IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Case No.: SC11-1913

(Third DCA Case No. 3D10-856)

JOSE LAZARO RODRIGUEZ
Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND THE FACTS

This case involves Miami-Dade County's (the "County") emergency law enforcement response to an in-progress burglary. The facts are undisputed. The Miami-Dade Police Department was dispatched to respond to an audible alarm at an electronics store. Officers Jesus Hernandez ("Officer Hernandez") and Javier Albite responded to the call. As they arrived at the scene, the officers actually saw a burglar breaking into the building. As Officer Hernandez emerged from the car to apprehend the burglar, another unidentified man arrived on the scene and pointed a gun at him. This man later turned out to be Petitioner, the owner of the electronics store. Officer Hernandez immediately fired his weapon in self-defense.

The County moved for summary judgment on the grounds that sovereign immunity shields it from negligence claims challenging the actions an officer takes in responding to an emergency. The trial court denied the County's motion. The County filed a petition for writ of certiorari with the Third District Court of Appeal ("District Court"), seeking review of the denial of its motion for summary judgment. In a published opinion following oral argument, the District Court granted the petition, rejecting Petitioner's argument that *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996) foreclosed the availability of certiorari review (the "Opinion"). The District Court also agreed with the County on the merits—that Officer Hernandez's decision to shoot was "the type of fundamental law

enforcement decision . . . that should be left to the expertise of law enforcement rather than [] put to a referendum by the courts and juries." *Miami-Dade County v. Rodriguez*, 67 So. 3d 1213, 1222 (Fla. 3d DCA 2011). The Court then certified conflict with the Fifth District Court of Appeal's per curiam decision in *Florida A&M Univ. Bd. of Trustees v. Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), and the Second District Court of Appeal's decision in *Pinellas Suncoast Transit Auth. v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996), review dismissed, *Pinellas Suncoast Transit Auth. v. Wrye*, 628 So. 2d 1100 (Fla. 1996).

SUMMARY OF ARGUMENT

Although the District Court certified conflict in this case, this Court should deny jurisdiction for a number of reasons. First, and despite Petitioner's assertions to the contrary, the District Court's decision does not conflict with this Court's decision in *Roe*. *Roe* holds only that a denial of sovereign immunity is not the proper subject of an interlocutory appeal under Florida Rule of Appellate Procedure 9.130; importantly, this Court's holding in *Roe* did not address whether an appellate court may review a denial of sovereign immunity via certiorari writ.[1]

Second, there is no "direct and express" conflict among the district courts of appeal on this narrow question in either of the cases cited by the District Court.

[1] This Court should also note that the application to an appellate court for certiorari review of a denial of sovereign immunity is rare because it is only with an undisputed factual record that an appellate court is in the position to evaluate whether sovereign immunity applies at all.

Thomas, the first case cited by the District Court, was a per curiam decision and therefore ineligible for purposes of creating conflict. 19 So. 3d 445 (Fla. 5th DCA 2009). Additionally, the Second District Court of Appeal's decision in *Wrye* does not squarely address the question presented. This Court should decline jurisdiction to allow further percolation among the district courts of appeal in response to the District Court's well-reasoned Opinion.

ARGUMENT

I. The Decision Below Does Not Expressly and Directly Conflict With This Court's Decision in *Roe*

The Florida Constitution provides that this Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of . . . the supreme court on the ***same question of law.***" FLA. CONST. art. 5, § 3(b)(3) (emphasis added). Petitioner's contention that the District Court's Opinion expressly and directly conflicts with this Court's holding in *Roe*, Pet. at 8—9, is misguided.

In *Roe*, this Court reviewed the First District Court of Appeal's refusal to review the denial of a motion to dismiss on sovereign immunity grounds. Petitioners there contended that the rule espoused in *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994)—allowing interlocutory review of a denial of qualified immunity—extended to denials of sovereign immunity as well. *Roe*, 679 So. 2d at 758. Although this Court disagreed with petitioners, and found that there was not a

separate category under Florida Rule of Appellate Procedure 9.130 for appeals of orders denying sovereign immunity, it did not expressly address or prohibit reviewing courts from exercising their certiorari jurisdiction in such cases, where appropriate. It refused only to "extend *Tucker* beyond the circumstances of that case," *id.* at 759, and carve out a new category of non-final, interlocutory orders that may be reviewed as of right under Rule 9.130(a)(3). The question ruled upon by the District Court in this case was simply not the question presented in *Roe*. Therefore, there is no express and direct conflict between the Opinion and *Roe*, and this Court should decline to take jurisdiction of this case.

II. The District Courts of Appeal Are Not Expressly and Directly in Conflict

The District Court's certification of conflict should be disregarded, as should Petitioner's assertion that the Opinion is in "express and direct conflict" with the *Thomas* and *Wrye* opinions. This Court has established that in order to rise to the level of an "express and direct" conflict it is not enough that two district courts of appeal reached contrary conclusions on a given issue of law.

In *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980), this Court declined jurisdiction where the district court of appeal decision purportedly establishing conflict was a per curiam decision. This Court explained that two decisions are not in conflict where one of the decisions requires the Court to "reexamine a case cited in a per curiam decision to determine if the contents of

that cited case now conflict with other appellate decisions." *Id.* at 1369. Petitioner's contention that the Fifth District Court of Appeal's per curiam decision in *Thomas* is enough to establish a conflict with the district court's decision here thus runs directly counter to *Dodi*'s holding. As in *Dodi*, the Fifth District Court of Appeal's decision in *Thomas*—that it lacks jurisdiction to review a denial of a motion for summary judgment asserting sovereign immunity—was a per curiam decision that relied upon two cites without any explanation. *Thomas*, 19 So. 3d at 446 ("We conclude that we lack jurisdiction to review this interlocutory order.") (citing *Roe*; *School Bd. of Miami-Dade County v. Levya*, 975 So. 2d 576 (3d DCA 2008)). *Thomas* therefore cannot be relied upon to create a conflict sufficient for jurisdiction in this Court.

Furthermore, there is at most only an apparent conflict between the Second District Court of Appeal's decision in *Wrye* and the District Court's decision here. *Wrye* did not squarely address whether an appellate court has the power to exercise its certiorari jurisdiction to review a denial of sovereign immunity at summary judgment. The only issue in front of the *Wrye* panel was whether the court had jurisdiction over an "appeal [of] a nonfinal order challenging the denial of [a] motion to dismiss based on sovereign immunity," *Wrye*, 750 So. 2d at 30 (emphasis added). *Wrye* does not mention that the appellant sought certiorari review of anything. *Wrye's* passing assertion that it did not have "jurisdiction to

review the denial of the motion to dismiss based on sovereign immunity . . . as a certiorari proceeding," *id*., was dicta.[2] Nevertheless, Petitioner misstates the ***holding*** in *Wrye* to be that "the district court lacked certiorari jurisdiction to review the denial of a motion for summary judgment or motion to dismiss based on a defense of sovereign immunity." Pet. at 2. Despite Petitioner's statements otherwise, the ultimate holding in *Wrye* does not reflect a conflict with the Opinion in this case.

Petitioner also incorrectly suggests that the District Court's Opinion conflicts with the First District Court of Appeal's decision in *Citizens Property Insurance Corp. v. San Perdido Assoc., Inc.*, 46 So. 3d 1051 (1st DCA 2010).[3] Pet. at 9—10. The narrow question at issue in *Citizens* was whether the district court could exercise its certiorari jurisdiction to review the trial court's denial of Citizens Property Insurance Corporation's statutory immunity under Fla. Stat. § 627.351(6)(s)(1).[4] The County appeared as *amicus* in *Citizens* and argued that

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[2] Notably, in the sixteen years since *Wrye* was decided, the Second District Court of Appeal has not offered any indication that it intends to adopt its dictum as binding precedent. Without any such suggestion, there is simply no conflict for this Court to resolve. This Court would thus be wise to conserve its resources and allow for the Second District Court of Appeal to react to the District Court's well-reasoned decision before accepting jurisdiction over this issue.

[3] *Citizens* is currently pending before this Court, Case No. SC10–2433.

[4] The First District Court of Appeal phrased the issue for review too broadly, certifying a question involving certiorari review of a denial of sovereign immunity generally, even though the issue before that court involved Citizens' statutory immunity only, and not traditional immunity, such as exists in this case.

the statutory immunity at issue there is not the same as the common law sovereign immunity of governmental entities. The differences between the immunities at issue in *Citizens* and this case mean that no conflict exists between the two decisions.

At most, the District Court's Opinion foreshadows what may be a future tension with other district courts of appeal. But the Florida Constitution imposes a higher threshold than mere tension: the decision must "expressly and directly conflict," FLA. CONST. art. 5, § 3(b)(3), with that of another district court of appeal. At present, there is no discernible conflict on the narrow question of whether a district court may exercise its discretion and review a denial of sovereign immunity by certiorari writ because both the Second and Fifth District Court decisions were devoid of any reasoning. Indeed, neither opinion is more than a few sentences long. The District Court's Opinion was the first thoroughly-reasoned decision on the narrow question presented. Given sufficient time to react to the District Court's well-reasoned Opinion, the other district courts may likely follow the District Court's analysis. Even if the appellate courts diverge at some point, however, this Court should not jump the gun and rule on a conflict until such conflict actually exists.

CONCLUSION

Although the District Court certified conflict, the cases upon which it and Petitioners rely do not establish the kind of express and direct conflict required for this Court to exercise its discretion and grant jurisdiction. The District Court has now analyzed the issues in its comprehensive Opinion. This Court should decline jurisdiction in this case and allow the other district courts of appeal to issue their own decisions before determining that a conflict exists on this narrow issue of law.

Respectfully submitted this 25th day of October, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the *Miami-Dade County's Response to Petitioner's Brief on Jurisdiction* was served by U.S. Mail on October 25, 2011 upon counsel for Plaintiff/Respondent, **Ervin Gonzalez, Esq., Curtis B. Miner, Esq.**, and **Barbara Silverman**, Colson Hicks Eidson Colson Cooper Matthew Martinez Gonzalez Kalbac Kane, 255 Aragon Avenue, Coral Gables, FL 33134.

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Assistant County Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been prepared in Times New Roman 14-point font and complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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