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## **Nelson Robles v. Metropolitan Dade County**

CHIEF JUSTICE: GOOD MORNING. GOOD MORNING, GENTLEMEN.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. JIM BLECK ON BEHALF OF MARVIN ROBLES AND HIS PARENTS. AS YOU ALL ARE AWARE, THIS CASE INVOLVES A HIJACKING WITH A BUS FULL OF SCHOOL CHILDREN THAT OCCURRED BACK IN 1995. I AM SURE THOSE MEMBERS OF THE COURT FROM THE MIAMI AREA RECALL THAT INCIDENT. I DON'T KNOW IF IT WAS IN THE PAPERS UP HERE, BUT COINCIDENTALLY ON FRIDAY OF LAST WEEK, AN ARMED MAN COMMANDEERED A POSTAL TRUCK AND TOOK A POSTAL WORKER HOSTAGE. THERE WAS A SLOW SPEED CHASE SIMILAR TO THIS CASE, THAT THE TRUCK WAS ULTIMATELY STOPPED, AND BECAUSE OF RESTRAINT, NO SHOTS WERE FIRED, NO ONE WAS INJURED OR KILLED. NEITHER BYSTANDER NOR SUBJECT, AND IT CAUSED ME TO THINK THAT THE COINCIDENCE OF THIS EVENT HE IS THAT, WHILE I AM TOTALLY FOCUSED ON MY CASE, THAT WHAT THIS COURT IS TO DO IN DECIDING MY CASE, IS DECIDE LAW THAT IS GOING TO IMPACT ON MANY OTHER CASES. THIS, OF COURSE, IS OBVIOUS TO YOU ALL BUT IT IS SOMETHING THAT, AS ATTORNEYS, WE SOMETIMES LOSE SIGHT OF. -- WE SOMETIMES LOSE SIGHT OF.

ARE YOU ARGUING THAT THE KEISNER EXTREME EMERGENCY EXCEPTION IS, REALLY, ONE THAT IS STILL SOMETHING FOR THE JURY TO DECIDE, RATHER THAN A MATTER OF LAW, OR ARE YOU SAYING THAT THE FACTS OF THIS CASE DON'T FIT INTO WHATEVER WE MEANT WHEN WE SAID ABOUT THIS EXTREME EMERGENCY, THAT THIS IS SOMETHING THAT, WHERE SOMEONE, THROUGH THEIR FAILURE TO ADHERE TO REASONABLE STANDARDS OF PUBLIC SAFETY THAT, IT IS SOMETHING, THEN, THAT GOES BACK INTO THE TRADITIONAL OPERATIONAL ASPECT OF SOVEREIGN IMMUNITY? DO YOU UNDERSTAND WHAT I AM SAYING? IN OTHER WORDS --

I UNDERSTAND THE QUESTION, BUT I HAVE NO GOOD ANSWER FOR THIS REASON. AND IT IS INTERESTING WHEN YOU SAY WHAT WE DECIDED. IT IS INTERESTING THAT KEISNER AND THE LAST MENTION OF THE KEISNER EXCEPTION, AT LEAST THE LAST TIME THAT I AM AWARE OF, IN THE BROWN DECISION IN 1992, THIS COURT AS AN INSTUGS, DECIDED THOSE TWO CASES, BUT THIS COURT, AS A GROUP OF INDIVIDUALS, THERE IS NO MEMBER OF THIS CURRENT COURT THAT PARTICIPATED IN EITHER OF THOSE DECISIONS, SO THERE IS NO ONE WITH IN SIGHT INTO WHAT THE AUTHORS OF THOSE OPINIONS MEANT, WHEN THEY DEALT WITH WHAT I BELIEVE IS PURE DICTUM, BECAUSE BASED AT LEAST ON MY RESEARCH, I CAN FIND NO CASE, OTHER THAN THIS CASE, WHERE THAT SO-CALLED EXCEPTION HAS EVER BEEN INVOKED. IT IS MERELY DICTUM IN TWO CASES DECIDED BY THIS COURT. I DO KNOW, AND --

IF THAT IS THE CASE --

ARE YOU, DO YOU AGREE THAT THERE IS AN OPERATIONAL LEVEL, AND THEN THERE IS A DISCRETIONARY LEVEL, FOR THESE POLICE DEPARTMENT DECISIONS?

YES, YOUR HONOR. I DO. I DON'T THINK THERE IS ANY QUESTION OF THAT.

SO WHAT ARE YOU CONTESTING HERE? ARE YOU CONTESTING THE ACTUAL DECISION THAT THE POLICE OFFICER MADE TO SHOOT, OR THE MANNER IN WHICH THE POLICE OFFICER CARRIED OUT THAT DECISION?

THEY --

AND ARE THOSE TWO DIFFERENT THINGS?

THEY ARE DIFFERENT THINGS, IN THE SENSE THAT WHETHER OR NOT THE CONDUCT WAS REASONABLE OR UNREASONABLE IS A TRADITIONAL TORT CONCEPT. REASONABLE CONDUCT IS THE ESSENCE OF TORT. AND ALL WE ARE SAYING IS THAT A JURY QUESTION WAS PRESENTED ON WHETHER OR NOT THE OFFICER'S CONDUCT WAS REASONABLE.

THE CONDUCT OF?

THAT, OF COURSE, HAS NOTHING DO WITH THE ISSUE OF SOVEREIGN IMMUNITY. AND ONE OF THE THINGS THAT MIGHT MAKE IT EASIER FOR THE COURT TO RESOLVE THE SOVEREIGN IMMUNITY SITUATION IS TO VARY OUR FACTS HERE JUST SLIGHTLY.

YOU THINK KISER IS -- KAISNER IS DICTA. WHATEVER 2 IT IS, IT IS WHAT THE COURT RELIED ON IN GRANTING JUDGMENT AS A MATTER OF LAW. ARE YOU SAYING THAT WE RECEDE FROM KAISN ERROR -- FROM KEISN ERROR THAT RECEDE -- FROM KEISNER?

I AM NOT SAYING --

BUT IF WE DON'T RECEDE, IF WE SAY THAT WAS THE HOLDING, THE THIRD DISTRICT TOOK THAT STATEMENT AND IS THAT AN EXAMPLE OF THE EXTREME EMERGENCY THAT WAS ENVISIONED IN KEYSNER AND IN PINELLAS PARK?

THAT IS WHY I HAVE TO SAY, AND I APOLOGIZE FOR DOING THIS, IS BECAUSE I DON'T KNOW. I DON'T UNDERSTAND THAT DECISION. T IS NOT CONSISTENT WITH THE LONG STANDING AND TRADITIONAL LAW. I DO KNOW THAT THREE MEMBERS OF THIS COURT, IN A DECISION AUTHORED BY JUSTICE WELLS, AND IT IS NOT QUOTED AT LENGTH, CITED, AND THE REASON IT IS CITED IS AS TO THE DIFFERENCE BETWEEN DISCRETIONARY AND OPERATIONAL. AT PAGE 8 OF MY BRIEF, I QUOTE FROM KEYSNER VERSUS KOLBE, AND THE DISTINCTION BETWEEN DISCRETIONARY AND OPERATIONAL. DISCRETIONARY IS THAT INVOLVED IN OUR LEGISLATIVE POWER TO, AS OPPOSED TO OPERATIONAL, WHICH IS NOT NECESSARILY INHERENT IN POLICY OR PLAY. IT MERELY AFFECTS THE DECISION AS TO HOW THESE POLICIES WILL BE IMPLEMENTED. THAT DISTINCTION IS INCONSISTENT AND IN COMPATIBLE WITH SOME SORT OF AN EMERGENCY CIRCUMSTANCE THAT IS NOW ELEVATED TO A SOVEREIGN IMMUNITY QUESTION, AND I THINK THAT IS THE PROBLEM WITH KEYSNER AND BROWN. AND I THINK I CAN BEST EMPHASIZE IT BY TAKING WHAT I THINK WE ALL WOULD AGREE WOULD BE AN UNREASONABLE RESPONSE, AND LET ME TAKE THE FACTS OF THIS CASE. WE HAVE THE BUS COMING, STOPPING MOMENTARILY. THIS OFFICER IS PRONE IN FOLIAGE, SITING THROUGH -- SIGHTING THROUGH HIS RIFLE. MR. SANG SEES SOMEONE POINTING AT HIM AND HE RESPONDS TO THAT, AND THE OFFICER SHOOTS THROUGH THE BUS, ADMITTING THERE WERE CHILDREN ON EITHER SIDE OF THIS MAN, INCLUDING MARVIN ROBLES. 12 INCHES WAS THE DESCRIPTION BETWEEN THE CHILD'S HEAD AND THE CENTER POINT THAT HIS AIM POINT, AND HE CHOSE TO FIRE AT THAT POINT, FOR WHATEVER WENT THROUGH HIS MIND AT THAT TIME. AND I ARGUE IT IS NEXT, THAT IT IS RECKLESS -- THAT IS NEGLIGENT, RECKLESS, WHAT HAVE YOU, AND COUNSEL ARGUES THAT IS AN APPROPRIATE RESPONSE AND HAS NOTHING TO DO WITH NEGLIGENT. IT HAS TO DO WITH WHAT IS REASONABLE AND LET'S TAKE REASONABLE OUT OF THE PICTURE. LET'S SAY IT IS WAS A FULLY AUTOMATIC WEAPON THAT HE SWITCHED IT ON TO AUTOMATIC AND FIRED 20 ROUNDS AT THE SIDE OF THAT BUS. I DON'T THINK ANYONE WOULD SUGGEST THAT THAT CONDUCT IS EITHER REASONABLE OR RATIONAL AND WOULD FIND IT NEGLIGENT, I BELIEVE, FIRING AT THAT BUS. SO THE DECISION TO FIRE 20 ROUNDS

FROM AN AUTOMATIC WEAPON INTO A SIDE OF A BUS WITH SCHOOL CHILDREN, WITH A MAN WHO HAS NOT EXHIBITED ANY WEAPON, ALTHOUGH IT IS BELIEVED THAT HE MIGHT HAVE A WEAPON OR A BOMB. IS THAT ENTITLED TO SOVEREIGN IMMUNITY, AND I THINK WHEN YOU VARY THE FACTS BY THAT LITTLE BIT, THAT WE NOW HAVE A SITUATION THAT, NO, THAT IS NOT A SITUATION THAT SHOULD BE IMMUNE FROM, WOULD IMMUNIZE THE COUNTY FROM LIABILITY, BUT THAT IS THE DISTINCTION, AND I WAS GUILTY OF THIS IN MY BRIEF AND I THINK COUNSEL WAS AS WELL. WE ARE ARGUING REASONABLE VERSUS UNREASONABLE, WHICH IS A TORT CONCEPT, AND IT GOES ALL OF THE WAY BACK TO TRIANON, AND PART OF THE TRILOGY I IN TRIANON, AND I WILL QUOTE IT AGAIN, IT IS THE LACK OF COMMON LAW DUTY DESCRIBED IN A DISCRETIONARY FUNCTION, BUT IT MUST BE DISTINGUISHED FROM EXISTING COMMON LAW DUTIES OF CARE APPLICABLE TO THE SAME INDIVIDUALS, OPERATING MOTOR VEHICLES OR THE HANDLING OF A FIREARM. THE HANDLING OF A FIREARM BY A POLICE OFFICER HAS -- OF A FIREARM BY A POLICE OFFICER HAS ALWAYS BEEN, IN THE TRADITIONAL TORT CONCEPTS, OF REASONABLE VERSUS UNREASONABLE, AND THE HANDLING OF A FIREARM, JUST LIKE AN UNREASONABLE HANDLING OF A VEHICLE, IS A TORT CONCEPT.

CAN I GO BACK A SECOND, TO THE THIRD DISTRICT'S OPINION. IT QUOTED FROM EIGHT PARAGRAPHS OF THE TRIAL COURT'S SUMMARY JUDGMENT ORDER, AND THEN IN ONE PARAGRAPH, IT QUOTED EXTENSIVELY FROM THIS COURT'S CASE IN CITY OF PINELLAS PARK VERSUS BROWN, AND, REALLY, ENDED THE PARAGRAPH WITH THAT QUOTE, AND JUST SAID AFFIRMED. WHAT, IN THAT OPINION, CONFLICTS WITH ANY OPINION FROM EITHER THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL?

WELL, THE, AND I DON'T HAVE THE JURISDICTIONAL BRIEF IN FRONT OF ME, AND I DON'T RECALL THE SPECIFIC CASE THAT HAS BEEN IN THE JURISDICTIONAL BRIEF, BUT THERE ARE A NUMBER OF CASES FROM THIS COURT THAT SAYS THAT THE MISAPPLICATION OF A DECISION OF THIS COURT IS SUFFICIENT BASIS TO CREATE CONFLICT. ALSO, IT IS THE DECISION ALLEGED DISCHARGE OF A FIREARM AS BEING A FUNCTION INDISCRETION IN TRY A NON, WHICH -- IN TRIANON, WHICH DESCRIBES THE TRADITIONAL CONCEPT OF A FIREARM AS JURISDICTIONAL. ONE, THE MISAPPLICATION OF BROWN AND KEYSNER VERSUS KOLBE, AND I DON'T THINK I HAVE THE BRIEFING TO SUPPORT THAT, AND THE SECOND CASE IS TRIANON ON THIS ISSUE, THAN IS WHAT GIVES THIS COURT JURISDICTION, BECAUSE IT IS INCONSISTENT AND INCOMPATIBLE WITH THE VIEWS OF THIS COURT.

IS IT YOUR VIEW THAT THE DISCRETIONAL PRINCIPLES OF LAW IS THE AREA HERE WHERE IT NEED NOT NECESSARILY BE A POLICE OFFICER, BUT IT IS THE OPERATIONAL VERSUS DISCRETIONARY FUNCTION THAT CREATES THE UNDERLYING JURISDICTION? THOSE PRINCIPLES OF LAWS ANNOUNCED THROUGHOUT, SINCE WE CAME DOWN?

YES, YOUR HONOR. THIS IS, IT IS, IN THIS CASE, WHATEVER WAS BEING DONE BY THE POLICE OFFICERS ON THE GROUND WAS OPERATIONAL, BECAUSE THE DECISION TO PURSUE THE BUS AND MR. SANG TO THE EXTENT THAT EVEN THAT WOULD BE A DISCRETIONARY FUNCTION, AND THAT IS SOMETHING WE NEED NOT ENGAGE IN, BUT LET'S ASSUME THAT IT WAS A DECISION TO FOLLOW MR. SANG AND THE BUS. EVERYTHING THAT FAILED TO BE DONE OR WAS DONE WAS OPERATIONAL, SO SOVEREIGN IMMUNITY IS NOT AN ISSUE. OR THE DECISION TO INTERVENE IN THIS SITUATION. YOU DRAW ANALOGY TO A MOB AND YOU CAN MAKE THE DECISION, THE DISCRETIONARY FUNCTION NOT TO BECOME INVOLVED, NOT TO COMMIT POLICE FORCE, WOULD BE THE SAME ANALYSIS AS WE HAVE HERE, WHICH WOULD BE NOT TO COMMIT POLICE FORCE TO THE SITUATION.

I THINK, YOUR HONOR, IT WOULD BE, I DON'T WANT TO SAY ABSURD BUT IT WOULD CERTAINLY BE STRANGE, IN DEED, IF THE POLICE MADE THE DISCRETIONARY DECISION NOT TO ENGAGE OR GET INVOLVED IN A HOSTAGE SITUATION, BUT THEORETICALLY, THAT IS WHERE WHATEVER DISCRETIONARY, FROM THAT POINT FORWARD, IT IS OPERATIONAL, AND WE SIMPLY DON'T HAVE -

GETTING BACK TO MY QUESTION --

THERE IS ANOTHER ASPECT, IN TERMS OF THE CONFLICT IF YOU WILL. ALSO IN KEYSNER AND IN BROWN, THEY TALKED ABOUT, AND I BELIEVE IT IS IN THE FOOTNOTE IN BROWN AND I KNOW IT IS QUOTED IN THE BRIEF, THE COURT DISTINGUISHES THE SITUATION. THE EXCEPTION WOULD NOT APPLY WHERE THE POLICE OFFICER IN SOME FASHION, EXACERBATES OR INCREASES THE RISK. THE RISK HAS TO BE CREATED ENTIRELY BY THE PERPETRATOR, THUS CAUSING, IN THIS CASE, THE RISK WAS CLEARLY EXACERBATED BY THE OFFICER, WHEN HE MADE THE DECISION, FOR WHATEVER REASON, TO FIRE INTO THE BUS. IT WAS THE SITUATION THAT WAS HIGHLY AGGRAVATED AT THAT POINT, AND INCREASED THE RISK SUBSTANTIALLY, AT THAT POINT, TO ALL CONCERNED, AND THAT, AGAIN, IS AN ASPECT OF CONFLICT. IT IS A MISAPPLICATION OF THE LAW AND A FAILURE OF BOTH THE TRIAL COURT AND DISTRICT COURT, TO RECOGNIZE WHAT I MIGHT CALL THE EXCEPTION TO THE EXCEPTION.

HOW IS THIS IN KEEPING WITH FEDERAL CASE LAW, REALIZING THAT THEIR STANDARDS FOR IMMUNITY ARE DIFFERENT, BUT I GUESS I WAS THINKING EVEN WITH THE WACO, TEXAS, SITUATION, WHERE, WAS THERE LITIGATION, WAS THERE ANY CASE LAW THAT AROSE OUT OF THOSE CIRCUMSTANCES?

THERE ARE MANY CASES, BOTH STATE AND FEDERAL, THAT DEAL WITH CONDUCT OTHER THAN WHAT I WILL CALL SIMPLE NEGLIGENCE. OUR WAIVER OF SOVEREIGN IMMUNITY IN FLORIDA IS THAT THE SOVEREIGN WILL BE HELD ACCOUNTABLE TO THE SAME EXTENT AS A PRIVATE PERSON OR CORPORATION, WHAT HAVE YOU, AND I THINK IT IS WORTH MENTIONING, COUNSEL MAKES THE POINT IN HIS BRIEF, THAT MY RELIANCE ON THE SCOTT VERSUS CITY OF OPEN LACK AN IN THE -- OF OPA-LOCKA IN THE EARLIER CITY OF MIAMI CASE THAT INVOLVED POLICE SHOOTINGS, WHERE THEY WERE RESPONDING TO, POLICE WERE BEING SHOT AT. THEY FIRED BACK AND SHOT INNOCENT BYSTANDERS. I MAKE THE POINT IN THE BRIEF THAT THOSE CASES HOLD FOR THE PROPOSITION THAT A NEGLIGENT STANDARD APPLIES, AND ACTUALLY ANOTHER POINT I WOULD LIKE TO MAKE IN RESPONSE TO THE COURT'S QUESTION IS THAT I BELIEVE THAT THIS CASE IS A CLASSIC SUDDEN EMERGENCY DOCTRINE CASE. TRADITIONAL TORT CONCEPT THAT, IS WHAT THE JURY WAS INSTRUCTED IN THIS CASE WAS UNDER SUDDEN EMERGENCY, AND THAT IS WHERE THE CASE SHOULD BE WON OR LOST. IN THIS CASE WE HAD A HUNG JURY, BUT THAT IS A TORT CONCEPT NOT A SOVEREIGN IMMUNITY CONCEPT.

CHIEF JUSTICE: YOU HAD A REMINDER A MINUTE OR TWO AGO ABOUT YOUR REBUTTAL TIME, WITH THE LIGHT GOING ON. I DON'T WANT YOU TO USE IT ALL UP AND THEN HAVE NONE LEFT.

IF IT IS LIKE THE BRIEFING IN THE CASE, I DON'T FIND IT NECESSARY TO FILE A REPLY BRIEF. HOPEFULLY THE SAME WILL BE TRUE HERE AND I WON'T ABUSE THAT PRIVILEGE.

MAY I ASK ONE QUESTION? MAY I ASK ONE QUESTION?

YES, SIR, IF YOU WILL.

IF THE OFFICER HAD NOT SHOT, AND THE OFFENDER THIS THIS CASE HAD, INDEED, PULLED THE GUN AND SHOT YOUR CLIENT AND KILLED HIM, WOULD YOUR ARGUMENT BE THE SAME?

YES AND MY ARGUMENT WOULD NOT BE THE SAME AS THE ARGUMENT I MADE TO THE JURY. MY ARGUMENT WOULD BE WEAKENED TO THE POINT OF I WOULDN'T HAVE A VERY GOOD CASE, BUT I WOULD BE ARGUING THE SAME POINTS OF LAW TO THIS COURT. THE DECISION TO SHOOT OR NOT SHOOT WAS OPERATIONAL. IT WAS EITHER NEGLIGENT, NOT NEGLIGENT, RECKLESS, PRUDENT, TORT CONCEPTS, BUT REGARDLESS OF WHETHER THE DECISION THAT THAT OFFICER MADE, TO EITHER SHOOT OR NOT SHOOT, DOES NOT GIVE RISE TO SOVEREIGN IMMUNITY, AND I THINK THAT

IS THE --

COUNSEL, AT WHAT POINT DO WE GET TO THE COURT'S STATEMENT IN BROWN THAT CERTAIN POLICE ACTIONS MAY INVOLVE A LEVEL OF SUCH URGENCY AS TO BE CONSIDERED DISCRETIONARY AND NOT OPERATIONAL. DO WE HAVE GET TO THAT POINT, THEN, UNDER YOUR ARGUMENT?

I DON'T KNOW HUGH YOU CAN, BECAUSE THAT --

-- I DON'T KNOW HOW YOU CAN, BECAUSE THAT --

YOU ARE ASKING US TO OVERRULE THE STATE VERSUS BROWN.

NO, YOUR HONOR, THAT WAS PURE DICTUM. THERE WAS NOTHING TO OVERRULE.

IF THAT WAS DICTUM, THEN WHERE IS THE CONFLICT?

THE CONFLICT IS THAT THAT IS DICTUM, AND EVEN IF IT IS TAKEN AS THE RULE OF LAW, THE EXCEPTION IS THAT IT ONLY APPLIES WHEN THE OFFICER OR, THE SILL SERVANT DOES NOT KPAS -  
- THE CIVIL SERVANT DOES NOT EXACERBATE --

IF IT IS A CONFLICT, YOU ARE ASKING US TO OVERRULE IT.

THE MISAPPLICATION OF DICTUM CAN STILL BE A HOLDING IN THIS CASE, IF IT IS INCONSISTENT WITH THE HOLDING. THE HOLDING IN KEYSNER VERSUS KOLBE AND IN PINELLAS VERSUS BROWN, THAT OPERATIONAL DECISIONS ARE SUBJECT TO TRADITIONAL TORT LIABILITY. THE DECISION IN THIS CASE, 4 IS THAT AN OPERATIONAL DECISION WAS NOT SUBJECT TO TORT LIABILITY BUT IS IMMUNE FROM SUIT. THAT IS A BLATANT CONFLICT. THEY TRIED TO JUSTIFY. THEY ARGUED THAT THERE IS NO CONFLICT, BECAUSE THIS FITS WITHIN DICTUM. WELL, IT DOESN'T FIT EVEN WITHIN THE DICTUM, BECAUSE THERE IS AN EXCEPTION TO THE DICTUM, BUT IT IS FOR THIS COURT, IF THERE IS A FACT CIRCUMSTANCE, AND THIS COURT HAS THE POWTER TO SAY HERE IS THE CASE THAT IS JUST LIKE, THIS IS WHAT WE MEANT IN KEYSNER AND IN BROWN THIS. IS WHAT WE MEANT. THIS IS A CASE THAT IS IMMUNE FROM SUIT THAT SOVEREIGN IMMUNITY APPLIES. THIS COURT HAS THE POWER TO TAKE WHAT, UP TO THIS POINT HAS BEEN DICTUM, AND CREATE A CASE THAT SAYS EXACTLY THAT, IN THESE FACT CIRCUMSTANCES. MY PROBLEM AND THE REASON WHY I RAISED THE, YOU KNOW, MENTION OF THE HIJACKING LAST WEEK AND TURNING THIS TO, YOU KNOW, SPRAYING THE SIDE OF A BU BUS WITH A FULL AUTOMATIC -- OF A BUS WITH A FULL AUTOMATIC WEAPON, IS BECAUSE THE DECISION OF THIS COURT IN NOW TAKING THAT POSSIBILITY THAT IS ALLUDED TO AND APPLYING IT TO CONCRETE FACTS THAT WILL MAKE IT A RULE OF LAW THAT WILL APPLY, NOT ONLY IN THIS CASE, WHERE THERE IS AN ARGUMENT THAT THE OFFICER WAS PRUDENT IN WHAT HE DID, BUT IT WILL APPLY WHEN THE OFFICER DOES SOMETHING TOTALLY UNREASONABLE, TOTALLY RECKLESS, BECAUSE THIS COURT WILL NOW SAY, NO, THAT IS IMMUNE FROM SUIT, AND THAT WE ARE GOING TO ALLOW OUR POLICE OFFICERS TO SPRAY BULLETS RANDOMLY AND WITHOUT REGARD, WHENEVER THEY PERCEIVE AN EMERGENCY, WHENEVER THEY CAN SAY, IN THEIR OWN SUBJECTIVE MIND, I WAS AFRAID, SO I FIRED, BECAUSE THAT IS WAY WANTED TO DO. I THINK THAT SHOULD BE SUBJECT TO TRADITIONAL TORT CONCEPTS. TO ELEVATE THAT TO SOVEREIGN IMMUNITY IS SIMPLY LONG, AND THAT IS WHAT I ASK -- IS SIMPLY WRONG, AND THAT IS WHAT I ASK THIS COURT TO DO IS TO RECOGNIZE THAT THIS IS NOT A SITUATION THAT IS SUBJECT TO --

GETTING BACK TO MY ORIGINAL QUESTION, THEN, YOU ARE ASKING US TO OVERRULE THE STATEMENT IN BROWN WHICH SAID THAT CERTAIN POLICE ACTIONS MAY INVOLVE A LEVEL OF SUCH URGENCY AS TO BE CONSIDERED DISCRETIONARY AND NOT OPERATIONAL. YOU ARE ASKING US TO SAY EVERY POLICE ACTION IS, BY DEFINITION, OPERATIONAL, AND WE NEED TO LOOK AT WHETHER IT WAS REASONABLE OR NOT. WE CAN'T SAY THAT THERE WAS ANY KIND OF

POLICE ACTION THAT IS, BY DEFINITION, DISCRETIONARY, AND THEREFORE WE WOULD HAVE TO OVERRULE BROWN.

I THINK IT IS WITHIN THIS COURT'S PREROGATIVE TO DO WHATEVER IT FEELS IS APPROPRIATE WITH THAT LANGUAGE, TO RECOGNIZE IT, TO EXPAND IT, CONTRACT IT, APPLY IT TO THE FACTS OF THIS CASE, TO NOT APPLY IT. MY SUGGESTION TO THE COURT IS THAT THAT LANGUAGE IS INCONSISTENT WITH THE, BY FAR, TRADITIONAL CONCEPT OF DISCRETIONARY VERSUS OPERATIONAL. I SEE MY TIME IS UP, AND WITH LUCK, EVERYTHING THAT HAS BEEN COVERED WILL NOT NEED TO BE READDRESSSED ON REBUTTAL. THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. WITH THE COURT'S PERMISSION, I AM TOM ROBERTSON, AND I AM AN ASSISTANT COUNTY ATTORNEY ON BEHALF OF MIAMI-DADE COUNTY HERE. THIS CASE DOES NOT BRING OUT THE PINELLAS PARK MANNER.

-- MATTER.

ARE YOU SAYING THAT, BECAUSE IT IS A HOSTAGE SITUATION, ARE YOU SAYING THAT ANYTHING THAT THE POLICE OFFICER DID IN THE COURSE OF RESPONDING, WOULD BE IMMUNE FROM EVEN LOOKING AT WHETHER THE ACTION WAS REASONABLE OR NOT. IS THAT THE, IS THAT WHAT WE WOULD HAVE TO SAY? BECAUSE IN OTHER WORDS THE IDEA IS THAT THIS IS A HOSTAGE, SO IT IS AN EXTREME EMERGENCY.

ABSOLUTELY.

AND SO THAT NO MATTER, SO THAT IF THE OFFICER, INSTEAD OF FIRING AT MR., AT, AGAIN, HAD SHOT A, HAD MISFIRED AND SHOT AND TWO CHILDREN KILLED, THAT WOULD BE IMMUNE BECAUSE IT WAS A HOSTAGE SITUATION?

IF IT WAS IN THIS SITUATION AND THE SHOT HAD MISSED MR. SANG COMPLETELY AND INSTEAD HIT THE CHILD, I WOULD SAY, YES, THAT IS IMMUNE, BECAUSE BASED ON -- I APOLOGIZE.

THAT IS BASED ON?

THE VERY SERIOUS SITUATION FACING AT THAT POINT. THAT IS A VERY SMALL DISTANCE INDIFFERENCE, BETWEEN WHAT ACTUALLY OCCURRED.

WELL, HOW IS THAT DIFFERENT FROM EVERYTHING, AND, AGAIN, I HAVE A GREAT DEAL OF RESPECT FOR POLICE OFFICERS, AND WHAT THEY HAVE TO DO EVERYDAY, EVERYDAY AREN'T THEY FACED WITH WHAT ARE, FOR THOSE OF US THAT ARE ORDINARY CITIZENS, DEFINITELY EMERGENCIES? THERE IS A SITUATION THAT THEY HAVE TO DECIDE WHETHER TO SHOOT AND WHEN TO SHOOT AND HAVEN'T THOSE DISCHARGE OF FIREARM CASES HERETOFORE BEEN JUDGED ON THE FACTS AND THE CIRCUMSTANCES OF THOSE CASES, SUBJECT, OF COURSE, TO THE LIMITS OF SOVEREIGN IMMUNITY? AND HOW DO YOU DISTINGUISH, YOU KNOW, HOW DO YOU, THEN, WHERE DOES THE LINE GET DRAWN AS TO WHY THOSE AREN'T ALL EMERGENCY CIRCUMSTANCES?

THE DISCHARGE OF FIREARM CASE THAT CAME TO THIS COURT, WHICH WAS THE CLEVELAND CASE, WAS IN A SITUATION WHERE THERE WAS NO SOVEREIGN IMMUNITY, BUT THE CLEVELAND CASE, ALSO, POINTS OUT THAT THERE WAS NO SERIOUS EMERGENCY AT THE TIME. THE EMERGENCY HAD PASSED. THAT IS THE SITUATION WHERE THEY WERE CALLED OUT TO A RIOT. THEY ARRESTED ONE PERSON. EVERYTHING HAD CALMED DOWN. AND THEN THEY HEAR SOME GUNFIRE OR WHAT THEY PERCEIVE TO BEGUN FIRE, AND AT THAT POINT, NO POLICE EMERGENCY THAT THEY RESPONDED TO. THEY RESPONDED TO A CIRCUMSTANCE.

ISN'T THAT WHAT WAS BEING, THOUGH, ADVANCED HERE, THAT IS THAT THEY HAD PASSED SUCCESSFULLY, FOR ABOUT AN HOUR, THAT TWO OF THE HOSTAGES HAD BEEN RELEASED, AND THAT WHAT THEY ARE DEALING HERE WITH IS THE QUESTION OF WHETHER, THROUGH THEIR OWN NEGLIGENT ACTS OR THE FAILURE TO ADHERE TO REASONABLE STANDARDS OF PUBLIC SAFETY THAT, THE OFFICER PUT ANOTHER, YOU KNOW, ONE OF THE STUDENTS AT-RISK?

WELL, TO START WITH, THERE WAS NEVER A TIME IN THIS, UNDER ANYBODY'S TESTIMONY, WHEN THINGS WERE GOOD. YOU HAVE GOT A BUS THAT IS MOVING THAT HAS A MAN WITH A GUN AND A BOMB. AS THEIR OWN EXPERT TESTIFIED, UNTIL A SITUATION IS CONTAINED, AND CONTAINED MEANS STOPPED AND CONTROLLED BY THE POLICE, IT IS BAD.

BUT ISN'T THAT AN ARGUMENT, THOUGH, THAT, THIS IS WHERE THE PROBLEM COMES IN. YOU ARE DISCUSSING WHETHER A DUTY WAS BREACHED, BUT YOU NEVER EVEN REACH THAT DISCUSSION IF IT IS IMMUNE, BECAUSE HERE, ACCORDING TO YOUR THEORY, I WOULD ASSUME THAT, HAD THE OFFICER PICKED OFF A HAND GRENADE AND TOSSED IT INTO THE BUS, YOU DON'T TALK ABOUT WHETHER THAT IS REASONABLE OR UNREASONABLE. THAT IS NOT THE DECISION. THE DECISION IS THAT WAS NOT AN OPERATIONAL ACTIVITY. THEREFORE THAT IS IMMUNE, BECAUSE YOU NEVER REACH THE NEGLIGENCE DISCUSSION, IF YOU CAN'T GET PAST IMMUNITY.

YOU KNOW, WE CAN COME UP WITH OUTRAGEOUS CIRCUMSTANCES. FIRING A MACHINE GUN INTO THE SIDE OF A SCHOOL BUS IS AN OUTRAGEOUS --

IT IS NOT OUTRAGEOUS. IT IS WHETHER YOU ARE EVEN GOING TO GET TO CONSIDER IT. IF IT IS SOVEREIGN IMMUNITY, YOU DON'T EVEN CONSIDER THAT.

WHEN WE ONCE RELIED ON TRIANON TO DETERMINE CONFLICT, THERE IS NOT, BECAUSE TRIANON WAS AN ISSUE OF DUTY. THERE IS A THREE-PRONG -- A TWO-PRONG AS TO THE DUTY. IF YOU SEE A DANGEROUS SITUATION AND THEN ACT UPON IT, THAT ISN'T AN ANSWER WITH REGARD TO TRIANON.

THE FIRST LEVEL DUTY IS WHETHER YOU ARE ACTING WITH IT. THE SECOND LEVEL RELATES TO THE IMMUNITY, SO WOULD YOU SAY THAT THERE IS NO, ABSOLUTELY NO, AT COMMON LAW, THERE IS NO OBLIGATION NEW YORK CITY DUTY AT ALL, WITH REGARD TO -- NO OBLIGATION, NO DUTY AT ALL, WITH REGARD TO POLICE AND THEIR ENTER -- THEIR INTERACTIONS WITH CITIZENS?

NO, THERE IS NO DIET AT ALL THAT WAS BREACHED HERE.

YOU WOULD AGREE WITH THAT THAT THERE WAS NO DUTY BREACHED HERE.

I WOULD AGREE THAT THE IMMUNITY WOULD PREVENT YOU FROM LOOKING AT THE DECISION. IF THE DECISION, ONCE CARRIED OUT WAS CARRIED OUT INAPPROPRIATELY. THE DECISION HERE WAS TO TAKE THIS MAN OUT BY SHOOTING. THE DECISION IS THE ONLY THING THAT HAS BEEN QUESTIONED. IF THE DECISION WERE TO THROW A HAND GRENADE THAT, IS NOT GOING TO BE AN APPROPRIATE DECISION, BECAUSE THEN THE OPERATION IS THAT THAT HAND GRENADE, THAT OPERATIONAL STEP OF THROWING A HAND GRENADE INTO A BUNCH OF PEOPLE, IS NOT GOING TO BE A VERY SMART OPERATIONAL MOVE. THE DECISION TO TAKE HIM OUT, THE DECISION TO TAKE HIM OUT WAS TO USE THE GUN, AND THE DECISION WAS MADE, EVEN UNDER THEIR OWN EXPERT, ALL OF THE FACTORS THAT ARE EXISTING IN THE PINELLAS PARK CASE WERE PRESENT. THERE IS A SERIOUS POLICE EMERGENCY CAUSED SOLELY BY MR. SANG. THEY DIDN'T CONTRIBUTE TO THE EMERGENCY, AND THE EXCEPTION THAT HE TRIES TO SPEAK ABOUT IS THAT WITHIN IT, IT SAYS IF THE OFFICERS, THEMSELVES, HAVE CREATED OR SUBSTANTIALLY CONTRIBUTED TO THE EMERGENCY, THROUGH THEIR ACTIONS.

SO IF, IN THIS SITUATION IF THE PLEADING HAD NOT BEEN THAT THE DECISION WAS MADE TO SHOOT BUT IF THE ALLEGATION WAS MADE THAT THE ACTUAL SHOOTING, ITSELF, WAS DONE IN A WRECK LESS MANNER, WE WOULD -- IN A RECKLESS MANNER, WE COULD, THEN, REACH THAT AND DETERMINE IT, IS THAT WHAT YOU ARE SAY SOMETHING.

I BELIEVE THAT THE DECISION TO SHOOT WAS WRONG, BASED ON THE CIRCUMSTANCES, BECAUSE THE SHOT HIT THE TARGET. HE HIT THE MAN. HE TOOK HIM DOWN FOUR MINUTES LATER, THIS WAS OVER.

BUT ASSUMING FACTS, THIS WAS NOT A VERY GOOD MARKS MAN --

AND HE HIT THE KID INSTEAD.

HE DID THE ACTUALLY SHOOTING ITSELF, IN A RECKLESS MANNER, THEN WE WOULD BE ABLE TO REACH IT, BECAUSE THAT BECOME ASPIRATIONAL DECISION AS OPPOSED TO A DISCRETIONARY DECISION?

AT THAT POINT IT IS THE CARRYING OUT OF THE DECISION NOT THE ACTUAL DECISION THAT IS BEING QUESTIONED. HERE, THE DECISION IS BEING QUESTIONED.

YOU MADE THE SAME ARGUMENT THAT WAS MADE, WITH REGARD TO THOSE CASES WHERE THEY WERE MAINTAINING THE ROADWAYS, AND THEY SAID, WELL, THE DECISION WHETHER OR NOT TO CUT THE BRUSH ALONG THE ROAD IS DISCRETIONARY AND WE DECIDED NOT CUT IT SHORTER. IT FLIES WRIGHT IN THE FACE OF THOSE -- IT FLIES RIGHT IN THE FACE OF THOSE. THAT IS NOT THE DECISION THAT THE DISCRETIONARY ANALYSIS TURNS UPON. IT IS THE DECISION MADE AT THE OPERATIONAL LEVEL, BECAUSE DECIDING WHETHER IT DO IT NEGLIGENTLY OR NONNEGLIGENTLY.

JUSTICE WELLS, AS THE COURT POINTED OUT IN KEYSNER, EVERY DECISION INCLUDES A LITTLE OPERATION AND EVERY OPERATION INCLUDES A LITTLE OF THE DECISION, SO MY UNDERSTANDING OF HOW IT IS DETERMINED IS WHAT IS THE IMPORTANCE OF THE DECISION, AND THAT IS WHERE THIS HAS BEEN IMPORTANT TO THIS COURT IS, IN A POLICE ACTIVITY AS TO THE LEVEL OF EMERGENCY GETS HIGHER AND HIGHER AND HIGHER, THE LEVEL WITH THE DECISION NEEDS TO BE MADE, GETS TO GO DOWN AND DOWN AND DOWN, BECAUSE WE AT SOME POINT HAVE GOT TO RELY ON THE INDIVIDUAL OFFICER ON THE STREET, WHO IS FACED WITH THE SEVERE EMERGENCY, TO MAKE A DECISION, AND AT THAT POINT HE IS USING EVERY SINGLE BIT OF TRAINING. HE IS USING EVERY SINGLE BIT OF KNOWLEDGE IN HIS MIND, TO MAKE THAT DECISION, AND THE COURTS SHOULDN'T STEP INTO THAT. WHEN THAT POLICE OFFICER, UNDER THE ORDINARY CIRCUMSTANCES, THE POLICE OFFICER HAS GOT 1,000 TRAINING, HE HAS GOT NO DISCRETION BUT THERE IS A CERTAIN POINT WHERE THE RISKS INVOLVED TO EVERYBODY ARE SO HIGH, THAT THAT INDIVIDUAL OFFICER HAS TO MAKE A DECISION, THAT THAT DECISION SHOULD BE IMMUNE. IF WE TAKE THE EXAMPLES THAT WERE HERE TODAY THAT THE DECISION THAT IS THE ONLY ONE THAT IS IMMUNE IS THE DECISION TO ENGAGE, THEN THE POLICE WOULD BE SMART TO STAY IN THEIR CARS AND STAY IN THEIR STATION HOUSES, BECAUSE THERE IS NO IMMUNITY, AND THAT WOULD BE AN ABSOLUTELY BOGUS SITUATION FOR OUR SOCIETY. IF WE WANT TO MAKE THE POLICE, IF THIS OFFICER IS TOLD, IF YOU DECIDE TO SHOOT, THE COUNTY IS LIABLE, BUT IF YOU DECIDE NOT TO, THAT IS FINE. THIRTY SECONDS LATER THERE COULD BE AN EXPLOSION FROM A BOMB THAT KILLS ALL OF THESE CHILDREN OR THERE COULD BE A GUNSHOT THAT KILLS HIM OR KILLS ONE OF THE KIDS.

SO THEN THE LEVEL, THEN, WOULD BE DOWN TO ANY GOVERNMENTAL EMPLOYEE WHO DECIDES TO DO SOMETHING IS IMMUNE THEN. THAT IS REALLY WHERE YOU ARE GOING, BECAUSE YOU ARE SAYING THAT IS THE LEVEL THAT WE HAVE TO ANALYZE THE DISCRETIONARY OPERATIONAL, WHICH COMMERCIAL CARRIER, ALL OF THESE CASES DRAW THAT, DO YOU AGREE THAT THEY ALL DRAW THAT DISTINCTION?

JUDGE, I AGREE THAT THE OVERALL DISTINCTION, I DON'T THINK, AND THAT IS WHY THE FACT THAT THIS IS AN EMERGENCY BECOMES SO IMPORTANT. THE LEVEL OF DISCRETION BECOMES GREATER AS THE EMERGENCY BECOMES GREATER, BECAUSE THE PERSON FURTHER DOWN THE LINE IS FORCED TO MAKE THE BIGGER DECISIONS IN THE EMERGENCY SITUATION, COMPELLING EMERGENCY SITUATIONS. CUTTING THE GRASS ON A D.O.T. RIGHT-OF-WAY IS NOT AN EMERGENCY SITUATION THAT REQUIRES A GREAT DEAL OF DISCRETION.

BUT THAT IS WHY THEY GOT THE SUDDEN EMERGENCY INSTRUCTION. I GUESS THERE IS A LOT OF GOOD POLICY CONCEPTS ABOUT WHERE LINES GET DRAWN, BUT GENERALLY, IN TORT LIABILITY, WE HAVE SAID, AND THEN THE SOVEREIGN IMMUNITY HAS THE CAP OF THE \$100,000, THAT THESE ARE CONSIDERED TO BE OPERATIONAL-LEVEL DECISIONS, AND I GUESS YOU COULD, AND THAT IS WHY I WANT TO UNDERSTAND AGAIN, IS IT BECAUSE, ARE WE GOING TO HAVE A HOSTAGE EXCEPTION TO THE SOVEREIGN IMMUNITY? IS IT BECAUSE A HOSTAGE, THE HOSTAGES WERE TAKEN, AND THIS IS IN THE COURSE OF IT, THAT WE ARE GOING TO THEN APPLY THIS SOVEREIGN IMMUNITY CONCEPT? BECAUSE, AGAIN, I COULD SEE A LOT OF HOT PURSUANT CASES, WHERE, AGAIN, WE HAVE, AFTER PINELLAS PARK, TO SAY, WELL, POLICE OFFICERS WOULD HAVE THOUGHT IT WOULD BE BETTER NOT TO ENGAGE IN HOT PURSUIT, BECAUSE IF THEY ENGAGE IN IT, THEY ARE GOING TO BE POTENTIALLY LIABLE, BUT IF THEY DON'T, THEY WON'T, AND PERHAPS IT HAS LED TO MORE RESPONSIBLE HOT PURSUANT POLICIES, SO IT -- HOT PURSUIT POLICIES, SO IT, THE POLICY, IN THIS CASE THE QUESTION WAS THIS IS A HOSTAGE TAKE OVER, AND THEREFORE ANYTHING FOLLOWING THAT SHOULD BE IMMUNE, BECAUSE OF THAT CIRCUMSTANCE, THAT IS THE HOSTAGE TAKE OVER EXCEPTION TO SOVEREIGN IMMUNITY?

I DON'T THINK IT NEEDS TO BE NECESSARILY HOSTAGE, ALTHOUGH HOSTAGE FITS INTO IT MAGNIFICENTLY. THE COURT IN BROWN, DESCRIBED IT, AND THE DESCRIPTION IS THAT WHEN THE CHOICE IS BETWEEN RISKS BETWEEN MULTIPLE PEOPLE. SO THE RISK CAN'T JUST BE TO THE OFFICER AND THE PERSON. THE RISK HAS TO BE INVOLVING A GROUP OF PEOPLE. RIFINGS TO THE PUBLIC AT LARGE, AND INTACT, THE -- RISKS RISKS TO THE PUBLIC -- RISKS TO THE PUBLIC AT LARGE, AND IN FACT IN THE BROWN CASE, WITH A FELON, RISK TO REASONABLE PEOPLE WOULD BE THAT HE WOULD GET AWAY IN THE CASE.

ALL OF THE NEGLIGENT DISCHARGE OF FIREARM CASES, WHERE THE OFFICER IS SHOOTING, AND WHETHER HE SHOOTS THE SUSPECT OR THE BYSTANDER, THAT THOSE HAVE BEEN SUBJECT TO SOVEREIGN IMMUNITY, BECAUSE THOSE, AGAIN, SEEM TO BE TO BE GENERALLY PRETTY EMERGENCY SITUATIONS.

THE TWO CASES THAT WERE CITED IN THIS COURT, FOR, IN THESE BRIEFS, ARE BOTH INVOLVING MUNICIPALITIES, AND SO SOVEREIGN IMMUNITY WAS NOT AN ISSUE IN EITHER OF THOSE CASES, AND I WOULD SUGGEST TO YOU THAT IN THE CITY OF OPA-LOCKA CASE WHERE THE OFFICER WAS SHOT AND WAS RETURNING FIRE, THAT WOULD HAVE BEEN SOVEREIGN IMMUNITY, HAD SOVEREIGN IMMUNITY BEEN AVAILABLE AND USING BROWN'S DISTINCTION. THERE WAS A QUESTION OF RISK INVOLVED THERE. HE WAS ACTUALLY INTERVENING IN AN ARMED ROBBERY. HE WAS SHOT AT BY THE ARMED ROBBER. HE WAS HIT AND WAS RETURNING FIRE.

SO IN OTHER WORDS, IT REALLY IS, THEN, ALMOST ANY CIRCUMSTANCE, BECAUSE, AGAIN, I CAN'T, I GUESS I CAN'T FORESEE A CIRCUMSTANCE WHERE EVERYDAY THE POLICE AREN'T IN WHAT FOR US ORDINARY CITIZENS, WOULD BE EMERGENCIES!

I THINK YOU LOOK AT THE CLEVELAND CASE WHICH IS ALREADY DECIDED AND IN THE CLEVELAND CASE YOU HAVE GOT A SITUATION WHERE THERE WASN'T AN EMERGENCY. THAT IS THE CIRCUMSTANCE. THEY DON'T HAVE AN IDENTIFIED PERSON CAUSING THEM ANY TYPE OF PROBLEM. THEY HAVE HEARD WHAT THEY BELIEVE TO BE GUNSHOTS BUT HAVEN'T IDENTIFIED THE PERSON OR THE SITUATION OR ANYTHING ELSE BUT THEY START SHOOTING. IT IS A POLICE

EMERGENCY.

I GUESS THAT IS WHAT JUSTICE LEWIS WAS TALKING ABOUT, AND ISN'T THAT THE CIRCUMSTANCE WHERE WHAT YOU ARE REALLY DOING IS LOOKING AT THE REASONABLENESS OF THE ACTION UNDER THE CIRCUMSTANCES, AND WHEN YOU HAVE AN EMERGENCY, SUDDEN EMERGENCY PUTS IT TO WHERE ALMOST ANY DECISION IS GOING TO BE REASONABLE, BUT AT THAT POINT, IT IS A QUESTION OF WHO MAKES THAT DECISION. IS IT EXEMPT AS A MATTER OF LAW, OR IS IT SUBJECT TO A REASONABLE UNDER THE CIRCUMSTANCES TEST?

I THINK THAT, FIRST, YOU HAVE TO MAKE A DETERMINATION OF WHETHER OR NOT THERE WAS, IN FACT, AN EMERGENCY, AND IN THE CLEVELAND CASE, I THINK YOU APPROPRIATELY WOULD HAVE NOT MADE THAT DETERMINATION. AND I THINK THAT THERE WILL BE MANY CIRCUMSTANCES WHERE AN OFFICER DOES USE THEIR WEAPON, WHERE THERE IS A DETERMINATION THAT IT WAS NOT A TRUE POLICE EMERGENCY, AND IT WAS A PERCEPTION ON HIS PART THAT WAS INCORRECT, AND THAT MIGHT BE WHAT OCCURS, BUT THERE IS NO QUESTION IN THIS CASE THAT THERE IS AN EXTREME POLICE EMERGENCY GOING ON. FOR THE COURT NOT TO AFFIRM THE THIRD DISTRICT, IT IS GOING TO HAVE TO RECEDE FROM BROWN IN SOME MANNER, BECAUSE THE BROWN CASE FITS THIS EXACTLY. IT, IF I WERE WRITING A CASE, TO BE ON ALL FOURS WITH MY SITUATION, I WOULD WRITE BROWN.

WHO MAKES A DECISION AS TO WHETHER WHAT THE OFFICER DID, WHETHER THERE WAS A TRUE EMERGENCY AT THAT TIME? IS THAT SOMETHING, I MEAN, WHAT IF THE MIAMI-DADE POLICE HAD INVESTIGATED THIS AND DECIDED THAT YOU KNOW, THE OFFICER SHOULD NOT HAVE SHOT WHEN HE SHOT. WOULD THAT, THEN, ONCE THEY MADE THAT DECISION, WOULD THAT, THEN, FREE THE PLAINTIFF FROM BEING ABLE TO SUE?

I, THAT IS NOT THE SITUATION WE HAVE HERE. THEIR OWN EXPERT SAYS THIS IS A POLICE EMERGENCY. THEIR OWN EXPERT SAYS THAT, AT THE MOMENT HE PULLED THE TRIGGER, HE WAS AT-RISK OF BEING SHOT, RISK OF BEING BLOWN UP. THE ACTUAL STATEMENT HE MAKES IS THAT HE SHOULD BE WILLING TO ACCEPT HOSTILE FIRE. THAT IS HIS JOB. I DON'T THINK THAT IS NECESSARILY WHAT WE WANT THE POLICE TO DO. I DON'T THINK WE WANT THE POLICE TO STAND OUT THERE AND SAY IT IS OKAY FOR YOU TO SHOOT ME, BECAUSE OTHERWISE FOR ME TO SHOOT YOU AND END THIS WOULD BE RECKLESS.

IT SOUNDS TO ME THAT HIS OWN EXPERT, THEN IT WOULD BE A SOUND JUDGMENT ON THE BASIS THAT THERE IS NO BREACH OF A DUTY OF REASONABLE CARE. I MEAN, THAT SOUNDS WHAT THE CASE IS ABOUT, NOT THAT THERE IS A SUDDEN EMERGENCY AND FROM FOR THERE IS -- AND THEREFORE THERE IS IMMUNITY.

THE PERSON DECIDED THAT THE DECISION TO -- THEIR CASE LAW SAYS THAT THE PERSON THAT DECIDED TO SHOOT WAS RECKLESS AND THE PINELLAS PARK CASE FITS IT PERFECTLY, WHICH IT DOES, AND GRANTED ON SOVEREIGN IMMUNITY, BECAUSE THE POLICE OFFICER SHOULDN'T HAVE TO FACE GOING THROUGH THE COURTS AT THIS PARTICULAR POINT AND THERE SHOULD BE IMMUNITY, SO THAT WHEN THE OFFICERS ARE OUT ON THE STREET AND THEY ARE WORKING, THEY DON'T THINK TO THEMSELVES, WELL, IF I PULL THE TRIGGER RIGHT NOW, AND BY THE WAY I MIGHT SAVE ELEVEN HANDICAPPED CHILDREN, BUT I MIGHT GET FOUND LIABLE.

BUT THE PROBLEM IS YOU HAVE VERY COMPELLING FACTS, BUT THE PRINCIPLE OF LAW THAT COMES OUT WILL BE THAT THE POLICE OFFICER STANDING THERE WITH A CHILD WITH A GUN OR A CHILD DOING SOMETHING ELSE AND THE POLICE OFFICER SAYING THAT IS AN EMERGENCY AS WELL AND THE OFFICER THEN SHOOTS THE CHILD UNDER THE CIRCUMSTANCES, SO YOU SEE, WE HAVE TO LOOK AT IT IN A BROADER PERSPECTIVE, TO SEE IF IS IT REALLY IMMUNITY OR IS THAT WHERE IT FITS IN THIS LEGAL CONTEXT, BECAUSE IN TOMORROW'S CASE IT WON'T BE IDENTICAL TO YOUR SITUATION AND WE WILL HAVE WHAT YOU ARE URGING, IS A VERY BROAD IMMUNITY

FOR ANYTHING THAT AN INDIVIDUAL POLICE OFFICER DEEMS TO BE AN EMERGENCY. THAT IS REALLY WHAT YOU ARE ARGUING.

I DON'T THINK IT IS THAT THE OFFICER DEEMS IT TO BE AN EMERGENCY. I THINK THE QUESTION OF WHETHER IT IS AN EMERGENCY IS A VERY GOOD QUESTION TO BE DETERMINED BY THE COURT. THE QUESTION IS WHERE THERE IS NO DOUBT THERE IS A POLICE EMERGENCY, WHERE THERE IS NO DOUBT THAT THE FACTORS SET FORTH IN BROWN EXIST, IT SHOULD BE IMMUNITY.

SO THE ONLY IMMUNITY YOU ARE ASKING FOR IS THE COURT, IN THIS DECISION, SAYS, IN OTHER WORDS NO MATTER WHAT DECISION THE POLICE OFFICER MAKES, SOMEONE OR SOME GROUP WILL BE PUT AT-RISK, ET CETERA. IT SAYS THAT --

CORRECT.

THAT IS THE ONLY EXCEPTION, IS THAT THE ONLY EXCEPTION?

THAT IS THE EXCEPTION. IF THIS OFFICER HAD NOT PULLED THE TRIGGER AND THAT THAT MAN HAD HAD A GUN OR A BOMB, THEN THE NEXT NOISES YOU PROBABLY WOULD HAVE HEARD, BASED ON HIS AGITATION, WAS AN EXPLOSION OR A GUNSHOT! HIS DECISION AT THAT POINT, I HAVE BEEN SEEN. THIS MAN HAS BEEN HIGHLY AGITATED AT EVERY SINGLE STEP OF THE WAY. HE HAS SEEN ME. I AM THE FIRST OFFICER HE HAS SEEN WHO HAS GOT A GUN OUT AND READY, AND HE IS SUDDENLY REACHING DOWNWARD! NOW, WHAT COULD HE POSSIBLY BE REACHING FOR EXCEPT FOR A WEAPON? AND AT THAT POINT THAT POLICE OFFICER, WHO HAS 11 KIDS ON THAT BUS, HAS HIMSELF NEARBY, HAS OTHER POLICE OFFICERS NEARBY AND IS A HIGHLY-TRAINED SHARPSHOOTER WHO KNOWS HOW TO GET THIS MAN, HAS TO MAKE A DECISION, AND WE SHOULDN'T BE GETTING INTO THAT DECISION. WHEN HE PULLS THAT TRIGGER, AND IT WAS SUCCESSFUL. HE TOOK THAT MAN DOWN. THE TESTIMONY IS THAT THE MAN WAS DOWN ON THE GROUND FROM THAT POINT, ON.

WHAT RELEVANCE IS IT WHETHER IT IS SUCCESSFUL OR NOT?

IN THIS INSTANCE IT JUST HAPPENS TO BE. IT SHOULDN'T BE.

IS IT RELEVANT FOR US WHETHER IT IS SUCCESSFUL OR NOT?

HE COULD HAVE SHOT EVERY CHILD ON THE BUS IN THIS PROCESS, AND WE WOULDN'T BE LOOKING AT IT, BECAUSE IF YOU SAY IMMUNITY, THEN YOU NEVER GET INTO THAT NEXT STEP.

IF YOU SAY IMMUNITY TO THE DECISION, BUT THE DECISION TO FIRE ONCE IS A WHOLE LOT DIFFERENT THAN SHOOTING THE ENTIRE SIDE OF A BUS. I THINK THAT IS A MUCH DIFFERENT SITUATION.

SO EACH INDIVIDUAL STEP, EVERY SINGLE THING HAS TO BE ANALYZED FOR DECISION, DISCRETION EACH STEP. HOW I AIM AND HOW I LOAD, YOU SEE IT GETS INTO AN UNWORKABLE SITUATION IS THE PROBLEM.

LOOKING AT IT IN TERMS OF DISCRETIONARY VERSUS OPERATIONAL AND LOOKING AT IT FROM A DECISION IS VERY DIFFICULT, AND THE CASE LAW RECOGNIZES THAT, AND THIS MONTH'S "FLORIDA BAR JOURNAL" HAS AN ARTICLE ON HOW DIFFICULT THIS IS TO MANAGE. IT IS A DIFFICULT WAY TO HANDLE THIS PARTICULAR AREA OF THE LAW. BUT IT IS VERY CLEAR THAT WE SHOULDN'T BE INTERFERING, AND THAT IS WHAT THE IDEA OF SOVEREIGN IMMUNITY IS THAT WE DON'T, IF THE COURTS DON'T INTERFERE WITH THE EXECUTIVE AND THE LEGISLATIVE, AND THAT IS WHAT IT IS BASED UPON. I SEE MY TIME IS UP.

CHIEF JUSTICE: WE HAVE TO END ON THAT KNOW. YOUR TIME IS EXPIRED, TOO, SO WE THANK

YOU BOTH VERY MUCH.