IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER SC02-132

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

Petitioners,

v.

METROPOLITAN DADE COUNTY, etc.,

Respondent.

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

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ANSWER BRIEF OF RESPONDENT

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ROBERT A. GINSBURG
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street

Miami, Florida 33128-1993

Tel: (305) 375-5151
Fax: (305) 375-5634
By
Thomas H. Robertson
Assistant County Attorney
Florida Bar No. 301991

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STATEMENT OF FACTS[1]

On the morning of November 2, 1995, Nicholas Sang forced his way onto a school bus loaded with 13 handicapped children, a bus driver and an aide. As he forced his way on, he also forced a parent onto the bus. Once on board, he commandeered the bus by threatening the occupants and saying he had a gun and a bomb. He forced the driver to take the bus onto the Palmetto Expressway in Miami-Dade County (County) and head north. While on the expressway, he stopped at one point and released the parent and two children, and later stopped and released the aide. (App. 5 at 2)

The police were notified of the hijacking and ultimately stopped the bus by blocking it just south of the Bird Road exit of the expressway. In response to that, Sang got very agitated and threatened to detonate a device if the road was not opened. (App. 1 at 13) At the same stop, Sang used the bus to ram a police car and move it out of the way. (App. 2 at 18) Every time the police got close to

[1] The statement of facts of Appellants, the Robles, is incomplete and incorrect. The facts below are complete and point out the incorrect statements by the Robles. The citations in the Statement of Facts are to the County Appendix which contains the depositions and trial testimony which were filed of record at the time of the summary judgment and a copy of the decision of the Third District Court of Appeal in this matter. These items are also contained in volumes 3 and 4 of the record on appeal. The citation will be first to the appendix exhibit number then the page within the exhibit. Hence, Exhibit 3 page 12 would be cited at "App. 3 at 12"

the bus, Sang got agitated and threatened the police[2]. (App. 2 at 36 and 17; App. 3 at 29-30)

As the bus was traveling, Sang spoke with police negotiators on a cellular telephone. He told them that he was taking the bus to various locations but kept changing the location, as he was moving. (App. 2 at 43-44) This had the effect of preventing the officers from setting up at a particular location in order to stop the bus effectively. (App. 3 at 13) Throughout the trip, there were no meaningful negotiations and Sang stayed at a significant level of agitation. (App. 3 at 12)

The bus made its way over to Miami Beach and ultimately headed to Joe's Stonecrab Restaurant (Joe's). When it became apparent that Joe's was the destination, Officer Joe Derringer, a member of the County's Special Response Team (SRT)[3] went to Joe's to set-up. Officer Derringer is a police marksman trained as a sniper and observer. Based upon his training and observation of the area, he set-up to the west of the entrance to Joe's. (App. 1 at 14 & 18) He chose to set-up where he did because he believed that the hijacker would stop the bus at the entrance to the restaurant, prior to reaching his location, and he would be able to observe what occurred and act as a "cut off" if Sang got out of the bus

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[2] The notable exception is the time he allowed a trooper to get close enough to throw a cellular telephone onto the bus. (App 2 at 35)

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

and attempted to escape in his direction. (App. 1 at 14 & 18) There was no expectation that the bus would continue past the entrance and come upon Officer Derringer's position.[4] (App. 1 at 14 and App. 2 at 49)

When the bus arrived at Joe's, it drove past the entrance and started to turn the corner where Officer Derringer had set-up. A school board police officer had left a patrol car partially blocking the road at the side of Joe's. When the bus attempted to turn the corner, it stopped because of the parked patrol car.[5] (App. 1 at 26) At that point, Officer Derringer could see Sang in the bus only 30 feet from him. Officer Derringer had previously heard the radio transmissions that described Sang as very agitated and was aware that Sang had become increasingly agitated when officers were able to get close to him during the trip over to the restaurant. Officer Derringer could see for himself that Sang was very agitated. (App. 1 at 27)

When the bus was stopped, Sang turned and looked first in the direction of the school board patrol car and became very, very agitated. He then turned and looked directly at Officer Derringer. (App.1 at 27) This was the first time during the entire episode that Sang was faced by an officer in close proximity that had a gun out that was ready for use. In fact, Officer Derringer's rifle was

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[4] Conspicuously, the Robles expert, Michael Cosgrove, did not find any fault with the location that Derringer chose. (App. 2 at 48)

[5] As noted before, on a previous occasion, the bus had rammed a police car that was blocking its path. (App. 2 at 18)

pointed in the general vicinity of Sang. Sang, at that instant, made a very quick movement with his hands, downward toward the seat as though reaching to grab something. (App. 1 at 27, 28) Officer Derringer, believing that Sang was reaching for either a gun or bomb, fired his gun shooting Sang. (App. 1 at 28) The bullet passed through the side of the bus just below the 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.[6]

The Robles, in their brief, state that the events "spun out of control" as a result of Officer Derringer's shot. In fact, the evidence is that Sang was hit by the bullet and went down.[7] (App. 2 at 24) This allowed the bus driver to signal the police to come onto the bus. The SRT team continued to follow the bus as it made movements forward.[8] Finally, a coordinated entry was made onto the bus. (App. 3 at 44) When the officers entered the bus, Sang was shot and killed because he had his hand inside his jacket and was making movements that the officer felt were threatening. The shooting was found to be justified at a judicial inquest.

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[6] Marlon Robles eye was injured during this incident. It is generally believed that the eye was struck by debris that traveled with the bullet after it passed through the side of the bus. In their brief, the Robles state that the eye was lost. In fact, the eye was injured, requiring an inter-ocular implant but the boy can see with the eye using glasses.

[7] The testimony relied upon by the Robles' expert was that the shot immobilized Sang and prevented him from doing anything. The expert chose not to believe that testimony. He did however agree that the shot from Derringer caused Sang to go down and remain down. (App 2-24)

[8] The bus made two short movements forward after the shot and prior to the police boarding the bus.

The Robles brief makes incorrect factual statements that are designed to inflame this Court which are not even supportable from the testimony of their own expert. In their brief at page 13 they state, "The situation was headed toward a controlled, peaceful resolution when Officer Derringer, on his own accord, recklessly fired into the bus full of children." (Brief at page 13) Their expert, in fact, opined that there was no indication from the police negotiators that a peaceful resolution was to be forth coming and that there was no indication that the bus could even be brought under control at Joe's. (App. 2 at 49, 58, App. 4 at 68)

The Robles further state in their brief that, "Officer Derringer's self-serving, uncorroborated testimony of his subjective fear raises jury issues of credibility inappropriate for resolution on summary judgment. . . . From the safety of his selected vantage point, any reactionary subjective fear Officer Derringer may have had for his own life was irrational at best, if not purely hysterical, and wholly inappropriate for a trained police sharpshooter. His fears cannot justify his shooting into the bus full of children". (Brief at 13-14) These

unsupported conclusory statements are directly contradicted by their expert's testimony that Officer Derringer was well within the zone of danger of any explosive device and that the Officer was well within the range for easily being shot by a person with a handgun. (App. 2 at 60) The expert explained, however, that Officer Derringer should consider it an acceptable risk that he be shot and that the Officer should be "available to sustain hostile fire." (App. 2 at 60 lines 8-14) Their expert also agreed that it was reasonable for the Officer to believe that Sang probably had a gun and an explosive device and to believe that Sang could be a threat to both the officer and the children on the bus. (App. 2 at 38, 68-72)

Interestingly, the expert stated that Officer Derringer's choice of location was appropriate (App. 2 at 48), his choice of weapons was appropriate (App. 2 at 53), his belief that Sang was armed was appropriate (App. 2 at 38), his belief that Sang was a threat to both he and the children was appropriate (App. 2 at 38), and that he was close enough to the bus for Sang to have an easy shot at the officer with a handgun, or to kill him with an explosive device (App. 2 at 59-60). The expert went on the say that shooting through the side of a bus is appropriate under the right circumstances. (App. 2 at 55-56) He only faults the decision to shoot, under those circumstances. He specifically states that "I think because of the close proximity, that is what made it unreasonable." (App. 2 at 73-74) He went on to say that there is risk involved any time you fire a weapon when people are in close proximity to the intended target and you have to weigh that risk and sometimes you take the risk. (App. 2 at 74) He merely disagreed with Officer Derringer's assessment, in that split second, of what the risks were and how to respond to them. (App. 2-74) The expert thought Derringer should consider being shot an acceptable risk. (App. 2 at 60) That of course does not consider that the response by Sang could have been to explode a device, killing the children, or shoot one of the children.

SUMMARY OF THE ARGUMENT

This case presents a situation where there are no disputed facts and where the only disagreement is an expert, hired by the Robles, who wants to substitute his judgment for that of a police officer concerning that officers decision to shoot an armed kidnapper. This Court has routinely held that decisions of the police made during serious police emergencies are immune under the doctrine of sovereign immunity. *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989); *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992). The expert admits that all of the factors set forth in *City of Pinellas Park* that determine whether immunity is proper exist in this case. The expert admits that this case presented a serious police emergency and admits that every action of this officer, except the decision to shoot, were appropriate. That expert admits that the officer's concern for his safety and that of the children was well founded. The expert just expects that the this police officer should accept being shot as an acceptable outcome even though that would also risk the children being shot.

This Court in *Kaisner* and *City of Pinellas Park* has stated its intention to stay out of police decision made during serious police emergencies and has enumerated the factors to use to decide when to grant immunity. Those factors fit this case exactly. This case is the case that this Court was writing about when it decided both *Kaisner* and *City of Pinellas Park*. For this Court to take any action other than to uphold the decision of the Third District Court of Appeal in this case, it will need to recede from or dramatically change the prior rule of law stated in both *Kaisner* and *City of Pinellas Park*. An officer's decision to fire his weapon at an armed kidnapper holding 11 handicapped children, who is only 30 feet from the officer, who is making a sudden furtive motion that can only be described as threatening, when the kidnapper has been highly agitated and has not involved himself in any meaningful negotiations, is immune under the decisions of this Court. This Court should not recede from its prior decision.

The decision of the Third District Court of Appeal in not in conflict with any decision of this Court and this appeal should be dismissed. The Third District decision does nothing more that to directly quote the rule of law set out by this Court in *City of Pinellas Park.* That does not constitute conflict with this Court's prior decisions and this Court lacks jurisdiction in this case.

ARGUMENT

I. THE UNDISPUTED FACTS OF THIS CASE MEET THE CRITERIA FOR SOVEREIGN IMMUNITY SET OUT IN THIS COURT'S PRONOUNCEMENTS IN *KAISNER V. KOLB* AND *CITY OF PINELLAS PARK V. BROWN* WHICH RECOGNIZE THAT SOVEREIGN IMMUNITY IS PROPERLY GRANTED TO POLICE DECISIONS MADE DURING SERIOUS POLICE EMERGENCIES

This case comes before this Court upon the granting of a summary judgment. There are no material facts in dispute. The only disputed issue in this case is whether, considering the facts and circumstances, Officer Derringer's decision to shoot his weapon was reasonable. However, the question of the reasonableness of the officer's decision is not a question for the courts. Based upon the prior decisions of this Court in *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989) and *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992) Officer Derringer's decision to shoot his weapon was immune under the doctrine of sovereign immunity. The sole issue before this Court is whether the facts of this case meet the requirements of this Court's prior decisions of *Kaisner* and *City of Pinellas Park*.

The undisputed facts and circumstances of this case are identical to the criteria for sovereign immunity established by this Court in both *Kaisner* and *City of Pinellas Park*. In those cases, this Court described situations in which police emergencies reach such a level of urgency that courts are required to

defer to the decisions of police officers and to grant immunity from liability for those decisions. This Court, in *City of Pinellas Park* 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)

Thus, to qualify under this immunity criteria, the following three factors must be met:

1) The police must be faced with a serious emergency;
2) The emergency must be thrust upon the police by the actions of the lawbreaker or other external forces; and
3) The police officer must have to choose between different risks posed to the public.

Each of these factors is present in this case.

It is undisputed, by the Robles' own expert, that these criteria have been met. In this case, the Robles' own expert agrees that this is a serious police emergency and that the emergency was thrust upon the police by the actions of the lawbreaker, Mr. Sang. (App. 4 at 69) The expert agrees that Officer Derringer was faced with a choice that would expose the public to the risk of danger no matter which way he decided. (App. 4 at 70) The Robles rely solely on the fact that their expert merely disagreed with Derringer's decision to shoot because he felt that Derringer should consider being shot by Sang or having a bomb explode as acceptable risks when weighed against the possibility that Sang was not, at that exact second, reaching for a gun.[9] But, under the circumstances

[9] The Robles emphasize throughout their brief that Sang was "unarmed", yet their own expert admits that Officer Derringer should believe that Sang was armed.

facing the Officer and in the split second he had to decide, firing his gun was a reasonable decision and that decision is immune under the criteria this Court established in both *Kaisner* and *City of Pinellas Park* .

As a police emergency becomes more urgent and dangerous, the decisions become more difficult and have the potential for more serious results. This pressure is surely felt by the officer or officers called upon to make the decision, and, in situations such as this, the decision becomes more and more a matter of

(App. 2 at 38) It must be remembered that while Sang did not have a gun or a bomb, he possessed a potentially more dangerous weapon in the form of the bus. The vehicle is perhaps the greatest weapon of all. With it, Sang could kill all the occupants through a crash, or kill innocent bystanders by crashing into them, just as he crashed into police cars.

on the spot judgment in response to grave circumstances occurring in split seconds. These decisions rest upon the experience and training of the officer. This Court has sought to avoid becoming entangled in these types of decisions. *Kaisner* at 737

To fully meet the *Kaisner* exception, the choice made by the police officer must have the potential for serious consequences no matter which way the decision goes. In this case, had Derringer chosen not to shoot, and Sang had been reaching for a gun or bomb, the next sound could have been a gunshot directed at either Derringer or one of the children, or an explosion. To force an officer, who is facing a hostage situation with an armed and dangerous person (and this officer had to presume that Sang was armed) to be cognizant of the potential liability they or their employer may face, would result in a serious distraction, keeping the officer from the correct course of action. To force the officer to justify his actions before a jury, when there is no question that the factors set forth in *City of Pinellas Park* apply, is to meddle in the actual workings of the police department. Where the decision of the officer is open to honest debate, and the decision reached by the officer is within the realm of reasonable options, the officer's decision should not be subjected to scrutiny. To do otherwise is to subject the discretionary decisions of the police to review by

the judiciary. That would violate separation of powers and would be contrary to exactly what sovereign immunity is designed to prevent. See, *Kaisner* at 737 [10]

This Court should not interfere with police decisions made under such dire circumstances and when the decision, no matter which way it is made, can likely result in injury or death to innocent parties. This Court has consistently held that courts should not second-guess the highly trained officers, facing extreme odds, on decisions that require particular expertise and which have extreme and dire consequences. In this case, a serious police emergency, which was not yet under control or even remotely stabilized, and which had no realistic prospect of being brought under control, was brought to a satisfactory conclusion as a result of the actions of Officer Derringer. Within four and a half minutes of having fired his weapon, a saga, which had taken police over a large portion of Miami-Dade County and threatened the lives of dozens of children, citizens and law enforcement officers, concluded with the safe release of all of the children. But for Officer Derringer's shot, this saga would have continued and Sang would have continued to subject the children, bystanders and law enforcement personnel to further and unnecessary danger.

The Robles, in their brief, characterize both *Kaisner,* and *City of Pinellas Park,* as cases involving police emergencies where deference was to be granted but where sovereign immunity would not apply. That is not the case. Neither case was considered by this Court to have been a police emergency. The *Kaisner* case dealt with the safety of the location where an officer told the petitioners to

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[10] The same or similar policy considerations are existing under both qualified immunity and sovereign immunity. As this Court recognized *in Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), there is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Tucker* at 11189. This is especially true in the case of serious police emergencies. While not directly on point, the doctrine of qualified immunity, which is used to determine when a police officer can be held personally liable under 42 U.S.C. § 1983, offers instructive criteria for police liability. As this Court stated, the standard for qualified immunity is that "no well-trained officer…would have believed" that the actions taken were proper. *Gentile v. Bauder*, 718 So. 2d 781, 784 (Fla. 1998). The Court also concluded that, "Qualified immunity protection applies to all except the plainly incompetent or those who knowingly violate the law." *Gentile*, at 784. Applying that standard to the facts of this case would still result in summary judgment for the County. Clearly, there are well-trained officers who would believe that it is acceptable to shoot an armed person who makes furtive motions in the direction of a potential weapon or explosive device.

stand during a traffic stop, and so, involved no emergency at all. The *City of Pinellas Park* case involved a police chase that resulted "[s]olely because a man ran a red light". 607 So.2d at 1227. Again, not a serious police emergency. The *Kaisner* Court specifically pointed out:

> We emphasize, however, that the facts of this case present no countervailing interests, such as the safety of others. The result we reach today would not necessarily be the same had the officers in this instance been confronted with an emergency requiring swift action to prevent harm to others, albeit at the risk of harm to petitioners.

543 So.2d at 738. Both cases recognized that in the face of a serious emergency, immunity would be proper.

The Robles then argue that *Kaisner* did not create an exception to liability for police emergencies to which sovereign immunity would apply, but merely held that courts should give deference to police decisions in the form of a reduced standard of care or an instruction to a jury on this deference. In both *Kaisner a*nd *City of Pinellas Park*, however, this Court specifically meant to confer immunity in cases such as this. Indeed, this Court stated, "The way in which government agents respond to a serious emergency is entitled to great deference, an may in fact reach a level of such urgency as to be considered discretionary and not operational." *Kaisner* at 738. In *City of Pinellas Park* this Court again stated, "It is this choice between risks that is entitled to the protection of *sovereign immunity* in appropriate cases." *City of Pinellas Park* at 1227 (emphasis added)

There is nothing more urgent than a bus full of children, being kidnapped by a man who is believed to have a gun and a bomb who is facing directly at an armed officer and then makes a sudden movement in a direction that can only be interpreted as threatening. There is no more critical choice for an officer to make than whether to shoot when that shot has the potential to hurt others, or not shoot when not shooting has a greater potential for hurting others.

II. THE ROBLES' CITATIONS TO CASES THAT DO NOT INVOLVE IMMUNITY AND/OR DO NOT INVOLVE SERIOUS POLICE EMERGENCIES ARE MISPLACED

Ignoring the plain language and meaning of this Court's decisions in *Kaisner* and *City of Pinellas Park*, the Robles argue that this Court has traditionally subjected police shooting cases to jury scrutiny and therefore, should continue to do so. They cite to *Cleveland v. City of Miami*,[11] as precedent for the proposition that this Court has held that police shooting cases should not be entitled to sovereign immunity, but should be determined by a jury. What they fail to point out is that sovereign immunity was never raised or argued in the *Cleveland* case specifically because municipalities did not enjoy sovereign immunity at that time.[12] The Robles' reliance upon *Cleveland* and *Scott v. City of Opa Locka*,[13] is misplaced inasmuch as sovereign immunity could not be raised or argued by either of those municipalities. *Hargrove v. Town of Cocoa Beach, supra*. In the absence of sovereign immunity, those cases had to be decided on ordinary tort law principals such as sudden emergency. The County is, however, entitled to the protection of sovereign immunity.

Similarly, the Robles' reliance upon *Lewis v. City of St. Petersburg*,[14] is misplaced. *Lewis* was decided upon the basis of a motion to dismiss where the

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11 263 So.2d 573 (Fla. 1972)

12 This Court, in the case of *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), eliminated sovereign immunity for municipalities except for legislative, judicial and quasi-judicial functions. This was later changed by the enactment of § 768.28 Fla. Stat (1977). See, *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981)

13 311 So.2d 825 (Fla. 3d DCA 1975)

14 260 F.3d 1260 (11th Cir. 2001)

facts came only from the allegations of the complaint. The allegations of the complaint at issue in *Lewis* did not demonstrate a serious police emergency that would be entitled to the *Kaisner* exception. The undisputed facts, disclosed through discovery herein, conclusively demonstrate that a serious police emergency did exist and that summary judgment was proper.

Again, the *City of Miami v. De La Cruz*[15] case is not instructive in this case because it too does not deal with a serious police emergency. *De La Cruz* involves a police chase, on foot, which resulted in the officer running into an innocent third party. The officer never faced a choice that involved risks to the public while involved in a serious emergency. That case clearly did not meet the criteria set down by this Court in *City of Pinellas Park*.

Officer Derringer's decision to shoot his weapon, while facing an armed man who had kidnapped innocent children is exactly the type of action that this Court envisioned when it set forth the *Kaisner* exception and clarified its applicability in *City of Pinellas Park*. This case is the case that *City of Pinellas Park* was speaking to and this is the case where immunity is proper. The trial

[15] 784 So.2d 475 (Fla. 3d DCA 2001)

court's decision and the decision of the Third District Court of Appeal finding sovereign immunity are correct, are in strict compliance with this Court's precedents, and should be upheld by this Court.

III. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS ACTION DOES NOT CONFLICT WITH ANY PRIOR ANNOUNCED RULE OF LAW AND THIS COURT HAS IMPROVIDENTLY ACCEPTED JURISDICTION OF THIS CASE AND THE PETITION FOR REVIEW SHOULD BE DENIED

In this action, the basis for this Court's jurisdiction, conflict, does not exist, and this action should be dismissed. The district court decision announced its rule of law by directly quoting this Court's decision in *City of Pinellas* Park. This is not conflict. On many occasions, this Court has accepted jurisdiction over an action and later determined that accepting jurisdiction was not proper. *Rose v. Norwegian Cruise Lines Limited*, 825 So.2d 342 (Fla. 2002*); Southeastern University of the Health Sciences, Inc. v. Sharick*, 822 So. 2d 1290 (Fla. 2002); *Poer v. Calder Race Course, Inc.*, 823 So.2d 739 (Fla. 2002). This has occurred even in cases where a question has been certified to this Court by one of the District Courts of Appeal and hence accepting the case was purely discretionary. *Florida Department of Lottery v. GTECH Corporation*, 822 So.2d 1243 (Fla. 2002).

For this case to be properly before this Court, one of the following two criteria must be met:

1) The Third District's decision announces a rule of law which conflicts with a rule of law previously announced by this Court, or

2) The Third District's decision applies a rule of law to produce a different result while having substantially the same controlling facts as a prior case disposed of by this Court.

As held 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 this 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).

There is no prior case disposed of by this Court with substantially the same controlling facts as this case. The Robles have pointed to none and none exist. It must then be decided if the Third District decision, in light of the fully briefed facts, announces a rule of law which conflicts with a rule of law previously announced by this Court. It should be remembered, however, that under this criterion, the facts are immaterial. *Nielsen* at 734 "It is the announcement of a conflicting rule of law that conveys jurisdiction to [this Court] to review the decision of the Court of Appeal." *Nielsen* at 734.

The Third District's opinion in this matter cites solely to *City of Pinellas Park*. The only rule of law announced in the Third District's opinion is a direct quote from *City of Pinellas Park* describing when a serious police emergency is raised to the level of sovereign immunity. Certainly, directly quoting a rule of law announced by this Court does not create a conflict with that rule of law. To then apply that rule of law directly to the facts of this case, and have those facts fit the rule of law exactly, is not conflict with this Court's prior opinion. As this Court has said, "The constitutional standard [for when conflict jurisdiction is conveyed] 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*, 157 So.2d 517, 518 (Fla. 1963)

"[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).

It can hardly be said that directly quoting a rule of law creates an "inconsistency or conflict among precedents." *Kincaid, supra* at 518. It can hardly be said that directly quoting a rule of law causes that decision "on its face to collide with a prior decision of this Court". *Kincaid, supra* at 518. It can hardly be said that directly quoting a rule of law from an opinion of this Court creates "a real and embarrassing conflict of opinion and authority' between decisions". *Ansin, supra* at 811.

There is no collision between the rule of law announced in the Third District opinion in this case and this Court's decision in *City of Pinellas Park.* There is no "real and embarrassing conflict of opinion and authority" when a District Court directly quotes the rule of law announced by this Court. *Ansin, supra* at 811. This Court cannot exert jurisdiction merely because it "might disagree with the decision of the district court nor because we might have made a factual determination if we had been the trier of fact." *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975)

The Robles, alternately, suggested that this case directly conflicts with *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), because *Trianon* recognized that there exists and has existed a common law duty of care concerning the operation of automobiles and the handling of firearms:

> The lack of a common law duty for exercising a discretionary police power function must, however, be distinguished from existing common law duties of care applicable to the same officials or employees in the operation of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law. In these latter circumstances there always has been a common law duty of care and the waiver of sovereign immunity now allow actions against all governmental entities for violations of those duties of care.

Trianon at 920

The Robles imply that since the Third District found sovereign immunity in this case, it must have determined that no common law duty of care existed. What the Robles fail to take into account is that the existence of a common law duty of care is a prerequisite to any suit against the County. As stated by this Court, "[I]t is important to note that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statutes sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care." *Trianon* at 917.

Absent a common law duty of care, no cause of action would lie against the County regardless of sovereign immunity. Once a duty is found, then the determination of sovereign immunity is made. As this Court held in *City of Pinellas Park*, "The issues before us today are (a) whether the police owed a legal duty to the Brown sisters, (b) whether the activities of the police officers described above were shielded from all liability by the doctrine of sovereign immunity *in spite of any duty owed the Browns*." *City of Pinellas Park* at 1225 (emphasis added). Absent a finding of common law duty of care, a court need not proceed to the question of sovereign immunity.

For the trial court and the Third District Court, in this case, to have made a determination on sovereign immunity, they implicitly accepted that there was an underlying common law duty of care on the part of Officer Derringer. The first prong of the test for government liability, duty, was never at issue in this case. By relying on *City of Pinellas Park*, the Third District accepted as given that there was a common law duty of care for the handling of firearms. This is completely consistent with *Trianon*. [16] The Third District decision announces no

[16] The Third District decision actually announced no rule of law concerning the existence of a common law duty of care in the handling of firearms, and, therefor, cannot conflict with *Trianon* on this issue.

rule of law that "collides" with *Trianon* so as to create a "real and embarrassing conflict of opinions".

This Court has improvidently accepted jurisdiction in this matter, the petition should be denied.

CONCLUSION

The facts and circumstances of this case conclusively establish that sovereign immunity applies. This case follows exactly this Court's decisions in *Kaisner* and *City of Pinellas Park* that recognized that sovereign immunity applies to decisions of police officers made in the course of a serious police emergency. There can be no greater police emergency than the kidnapping and hijacking of handicapped children by an armed man. How the police deal with that emergency and how they successfully end such a saga is not subject to scrutiny by the Courts. The decision of the Third District Court of Appeal should be upheld.

The decision of the Third District Court of Appeal does not conflict with any decision of this Court. The only rule of law announced by the Third District was a direct quote from this Court. That is not conflict. The undisputed facts of this case track exactly the criteria set by this Court for sovereign immunity. That

is not misapplication. The acceptance of jurisdiction over this case was improvidently made and this action should be dismissed.

Respectfully submitted,

ROBERT A. GINSBURG
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
Tel: (305) 375-5151
Fax: (305) 375-5634

By:_____
Thomas H. Robertson
Assistant County Attorney
Florida Bar No. 301991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of October, 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.

_____
Thomas H. Robertson
Assistant County Attorney

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.

_____
Thomas H. Robertson
Assistant County Attorney