IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,623

OLIVIA RODRIGUEZ, as Personal Representative of the Estate of Eddie Rodriguez,

Petitioner,

vs.

CITY OF CAPE CORAL, RENNY WIERSMA and THE AETNA CASUALTY & SURETY COMPANY,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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I
STATEMENT OF THE CASE AND FACTS

In the decision sought to be reviewed--*Rodriguez v. City of Cape Coral, et al.*, ___ So.2d ___ (Fla. 2nd DCA 1984) (1984 FLW DCA 1010) (A. 1)--the Court of Appeal, Second District, held that the determination of a police officer not to take a drunk pedestrian into protective custody in order to secure his safety or obtain treatment, is a decision protected by the sovereign immunity doctrine, despite the requirements of §396.072, Fla. Stat. (1977).[1] The district court's sole authority for this decision are two cases presently on review before this Court--*Everton v. Willard*, 426 So.2d 996 (Fla. 2nd DCA 1983), *review granted*, No. 63,440 (Fla., Sept. 9, 1983), and *City of Cape Coral v. Duvall*, 436 So.2d 136 (Fla. 2nd DCA 1983), *review granted*, No. 63,441 (Fla., Sept. 9, 1983)--both holding that the decision of a police officer not to arrest or otherwise apprehend a drunk driver is protected by the sovereign immunity doctrine.

The relevant facts of this case are set forth in the district court's opinion. Three Cape Coral police officers encountered the plaintiff's decedent, Eddie Rodriguez, walking east on the Cape Coral Parkway toward the Cape Coral Bridge in the early morning hours of October 15, 1978. The district court's opinion assumes *arguendo* that

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[1] In subsection (1), this statute provided, and still provides:

> Any person who is intoxicated in a public place and who appears in need of help, if he consents to the proffered help, may be assisted to his home or to an appropriate treatment resource, whether public or private, by a peace officer. Any person who is intoxicated in a public place and appears to be incapacitated ***shall*** be taken by the police officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention, or when he appears to be unable to make a rational decision about his need for care (our emphasis).

Subsection (2) of §396.072 empowers the officer to take an intoxicated person to an appropriate treatment resource against his will, so long as unreasonable force is not used.

the evidence was sufficient to permit a conclusion that Mr. Rodriguez was obviously intoxicated and incapacitated; but instead of taking Mr. Rodriguez into protective custody or for treatment under §396.072, the officers left him with a third party who had stopped on the bridge and was waiting for a friend to bring him some gas. After the officers left, however, Mr. Rodriguez wandered onto the parkway and was struck and killed by a passing automobile. On the sole basis of its earlier decisions in *Everton* and *Duvall*, the district court held that the officers' decision not to take Mr. Rodriguez into custody or for treatment was a discretionary act no less protected by the sovereign immunity doctrine than the decision of an officer not to arrest or apprehend a drunk driver.

Acknowleding the requirement of §396.072(1) that any person who appears to be intoxicated and incapacitated in a public place "shall be taken by the peace officer to a hospital or other appropriate treatment resource," the district court nevertheless concluded that the factual judgment of an officer about whether or not an individual does appear to be incapacitated is a discretionary decision also protected by the sovereign immunity doctrine (A. 7). Thus, while *Everton* and *Duvall* protected the judgment of an officer about whether or not to make an arrest, *Rodriguez* now protects the purely-factual judgment of an officer about whether or not someone appears to be incapacitated.

II
ISSUE ON APPEAL

WHETHER THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL, HOLDING THAT THE SOVEREIGN IMMUNITY DOCTRINE DOES NOT PROTECT OPERATIONAL-LEVEL DECISIONS, HOWEVER DISCRETIONARY.

III
ARGUMENT

THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL,

HOLDING THAT THE SOVEREIGN IMMUNITY DOCTRINE DOES NOT PROTECT OPERATIONAL-LEVEL DECISIONS, HOWEVER DISCRETIONARY.

Because this Court has accepted review of the *Everton* and *Duvall* decisions on the ground that they conflict with decisions of this Court or other district courts of appeal, and because the instant decision is based entirely upon the *Everton* and *Duvall* cases, we respectfully submit that the instant decision necessarily conflicts with decisions of this Court or other district courts of appeal. Some of the cases upon which review by this Court was sought in *Duvall* are cited in the footnote below.[2] All of these decisions, and many others, interpret §768.28, Fla. Stat., to draw a distinction between planning-level decisionmaking, which is protected by the sovereign immunity doctrine, and operational-level decisionmaking, however discretionary, which is not protected. Many of these decisions involve operational-level decisions which are no less discretionary in nature, and no less important to society, than the decision of an officer about whether or not to arrest a drunk driver, or about whether or not to take a drunk pedestrian into protective custody.

In addition, since the *Everton* and *Duvall* decisions, a number of other cases have acknowledged the conflict. In *Huhn v. Dixie Ins. Co.*, ___ So.2d ___ (Fla. 5th DCA 1984) (1984 FLW DCA 1106), the court expressly disagreed with the *Everton* and *Duvall* decisions, thus creating express conflict, in holding that a municipal corporation does not

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[2]*See City of St. Petersburg v. Collum*, 419 So.2d 1082, 1083 (Fla. 1982); *Ingham v. State Department of Transportation*, 419 So.2d 1081, 1082 (Fla. 1982); *Department of Transportation v. Neilson*, 419 So.2d 1071, 1075 (Fla. 1982); *Rupp v. Bryant*, 417 So.2d 658, 663 (Fla. 1982); *City of Lauderdale Lakes v. Corn*, 415 So.2d 1270, 1272 (Fla. 1982); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979); *Willis v. Dade County School Board*, 411 So.2d 245 (Fla. 3rd DCA 1982); *Department of Transportation v. Webb*, 409 So.2d 1061, 1064 (Fla. 1st DCA 1982) (per curiam); *Jones v. City of Longwood*, 404 So.2d 1083, 1085 (Fla. 5th DCA 1981); *Bellavance v. State*, 390 So.2d 422, 423 (Fla. 1st DCA 1980); *Hollis v. School Board of Leon County*, 384 So.2d 661, 665 (Fla. 1st DCA 1980); *Pitts v. Metropolitan Dade County*, 374 So.2d 996 (Fla. 3rd DCA 1979).

enjoy sovereign immunity for the actions of police officers who stopped a visibly intoxicated driver but did not apprehend him. The opinion certifies direct conflict with *Everton*, and is now before this Court.

Likewise in *Palmer v. City of Daytona Beach*, 443 So.2d 371 (Fla. 5th DCA 1983), the same court held, against the claim of sovereign immunity, that a city may be liable to a property owner for damages caused by negligent acts of the city's firefighters. But citing *Everton*, the court certified the issue to this Court as one of great public importance.

And in *Smith v. Department of Corrections of the State of Florida*, ___ So.2d ___ (Fla. 1st DCA 1983) (1983 FLW DCA 1155), the court held that the Department of Corrections is not insulated from liability for its asserted negligence in allowing a prisoner held in minimum custody to escape. The concurring opinion notes the conflict between that decision and both *Everton* and *Duvall*.

In light of all the foregoing, we respectfully submit that the decision in this case, based entirely on the *Everton* and *Duvall* decisions, expressly and directly conflicts with decisions of this Court and other district courts of appeal in ignoring the fundamental distinction between planning-level decisions and operational-level decisions, however discretionary. In addition, if permitted to brief this case on the merits, we will demonstrate that even if this Court, in reviewing *Everton* and *Duvall*, should hold that some operational-level decisions should be protected, this was not such a case. In this case, the officers were *required* under §396.072 to take to a hospital or other appropriate treatment resource any person who was intoxicated and appeared to be incapacitated.

The district court held that the factual judgment of an officer about whether a person in fact appears to be incapacitated is no less entitled to protection by the sovereign immunity doctrine than the judgment about whether or not to arrest somebody (A. 7). But those are two very different kinds of decisions. Every operational-level

action involves some decisionmaking of a *factual* nature--decisions by bus drivers and building inspectors and school teachers and anyone who drives a vehicle for the government. Even if this Court were to make new law in affirming *Everton* and *Duvall*, it would not follow that the purely-factual judgment of an officer about whether a person appears incapacitated is the kind of decision which enjoys protection. It certainly has nothing to do with policymaking or governing. If such a decision is protected, then we respectfully submit that no decision ever made by any public official at any level will ever be subject to suit, and that §768.28 has been abolished.

Our primary point, however, is that the instant decision expressly and directly conflicts with those cases in this and other courts which continue to draw the distinction between planning and operational decisions, and thus is appropriate for review by this Court.

IV
CONCLUSION

It is respectfully urged that this Court exercise its discretion to resolve the conflicts which appear upon the face of the district court's decision, and accept jurisdiction to review the instant case.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of July, 1984, to: GERALD PIERCE, ESQ., P.O. Box 280, Ft. Myers, Florida 33902; JOHN M. HARTMAN, ESQ., P.O. Box 2696, Ft. Myers, Florida 33902; XAVIER J. FERNANDEZ, ESQ., P.O. Box 729, Ft. Myers, Florida 33902; and to GEORGE O. KLUTTZ, ESQ., P.O. Box 2446, Ft. Myers, Florida 33902.

Respectfully submitted,

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