IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC02-132

NELSON ROBLES and ANA ISABEL ROBLES, individually and as parents of MARLON ROBLES, a minor,

Petitioners,

v.

METROPOLITAN DADE COUNTY,

Respondent.

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

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a petition for discretionary review after the Third District Court of Appeal affirmed a final summary judgment entered in favor of Miami-Dade County (hereafter "County") and against the Plaintiffs/ Petitioners, Nelson Robles and Ana Isabel Robles individually and as parents of Marlon Robles (hereafter "Robles"). The case was tried in front of a jury but resulted in a mistrial. Prior to trial, the County filed and argued a Motion for Summary Judgment. The trial court deferred ruling on the motion. The County renewed the motion after the mistrial and the trial court granted the summary judgment.

STATEMENT OF FACTS[1]

On the morning of November 2, 1995, Nicholas Sang forced his way onto a school bus loaded with handicapped children, a bus driver, an aide and one parent. Once on board, he commandeered the bus by threatening the occupants saying he had a gun and a bomb. He forced the driver to take the bus onto the Palmetto Expressway in a northerly direction. At one point while on the expressway, he stopped and released the parent and the aide.

The police were notified of the hijacking and of the fact that Sang was believed to be armed.

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[1] The entire Statement of the Facts comes from the opinion of the Third District Court of Appeal that is contained in the Petitioners' addendum.

The bus made its way over to Miami Beach and ultimately was headed to Joe's Stonecrab restaurant. When it became apparent that the restaurant was the destination, Officer Joe Derringer, a member of the County's Special Response Team (SRT)[2], went to the restaurant to set up. He chose his location because he believed that the bus would stop at the entrance to the restaurant, prior to reaching him. He believed he would be able to observe what occurred and act as a cut off if Sang got out of the bus and attempted to escape in his direction.

When the bus arrived at the restaurant, it drove past the entrance and started to turn at the corner where Officer Derringer had positioned himself. While attempting to turn the corner, the bus stopped. At the point where the bus was stopped, Officer Derringer was only 30 feet from the bus. He was able to see Sang clearly.

When the bus was stopped, Sang turned and looked directly at Officer Derringer. Sang, at that instant, made a very quick movement with his hands, downward toward the seat as though reaching to grab something. Officer Derringer, believing that Sang was reaching for either a gun or bomb, fired his gun shooting Sang. The bullet passed through the side of the bus just below the

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[2] SRT is similar in function to what is commonly referred to as SWAT teams.

window. When it did, it carried with it debris from its passage through the bus. It is believed that part of this debris struck Marlon Robles in his left eye.

Throughout the litigation, there has been no dispute concerning the facts. Throughout, the dispute has centered on whether or not Officer Derringer's decision to shoot was negligent. Even Robles' expert agreed that there was no negligence in any action by the police except the decision to shoot. Robles' expert also agreed that the situation was an extreme police emergency brought on by the acts of Sang and even agreed that the decision to shoot was such that Officer Derringer was faced with choosing between different actions that each posed a potential threat to the public.

SUMMARY OF THE ARGUMENT

The Petitioner's assert that this Court has jurisdiction based upon the misapplication doctrine asserting that the decision below creates a conflict with this Court's decision of *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992). In that case, this Court announced a test to determine when decisions made during extreme police emergencies would be raised to such a level as to be considered discretionary decision entitled to sovereign immunity. This Court stated,

> To fall within the *Kaisner* exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to choose between different risks posed to the public.

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

City of Pinellas Park at 1227 (footnote and citation omitted)

Nothing contained in the decision of the Third District Court of Appeal conflicts with the *City of Pinellas Park* decision. The Third District does not announce any statement of law different than that announced by this Court, and the facts of this case are perfectly consistent with the criteria set by this Court. There was a serious police emergency, caused by the actions of a lawbreaker that caused Officer Derringer to make a decision that could have resulted in danger to the public no matter what decision he made. Shoot and a child may be hurt. Don't shoot and an explosion or gunshots could be the next result.

ARGUMENT

Robles seek to invoke this Courts jurisdiction under the conflicts of decision theory found in Article V Section 3 of the Constitution of the State of Florida. To do so, Robles seeks to apply this Court's doctrine of misapplication of a case to find the conflict. In so doing, Robles ignores this Court's many descriptions of the misapplication doctrine. The doctrine has been developed by

this Court to determine when a conflict truly exists between cases so as to confer jurisdiction on this Court.

As announced in *Nielsen v. City of Sarasota*, 117 So 2d 731 (Fla. 1960):

> While conceivably there may be other circumstances, the principal situations justifying the invocation of our jurisdiction to review decisions of Court of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by his Court. Under the first situation, the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the Court of Appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court. *Florida Power & Light v. Bell*, 113 So.2d 697 (Fla. 1959)

Nielsen v. City of Sarasota, at 734; *see also*, *Mancini v. State*, 312 So.2d 732 (Fla. 1975); *Kincaid v. World Insurance Company*, 157 So. 2d 517 (Fla. 1963); *City of Jacksonville v. Florida First National Bank of Jacksonville*, 339 So.2d 632 (Fla. 1976); *Crossley v. State*, 596 So.2d 447 (Fla. 1992).

It is safe to say that Robles has pointed to no prior case by this Court which "involves substantially the same facts as" this case. *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975). As such, Robles must rely on "the announcement of

a law which conflicts with a rule previously announced by this Court or another district" as the basis for conferring jurisdiction upon this Court.

"The measure of ...appellate jurisdiction on the so-called 'conflict theory' is not whether [this Court] would necessarily have arrived at a conclusion differing from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents." (citations omitted) *Kincaid v. World Insurance Company*, at 517 "[I]t is of obvious importance there should be developed consistent rules for limiting issuance of the writ of certiorari to ... 'cases where there is a real and embarrassing conflict of opinion and authority' between decisions." (citations omitted) *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958). No such conflict exists here.

This Court has consistently recognized the premise that sovereign immunity protects the police from liability in many of the activities in which the police engage. *See*, *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989); *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992). Specifically, in *Kaisner* and again in *Pinellas Park*, this Court emphasized that, "The way in which government agents respond to a serious emergency is entitled to great deference, and may in fact reach a level of such

urgency as to be considered discretionary and not operational." *Kaisner* at 738. This Court, in *Pinellas Park* explained the meaning of this and provided a test to determine when this level of urgency exists:

> To fall within the *Kaisner* exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to choose between different risks posed to the public. In other words, no matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. *It is this choice between risks that is entitled to the protection of sovereign immunity in appropriate cases, because it involves what essentially is a discretionary act of executive decision-making.* (emphasis added)

City of Pinellas Park at 1227 (footnote and citation omitted)

The Third District has announced and followed this rule exactly. In fact, the Third District adopted the decision of the trial court judge that quoted verbatim from *City of Pinellas Park* as its only statement of the law. Directly quoting from *City of Pinellas Park* can hardly be considered the pronouncement of a rule of law that conflicts with that case. It can hardly be considered to have caused "a real and embarrassing conflict of opinion and authority" with any case.

Throughout their argument, Robles ignore the part of this Court's pronouncement, contained in *City of Pinellas Park*, that "[I]t is this choice between risks that is entitled to the protection of sovereign immunity in

appropriate cases, because it essentially is a discretionary act of executive decision making." *Id.* at 1227. Robles suggest that the Third District's decision conflicts with *City of Pinellas Park* by affirming the determination of immunity instead of returning the case for trial but with an instruction on deference. Nothing in *City of Pinellas Park* indicates that immunity should not be granted in the police emergency context and that the police are only entitled to an instruction on deference. In fact, the very language of *City of Pinellas Park* is that immunity is to be granted.

What Robles fails to take into account is that the deference, which this Court discussed in *City of Pinellas Park*, is premised upon the doctrine of separation of powers that is the basis of sovereign immunity. *See Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla. 1979) ("concept of exemption from tort liability for the exercise of certain governmental functions bottomed on the concept of separation of powers"); *Trianon Park Condominium Association v. City of Hialeah*, 468 So.2d 912 (Fla. 1985) ("Judicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches and would violate the separation of powers doctrine"); *Kaisner v. Kolb* 543 So.2d 732 (Fla. 1989) ("governmental immunity derives

entirely from the doctrine of separation of powers." "it would be an improper infringement of separation of powers for the judiciary, by way of tort law, to intervene in fundamental decisionmaking of the executive branch). That type of deference is not an evidentiary matter dictated to a jury. As this Court noted in quoting Judge Fuld of the New York Court of Appeals, leaving decisions concerning sovereign immunity to a jury would be to "place in inexpert hands what the Legislature has seen fit to entrust to experts." *Commercial Carrier Corporation*, 371 So.2d at 1018 quoting *Wiess v. Fote*, 7 N.Y. 2d 579, 586, 167 N.E.2d 63, 66 (1960).

The Third District Court of Appeal properly followed the test set forth in *City of Pinellas Park*. A serious police emergency, thrust upon the police by the actions of a lawbreaker that requires them to choose between different risks to the public. All agree, including the Robles' own expert, that this case was a serious police emergency caused by the actions of Nicholas Sang that required the Officer to choose between different risks. He was faced with the prospect that Sang was reaching for either a gun or a bomb. To shoot *may* involve some risk that the child closest to Sang could be hurt. To not shoot involved the risk that Sang was going to detonate a device or shoot a gun either at the Officer or at one of the hostages. Robles merely argue that this Court's decision *in City of Pinellas Park* required a jury instruction on deference rather than the true

deference that is required. The deference of separation of powers required the Third District to affirm the Summary Judgment of Sovereign Immunity.

No conflict has been demonstrated with any decisions of this Court or any other District Court of Appeal. This Court should find that it is without jurisdiction to hear this case and deny the Petition filed by the Robles.

CONCLUSION

There is not a conflict with any decision of this Court nor any other District Court of Appeal. The Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th day of February, 2002, to: *Charles B. Patrick, P.A.*, 1648 South Bayshore Drive, Miami, Florida 33133; and to *James C. Blecke, Esquire*, DEUTSCH & BLUMBERG, P.A., New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, Florida 33132.

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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