No. 127236

In the

# Supreme Court of Illinois

JAVIER ROBINSON,

*Plaintiff-Appellee*,

v.

THE VILLAGE OF SAUK VILLAGE, THE VILLAGE OF CRETE, OFFICER MARK BUGAJSKI, OFFICER ANDREW VAUGHN, OFFICER ALLEN RINCHICH, and OFFICER JUAN GARCIA

*Defendant- Appellants*.

On Petition for Leave to Appeal from the
Illinois Appellate Court, First Judicial District, No. 20-0223
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 18 L 002000
The Honorable **Melissa A. Durkin**, Judge Presiding.

## BRIEF OF THE APPELLEE

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ORAL ARGUMENT REQUESTED

## POINTS AND AUTHORITIES

## STATUTES INVOLVED

**745 ILCS 10/4-106 [Injury relating to parole determination; injury inflicted by escaped prisoner]**

Neither a local public entity nor a public employee is liable for:

…(b) Any injury inflicted by an escaped or escaping prisoner.

## STATEMENT OF FACTS

On the morning of August 10, 2017, Defendant Officer Allen Rinchich, a police officer for the Village of Crete, was working the 6:00PM – 6:00AM patrol shift. C. 378. Officer Rinchich heard a dispatch come over the radio of a recently stolen black Buick LaCrosse, and soon after saw what he believed to be said vehicle. C. 381. The Village of Crete police patrol on August 10, 2017, consisted of three officers. C. 381. Defendant, Sergeant Juan Garcia was the officer in charge and Officers Rinchich and Hoernig were his subordinate patrolmen. *Id.* After seeing the suspected stolen vehicle, Officer Rinchich made a U-turn and got behind the suspected stolen vehicle. C. 383. He followed the vehicle for approximately a quarter mile and when he reached Sauk Trail road at 4:59AM, he turned eastbound and activated his lights to effectuate a traffic stop. C. 385. The vehicle he was following was driven by a Mr. Mark Coffey. Coffey did not pull over to the side of the road, instead he sped up attempting to flee. C. 389.

Officer Rinchich followed Coffey and radioed Officers Garcia and Hoernig that the vehicle was not stopping. Officer Garcia made his way to

the pursuit where he fell in behind Officer Rinchich. C. 396. Officer Hoernig, got behind Officer Garcia, becoming the third officer in pursuit. C. 396. The chase proceeded on at high rates of speed. Coffey led the officers on an extended police pursuit, crossing multiple jurisdictions and into Indiana. C. 398. The officers broke and disregarded numerous traffic laws, and department policies in their pursuit including driving into oncoming traffic, going through red lights without slowing, and traveling at speeds in excess of 100 mph. C. 2006-2011.

At approximately 5:06 AM, Officer Rinchich lost sight of Coffey's taillights; Coffey was travelling at extreme speeds. C. 399. See also Sup E. 7, file m-25 1 (VT) 5:06AM. At 5:06:36 AM, Officer Rinchich came to a curve in the road where the road appeared to split. *Id.* The road at this juncture curves to the left; however, proceeding straight one would continue into a church parking lot located in Dyer, Indiana. Sup E. 7, file m-25 1 (VT) 5:06:36AM. Coffey proceeded straight into the church parking lot, coming to a stop on his own, with no officers in close proximity to his vehicle. The nearest officer, Rinchich, was so far away he'd lost sight of Coffey's taillights. Sup E. 7, file m-25 1 (VT) 5:06:36AM. Rinchich later testified "when he (Coffey) ended up coming to the stop at the church, had he not stopped there, he would have been gone." C. 399. Officer Rinchich pulled into the parking lot such that his squad car was stopped perpendicular to the left side of Coffey's vehicle with his headlights shining on the driver side of the black

Buick. C. 434. Officer Rinchich exited his squad car with his weapon drawn and yelled "hands" repeatedly at Coffey who did not comply, and instead made repeated furtive and threatening movements towards the officer with a water bottle. Sup E. 7, file m-25 1. After Rinchich stopped in the parking lot, Officers Garcia and Hoernig and other officers from Sauk Village, who had since heard of and joined the chase, pulled into the parking lot adjacent to and behind Officer Rinchich's squad car. Sup E. 7, file m-30 5 (VT) 5:06: AM.

Defendant officers Bugajski and Vaughan of Sauk Village were eating in the Sauk Village police station when they heard of an ensuing police pursuit involving officers from Crete. C. 589. Officers Bugajski and Vaughan were the two Sauk Village officers on patrol on August 10, 2017, Bugajski being the more senior officer in charge. C. 569. The pursuit passed through their jurisdiction, came back into Sauk Village, then left again. C. 591. The Sauk Village officers then heard over the radio that the chase came to stop at a church in Dyer, Indiana, outside their jurisdiction. C. 605. Officers Bugajski and Vaughan proceeded to the church parking lot. C. 612. All police vehicles were to the left side of and facing the black Buick when Officer Bugajski arrived. C. 612. Officer Rinchich, remained the front officer closest to Coffey in the Buick. At one point, Rinchich approached closer to the vehicle continuing to point his weapon and shout at Coffey. He got no closer than 10-15 feet away from the suspect. Sup E. 7, file m-25 1. (VT) 5:06:56 AM.

Coffey remained seated in the driver's seat of the vehicle and did not open the door, exit, or turn off the vehicle. Sup E. 7, file m-25 1. (VT) 5:06:56 AM. At approximately 5:07:55 AM, (one minute and nineteen seconds after Rinchich pulled into the parking lot) Coffey placed his vehicle in gear and proceeded forward continuing to flee with Officer Rinchich again following immediately behind as the lead pursuing vehicle. Sup E. 7, file m-25 1. (VT) 5:07:55 AM. Defendant Officer Vaughan arrived at the church parking lot soon after Coffey began to pull away. C. 616. The pursuit continued, led by Officer Rinchich with officers Garcia and Hoernig following. C. 438. The officers from Sauk Village monitored the chase on radios, blocked off intersections, and at points, joined in the pursuit as the 4th and 5th pursuing vehicles. C. 2009. They also tracked and followed the pursuit on nearby parallel streets. C. 2009.

The chase went back into Illinois and onto westbound Sauk Trail. C. 622. Coffey and the pursuing officers continued to drive at high rates of speed, and disregarded numerous traffic laws including driving into oncoming traffic. Officers at times drove over 100 mph. C. 2007-2011. The chase continued in this fashion and proceeded into a residential neighborhood at approximately 5:15AM. Sup E. 7, file m-25 1. (VT) 5:15 AM. The Crete officers were still the lead pursuing vehicles, while the Sauk Officers were in the immediate vicinity paralleling the pursuit. C. 438. Pursuant to police department policies for both Sauk Village and the Village of Crete the patrol

officer in charge as well as the lead pursuing officer both have the authority to terminate a police pursuit at any time. C. 583. Termination was not ordered and did not occur even though multiple department policies and safety concerns necessitated it. C. 2007-2011.

At 5:16:47 AM, while still in the residential neighborhood, Coffey exited the black Buick and got into another vehicle. C. 718. He seamlessly commandeered the second vehicle and continued to flee, speeding past Officer Vaughan from Sauk Village who was approaching from the opposite direction of the roadway. Officer Vaughn then made a three-point turn and turned around to follow Coffey in the new vehicle, becoming the lead pursuing vehicle. C. 1040. Officers Hoernig and Garcia followed behind him, while Officer Rinchich stayed at the location of the black Buick, Coffey left behind C. 1041.

Coffey soon exited the residential neighborhood. As he sped through the intersection of 221st Street and Sauk Trail he struck a pedestrian, the Plaintiff, Mr. Javier Robinson, who was walking across the street in a crosswalk to get to a bus stop on his way to work. Sup E. 7 file m-30 5 (VT) 5:16:45 AM see also C. 1757. Mr. Robinson suffered multiple and severe debilitating injuries. C. 1762- 1763. Coffey would continue to flee, with the pursuit culminating in his death when he was shot by officers in Indiana. C. 735.

**Legal Proceedings.**

On February 23, 2018, Javier Robinson filed his Complaint at Law naming as defendants The Village of Sauk Village, The Village of Crete, Officer Mark Bugajski, Officer Andrew Vaughan, Officer Allen Rinchich and Officer Juan Garcia. C. 15-26. Plaintiff's complaint asserted one count for willful and wanton conduct as to each Defendant, and through agency, asserted the counts against the Defendant municipalities for the conduct of their officers. C. 18-21. On May 22, 2018, Crete Defendants answered the complaint including seven affirmative defenses one of which being immunity pursuant to 745 ILCS 10/4-106(b). C. 99-122.

On September 12, 2019, the Sauk defendants filed a motion for summary judgment asserting, among other things, immunity pursuant to 745 ILCS 10/4-106(b). C. 291. The next day, on September 13, 2019, Crete Defendants filed a motion for summary judgment on similar grounds. C. 1158.

After full briefing of the Defendants' motions for summary judgment, on January 9, 2020, the Circuit Court granted both motions for summary judgment on the grounds of 745 ILCS 10/4-106(b). R. 1-15. The Court held that Coffey was in custody when Officer Rinchich pointed the gun at Coffey in the church parking in Dyer, Indiana, since no reasonable person in his position would have felt free to leave. R. 10. The Court wrote, "a person is in custody if no reasonable person in his position would have felt free to leave

according to the case of *Townsend*". R. 10. Summary judgment was entered for all Defendants and on January 31, 2020, Plaintiff filed a timely notice of appeal to the First District. Oral arguments were had on March 30, 2021, and on April 9, 2021, the Appellate Court reversed the holding of the Circuit Court on all grounds and remanded for further proceedings. *Robinson v. Village of Sauk Village*, 2021 IL App (1st) 200223. (A16-30).

On May 7, 2021 Defendants filed a joint petition for leave to appeal which was allowed by this Court on September 29, 2021. Defendants elected to allow their petition stand as their brief. Defendants narrowed their argument on this appeal to only the 4-106(b) issue.

## ARGUMENT

Defendants ask this Court to adopt a new expansive interpretation of the Illinois Tort Immunity Act; that a show of authority alone is enough for "custody" under the Act. Defs'. Br. Pg 10. Defendants submit that Mr. Coffey, the fleeing suspect in this case, was in custody in the church parking lot by way of show of authority on the part of the Defendant officers. The record is clear as to the events that transpired in the church parking lot due to dash cam footage from the squad cars. Sup E. 7, file m-25 1. There is no real dispute that Coffey was never touched, grabbed, moved, surrounded, nor were his movements altered by the officers in any real or direct way. Instead, Defendants' focus narrowly on the assertion that a show of authority is enough for custody. The two seminal cases on these issues, *Ries v. City of*

*Chicago*, and *Townsend v. Anderson,* simply do not endorse Defendants' assertion. A show of authority is not enough for custody, no court has interpreted the Act to mean the same, and a new interpretation by this Court to adopt such a holding would be a drastic new expansion to Illinois police immunities.

1) A show of authority is not enough for custody under the Illinois Tort Immunity Act.

Defendants contend that a show of authority is enough for custody under the Illinois Local Governmental and Governmental Employees Tort Immunity Act. Defendants' argument lacks any support in case law and seeks a new expansive interpretation of the Illinois Tort Immunity Act. Looking to the relevant case law, legislative history, language of the statute, and the policy implications of such a holding show the requested expansion to be unsupported and unworkable. This Court has outlined a two-part test for custody under the Tort Immunity Act, in police pursuit cases. First, that the freedom of movement of a suspect be directly controlled and limited by lawful authority and second, that a reasonable person would not feel free to leave. *Ries v. City of Chicago*, 242 Ill. 2d 205, 217, 950 N.E.2d 631, 638 (2011). Show of authority alone is not enough, and as such, the ruling of the Appellate Court should be affirmed, reversing the holding of the Circuit Court and remanding for further proceedings.

### a. Neither the *Ries* nor the *Townsend* opinions support a show of authority being enough for custody under the Illinois Tort Immunity Act.

This Court's ruling in *Ries v. the City of Chicago* did not propose or anticipate a "show of authority" being enough for custody under the Illinois Tort Immunity Act. Instead, the Court laid out a two-part test for custody 1) freedom of movement being directly controlled and limited by lawful authority and 2) that the suspect had no reasonable expectation they were free to leave. *Ries v. City of Chicago*, 242 Ill. 2d 205, 217, 950 N.E.2d 631, 638 (2011). Neither the *Ries* nor *Townsend* Courts considered a show of authority being enough for custody.

This Court in *Ries* outlined a two-part test for custody under the Illinois Tort Immunity Act. In *Ries*, a Chicago police officer Sergio Oliva went to put gas in his supervisor's vehicle. *Ries*, 242 Ill. 2d 205 at 208. In the gas station parking lot, Oliva noticed people standing around a man who they claimed tried to flee the scene of an accident. *Id.* at 208. Officer Oliva placed the suspect in the back of his supervisor's squad car. *Id.* The engine was left running and there was no cage, screen, or divider between the back and driver's seat. *Id.* The suspect proceeded to climb into the driver's seat and commandeer the police vehicle. *Id.* Sergeant Edward Veth, another officer nearby, took pursuit of the stolen squad car. *Ries*, 242 Ill. 2d 205 at 208. The suspect ultimately hit a number of parked cars, ran through a red light and collided with the Plaintiffs' vehicle. *Id.* The two Plaintiffs brought

suit against the officers alleging the willful and wanton failure to secure the suspect and the officers in turn invoked section 4-106(b) of the Tort Immunity Act. *Id.* at 208-09.

This Court clarified that in considering whether someone is an escaped prisoner under the statute, the operative question is whether that person was "in custody". A prisoner is defined within the Illinois Local Governmental and Governmental Employees Tort Immunity Act as a "a person held in custody". 745 ILCS 10/4-101. The Court's opinion thoroughly examined different definitions of the term custody and looked to numerous other authorities on the term custody for guidance. It noted that the Black's Law dictionary 442(9th ed. 2009) defined custody as "the detention of a person by virtue of lawful process or authority" and that physical custody is defined as "custody of a person (such as an arrestee) whose freedom is directly controlled and limited". *Ries,* 242 Ill. 2d 205, at 216. It went on to look at custodial interrogations in the Miranda context, which holds that someone is in custody when a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *Id.* at 217.

Although the Court considered multiple definitions of custody, its holding set forth a two-part test for custody under the Illinois Tort Immunity Act 1) that freedom of movement was directly controlled and limited by lawful authority and 2) that a reasonable person would not feel free to leave. *Id.* at 217. In its explicit holding this Court wrote:

> *Here, Oliva arrived at the scene of a traffic accident and was told that Lowe had caused the accident and was attempting to flee the scene. Oliva then placed Lowe in the back of his squad car. Lowe was in custody at this point. He was being detained, and his freedom of movement had been directly controlled and limited by Oliva's lawful authority. Moreover, a reasonable person placed in the back of a squad car by a police officer would not feel free to leave.*

*Ries v. City of Chicago*, 242 Ill. 2d 205, 217, 950 N.E.2d 631, 638 (2011)

The Court's language above is instructive. It incorporated elements of the physical custody definition from Black's Law as well as elements of custody under in the Miranda context. It notes when Lowe was placed in the back of the squad car he was in custody "at that point", calling attention to the moment Lowe was physically placed by Officer Oliva into the back of the squad car. Further the Court opted to use clear explicit language explaining that Lowe's movement had been "***directly"*** controlled by Oliva's lawful authority. The Court could have opted to use different words or focus on only the suspects reasonable expectations. Instead, it looked to the real, direct, tangible and actual physical confinement of Demario Lowe, in making its custody determination.

The court did not labor to explain the scope of "custody" under the Act terming it broad enough to include situations such as the case of a suspect placed in the back of a squad car. *Id.* at 217. In *Ries* there was uncontroverted limitation on the suspect's freedom of movement. Demario Lowe had been apprehended, physically touched, moved, and placed in the back of a squad car. His course of movement was diverted, and his freedom

to continue on his prior path was directly limited. The *Ries* court made no comment on "show of authority" in any part of its opinion; one which intricately explored and discussed the term "custody", its meaning, and its uses in different contexts. Never once was a show of authority considered.

The *Ries* Court did however include some insight into its expectations on future uses of section 4-106(b), yet nothing alludes to a show of authority being considered for custody. In discussing how Plaintiff's argument was strained, the Court wrote "Anytime a prisoner escapes from custody, a plaintiff would likely be able to point to some failure by those responsible for keeping the prisoner in custody." *Ries*, 242 Ill. 2d 205, at 219. In this section of its opinion, the Court was attempting to foresee any and all potential future claims which may implicate 4-106(b) and its holding. In doing so the Court used the terms "those responsible for keeping the prisoner in custody". The Court foresaw "custody" to denote some element of keeping a prisoner, or some element of control or dominion over the prisoner, even if minimal, such that a prisoner was kept in custody or held in custody by another individual. Defendants in the present case had no element of control or dominion over Coffey. There was no occasion to keep or release Mr. Coffey; they simply never had him in the first place. This Court in *Ries* showed no inclination or anticipation of a show of authority alone being enough for custody under the Act.

Defendants' assert that *Townsend* created the doctrine that a show of authority is enough for custody under the Illinois Tort Immunity Act. Defs'. Br. Pg 10. They are mistaken. The Court in *Townsend v. Anderson* analyzed custody under the same framework, considering 1) whether a suspect's freedom of movement had been directly controlled and limited by lawful authority and 2) whether a suspect had a reasonable expectation he was free to leave. *Townsend v. Anderson*, 2019 IL App (1st) 180771, ¶ 31 & ¶ 32, 161 N.E.3d 211. Defendants propose that the facts of *Townsend* amount to nothing more than a show of authority. Defs'. Br. pgs. 17- 18. Defendants are mistaken.

In *Townsend v. Anderson*, two officers on patrol encountered and curbed a vehicle operating without its headlights. *Townsend v. Anderson*, 2019 IL App (1st) 180771 at ¶ 6. Officer Higgins of the Chicago Police Department approached the driver's side of the curbed vehicle and Officer Lewandowski approached the front passenger side of the vehicle which had four male occupants. *Townsend*, 2019 IL App (1st) at ¶ 6 & ¶ 3. The driver of the vehicle was unable to produce a drivers' license, and Officer Lewandowski noticed an open container of alcohol on the floor of the vehicle. *Id. at* ¶ 6. Following the stop the officers pulled the driver and front seat passenger out of the car and began handcuffing them. *Id.* at ¶ 31. Officer Higgins then observed Anderson, a back-seat passenger, jump into the driver's seat and begin to put the car in gear. *Id.* at ¶ 6. Officer Higgins proceeded to grab at

Anderson to prevent him from fleeing, to which Anderson responded, "why are you grabbing me". *Id.* Anderson was able to elude Higgins' efforts to restrain him, place the vehicle in gear, and flee the scene. *Id.* The fleeing vehicle went on to strike the Plaintiff's vehicle, who sustained injuries. *Id.* at ¶ 7. The Plaintiff brought suit against multiple officers involved, the municipality, and the fleeing suspect. *Townsend*, 2019 IL App (1st) at ¶ 1. The municipal Defendants filed a motion for summary judgment invoking section 4-106(b) which was granted by the circuit court. *Id.*

The *Townsend* Court followed the two-part test laid out by this Court in *Ries* and never mentioned or considered the terms "show of authority" when it could have chosen to do so. Instead, the *Townsend* court wrote "the officers took positions on opposite sides of the vehicle ***effectively curtailing the suspects freedom of movement***." Townsend 2019 IL App (1st)180771 at Paragraph 31. The Court did not write that the "officer's positioning was a show of authority" or that "Anderson in light of their show of authority opted to continue on". The *Townsend* court instead focused on whether the suspect had a reasonable expectation he was free to leave, as well as the real and direct obstacles, impediments or burdens upon Anderson's freedom of movement.

Defendants contend that the *Townsend* Court expanded *Ries* and created custody by a "show of authority". In reality, the *Townsend* court considered at length whether Anderson had been physically touched,

concluding that indeed he had. The Townsend court wrote, "In response to Officer Higgins's efforts to "grab at him," Anderson said 'something*** like 'why are you grabbing me'". Townsend, 2019 IL App (1st) 180771 at Paragraph 6. Defendants here overlook this and other facts including that an extended discussion was had in the *Townsend* oral arguments considering whether Anderson was actually touched by Officer Higgins. Justice Mason concluded in said hearing there was no evidence to contradict that Anderson had in fact been grabbed by officers in their attempt to restrain him. Despite this, Defendant's submit to this Court that *Townsend* was a mere "show of authority" case.

The facts of the present case, and those of *Townsend*, are readily distinguishable when considering the real and direct limitations on freedom of movement present in each case. In total, the impediments to continued movement and escape for Anderson as he sat in the back seat far outweighed those present for Coffey here. Anderson needed to climb over and into the driver's seat, put the car in gear and/or turn the car on, and do so quickly, before the officers to his immediate left and right could stop him. He then needed to wrestle away from an officer grabbing him, hopefully dodge the traffic on the road he was pulling onto, and then, only after said successful maneuver could he continue on. Here, Coffey needed only to press the gas pedal. Nobody was blocking his path, and Defendant's never got closer than 10-15 feet away from Mr. Coffey. He simply put the car in drive and drove

away. He remained seated in the driver's seat with the ability to drive the vehicle at his discretion. Plaintiff does not assert that officers must close all possible means of escape for custody, but based on the guidance of prior cases, something more is necessary for custody than the facts present here.

2) The history and plain language of 4-106(b) shows no inclination towards show of authority being enough for custody.

The language of the Tort Immunity Act and 735 ILCS 4-106(b) shows no inclination towards a show of authority being enough for custody. In response to the Illinois Supreme Court's 1964 holding in *Harvey v. Ogle Park District*, the legislature passed the Illinois Governmental and Local Liability Act. *Harvey v. Ogle Park District*, 32 Ill. 2d. 60 (1964). Specifically, the language of 4-106(b), was enacted within that legislation and went into effect in 1965. Laws 1965, p. 2983. Section 4-106 has remained largely unaltered but for an amendment effective in 2014 via Public Act 98-0558 adding the terms "condition of release" to 4-106(a), and making 4-106(a) gender neutral. 4-106(b), on the other hand, was not amended, and in Plaintiff's view, remained relatively unutilized by Illinois Courts from the years 1965 until the *Ries* opinion.

Looking to the language of the statute itself reveals not a shred of inference or foresight to a show of authority alone being enough for custody under the Act. The cardinal rule of statutory construction is to determine and give effect to the legislature's intent. *Sulser v. Country Mutual Ins. Co.*, 147 Ill. 2d 548 (1992). The best indication of legislative intent is the statutory

language, given its plain and ordinary meaning. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11, 958 N.E.2d 1021. A court should interpret a statute, where possible, according to the plain and ordinary meaning of the language used. *Orlak v. Loyola University Health System*, 228 Ill.2d 1 (2007). Looking to the language of the Tort Immunity Act and its use of the terms prisoner and custody, shows no inclination or anticipation of a show of authority being enough for custody. The term "prisoner" is used in the following manners throughout the Act: someone who may have parole or a condition of release, individuals who may need periodic inspection, individuals who may need medical care furnished upon them while in custody, and someone with the right to obtain a judicial determination or review of the legality of their confinement. *See* 745 ILCS 10/4-106(a), 745 ILCS 10/4-103, 745 ILCS 10/4-105 and 745 ILCS 10/4-104

Although this Court in *Ries* held the term prisoner was broad enough to include an individual placed in the back of a squad car, nothing in the statute pertaining to the term prisoner describes a suspect approached by officers on the street with only a show of authority. Instead, each and every use of the term prisoner throughout the Local Governmental and Governmental Employees Tort Immunity Act refers to some function or form of the traditional incarceration custodial dynamic. Every use of the term prisoner implies an element of control, dominion, possession, or keeping of said prisoner.

The term custody is used only a few times throughout the Act but similarly is used only in reference to the traditional incarceration custodial dynamic. Use of the term custody shows no anticipation of a show of authority being enough for custody under the Act. Custody, applies to someone who is held in section 4-101, and in section 4-105, the term custody is used as follows "nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his *custody*." *See* 745 ILCS 10/4-101 and 745 ILCS 10/4-105. All uses of the term custody in the statute imply some element of keeping or holding a prisoner and denote an element of control for custody.

In total, the conclusion sought by the Defendants here is a great leap from all prior relevant case law, is unsupported by any interpretive history, and is contrary to use of the terms prisoner and custody in the Act itself. As such this Court should hold that custody under the Act cannot be accomplished by a show of authority and that Coffey was not in custody in the church parking lot.

3) **Adopting Defendants' expansive view of custody ensures that lower courts will lack uniformity, and jeopardizes public safety**

If a show of authority alone is enough for custody, lower courts will be helplessly hamstrung. In such a scenario it is a virtual guarantee that 4-106(b) will be invoked repeatedly and inventively, and even in those cases with a minimal nexus to the facts outlined here. While this case has a number of officers pointing guns, all the ones to follow will not. A police

officer turning on their lights and siren has been repeatedly recognized and considered a show of authority on the part of officers. *People v. Brodack*, 296 Ill. App. 3d 71, 75, 693 N.E.2d 1291, 1295 (2nd Dist. 1998). As is an officer yelling "stop, in the name of the law". *People v. Hunter*, 2013 IL App (3d) 110310, ¶ 1, 984 N.E.2d 576. An officer simply showing his or her badge, in a very literal sense, is a show of authority and could be argued by future litigants to be enough for custody. This Court risks conferring broad sweeping and absolute immunity upon officers across this state involved in any number of police scenarios. Section 4-106(b) could become one of the most commonly invoked police immunities, invoked any time an officer points a weapon at a suspect, shows a badge, yells halt, or turns on their lights and siren. All of the foregoing are various shows of authority and meet the definition of custody Defendants propose.

In the alternative, if this Court finds that in some cases a show of authority is sufficient but not in others, Courts will be forced to draw an arbitrary line or hit a moving target on the requisite amount of authority necessary to meet custody. If six officers pointing weapons is custody, many would argue that three officers pointing weapons, or even one officer pointing a weapon meets the threshold all the same. Some courts may draw an arbitrary line between custody and not custody based on the amount of authority shown, and others may not. Courts all over this state will have answers to these questions that are scattered all over the board. This Court

has an interest in promoting clarity and uniformity amongst holdings of lower courts. Stare decisis expresses the policy of the courts to stand by precedents, not to disturb settled points, and is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion. *Cahokia Unit School District No. 187 v. Pritzker*, 2020 IL App (5th) 180542, ¶ 1, 156 N.E.3d 510. The Court risks opening up an endless black hole of unsettled law, inconsistent holdings, and further appeals by adopting a show of authority as enough for custody. A settled area of the law will become patently unsettled and offer a new expansive means for officers to escape liability.

Holding that a show of authority is enough for custody would create a serious disconnect between the use of the terms prisoner and custody in everyday parlance, and their use in this specific legal context. Under the Defendants' argument simply getting behind a suspect's vehicle would render the driver of that vehicle and all of its occupants' prisoners in custody. A core tenant of statutory construction is to give words their "plain and ordinary meaning". *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 535 (2000)). Defendants ask this Court to deviate from the plain and ordinary meanings of the term's "prisoner" and "custody" to the point the terms are unrecognizable. The terms prisoner and custody under the Act will have an un-plain, un-ordinary, and unorthodox meaning, unique only to this specific legal context. Defendants cannot rewrite statute,

even with intense legal wordsmanship. The legislature did not include any reference to a fleeing suspect, a traffic stop, or a show of authority in the Tort Immunity Act, in reference to the terms prisoner and custody.

Defendants' proposed expansion would undermine notions of public safety and encourage unreasonable chases. Officers should regularly consider the risks that a police pursuit poses to the general public and weigh those risks in considering whether to terminate or continue a pursuit. Defendants' assertion would anoint officers with absolute immunity for any injury inflicted by a fleeing vehicle during a police pursuit. Danger to the public in police pursuits is not an abstract concept. Injuries and deaths stemming from police pursuits are a real outcome, posing a real danger to the citizens of Illinois. In the year 2019, in the City of Chicago, 180 police pursuits, equivalent to 66% of all police pursuits in Chicago for that year, ended in motor vehicle crashes.[1] Further, according to a USA Today analysis of federal law enforcement figures, at least 11,506 people in the United States were killed in police chases from 1979 through 2013, an average of 329 per year, or nearly one person per day. Police chases killed nearly as many people as justifiable police shootings for the same time span, and a large

[1] David Struett, Chicago Sun Times, 66% of Chicago police chases in 2019 ended in crashes — 8 of them fatal — yet pursuit policy went unchanged until late 2020, emails show, https://chicago.suntimes.com/crime/2021/5/12/22425231/lori-lightfoot-chicago-police-vehicle-pursuit-policy-emails (last visited Dec. 13, 2021)

portion of those killed in pursuits were innocent bystanders, passengers in fleeing vehicles, and police officers themselves.[2]

Police pursuits have been described by Courts to be unique in that a pursuit can occur only if two vehicles are involved, a fleeing and chasing vehicle. It is essentially symbiotic; both vehicles are necessary to have a chase. *Suwanski v. Village of Lombard*, 342 Ill. App. 3d 248, 255-56, 794 N.E.2d 1016, 1022 (2nd Dist. 2003). Officers cannot consider their conduct in a vacuum, they must consider the dangers posed by the people they chase, in light of the crimes they are believed to have committed. To allow all police officers complete immunity for any injury inflicted by a fleeing vehicle, would only support notions of irresponsible and unaccountable police pursuits, without regard for innocent bystanders like Mr. Robinson. Most would agree that a 10-hour chase that shuts down free-ways and injures a number of innocent bystanders is unreasonable if the chase was to apprehend an individual who shoplifted a can of Coca-Cola. In recent years, a balancing test for officers to consider terminating a pursuit has become more ingrained in police department policies and training across the state. Officers are to constantly assess the danger to the public, the alleged crime committed of the suspect, the traffic conditions, speed of the pursuit and a number of other factors or variables in determining whether to terminate a pursuit. Such a

[2] Thomas Frank, USA Today, High-speed police chases have killed thousands of innocent bystanders, https://www.usatoday.com/story/news/2015/07/30/police-pursuits-fatal-injuries/30187827/, (last visited December 13, 2021)

balancing test has been adopted by a number of different Illinois police departments, including the Village of Sauk Village and the Village of Crete. C. 400-403, C. 1072, and C. 1604.

This evolving sentiment is also evidenced by the Chicago Police Departments' recent policy change to incorporate the balancing test to terminate a chase and that a police pursuit cannot be initiated based only on a suspected stolen vehicle or property offense.[3] Mr. Coffey in this case was suspected of driving a stolen vehicle, a property offense. Defendant officers were able to recover the stolen vehicle, however, Mr. Coffey was shot dead by officers and Mr. Robinson was left brutally injured in the process. It is crucial that officers thoughtfully and constantly consider the risk that chasing a suspect poses to the community when they engage in police pursuits.

This and other types of police pursuit policy change are not only aimed towards public safety, but also are geared towards protecting the public purse. The number of injuries stemming from police pursuits is considerable. According to the City of Chicago's 2019 Report on Chicago Police Department litigation, the largest portion of injury settlements and verdicts paid by the City of Chicago in the year 2019 stemmed from police pursuits and their accompanying injuries. In the same year, the City of Chicago paid 6.2 million

[3] Madeline Buckley, Chicago Tribune, Chicago police pursuits agains under sctrutiny after cop car speeds through intersection, killing driver of SUV, https://www.chicagotribune.com/news/breaking/ct-police-chase-fatality-copa-20200610-h5icm5cjzfct5hqtrn4ltxxnqa-story.html (Last visited December 13, 2021)

in settlements and 21.3 million in verdicts stemming from injuries related to police pursuits.[4] This Court should encourage reasonable chases and a measured approach to policing. The blanket immunity proposed by the Defense triggered by a simple show of authority discourages a measured approach to police pursuits, and instead encourages unaccountable behavior and unreasonable chases.

In recent years a magnifying glass has been placed on police immunities, police pursuits, and the police department policies that govern said pursuits. As part of the SAFE-T Act that was signed in February of this year by Governor Pritzker, the Illinois Task Force on Constitutional Rights and Remedies was commissioned. The task force, which is made up of lawmakers, scholars, civil rights advocates, law enforcement community members and more was created to examine and make recommendations on, among other things, qualified immunity for police officers in Illinois. 20 ILCS 5165/4-5. Those meetings are ongoing and examine the utility of qualified immunities, and their implications in practice. These issues are hotly debated and intricately considered. To permit an expansion of an unqualified, absolute immunity, as those discussions continue would serve to undercut their goal. It would be contrary to the legislature's intent for this Court to expand an absolute unqualified immunity at the same time the

[4] City of Chicago, Report on Chicago Police Department 2019 Litigation, https://www.chicago.gov/content/dam/city/sites/police-reform/docs/PoliceLitigationReport-Revised10-1-2020.pdf

legislature has voted on and passed a thorough reexamination of qualified immunity.

4) Assuming this Court adopts Defendants' expansive view that a show of authority is enough for custody, there must be submission to said authority.

Citing *People v. Marcella*, Defendant-Appellees assert that a show of authority is enough for custody because it is enough for arrest and seizure in the Fourth Amendment context. Def's. Brief at pg. 16. That conclusion has not been reached in prior relevant case law. Should the Court endeavor to consider whether a show of authority is enough for custody, it should consider how a show of authority is viewed in other legal contexts. Even under the more expansive standards of a seizure under the Fourth Amendment, Coffey was not seized.

For Fourth Amendment purposes, a person is seized by police and entitled to challenge the government's action under the Fourth Amendment when the officer, "'by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382. Seizures are construed broadly in the Fourth Amendment context such that a traffic stop entails a seizure of the driver and all of the passengers in the vehicle, no matter how brief the stop. *Brendlin*, 551 U.S. 249, 255.

The facts of this case do not meet the standards of a seizure under the Fourth Amendment by a show of authority. In the Fourth Amendment context, there is no seizure by show of authority unless there is a submission to said authority. *United States v. Brissey*, 520 F. App'x 481, 483 (7th Cir. 2013). The seventh circuit looked at this issue in relation to a seizure writing:

> *"Submission to a show of authority is a necessary element of a seizure; while a suspect is still fleeing, he is not seized. The word seizure does not remotely apply to the prospect of a policeman yelling Stop, in the name of the law! at a fleeing form that continues to flee. If a suspect is not seized during the entire time he is being pursued by police, then the seizure does not occur until he submits to the show of authority or the pursuing officer resorts to force to stop the suspect's flight."*

*United States v. Griffin*, 652 F.3d 793, 795 (7th Cir. 2011)

Under the Fourth Amendment a show of authority alone is not enough. *Id.* It cannot be enough to satisfy "custody". To hold otherwise, would mean empty words and commands from an officer can deem someone a prisoner in custody in the eyes of the law. In the context of a traffic stop, absent physical force, a show of authority in activating lights and siren does not amount to a stop or seizure of defendant, until the Defendant submits to the show of authority. *People v. Brodack*, 296 Ill. App. 3d 71, 75, 693 N.E.2d 1291, 1295 (2nd Dist. 1998). Submission can be different in the eyes of the law based on the suspect's prior conduct. *People v. Hunter*, 2013 IL App (3d) 110310, ¶ 1, 984 N.E.2d 576. A fleeing man is not seized until he is

physically over-powered, whereas someone who hadn't fled but instead simply sat in a chair, submits to authority by not getting up to run away. *Hunter*, 2013 IL App (3d), ¶ 1.

In this case there was no submission to the show of authority by the officers, and Coffey was not physically overpowered. Coffey repeatedly and continually disobeyed the commands shouted at him in the church parking lot. He did not answer officers' questions, provide his driver's license, put his hands up in the air, exit the vehicle, get on the ground, allow them to search the car or do anything that could be argued to be compliance/submission to the officers' authority. Additionally, Coffey was not physically overpowered or even physically touched by officers. Instead, Coffey made repeated threatening gestures at officers which prevented them from approaching the vehicle and placing him in custody.

Plaintiff submits that the terms "custody" and "prisoner" as used in the Tort Immunity Act denote higher forms of restraint than a "seizure" under the Fourth Amendment. Even still, under the more laxed standards of a seizure, Coffey was not seized since he did not comply or submit and he was never physically overpowered, as is required for a seizure of a fleeing suspect under the Fourth Amendment. In addition, his movements were not limited or curtailed by the officers, as required and outline by this Court in *Ries*.

## CONCLUSION

A show of authority alone is not enough for custody. A holding to the contrary is not supported by either the *Ries* or *Townsend* opinions, the language of the statute, or any other interpretive history of the Act, and would hopelessly expand the section 4-106(b) police immunity. Such a holding would guarantee confusion and disparity in lower court opinions, undermine the safety of the general public, and generally create immense confusion as to the meanings of the terms "prisoner" and "custody". Coffey was not in custody in the church parking lot. He was never touched, moved, or surrounded, and his freedom of movement was not limited or altered in any real or direct way. The First District did not find any conflict between its decision in this case and the *Townsend* decision, because *Townsend* complied with the two-part test. Should this Court find that the *Townsend* decision and the *Robinson* appellate decision are in conflict because *Townsend* expanded *Ries*, that a mere show of authority was enough for custody, then this Court should find that *Townsend* was wrongfully decided. This was the position taken by the Illinois Trial Lawyers Association in their amicus brief to the First District in this case. Pursuant to this Court's holding in *Ries*, and the two-part test for custody it establishes, Defendants' prayer for reversal should be denied.

WHEREFORE, based on the forgoing, the PLAINTIFF-APPELLEE respectfully requests that this Honorable Court Uphold the Ruling of the

Illinois Appellate Court, and remand this matter to the Circuit Court for further proceedings consistent with its ruling.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages or words.

*/s/Kevin O'Connor*
Kevin O'Connor

No. 127236

# In the Supreme Court of Illinois

JAVIER ROBINSON,

*Plaintiff-Appellee*,

v.

THE VILLAGE OF SAUK VILLAGE, THE VILLAGE OF CRETE, OFFICER MARK BUGAJSKI, OFFICER ANDREW VAUGHN, OFFICER ALLEN RINCHICH, and OFFICER JUAN GARCIA

*Defendant- Appellants*.

On Leave to Appeal from the
Appellate Court of Illinois, First District, No. 20-0223
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, 18 L 002000
The Honorable **Melissa A. Durkin**, Judge Presiding.

**NOTICE OF FILING and PROOF OF SERVICE**

The undersigned, being first duly sworn, deposes and states that on December 13, 2021, there was electronically filed and served upon the Clerk of the above court the Brief of Plaintiff-Appellant.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Kevin W. O'Connor
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