYING THE COUNTY'S SOVEREIGN IMMUNITY DEFENSE CAUSES IT IRREPARABLE HARM

Before a district court of appeal may grant a petition for a writ of common law certiorari it must find (1) a departure from the essential requirements of the law, (2) resulting in irreparable harm that cannot be remedied on plenary appeal. *Belair*, 770 So. 2d at 1166. The irreparable harm requirement is jurisdictional and must be evaluated at the outset. *Dees v. Kidney Group, LLC*, 16 So. 3d 277, 279 (Fla. 2d DCA 2009). Only if irreparable harm exists can the court reach the issue of whether the challenged ruling departed from the essential requirements of law. *Id.* Whether the trial court's denial of sovereign immunity qualifies as an irreparable harm is central to this case.

A. Sovereign Immunity Is Immunity From Suit

The historical support for treating sovereign immunity as immunity from suit is undeniable. For over 100 years this Court has been remarkably consistent in its treatment of sovereign immunity as immunity from suit. *See, e.g.*, *Hampton v. State Bd. of Educ. of Fla.*, 105 So. 323, 327 (Fla. 1925) ("[t]he immunity of the state from suit" justified dismissal of a claim for specific performance of a contract entered into by the State Board of Education); *State ex rel. Davis v. Love*, 126 So.

374, 379 (Fla. 1930) (in banc) (finding writ of prohibition appropriate remedy to preclude action against the state road department because the "immunity of the state from suit, which the Legislature may provide for by general law . . . can[not] be taken away by a mere provision incidentally embraced in an act dealing with another subject"); *Spangler. v. Fla. Tpk. Auth.*, 106 So. 2d 421, 422 (Fla. 1958) (affirming dismissal of complaint against the Turnpike Authority because "[a]s a state agency, absent a specific waiver, it shares in the sovereign immunity to suit"); *Buck v. McLean*, 115 So. 2d 764, 765 (Fla. 1959) ("The immunity of the State from suit is absolute and unqualified . . . .") (internal footnotes omitted); *Circuit Court of Twelfth Judicial Circuit v. Dep't of Natural Resources*, 339 So. 2d 1113, 1115, 1116-17 (Fla. 1976) (Department of Natural Resources was protected by "constitutional immunity from suit"). The State of Florida's treatment of the issue is not unique. Indeed, the view that sovereign immunity is immunity from suit finds overwhelming support from decisions around the country.[6]

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[6] *See, e.g., Pyeritz v. Commonwealth*, 32 A.2d 687, 695 (Pa. 2011) ("The Commonwealth enjoys immunity from suit unless the injury in question lies within one of the exceptions provided by the legislature."); *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 101 (Va. 2008) ("It is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts without its consent and permission.") (internal ellipses omitted) (quoting *Bd. of Pub. Works v. Gannt*, 76 Va. 455, 461 (Va. 1861)); *Anzaldua v. Band*, 457 Mich. 530, 552 (Mich. 1998) ("The State, as sovereign, is immune from suit save as it consents to be sued, and relinquishment of sovereign immunity from suit must be strictly interpreted.") (internal citation, brackets, ellipses, and quotation marks omitted); *Texas Dep't of Transp. v. Jones*, 8 S.W. 3d 636, 637 (Tex. 1999) (per curiam)

This Court recently reaffirmed its treatment of sovereign immunity as immunity from suit in *Wallace v. Dean*, 3 So. 3d 1035, 1044 (Fla. 2009). The majority in *Wallace* clarified the distinction between a duty analysis from "whether the governmental entity remains ***sovereignly immune from suit*** notwithstanding the legislative waiver present in section 768.28 []." *Id.* (emphasis added). In highlighting the distinction, the majority observed that:

> the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit. *Conversely, sovereign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction) even when the State may otherwise be liable to an injured party for its tortious conduct.*

Id. (internal citations omitted) (emphasis in original & added). The majority also explained that prior to the enactment of section 768.28, "courts did not have subject matter jurisdiction of tort suits against the State and its agencies because they enjoyed sovereign immunity pursuant to Article X, [s]ection 13, Florida

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("Today we reaffirm that governmental immunity from suit defeats a trial court's subject matter jurisdiction[.]"); *Daughton v. Maryland Auto Ins. Fund*, 198 Md. App. 524, 159 (Md. Ct. Spec. App. 2011) ("The doctrine of sovereign immunity from suit, rooted in the ancient common law, is firmly embedded in the law of Maryland.") (citations omitted); *Bd. of Regents v. Canas*, 295 Ga. App. 505, 507 (Ga. App. 2009) ("Under Georgia law, sovereign immunity is an immunity from suit, rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to go to trial.") (citing *Grissell v. Hamlin*, 963 F.2d 338, 340 (11th Cir. 1992) (permitting interlocutory appeal of a denial of sovereign immunity since "it is clear that sovereign immunity under Georgia law is an immunity from suit").

Constitution." *Id.* at 1045 n.14 (quoting *Hutchins v. Mills*, 363 So. 2d 818, 821 (Fla. 1st DCA 1978)). Courts obtained subject matter jurisdiction after section 768.28 was enacted for the limited purpose of determining "which suits fall within the parameters of the statute." *Hutchins*, 363 So. 2d at 821. Thus, only as a result of this "limited waiver of sovereign immunity found in the statute," *id.* at 821-22, were litigants able to enter the courthouse door.

Petitioner ignores the overwhelming authority treating sovereign immunity as immunity from suit and the corollary principle that the deprivation of immunity from suit is an irreparable harm. His lone contention is that the Third District's exercise of its discretion to grant certiorari in ***this*** case is inconsistent with *Roe*. According to Petitioner, *Roe* espoused the far-reaching principle that a district court of appeal is categorically prohibited from exercising its discretion in the appropriate case to review on certiorari a denial of sovereign immunity. Pet'r Br. 11, 12.[7] In advancing that argument, Petitioner ignores *Wallace* and the fact that *Roe* dealt solely with the interlocutory, not certiorari, review.

[7] Petitioner's premise—that *Roe* eliminates the availability of certiorari review of cases raising sovereign immunity—is fundamentally flawed. Unlike interlocutory review, which deals with categories of cases, certiorari review is determined on a case-by-case basis. *Carroll Contracting, Inc. v. Edwards*, 528 So. 2d 951, 952 (Fla. 5th DCA 1988). It would therefore be inappropriate for this Court to categorically eliminate the availability of certiorari jurisdiction in all cases where sovereign immunity is at issue.

Petitioner's final argument in support of reversal is that the passage of section 768.28 transformed sovereign immunity from suit into immunity against liability only. Pet'r Br. 15. Petitioner's contention turns the history of sovereign immunity and section 768.28's purpose on its head. Section 768.28 did not in any way alter the landscape of sovereign immunity or modify its character as immunity from suit. Its purpose was only to waive sovereign immunity in a narrow category of cases. Where the waiver does not apply, governmental entities remain immune from suit. A brief history of sovereign immunity makes clear Petitioner's error.

The State of Florida formally recognized the doctrine of sovereign immunity in 1822. *City of Miami v. Valdez*, 847 So. 2d 1005, 1006-07 (Fla. 3d DCA 2003). At that time, a citizen's only method of recourse against a governmental entity was through the claims bill process in the legislature. *Id.*

In the 1868 version of the Florida Constitution, the people of Florida granted the legislature the right to waive sovereign immunity upon enactment of "general law." *See Cauley v. City of Jacksonville,* 403 So. 2d 379, 381 (Fla. 1981) (citing Art. IV, § 19, Fla. Const.). Even after that amendment, however, Florida courts decreed the immunity of the State and its agencies to be "absolute and unqualified" in the absence of general law clearly waiving that immunity. *Buck*, 115 So. 2d at 765; *see also Spangler*, 106 So. 2d at 424 ("immunity of the sovereign is a part of the public policy of the state"); *Klonis v. Fla. Dep't of Revenue*, 766 So. 2d 1186,

1189 (Fla. 1st DCA 2000) (observing that the immunity of the State of Florida and its agencies was "'absolute . . . absent waiver by legislative enactment or constitutional amendment'") (quoting *Circuit Court of Twelfth Judicial Circuit*, 339 So. 2d at 1114)).

This Court repeatedly rejected attempts to repudiate what it referred to as the "ancient" doctrine of sovereign immunity. *See, e.g., Davis*, 126 So. at 377; *see also Circuit Court of Twelfth Judicial Circuit*, 339 So. 2d at 1116-17 (affirming writ of prohibition based on a sovereign immunity defense in torts case because at the time the plaintiffs' child died at a state park, the Florida legislature had not yet enacted section 768.28); *Buck*, 115 So. 2d at 768 (rejecting other opinions that had renounced sovereign immunity as inconsistent with the "established law of this jurisdiction").

It was not until 1973 that Florida exercised its constitutional right—through the enactment of section 768.28—to waive sovereign immunity, yet only in certain, carefully defined instances. Section 768.28 was not a panacea for those hoping that governmental entities could now be subjected to suit for all forms of alleged misconduct. It waived sovereign immunity for tort actions only, and only up to a certain dollar amount. *See Wallace*, 3 So. 3d at 1044 (describing section

768.28 as a "legislative waiver").[8] Courts have been clear since its enactment to "employ a rule of strict construction against waiver of immunity beyond this amount." *Berek v. Metro. Dade County*, 396 So. 2d 756, 758 (Fla. 3d DCA 1981). Indeed, it remains true that "sovereign immunity is the rule, rather than the exception," *City of Orlando v. West Orange Country Club*, 9 So. 3d 1268, 1272 (Fla. 5th DCA 2009) (citation and internal quotation marks omitted), and that attempts to waive sovereign immunity "must be strictly construed." *Berek v. Metro. Dade County*, 422 So. 2d 838, 840 (Fla. 1982) (citation omitted).

Petitioner advances the misguided contention section 768.28 transformed sovereign immunity into immunity from liability only, and that it thus subjects governmental entities to suit in all cases. Petitioner also overlooks the fact that there are many instances in which sovereign immunity still applies and bars a claim—even a claim that seemingly fits within the waiver. *See Wallace*, 3 So. 3d at 1045, n.14. This is because there are exceptions to the waiver in section 768.28, both statutory and judicially-created, that effectively preempt the waiver and render the sovereign immune when qualifying circumstances exist.

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[8] The initial statutory cap was $50,000 per person, $100,000 per occurrence. The amount was doubled to $100,000 and $200,000, respectively, in 1981. § 768.28(5), Fla. Stat.; *Pensacola Jr. Coll. v. Montgomery*, 539 So. 2d 1153, 1154 (Fla. 1st DCA 1989). The Florida Legislature recently increased the limits to $200,000, and $300,000, respectively, effective October 1, 2011.

By way of statutory example, section 768.28(9)(a) maintains sovereign immunity for the acts of individual officials so long as officials have not acted "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." The statute also exempts from the waiver cases where an individual has participated in a riot (§ 768.28(15), Fla. Stat.), as well as claims for punitive damages (§ 768.28(5), Fla. Stat.).

Likewise, a prominent example of a judicially-created exception to the waiver in section 768.28 was recognized by this Court in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1012, 1016 (Fla. 1979). There, the Court considered whether discretionary acts of the government were excepted from section 768.28's waiver. The Court observed that "even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Id.* [9] It thus reaffirmed that section 768.28 did not modify the well-

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[9] The County anticipates that Petitioner will seize on the *Commercial Carrier* Court's use of the phrase "traditional tort liability" as support for his position that sovereign immunity is immunity from liability only. Petitioner makes a similar point in discussing the impact of *Wallace v. Dean*, where he notes that the Court alternates between its use of the phrase "immunity from suit" and "insulated from tort liability." Pet'r Br. 22. The simple response to this non-issue is that an entity entitled to sovereign immunity is immune from liability ***because it is immune from suit***. Petitioner cites no support for his argument that the *Wallace* references to immunity from liability are intended to be a judicial declaration that there is no longer immunity from suit for governmental entities.

established common law principle that the Florida Constitution's separation-of-powers provision, found in Article II, Section 3 of the Florida Constitution, shields governments from suit when they exercise discretionary functions. *Id.*; *Wallace v. Dean*, 3 So. 3d at 1053; *see also Pollock v. Florida Dep't of Highway Patrol*, 882 So. 2d 928, 933 (Fla. 2004) ("basic judgmental or discretionary governmental functions are ***immune from legal action***") (emphasis added); *see also Cauley*, 403 So. 2d at 384 (summarizing *Commercial Carrier*'s holding: "section 768.28 had waived county and state governmental immunity, within the set limits, in 'operation-level' functions, but . . .'planning' or 'decision-making' levels remained immune").

This Court in *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989) ruled that "governmental immunity derives entirely from the doctrine of separation of powers not from a duty of care or from any statutory basis." Importantly, the Court further noted that the judiciary "is ill-equipped to interfere in the fundamental processes and legislative branches," and that "there remains a sphere of governmental activity ***immune from suit.***" *Id.* at 733 (emphasis added).

The concept of preserving immunity for the discretionary decisions of governmental entities extends to the law enforcement forum as well. In this context, officers' use of split-second judgment is akin to the discretionary decisions immunized in *Commercial Carrier*. Courts are particularly careful not to

overreach and second-guess officers, as officers must perform functions not ordinarily asked of civilians. *City of Miami v. Albro*, 120 So. 2d 23, 26 (Fla. 3d DCA 1960). That principle applies to suits against municipalities for officers' conduct. It is therefore "unthinkable that a municipal corporation exercising its police power for the protection of the public should be liable in damages for every mistake of judgment by its officers." *Id.*

Police officials need flexibility to exercise their authority. "[I]nherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers." *Wong v. City of Miami*, 237 So. 2d 132, 134 (Fla. 1970). The plaintiffs in *Wong* owned businesses near the sight of a planned rally against the City of Miami. *Id.* at 133. The City of Miami had positioned additional police officers near the businesses, but eventually removed them from the area. *Id*. The businesses were subsequently plundered, and the owners sued the City for negligence. *Id*. This Court eventually affirmed dismissal of the complaint, reasoning that:

> sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence. Here officials thought it best to withdraw their officers. Who can say whether or not the damage sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case, couldn't petitioners allege just as well that [t]hat course of action was negligent?

Id. at 134.

It is this same need to preserve the deliberative efforts of law enforcement officers that makes sovereign entities immune from suit for actions undertaken by their officers while responding to emergency situations. *Kaisner* is the first case from this Court to mention of an emergency exception to the statutory waiver of sovereign immunity. The issue in *Kaisner* was whether the sheriff's department was immune from suit for the manner in which one of its officers conducted a routine traffic stop. *Kaisner*, 543 So. 2d at 737-38. The court held that the department was not immune since the execution of a routine traffic stop was operational in nature. *Id.* at 738. The court limited the reach of its holding, however, noting that its answer likely would have been different if law enforcement was responding to an emergency:

> We emphasize, however, that the facts of this case present no countervailing interests, such as the safety of others. The result we reach today would not necessarily be the same had the officers in this instance been confronted with an emergency requiring swift action to prevent harm to others, albeit at the risk of harm to petitioners. ***The way in which government agents respond to a serious emergency is entitled to great deference, and may in fact reach a level of such urgency as to be considered discretionary and not operational.***

Id. at 738 n.3 (emphasis added).

This Court elaborated on what it called the "*Kaisner* exception" for emergencies in *City of Pinellas Park v. Brown*, 604 So. 2d 1222, 1226-27 (Fla.

1992), noting that it applied in cases where the emergency was thrust upon the police "by lawbreakers or external forces" in a manner that required them "to choose between different risks posed to the public." *Id.* at 1227. It noted that:

> [N]o matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. It is this choice between risks that is entitled to the protection of sovereign immunity in appropriate cases, because it involves what essentially is a discretionary act of executive decision-making.

Id.

A federal court considered the emergency exception in a 1998 case. In the tragic *Smith v. City of Plantation*, 19 F. Supp. 2d 1323, 1325 (S.D. Fla. 1998), *aff'd*, 198 F.3d 262 (11th Cir. 1999) case, a mother contacted police for help rescuing her children who were being held hostage. Police responded, and investigated for 80 seconds before the suspect set off an explosion in the mother's home, killing her children. *Id*. at 1332. The court held that the city had sovereign immunity for the officer's actions under the emergency exception, and noted that even if the officer had taken the steps suggested by the plaintiff, he still would have exposed the children to harm. *Id*. at 1333.

Likewise, the Third District has held that sovereign immunity barred a claim against Miami-Dade County for negligence where the circumstances—an individual had hijacked a bus filled with schoolchildren—forced the officer "to choose between different actions, each of which posed a potential threat to the

public." *Robles v. Metro. Dade County*, 802 So. 2d 453, 454 (Fla. 3d DCA 2001). In firing his weapon and inadvertently injuring a child nearby, the officer reacted to an emergency that had been thrust upon him by external forces. *Id.* at 455. The court relied on *City of Pinellas Park's* reasoning that the choice between risks amounts to a discretionary decision, and affirmed the trial court's entry of summary judgment for Miami-Dade County. *Id.*

Commercial Carrier makes clear that the enactment of section 768.28 did not eradicate the existence of sovereign immunity in negligence cases. Indeed, as that case declared, "certain 'discretionary' governmental functions remain immune from tort liability" regardless of section 768.28. 371 So. 2d at 1022. The *Kolb, City of Pinellas Park, Smith*, and *Robles* cases extended this reasoning to encompass claims where the governmental entity is defending a negligence suit involving an emergency response by one of its law enforcement officers. In those examples, the officer's use of split-second judgment is akin to the discretionary decisions immunized in *Commercial Carrier*.

The County has sovereign immunity for the acts taken by Officer Hernandez in this case because he was called upon to respond to an emergency: an in-progress burglary involving multiple suspects, one of whom was breaking into a building, and the other of whom was armed with a firearm. The setting was intense, dangerous, and rapidly-unfolding. Because "the immunity issue in this case is

predicated on the doctrine of separation of powers," *Rodriguez*, 67 So. 3d at 1221, the Third District correctly framed it as immunity from suit and properly exercised its certiorari jurisdiction to spare the County from suffering the irreparable harm that would follow the trial court's order denying its sovereign immunity defense.

B. The Deprivation Of Immunity From Suit Causes Irreparable Harm

When immunity from suit is at issue, the deprivation of that immunity qualifies as an irreparable harm. *Tucker*, 648 So. at 1189-90 (recognizing that a denial of qualified immunity may be reviewed before final judgment because the official is immune from suit and thus cannot be reimmunized after an improperly-held trial); *Vermette v. Ludwig*, 707 So. 2d 742, 744 (Fla. 2d DCA 1997) (the benefit of immunity from suit is lost the instant the immunized party is forced to litigate a case to final judgment because "[a] party cannot be reimmunized from suit after-the-fact") (citation omitted).[10] District courts of appeal properly exercise

[10] Petitioner cites two cases, *South Broward Hospital District v. Dupont*, 683 So. 2d 1135 (Fla. 4th DCA 1996) and *Brown & Williamson Tobacco Corp. v. Carter*, 680 So. 2d 546 (Fla. 1st DCA 1996) to support his argument that a denial of summary judgment is generally not reviewable on certiorari "because the petitioner will have an adequate remedy on final appeal." Pet'r Br. 11. But in neither case was sovereign immunity at issue. Petitioner's reliance on those cases is thus misplaced. Petitioner also advances the unpersuasive proposition that "the expense and inconvenience of an unnecessary trial is considered insufficient harm to justify certiorari review." Pet'r Br. 11 (citing cases). Petitioner, however, ignores a crucial point: the immunity at issue in this case does not exist merely to protect the County's coffers. It seeks, in the interest of respecting the separation of powers, to "preserve the pattern of distribution of governmental functions prescribed by the

their discretion in invoking certiorari jurisdiction to review a potentially improper denial of immunity from suit. *Bd. of Regents of Fla. v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002) (concluding that it was "necessary for th[e] court to invoke its certiorari jurisdiction" to avoid the irreparable harm that would occur from postponing review of a denial of sovereign immunity from suit until after final judgment). Accordingly, since the County's sovereign immunity is immunity from suit, the Third District's order denying that immunity causes it irreparable harm.

Furthermore, the County faces additional irreparable harm the instant it is embroiled in a lawsuit that seeks to second-guess its officers' response to a pressing emergency. The harm is not, as in the immunity of liability context, purely monetary. *American Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). Rather, as this Court has recognized, one of the central purposes underlying sovereign immunity is to preserve "the constitutional principle of separation of powers." *Id.* (citing *Commercial Carrier*, 371 So. 2d at 1022). That constitutional principle is violated the instant the County is hauled into court to answer for the manner in which one of its officers responded to a

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[Florida] [C]onstitution." *Commercial*, 371 So. 2d at 1018 (citation omitted). That distributional pattern is disrupted the instant juries are extended the opportunity to second-guess the officers' response to a pressing emergency. The harm inflicted when the doctrine of separation of powers is ignored extends far beyond the inconvenience and unnecessary expenditure of taxpayers' money that flows from an unnecessary trial. The immunity at issue here is thus immunity from suit.

pressing emergency. Additional concerns, mentioned by this Court in *Tucker*, 648 So. 2d at 1187, threaten to irreparably harm the County in such cases.

In reaching its holding, the court in *Tucker* noted that without a right to immediate review of a denial of qualified immunity, "the very policy that animates the decision to afford such immunity is thwarted." *Id.* at 1189-90; *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding with respect to qualified immunity that "[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."). As the majority explained, society as a whole pays a cost when immunity from suit is ignored because of: (1) the expenses of litigation; (2) the diversion of official energy from pressing public issues; (3) the deterrence of able citizens from accepting public office; and (4) a possible chilling effect that prevents officials from vigorously pursuing their work. *Id.* at 1190. *Tucker*'s discussion regarding the serious implications of an erroneously deprived immunity defense apply with equal force here.

First, there exists the same potential for the unnecessary expenditure of tax-payer funds. In positing that monetary considerations are alone insufficient to justify certiorari review, Petitioner ignores that, as in *Tucker*, it is taxpayers—not private parties—who are funding the potentially unnecessary litigation. Immunity from suit thus protects "the public against profligate encroachments on the public

treasury." *American Home Assurance Co.*, 908 So. 2d at 471 (quoting *Spangler,* 106 So.2d at 424).

Second, there is the same real likelihood that officials will be diverted from their work, as in the qualified immunity context. It is an officer's conduct that is squarely at issue in this negligence case against the County. As a result, the burdens of the litigation process would undoubtedly divert that officer's attention away from his law enforcement responsibilities.

Third, governmental entities face the very same risk that able citizens might be deterred from seeking law enforcement positions to avoid having to defend their conduct in a lawsuit against their employer. Because the nature of law enforcement is such that officers must interact on a daily basis with the public—and often under circumstances fraught with risk—their conduct can always be second-guessed through the means of a private lawsuit, either against them individually or against their employer. If there is no vehicle to have an immediate review of their actions, and defending that conduct at trial is a part of the job, there will evolve a disincentive to taking the job in the first instance, to the detriment of the community that needs a law enforcement presence.

Finally, the risk that police officers may be chilled in vigorously performing their responsibilities is the same even it if it is only their employers that may be held liable for their actions. Petitioner argues that the County faces no irreparable

harm in defending suit because a suit against an entity is not "likely to have a chilling effect on the exercise of public officials' discretion in the discharge of their official duties" since the officials are not sued in their personal capacities. Pet'r Br. 12 (quoting *Roe*, 679 So. 2d at 759). Although police officers do not face individual liability in such circumstances, it elevates form over substance to suggest officers' activities will nevertheless not be chilled. A trial on the merits in this case, for example, would focus exclusively on whether Officer Hernandez acted unreasonably in the manner in which he responded to scene of the burglary. A law enforcement officer similarly situated to Officer Hernandez might thus constrain his reaction to crime-fighting so as to minimize the chance his employer will be subjected to suit for his actions. And, of course, a law enforcement officer would not be unreasonable in thinking that although he may not be liable for money damages for his conduct in the context of an emergency, he may still face negative employment action should his employer be subject to a lawsuit for his conduct.

This concern is especially important. Public safety is at risk where governmental entities are erroneously held liable for their officers' response to an emergency. Officers whose conduct is at issue in a lawsuit may second-guess their instincts when called upon to react to a pressing emergency. Even a minor delay in reaction time could have disastrous consequences for the public and seriously

hamper police officers' ability to effectively fight crime. In addition to the harm that occurs when a governmental entity is deprived of its immunity from suit, these four harms cannot be remedied fully after trial. The Third District properly granted certiorari review upon finding that the County faced irreparable harm from the effect of the trial court's order.

III. THE THIRD DISTRICT PROPERLY GRANTED CERTIORARI REVIEW BECAUSE THE TRIAL COURT'S ORDER DENYING SOVEREIGN IMMUNITY WAS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW SINCE THE RECORD CONCLUSIVELY DEMONSTRATED THE COUNTY'S ENTITLEMENT TO IMMUNITY

The variation of sovereign immunity at issue in this case is extremely important—it shields from suit an officer's method of responding to a pressing emergency. This immunity exists to preserve the longstanding principle that the judiciary should not meddle into sensitive zones of law enforcement that lie at the heart of executive decision-making.

The Third District dutifully applied this principle and concluded correctly that the County cannot be subjected to suit for the manner in which its officers responded to an emergency that "was thrust upon police by the acts of others." *Rodriguez*, 67 So. 3d at 1221. The court's decision was informed by real-time footage captured by a nearby video camera that provides an unbiased, undisputable, and comprehensive account of the emergency to which officers responded. App. Ex. B. Since "the record conclusively demonstrates entitlement

to immunity, it [was] a departure from the essential requirements of the law for [the] trial court to deny a motion for summary judgment on that basis." *Snyder*, 826 So. 2d at 387 (quoting *Stephens v. Geoghegan*, 702 So. 2d 517, 525 (Fla. 2d DCA 1997)).

Petitioner attempts to manufacture a dispute of fact to escape the force of the Third District's finding that the trial court departed from the essential requirements of law. But this case is unlike the majority of negligence cases—where he-said, she-said disputes are common—simply because the events that are at issue in this case were captured by a nearby security video camera. The footage provides an unbiased, undisputable, and comprehensive account of the emergency to which the officers responded.

A. The Sequence of Gunshots Is Not A Disputed Issue Of Fact In This Case

Petitioner contends that the Third District did not credit his version of the facts, namely, that he was supposedly shot in his left buttock. Pet'r Br. 28. This novel version of the facts—not advanced in the pleadings and only first raised in an affidavit Petitioner put forth in opposition to the County's Motion for Summary Judgment—seeks to establish that Officer Hernandez shot him from behind, and the impact caused him to rotate towards Officer Hernandez. Pet'r Br. 28; Resp.

Appx. Ex. B.1 ¶ 9. The video footage and still photographs of the incident, however, prove otherwise. App. Exs. B & C.[11]

They show that Petitioner fell to the ground only after he pointed his revolver at Officer Hernandez, not before, and certainly not in response to a blindsided gunshot wound. Because Petitioner's version of the facts is inconsistent with what is portrayed in the video footage, he cannot create a dispute of fact with is version. *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (reversing denial of summary judgment on qualified immunity where videotape evidence contradicted plaintiff's version of events); *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291 n.3 (11th Cir. 2009) ("We have followed the Supreme Court's example and reviewed *de novo* the videotape evidence that was presented to the district court at the summary judgment stage.") (citing *Scott v. Harris*)*; Sennett v. United States*, 667 F.3d 531, 537 (4th Cir. 2012) ("Given that virtually all of the relevant facts are derived from videotape that is in the record, there are no factual issues to be decided."); *Small v. Moore*, No. 5:07cv200/RS-MD, 2009 WL 1605369, at *5 (N.D. Fla. June 5, 2009) ("Where a videotape capturing the events in question so discredits the non-moving party's version of events that a reasonable jury could not believe it, the court cannot adopt the non-moving party's version, and must view the facts in the light depicted by the videotape.").

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[11] The fourth and fifth still photographs in particular demonstrate the sheer impossibility of Petitioner's contention that he was shot first in the left buttock.

Regardless, the sequence of gunshots is not a material fact in this negligence case anyway. If Petitioner's version of events is credited—that he was shot from behind and involuntarily spun towards the direction of the officer—and the video footage ignored, Officer Hernandez would have committed an *intentional* act. But if an intentional act is the basis of Petitioner's suit, then the proper claim is for an an "intentional tort rather than mere negligence." *Wal-Mart Stores v. McDonald*, 676 So. 2d 12, 17 (Fla. 1st DCA 1996) (noting that plaintiff *could not maintain negligence action* against defendant Wal-Mart for robbery because unknown assailant's conduct in pointing gun at plaintiff and shooting him "was an intentional tort, and not merely negligent"); *see also McDonald v. Ford*, 223 So. 2d 553, 554-55 (Fla. 2d DCA 1969) (plaintiff cannot maintain a negligence claim for what would be an assault or battery). Petitioner's version of the facts thus eviscerates the legal theory that he claims entitles him to relief.

Indeed, both state and federal courts interpreting Florida law have consistently held that there is no cause of action for negligent use of excessive force. *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996); *see also Lewis*, 561 F.3d at 1294 (11th Cir. 2009) (no cause of action for negligent use of force under Florida law), *cert. denied*, 130 S. Ct. 1503 (2010); *Vilceus v. City of West Palm Beach*, No. 08-80968-CIV, 2009 WL 2242604, at *7 n.2 (S.D. Fla. July 27, 2009) ("There can be no cause of action for the negligent use of force.").

Courts insist that the only possible claim to encompass such facts would be battery. *Ritter v. City of Jacksonville*, No. 3:07-cv-506-J-16HTS, 2007 WL 2298347, at *2 (M.D. Fla. Aug. 7, 2007) (observing that battery is the proper cause of action when a theory of "negligent excessive force" is alleged). There is no claim for battery in this case, only negligence. Accordingly, whether Petitioner was shot first from behind does not create a dispute of fact that is material.

Finally, even if this Court were to recognize for the first time a negligent shooting cause of action, Petitioner waived that claim by not properly advancing it to the trial court. *Sunset Harbour Condo. Ass'n. v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the ***specific legal argument*** or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") (citing *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (emphasis added)). It is axiomatic that "issues not presented in the trial court cannot be raised for the first time on appeal." *Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003).

While Petitioner's affidavit alleges that he was shot in his buttocks and the shot "spun [him] around clockwise, so that [he] was rotating towards the direction of the shooter," he made no "specific legal argument" about this fact in his Response to the County's Amended Motion for Summary Judgment. App. Ex. G:

¶ 9; App. Ex. H. The County can thus only speculate that Petitioner's point is that Officer Hernandez was negligent in the act of shooting him—a claim that Florida law does not recognize. Likewise, Petitioner did not make a "specific legal argument" on this point at the summary judgment hearing, either; rather, Petitioner's counsel merely said that his client was first shot in the left buttock, and that it was "[J]ust another thing for you to consider." App. Ex. I: 38. For such a critical issue to have been omitted from the pleadings, one would expect for Petitioner to have raised a cogent legal argument as to how this seemingly critical fact fits into the only remaining claim for negligence. No such argument was ever made and the trial court was never given the opportunity to rule on the matter.

As the video clearly shows, it was not until Petitioner raised his revolver and pointed it at Officer Hernandez that the officer discharged his firearm. Petitioner's suggestion of a different version of the facts and assertion that the "videotape is not conclusive," Pet'r Br. 28, are merely veiled attempts to manufacture a dispute of fact where none exists. And even if it there is a factual dispute about whether Officer Hernandez shot Petitioner before he raised his gun, it is not material because those facts would satisfy only the elements of battery. Negligence is the only claim remaining in this case. Since the record conclusively demonstrates the County's entitlement to sovereign immunity, it was a departure from the essential

requirements of law for the trial court to deny its Motion for Summary Judgment on that basis.

B. There Is No Material Issue Of Fact In This Case Concerning The Emergency Nature Of The Burglary

Petitioner posits that Officer Hernandez did not confront emergent circumstances when he arrived on-scene and witnessed the in-progress, multi-suspect burglary. *See* Pet'r Br. 40 (contending that *Robles* does not apply because an in-progress burglary crime "d[oes] not involve a risk of life or serious injury to members of the public"). He mistakenly views burglary as "a simple property crime." *Id.* Petitioner, however, ignores the fact that it is not the crime itself that poses the danger. Rather, it is the manner in which the crime is committed that poses a substantial risk of violent confrontation between burglars and those attempting to impede their efforts—be it a law enforcement officer responding to an alarm call or an owner of the burglarized property. Crime-stopping efforts must take into account the often unpredictable, dangerous environment in-progress burglaries create. Thus, Officer Hernandez's conduct in responding to the burglary could not have *created* an emergency, as one already existed when he arrived on-scene.

The unsupported assumption that an in-progress burglary is a benign property crime is also contrary to the weight of authority. Indeed, the Supreme Court of the United States has weighed in on the risk of danger inherent in a

burglary crime under Florida law, and arrived at a conclusion that conflicts with Petitioner's conception of the crime.

In *James v. United States*, the Court opined that even an *inchoate* burglary crime—as defined by Florida law— qualifies as a "violent felony" for purposes of federal law. 550 U.S. 192 (2007). In finding that a burglary is a violent felony the Court stressed that "[t]he main risk of burglary arises not from the simply physical act of wrongfully entering onto the property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." *Id*. at 203; *see also Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (noting that burglary is a "classic example" of a "crime of violence" because "burglary, by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime"); *see also Moore v. City of Columbus*, 98 Ohio App. 3d 701, 707 (Ohio Ct. App. 1994) (affirming entry of summary judgment in favor of city where lower court found that officers responding to an in-progress burglary were on an "emergency call" and thus immune from a car accident experienced in-transit); *Sims v. Town of Ramapo*, 676 N.Y.S.2d 421, 421-22 (N.Y. App. Div. 1998) (acknowledging that "an officer responding to a radio call concerning a burglary in progress is engaged in an emergency operation").

Petitioner rejects this conception of burglary and instead frames it as a "simple property crime in progress involving a nighttime break-in of a closed business," Pet'r Br. 38, "which did not involve a risk of life or serious injury to members of the public," *id*. at 40. Petitioner does not, however, cite to a single authority in support of his conception of a burglary crime.

Regardless of what response to other kinds of burglaries may be warranted, the facts of this case belie Petitioner's argument there was no emergency at issue when Officer Hernandez arrived on-scene. The fact that Petitioner "emerged from his vehicle carrying a firearm [illustrates that burglary, by its nature,] is a serious emergency which poses a level of danger to the public." *Rodriguez*, 67 So. 3d at 1221. Arguably, the danger surrounding the scene in this case could have been heightened had Officer Hernandez not responded to the dispatch call and Petitioner confronted any one of the three suspects either breaking into the business or waiting in a car down the street.

The in-progress burglary to which officers responded in this case was especially dangerous, and easily qualifies as an "emergency," for several reasons. First, a burglar was inside the business when Officer Hernandez first responded to the scene. This was not a false alarm call, or one in which the criminal act had been accomplished and the criminal already fled the scene. Petitioner ignores the grave risk to officers and bystanders who confront a burglar inside a burglarized

structure. The risk of confrontation is so extreme "because the [burglar] is likely to cause greater alarm to whomever he confronts and is likely to have no easy way out." *United States v. Jackson*, 113 F.3d 249, 253 (D.C. Cir. 1997); *In re Sealed Case*, 153 F.3d 759, 767 (D.C. Cir. 1998) ("The need to prevent such a confrontation, by intercepting the burglar before he potentially confronts (or is confronted by) an occupant, is surely an exigent circumstance.").

Second, there were two other suspects in a car slightly down the street. App. Ex. E: 44-46. Obviously the presence of additional suspects only heightens the urgency of the situation and makes it all the more critical for the officers responding to intervene and resolve it as quickly as possible.

Third, it was 2:00 in the morning when Officer Hernandez arrived on the scene. App. Exs. B & C. Risks to officer safety are obviously heightened when visibility is poor.

Fourth, all of the events transpired in an extremely short window of time. In fact, Officer Hernandez had only two seconds between when he exited his vehicle and faced the barrel of Petitioner's gun to appreciate the situation and attempt to resolve it. For all of these reasons, Officer Hernandez faced an "emergency" upon arriving at the scene of the nighttime burglary of Petitioner's business. The Third District Court of Appeal's decision in *Robles* is instructive.

In that case, officers faced a hijacked bus filled with schoolchildren. In an effort to rescue the children, a police sharpshooter was summoned to the hijacked bus's ultimate destination. *Robles*, 802 So. 2d at 454. Upon reaching his destination, the sharpshooting officer witnessed the driver "looking directly at him and making a sudden unexpected move with his hands." *Id.* As here, the officer "feared for his life and . . . fired his weapon at [hijacker]." *Id.* The hijacker was killed, but unfortunately one of the children on the bus was struck by debris and suffered an eye injury. *Id.* The County was sued for the injury to the child.

The Third District affirmed the trial court's entry of summary judgment in favor of Miami-Dade County. Because the officer "had to choose between different actions, each of which posed a potential threat," *id.*, the County was immunized from suit for his actions. The court explained that where "officers [] are left no option but to choose between two different evils . . . th[e] choice between risks [] is entitled to the protection of sovereign immunity . . . ." *Id.* at 455 (citing *City of Pinellas Park*, 604 So. 2d at 1227). At the time the officer shot into a bus filled with schoolchildren there was of course a risk that a misfire could result in serious injury to someone other than the suspect. But the district court of appeal was unwilling to second-guess the actions taken by the officers during a very tense situation. That principle applies here.

Only two seconds after Officer Hernandez reached the highly-charged scene of an in-progress burglary, he faced an unknown, plain-clothed individual holding a revolver pointed in his direction. Officer Hernandez thus had to make a "cho[ice] between different risks," *City of Pinellas Park*, 604 So. 2d at 1227. He had the option of either not shooting and risk being shot at, or he could shoot, albeit at the risk of shooting a bystander or someone who was associated with the burglary itself. There was thus a great risk of bodily harm attached to both courses of action. "It is this choice between risks that is entitled to the protection of sovereign immunity . . . because it involves what essentially is a discretionary act of executive decision-making." *Id.* at 1227 (citing *Kaisner*, So.2d at 737).

Deference to the actions taken by police officers makes the most sense when the response is to an in-progress, nighttime burglary because the danger under which officers labor is unmistakable. As here, officers often find themselves caught between a rock and a hard place when confronting armed individuals at the scene of an in-progress burglary: they can make the split-second decision to use force or decide not to and suffer the consequences. So long as their efforts to apprehend the suspect are not "flagrantly dangerous" under the circumstances, police officers' conduct should not be subjected to a review process that has the benefit of hindsight. Separation of powers principles demand that officers' split-

second decision-making—in the midst of counteracting an ongoing violent crime—not be second-guessed in a lawsuit against their municipal employers.

C. The Emergency Immunity Exception To The Waiver Of Sovereign Immunity, And Not The *Commercial Carrier* Test, Governs This Case And Bars Petitioner's Negligence Claim Against The County

The Third District correctly noted that officers' conduct in this case cannot be the subject of a lawsuit because the emergency exception to the waiver of sovereign immunity applies. *Rodriguez*, 67 So. 3d at 1222-23. Contrary to Petitioner's suggestion, Pet'r Br. 31, the general four-part *Commercial Carrier* test does not dictate whether Officer Hernandez's conduct was discretionary, and thus immune from suit. That analysis simply does not apply to "police action in emergency situations." *Smith*, 19 F. Supp. at 1333; *accord Rodriguez*, 67 So. 3d at 1222-23. This is because where emergency action is called for, the officer's response is considered tantamount to a discretionary decision. *Kaisner*, 543 So. 2d at 738 n. 3 ("The way in which government agents respond to a serious emergency is entitled to great deference, and may in fact reach a level of such urgency as to be considered discretionary and not operational."). Petitioner's reliance on the *Commercial Carrier* test, and his conclusion that Officer Hernandez's actions were operational, is thus misplaced. Petitioner's alternative argument—that *City of Pinellas Park* and *Kaisner*—are in tension with the Third District's ruling is also

misplaced. Both cases are easily distinguishable and do not dictate the outcome here.

The issue in *City of Pinellas Park* was whether the command to chase a red-light violator with a "threatening stream of publicly-owned vehicles hurling pell-mell, at breakneck speed, down a busy roadway in one of Florida's most densely populated urban areas," was an operational or discretionary decision. 604 So. 2d at 1227. The unfortunate result of the "flagrantly dangerous" high-speed chase was the death of two innocent sisters. *Id.* at 1224, 1226. This Court found that the "enormous overreaction" by law enforcement—"reminiscent of the most violent, daredevil films, that Hollywood stunt men have produced"—could not qualify as discretionary. *Id.* at 1227. The Court also found that because officers created this substantial risk of harm when deciding to chase the red-light-violator, their actions cannot "be shielded by sovereign immunity." *Id.* (citing *Kaisner*, 543 So. 2d at 735). The exceptional facts in *City of Pinellas Park* are far removed from the facts in this case and do not come close to dictating the result here.

The officers in *City of Pinellas Park* contributed substantially to the risk of injury by deciding to engage in a massive, twenty-three car high-speed chase of a mere red-light violator. In this case, Officer Hernandez, caught in the midst of an ongoing burglary while at the same time confronted by Petitioner aiming a firearm at him, did not have the same luxury. Indeed, as the Third District wondered,

"who can say whether it would have been safer for Rodriguez to have been left to his own devices while the officers reconnoitered and planned?" *Rodriguez*, 67 So. 3d at 1222. In any event, Officer Hernandez's decision to respond to the ongoing burglary in the manner he did does not rise to the level of a "flagrantly dangerous" course of action, as in *City of Pinellas Park*. Only with the benefit of hindsight now do we have the freedom to speculate about whether Officer Hernandez had available to him a safer course of action then. But that is an exercise this Court has repeatedly disavowed.

Petitioner places great weight on this Court's statement in *City of Pinellas Park* that "state agents can[not] escape liability if they have created or substantially contributed to the emergency through their own negligent acts or failure to adhere to the reasonable standards of public safety." Pet'r Br. 36-37 (citing *City of Pinellas Park*, 604 So.2d at 1226-27). That statement, however, must be read in its proper context. The Court in *City of Pinellas Park* was attempting to limit the *Kaisner* exception for emergency-response sovereign immunity in a way that makes clear that officers cannot engage in outrageous conduct and expect that conduct to be immunized from suit. Because of the exceptional facts in that case, the Court's chief concern was to establish a limiting principle as to what qualifies as discretionary conduct. The danger was that if this Court had shielded from suit conduct "reminiscent of the most violent, daredevil films that Hollywood stunt

men have produced," *id.* at 1227, officers would have free rein to enforce the law according to their darkest whims. This Court rightly found that proposition unsettling. This case does not present the same concerns.

Petitioner also contends that *Kaiser* supports a finding that the conduct of officers in this case can be the subject of a lawsuit against the County. There, the Court considered only whether the manner in which an officer conducted a routine traffic stop was a discretionary decision. *Kaisner*, 543 So. 2d at 737. This Court opined that the decision was operational because "[t]he precise manner in which a motorist is ordered to the side of the road is neither quasi-legislative or sensitive." *Id*. In reaching its conclusion, the *Kaisner* Court erected an important limitation to its holding. It acknowledged expressly that the default framework used to determine whether conduct is discretionary or operational does not apply where officers are "confronted with an emergency requiring swift action to prevent harm to others." *Id.* at 738 n.3. Petitioner thus incorrectly extends *Kaisner*'s use of the *Commercial Carrier* framework to a set of facts that the *Kaisner* Court itself recognized was outside that framework.

Petitioner also advances the misguided contention that *Brown v. Miami-Dade County*, 837 So. 2d 414 (Fla. 3d DCA 2001), requires a result different from that reached by the Third District below. *See* Pet'r Br. 40. The Court in *Brown* held only that the way in which the police ***implemented*** a planned sting event was

operational. *Id.* at 418. Here, Officer Hernandez was not operating under a staged environment; he was thrust into an emergency that was only heightened by Petitioner's presence at the scene and his actions in raising a firearm at the officer. In the midst of that emergency, Officer Hernandez's actions were entitled to deference. The County is thus immune for the consequences of his measured response.

The urgency faced by an officer responding to an in-progress burglary involving multiple subjects is manifold. If officers do not act quickly there is a risk that a violent and possibly armed felon will escape and continue to prey on unsuspecting citizens. Also, there is the risk that, as here, an individual bystander might arrive at the scene and confront the burglars head-on. The risk of violence and injury in such a scenario is high. Petitioner's reliance upon the traditional *Commercial Carrier* test for deciding whether conduct is discretionary or operational is misplaced. The officer's actions are deemed discretionary because he used his judgment in responding to an ongoing, urgent, and rapidly-unfolding crime. The County is sovereignly immune from suit for those actions.

CONCLUSION

Based on the arguments above, Respondent Miami-Dade County requests that this Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been generated in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the *Answer Brief on the Merits* was served by U.S. Mail to the following: **BARBARA A. SILVERMAN, ESQ., CURTIS B. MINER, ESQ., and ERVIN A. GONZALEZ, ESQ.,** Colson Hicks Eidson, 255 Alhambra Circle, Penthouse, Coral Gables, FL 33134; **THOMAS W. POULTON, ESQ.,** DeBevoise & Poulton, P.A., Lakeview Office Park, Suite 1010, 1035 S. Semoran Boulevard, Winter Park, FL 32792; and **PAMELA J. BONDI, ESQ.**, Attorney General, Office of the Attorney General, The Capitol – PL 01, Tallahassee, FL 32399-1050, on this 20th day of March, 2012.

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