THE SUPREME COURT
STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS
OF THE STATE OF FLORIDA;
J. J. REDDISH, individually,

Appellees/Petitioners,

vs.

CASE NO. 63,950

CHARLES W. SMITH and EDNA
L. SMITH, his wife,

Appellants/Respondents.

_____/

BRIEF OF AMICUS CURIAE
JAMES M. JOHNSON

ROBERTS, BAGGETT, LaFACE,
RICHARD & WISER
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

THE SUPREME COURT
STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS
OF THE STATE OF FLORIDA;
J. J. REDDISH, individually,

Appellees/Petitioners,

vs. CASE NO. 63,950

CHARLES W. SMITH and EDNA
L. SMITH, his wife,

Appellants/Respondents.

_____/

BRIEF OF AMICUS CURIAE
JAMES M. JOHNSON

ROBERTS, BAGGETT, LaFACE,
RICHARD & WISER
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

TABLE OF CONTENTS

TABLE OF CITATIONS

PRISONER CLASSIFICATION MAY GIVE RISE TO TORT LIABILITY WHEN THE CLASSIFICATION INVOLVES NEGLIGENCE WHICH IS NOT INHERENT IN A POLICY ADOPTED AS A PLANNING LEVEL DECISION.

When the Legislature waived sovereign immunity, it evinced an intention to broadly open the scope of government liability for the negligent acts of its officers and employees. The Legislature pointedly ignored the exceptions included in the Federal Tort Claims Act model and, in fact, included no exceptions so long as the act would have subjected private individuals to liability "under like circumstances". Nevertheless, in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), this Court recognized an exemption from tort liability for "certain judgmental decisions of governmental authorities which are inherent in the act of governing." In rejecting a semantic test for identification of exempt decisions, the Court noted that the California Supreme Court's effort to develop a dictionary definition of "discretion" failed because all governmental functions can be said to involve some exercise of discretion. Hence, this Court adopted instead the "planning level" - "operational level" dichotomy. In his dissenting opinion in Department of Transportation v. Neilson, 419 So.2d 1071((Fla. 1982), Justice Sundberg expressed concern that this test could also be rendered unworkable if it were to become nothing more than "result descriptive labels". The position now urged by the Appellees and the Attorney General invites precisely the problem which concerned Justice Sundberg.

Just as it can be argued that all governmental acts involve some degree of discretion, so it can be argued in virtually every case (and undoubtedly will be argued by government agencies) that all government actions implement policies which, at some point, involved a planning level decision. The case at Bar is a classic example. The Appellees and the Attorney General urge that an entire area of government action be completely removed from liability regardless of the circumstances of any given case. Such a position suggests that there is some unique factor involved in the

establishment of a prisoner's custody status which sets it apart from other governmental actions that would be subject to tort liability. The fact is, however, that there is nothing which materially distinguishes prisoner custody classification from most other governmental decisions. It is educational to note that the language by which the Attorney General purports to apply the four-part Evangelical[1] test is so broad that it could be utilized with regard to virtually every governmental act, regardless of how ministerial.

The position urged by the Appellees creates an irrefutable presumption that custody classification always results from a public policy created by a judgmental, planning-level decision. In City of St. Petersburg v. Collom, 419 So.2d 1082 at 1086, this Court refused to raise such a presumption with regard to the failure of government agencies to give warning of known hazards:

> We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly create a trap or a dangerous condition and intentionally fail to warn or protect the users of that improvement from the risk.

Is it any more reasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly reduce to minimum custody status a prisoner with a history of escape and violent crime in the absence of any legitimate overriding public policy? Is it any more reasonable to presume that an agency would make such a decision with regard to a prisoner whom it has reason to believe is a dangerous psychotic without any consideration of psychiatric evaluations?

---

1. Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965).

If the Court were to follow the position suggested by the Appellees, it would be taking a major step in the direction of whittling the scope of governmental liability down to nothing but failure to give warning of known hazards. Surely, it was never the intention of the Legislature that its waiver of sovereign immunity be so narrowly interpreted. The problems suggested above were no doubt contemplated by this Court when it gave a significant illustration in the Neilson case:

> We also hold that the decision to build or change a road, and all determinations inherent in such a decision, are of a judgmental, planning-level type. * * * This is not to say, however, that a governmental entity may not be liable for an engineering design defect not inherent in the overall plan for a project it has directed be built, or for an inherent defect which creates a known dangerous condition. To illustrate a situation in which liability may arise in the former instance, a highway could be constructed with a bridge spanning a waterway. If the bridge supports are negligently designed and give way, causing injury, an action could be maintained because there is an engineering design defect not inherent in the overall plan approved by the governmental entity. If, however, the alleged defect is one that results from the overall plan itself, it is not actionable unless a known dangerous condition is established.

Department of Transporation v. Neilson, supra. at 1077, 1078. The Court's reasoning is not uniquely applicable to road construction. It applies as well with the circumstances in the case at Bar. Clearly, the Legislature or state agencies such as the Department of Corrections or the Parole and Probation Commission acting within the scope of their delegated authority, can establish planning-level policies which give higher consideration to other factors than public safety. For example, the need to reduce prison overcrowding may result in the decision to lower the standards of eligibility for work-release or parole. If a prisoner were then to cause injury as a result of having been released pursuant to such reduced standards, the problem could be said to be inherent in the basic policy and not subject to tort liability. However, it does not follow that all decisions to reduce custody or release from prison result from considerations inherent in the planning level policy. Those decisions may just as well result from simple, everyday negligence. They may result from carelessness, lack of

attention to the policy being implemented, or, as the Court found in the case at Bar, from strictly personal considerations.

The Attorney General expresses concern over the "chilling effect" that the lower court's decision would have upon the willingness of Department of Corrections personnel to perform their classification functions properly. If, in fact, such a chilling effect would occur, it would occur equally with regard to all employees subject to tort liability. Concern over such an effect was implicitly rejected by the Legislature when it waived sovereign immunity. It was also rejected by the Supreme Court of California in Johnson v. State, 447 P.2d 352 (Calf. 1968), a case heavily relied upon by both the Appellees and the Attorney General and cited favorably by this Court in Commercial Carrier Corporation, supra. The Court in Johnson noted that the chilling effect was not likely to occur since California statutory law provided for the defense of public employees and payment of judgments against them for negligent acts. Johnson v. State, at 358, 359. Florida has provided the same protection to its officers and employees.[2] The court in Johnson further concluded that even if there were to be a chilling effect, this was no basis for limiting liability:

> Nor do we deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of "discretionary" and hence immune, acts. As a threshhold matter, we consider it unlikely that the possibility of governmental liability will be a serious deterrent to the fearless exercise of judgment by the employee. [citations omitted] In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees.

Johnson v. State, supra at 359, 360.

---

2. Sections 111.07, 111.071, 111.072, 284.38

The approach urged herein is not new. It is consistent with the theories encompassed in Commercial Carrier Corporation v. Indian River County, supra; Department of Transportation v. Neilson, supra; and City of St. Petersburg v. Collom, supra. If the planning level-operational level analysis is to remain a meaningful test of the substance of governmental actions, Courts must continue to analyze challenged actions within the particular circumstances of each case, the procedure originally called for by this Court in Commercial Carrier Corporation. The practice of removing entire areas of governmental decision making from tort liability with no consideration whatsoever for the particular circumstances will not only destroy the integrity of the planning level-operational level test, but will inevitably narrow government tort liability far beyond anything intended by the Legislature or required by the Constitution.

CONCLUSION

It is respectfully urged that the decision of the lower court be affirmed and that the certified question be answered in the affirmative to the effect that prisoner classifications may give rise to tort liability when they involve negligence which is not inherent in a policy adoped by a planning level decision.

ROBERTS, BAGGETT, LaFACE,
RICHARD & WISER
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

BARRY RICHARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been served by U.S. Mail upon Richard L. Randle, Esquire, Slater and Randle, P.A. Suite 920, Atlantic Bank Building, Jacksonville, Florida 32202; Kenneth Vickers, Esquire, Vickers and Rohan, P.A., 430 East Monroe Street, Jacksonville, Florida 32202; and Miquel A. Olivella, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301 on this 13th day of September, 1983.

BARRY RICHARD