IN THE SUPREME COURT

STATE OF FLORIDA

BARBARA URSIN, Plaintiff, Petitioner, vs. LAW ENFORCEMENT INSURANCE COMPANY, LTD., a foreign corporation, FLORIDA SHERIFF'S SELF-INSURANCE FUND, AUBREY ROGERS, individually and as Sheriff of Collier County, Florida, AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida, and GEORGE SNIDER, individually and as Deputy of Collier County, Florida, Defendants, Respondents.	District Court Case No. 83-938

65523

APPLICATION FOR CONSTITUTIONAL CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JOHN B. CECHMAN
GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Attorneys for Petitioner
Post Office Box 2366
Fort Myers, Florida 33902
813-334-1146

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STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, Petitioner, BARBARA URSIN, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on June 20, 1984. The Petitioner was the original Plaintiff below and Appellant before the District Court of Appeal. The Respondents, LAW ENFORCEMENT INSURANCE COMPANY, LTD., a foreign corporation, FLORIDA SHERIFF'S SELF-INSURANCE FUND, AUBREY ROGERS, individually and as Sheriff of Collier County, Florida, AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida, and GEORGE SNIDER, individually and as Deputy of Collier County, Florida, were the original Defendants in the trial forum and the Appellees before the District Court of Appeal. This was an appeal by the Petitioner from an Order dismissing her lawsuit with prejudice entered by the Circuit Court in and for Collier County. The District Court of Appeal, Second District, affirmed the lower court's ruling.

In this brief, the parties will be referred to by the positions they occupy before this court. The germane facts are as follows:

In January 1978, a man named Earl Baumgardt was sentenced to twenty (20) years in prison as a result of his convictions for rape, kidnapping, and robbery. He was then committed to the Mentally Disordered Sex Offenders (MDSO) program. In the latter part of 1980, Baumgardt was returned to Collier

County for a hearing on the clarification of his status as an MDSO. He was then in the custody of the Collier County Sheriff. While awaiting a hearing on his MDSO status, Baumgardt was made a trustee at the Collier County Jail and assigned to the kitchen detail. On January 13, 1981, Baumgardt walked away from the kitchen detail and within minutes had kidnapped the Petitioner. The Petitioner was subsequently sexually molested by Baumgardt. The Petitioner filed a complaint in two counts alleging that Baumgardt was negligently assigned to a trustee kitchen detail by Respondent Deputy Sheriffs, and that the Sheriff of Collier County negligently failed to instruct, supervise, and control his deputies. All Respondents filed motions to dismiss and the trial judge granted same determining that sovereign immunity protects the Respondents from liability in this case. Appeal was taken by Petitioner to the Second District Court of Appeal. The Second District Court of Appeal affirmed the trial court and the trial court's reasoning that sovereign immunity bars recovery by the Petitioner in this suit.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE CASES HOLDING THAT A GOVERNMENTAL ENTITY DOES NOT ENJOY SOVEREIGN IMMUNITY FOR THE ACTIONS OF ITS EMPLOYEES WHERE THE EMPLOYEES ARE IMPLEMENTING GOVERNMENTAL POLICY AND NOT EXERCISING A DISCRETIONARY GOVERNMENTAL FUNCTION.

ARGUMENT

THE PRESENT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THOSE CASES HOLDING THAT A GOVERNMENTAL BODY DOES NOT ENJOY SOVEREIGN IMMUNITY FOR THE ACTIONS OF ITS EMPLOYEES WHERE THE EMPLOYEES ARE IMPLEMENTING GOVERNMENTAL POLICY AND NOT EXERCISING A DISCRETIONARY GOVERNMENTAL FUNCTION.

In January 1978, one Earl Baumgardt was sentenced to a total of twenty (20) years in prison as a result of his convictions for rape, kidnapping, and robbery. He was then committed to the Mentally Disordered Sex Offenders (MDSO) program. In the latter part of 1980, Baumgardt was returned to Collier County for a hearing on the clarification of his status as an MDSO. He was then in the custody of the Collier County Sheriff and while awaiting hearing on his MDSO status, Baumgardt was made a trustee at the Collier County Jail and assigned to the trustee kitchen detail. On January 13, 1981, Baumgardt walked away from the kitchen detail and within minutes had kidnapped the Petitioner and forced the Petitioner to drive to Lee County where he sexually molested her. The Petitioner subsequently filed a lawsuit in two counts. Count I alleged that Baumgardt was negligently assigned to a trustee kitchen detail by the Respondent Deputy Sheriffs while Baumgardt was in the custody, care, and control of the Sheriff and these deputies. Count II alleges that the Sheriff of Collier County negligently failed to instruct, supervise, and control his deputies. All Respondents filed motions to dismiss and their motions were granted by the trial judge based on the argument that the Respondents enjoyed

sovereign immunity from these actions. The Second District Court of Appeal affirmed the trial court and held that sovereign immunity bars recovery by the Petitioner in this lawsuit. The opinion indicates that the Second District Court of Appeal reached this conclusion based upon the reasoning of its earlier decisions of Rodriguez v. City of Cape Coral, No. 83-1068 (Fla. 2d DCA May 4, 1984); City of Cape Coral v. Duvall, 436 So.2d 136 (Fla. 2d DCA 1983); and Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983).

Everton v. Willard, supra, and City of Cape Coral v. Duvall, supra, are both cases wherein a law enforcement officer and the governmental agency that he worked for were sued, and it was alleged by the Plaintiff that the law enforcement officer was negligent in not arresting a drinking driver when that driver subsequently caused injury. In both cases the Second District Court of Appeal determined that neither the governmental entity nor the law enforcement officer should be held liable for the exercise of discretion not to arrest a drinking driver. The Appellate court felt that the law enforcement officer was exercising a discretion inherent both in the nature of enforcement and in the implementation of basic planning level activity and, consequently, pursuant to the rationale of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), both the law enforcement officer and the governmental entity that employed the law enforcement officer enjoyed sovereign immunity. In Rodriguez v. City of Cape Coral, No. 83-1068 (Fla. 2d DCA May 4, 1984), the Second District Court

of Appeal determined that neither a city nor a city police officer may be held liable for the exercise of the police officer's discretion in not taking an intoxicated person into protective custody. The intoxicated person later was killed in a motor vehicle accident and his estate filed a lawsuit against both the city police officer and the city. The Second District Court of Appeal determined that both Defendants enjoyed sovereign immunity based on the rationale of Everton and Duvall.

Cases reaching a conflicting conclusion on the same question of law are Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983); and Huhn v. Dixie Insurance Company, No. 82-1150 (Fla. 5th DCA May 17, 1984). The facts of Smith v. Department of Corrections are strikingly analogous to the facts of the case under review. In Smith, inmate Prince was convicted of first degree murder and given a life sentence in February 1973. His parole from a twenty (20) year sentence for armed robbery was revoked. In October 1974, Prince was classified as a minimum-custody inmate and he subsequently escaped. After recapture, Prince was returned to maximum custody. In May 1976, a Department of Corrections employee caused Prince to be reclassified to minimum custody status. In October 1977, again at the request of Department of Corrections employee, Prince was transferred to another facility and held in minimum custody. In March 1978, Prince escaped and in June 1978 perpetrated an armed robbery and in the process of this armed robbery, abducted and shot the Plaintiff. The Plaintiff brought suit against the Department of Corrections and the Department of Corrections' employee. The trial court dismissed

Smith's second amended complaint based upon holdings that inmate classification was discretionary rather than an operational function and thus immune from tort liability, and alternatively, that the injury to Smith was unforeseeable. The First District Court of Appeal easily disposed of the foreseeability argument and, as to the sovereign immunity argument, determined that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement.

The fact pattern of Huhn v. Dixie Insurance Company is identical to the fact pattern of Everton v. Willard. Both cases deal with the issue as to whether a law enforcement officer and his employer can be held responsible for the law enforcement officer's actions in not detaining a visably intoxicated driver who was operating his motor vehicle in a careless and reckless fashion and who subsequently causes an accident and injury to the Plaintiff. The Fifth District Court of Appeal in Huhn v. Dixie Insurance Company rejected the reasoning of Everton and determined that the police officer is merely implementing policy by enforcing the laws and cannot be said to be exercising a discretionary governmental function and, consequently, both the police officer and his employer do not enjoy sovereign immunity. The Fifth District Court of Appeal recognized that its opinion is in direct conflict with Everton v. Willard.

As can be seen, Petitioner is invoking the Florida Supreme Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, by

pointing out that the decision here-being reviewed expressly and directly conflicts with a decision of another District Court of Appeal. Additionally, Petitioner would hereby invoke the Florida Supreme Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure, and Petitioner would show that the decision here reviewed has been certified to be in direct conflict with a decision of another District Court of Appeal. In the last sentence of the decision here reviewed, the Second District Court of Appeal states as follows:

> In reaching our decision, we acknowledge that it expressly and directly conflicts with the decision of our sister court in Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983).

Also, as previously pointed out, the Fifth District Court of Appeal in Huhn v. Dixie Insurance Company recognized that its decision conflicted with the Second District Court of Appeal decision of Everton v. Willard when the Fifth District Court of Appeal, in the last sentence of its opinion, stated as follows:

> In so concluding, this opinion appears to be in direct conflict with Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA 1983).

In summary, it is clear that the District Courts of Appeal of the State of Florida are reaching directly conflicting decisions regarding the issue of sovereign immunity. The case under review and those cases relied upon by the case under review (Everton, Duvall, and Rodriguez) hold that a governmental entity and its employees enjoy governmental

immunity for the actions of the employees in the day-to-day ministerial decisions regarding classifications of persons that the employees come in contact with, i.e. to arrest or not to arrest, to make trustee or not to make trustee, to take into protective custody or not to take into protective custody. On the other hand, an opposite holding has been reached by the Fifth District Court of Appeal in Huhn v. Dixie Insurance Company and by the First District Court of Appeal in Smith v. Department of Corrections. Those cases hold that a governmental entity and its employees do not enjoy governmental immunity for the actions of the employees in the day-to-day ministerial decisions regarding the classifications of persons that the employees come in contact with.

CONCLUSION

The decision of the District Court of Appeal, Second District, that the Petitioner, BARBARA URSIN, seeks to have reviewed is in direct and express conflict with the decision of the District Court of Appeal, First District, in the case of Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983) and the decision of the District Court of Appeal, Fifth District, in the case of Huhn v. Dixie Insurance Company, No. 82-1150 (Fla. 5th DCA May 17, 1984). Additionally, the Second District Court of Appeal in the case under review certified that its decision was in direct conflict with the decision of the First District Court of Appeal in Smith. It is submitted by the Petitioner that the decision in the present case is erroneous and that the conflicting decisions of the District Courts of Appeal for the Fifth and First Districts are correct and should be approved by this court as the controlling law of this State.

The Petitioner, therefore, requests this Court to extend its discretionary jurisdiction to this cause, and to enter its Order quashing the decision hereby sought to be reviewed, and approving the conflicting decisions of the District Courts of Appeal of Florida for the Fifth and First Districts, as the correct decisions.

Respectfully submitted,
GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Attorneys for Plaintiff/Petitioner
Post Office Box 2366
Fort Myers, Florida 33902
813-334-1146

BY: _____
JOHN B. CECHMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five copies of the foregoing Brief have been furnished by United States mail to The Hon. Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a true and correct copy has been furnished by United States mail to GAYLE SMITH SWEDMARK, Attorney for Defendants, Respondents, Post Office Box 669, Tallahassee, Florida 32302-0669, this the 10th day of July, 1984.

GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Attorneys for Plaintiff, Petitioner
Post Office Box 2366
Fort Myers, Florida 33902
813-334-1146

BY: _____
JOHN B. CECHMAN