IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, v. SCOT RALPH PETERSON, Defendant.	: : : : : : : :	Case No. 19-007166CF10A

MOTION TO DISMISS

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COMES NOW, the Defendant, SCOT RALPH PETERSON, by and through the undersigned counsel, pursuant to Fla. R. Crim. P. 3.190, U.S. Const. amend. XIV, Fla. Const. art. I, § 9, U.S. Const. art. I, §§ 9 & 10, and Fla. Const. art. I, § 10 hereby moves to dismiss the information *in toto* with prejudice. In support thereof the Defendant states as follows.

INTRODUCTION

"Throughout history, there has been a long line of cases where prosecutors have attempted to stretch statutes to cover conduct that they consider criminal." Ellen S. Podgor, "*What Kind of a Mad Prosecutor" Brought Us This White Collar Case*, 41 Vt. L. Rev. 523 (2017) (citing, *inter alia*, *Cleveland v. United States*, 531 U.S. 12 (2000)).

The instant case is yet another unfortunate example. In the case at bar, the State has stretched the child neglect, culpable negligence, and perjury statutes beyond their breaking points. The State's legal theory was that the Defendant — as a deputy sheriff — was a "caregiver" of the students at Marjory Stoneman Douglas High School and that he had a legal duty to enter Building 12.[1] The State's legal theory does not withstand serious scrutiny. As demonstrated below, the State's tortured reading of the operative statutes must be rejected in light of well-established canons of statutory construction and binding precedent. The instant motion should be granted in full.

PROCEDURAL HISTORY & BACKGROUND

I. PETERSON'S ROLE AS A BROWARD SHERIFF'S OFFICE SCHOOL RESOURCE OFFICER

Peterson was employed by the Broward Sheriff's Office ("BSO") as a School Resource Office ("SRO"). On July 25, 2017, BSO executed a "School Resource Officer Agreement" ("SRO

[1] While this was a horrific tragedy, and Defendant wishes he could have saved the students from harm, ultimately he was under no legal duty to guarantee their safety.

Agreement") with the School Board of Broward County, Florida. A copy of the SRO Agreement is attached hereto as Exhibit 1.

The SRO Agreement clearly states that "[a]n SRO shall not function as a school disciplinarian or security officer and shall not intervene in the normal disciplinary actions of the Participating Schools." Ex. 1 at ¶ 2.05. The SRO Agreement also states that there is no waiver of sovereign immunity under Fla. Stat. § 768.28, and that there are no third-party beneficiaries. Ex. 1 at ¶¶ 3.01 & 3.02. Further, the SRO Agreement is also clear that the relationship is one of an independent contractor, "and not as an officer, employee or agent of one another." Ex. 1 at ¶ 3.03. *See also id.* ("[n]othing within this Agreement is intended to create an agency or employment relationship between [the School Board of Broward County] and any officer assigned by [BSO] to participate in the SRO Program."). Florida Statutes provide the statutory definition and role of an SRO to be law enforcement officers, whose "*powers and duties* of a law enforcement officer shall continue throughout the employee's tenure as a school resource officer." Fla. Stat. § 1006.12(1)(a) (emphasis added).

During the tragic events at issue in this case, BSO had standard operating procedures ("SOP") for active shooter incidents. A copy of the BSO Active Shooter SOP is attached hereto as Exhibit 2. The Active Shooter SOP provides that "[i]f real time intelligence exists the sole deputy or a team of deputies *may* enter the area and/or structure to preserve life." Ex. 2 at § 4.37.2(C) (emphasis added). Furthermore, the BSO Active Shooter SOP provides that "[i]f the situation turns to a barricade or hostage situation the response team *will contain, isolate, communicate and wait for SWAT.*" Ex. 2 at § 4.37.2(G) (emphasis added).

II. THE INSTANT LITIGATION

On June 24, 2019, an eleven-count information was filed asserting the following counts: Counts 1-7 Neglect of a Child in purported violation of Fla. Stat. §§ 827.01 & 827.03, Counts 8-10 Culpable Negligence in purported violation of Fla. Stat. § 784.05(1), and Count 11 Perjury When Not In An Official Proceeding in purported violation of Fla. Stat. § 837.012.

APPLICABLE LAW

I. AS APPLIED CHALLENGE

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts at hand." *Jean v. State*, 764 So. 2d 605, 607 (Fla. 4th DCA1999) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). An "as applied" challenge is to the constitutionality of the fact-specific application of a statute to the person challenging the statute. *See e.g., State v. Rygwelski*, 899 So.2d 498, 503 (Fla. 2d DCA 2005).

II. DUE PROCESS

No "... State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similar to the Federal Constitution, the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Fla. Const. art. I, § 9.

The Florida Supreme Court has interpreted "the Florida Constitution to offer *more* protection than the right provided in the Fifth Amendment to the United States Constitution." *Myers v. State*, 211 So. 3d 962, 971 (Fla. 2017) (cleaned up, emphasis in original).

III. *EX POST FACTO*

"No bill of attainder or *ex post facto* Law shall be passed." U.S. Const. art. I, § 9. "No state shall ... pass any bill of attainder, *ex post facto* law ...." U.S. Const. art. I, § 10. The Florida Constitution likewise provides: "No bill of attainder, *ex post facto* law or law impairing the obligation of contracts shall be passed." Fla. Const. art. I, § 10.

IV. VOID FOR VAGUENESS

> In our constitutional order, a vague law is no law at all. Only the people's elected representatives in [State Legislatures] have the power to write new [State] criminal laws. And when [a State Legislature] exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When [a State Legislature] passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [State Legislatures] to try again.

United States v. Davis, 139 S. Ct. 2319, 2323 (2019) (brackets added). Against this constitutional backdrop, the U.S. Supreme Court has been clear:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (cleaned up). "[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law

enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). When a legislature abdicates its responsibility for setting standards of the criminal law with such a "standardless sweep" as to "allow policemen, prosecutors and juries to pursue their personal predilections," there is a denial of due process. *Id.* at 575-76.

Florida law is similar to federal law in that,

> the requirements of due process of Article I, Section 9, Florida Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States are not fulfilled unless the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. It is constitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong.

State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). A vague statute, "because of its imprecision, may also invite arbitrary and discriminatory enforcement." *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla. 1984).

V. PROHIBITION ON STRICT LIABILITY OFFENSES

"In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (cleaned up). Courts are to "normally characterize this interpretive maxim as a presumption in favor of 'scienter,' by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission." *Id.* (cleaned up). Indeed, "[s]cienter requirements advance this basic principle of criminal law by helping to separate those who understand the wrongful nature of their act from those who do not." *Id.* at 2196 (cleaned up).

> Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence.

Staples v. United States, 511 U.S. 600, 605 (1994) (cleaned up).

Statutes lacking a scienter or *mens rea* requirement are more likely to be struck down as being void for vagueness. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979) (lack of scienter requirement was fatal to criminal statute prohibiting a particular abortion procedure if the physician determined the fetus was potentially viable); *Smith v. California*, 361 U.S. 147, 154-55 (1959) (ordinance imposing strict criminal liability on bookseller possessing obscene material irrespective of knowledge of such material was unconstitutional); *Lambert v. California*, 355 U.S. 225, 228-29 (1957) (felon registration ordinance carrying criminal penalties was unconstitutional as applied to a criminal defendant who had no knowledge of the duty to register).

Florida law is similar to federal law in that "[s]cienter is often necessary to comport with due process requirements[.]" *State v. Giorgetti*, 868 So.2d 512, 518 (Fla. 2004). "Criminal statutes are presumed to include broadly applicable scienter requirements in the absence of express contrary intent[.]" *Cashatt v. State*, 873 So.2d 430, 436 (Fla. 1st DCA 2004).

Crimes in which "criminal liability is imposed in the absence of any *mens rea* whatsoever," *United States v. Bailey*, 444 U.S. 394, 404 n.4 (1980), are often referred to as "strict liability" crimes. "While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, they are generally viewed with disfavor." *State v. Rubio*, 917 So.2d 383, 394 (Fla. 5th DCA 2005) (citation omitted), *aff'd in part and rev'd in part*, 967 So.2d 768 (Fla. 2007).

Where the statute is silent on the issue of scienter, the recent trend is to read a guilty knowledge requirement into the law, at least in felony cases." *Hodge v. State*, 866 So.2d 1270, 1272 (Fla. 4th DCA 2004) (citation omitted).

ARGUMENT

I. PETERSON IS IMMUNE FROM SUIT

Fla. Stat. § 768.28 provides:

> No officer, *employee*, or agent *of the state or of any of its subdivisions* shall be held personally liable in tort *or named as a party defendant in any action for any injury or damage suffered* as a result of any act, event, or *omission of action in the scope of her or his employment or function*, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Fla. Stat. § 768.28(9)(a) (emphasis added). "Qualified immunity of public officials involves immunity from suit rather than a mere defense to liability." *Keck v. Eminisor*, 104 So. 3d 359, 364 (Fla. 2012) (cleaned up).

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So.3d 828, 837–38 (Fla. 2011). In this case (i) Peterson has been named as a defendant, (ii) he was working in his official capacity as a BSO deputy, and (iii) the action arises from his alleged omissions of action in his official capacity. Peterson did not act in bad faith or with malicious purpose because there is neither statutory nor constitutional authority imposing a duty on Peterson to confront Cruz in a firefight, *see* discussion *infra*, which is cumulative to the extant BSO Active Shooter SOP (Ex. 2) (stating that "*[i]f real time intelligence exists* the sole deputy or a team of deputies *may* enter the area

and/or structure to preserve life.") (emphasis added). Accordingly, as this case is "any action" arising from Peterson's alleged omission of act during his official actions as an employee of BSO, Peterson is immune from suit.

To the extent that further analysis is required, Florida Statutes, Florida Supreme Court case law, U.S. Supreme Court case law, and the Rule of Lenity support Peterson's contention that he is immune form suit.

First, the statutory scheme provides that "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, *and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.*" Fla. Stat. § 30.07 (emphasis added). Thus, to the extent that Peterson was negligent in his role as a BSO deputy (as point we contest), former Sherriff Israel was legally responsible for such negligence. It necessarily follows that when the Legislature provided in Fla. Stat. § 30.07 that the Sherriff is responsible for negligent acts of his deputy sheriffs, Fla. Stat. § 768.28(9)(a) comes to bear precluding this Court from allowing any action to proceed where the deputy sheriff was named as a party defendant.

Second, the Florida Supreme Court has held "*that there has never been a common law duty to individual citizens for the enforcement of police power functions.*" *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 914–15 (Fla. 1985) (emphasis added); *see also Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (standing for the proposition that (with some exceptions not relevant here) police officers do not owe a legal duty under the 5th & 14th amendments of the U.S. Constitution to protect citizens). Further, "there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, *there is no common law duty to prevent the misconduct of*

third persons." *Trianon Park*, 468 So. 2d at 918 (emphasis added). *See also Vann v. Dep't of Corr.*, 662 So. 2d 339, 340 (Fla. 1995) (no duty to protect the public from the lawless acts of third parties).

Thus, as there has never been a duty imposed on individual police officers to provide police power functions, and as there is no duty to prevent the misconduct of third persons (such as Cruz), as a matter of law, Peterson's actions cannot rise to being "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property," *see* Fla. Stat. § 768.28(9)(a), to prevent Peterson from being immune from suit. Accordingly, statutory immunity is proper here and the Court must dismiss Counts 1-10 with prejudice.

Third, the analogous situation of qualified immunity balances two important public interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Consequently, the U.S. Supreme Court has "explained many times: qualified immunity attaches when an official's conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (cleaned up, emphasis added). "Although [the Supreme Court's] caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

Based on the authorities cited above, and discussed more fully below, because (i) there was no clearly established duty on the part of Peterson to engage Cruz in a gunfight, and (ii) there was no clearly established right on the part of the decedents that required Peterson to likewise engage Cruz in a gunfight, immunity attached to Peterson's actions and/or inactions. This is necessarily so

as there is no existing precedent establishing that a deputy sheriff, without military grade body armor and armed only with his/her service pistol, would have to engage an active shooter armed with an AR-15. Consequently, there can be no argument that the "backdrop of the law at the time," *see Brosseau v. Haugen*, 543 U.S. 194, 198 (2004), of the tragic event "placed the [legal] question beyond debate," *see Kisela*, 138 S. Ct. at 1152. Immunity is required here.

In a strikingly similar situation involving a mass-shooting at the Pulse nightclub, United States District Judge Paul G. Bryon of the Middle District of Florida held that notwithstanding a City of Orlando law enforcement officer's failure to enter the Pulse nightclub, such inaction was entitled to qualified immunity. *Aracena v. Gruler*, 347 F. Supp. 3d 1107, 1119 (M.D. Fla. 2018). In dismissing the federal civil lawsuit, the *Aracena* court reasoned:

> Since this entire circumstance begins and ends with a private actor, Officer Gruler cannot be sued for violating Plaintiff's due process rights. Indeed, Count I boils down to a claim that Gruler initially absconded and then failed to protect Plaintiff after the attack began. Yet, the affirmative duty of protection that the Supreme Court rejected in *DeShaney* is precisely the duty Plaintiff relies on in this case. Officer Gruler's failure to protect Plaintiff against private violence simply does not constitute a violation of the Due Process Clause. The Pulse shooting was a spontaneous act of violence carried out by a thug with no regard for human life.

Id. at 1115 (cleaned up). The logic and reasoning of *Aracena* applies with equal force to the facts of this case; the Court should hold that Peterson is immune from suit.

Fourth and *finally*, to the extent that there is any ambiguity, such must be resolved in favor of Peterson as a criminal defendant. If a law is "indefinite and susceptible of differing constructions, the rule of lenity applies; the statute must be construed in the manner most favorable to the accused." *State v. Del Castillo*, 890 So.2d 376, 398 (Fla. 3d DCA 2004). *See* Fla. Stat. § 775.021(1) (codifying the rule of lenity). Indeed, stretching the statutes to apply to this case violates "the rule

of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is perhaps not much less old than the task of statutory construction itself." *Davis*, 139 S. Ct. at 2333 (cleaned up); *see also Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *Watson v. Stone*, 148 Fla. 516, 518-19 (Fla. 1941) ("[a]ny doubt or ambiguity in the provisions of criminal statutes are to be construed in favor of the citizen, life and liberty.").

II. THE CULPABLE NEGLIGENCE COUNTS MUST BE DISMISSED WITH PREJUDICE

Fla. Stat. § 784.05(1) provides that "[w]hoever, through culpable negligence, exposes another person to personal injury commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083." "'Culpable negligence' isn't statutorily defined." *Kish v. State*, 145 So. 3d 225, 227–28 (Fla. 1st DCA 2014). Moreover, Fla. Stat. § 784.05(1) makes no provision for the health, safety and/or life of the criminal defendant.

A. Peterson Was Not Negligent

The Florida Supreme Court has defined negligence as comprising four elements:

> 1. A duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
> 2. A failure on the defendant's part to conform to the standard required: a breach of the duty.
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
> 4. Actual loss or damage.

Clay Elec. Co-op., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003) (cleaned up). As demonstrated below, the first three elements are not present here (the absence of any one of which requires the Court to dismiss with prejudice).

First, there was no duty[2] on the part of Peterson to protect the victims. "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).

There is no statutory authority that required Peterson to enter Building 12 and engage Cruz in a gunfight. Further, the Florida Supreme Court has held that there is neither a duty for the enforcement of police functions, nor a duty to prevent the misconduct of third parties. *Trianon Park*, 468 So. 2d at 914–15, 918; *Vann*, 662 So. 2d at 340. *See also Castle Rock*, 545 U.S. 748 (police officers do not owe a legal duty under the 5th & 14th amendments of the U.S. Constitution to protect citizens). The fact that there is neither statutory nor constitutional authority imposing a duty on Peterson is cumulative to the extant BSO Active Shooter Policy (Ex. 2) that stated that "the sole deputy or a team of deputies *may* enter the area and/or structure to preserve life." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 112 (2012) (Mandatory/Permissive Canon: "mandatory words impose a duty; permissive words grant discretion."). Simply put, there is no statutory nor constitutional duty that required Peterson to enter the school and confront Cruz, nor is there a mandatory policy by BSO that required Peterson to enter and confront Cruz. All three points lead to the inescapable conclusion that Peterson's actions did not broaden a "zone of risk" that posed a threat of harm to others. *McCain.*, 593 So. 2d at 502.

[2] Existence of duty of care in a negligence action is a question of law for this Court to decide. *McCain*, 593 So. 2d at 502.

The first element also must be viewed in context of an active shooter incident with potential for individuals to be caught in a crossfire and/or used as human shields. Assuming that Peterson received intel and knew that Cruz was inside the building, then engaged Cruz, Peterson was not properly equipped to confront such force: he was not even wearing a bulletproof vest and would have been using his service pistol against Cruz's AR-15.[3] There can be no reasonable argument to negate the fact that Cruz was wielding an assault rifle with rounds that are capable of piercing bulletproof vests.[4] If Peterson had engaged Cruz, some of the students and/or staff at Marjory Stoneman Douglas High School could have been caught in the crossfire. Viewed holistically, this Court cannot say as a matter of law that had Peterson entered Building 12, he would have "protected [the decedents] against unreasonable risks." *See Clay Elec.*, 873 So. 2d at 1185.

Second, assuming *arguendo* there was a duty (a point we contest), Peterson did not intentionally breach a duty imposed upon him as a BSO deputy. The State cannot dispute that the BSO Active Shooter SOP (Ex. 2) provided that BSO officers had the discretion to engage an active shooter; thus, Peterson's actions did not qualify as a willing breach of his duty.

Third, there is no causal connection, let alone a "reasonably close" one, between Peterson's failure to enter Building 12 and the resulting injury to the decedents. "The proximate causation element, ... is concerned with whether and to what extent the defendant's *conduct foreseeably and*

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[3] An AR-15 fires 5.56 x 45mm rounds, with a muzzle velocity in excess of 2700 feet per second.

[4] "Standard kevlar ballistic vests used by police in the United States are almost exclusively rated as NIJ Type IIa, II, or IIIa. High velocity rifle bullets, like those fired from an AR-15 rifle, will easily penetrate Type IIa, II, or IIIa vests. While these flexible vests successfully stop most handgun bullets and shotgun rounds at close range, nearly any projectile travelling faster than 2000 feet per second (609.6 meters per second) will penetrate through any kevlar vest." https://www.quora.com/Would-a-standard-US-police-bulletproof-vest-be-able-to-stop-a-bullet-from-an-AR-15-rifle (last accessed July 9, 2019).

substantially caused the specific injury that actually occurred." *McCain*, 593 So. 2d at 502 (emphasis added).

Simply stated there is no proximate cause based on Peterson's actions that day. The State wishes this Court to ignore the fact that had Peterson entered Building 12 he would have still had to "systematically and tactically" entered, searched, and cleared 10 classrooms, 2 bathrooms, and administrative offices on the first floor. After clearing the first floor, Peterson would have had to proceed to the second floor entered, searched and cleared another 10 classrooms, 2 bathrooms, and a teachers' lounge prior to proceeding to the third floor to engage Cruz. Based on the Marjory Stoneman Douglas Commission timeline, Peterson would have had only *seventy three seconds* to enter Building 12 and search 20 classrooms, 4 bathrooms, and an administrative and teachers' lounge on the first and second floors before ever having the opportunity to locate and engage Cruz prior to Cruz killing and injuring the victims on the third floor.

The State's misguided theory requires this Court to make an impossible leap in logic that had Peterson entered Building 12, he would have cleared the first and second floors, located Cruz, then shot and killed Cruz prior to Cruz killing the victims on the third floor. Peterson's conduct neither substantially nor foreseeably caused the injuries that Cruz inflicted. To that end, there can be no dispute that if Peterson had engaged Cruz, Cruz could have shot and killed Peterson. Based on this alone (and in conjunction with the fact that engaging Cruz could have resulted in additional injury to others caught in the crossfire) the "legal cause" for the death of the decedent falls not on Peterson, but on Cruz.

Additionally, to avoid vagueness, *see* discussion *infra*, and rule of lenity concerns, every element of negligence must be interpreted narrowly,[5] and in respect to proximate cause such must mean direct cause, not merely a failure to protect. Given that negligence on the part of law enforcement has never been criminally applied to an officer who failed to act in an active shooter incident, in this context each element of negligence must be construed in Peterson's favor. Fla. Stat. § 775.021(1); *Del Castillo*, 890 So.2d at 398; *Davis*, 139 S. Ct. at 2333; *Yates*, 135 S. Ct. at 1088. *See also Watson*, 148 Fla. at 518-19 ("[a]ny doubt or ambiguity in the provisions of criminal statutes are to be construed in favor of the citizen, life and liberty.").

B. Peterson Was Not Culpable

The Florida Supreme Court has defined culpable negligence as "the omission to do something which *a reasonable, prudent and cautious man would do*, or the doing of something which such a man would not do under the circumstances surrounding the particular case." *Russ v. State*, 140 Fla. 271, 191 So. 296, 298 (Fla. 1939) (emphasis added). *See also State v. Greene*, 348 So.2d 3, 4 (Fla. 1977).

However, to justify criminal sanctions for culpable negligence, the degree of negligence must be as high as that required for the imposition of punitive damages in a civil case. To obtain punitive damages in a civil case, a plaintiff must prove that the defendant's negligence rose to the following:

> A gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public, or

[5] *See Watson*, 148 Fla. at 518 ("Penal Laws should be strictly construed and those in favor of the accused should receive a liberal construction.").

> that reckless indifference to the rights of others, which is equivalent to an intentional violation of them.

Greene, 348 So.2d at 4; *Russ*, 191 So. at 298.

At its core, the State's theory of criminal liability is that Peterson had to enter Building 12 and engage Cruz in a firefight, without a bullet proof vest, without body armor, and without appropriate weaponry to confront such a shooter, all while exposing others to potential crossfire and subjecting Peterson to serious bodily harm and potential death. When law enforcement goes to execute a search warrant or serve an arrest warrant for any criminal, let alone a potentially violent criminal, they go with multiple officers who are outfitted with Kevlar helmets, body armor and high-powered weapons on the *chance* that they would be met with violence. No law enforcement agency would ever send a lone officer into such a situation with nothing more than a handgun.

Would a prudent and cautious person engage in such a gunfight being that he was not properly outfitted? We think not. But even if a prudent and cautious person might engage in a gunfight, would Peterson's failure to act be so wanton or reckless as to allow punitive damages in a civil case? Again, we think not. Indeed, we know of no case in the country imposing punitive damages against a law enforcement officer (or any person for that matter) under similar circumstances. Accordingly, this Court can and should hold that in the context of the facts of this case, as a matter of law, Peterson was not culpable.

C. Scienter Problem

The Florida culpable negligence statute lacks the scienter requirement. *See Tyson v. State*, 646 So. 2d 816, 817 (Fla. 1st DCA 1994) (citing *Taylor v State*, 444 So. 2d 931, 933 (Fla. 1983) ("[t]he rationale is that a person cannot form an intent to commit an act by culpable negligence.")). Thus,

culpable negligence is a strict liability crime, *Bailey*, 444 U.S. at 404 n.4, which this Court must view with disfavor, *Rubio*, 917 So.2d at 394, as it implicates due process considerations, *Giorgetti*, 868 So.2d at 518. To be certain, due process "may come into play where the statute imposes an affirmative duty to act and then penalizes the failure to comply. In such an instance, if the failure to act otherwise amounts to essentially innocent conduct, the failure of the penal statute to require some specific intent may violate due process." *State v. Oxx*, 417 So.2d 287, 290 (Fla. 5th DCA 1982).

The *Oxx* decision is applicable to this case as the State's theory of criminal liability assumes Peterson had an affirmative duty to act and now seeks to penalize him for his failure to act. However, Peterson's conduct of not engaging Cruz in a gunfight cannot be viewed as anything else than innocent conduct. Thus, in order to save the culpable negligence counts in this case from a Due Process Clause challenge under the Federal and Florida Constitutions, *see Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (cleaned up) ("the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"), as this is a felony case,[6] this Court must read a guilty knowledge requirement into the law. *Hodge*, 866 So.2d at 1272; *see also Rehaif*, 139 S. Ct. at 2195 (courts "apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.").[7]

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[6] Culpable Negligence forms the basis for the child neglect counts. *See* Fla. Stat. § 827.03(2)(b) "[a] person who willfully *or by culpable negligence* neglects a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the second degree..." (emphasis added).

[7] Admittedly, the U.S. Supreme Court has "sometimes declined to read a scienter requirement into criminal statutes. But [it has] typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Rehaif*, 139 S. Ct. at 2197 (cleaned up). There can be no dispute here that the Defendant faces more than "minor" penalties in this case, and the criminal counts address neither a regulatory nor a public welfare statute.

Once the Court reads scienter into the operative statutes it becomes readily apparent that the Court must dismiss this case. *First*, the State as a matter of law cannot prove that Peterson had an objective duty, as there is no statutory, constitutional, or BSO policy that imposed a duty. *See Trianon Park*, 468 So. 2d at 914–15, 918; *Vann*, 662 So. 2d at 340; *Castle Rock*, 545 U.S. 748; Ex. 2.

Second, assuming *arguendo* that there was a duty (a point we contest) the State cannot establish that Peterson knew he had this legal duty imposed upon him. Again, the BSO Active Shooter Policy (Ex. 2) was clear in *that it permitted but did not require BSO deputies to engage an active shooter.*[8] To that end the U.S. Supreme Court's *Rehaif* decision controls. In *Rehaif*, the High Court held that the criminal defendant had to know that he was in the country illegally to be convicted and reiterated that "a mistake of law is a defense if the mistake negates the knowledge required to establish a material element of the offense." *Rehaif*, 139 S. Ct. at 2198 (cleaned up). Such is true here, as once this Court reads a scienter element into Fla. Stat. § 784.05(1), the Defendant could not have had the requisite mental state given the extant BSO Active Shooter SOP (Ex. 2) and the decisions in *Trianon Park, supra, Vann, supra,* and *Castle Rock, supra.*

D. Section 30.07 Absolves Peterson Of Any Responsibility For Any Neglect

As noted above, Fla. Stat. § 30.07 provides that the Sheriff is responsible for any neglect of his/her deputies. Accordingly, as argued above, *see supra* at p. 8, to the extent that Peterson committed any type of negligence (a point we contest), he is statutorily absolved of all liability.

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[8] Additionally, the BSO Active Shooter SOP (Ex. 2) provides that "[i]f the situation turns to a barricade or hostage situation the response team will contain, isolate, communicate and wait for SWAT."

E. Rule Of Lenity

Further, to the extent that there is any ambiguity in Fla. Stat. § 784.05(1), such must be resolved in favor of Peterson as a criminal defendant. Fla. Stat. § 775.021(1); *Del Castillo*, 890 So.2d at 398; *Davis*, 139 S. Ct. at 2333; *Yates*, 135 S. Ct. at 1088; *Watson*, 148 Fla. at 518-19. At no point in time did the Defendant "expose" any of the decedents to personal injury; that blame falls on the shoulders of Cruz. But even if one could, somehow, argue that Peterson did "expose" the decedents to personal injury, Fla. Stat. § 784.05(1) is ambiguous; that ambiguity must be resolved in Peterson's favor.

F. Fla. Stat. § 784.05 Is Void For Vagueness As Applied To Peterson

"Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *Davis*, 139 S. Ct. at 2333. Accordingly, this Court must hold that Fla. Stat. § 784.05(1), as applied to the Defendant, is unconstitutionally vague. It is beyond cavil that Fla. Stat. § 784.05(1) fails to make any provision for the health, safety, and/or life of any criminal defendant in general, and law enforcement in particular. Thus, Fla. Stat. § 784.05(1) as applied to the Defendant fails every vagueness consideration, *see supra* at p. 4, set forth in *Grayned v. City of Rockford.*

First, the requirement to have law enforcement risk his/her health, safety, and/or life is, at best, not clearly defined. *See Grayned,* 408 U.S. at 108–09; *Wershow*, 343 So.2d at 608. Assuming, *arguendo,* that the Florida Supreme Court's decisions in *Trianon Park,* 468 So. 2d at 914–15, 918, and *Vann,* 662 So. 2d at 340, did not expressly hold that there is neither a right to the enforcement of police functions, nor a duty to prevent the misconduct of third parties, the intersection of the

purportedly imposed duty of Fla. Stat. § 784.05(1) and Florida Supreme Court cases law has made the obligation of law enforcement to engage in a firefight less than clearly defined.

Second, a person of ordinary intelligence would not have known that he/she as a member of law enforcement would have to risk his/her health, safety, and/or life, or else be subject to criminal liability. Indeed, there has never been a ruling, announcement, or notice that would have informed the Defendant that he had to enter Building 12 at Marjory Stoneman Douglas High School and engage (with only a service pistol and without military grade body armor) Cruz (who was armed with an AR-15 shooting high velocity ammunition). Moreover, given the permissive nature of the BSO Active Shooter SOP (Ex. 2), the Defendant cannot have been reasonably put on notice, and was not provided "fair warning" so that he could have acted accordingly. *See Grayned*, 408 U.S. at 108–09; *Wershow*, 343 So.2d at 608.

Third, "laws must provide explicit standards for those who apply them[.]" *Grayned*, 408 U.S. at 108–09; *see also State v. Winters*, 346 So.2d 991, 993 (Fla. 1977) (holding a statute in violation of due process where "[w]ithout some statutory standards or guidelines," the Legislature "effectively set a net large enough to catch all possible offenders"). Consequently, the failure of Fla. Stat. § 784.05(1) to provides express and explicit standards renders it unconstitutional as applied to the facts of this case. All one must do is attempt to tease out the contours of how Fla. Stat. § 784.05(1) would apply to an active shooter incident:

- If Peterson was not receiving proper intelligence as to the location of the shooter, would he still be required to engage Cruz?
- If Peterson was off duty and did not have his service pistol, would he still be required to engage Cruz?

- If Peterson had a leg injury and could not run up a flight of stairs, would he still be required to engage Cruz?
- If Peterson was without a bullet proof vest or other body armor, would he still be required to engage Cruz?
- If Cruz had an accomplice (that was also armed with an AR-15) who was waiting to ambush law enforcement as they entered Building 12, would Peterson still have to run headlong into the breach?
- If Cruz had a team of accomplices (armed with an AR-15s and sniper rifles) who were waiting to ambush law enforcement[9] as they entered Building 12, would Peterson still have to run headlong into the breach?
- Would Peterson have to be shot at not to be criminally liable?
- Would Peterson have to be physically injured (e.g. shot) not to be criminally liable?
- Would Peterson have to die not to be criminally liable?

These are but a few of the questions that demonstrate that explicit standards are needed in order to impose criminal liability. The failure to do so renders the statute unconstitutionally vague as applied to Peterson as it provides for nothing more than "*ad hoc* and subjective" analysis, "with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09; *see also Winters*, 346 So.2d at 993 (a statute is improper where it is "left to the courts the power to say who should be detained and who should be set at large").

[9] This is not a fanciful hypothetical. On February 28, 1997, in what has been called "The Battle of North Hollywood," *see* https://www.youtube.com/watch?v=I_1IvZFwj0M (last accessed July 10, 2019), two heavily armed bank robbers engaged in an extended shootout with police where multiple officers and civilians were shot.

This last consideration dovetails into the "requirement that a legislature establish minimal guidelines to govern law enforcement." *Goguen*, 415 U.S. at 574; *Wershow*, 343 So.2d at 608. Here, there are no guidelines to govern law enforcement's policing of other law enforcement. Consequently, the case at bar has devolved into nothing more than a "standardless sweep," which has allowed the Executive Branch in this case "to pursue their personal predilections," *Goguen*, 415 U.S. at 575-76. And to that end, as Peterson has been the only police officer to ever be prosecuted for an active shooter incident, such reeks of "arbitrary and discriminatory enforcement," which the Florida Supreme Court prohibits. *Southeastern Fisheries Ass'n*, 453 So.2d at 1353. To allow these counts to proceed would deny the Defendant of his right to due process under the Federal Constitution, *viz.* U.S. Const. amend. XIV, § 1.

Moreover, there is an additional consideration that this Court must take into account. Under Florida law, due process protections for criminal defendant are even more robust than under Federal law. *See Myers*, 211 So. 3d at 971. Thus, if this Court were to conclude that there has been no violation of the Federal Due Process Clause, it must still engage in an independent analysis of Florida law under Fla. Const. art. I, § 9.

In construing Fla. Const. art. I, § 9, this Court "should focus primarily on factors ... such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law." *Myers*, 211 So. 3d at 971 (cleaned up). Here, each factor leads to the inexorable conclusion that law enforcement in the State of Florida cannot be prosecuted for failing to enter a building and engage a suspect

armed with an AR-15 in a firefight. To be clear, there has never been a law, custom,[10] tradition, nor anything in the State of Florida's history that leads to the conclusion that the Defendant was required to engage Cruz and that his failure to do so is criminal culpable negligence.

Furthermore, in *Schmitt v. State*, 590 So.2d 404, 413 (Fla. 1991), our State Supreme Court concluded that "a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct." In this case, there is no rational relationship between law enforcement actions/inactions during an active shooter incident and the purpose of the culpable negligence statute. Indeed, as the there is no duty imposed upon law enforcement, *see Trianon Park, supra, Vann, supra, Castle Rock, supra,*[11] permitting the State's legal theory of culpability to go forward would criminalize the Defendant's innocuous conduct; such offends due process under the Florida Constitution, *viz.* Fla. Const. art. I, § 9.

G. The State's Novel Construction Has Unconstitutional *Ex Post Facto* Effect

In *United States v. Lanier*, 520 U.S. 259 (1997), the U.S. Supreme Court held that an unexpected, retroactive judicial construction of a statute could constitute a due process violation with the effect of an *ex post facto* law, to wit:

> [D]ue process bars court from applying *a novel construction* of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute,

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[10] *Accord Brown v. State*, 629 So.2d 841 (Fla. 1994) (emphasis added) ("[i]f the language of the statute, when measured *by common understanding and practice*, conveys a sufficiently definite warning of what conduct is proscribed it should not be found unconstitutionally vague."). There has never been a common understanding and practice to indicate that there was a requirement to engage a suspect in a firefight. This commonsense conclusion is buttressed by BSO's Active Shooter SOP that was permissive in nature.

[11] *See also* BSO's Active Shooter SOP, Ex. 2, establishing the permissive policy of confronting active shooters.

> either standing alone or as construed, made it reasonably clear *at the relevant time* that a defendant's conduct was criminal.

Id. at 266 (cleaned up, emphasis added).

And in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the U.S. Supreme Court again noted that even when a statutory phrase is seemingly "narrow and precise," a novel judicial construction can violate the *ex post facto* clause:

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, s 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. The fundamental principle that the required criminal law must have existed when the conduct in issue occurred, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect.

Id. at 353-54 (cleaned up).

The Defendant submits that at the time of his alleged offense, Fla. Stat. § 784.05(1) did not give him fair notice of "what the law intends to do if a certain line [was] passed," *McBoyle v. United States*, 283 U.S. 25, 27 (1931), as no police officer had ever been prosecuted for failing to engage an assailant in an active shooter incident and extant case law holds that there is no right to police services nor a duty to protect from third parties, *see Trianon Park, supra, Vann, supra, Castle Rock, supra.*

Accordingly, a judicial ruling that would "alter[] the definition of criminal conduct" *Gwong v. Singletary*, 683 So.2d 109, 112 (Fla. 1996), to hold Peterson's actions/inactions, never so held before, to be criminal would violate U.S. Const. art. I, §§ 9 & 10, and Fla. Const. art. I, § 10.

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In sum, the Court must dismiss Counts 8-10 with prejudice.

III. THE CHILD NEGLECT COUNTS MUST BE DISMISSED WITH PREJUDICE

Chapter 827 of the Florida Statutes, *see* Fla. Stat. §§ 827.01-827.10, addresses "abuse of children." Fla. Stat. § 827.03(2)(b) provides that: "[a] person who willfully or by culpable negligence neglects a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." Under Florida law, the criminal offense of "[n]eglect of a child" occurs upon the following:

> 1. A *caregiver's failure or omission* to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or
> 2. A *caregiver's failure* to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person.

Fla. Stat. § 827.03(1)(e) (emphasis added).

As used in Chapter 827, "'[c]aregiver' means a parent, adult household member, or other person responsible for a child's welfare." Fla. Stat. § 827.01(1). *Accord* Fla. Stat. § 39.01(10) ("'[c]aregiver' means the parent, legal custodian, permanent guardian, adult household member, or other person responsible for a child's welfare as defined in subsection (54)."). The legal term "other person responsible for a child's welfare" is not defined in Chapter 827.

A. Peterson Was Not Culpably Negligent

For the reasons discussed above at pp. 11-25, Peterson is not culpably negligent. Consequently, as culpable negligence forms the legally necessary prerequisite under Fla. Stat. § 827.03(2)(b) for child neglect, the absence of culpable negligence necessary results in the child neglect counts being statutorily infirm.

B. Peterson Does Not Fall Under The Statutory Definition Of "Caregiver"

1. Because the term "other person responsible for a child's welfare" is not defined in Chapter 827, the definition must be borrowed from Fla. Stat. § 39.01(54)

The Constitutional-Doubt Canon provides that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *supra* at 247 (citing *United States ex rel. Attorney General v. Delaward & Hudson Co.*, 213 U.S. 366, 408 (1909)). This canon of statutory construction "militates against not only those interpretation that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Scalia & Garner, *supra* at 247 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Constitutional-Doubt Canon, in turn, leads to "[t]he elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales*, 550 U.S. at 153 (cleaned up).

The Related-Statutes Canon provides that "[s]tatutes *in pari materia* are to be interpreted together, as though they were one law." Scalia & Garner, *supra* at 252 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988))[12]. The underlying rationale for this canon is that terms are not only

[12] *See also McGhee v. Volusia Cty.*, 679 So. 2d 729, 730 (Fla. 1996) (cleaned up) ("The doctrine of *in pari materia* requires the courts to construe related statutes together so that they illuminate each other and are harmonized. '*In pari materia*' in Latin means 'on the same matter.'").

part of whole statute but "part of an entire *corpus juris*." *Id.* "Hence law dealing with the same subject-being *in pari materia* ... - should if possible be interpreted harmoniously." *Id*; *see also Davis*, 139 S. Ct. at 2329 ("And we normally presume that the same language in related statutes carries a consistent meaning.").

As Fla. Stat. § 827.01(1) does not define "other person responsible for a child's welfare," in order to save the statute from a construction rendering it unconstitutionally vague, *see* discussion *infra*, this Court must interpret this undefined statutory term in Chapter 827 in a manner consistent, i.e., *in pari materia*, with Chapter 39 of the Florida Statutes ("proceedings relating to children"). Indeed, "[r]eading the similar language of ["other person responsible for a child's welfare" in Fla. Stat. § 827.01(1) and Fla. Stat. § 39.01(54)] similarly yields sensibly congruent applications across [both] statutes." *Davis*, 139 S. Ct. at 2329.

2. Peterson does not fall under the definition of "other person responsible for a child's welfare" provided in Fla. Stat. § 39.01(54)

Chapter 39 defines the statutory phrase at issue here:

> "Other person responsible for a child's welfare" includes the child's legal guardian or foster parent; an employee of any school, public or private child day care center, residential home, institution, facility, or agency; a law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice; or any other person legally responsible for the child's welfare in a residential setting; and also includes an adult sitter or relative entrusted with a child's care. For the purpose of departmental investigative jurisdiction, this definition does not include the following persons when they are acting in an official capacity: law enforcement officers, except as otherwise provided in this subsection; employees of municipal or county detention facilities; or employees of the Department of Corrections.

Fla. Stat. § 39.01(54). Subsection 54 consists of two sentences, the first provides the statutory definition, the second a limitation on a term of art in the preceding sentence. As discussed below Peterson cannot meet any plausible statutory definition of "caregiver."

First, it cannot reasonably be argued that Peterson is a parent or adult household member under Fla. Stat. § 827.01(1).

Second, it likewise cannot reasonably be argued that Peterson fits into the express statutory definitions in Fla. Stat. § 39.01(54). A review of each clause of subsection 54 demonstrates as much, to wit: (i) Peterson was not the "legal guardian or foster parent" of the deceased; (ii) Peterson was not "an employee of any school" as the BSO SRO contract (Ex. 1) makes clear; (iii) Peterson was not a law enforcement officer under the auspices of the Florida Department of Juvenile Justice; (iv) Marjory Stoneman Douglas High School was not a "residential setting" and Peterson was not (in his role as a BSO SRO) responsible for the deceased as such; and (v) Peterson was not an "adult sitter" or "relative entrusted with a child's care." Accordingly, the examination of each operative clause of Fla. Stat. § 39.01(54) reveals Peterson does not fall under the ambit of the statutory definition of "other person responsible for a child's welfare."

Third, assuming *arguendo* that, somehow, Peterson did meet the statutory definition (a point we contest) the second sentence of subsection 54 provides that law enforcement acting in an official capacity are excluded from the statutory definition of "other person responsible for a child's welfare."

***

Even if this statutory examination leaves the Court with any doubt (which it should not), the State cannot provide any evidence, let alone compelling evidence, that the identical language of Fla. Stat. § 827.01 and Fla. Stat. § 39.01(54) bear different meanings. However, such is required under

the Related-Statutes Canon (*see* Scalia &. Garner, *supra* at 252) and U.S. Supreme Court precedent (*see Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 754 (1988) ("[i]n the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings. Petitioners have not proffered such evidence here.")). Accordingly, Fla. Stat. §§ 827.01 & 39.01(54) must be construed *in pari materia*, and when done so Peterson cannot fall under the statutory definition of "other person responsible for a child's welfare." Thus, the Court must dismiss Counts 1-7 with prejudice.

3. *Noscitur a sociis* and *ejusdem generis* resolve any ambiguities in Fla. Stat. § 827.01(1) in Peterson's favor

Two canons of statutory construction bear on this Court's interpretation of the undefined term of "other person responsible for a child's welfare" found in Fla. Stat. § 827.01.

The Associated-Words Canon provides that "associated words bear on one another's meaning (*noscitur a sociis*). Scalia & Garner, *supra* at 195. Courts "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates*, 135 S. Ct. at 1085 (cleaned up); *see also United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated").

Relatedly, the *Ejusdem Generis* Canon provides that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Scalia & Garner, *supra* at 199; *see also Yates*, 135 S. Ct. at 1086 (cleaned up) ("[a] canon related to *noscitur a sociis*, *ejusdem generis*, counsels: where general words

follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

Applying *noscitur a sociis* to the definition to "other person responsible for a child's welfare" found in Fla. Stat. § 827.01(1) requires the Court to limit this legal term of art in a manner similar to parents and adult household members. These two terms clearly demonstrate some manner of physical control, and the obligation to provide for children the necessities of life: food, shelter, clothing, and care. *See Winters*, 346 So.2d at 993 ("[a] parent, guardian or other person having custody of a child or responsibility for its well being has a duty to provide the child with food, clothing, shelter and medical treatment.")

Thus, one can reasonably interpret "other person responsible for a child's welfare" to mean an aunt who watches over her nieces/nephews when the parents are out of town on a vacation; a grandparent who has his/her grandchild over for the weekend; a fiancée of the parent of a child who is caring for the child while the parent is working late at the office; a baby sitter in charge of children while the parents attend a professional function; a camp counselor at a summer camp for school age children. The Court should adopt such a reasonable construction for Fla. Stat. § 827.01(1). To conclude that "other person responsible for a child's welfare" has a more expansive definition[13] would give this term a meaning inconsistent with the accompanying terms and would give unintended (and unconstitutional) breath to the legislation. *Yates*, 135 S. Ct. at 1085.

Additionally, applying *ejusdem generis* likewise to "other person responsible for a child's welfare" requires this Court to limit this term in a manner that is of similar nature, *id.* at 1086, to

[13] Taken to the State's logical conclusion, Peterson would be a "caregiver" to every student at Marjory Stoneman Douglas High School, which numbered in excess of three thousand.

both "parent" and "adult household member." What is similar to both "parent" and "adult household member"? The Defendant submits anyone who stands *in loco parentis.* Thus, when an individual *voluntarily accepts* the custody of a child, he/she has all the same benefits and burden of the child as if the child were his/her own. Accordingly, when such occurs and one has *in loco parentis* status the adult must provide the child/children with the necessities of life: food, shelter, clothing, and care.

Upon examination of *ejusdem generis* and *noscitur a sociis* canons of statutory construction, one can see that Peterson does not fall within the ambit of the statutory definition of "caregiver" under Fla. Stat. § 827.01(1). And because Peterson is not a "caregiver" he cannot be prosecuted under Fla. Stat. § 827.03. Counts 1-7 must be dismissed with prejudice.

C. Rule Of Lenity

Further, to the extent that there is any ambiguity in Fla. Stat. § 827.03(2)(b), such must be resolved in favor of Peterson as a criminal defendant. Fla. Stat. § 775.021(1); *Del Castillo*, 890 So.2d at 398; *Davis*, 139 S. Ct. at 2333; *Yates*, 135 S. Ct. at 1088; *Watson*, 148 Fla. at 518-19. Peterson submits that he clearly does not fall within the definition of "caregiver." But even if there is a plausible argument that Peterson falls under the State's tortured reading of "caregiver" under Fla. Stat. § 827.01(1), the definition is ambiguous at best. That ambiguity must be resolved in Peterson's favor and the Court must dismiss Counts 1-7.

D. Peterson Did Not "Neglect a Child" Under Fla. Stat. § 827.03(1)(e)

Section 827.03(1)(e) provides two alternative definitions of child neglect; Peterson does not meet either definition.

The first statutory definition provides that child neglect occurs when "[a] caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child[.]" Fla. Stat. § 827.03(1)(e)(1).

The second statutory definition provides that child neglect occurs when "[a] caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person." Fla. Stat. § 827.03(1)(e)(2).

Peterson fails to fall within the ambit of Fla. Stat. § 827.03(1)(e)(1) or (2) for a few reasons. *First,* Peterson is not a "caregiver," *see* discussion *supra* at pp. 26-31. *Second,* the decedents had neither the right to police services nor a right to receive protection from third parties. *Trianon Park*, 468 So. 2d at 914–15, 918; *Vann*, 662 So. 2d at 340; *Castle Rock*, 545 U.S. 748. Thus, Peterson was under no legal obligation that required him to provide the decedents with either protection from Cruz, or services that relate to the well-being of the decedents. *Third,* the extant BSO Active Shooter SOP (Ex. 2) was clear that Peterson was not required to enter Building 12. *Fourth,* "a prudent person" (*see* Fla. Stat. § 827.03(1)(e)(1)) would not enter a building with an unknown number of assailants, potentially armed with assault rifles all while not wearing a bulletproof vest, which would have been unable to protect him from AR-15 rounds in any event. *Fifth,* entering a building with an unknown number of assailants, potentially armed with assault rifles, was not a "failure to make a reasonable effort" under Fla. Stat. § 827.03(1)(e)(2). *Finally,* as discussed more fully below, Fla. Stat. § 827.03(1)(e)(1) fails to take into account the health, safety, and/or life of the person allegedly

neglecting a child; accordingly, Peterson's actions/inactions that day were neither unreasonable nor imprudent.

E. Section 30.07 Absolves Peterson Of Any Responsibility For Any Neglect

As noted above, Fla. Stat. § 30.07 provides that the Sheriff is responsible for any neglect of his/her deputies. Accordingly, as argued above, *see supra* at p. 8, to the extent that Peterson committed any type of negligence (a point we contest), he is statutorily absolved of all liability.

F. Fla. Stat. §§ 827.01 & 827.03 Are Unconstitutionally Vague As Applied To Peterson

This Court must hold that Fla. Stat. §§ 827.01 & 827.03, as applied to the Defendant, are unconstitutionally vague. It is beyond cavil that neither Section 827.01 nor Section 827.03, make any provision for the health, safety, and/or life of a criminal defendant. Thus, similar to Fla. Stat. § 784.05(1), *see* discussion *supra* at pp. 19-23, both Fla. Stat. §§ 827.01 & 827.03 as applied to the Defendant fails every vagueness consideration set forth in *Grayned v. City of Rockford.*

For sake of completeness (and admittedly redundant), the Defendant sets forth the *Grayned* factors. *First,* the requirement to have law enforcement risk his/her health, safety, and/or life is, at best, not clearly defined. *Second,* a person of ordinary intelligence would not have known that he/she as a member of law enforcement would have to risk his/her health, safety, and/or life, else be subject to criminal liability, especially in light of the permissive nature of the BSO Active Shooter SOP. *Third,* as "laws must provide explicit standards for those who apply them," *Grayned,* 408 U.S. at 108–09, the failure of Fla. Stat. §§ 827.01 & 827.03 to do so renders both unconstitutional as applied to the facts of this case.

Just as with Fla. Stat. § 784.05(1), Fla. Stat. §§ 827.01 & 827.03 are unconstitutionally vague as applied to Peterson as both Fla. Stat. §§ 827.01 & 827.03 provide for nothing more than "*ad hoc* and subjective" analysis, "with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09. To allow Counts 1-7 to proceed would deny the Defendant his right to due process under the Federal Constitution, *viz.* U.S. Const. amend. XIV, § 1.

Finally, similar to Counts 8-10, this Court must take into consideration that due process protections for criminal defendants under Florida law are even more robust than under Federal law. *See Myers*, 211 So. 3d at 971. Thus, if this Court were to conclude that there has been no violation of the Federal Due Process Clause, it must still engage in an independent analysis of Fla. Stat. §§ 827.01 & 827.03 under Fla. Const. art. I, § 9. Accordingly, as there has never been a law, custom, tradition (*see Myers*, 211 So. 3d at 971), or anything in the State of Florida's history that leads to the conclusion that the Defendant was required to enter Building 12, Peterson's failure to do so cannot amount to criminal child neglect.

G. The State's Novel Construction Has Unconstitutional *Ex Post Facto* Effect

Just as with the culpable negligence counts, Peterson submits that at the time of his alleged offense, Fla. Stat. §§ 827.01 & 827.03 did not give him fair notice of his statutory obligations, *see McBoyle*, 283 U.S. at 27, as no police officer has ever been prosecuted (for child neglect no less) for failing to engage an assailant in an active shooter incident and extant case law holds that there is no right to police services nor a duty to protect from third parties, *see Trianon Park, supra, Vann, supra, Castle Rock, supra.*

Accordingly, a judicial ruling that would "alter[] the definition of criminal conduct" *Gwong*, 683 So.2d at 112, to hold Peterson's actions/inactions, never so held before, to be criminal child neglect would violate U.S. Const. art. I, §§ 9 & 10, and Fla. Const. art. I, § 10.

IV. THE PERJURY COUNT MUST BE DISMISSED WITH PREJUDICE

Fla. Stat. § 837.012(1) provides that "[w]hoever makes a false statement, which he or she does not believe to be true, under oath, not in an official proceeding, in regard to any *material matter* shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083." (emphasis added). "Materiality" is not an element of the crime of perjury in Florida but is a threshold issue that a court must determine as a matter of law prior to trial. *State v. Ellis*, 723 So.2d 187 (Fla. 1998).

Fla. Stat. § 837.011(3), defines material matter as "any subject, regardless of its admissibility under the rules of evidence, which could affect the course or outcome of the proceeding." Consequently, "[t]o be material, statements must be germane to the inquiry, and *have a bearing* on a determination *in the underlying case*." *Vargas v. State*, 795 So. 2d 270, 272 (Fla. 3rd DCA 2001) (emphasis added, citation omitted).

As to materiality, Count 11 alleges that the Defendant "minimized the number of shots he heard and/or people exiting the building" to justify why he never entered Building 12. Count 11 fails as a matter of law.

First, there can be no dispute that the BSO Active Shooter SOP (Ex. 2) was permissive in nature. *Second*, as discussed more fully, *supra* at pp. 11-15, for Counts 1-10, there is neither a duty for the enforcement of police functions, nor a duty to prevent the misconduct of third parties. *Trianon Park*, 468 So. 2d at 914–15, 918; *Vann*, 662 So. 2d at 340; *Castle Rock*, 545 U.S. 748. Thus,

as Peterson lacked either common law, statutory, or a BSO imposed duty to enter Building 12, it logically follows that anything that Peterson said regarding his failure to enter Building 12 and engage Cruz was immaterial (i.e. it was neither germane nor had a bearing to the inquiry) to the investigation to either Cruz's actions or Peterson's alleged inactions (i.e., the alleged child neglect or culpable negligence). Count 11, therefore, must be dismissed with prejudice.

Moreover, "statements alleged to be perjurious must be of 'empirical fact' *and not of opinion, belief or perception.*" *Cohen v. State*, 985 So. 2d 1207, 1209 (Fla. 3rd DCA 2008) (emphasis added, citation omitted). Mere inaccuracy or confusion is not an adequate basis to find perjury has been committed. *Wolfe v. State*, 271 So. 2d 132, 135 (Fla. 1972). Personal opinions or matters of belief are not perjury, and an initially false statement, can be further explained so that the statement taken as a whole is not perjury. *See Doyle v. Dep't of Bus. & Prof'l Regulation*, 713 So. 2d 1040, 1045 (Fla. 1st DCA 1998). And to that end, "[t]he questions posed to elicit perjured testimony must be asked with the appropriate specificity necessary to result in an equally specific statement of fact." *Cohen*, 985 So. 2d at 1209 (citation omitted). *See also Bronston v. United States*, 409 U.S. 352, 362 (1973) ("[p]recise questioning is imperative as a predicate for the offense of perjury.").

The U.S. Supreme Court in *Bronston* was clear regarding that it is the State's duty to conduct competent and thorough questioning. Succinctly stated, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id.* at 360. Accordingly, even if Peterson's statements were evasive or misleading (a point we contest) the State cannot use Fla. Stat. § 837.012(1) to reach evasive or misleading statements, as such would obviate the State's duty to thoroughly examine the witness. *Id.* at 358 (noting that competent cross-examination should be

conducted "by counsel alert—as every examiner ought to be—to the incongruity of [the witness's] unresponsive answer").

Here, the questions posed lacked the appropriate specificity and the responses given were of perception and belief. For example:

- Q. "... how many rounds *do you think* you *heard*?";
- Q. *Okay.*
- A. "I *heard* a couple of shots, haven't *heard* anything since ...."
- Q. (*inaudible*)—
- A. "—but we didn't *see* any kids, ..."

See information at pp. 13-14 (emphasis added).

The transcript of questions and answers that the Government uses as a basis for the perjury charges are rife with half questions, ambiguous questions, and questions that lacked a temporal nexus. Further, one of the questions cited in the information was deemed "*inaudible.*" As these examples show, the questions (to the extent that they were even questions as "okay" is a statement/affirmation not a question) were not specific in the least (or even audible) and the answers were of belief and perception. With precision needed in questioning, these questions lacked even the basic English structure to properly form a sentence let alone a precise question. Accordingly, the investigators failed to clarify or pin Peterson down, *Bronston*, 409 U.S. at 360, with appropriately specific questions, *Cohen*, 985 So. 3d at 1209, of empirical fact, *id.*, which precludes the State from bringing a perjury charge under Fla. Stat. § 837.012(1). Count 11 must be dismissed with prejudice.

CONCLUSION

The State has responded to the tragedy by stretching the child neglect, culpable negligence, and perjury statutes beyond their breaking points. There is only one person responsible for the

events of February 14, 2018 – Nikolas Cruz. When the Court reviews the facts of this case and dispassionately applies the law,[14] the State's misguided theories attempting to assign criminal liability to Peterson collapse under their own weight and must be rejected in full.

WHEREFORE, the Defendant, respectfully requests this Honorable Court dismiss the information *in toto* with prejudice.

Respectfully submitted,

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2019.07.18 13:33:43 -04'00'
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Dated: July 18, 2019

[14] In contrast to enmity for the Defendant, which appears to the be the political coin of the realm. *See* S.B. 1450 (Fla. 2019), *available at* http://www.flsenate.gov/Session/Bill/2019/01450; H.B. 1091 (Fla. 2019), *available at* http://www.flsenate.gov/Session/Bill/2019/01091 (attempting to strip Peterson of his pension, which would operate as unconstitutional bills of attainder, *see* U.S. Const. art. I, § 9; Fla. Const. art. I, § 10, and taking, *see* U.S. Const. amend. V; Fla. Const. art. X, § 6(a)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to the Office of the State Attorney, 17th Judicial Circuit, Broward County, Florida, this 18th day of July, 2019.

/s/ Joseph A. DiRuzzo, III

Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2019.07.18 13:35:35 -04'00'

Joseph A. DiRuzzo, III

EXHIBIT 1

SCHOOL RESOURCE OFFICER AGREEMENT

THIS AGREEMENT is made and entered into as of this 25th day of July, 2017, by and between

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA
(hereinafter referred to as "SBBC"),
a body corporate and political subdivision of the State of Florida,
whose principal place of business is
600 Southeast Third Avenue, Fort Lauderdale, Florida 33301

and

SHERIFF OF BROWARD COUNTY, FLORIDA
(hereinafter referred to as "SHERIFF"),
whose principal place of business is
2601 West Broward Boulevard
Fort Lauderdale, Florida 33311

WHEREAS, SBBC has established a School Resource Officer Program (hereafter referred to as "SRO Program") pursuant to applicable law; and

WHEREAS, SBBC desires that the SHERIFF provide law enforcement officers to serve as School Resource Officers (hereafter referred to as "SROs" or "SRO") in several public schools located within Broward County, Florida and the SHERIFF is willing to assign law enforcement officers to serve as SROs under the SRO Program; and

WHEREAS, the SHERIFF and SBBC agree that the SRO Program is a great benefit to the school administration, the student body, and the community as a whole and desire to enter into this School Resource Officer Agreement (hereafter referred to as "Agreement") to accomplish the purposes expressed herein; and

WHEREAS, the SHERIFF and SBBC understand and agree that the SRO Program is established for the purposes set forth under applicable Florida law including assisting in the prevention of juvenile delinquency through the provision of programs specifically developed to respond to the factors and conditions that give rise to delinquency.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

ARTICLE 1 - RECITALS

1.01 **Recitals**. The parties agree that the foregoing recitals are true and correct and that such recitals are incorporated herein by reference.

ARTICLE 2 – SPECIAL CONDITIONS

2.01 **Term of Agreement**. Unless terminated earlier pursuant to Section 3.05 of this Agreement, the term of this Agreement shall commence on August 14, 2017 and conclude on June 7, 2018.

2.02 **Participating District Schools**. SHERIFF shall assign three (3) Deputies to serve as SROs at three (3) elementary schools operated by SBBC that are listed on the attached **Exhibit "A"** and two (2) Deputies to serve as SROs at two (2) secondary schools operated by SBBC that are listed on the attached **Exhibit "A"** (hereafter collectively referred to as "Participating Schools").

2.03 **Assignment of SROs**. The SHERIFF shall promptly notify the principal of the Participating School of the names of those law enforcement officers assigned to provide SRO services at the school. The SHERIFF may change the law enforcement officers assigned to participate as SROs at any time during the term of this Agreement. Unless precluded by law enforcement requirements or emergency circumstances, the SHERIFF shall at all times maintain SROs on duty during those regular school hours in which students are required to be in attendance the number of SROs specified in Section 2.02. However, at the discretion of the SHERIFF, any SRO may be assigned to patrol the neighborhoods surrounding their assigned school to address school security, truancy and juvenile delinquency issues. Each SRO assigned to one or more of the Participating School(s) shall attend any required SRO training programs conducted by SBBC. Whenever possible, the SHERIFF shall assign a replacement law enforcement officer, on a temporary basis, if the SHERIFF approves the absence of an assigned SRO for a period of absence in excess of two (2) days. The SHERIFF shall promptly advise the principal of the Participating School of the name of any replacement SRO assigned to provide services under this Agreement.

2.04 **Applicable Policies and Standards**. The SHERIFF shall ensure that the exercise of law enforcement powers by each assigned SRO shall be in compliance with the authority granted by applicable law. Each law enforcement officer assigned to the SRO Program shall perform his/her duties as an SRO in accordance with the School Resource Officer Standard Operating Procedure Manual and with applicable Florida law and SBBC policies.

2.05 **Duties of SROs**. An SRO shall not function as a school disciplinarian or security officer and shall not intervene in the normal disciplinary actions of the Participating Schools. Each assigned SRO shall act at all times within the scope of authority granted to the SRO by applicable law. Each SRO shall perform duties including, without limitation, the following:

a) the performance of law enforcement functions within the school setting;

b) the identification and prevention of juvenile delinquency (including substance abuse) through counseling and referral services);

c) the enhancement of student knowledge of the law enforcement function and of the fundamental concept and structure of law;

d) the development of positive student concepts of the law enforcement community and promotion of positive interaction and enhanced relations between students and law enforcement officers;

e) the provision of assistance and support for crime victims (including victims of abuse) identified within the school setting;

f) the presentation of educational programs concerning crime prevention and the rights, obligations and responsibilities of students as citizens; and

g) the provision of assistance to SBBC in protecting and securing the school plant and its occupants.

2.06 **Student Instruction**. SBBC shall at all times maintain control over the content of any educational programs and instructional materials provided at the Participating Schools including those provided through the SRO Program. Each SRO will provide instructional activities to the students at his/her assigned school(s) in areas of instruction within the SRO's experience, education and training. Any activities conducted by an SRO as part of the regular instructional program shall be provided upon prior consultation and coordination with the principal of the Participating School.

2.07 **SBBC Contact Persons**. The principal at each Participating School shall be SBBC's on-site contact person for any SROs assigned to that school. In addition, this section confirms that SBBC's Superintendent of Schools has designated the Chief, Special Investigative Unit to serve as SBBC's liaison for the SRO Program.

2.08 **Payment for SRO Program Services**. SBBC shall pay to SHERIFF the sum of Two Hundred Thirty-One Thousand, Two Hundred Sixty Dollars and 00/100 Cents ($231,260.00). The SHERIFF shall invoice SBBC for SRO services rendered under this Agreement in ten (10) monthly installments with the first invoice being delivered to SBBC in August 2017, and subsequent invoices shall be delivered to SBBC on a monthly basis, with the final invoice delivered to SBBC in May 2018. Each monthly invoice shall contain reference to the respective installment to which it pertains and the date of this Agreement. Additionally, each monthly invoice shall be in the amount of Twenty-Three Thousand, One Hundred Twenty-Six Dollars and 00/100 Cents ($23,126.00). However, the SHERIFF shall make appropriate pro rata reductions in the amount invoiced during any month in which emergency circumstances reduced the amount of SRO services provided by the SHERIFF. Upon certification by SBBC's contact person designated in Section 2.07 that the SRO services provided by the SHERIFF were satisfactory, SBBC shall make payment for SRO services within thirty (30) days of its receipt of an invoice from the SHERIFF for such services.

2.09 **Inspection of SHERIFF's Records by SBBC**. SHERIFF shall establish and maintain books, records and documents (including electronic storage media) sufficient to reflect all income and expenditures of funds provided by SBBC under this Agreement. All SHERIFF's Records relating to the SRO Program, regardless of the form in which they are kept, shall be open to inspection and subject to audit, inspection, examination, evaluation and/or reproduction,

during normal working hours, by SBBC's agent or its authorized representative to permit SBBC to evaluate, analyze and verify the satisfactory performance of the terms and conditions of this Agreement and to evaluate, analyze and verify any and all invoices, billings, payments and/or claims submitted by SHERIFF or any of SHERIFF's payees pursuant to this Agreement. SHERIFF's Records subject to examination shall include, without limitation, those records necessary to evaluate and verify direct and indirect costs (including overhead allocations) as they may apply to costs associated with this Agreement. SHERIFF's Records subject to this section shall include any and all documents pertinent to the evaluation, analysis, verification and reconciliation of any and all expenditures under this Agreement without regard to funding sources.

(a) SHERIFF's Records Defined. For the purposes of this Agreement, the term "SHERIFF's Records" shall include, without limitation, accounting records, payroll time sheets, cancelled payroll checks, W-2 forms, written policies and procedures, computer records, and any other supporting documents that would substantiate, reconcile or refute any charges and/or expenditures related to the SRO services provided under this Agreement.

(b) Duration of Right to Inspect. For the purpose of such audits, inspections, examinations, evaluations and/or reproductions, SBBC's agent or authorized representative shall have access to SHERIFF's Records from the effective date of this Agreement, for the duration of the term of this Agreement, and until the later of five (5) years after the termination of this Agreement or five (5) years after the date of final payment by SBBC to SHERIFF pursuant to this Agreement.

(c) Notice of Inspection. SBBC's agent or its authorized representative shall provide SHERIFF reasonable advance notice (not to exceed two (2) weeks) of any intended audit, inspection, examination, evaluation and or reproduction.

(d) Audit Site Conditions. SBBC's agent or its authorized representative shall have reasonable access to any and all records related to this Agreement, subject to SHERIFF's reasonable security procedures, and shall be provided adequate and appropriate work space at the SHERIFF facility where such records are located in order to exercise the rights permitted under this section.

(e) Failure to Permit Inspection. Failure by SHERIFF to permit audit, inspection, examination, evaluation and/or reproduction as permitted under this Section shall constitute grounds for termination of this Agreement by SBBC for cause and shall be grounds for the denial of SHERIFF's claims for payment by SBBC for services relating specifically to the records not being permitted to be inspected.

(f) Overcharges and Unauthorized Charges. If an audit conducted in accordance with this Section discloses overcharges or unauthorized charges to SBBC by SHERIFF in excess of two percent (2%) of the total billings under this Agreement, the actual cost of SBBC's audit shall be paid by SHERIFF. If the audit discloses billings or charges to which SHERIFF is not contractually entitled, SHERIFF shall pay said sum to SBBC within twenty (20) days of receipt of written demand under otherwise agreed to in writing by both parties.

(g) Inspection of Subcontractor's Records. SHERIFF shall require any and all subcontractors, insurance agents and material suppliers (hereafter referred to as "Payees") providing services or goods with regard to this Agreement to comply with the requirements of this Section by insertion of such requirements in any written subcontract. Failure by SHERIFF to include such requirements in any subcontract shall constitute grounds for termination of this Agreement by SBBC for cause and shall be grounds for the exclusion of Payee's costs from amounts payable by SBBC to SHERIFF pursuant to this Agreement for services relating specifically to the records not being permitted by Payee for SBBC's inspection, and such excluded costs shall become the liability of SHERIFF.

(h) Inspector General Audits. SHERIFF shall timely comply and cooperate with any reasonable inspections, reviews, investigations, or audits deemed necessary by the Florida Office of the Inspector General or by any other state or federal officials.

(i) Exempt Records. Notwithstanding anything to the contrary contained herein, the SHERIFF's Records will not be open to inspection, examination, evaluation, reproduction or audit if prohibited by law.

2.10 **Notice**. When any of the parties desire to give notice to the other, such notice must be in writing, sent by U.S. Mail, postage prepaid, addressed to the party for whom it is intended at the place last specified; the place for giving notice shall remain such until it is changed by written notice in compliance with the provisions of this paragraph. For the present, the Parties designate the following as the respective places for giving notice:

To SBBC:	Superintendent of Schools The School Board of Broward County, Florida 600 Southeast Third Avenue Fort Lauderdale, Florida 33301
With a Copy to:	Chief-Broward District Schools Special Investigative Unit The School Board of Broward County, Florida 7720 West Oakland Park Boulevard – Suite 355 Sunrise, FL 33351
To Sheriff:	Sheriff Scott J. Israel Broward Sheriff's Office 2601 West Broward Boulevard Fort Lauderdale, Florida 33311
To District Captain:	Captain Jan Jordan Broward Sheriff's Office Parkland/District 17 6650 University Drive Parkland, Florida 33067

2.11 **Indemnification.** Each party agrees to be fully responsible for its acts of negligence, or its agents' acts of negligence when acting within the scope of their employment and agrees to be liable for any damages resulting from said negligence. This section shall survive the termination of all performance or obligations under this Agreement and shall be fully binding until such time as any proceeding brought on account of this Agreement is barred by any applicable statute of limitations. Nothing herein is intended to serve as a waiver of sovereign immunity by any agency or political subdivision to which sovereign immunity may be applicable or of any rights or limits to liability existing under Section 768.28, Florida Statutes.

ARTICLE 3 – GENERAL CONDITIONS

3.01 **No Waiver of Sovereign Immunity**. Nothing herein is intended to serve as a waiver of sovereign immunity by any agency or political subdivision to which sovereign immunity may be applicable or of any rights or limits to liability existing under Section 768.28, Florida Statutes. This section shall survive the termination of all performance or obligations under this Agreement and shall be fully binding until such time as any proceeding brought on account of this Agreement is barred by any applicable statute of limitations.

3.02 **No Third Party Beneficiaries**. The parties expressly acknowledge that it is not their intent to create or confer any rights or obligations in or upon any third person or entity under this Agreement. None of the parties intend to directly or substantially benefit a third party by this Agreement. The parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against any of the parties based upon this Agreement. Nothing herein shall be construed as consent by an agency or political subdivision of the State of Florida to be sued by third parties in any matter arising out of any contract.

3.03 **Independent Contractor**. The parties to this agreement shall at all times be acting in the capacity of independent contractors and not as an officer, employee or agent of one another. Neither party nor its respective agents, employees, subcontractors or assignees shall represent to others that it has the authority to bind the other party unless specifically authorized in writing to do so. The SHERIFF shall at all times be responsible for all aspects of the employment, control and direction of Officers assigned as SROs under this Agreement. Nothing within this Agreement is intended to create an agency or employment relationship between SBBC and any officer assigned by the SHERIFF to participate in the SRO Program. All compensation, wages, salaries, benefits and other emoluments of employment payable to the SROs shall be the sole responsibility of the SHERIFF. No right to SBBC retirement, leave benefits or any other benefits of SBBC employees shall exist as a result of the performance of any duties or responsibilities under this Agreement. SBBC shall not be responsible for social security, withholding taxes, contributions to unemployment compensation funds or insurance for the SHERIFF'S officers, employees, agents, subcontractors or assignees.

3.04 **Equal Opportunity Provision**. The parties agree that no person shall be subjected to discrimination because of age, race, color, disability, gender identity, gender expression marital status, national origin, religion, sex or sexual orientation in the performance of the parties' respective duties, responsibilities and obligations under this Agreement.

3.05 **Termination**. This Agreement may be canceled with or without cause by either party during the term hereof upon thirty (30) days written notice to the other parties of its desire to terminate this Agreement. In the event of such termination, SBBC shall pay the SHERIFF for all services rendered through the effective date of termination.

3.06 **Default**. The parties agree that, in the event that either party is in default of its obligations under this Agreement, the non-defaulting party shall provide to the defaulting party (30) days written notice to cure the default. However, in the event said default cannot be cured within said thirty (30) day period and the defaulting party is diligently attempting in good faith to cure same, the time period shall be reasonably extended to allow the defaulting party additional cure time. Upon the occurrence of a default that is not cured during the applicable cure period, this Agreement may be terminated by the non-defaulting party upon thirty (30) days notice. This remedy is not intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy now or hereafter existing at law or in equity or by statute or otherwise. No single or partial exercise by any party of any right, power, or remedy hereunder shall preclude any other or future exercise thereof. Nothing in this section shall be construed to preclude termination for convenience pursuant to Section 3.05.

3.07 **Annual Appropriation.** The performance and obligations of SBBC under this Agreement shall be contingent upon an annual budgetary appropriation by its governing body. If SBBC does not allocate funds for the payment of services or products to be provided under this Agreement, this Agreement may be terminated by SBBC at the end of the period for which funds have been allocated. SBBC shall notify the other party at the earliest possible time before such termination. In the event of such termination, SBBC shall pay the SHERIFF for all services rendered through the effective date of termination and the SHERIFF will not be obligated to provide services after the effective date of termination. No penalty shall accrue to SBBC in the event this provision is exercised, and SBBC shall not be obligated or liable for any future payments due or any damages as a result of termination under this section.

3.08 **Excess Funds**. Any party receiving funds paid by SBBC under this Agreement agrees to promptly notify SBBC of any funds erroneously received from SBBC upon the discovery of such erroneous payment or overpayment. Any such excess funds shall be promptly refunded to SBBC.

3.09 **Public Records**. The following provisions are required by Section 119.0701, Florida Statutes, and may not be amended. The SHERIFF shall keep and maintain public records required by SBBC to perform the services required under this Agreement. Upon request from SBBC's custodian of public records, the SHERIFF shall provide SBBC with a copy of any requested public records or to allow the requested public records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law. The SHERIFF shall ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement's term and following completion of the Agreement if the SHERIFF does not transfer the public records to SBBC. Upon completion of the Agreement, the SHERIFF shall transfer, at no cost, to SBBC all public records in possession of the SHERIFF or keep and maintain public records required by SBBC to perform

the services required under the Agreement. If the SHERIFF transfers all public records to SBBC upon completion of the Agreement, the SHERIFF shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the SHERIFF keeps and maintains public records upon completion of the Agreement, the SHERIFF shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to SBBC, upon request from SBBC's custodian of public records, in a format that is compatible with SBBC's information technology systems.

IF A PARTY TO THIS AGREEMENT HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO ITS DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THE AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT 754-321-1900, REQUEL.BELL@BROWARDSCHOOLS.COM, RISK MANAGEMENT DEPARTMENT, PUBLIC RECORDS DIVISION, 600 SOUTHEAST THIRD AVENUE, FORT LAUDERDALE, FLORIDA 33301.

3.10 **Student Records:** Notwithstanding any provision to the contrary within this Agreement, the CITY under this Agreement shall fully comply with the requirements of Sections 1002.22 and 1002.221, Florida Statutes, or any other state or federal law or regulation, including Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. 1232g), and its implementing regulations (34 C.F.R. Part 99), regarding the confidentiality of student information and records. All SHERIFF requests for student records made to SBBC shall be in compliance with this provision. The SHERIFF represents, warrants, and agrees that it will: (1) hold the student records in strict confidence and will not use or disclose said Records except as (a) permitted or required by this Agreement, (b) required by law, or (c) otherwise authorized by SBBC in writing. At the request of the District, the SHERIFF agrees to provide SBBC with a written report of the student records and information disclosed to third parties. A breach of these confidentiality requirements shall constitute grounds for the immediate termination of this Agreement. The SHERIFF agrees, for itself, its officers, employees, agents, representatives, contractors or subcontractors, to fully indemnify and hold harmless SBBC and its officers and employees for any violation of this section, including, without limitation, defending SBBC and its officers and employees against any complaint, administrative or judicial proceeding, payment of any penalty imposed upon SBBC, or payment of any and all costs, damages, judgments or losses incurred by or imposed upon SBBC arising out of a breach of this covenant by the SHERIFF, or an officer, employee, agent, representative, contractor, or sub-contractor of the SHERIFF to the extent that the SHERIFF or an officer, employee, agent, representative, contractor, or sub-contractor of the SHERIFF shall negligently violate the provisions of this section or of Sections 1002.22 and 1002.221, Florida Statutes. This section shall survive the termination of all performance or obligations under this Agreement and shall be fully binding until such time as any proceeding brought on account of this Agreement is barred by any applicable statute of limitations. Nothing herein is intended to serve as a waiver of sovereign immunity by any agency or political subdivision to which sovereign immunity may be applicable or of any rights or limits to liability existing under Section 768.28, Florida Statutes.

3.11 **Compliance with Laws.** Each party shall comply with all applicable federal, state, and local laws, codes, rules and regulations in performing its duties, responsibilities and obligations pursuant to this Agreement.

3.12 **Place of Performance**. All obligations of SBBC under the terms of this Agreement are reasonably susceptible of being performed in Broward County, Florida and shall be payable and performable in Broward County, Florida.

3.13 **Governing Law and Venue**. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any controversies or legal problems arising out of this Agreement and any action involving the enforcement or interpretation of any rights hereunder shall be submitted to the jurisdiction of the State courts of the Seventeenth Judicial Circuit of Broward County, Florida.

3.14 **Entirety of Agreement**. This document incorporates and includes all prior negotiations, correspondence, conversations, agreements and understandings applicable to the matters contained herein and the parties agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

3.15 **Binding Effect**. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

3.16 **Assignment**. Neither this Agreement nor any interest herein may be assigned, transferred or encumbered by any party without the prior written consent of the other party. There shall be no partial assignments of this Agreement including, without limitation, the partial assignment of any right to receive payments from SBBC.

3.17 **Incorporation by Reference**. **Exhibit "A"** attached hereto and referenced herein shall be deemed to be incorporated into this Agreement by reference.

3.18 **Captions**. The captions, section designations, section numbers, article numbers, titles and headings appearing in this Agreement are inserted only as a matter of convenience, have no substantive meaning, and in no way define, limit, construe or describe the scope or intent of such articles or sections of this Agreement, nor in any way affect this Agreement and shall not be construed to create a conflict with the provisions of this Agreement.

3.19 **Severability**. In the event that any one or more of the sections, paragraphs, sentences, clauses or provisions contained in this Agreement is held by a court of competent jurisdiction to be invalid, illegal, unlawful, unenforceable or void in any respect, such shall not affect the remaining portions of this Agreement and the same shall remain in full force and effect as if such invalid, illegal, unlawful, unenforceable or void sections, paragraphs, sentences, clauses or provisions had never been included herein.

3.20 **Preparation of Agreement**. The parties acknowledge that they have sought and obtained whatever competent advice and counsel as was necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this Agreement has been their joint effort. The language agreed to herein expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the parties than the other.

3.21 **Amendments**. No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by each party hereto.

3.22 **Waiver**. The parties agree that each requirement, duty and obligation set forth herein is substantial and important to the formation of this Agreement and, therefore, is a material term hereof. Any party's failure to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement unless the waiver is in writing and signed by the party waiving such provision. A written waiver shall only be effective as to the specific instance for which it is obtained and shall not be deemed a continuing or future waiver.

3.23 **Force Majeure**. Neither party shall be obligated to perform any duty, requirement or obligation under this Agreement if such performance is prevented by fire, hurricane, earthquake, explosion, wars, sabotage, accident, flood, acts of God, strikes, or other labor disputes, riot or civil commotions, or by reason of any other matter or condition beyond the control of either party, and which cannot be overcome by reasonable diligence and without unusual expense ("Force Majeure"). In no event shall a lack of funds on the part of either party be deemed Force Majeure.

3.24 **Survival**. All representations and warranties made herein regarding indemnification obligations, obligations to reimburse SBBC, obligations to maintain and allow inspection and audit of records and property, obligations to maintain the confidentiality of records, reporting requirements, and obligations to return public funds shall survive the termination of this Agreement.

3.25 **Authority**. Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement on the date first above written.

FOR SBBC

(Corporate Seal)

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

By _____
Abby M. Freedman, Chair

ATTEST:

_____
Robert W. Runcie
Superintendent of Schools

Approved as to Form and Legal Content:

_____
Digitally signed by Kathelyn Jacques-Adams, Esq. - kathelyn.jacques-adams@gbrowardschools.com
Reason: Sheriff of Broward County, Florida - Parkland - SftO 2017-2018
Date: 2017.06.20 13:56:22 -04'00'

Office of the General Counsel

FOR SHERIFF

SHERIFF OF BROWARD COUNTY, FLORIDA

By _____
Scott J. Israel, Sheriff

Approved as to form and legal sufficiency
Subject to execution by the parties:

_____
Ronald M. Gunzburger
General Counsel
Office of the General Counsel

EXHIBIT "A"
LIST OF PARTICIPATING SCHOOLS

a) Participating Elementary Schools:

Heron Heights
Park Trails
Riverglades

b) Participating Middle School:

Westglades

c) Participating High School:

Marjory Stoneman Douglas

EXHIBIT 2

4.37 ACTIVE SHOOTER

4.37.1 Definitions:

A. Active Shooter: One or more subjects who participate in a random or systematic shooting spree and who demonstrates the intent to continuously inflict death or great bodily harm onto others. This includes anyone who uses a firearm or other type of deadly weapon (i.e. knife, explosives)

B. Real Time Intelligence: Deputy(s) personal observation of people fleeing, gunfire etc. provides awareness of an on-going Active Shooter situation.

C. Deputy Response Team: A deputy or a team of deputies who while on scene have "real time intelligence" and make the decision to enter the area/structure of the active shooter with the goal of stopping the threat.

D. Extraction Team: A team consisting of deputies with the ability to enter the area/structure and either remove a victim to a casualty collection point (CCP) or provide first aid in place. The purpose of the Extraction Teams is to provide first aid in the area/structure or move victims to a casualty collection point prior to the arrival of fire rescue paramedics.

E. Rescue Task Force: A team consisting of deputies and fire rescue paramedics with the ability to enter the area/structure. The purpose of the Rescue Task Force (RTF) is to provide advanced emergency first aid to victims of an active shooter event as quickly as possible in the area/structure.

F. Hot zone: The current location of the subject in the area/structure

G. Warm zone: Where the subject was previously in the area/structure

H. Cold zone: A location away from the area/structure. The cold zone may include staging areas, the CCP, and Incident Command Post (ICP).

4.37.2 Response/Responsibilities:

A. Upon recognizing an active shooter situation the deputy on scene will immediately notify Communications.

B. Communications will immediately notify SWAT.

C. If real time intelligence exists the sole deputy or a team of deputies may enter the area and/or structure to preserve life. A supervisor's approval or on-site observation is not required for this decision.

D. The Deputy Contact Team will continue until one of these objectives has been met:

1. The subject/s has been forced into a surrender.

2. The subject/s has been forced into a barricade.

3. The subject/s hostilities have been stopped.

4. The Deputy Contact Team is relieved by SWAT personnel.

E. Extraction Team Responsibilities: (Consists of LE members only)

1. Locate victims

2. Provide appropriate first aid

3. Remove victims to the casualty collection point (CCP)

4. Area of operations for the Extraction Team may include warm and cold zones.

F. Rescue Task Force Responsibilities: (Consists of LE and FR members)

1. Locate victims

2. Provide advanced emergency first aid and triage

3. The RTF may remove a victim from the area/structure or request an extraction team.

4. Area of operations for the RTF may include the warm zone and cold zones.

G. If the situation turns to a barricade or hostage situation the response team will contain, isolate, communicate and wait for SWAT.

H. Patrol Sergeant/Supervisor's Responsibilities:

1. Respond to the scene

2. Identify who entered the structure and where they entered

3. Summon any additional resources

4. Coordinate the inner and outer perimeters

I. Incident Commander (IC) Responsibilities:

1. Establish a command post with Fire Rescue.

2. Ensure proper notifications are made.

3. Establish a CCP for Fire Rescue and Emergency Services.

4. Establish a staging area for Aviation/Medical Evacuation.

5. Establish an evacuation/holding area for all removed subjects

6. Establish a PIO/Media staging area

7. Once the Active Shooter is stopped, the IC will ensure that SWAT searches the structure for any secondary shooters and/or dangerous traps.

4.37.3 Debriefing:

A. The Incident Commander will be responsible for conducting a debriefing of all personnel involved in an active shooter situation in timely manner to learn of the successes of the response and identify any needs for improvement.

B. The Incident Commander will complete an After Action Report in addition to ensuring the submission of the required Offense Reports and supplements by any involved personnel.

4.37.4 Training: All sworn personnel, up to the rank of Colonel, will attend the Active Shooter/Rescue Task Force training course that is provided by the Training Division.

NOTICE

These Standard Operating Procedures are considered law enforcement sensitive and may contain certain information that may be exempt under Florida Public Records Law. Outside or public requests for information from this Standard Operating Procedures Manual must be directed to the Department of Law Enforcement for review and redaction, if necessary, prior to disclosure.

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