THE SUPREME COURT
STATE OF FLORIDA

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

Appellees/Petitioners,

V.

CASE NO. 63,950

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

Appellants/Respondents.

RESPONDENTS' BRIEF

VICKERS & ROHAN P.A.
437 East Monroe Street
Jacksonville, Florida 32202
(904) 356-7300
Attorneys for the appellant

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PRELIMINARY STATEMENT

In this brief, the respondent, Charles W. Smith, shall be referred to herein as "Smith".

The petitioner-defendants below, Department of Corrections of the State of Florida shall be referred to as "The Department" and the petitioner-defendant below, J.R. Reddish shall be referred to as "Reddish".

Franklin Delano Prince, the perpetrator of the crimes against Charles Wayne Smith shall be referred to as "Prince".

All references to the Record on Appeal shall be made by the following symbol with the page number included, (R-).

STATEMENT OF THE CASE

On June 7, 1978, Prince, a prison escapee, while in the commission of an armed robbery in Jacksonville, Florida, abducted the respondent and subsequently shot him (R-12-23, 26)

On April 10, 1980 Smith filed suit against the Department and Reddish in Duval County. (R-55)

After Petitioner's Motion to Dismiss, respondent's Amended Complaint and petitioners subsequent Motion to Dismiss the Amended Complaint, the case was transferred to Leon County on January 22, 1981. (R-17) August 25, 1981 the case was referred to Union County. (R-17)

In November 1981, respondents served the Second Amended Complaint which was officially filed in March of 1982. (R-10)

On November 23, 1981, petitioners again filed a Motion to Dismiss and Motion to Strike the Second Amended Complaint. (R-3)

On March 11, 1982, an Order of Dismissal with Prejudice was entered by Circuit Judge Chester Chance of Union County based upon holdings that inmate classification was a discretionary rather than operational function, thus there was immunity from tort liability and alternatively, that elapsed time between reclassification and escape and further elapsed time before Smith's injury rendered Smith's injuiry unforseeable.

Respondents took an appeal of the Circuit Court order to the First District Court of Appeals (Case Number AL-39). On April 27, 1983, the First District Court of Appeals reversed the dismissal of respondents Second Amended Complaint and remanded it for further proceedings.

On May 9, 1983, petitioners filed a Motion for Rehearing and for Clarification En Banc.

The motion was denied by the First District Court of Appeals in an opinion filed on June 17, 1983. The Court did, at that time, certify the following question a being of great public importance:

> "May prisoner classifications ever give rise to tort liability, and if so, under what circumstances?"

It is through the certification of the aforementioned question that this case has come before this Court.

STATEMENT OF THE FACTS

On February 2, 1973, Prince was adjudicated to be guilty of murder in the first degree and was committed to the custody of the Department to serve a sentence of life imprisonment. (R-11-8) At the time of Prince's commitment to the Department in February 1973, Prince also had a sentence of twenty years for the offense of armed robbery to serve as a result of having been placed on parole and having said parole revoked. (R-11-8) Prince was asigned by the Department to the Correctional Vocational Center #37, Doctors Inlet, Clay County Florida, a minimum custody institution on October 10, 1974. (R-11-9) That same day Prince escaped. (R-11-10) Prince was recaptured October 22, 1974 at University Hospital in Jacksonville, suffering gunshot wounds. (R-11-11,12) Prince was given consecutive imprisonment for escape. (R-11-14) Prince was returned to the reception and Medical Facility at Lake Butler Florida and was placed under maximum custody. (R-11-15) On May 21, 1976, Reddish, the Assistant Superintendent of the Union correctional Institute (UCI), acting in concert with other employees of the Department, caused Prince to be reclassified into minimum custody status. (R-11-16) On August 19, 1976 Reddish approved a transfer of Prince from the Reception and Medical Center to UCI (R-12-17) and on October 16, 1976 personally transported Prince to UCI. (R-12-18) Once at UCI, Reddish utilized Prince as a houseboy at his residence (R-12-19). On August 5, 1977, Reddish requested and obtained a transfer of Prince from UCI to Lawtey Correctional Institute, as a minimum security inmate (R-12-20). This transfer was facilitated on October 26, 1977 (R-12-22). On March 13, 1978 Prince walked off from Lawtey correctional Institution and made an effective escape from custody (R-12-23). While at large on June 7, 1978, Prince, while in the commission of an armed robbery in Jacksonville, Florida, abducted the Respondent, Charles Wayne Smith, and subsequently shot him. (R-12-26) As a result of the injuries caused to Smtih, he has presently brought suit against the

Department and Reddish for their negligent conduct in effecting the transfer of this dangerous killer/escapee from close custody to minimum custody.

QUESTION CERTIFIED BY THE FIRST DISTRICT COURT OF APPEALS AS BEING OF GREAT PUBLIC IMPORTANCE

"May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?"

ARGUMENT

Under the circumstances of this case the classification of prisoners should give rise to Tort Liability.

It should be emphasized at the outset what is not the issue here before the Court. The issue is not whether this Court should rule to charge the traditional governmental immunity of prison authorities ability to exercise its police power and its discretionary, judgmental and planning level functions. The issue here is as was certified by the First District Court of Appeals as being of great public importance:

> "May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances."

The Florida Supreme Court in the landmark decision **Commercial Carrier Corporation v. Indian River City,** 371 So.2d 1010 (Fla. 1979) redefined the scope of the waiver of sovereign immunity as it applies to Florida under Section 768.28, Florida Statute (1979). In setting standards for the Florida courts to follow in determining which governmental functions or activities have sovereign immunity, the Court embraced an analysis employed by the California Supreme Court in the case of **Johnson v. State,** 447 Pacific 2d 352 (Calif. 1968) which distinguished between decisions made at the "planning level" and those at the "operational level".

The **Johnson** case involved a situation where the California Youth Authority placed a sixteen year old with known homicidal tendencies and a background of violence in a foster home without notice of those dangerous propensities to the foster parents. After the youth attacked and injured one of the foster parents, the foster parent sued the state for negligence. The state claimed that the action was discretionary and thus, under California law, was immune. The California Supreme Court held that while almost any official act involved some degree of discretion, in order to result in immunity, the act must involve a basic policy decision or planning level decision. It therefore

held that the decision not to tell the foster parents of the dangerous propensities of the youth was a ministerial action at the operational level and not subject to immunity. Under the **Johnson** analysis, there must have been an actual policy decision consciously balancing the danger of the risks involved against the advantages to be gained as to policy objectives in order for the immunity to attach. Further, the **Johnson** court stated that the principle that although a basic policy decision (such as standards for parole) may be discretinary and hence warrant governmental immunity, subsequent ministerial actions in the implimentation of that basic decision must face case by case adjudication on the question of negligence.

To hold that the actions of Reddish in the case at bar were discretionary flies in the face of the holding in **Johnson** as adopted by the Florida Supreme court in **Commercial Carrier.** The decision to return Prince to a minimum security facililty was not made pursuant to established standards and thus, a basic policy decision, but in fact, as alleged, was a result of favoritism toward Prince by Reddish who had made Prince a house boy while under his jurisdiction. The claim that in returning this murderer-armed robber back to a minimum security facility after he had already escaped once from a minimum security facility, the state was consciously balancing the danger of the risks involved against the advantages to be gained as to the policy ogjectives is impossible to accept.

In addition to the standards set forth by the California Supreme Court in **Johnson,** the Florida Supreme Court in **Commercial Carrier** also adopted a four pronged preliminary test set forth by the Washington Supreme Court in **Evangelical United Bretheran Church v. State,** 407 P 2d 440 (Wash. 1965):

> "1. Does a challenged act, ommission or decision necessarily involve a basic governmental policy, program or objective?
>
> 2. Is the questioned act, ommission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy program or objective?
>
> 3. Does the act, ommission or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?
>
> 4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, ommission or decision?"
>
> 371 So.2d 1010, 1019

It was stated by the Washington Court and the Florida Supreme Court that if these preliminary questions can be clearly and unequivocally answered in the affirmative, than the challenged act, ommission or decision can, with a reasonable degree of assurance be classified as a discretionary governmental process and nontortious regardless of its unwisdom. If, however, one or more of the questions call for, or suggests a negative answer, then further inquiry may well become necessary depending upon the facts and circumstances involved. Applying the above test to the situation at bar, it becomes apparent that questions 1 and 4 can be answered in the affirmative. The decision to classify or reclassify a person incarcerated in the penal system does involve a basic governmental program of rehabilitation. In addition, it is within the Department's lawful authority to reclassify a prisoner as to the degree of security under which he is held. However, questions 2 and 3 should not be answered in the affirmative. The decision to reclassify Prince individually would not be essential to the realization or accomplishment of that program of rehabilitation and indeed, the decision not to do so, would not change the course or direction of that program. As to question 3, the decision to reclassify Prince could have and should have involved evaluation judgment

and expertise on the part of Reddish, but in fact, did not as it was tainted by the fact that Reddish had used Prince as a personal houseboy.

Consistent with **Commercial Carrier** and its progeny, it is not argued that the Department of Corrections plan or criteria for prisoner reclassification should be subject to the scrutiny of judges or juries. It is vital to the prison system in Florida for the Department to have a plan or policy of reclassification of prisoners and to have soveriegn immunity from tort liability from injuries caused pursuant to the policy making or planning stage. In a situation in which a prisoner was reclassified **through the normal channels,** pursuant to a DOT plan of reclassification there could be no question that the Department would have immunity just because injury results. Respondent argues that while there is a valid policy reason for retaining sovereign immunity for such plans, that whenever a prisoner is reclassified **outside of the normal channels** and specifically due to favoritism or negligence on the part of prison personnel, that the operational decision to reclassify a prisoner no longer retains the policy reasons for retaining sovereign immunity and thus the negligence of making that decision should be subject to tort liability.

A point from **Commerical Carrier** reaffirmed in **Department of Transportation v. Neilson,** 419 So. 2d 1071 (Fla. 1982) is that while the decision of where and why to build a road is a planning level function, the failure to properly maintain an existing road may be the basis of a suit against a governmental entity. Similarly, while the decision to implement a plan of reclassifying prisoners is a planning level function, the failure to follow such a plan which results in injury should be the basis of a suit against the governmental entity. Here, as in the traffic cases, the decision whether to take a classification system is a planning stage; however, as in the traffic cases, the operation of the system, in effect, the maintenance of the system is at the operational, and when a wrong is done and an injury results, the state and officials should not be able to shirk that liability by use of sovereign immunity.

The Court has recently dealt with the issue of sovereign immunity from tort liability in a trilogy of cases; **Department of Transportation v. Neilson,** 419 So.2d 1071 (Fla. 1982); **Ingham v. Department of Transportation,** 419 So.2d 1081 (Fla. 1982); and **City of St. Petersburg v. Collom,** 419 So.2d 1082 (Fla. 1982). In these 4-3 split decisions (Neilson and Ingham were split 4-3 while Collom was unanimous, however three of the justices concurred in the result only) the Court further attempted to define the boundaries boundaries of sovereign immunity from tort liability. In **Neilson,** Justice Overton reitterated the law as set out in **Commercial Carrier.**

> "**Commercial Carrier** established that discretionary, judgmental, planning level decisions were immune from suit, but that operational level decisions were not so immune."

Neilson, 419 So.2d at 1075. While the majority of the Court in **Neilson** found that by applying these principles to the facts of that case, sovereign immunity was not waived, the present case lends itself much moreso to the reasoning of Justice Sundberg in his dissenting opinion. It was noted that Florida Statute 768. 28 evinces the intent of our legislature to waive sovereign immunity on a broad basis though certain "discretionary" government functions remain immune from tort liability. Further, that under **Commercial Carrier,** a finding of immunity should be the exception rather than the rule. Justice Sundberg further reasoned that not all discretionary governmental functions were immune but only planning level functions requiring basic policy decisions.

It was further reasoned, that in any such analysis the governmental agency must additionally demonstrate that a " considered" decision was undertaken. This goes to the heart of the matter in the present case. Under the facts as alleged there was not a "considered" decision as to change the classification of Prince, but such change was a result of favoritism. Lastly, Justice Sundberg cites **Bellevance v. State,** 390 So.2d 422 (Fla. 1st DCA 1980) cert. denied, 399 So.2d 1145 (Fla. 1981). **Bellevance** involved a situation where a patient who was involuntarily committed to a state mental hospital and was negligently released from the hospital by the state before he was sufficiently

treated and cured, subsequently injured the plaintiff. The District Court of Appeals held that the act of the state in releasing the patient did not rise to the level of "basic policy decisions" falling within the area for which sovereign immunity remained. The Court further held that the state did not show that the personnel involved, after consciously balancing risks and advantages, made a considered decision in releasing the patient.

While the facts of **Bellevance** and the present case are not identical, they are sufficiently close that the same line of reasoning may be applied in both cases. In both cases, a person who was confined against his will and for the protection of society was negligently allowed to re-enter society and subsequently caused harm to members of society. Similarly, in both cases there was an absence of a conscious balance ofthe risks and advantages in changing the status of the confined person.

CONCLUSION

Thus in conclusion, this is not a case in which sovereign immunity as redefined by this Court in **Commercial Carrier** is threatened; rather this is a case in which those guidelines are to be applied. The government should be allowed to govern and the Department of Corrections should be allowed to operate. However, both must do so within the boundaries as set out by the Legislature and this Court; very few governmental actions cannot somehow be traced back to some planning level decision; however, the granting of sovereign immunity is to be the exception, not the rule, thus it should be construed narrowly.

For the reasons stated herein, the Respondent prays that this Honorable Court will uphold the First District Court of Appeals decision.

KEN VICKERS, P.A.

Kenneth Vickers

Kenneth Vickers
437 East Monroe Street
Jacksonville, Florida 32202
(904) 356-7300
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a 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; Barry Richard, Esquire, Roberts, Baggett, LaFace, Richard & Wiser, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and Miquel A. Olivella, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301 on this 21st day of September, 1983.

Kenneth Vickers
KENNETH VICKERS