SUPREME COURT OF FLORIDA

DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA; J.R. REDDISH, Individually, Petitioners,	)	
vs.	:	CASE NO.#63,950
CHARLES W. SMITH and EMMA L. SMITH, his wife, Respondents.	)	

PETITIONERS' BRIEF

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TABLE OF CASES AND AUTHORITIES CITED

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PRELIMINARY STATEMENT

For the sake of brevity, the Petitioners herein will be referred to hereafter as "Petitioners", "Department of Corrections" and/or "Reddish"; and the Respondents will be referred to as "Respondents" or "Smith".

Reference to Petitioners' Appendix will be by "App.", followed by an appropriate page number(s), in parentheses.

STATEMENT OF THE CASE

The Respondents filed a Complaint on April 10, 1980 in the Circuit Court, Duval County, Florida (App.128), listing not only the Petitioners herein, but also Louis L. Wainwright, individually and as Secretary of the Department of Corrections, State of Florida; James Wainwright, individually and as Superintendent of Lawtey Correctional Institute; and C. L. Sewell, individually and as Transfer Authority at Union Correctional Institute.

That prior to the filing of the Complaint on April 10, 1980, the Circuit Court in and for Duval County, Florida, had dismissed an action by Respondents against the parties referred to above (App.127), said Court having allowed the Respondents (Smith) a period of time in which to amend the complaint. No further action was taken by the Respondents (Smith) and the Circuit Court in and for Duval County, Florida ordered

the Clerk of the Court to close the file for failure to comply with the Court's Order (App. 119).

To the Complaint filed April 10, 1980, a Motion to Dismiss was filed (App. 120) and thereafter the Complaint was dismissed by the Circuit Court, in and for Duval County, Florida (App. 118).

On November 19, 1980, Respondents (Smith) filed an Amended Complaint (App. 106), and that Amended Complaint listed the present Petitioners only, i.e. Department of Corrections of the State of Florida, and J. R. Reddish, individually. To that Amended Complaint was filed a Motion to Dismiss (App. 98).

Said Amended Complaint was transferred to Leon County, Florida, by Order of the Circuit Court, in and for Duval County, Florida (App. 95).

By Order dated August 25, 1981, the Motion to Dismiss the Amended Complaint was considered to be a motion to abate and transfer, and the Amended Complaint was held in abeyance and transferred to the Circuit Court of Union County, Florida (App. 94).

On the 26th day of October, 1981 Respondents' (Smith) Amended Complaint was dismissed for its failure to state a cause of action in its entirety (underscoring supplied), with leave to file a second amended complaint within 20 days from October 26, 1981 (App. 93).

Respondents filed (on March 10, 1982) a Second Amended Complaint (App. 88) which is basically the same complaint but with the exception that the Second Amended Complaint failed to include the paragraph stating that "The defendant, Department of Corrections, has written rules and regula-

tions governing the classification of inmates and the inmates between and within institutions..." (App.108; Paragraph 19.); and failed to allege "That Louis Wainwright, in and was at all times complained of herein, the duly appointed Secretary of the said Department of Corrections and as such, is responsible for the acts of the employees and agents of the said Department of Corrections." (App.107; Paragraph 5.); fails to reallege that "C. L. Sewell, on or about August 26, 1977, was an agent and/or employee of the said Department of Corrections." (App. 107 ; Paragraph 8.); and failed to reallege Paragraph 24. of the Amended Complaint wherein "...C. L. Sewell had the authority to authorize the transfer of Prince and other inmates from U.C.I. to other institutions (App.108;Paragraph 24.)

To said Second Amended Complaint a Motion to Dismiss was directed and filed on November 24, 1981, setting forth the fact of the dismissal and closing of the file on the original complaint (App. 81).

The Circuit Court, in and for Union County, Florida, entered its Order of Dismissal With Prejudice on the Second Amended Complaint on the 11th day of March, 1982 (filed March 15, 1982), (App.79), on the grounds that the Second Amended Complaint failed to state a cause of action and that the Respondents (Smith) elected not to further amend said second amended complaint, the Court further stating that the transfer of inmate Prince had taken place months and years prior to Smith's alleged injury, and holding that such actions of Petitioners qualify as discretionary functions and are, therefore, immune from tort liability; and further,

that the allegations of Smiths' Second Amended Complaint that the transfer occurred months and years prior to Smith's alleged injury and that it was not reasonably foreseeable that the transfer would result in an escape from the State penal system and thereafter result in the escaped prisoner being involved in a robbery (months after his escape) in which Smith was injured (App. 79).

Respondents took an appeal to the District Court of Appeal, First District, of the State of Florida (Case No. #AL-39), and the First District Court of Appeal did, on an Opinion filed April 27, 1983 (App. 22) reverse the trial court; an Opinion being written by Judge Mills and a Specially Concurring Opinion written by Judge Ervin, and a Dissenting Opinion by Judge Thompson. Both Judge Mills' Opinion and Judge Ervin's Opinion cite conflict between these Opinions and the Second District Court of Appeal and its Opinions.

A Motion for Rehearing and for Clarification En Banc was filed by the Petitioners (Appellees below)(App. 06). On Opinion filed June 17, 1983, Judge Mills amended his Opinion (App. 03), but otherwise denied said Motion for Rehearing and for Clarification En Banc, but did certify the following question as being of great public importance:

> "May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?" (App.04)

The First District Court of Appeal denied all requests for oral argument (App. 32 and App. 05), and said case was never orally argued before the First District Court of Appeal.

STATEMENT OF THE FACTS

Petitioner, DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA, is a department (agency) of the State of Florida and operates the prison system for the State of Florida.

Petitioner, J. R. REDDISH, was an Assistant Superintendent of the Union Correctional Institute, more commonly referred to as "U.C.I.", located in Union County, Florida (App. 88).

The Second Amended Complaint alleges that in February of 1973, Franklin Delano Prince (hereinafter referred to as "Prince") was convicted of violating the law of the State of Florida and confined within the Department of Corrections of the State of Florida (App. 89).

The Second Amended Complaint alleges that on or about May 21, 1976 that Prince was reclassified from medium custody status to minimum custody status (NOTE: there was no allegation of any rule or regulation nor any law or Statute of the State of Florida being violated in said classification).

Thereafter, the Second Amended Complaint alleges that prior to August 5, 1977, Reddish requested C. L. Sewell, Transfer Authority, to transfer Prince to Lawtey Correctional Institute and that Superintendent J. T. Wainwright was requested to accept Prince at the Lawtey Correctional Institute; and that pursuant to that request, and we state in accordance with the laws of the State of Florida and the Rules and Regulations of the Department of Corrections (there being no allegation

in the Second Amended Complaint of any violation of any Rule or Regulation of the Department of Corrections or the law of the State of Florida)(App. 90), Prince was transferred to Lawtey Correctional Institute on October 26, 1977, in the same classification that he had had at Union Correctional Institute since May of 1976, to-wit: minimum custody status.

That after being transferred in 1977 to Lawtey Correctional Institute, in the same classification that he had been classified in May of 1976, i.e. minimum custody inmate, in March of 1978, as alleged in the Second Amended Complaint, Prince escaped from Lawtey Correctional Institute (App. 90).

The Second Amended Complaint alleges that in June of 1978 (approximately three months after escaping from Lawtey Correctional Institute), the Respondent, Charles W. Smith, was injured allegedly by the escaped inmate Prince.

ISSUES

I

The question certified by the First District Court of Appeal as being of great public importance is as follows: (App. 04)

> MAY PRISONER CLASSIFICATIONS EVER GIVE RISE TO TORT LIABILITY, AND, IF SO, UNDER WHAT CIRCUMSTANCES?

It is respectfully submitted that the certified question could have been certified as follows and be of equally great public importance:

> WHETHER THE DEPARTMENT OF CORRECTIONS CAN BY THE DEPARTMENT OF CORRECTIONS' DULY CONSTITUTED AUTHORITY AND IN ACCORD WITH ITS RULES AND REGULATIONS CLASSIFY PRISONERS WITHIN THE JURISDICTION OF THE DEPARTMENT OF CORRECTIONS AND SUCH CLASSIFICATION WILL BE A DISCRETIONARY, JUDGMENTAL, PLANNING-LEVEL FUNCTION OF THE DEPARTMENT OF CORRECTIONS?

II

> THE APPELLATE COURT FAILED TO FOLLOW THE LAW OF THE STATE OF FLORIDA AS ANNOUNCED BY THIS COURT (SUPREME COURT OF FLORIDA) AND SAID OPINION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA.

III

> THE FIRST DISTRICT COURT OF APPEAL ERRED IN NOT FOLLOWING THE LAW OF THE STATE OF FLORIDA AS SET FORTH BY THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF FLORIDA AND OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA WHEN IT HELD THAT VIOLENCE TO THIRD PARTIES WAS A FORESEEABLE CONSEQUENCE OF PLACING PRINCE IN MIMIMUM CUSTODY (IN MAY OF 1976).

ARGUMENT

I

The question certified by the First District Court of Appeal as being of great public importance is as follows:

> MAY PRISONER CLASSIFICATIONS EVER GIVE RISE TO TORT LIABILITY, AND, IF SO, UNDER WHAT CIRCUMSTANCES? (App. 04)

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It is respectfully submitted that this Issue is simply one of whether or not the prison authority, i.e. the Department of Corrections, when it classifies a prisoner, is exercising a discretionary, judgmental, planning-level function. The question certified by the First District Court of Appeal seems to admit, and certainly implies, that they are conceding that a classification of a prisoner by the Department of Corrections is a discretionary, judgmental, planning-level function, but then the Court wishes this Court to engage in conjecture and surmise as to what factual situations could be thought of wherein such discretionary, judgmental, planning-level function could thereafter give rise to tort liability.

It is respectfully submitted and argued that there is absolutely nothing in Respondents' Second Amended Complaint that would give rise to

tort liability when the classification of the inmate Prince was a discretionary, judgmental, planning-level function of the Department of Corrections. There has been no allegation that any statute has been violated or not followed. There has been no allegation that there has been any rule or regulation that has been violated or not followed in Respondents' Second Amended Complaint. Truly this Court would have to engage in surmise, conjecture, and dream up factual situations not any way alleged in Respondents' Second Amended Complaint in an attempt to come up with any "tort liability" against Reddish or the Department of Corrections of the State of Florida.

As pointed out by the Hon. Wayne Carlisle when he dismissed the Amended Complaint for its total failure to state a cause of action in any respect whatsoever and his remarks to counsel at that time, "if you have some violation of a rule or regulation or a Statute of the State of Florida, put it in your Complaint and then it can be ruled on." It is respectfully submitted that there is not one shread of fact or otherwise alleged in Respondents' Second Amended Complaint of anything wherein Reddish or the Department of Corrections violated a rule or regulation or law or statute of the State of Florida.

There appears to be absolutely no question that the classification of a prisoner by the appropriate authority of the Department of Corrections is a discretionary, judgmental, planning-level function of the Department of Corrections. This Court's decision in Commercial Carrier Corp. v. Indian River Cty., 371 So.2d 1010 (Fla. Sup. Ct. 1979), makes this abundantly clear and the tests set forth by this Court are answered in the affirmative without question.

This Court, Supreme Court of Florida, in its recent decision of Harrison v. Escambia County School Board, Case No.#62,629, dated July 7, 1983, held that the Plaintiffs' Complaint therein failed to state a cause of action on the grounds that the action alleged (the decision of where to locate a school bus stop) was a discretionary, planning-level decision and, therefore, immune from tort liability.

This Court, in its Opinion, said:

> "In its thoughtful and well-reasoned majority opinion the district court discussed the allegations in the amended complaint and concluded that the 'gravamen of the complaint is that the county negligently decided to locate the school bus stop on one street rather than another, and negligently failed to post warning signs.' 419 So.2d at 642-43. Using the four-part test recommended by Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), the district court held that selecting locations for school bus stops is a planning decision protected under the discretionary governmental function exception to section 768.28, Florida Statutes (1977). In reaching its conclusion the district court relied on the planning level/operational level analysis in Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), which this Court adopted in Commercial Carrier. Applying the Johnson analysis, the court stated:
>
> > 'It appears to us that to require the school board to decide on school bus stop locations under the threat of tort liability in the event a judge or jury at some later date might determine that the chosen location constituted a safety hazard to an individual child injured enroute to it, would present some difficulties. It is obvious that some potential for injury to a child would exist at any location where motor vehicle traffic exists, yet it would be totally impracticable and indeed impossible to locate a bus stop at any place where this would not be true.' "

> "419 So.2d at 644. The district court concluded that 'sufficient justification exists for a holding that the school board's function in selecting school bus stop sites is not one that should 'be subject to scrutiny by judge or jury as to the widsom of their performance.' Id. at 645, quoting Commercial Carrier, 371 So.2d at 1022." (Harrison Opinion - pages 3. and 4.)

In the Harrison, supra, case this Court was also confronted with a statute and the violation thereof, in addition to whether or not there had been sufficient allegations in the amended complaint to allege the existence of a known trap or dangerous condition which would create an operational-level duty to post warnings. There is no such problem of violation of a statute etc., or of posting warnings in the instant case and it is abundantly clear that there is a complete failure to allege, sufficiently or otherwise in any way, a cause of action against Reddish or the Department of Corrections.

This Court went on to say:

> "As noted by the district court, it would be impossible to locate a school bus stop at any place which would not have some potential danger for some student. Some locations may be more dangerous than others, however, and it is to those locations that section 234.112 is directed. The decision as to where to locate bus stops necessarily requires the utilization of governmental planning and discretion.
>
> We also hold that Harrison's amended complaint fails to allege the creation of a dangerous condition or trap which would necessitate giving notice of the danger, as needed under City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), and Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), in order to circumvent the school board's immunity." (Harrison Opinion -- page -6-)(underscoring supplied)

And further:

> "Under Collom, therefore, a plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, created by it and being not readily apparent, constitutes a trap for the unwary. Neilson also requires the pleading of a known trap or known dangerous condition. Collom and Neilson require specific allegations of fact instead of generalities. Harrison's amended complaint did not meet this burden. The complaint merely alleges 'unusual traffic hazards' and is insufficient to state a cause of action under Collom or Neilson.
>
> "We hold that the designation of school bus stops is a planning level decision which is immune from tort liability under the doctrine of sovereign immunity and that Harrison's amended complaint failed to allege sufficiently the existence of a known trap or dangerous condition which would create an operational level duty to post warnings. We approve the district court's affirming of the trial court ruling.
>
> "It is so ordered."
> (Harrison Opinion -- pages 6. and 7.)

Following the reasoning, logic and opinion of this Court (Supreme Court) in the above-cited Harrison, supra, case, it is abundantly clear what the Honorable Wayne Carlisle meant when he dismissed the Amended Complaint for its total failure to state a cause of action in any respect whatsoever.

What we have is a simple issue of the Department of Corrections (prison authority) under the police power of the State, classifying a person in an appropriate and proper manner, there being no allegations to the contrary, and exercising a discretionary, judgmental, planning-level function. There were no allegations in Respondents' Second Amended Complaint that there was or has been any violation of any rule or regulation,

statute or law of the State of Florida relative to the classification of the inmate Prince. As this Court said in Harrison, supra, that amended complaint fails to create an obligation or duty in order to circumvent the School Board's immunity and that the amended complaint required pleading to that extent and required specific allegations of fact instead of generalities and that Harrison's amended complaint did not meet this burden and that the complaint was insufficient to state a cause of action.

It is even more abundantly true in the case now before this Court (The Supreme Court) when there is a discretionary, judgmental, planning-level function of the Department of Corrections, with absolutely no allegations of fact or ultimate fact, or otherwise, to state a cause of action and if any language is used in Respondents' Second Amended Complaint in an attempt to state such a cause of action, it is only in terms of vague generalities and mere conclusions insufficient to state any cause of action under the Supreme Court's decision in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), and Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), and Harrison, supra.

Certainly the language which this Court (Supreme Court) cites from the Second District Court of Appeal is even more applicable to this case. To paraphrase the language, it appears to us that to require the Department of Corrections to classify each prisoner under the threat of tort liability in the event a judge or jury at some later date might deem that such classification might constitute a hazard to some individual injured in the State of Florida, would present difficulties. It is

obvious that some potential for injury to a citizen of the State of Florida might exist with any classification of a prisoner, yet it would be totally impractical and indeed impossible to classify every prisoner in every circumstance where this would not be true. And again, to paraphrase, sufficient justification exists for a holding that the Department of Corrections' function in classification of prisoners is not one that should be subject to scrutiny by judge and jury as to the wisdom of their performance, as contained in Commercial Carrier, supra.

It is respectfully submitted that any other conclusion by this Court would produce and leave the prison system and authority, Department of Corrections, in the State of Florida in a state of total inability to function and to plan, use their judgment and discretion as they are required to do under the laws of the State of Florida.

Truly the exercise of police power of the State is a pure governmental function which has historically enjoyed immunity from tort liability. To hold otherwise would paralyze law enforcement agencies including the Florida penal system and the Department of Corrections. Laws are passed but the government cannot guarantee or insure that these laws will not be broken and individuals injured when these laws and regulations are broken. Truly to hold other than the classification of inmates is a discretionary, judgmental, planning-level function of the Department of Corrections and must be preserved as such, or it would require the building of countless more prison facilities and the hiring of enormous numbers of guards and still there could be no guarantee and the government could not be an insurer of every citizen's safety in the State of Florida.

Again, this discretionary, judgmental, planning-level function and the preservation of immunity must be preserved and not changed.

In Neumann v. Davis Water and Waste, Inc., et al., Case No.#81-1742, 2nd DCA of Florida, May 13, 1983, the Second District Court of Appeal discusses the doctrine of sovereign immunity in the State of Florida and then discusses F.S. 768.28 and the terms "governmental activity--discretionary and nondiscretionary, or operational and planning level" function. The Court went on to say:

> "Whether controlled by sovereign immunity or its waiver, and regardless of the labels we use, the result is the same: certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern. See: Department of Transportation v. Neilson, 419 So.2d 1071, 1075 (Fla. 198]). We perceive the pure exercise of the police power to be the clearest illustration of where to allow tort liability would strike at the very foundation of the power to govern." (Neumann Opinion - page -5-)

The Second District Court of Appeal then discusses this Court's Commercial Carrier, supra, decision and Johnson v. State, 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968) cited therein, and further discusses City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) and Department of Transportation v. Kennedy, No. 82-125 (Fla. 2d DCA Feb. 25, 1982), and then states as follows:

> "The most important factor to consider is that by imposing rules and regulations and deciding when and where or what to inspect, DER is exercising the police power of the state, a pure governmental function which historically has enjoyed immunity from tort liability. See, e.g., Wong v. City of Miami, 237 So.2d 132 (Fla. 1970); Hernandez v. City of Miami, 305 So.2d 277 (Fla. 3d DCA 1974)."

> "If we were to hold DER liable here we would, by analogy, be requiring a law enforcement officer to be posted on every street corner. Any time a crime or other violation of law resulted in injury to person or property, a judge or jury would have to second guess the reasonableness or adequacy of the police action. Our legislature enacts traffic and penal laws, but law enforcement agencies cannot guarantee that these laws will be obeyed. Government cannot become the insurer of those injured when its laws and regulations are broken or safety measures it imposes are ignored by others."
>
> "The decision of the trial court is AFFIRMED." (Neumann Opinion -- page -7-)(underscoring supplied)

We realize that the cited Neumann, supra, case is a Second District Court of Appeal Opinion, however, the law recited therein is the law of the State of Florida as announced by this Court (Supreme Court) and the citations contained therein are, for the most part, Supreme Court decisions. But, in any event, the Opinion might well have been written by the Supreme Court and is the law of the State of Florida.

We will refer to the Neumann, supra, case in our argument under conflict of the case now on appeal being contrary to the decisions of the Supreme Court and of other District Courts of Appeal in this Brief.

The Neumann, supra, case cites this Court's (Supreme Court) Opinion in Commercial Carrier, supra, and the Johnson case cited therein and, of course, we have previously discussed the discretion allowed in the Johnson case. The Second District Court of Appeal, in the Neumann, supra, case said:

> "The Johnson court further noted that a workable definition of 'discretionary' must recognize that much of what is done by government employees must remain beyond the range of judicial inquiry." (Neumann Opinion -- page -6-)

The instant case is factually dissimilar from the Johnson case in that no one was placing or releasing a youthful offender into a private home as were the facts in the Johnson case; but the inmate Prince escaped from Lawtey Correctional Institute.

In Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), cited with approval by this Court in Commercial Carrier, supra, involved a claim against the state by the Plaintiffs whose buildings had been destroyed by fire set by an escapee from a state-maintained juvenile correctional facility. In that case the complaint alleged fault on the part of the state in maintaining an "open program" and too of assigning of the individual who later escaped from the open program. The Washington State Court held that this was a discretionary, judgmental, planning-level function and should not be characterized as being tortious and, therefore, immune from suit.

Again we reiterate that the classification of inmate Prince was a discretionary, judgmental, planning-level function and immune from suit.

Another case cited in Commercial Carrier, supra, was a previous Supreme Court decision of Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), wherein it was alleged by merchants whose property was damaged in connection with a rally which culminated in civil disorder and plundering, sued the City of Miami and Dade County for negligent handling of the rally. Increased police protection in the area was requested by merchants and supplied by the City and County. Subsequently, however, on an order of the Mayor, confirmed by an Order of the County Sheriff,

the increased police forces were removed. Thereafter, the rally got out of hand and the damage complained of was done.

The argument by the merchants was that the City and County carelessly and negligently removed the officers. To this complaint was filed a Motion to Dismiss and the Court granted the Motion to Dismiss the complaint with prejudice. This Court, in holding the action was immune because of sovereign immunity, said:

> "It is important to note that while this Court discharged the writ of certiorari it took issue with the aspect of the majority decision which impliedly conceded negligence on the part of the city but found it not to be actionable because of sovereign immunity:
>
> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers. In the Report of the National Advisory Commission on Civil Disorders, issued pursuant to Executive Order 11365 in 1967, the point was frequently made that police visibility was often an operative factor in the raising of tensions, and that withdrawal from an area could be a highly useful tactical tool for the relaxing of tensions in certain situations. The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence. Here officials thought it best to withdraw their officers. Who can say whether or not the damage sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case, couldn't petitioners allege just as well that (emphasis theirs) course of action was negligent?
>
> 237 So.2d at 134 (emphasis supplied). This was a clear recognition by the Court of a principle of law apart from the ancient doctrine of immunity as a simple aspect of sovereignty. It represents the distinct principle of law alluded to by Judge Fuld in Weiss v. Fote, supra,"

> "which makes not actionable in tort certain judgmental decisions of governmental authorities which are inherent in the act of governing.
>
> (8) Hence, we are persuaded by these authorities that even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." (Commercial Carrier, supra; page 1020)(underscoring supplied)

This Court stating that sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry of personal allegations of negligence, is indeed applicable to the instant case. As pointed out by this Court (Supreme Court), authorities can always be second guessed for the decisions that they make and there may always be those that state that any decision made by anyone under any circumstance is improper and wrong. This is the very reason why governmental immunity exists for sovereign authorities having the right to exercise their discretionary, judgmental, planning-level functions without incurring tort liability.

The Petitioners would adopt and make a part hereof the Dissent of Judge Thompson contained in the First District Court of Appeal's Opinion in the instant case (App. 29). Judge Thompson succinctly stated:

> "If there is any governmental sector in which immunity for judgmental decisions must be maintained, it is in our criminal justice and penal systems. Judges place convicted criminals on probation when, in their judgment, it is warranted. The Florida Parole and Probation Commission (Commission) releases prisoners from confinement in the exercise of its discretion and in accordance with legislatively mandated guidelines. The Department of Corrections (DOC) exercises its judgment to determine the extent of confinement of prisoners, such as solitary confinement or minimum security, subject only to certain prescribed limitations. In order"

"to maintain the integrity and operability of our criminal justice and penal systems these judgmental decisions must be immune from suit by citizens injured by probationers, parolees, or those whose confinement status has been changed by the DOC in accordance with its rules and regulations." (Opinion filed April 27, 1983 -- page -8-)

Judge Thompson then cites this Court's decision in Commercial Carrier, supra, and the citation contained therein of Evangelical United Brethren, supra. Judge Thompson further sets forth in his Opinion:

"The following rationale used in Evangelical United Brethren and quoted in Commercial Carrier is instructive:

' The reason most frequently assigned is that in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer "Liability cannot be imposed when condemnation of the acts or omissions relied upon necessaily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives." Peck, The Federal Tort Claims Act, 31 Wash.L.Rev. 207 (1956) . . . .

Evangelical United Brethren at 444.

Commercial Carrier commended the four-point test adopted by Evangelical United Brethren to determine those acts or functions which remain immune from tort liability. While this test might appear difficult to apply in some situations, it is easily applied in this case. First, the challenged decision of a reclassification in the prison system necessarily involves the basic governmental program of rehabilitation. Second, the decision to reclassify Prince is essential to the realization of the rehabilitation program and objective. Third, the decision to reclassify Prince required the exercise of basis policy judgment and expertise on the part of the DOC. Fourth, the DOC has the"

> "requisite authority and duty to classify or reclassify an inmate's prison status. Accordingly, I disagree with the majority's conclusion that not all of the four can be answered in the affirmative and conclude that the challenged decision is immune from liability." (Opinion filed April 27, 1983 -- pages 9 and 10)(App. 30 and 31)

The Majority Opinion written by Judge Mills contains the language: "...while inmate classification is necessary to the maintenance of a prison system, this inmate's reclassification appears to have been made for reasons unrelated to the functioning of the prison system and without use of agency expertise." (Opinion filed April 27, 1983; page 3) (underscoring supplied)(App. 24)

We respectfully submit that nowhere in Respondents' Second Amended Complaint are there any facts or ultimate facts or sufficient allegations on which to base the statement "...appears, ...", as the Second Amended Complaint states, when read without some frilly adjectives or adverbs (which are meaningless before this Court, as set forth in this Court's Opinion in Harrison, supra), in causing inmate Prince to be reclassified by Reddish and other agents and employees of the Department of Corrections, and nowhere in said Second Amended Complaint does it state this was done in violation of any rule, regulation or law of the State of Florida, or other than the proper authority did the actual reclassification, and it plainly shows that there was the use of agency expertise, just as the transfer was done in accordance with the rules and regulations and the law of the State of Florida.

We would further invite the Court's attention in the Majority Opinion to Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980). We thoroughly discussed in the Motion for Rehearing and for Clarification

En Banc (App. 6-21) why the Bellavance, supra, decision has nothing to do with the instant case. The Bellavance, supra, case did not consider or discuss discretionary function and was decided at a time when special duty was the major consideration occupying most of the Court's time when considering cases under F.S. 768.28.

The Bellavance, supra, case, a split decision of the First District Court of Appeal, the Opinion being written by an Associate Judge, involved a release of a mental patient by an individual doctor (when a staff report just days before his release warned of patient's homicidal tendencies). Further, the fact of the allegations of the complaint were not before the Court at that time and the Court did not decide whether the complaint stated a cause of action or not. Hence, the Bellavance, supra, case has absolutely no merit, law or fact-wise, as far as the instant case is concerned. We would respectfully submit that more details of the Bellavance, supra, differences are spelled out in Petitioners' Appendix at pages 8 and 9 of Motion for Rehearing and for Clarification En Banc.

The Motion for Rehearing and for Clarification En Banc (App. 9 and 10) also discussed the Kirkland v. State, Dept. of Health, Etc., 424 So.2d 925 (Fla. 1st DCA, Dec. 29, 1982; Rehearing Denied, Jan. 28, 1983), case cited in the Majority Opinion and the fact that it is inapplicable to the instant case as all that decision decided was that the plaintiff should be given a further chance to amend his complaint (the original complaint was dismissed with prejudice); whereas, in the instant case the Respondents (Smith), after filing and having dismissed a Second Amended Complaint, chose not to further amend.

The case of Payton v. United States, 636 F.2d 132 (5th Cir. 1981) was reversed by an En Banc decision of the 5th Circuit Court of Appeals and held that parole was discretionary under the Federal Tort Claims Act.

The Motion for Rehearing and for Clarification En Banc fully discusses the facts and inapplicability of Rupp v. Bryant, 417 So.2d 658 (Fla. 1982)(App.11&12). Certainly Rupp v. Bryant , supra, does not stand for authority that prison officials do not have discretionary, judgmental, planning-level function authority. The Rupp, supra, case factually has no bearing whatsoever to the instant case in that it did not involve any prisoner, but involved a fraternity club meeting and hazing wherein a student was injured. The fraternity was sanctioned by the school board and principal and was assigned a faculty adviser to attend "all meetings". The faculty adviser did not attend the hazing meeting which he was required to do and the student was injured. This certainly is not any authority for the fact that prison officials, acting in their official capacity in classifying a prisoner or transferring a prisoner, are not acting in discretionary, judgmental, planning-level functions from which they are immune from tort liability.

The Opinion rendered in the instant case is in direct conflict with the decision of Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA; 1983)(cited by the 1st DCA as: 8 FLW 238--Fla. 2d DCA, January 5, 1983), which we will also cite under conflict cases. Everton v. Willard, supra, is a case wherein Defendant's Motion to Dismiss on grounds of immunity was upheld by the Second District Court of Appeal, wherein the actions of a police officer in not detaining or arresting an individual was held

inherent both in nature of enforcement and in implementation of basic planning level activity and, as such, is immune. The Court stated, after a long Opinion involving discussions of Commercial Carrier, supra, Johnson, supra, and Evangelical, supra, and a number of articles and treatises on discretion in police in not invoking the criminal processes, the Second District Court stated, in part, from Commercial Carrier, supra:

> "So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary' governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance."(page 1001)

And goes on to state:

> "In regard to the exercise of discretion at the subsequent stages of the criminal process, we encourage a close reading of Judge Hurley's opinion in Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981), regarding judicial and prosecutorial immunity in light of section 768.28. It would seem less than fair to not impose immunity as a result of the actions of the officer in the street under the pressures of the moment when immunity in the same case would be affordeed the judge and prosecutor for their deliberate actions in the cool light of day." (page 1003)

And further stated:

> "(4,5) We, therefore, determine that the proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion." (pages 1003 and 1004)

The Special Concurring Opinion of Judge Ervin likewise sets out conflict when he states that a conflict exists between the Majority Opinion and the decision in Everton v. Willard, supra, which absolved certain governmental bodies from any liability to persons injured by intoxicated motorists, etc. (App. 27).

It is respectfully submitted that the Concurring Opinion confuses the holding of this Court in Commercial Carrier, supra; Wong v. City of Miami, supra; City of St. Petersburg, supra; Department of Transportation v. Neilson, Hillsborough County v. Neilson, City of Tampa v. Neilson, 419 So.2d 1971 (Fla. 1982); and Ingham v. State Dept. of Transportation, 419 So.2d 1981 (Fla. 1982), and, of course, the First District Court of Appeal did not have the advantage of having the Supreme Court's decision of Harrison v. Escambia County School Board, SC, No.#62,629, July 7, 1983, and this Court's decision of Perez v. Department of Transportation, SC, No.#62,356, and Joa v. Department of Transportation, SC, No.#62,327, dated July 21, 1983, and the case of Ralph v. City of Daytona Beach, SC, No.#62,094 (Fla. Feb. 17, 1983) cited therein, available to it at the time of writing the Opinions in the instant case.

It is respectfully submitted that the law of the State of Florida has traditionally held under the police powers of the State of Florida, both before and after F.S. 768.28, as the cases herein before cited abundantly demonstrate and show, that the classification of a prisoner by the prison system, i.e. Department of Corrections of the State of Florida, is a discretionary, judgmental, planning-level function of the Department of Corrections and if there is any governmental section in which immunity for governmental decisions must be maintained, it is in

our criminal justice and penal systems. Judges who place convicted criminals on probation when in their judgment it is warranted, and when the Florida Parole and Probation Commission releases prisoners from confinement in the exercise of its discretion and in accordance with legislative mandated guidelines, there is immunity from tort liability.

Likewise, it is of great public importance that the Department of Corrections be allowed to exercise its judgment (i.e. discretionary, judgmental, planning-level function) to determine the extent of confinement of prisoners, such as solitary confinement, maximum custody, medium custody or minimum custody or security, subject only to certain prescribed limitations. This is absolutely necessary in order to maintain the integrity and operability of our criminal justice system and these judgmental decisions must be immune from suit by citizens injured by probationees, parolees or those whose confinement status has been changed by the Department of Corrections in accordance with its rules and regulations (SEE: Berry v. State, 400 So.2d 80/ Fla. 4th DCA 1981, Cert. Denied; Weston v. State, 373 So.2d 701/ Fla.1st DCA 1970; Payton v. United States, 636 F.2d 132 (5th Cir. 1981; 649 F.2d 385 (en banc) and Reversal thereof in 679 F.2d 475; Commercial Carrier, supra; Wong v. City of Miami, supra; City of St. Petersburg v. Collom, supra; Department of Transportation v. Neilson, etc., et al., supra; Ingham v. State, Dept. of Transportation, supra; and Harrison v. Escambia County School Board, supra; Perez v. Department of Transportation, supra; Joa v. Department of Transportation, supra; and Ralph v. City of Daytona Beach, supra).

There is no question that this case presents a case of great public importance and any decision to change the traditional governmental

immunity of the prison authorities' ability to exercise their discretionary, judgmental, planning-level function, would bring about chaos and would absolutely, totally and completely disrupt the proper functioning of the prison system and the Department of Corrections of the State of Florida. If, under the facts and circumstances of this case the Court were to decide anything other than the fact that this case is governed by discretionary, judgmental, planning-level function of the Department of Corrections, would bring about disaster to the State of Florida and its proper and orderly functioning of the prison system.

II

THE APPELLATE COURT FAILED TO FOLLOW THE LAW OF THE STATE OF FLORIDA AS ANNOUNCED BY THIS COURT (SUPREME COURT OF FLORIDA) AND SAID OPINION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA.

It is respectfully submitted that the First District Court of Appeal, in the Majority Opinion and the Special Concurring Opinion, failed to follow the law of the State of Florida as announced by this Court (Supreme Court) and the Majority Opinion and the Concurring Opinion are further in direct conflict with decisions of this Court and of other District Courts of Florida as follows: Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA, 1983); and City of Cape Coral v. Duvall, ____ So.2d ____, 8 FLW 366 (Fla. 2nd DCA Jan. 19, 1983); Janice D. Neumann, etc. vs. Davis Water And Waste, Inc., etc., _____So.2d _____, 8 FLW (#20) 1369 (Fla.

2nd DCA, May 13, 1983); Commercial Carrier Corp. v. Indian River Cty., 371 So.2d 1010; April 19, 1979 - Rehearing Den. 7/9/79; Wong v. City of Miami, 237 So.2d 132; Fla. 1970; City of St. Petersburg v. Collom, 419 So.2d 1082; Fla. 1982; Department of Transportation v. Neilson; Hillsborough County v. Neilson; City of Tampa v. Neilson, 419 So.2d 1071; Fla. 1982; and Ingham v. State, Dept. of Transportation, 419 So.2d 1081; Fla. 1982; as well as in Harrison v. Escambia County School Board, SC, No.#62,629, July 7, 1983; Perez v. Department of Transportation, SC, No.#62,356 and Joa v. Department of Transportation, SC, No.#62,327, dated July 21, 1983, and the case of Ralph v. City of Daytona Beach, SC, No.#62,094 (Fla. Feb. 17, 1983) cited therein.

We attempted in ISSUE I not to engage in argument relative to ISSUE II, but feel in some instances we may have done so and would ask the Court to consider any argument under ISSUE I relative to ISSUE II because of the great public importance and gravity of the decision that this Court will make.

Both the Majority Opinion written by Judge Mills and the Special Concurring Opinion cite the conflict of this Opinion with the 2nd DCA's Opinions in Everton v. Willard, et al., 426 So.2d 996, 8 FLW 238 (Fla. 2d DCA, January 5, 1983) and City of Cape Coral v. Duvall, _____ So.2d _____, 8 FLW 366 (Fla. 2d DCA, January 19, 1983)(SEE discussion and argument under ISSUE I hereof, page). There is without a doubt conflict between these cases and the instant case although it is respectfully submitted that the instant case involves a far more established, traditional, and thoroughly indoctrinated rule (SEE above cases and Berry v. State, 400 So.2d 80; Fla. 4th DCA 1981, Cert. Denied by this

Court 411 So.2d 380; and Weston v. State, 373 So.2d 701; Fla. 1st DCA 1970).

Berry v. State, supra (Cert. denied by this Court), held that absolute immunity is enjoyed by judges from damages (liability) for acts performed in the course of their jurisdictional capacity, unless such acts are undertaken with a clear absence of all jurisdiction. Further, that the State's Attorney, in the exercise of his prosecutorial duties enjoys absolute immunity for damages when he acts within the scope of his prosecutorial duties. So also are the acts of the Florida Parole and Probation Commission and its members. The 4th DCA's decision in the Berry, supra, case is in direct conflict with the instant decision and is actually in conflict with the 1st DCA's own opinion in the case of Weston v. State, supra, on which the 4th DCA relied and quoted the 4th DCA, stating:

> " Our sister court addressed this issue in Weston v. State, 373 So.2d 701, 703 (Fla. 1st DCA 1979):
>
> > It is necessary to the judicial process in the enforcement of the criminal laws of the state that the state attorney be free from any apprehension that he or she may subject the state to liability for acts performed in the exercise of the discretionary duties of the office. Such acts require the exercise of basic policy evaluation, judgment and expertise in determining whether or not a charge should be made for violation of the state's criminal laws.
>
> Accordingly, we join with the First District and hold that the conduct of a state attorney in the exercise of his prosecutorial duties qualifies as a discretionary governmental function the performance of which is not affected by the statute waiving sovereign immunity. Therefore, the trial court in the case at bar was correct in dismissing count one." (Berry, page 84)

It is likewise respectfully submitted that the instant decision is in direct conflict with the decision of this Court in Commercial Carrier, supra, the leading (landmark) case on governmental immunity in the State of Florida, and the one to which all courts look for guidance in deciding governmental immunity. Without going into implicit detail of each conflict, we would ask the Court to consider our argument under ISSUE I wherein we discussed Commercial Carrier, supra, and submit to the Court that the 1st DCA did not follow the guidelines as set forth in Commercial Carrier, supra, either as to the Johnson v. State, supra, case cited therein, and certainly not the Evangelical United Brethren Church v. State, supra, case cited with approval therein and its tests as enunciated by the Court.

As stated, the Wong, supra, case as decided by the Supreme Court and set forth again in Commercial Carrier, supra, has not been followed and we again would invite the Court's attention to our argument under ISSUE I of the Wong case, without reiterating the same argument at this point in the Brief. Suffice it to say that the Wong, supra, case stands for the proposition that there has been the traditional and established exemption from tort liability when the sovereign exercises its discretionary, judgmental, planning-level function and should be left free to exercise its discretion and choose the decisions it is to make and must make without worry of possible allegations of negligence, i.e. whether to withdraw its police force, or whether (we assert) to classify a prisoner with one classification or another.

Again, the recently decided cases of City of St. Petersburg v. Collom, supra; Department of Transportation v. Neilson, supra; and Ingham v.

State, Department of Transportation, supra, are ample authority of the conflict between the Opinion in the instant case and the Opinions of the Supreme Court, when the decision is to build a road, how to build the road, the particular alignment of the road, etc., which have been held to be discretionary, judgmental, planning-level functions to which absolute immunity attaches. This Court did hold that there was judgmental, planning-level function which was immune from suit and stated:

> "For the reasons expressed in our Neilson decision, defects inherent in the overall plan for an improvement, as approved by a governmental entity, are not matters that in and of themselves subject the entity to liability. The judicial branch can neither mandate the building of expensive and failsafe improvements, nor otherwise require expenditures for such improvements...." (Collom; pages 1085 and 1086)

This Court did hold that after the decision-making process had taken place, if the State, i.e. the Road Department, knew that under the design of the road a motorist should not proceed at more than 25 miles per hour, an appropriate warning should be made on the highway.

As we have stated in ISSUE I, and will only briefly reiterate here, there are absolutely no facts, ultimate facts, or allegations in Respondents' Second Amended Complaint that there was any violation of any rule, regulation, law, statute, or duty on behalf of the Department of Corrections to a member of the public.

As expressed much better than we could ever express it, we cite from the last paragraph of the Neumann v. Davis Water and Waste, Inc., supra, case (which we also cited as in direct conflict with the instant case), the 2nd DCA said:

> " The most important factor to consider is that by imposing rules and regulations and deciding when and where or what to inspect, DER is exercising the police power of the state, a purely governmental function which historically has enjoyed immunity from tort liability. See, e.g., Wong v. City of Miami, 237 So.2d 132 (Fla. 1970); Hernandez v. City of Miami, 305 So.2d 277 (Fla. 3d DCA 1974). If we were to hold DER liable here we would, by analogy, be requiring a law enforcement officer to be posted on every street corner. Any time a crime or other violation of law resulted in injury to person or property, a judge or jury would have to second guess the reasonableness or adequacy of the police action. Our legislature enacts traffic and penal laws, but law enforcement agencies cannot guarantee that these laws will be obeyed. Government cannot become the insurer of those injured when its laws and regulations are broken or safety measures it imposes are ignored by others." (Neumann Opinion -- page -7-)(underscoring supplied)

As further authority of the conflict between the Opinion in the instant case, we would invite the Court's attention to Besecker v. Seminole County, 421 So.2d 1082 (Fla. 5th DCA; 1982), wherein it was held that dismissal of Plaintiff's Complaint was proper and that the action was barred by sovereign immunity and that the county was engaged only in a planning-level decision, the Court having applied Commercial Carrier, supra.

Again, without attempting to belabor the conflict, we would further invite the Court's attention to the conflict between the most recently decided case on governmental immunity that we have knowledge of, Harrison vs. Escambia County School Board, supra, in which this Court held, while also deciding on a question of great public importance certified by the 1st DCA, that the School Board's decision in where to place a school bus stop, such action alleged to have been negligent, involved

discretionary, planning-level decision and, therefore, immune from tort liability and the School Board had not waived sovereign immunity.

Again, we would invite the Court's attention to our discussion under ISSUE I of this Brief and would further invite the Court's attention to its own scholarly and succinct statements of law in discussing in the Opinion therein Commercial Carrier, supra, and Johnson v. State, supra, and citing pertinent portions of the 1st DCA's Opinion therein. This Court certainly pointed out that some bus stops' location may be more dangerous than others, but that the decision of where to locate bus stops necessarily requires the utilization of governmental planning and discretion.

We would inject at this point, that the classification of a prisoner necessarily requires the utilization of governmental planning and discretion and the decision to be made by the appropriate authority, and that authority cannot be second guessed when it exercises such discretionary, judgmental, planning-level functions. And to answer what might appear to be an issue raised by Judge Ervin in his Specially Concurring Opinion on a "known" dangerous condition, we would quote the last paragraph of this Court's Harrison, supra, decision in which the Supreme Court said:

> " We hold that the designation of school bus stops is a planning level decision which is immune from tort liability under the doctrine of sovereign immunity and that Harrison's amended complaint failed to allege sufficiently the existence of a known trap or dangerous condition which would create an operational level duty to post warnings."(Harrison Opinion -- page -7-).

This Court unequivocally holds that a plaintiff would have to allege specifically the existence of an operational level duty to warn the public

of a known dangerous condition which, created by it and not being readily apparent, constitutes a trap for the unwary. This Court goes on to say that Collom, supra, and Neilson, supra, require specific allegations of fact instead of generalities. Harrison's amended complaint did not meet this burden. The complaint merely alleged "unusual traffic hazards" and was insufficient to state a cause of action under Collom or Neilson.

It is respectfully submitted that Respondents' Second Amended Complaint, which they elected not to amend further, failed to allege a cause of action by alleging even generalities much less facts or ultimate facts sufficient to state a cause of action. As expressed in the Dissent, there was no allegation that the custodial officials at Lawtey Correctional Institute were negligent and, as expressed by this Court (Supreme Court) in Harrison, supra, citing from the District Court, it appears the gravamen of the complaint is that the county negligently decided to locate the school bus stops on one street, rather than the other, and negligently failed to post warning signs. The gravamen of the Second Amended Complaint in the instant case is that the authorities within the Department of Corrections classified the inmate Prince in a certain capacity and that almost two years later the Respondents' (Plaintiffs below) did not like that classification. There was no negligence alleged against the custodial officials at Lawtey Correctional Institute.

Many more cases could be cited and more argument made on the issue of conflict and the fact that the 1st DCA failed to follow the law of the State of Florida in direct conflict with other District Courts of the State of Florida and particularly and more importantly, failed to

to follow the law as set forth and announced by the Supreme Court of Florida in the cases we have cited above.

The trial court, in dismissing Respondents' (Plaintiffs below) Second Amended Complaint was, without question, correct.

III

THE FIRST DISTRICT COURT OF APPEAL ERRED IN NOT FOLLOWING THE LAW OF THE STATE OF FLORIDA AS SET FORTH BY THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF FLORIDA AND OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA WHEN IT HELD THAT VIOLENCE TO THIRD PARTIES WAS A FORESEEABLE CONSEQUENCE OF PLACING PRINCE IN MIMIMUM CUSTODY (IN MAY OF 1976).

We would once again borrow language from Judge Thompson in his Dissent when he said:

> " Under the foreseeability test approved by the majority, it is foreseeable that all inmates who escape or are released through official channels will commit a crime again simply because they have previously done so at least once. Under such a foreseeability test, judges and the state could be liable for injury or damage caused by a probationer. The Commission and the state could be liable for injury or damage caused by a parolee. The DOC and the state could be liable for injury or damage caused by an escapee or by an inmate whose confinement status has been changed in accordance with DOC rules and regulations." (Opinion -- page -8-)(App. 29)

Judge Thompson continued by saying:

> " . . . Prince was reclassified from maximum custody status to minimum custody status in May of 1976, almost one and one-half years before his transfer to Lawtey Correctional Institute (Lawtey), and had been in minimum custody status for approximately one year and ten months before escaping. Prince's transfer to Lawtey was made by the DOC Transfer Authority at Union Correctional Institute (UCI). The Transfer Authority as UCI was deleted as a defendant in the amended complaint which was subsequently dismissed. There is no allegation that the custodial officers at Lawtey were negligent. Only by hindsight are we now able to foresee that approximately five months after his transfer Prince would escape and subsequently seriously injure someone during the comission of a crime."
> (Opinion -- page -10-)(App. 31)

In the case of Schatz v. 7-Eleven, Inc., 128 So.2d 901 (Fla. 1st DCA, 1961) the 1st DCA, speaking through Judge Wigginton, likewise agreed that if you want to, you can say anything is foreseeable; when in fact, under the law of the State of Florida, everything is not foreseeable and there are circumstances which fall in the category of unusual or extraordinary or which necessarily do not follow and, therefore, are not foreseeable in the contemplation of the law. The law stated in the Schatz, supra decision:

> " Secondly, it cannot be contended with any degree of reason or logic that the owner of a store, by permitting automobiles to park perpendicularly to the curb in front of his entrance, or by failing to erect an impregnable barrier between the entrance of his store and an adjacent area where motor vehicles are driven and parked, should have anticipated that automobiles will be negligently propelled over the curb and across the sidewalk into the entrance of his store. We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. In a sense all such occurrences are foreseeable. They are not, however, incidents to ordinary operation of vehicles,"

> "and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If as a matter of law such occurrences are held to be foreseeable and therefore to be guarded against, there would be no limitation on the duty owed by the owners of establishments into which people are invited to enter. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law." (page 904)(underscoring supplied)

And, further:

> ". . . Causation is that act which, in the natural and continuous sequence, unbroken by any intervening cause, produces the injury, and without which the result would not have occurred." (page 903)(underscoring supplied)

In Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227 (Fla. 1st DCA, 1960), another 1st DCA case of foreseeability which is cited in the Schatz, supra, case, the Court stated:

> "Our Supreme Court has consistently recognized that liability for negligence depends upon a showing that the injury suffered by a plaintiff was caused by the alleged wrongful act or omission of the defendant....In short, the courts have reasoned that the connection must be such that the law regards the negligent act as the proximate cause of an injury....The proximate cause of injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred...."(Page 229)

The Court went on to say that if liability was found to exist in the cited case, it must be predicated upon a great number of assumptions, and then states indulging in all of these assumptions and suppositions you would wind up with mere conjecture. It is submitted the same is true in Respondents' Second Amended Complaint (in the instant case), in that

the Respondents would have the Court to hold that (on the question of foreseeability only), the classification of inmate Prince approximately a year and ten months before, resulted in injury to Respondent (Smith).

In a later decision of the 1st DCA, in which the writer of this Brief was involved, Newton v. Davis Transport, 312 So.2d 200 (Fla. 1st DCA, 1975), which case also involved a dismissal of the complaint with prejudice, Judge McCord, speaking for the Court, stated:

> " 'In the instant case, the appellants' complaint fails to directly allege, or to present such facts which could lead to the inference, that the defendant's negligence was the proximate cause of those natural and probable injuries which would have been reasonably foreseeable by the defendants.'"
>
> * * *
>
> "Such is the situation here. The injury which resulted to appellant was not the foreseeable result of the mechanic instructing him to loosen the blockage in the brake cylinder valve with a probe. It was foreseeable that the probe would cause water to come from the brake cylinder with force, but it was not foreseeable that the water striking the floor would combine with a substance on the floor (battery acid) and then bounce at just the right angle to strike appellant in the eye thereby causing injury from the acid entering the plaintiff's eye. As stated by Judge John Wigginton speaking for this court in Schatz v. 7-Eleven, Inc., Fla.App.(1st), 128 So.2d 901:
>
> > '. . . Even though the person charged may be guilty of a negligent act, there can be no recovery from an injury resulting therefrom which was not a reasonable foreseeable consequence of his negligence. For the consequence of a negligent act to be foreseeable, it must be such that a person by prudent human foresight can anticipate will likely result from the act, because it happens so frequently from the commission of such an act that in the field of human experience it may be expected to happen again.'

"The following additional statement of the Supreme Court in Cone v. Inter-County Telephone and Telegraph Co., Fla. 40 So.2d 148, is appropriate here:

> '. . . The responsibility of a tortfeasor for the consequences of his negligent acts must end somewhere, and under our legal system the liability of the wrongdoer is extended only to the reasonable and probable, not the merely possible, result of a dereliction of duty...'

"The trial court was correct in dismissing with prejudice the second amended complaint." (page 201) (underscoring supplied)

In an even later case decided by the 1st DCA, Guice v. Enfinger, 389 So.2d 270 (Fla. 1st DCA, Oct. 7, 1980; Rehearing Denied Nov. 12, 1980), the 1st DCA held foreseeability not applicable involving an action against the Sheriff of Santa Rosa County for the death of an inmate, i.e. suicide, in the County Jail. The 1st DCA, speaking through Judge McCord (joined by Judge Mills and Judge Thompson) affirmed the trial court in holding as a matter of law that it was not foreseeable that the failure to remove the belt from the inmate would result in the inmate's death and suicide. The Court stated:

> "The trial court considered the primary issue before it to be whether the negligence, if any, of the Sheriff's Office was the proximate cause of the deceased's death. The court found that the act of the deceased in taking his own life was an independent, intervening cause of his death for which the Sheriff's Office is not liable. Relying on Kwoka v. Campbell, 296 So.2d 629 (Fla. 3d DCA 1974), the court declared that the question of proximate cause in a negligence action is one for the court where there is an active and efficient intervening cause. The trial court thereupon entered summary judgment in favor of appellees."

> "(1) Under the circumstances of this case, the deceased's suicide was not sufficiently foreseeable to impose upon the Sheriff's employees the duty to remove the deceased's belt. . . . it was not a probable consequence and was not foreseeable."(page 271)(underscoring supplied)

The Court went on to say:

> "Under established case law in Florida, a defendant is not liable for injuries resulting to a plaintiff when there is an independent intervening cause, unless that independent intervening cause is a foreseeable and probable consequence of the wrongful actions of the defendant. Adair v. The Island Club, 225 So.2d 541 (Fla. 2d DCA 1969), and Cone v. Inter-County Telephone & Telegraph Company, 40 So.2d 148, 149 (Fla. 1949). As stated in Cone: '. . . Not every negligent act or omission or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person who himself is without contributing fault has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent, efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act, that such injured person is entitled to recover damages . . . Conversely, when the loss is not a direct result of the negligent act complained of . . . but it merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed. . . 'Possible' sequences are those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected as likely to happen again from the commission of the same act' (Citations omitted.)
>
> On the basis of the facts of this case and the above-cited authorities, we affirm." (pages 271 and 272)(underscoring supplied)

This case has been cited by the even more recent decision of the 4th DCA in Spann v. State, Dept. of Corrections, 421 So.2d 1090 (Fla. 4th DCA, 1982), in which the Court, after citing Guice, supra, said:

> "The Guice court laid down yet another principle which has application here. The court stated that as to a loss or injury which is not a direct result of the negligent act, recovery will not be allowed if the injury was only 'possible' as opposed to 'probable'. The opinion continues by defining the former term as:
>
> > 'those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected as likely to happen again from the commission of the same act.' 389 So.2d at 272, quoting from Cone v. Inter-County Telephone & Telegraph Co., 40 So.2d 148, 149 (Fla. 1949). Id. at 1332."(pages 1092 and 1093)

The Guice, supra, case was further cited in the case of Attwood v. Rowland Truck Equipment, Inc., 408 So.2d 590 (Fla. 3rd DCA, 1981). That case resulted in a summary judgment being affirmed and the question of foreseeability being decided as a matter of law by the trial court.

We would respectfully invite the Court's attention on the question of foreseeability not being appropriate or applicable to the decision in Jenkins v. City of Miami Beach, 389 So.2d 1195 (Fla. 3rd DCA, 1980), on the question of the City to provide no supervision in a park at night being a planning-level, discretionary governmental decision for which the City could not be held liable in tort. The 3rd DCA held that the action of a young boy in removing a loose copper coil from a water fountain in a City park was not foreseeable despite the City's admitted knowledge of previous acts of vandalism by minors in the park at night and thus failure by the City to properly maintain the water fountain was not the proximate cause of injuries sustained by a girl who was struck with the copper coil when a young boy threw it. The Court not only held that the City's decision to provide no supervision in the park at night was a

planning-level, discretionary, governmental decision and, therefore, the City could not be held liable in tort, but further decided, as a matter of law, that the purported negligence of the City was not foreseeable as a matter of law.

We would also invite the Court's attention to the case of Cassel v. Price, 396 So.2d 258 (Fla. 1st DCA, 1981), wherein the 1st DCA held that there was no foreseeability in the injury of a child and the Court went on to discuss this point of law and then stated:

> "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (page 266)

The case of Relyea v. State, 385 So.2d 1378, is an additional case where the 4th DCA held that the State of Florida, Board of Regents of the State of Florida, were immune from suit because of fact that providing security guards for all persons lawfully on the campus fell within the definition of discretionary function and thus the State and its agents enjoyed sovereign immunity. The case also holds that there was no cause of action for the violent assaults that occurred on the campus, even against the insurer, i,e. the insurance company, because it did not enjoy sovereign immunity available to the Board of Regents but notwithstanding, there was no showing of any serious crimes being committed on the campus or in the area where the two students were abducted and murdered and there was a failure to demonstrate foreseeability of the violent assaults and, in turn, there was no duty to protect from the type of conduct that resulted in abduction and murder of the students.

There are certainly no allegations in Respondents' (Smith) Second Amended Complaint that others who have been placed on minimum custody have escaped and assaulted anyone and, as we have argued earlier and will not repeat here except to say that there are no allegations of fact or ultimate fact to state a cause under any foreseeability theory of law.

There are numerous other cases that could be cited on the question of foreseeability but it is respectfully submitted that there is absolutely no basis for holding foreseeability and we will refer this Court once again to those portions of this Brief and to the Dissent Opinion of Judge Thompson in which, in his opinion, there is no question that there could be no cause of action under foreseeability. As Judge Thompson also stated, only through hindsight would anyone be able to foresee that placing an inmate on minimum custody approximately one year and ten months prior to his escape, and then five months after his escape that he would be involved in some crime injuring someone.

Suffice it to say, although we strongly believe that the foreseeability doctrine is not applicable in this case, we again quote from Judge Thompson's Dissent when he said the majority foreseeability test is simply not applicable to judgmental decisions such as those outlined above because they are immune from traditional theories of tort liability.

CONCLUSION

This case is of great public importance and any decision to change the traditional governmental immunity of the prison authorities' ability to exercise its police power and its discretionary, judgmental, planning-level functions would be disastrous and chaotic and an absolute, total and complete disruption of the proper functioning of the prison system of Florida.

It would destroy the function of government, the administration of justice, judges' probation power and the ability to parole or to decide the type of confinement, placement thereof, and status of inmates.

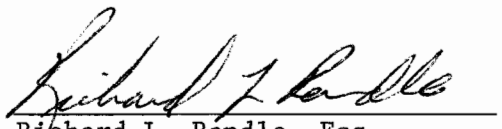
This Court has held government must be allowed to govern and has recognized that discretionary acts are the legislative, judicial and purely executive processes of government as not being tortious. Public policy and maintenance of integrity of government require this immunity as does organized society.

The law must not be changed. Judges must be able to judge and use probation, parole boards must be able to function, just as the prison system must.

This case is simply one of discretionary, judgmental, planning-level function and the certified question must be answered as such. This will resolve and conform the conflict decisions set forth in this Brief when this Court quashes the decision of the First District Court of Appeal and reinstates the trial court's decision.

Respectfully submitted,

SLATER & RANDLE, P.A.



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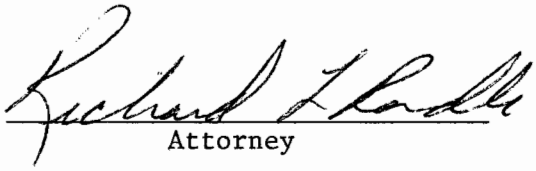
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing PETITIONERS' BRIEF has been furnished to: KENNETH VICKERS, ESQ., Attorney for Respondents, 437 E. Monroe Street, Jacksonville, Fla. 32202, by Hand Delivery, this 18th day of August, 1983.



Attorney