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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

FILED

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SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

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

Appellees/Petitioners

vs.

CASE NO. 63,950

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

Appellants/Respondents

_____/

INITIAL BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

Petitioners, Department of Corrections and J. R. Reddish, are defendants in an action brought in the Circuit Court for Union County, Florida. They will be referred to as "Petitioners", "DOC" and/or "Reddish".

Respondents, Charles W. Smith and Edna L. Smith, are the plaintiffs in the aforementioned action. They will be referred to as "Respondents" or "Smiths".

Amicus Curiae, the Attorney General of the State of Florida, has sought leave to appear as amicus in this litigation. Reference to the Attorney General will be simply as "Attorney General".

Since the Attorney General has not been involved in the litigation which precedes this appeal, it does not have the benefit of the record on appeal. Accordingly, no references will be made thereto. An Appendix does accompany this brief which is limited to the decision of the First District Court of Appeal, the subsequent ruling on the Motion for Rehearing, and the Attorney General's Motion for Leave to Appear as Amicus Curiae. The Appendix will be referred to as the symbol "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondents initiated the instant litigation by filing a complaint against the Petitioners. Following an amended complaint, the trial court dismissed the cause, finding that the doctrine of sovereign immunity barred the action (A-2). The Court also ruled that the alleged injury to the Respondents was unforeseeable, but that issue will not be addressed by the Attorney General.

Respondents appealed the ruling to the First District Court of Appeal, and on April 27, 1983, the First District reversed the lower court, finding that the doctrine of sovereign immunity did not bar the action (A 1-10). On June 17, 1983, the First District granted Petitioners' Motion for Rehearing in part, and certified the following question to this Court as one of great public importance:

> May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?
>
> (A-12).

Since the question necessarily affects the interests of the State of Florida, the Attorney General has filed a Motion for Leave to Appear as Amicus Curiae (A 13,14). In the event this Honorable Court grants the Attorney General's request this brief is offered to aid the Court in resolving the matter before it.

With regards to the facts which give rise to this appeal, due to the fact that the Attorney General has not been involved in the litigation to date, he does not have the benefit of the record on appeal. Accordingly, the Attorney General will adopt the facts as set forth by the First District Court of Appeal and incorporate them by reference herein.

I.

ARGUMENT

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

No.

Under no circumstances.

In order to arrive at the foregoing conclusions, we must initially establish that prisoner classification is a discretionary, planning-level function of government involving basic policy and the implementation thereof. This is not as difficult a chore as one might imagine due to the guidelines which have been established by this and other judicial bodies. Once established as a premise, the conclusion urged above is the natural, logical consequence.

The guidelines we refer to were first announced by this Honorable Court in its landmark decision of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). Commercial Carrier relied heavily on two other judicial decisions, Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (Wash. 1965) and Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (Cal. 1968). Evangelical provides a four-tiered test which this Court urged as helpful in determining whether an act of government was subject

to tort liability. Johnson contains excellent in-depth analysis of the issue, which was expressly adopted by this Court in Commercial Carrier.

In discussing the certified question, we will begin by applying the Evangelical test to the case at hand. Then, we will demonstrate how the Johnson analysis supports our position herein.

The discussion will not end there. In 1982, this Court handed down additional guidelines to aid us in determining whether a governmental act is shielded by immunity. We refer, of course, to Department of Transportation v. Neilsen, 419 So.2d 1071 (Fla. 1982). The Neilsen guidelines will be addressed as they relate to the instant case following the discussion of Commercial Carrier.

At that point, we will ask this Court to conclude, as we have, that prisoner classification may never give rise to tort liability.

A.

PRISONER CLASSIFICATIONS ARE DISCRETIONARY, PLANNING-LEVEL DECISIONS PURSUANT TO COMMERCIAL CARRIER, SUPRA.

Prior to 1979, it was unclear whether in Florida, discretionary planning-level decisions of government were exempted from

liability. Florida Statutes, Section 768.28, Florida's waiver of sovereign immunity, did not expressly exempt such governmental functions as did the Federal Tort Claims Act. See 28 U.S.C. §2680(a). In Commercial Carrier, supra, which was handed down by this Court in 1979, this Court determined that certain governmental functions must never give rise to liability, predicating the exception on the doctrine of separation of powers. In the absence of express legislative language, it was judicially recognized that in order for the coordinate branches of government to exist in our system of government, it could not be permitted for a judge or jury to substitute its judgment for the planning-level decisions of the state and/or its agencies. 371 So.2d 1018, 1022. In support of this proposition, the Commercial Carrier decision cited with approval to the Honorable Judge Fuld's comments in Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960):

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature had seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that 'the king can do no wrong,' serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute. 7 N.Y.2d at 586, 200 N.Y.S.2d at 413, 167 N.E.2d at 66. (Emphasis supplied).

In the same vein this Court cited to Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (Wash. 1965), where it was also "...judged necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins." In discussing the Evangelical decision, this Court stated:

> The court recognized that the legislative, judicial and purely executive processes of government, including discretionary acts and decision within the framework of such processes, cannot and should not be characterized as tortious. Public policy and maintenance of the integrity of our system of government necessitate this immunity, however unwise, unpopular, mistaken or neglectful a particular decision or act might be. The rationale for this conclusion was stated thus:
>
> > 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 necessarily 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).
>
> 371 So.2d at 1018-1019 (Emphasis added).

This Court also noted one prior decision of its own, urging the concept of exemption from tort liability for the exercise of certain governmental functions due to the doctrine of separation of powers. After reviewing the setting in Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), this Court went on to characterize the holding of the decision as follows:

> 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.
>
> 371 So.2d at 1020.

The first step was thus taken by this Court in Commercial Carrier. It had concluded that certain discretionary government functions required immunity from liability. The next step was to identify which governmental functions were discretionary in nature so as to provide guidance for the lower echelons of the judiciary.

The use of semantic labels was discouraged when it came to identifying the governmental functions that would remain immune from tort liability. Instead, this Court adopted the analysis of Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (Cal. 1968), which distinguished between the "planning" and "operational" levels of decision-making by governmental

agencies. More important, however, this Court directed the utilization of the preliminary test provided in Evangelical United Brethren Church v. State, supra, when conducting an analysis of the governmental act. 371 So.2d at 1022.

In Evangelical United Brethren Church, the following test was proposed:

> Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, 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, omission, 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, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, 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 suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.
>
> 407 P.2d at 445
> (Emphasis added).

Thus, in order to resolve the question certified by the First District, it is appropriate that we begin by utilizing the Evangelical test and ascertain whether the act of prisoner classification calls for four clear and unequivocal affirmative responses to the four prongs of the test.

B.

PRISONER CLASSIFICATION IS A DISCRETIONARY, GOVERNMENTAL PROCESS WHICH IS IMMUNE FROM LIABILITY PURSUANT TO EVANGELICAL UNITED BRETHREN CHURCH V. STATE, SUPRA.

The first prong of the Evangelical test asks us to determine whether prisoner classification necessarily involves a basic governmental policy, objective and/or program. To document our affirmative response to the query we need only turn to Florida Statutes, Section 944.012(6) reads as follows:

> (6) It is the intent of the Legislature:
> (a) To provide a mechanism for the early identification, evaluation, and treatment of behavioral disorders of adult offenders coming into contact with the correctional system.
> (b) To separate dangerous or repeat offenders from nondangerous offenders, who have potential for rehabilitation, and place dangerous offenders in secure and manageable institutions.
> (c) When possible, to divert from expensive institutional commitment those individuals who, by virtue of professional diagnosis and evaluation, can be placed in less costly and more effective environments and programs better suited for their rehabilitation and the protection of society.
> (d) To make available to those offenders who are capable of rehabilitation the job-

> training and job-placement assistance they need to build meaningful and productive lives when they return to the community.
> (e) To provide intensive and meaningful supervision for those on probation so that the condition or situation which caused the person to commit the crime is corrected.
>
> (Emphasis added).

To summarize the foregoing, it is evident that in Florida, the legislature has decided that prisoner classification will not involve merely assigning an inmate to an institution by drawing a name from a hat, but that various objectives must be realized in classifying an inmate.

Fiscal considerations must play a role in the decision. An inmate is to be classified to the least costly custody permitted. Implicit within the fiscal consideration is a second, more subtle consideration, which is the necessary result. Inherent to less costly confinement is less restrictive confinement as less restrictive confinement is less expensive. Thus, the legislature has implicitly created a second policy objective in prisoner classification, and that is that an inmate should be classified to the least restrictive confinement possible. This second objective coincides with a third one that is expressly contained in Section 944.012(6), and that is that prisoner classification must afford the inmate the best opportunity for rehabilitation in order to properly prepare him/her for his/her eventual return to society.

Thus, pursuant to Florida Statutes, Section 944.012(6), one must find that in Florida, prisoner classification necessarily involves basic governmental policy, programs and/or objectives -- classification to the least costly, least restrictive environment to maximize inmate rehabilitation. For purposes of the Evangelical test, this answers the first prong with a clear affirmative response.

Next, we must determine whether the act of prisoner classification is essential to the realization of the policy programs and/or objectives discussed above. The second prong of the test must also be answered in the affirmative. If DOC is not given the requisite discretion of being able to classify an inmate as it deems appropriate absent the threat of tort liability hanging over its head, the realization of the announced legislative intent discussed above would never result.

The United States Supreme Court has recognized as much in Martinez v. United States, 444 U.S. 277 (1980). In Martinez, the issue was one of parole decisions instead of classification decisions vis-a-vis the potential ramifications of tort liability. The distinction between the case at hand (classification decisions) and Martinez (parole decisions) is one without a difference, rendering Martinez extremely persuasive authority.

In Martinez, the Supreme Court found that judicial review of parole decisions would inevitably inhibit the exercise of

discretion to the point where it would impede the ability of the state to implement a parole program designed to promote rehabilitation of inmates. This chilling effect would result in the impedence of trial-release programs and prolonged incarceration without justification for many prisoners. The unanimous Court concluded that immunity for parole decisions furthered the policy that reasonable lawmakers favored. 444 U.S. at 282-283.

The very same chilling effect which concerned Mr. Justice Stevens in Martinez would ensue in the State of Florida's Department of Corrections should this Court decline to immunize prisoner classification decisions. There would no longer be any incentive for the DOC officials to classify an inmate to less restrictive, less costly institutions. There would be no concern over whether an inmate was given every opportunity to take part in rehabilitation programs. Rather, the incentive would be to classify an inmate to the most restrictive, most costly custody simply to mitigate the possibility of escape and possible subsequent tort liability for the escapee's actions while at large.

If prisoner classification decisions are subjected to tort liability, the legislative objectives mandated by Florida Statutes, Section 944.012(6) would clearly be abrogated. Consequently, the second prong of the Evangelical test as applied renders an affirmative response.

Turning to the third prong of the Evangelical test, we are called upon to decide whether prisoner classification requires the exercise of basic policy evaluation, judgment and expertise on the part of DOC.

Florida Statutes, Section 945.081 answers the question in part. It reads:

> 945.081 Classification regulations.--The Department of Corrections shall adopt regulations for the classification of all offenders according to age, sex, and such other factors as it may deem advisable and shall provide for the separation of prisoners by sex.

In addition, Florida Statutes, Section 945.09 provides:

> 945.09 Commitment of prisoners; classification; reception and classification program; transfer.--
> (1) All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the Department of Corrections.
> (2) All prisoners committed to its custody shall be conveyed to such institution, facility, or program in the correctional system as the department shall direct, in accordance with its classification scheme. The department shall establish a program of graduated punishment with the following classification of inmates:
> (a) Class I.--Incorrigible inmates for whom a total lockup will be required; facilities shall include, but not be limited to, a portion of the Florida State Prison;
> (b) Class II.--An intermediate class between Class I and Class III for those inmates who have had difficulty in the system but who have not yet proven themselves to be incorrigible;
> (c) Class III.--Inmates for whom there exists hope of rehabilitation.

> (3) Pursuant to such regulations as it may provide, the department is authorized to transfer prisoners from one institution to another institution in the correctional system and to classify and reclassify prisoners as circumstances may require.

Finally, Florida Statutes, Section 20.315(17) states:

> (17) PLACEMENT OF OFFENDERS.--The department shall classify its programs according to the character and range of services available for its clients. The department shall place each offender in the program or facility most appropriate to the offender's needs, subject to budgetary limitations and the availability of space.

In the face of the foregoing statutes, can one conclude anything but that prisoner classification requires DOC to evaluate basic policy objectives and exercise its judgment and expertise in reaching its decisions?

Initially, DOC has to determine how to classify the inmate, basing its decision on factors such as prior history, nature of the crime, propensity for violence, age, sex and countless other factors. This decision is made with the policy objective in mind that the custody must be the least restrictive, least costly possible and must afford the inmate the best opportunity for rehabilitation.

Next, DOC must utilize its expertise in ultimately judging what degree of confinement would best serve the needs of the inmate, satisfy the policy objectives, and protect the safety of

the public. Drawing this delicate balance necessitates that the third prong be answered yes.

The fourth prong of the Evangelical test requires only a brief discussion as the answer is quite obvious. Florida Statutes, Section 945.09(1) specifically directs that all inmates sentenced to the state penitentiary shall be committed to the custody of the Department of Corrections place each offender in the most appropriate program or facility.

Without any doubt, DOC has the requisite statutory authority to classify prisoners. Prong four must be answered affirmatively.

Having answered each of the four prongs of the Evangelical test in the affirmative, this Court should be compelled to find that prisoner classification involves a discretionary governmental function. It necessarily follows that such decisions must be immunized from tort liability if the Department of Corrections is to make the decisions and further governmental policy objectives.

It should not be surprising that the foregoing conclusion was reached upon application of the Evangelical test. By sheer coincidence, the underlying facts in Evangelical are identical to those before this Court. Evangelical involved a prisoner classification decision as it relates to tort liability. Closer

scrutiny of the opinion reveals that at least one policy objective that has been documented here existed there -- maximizing rehabilitation. After considering facts, policies and a "challenged act" identical to those present here, the Evangelical Court applied its four-pronged test and concluded that prisoner classification is immune from liability.

Accordingly, applying not only the Evangelical test to the case at hand, but the decision itself, we would respectfully submit that prisoner classification cannot subject this state to tort liability.

Parenthetically, by analogy, we would submit that judicial decisions involving similar decision-making lends added weight to our position. We specifically refer to cases involving parole decisions.

The distinction between parole decisions and classification decisions is one without a difference since identical policy considerations are at stake in both types of decision-making -- cost, rehabilitation, degree of confinement, and safety of the public. Therefore, if the judiciary has determined that parole decisions are discretionary and planning level in nature and do not result in tort liability, it is most persuasive in buttressing our position herein.

We have already discussed the United States Supreme Court's decision in Martinez v. United States, supra, which held that immunizing parole decisions from liability furthers governmental policy objectives. Martinez also found that imposing tort liability would impede the decision-making process in parole decisions and create a chilling effect on the process, precluding the realization of reasonable objectives. The Fifth Circuit Court of Appeals has reached the same result in Payton v. United States, 697 F.2d 475 (5th Cir. 1982).

Closer to home, the Fourth District Court of Appeal confronted the issue of whether parole decisions warranted immunity from liability and decided that parole decisions were immune, discretionary and planning-level in nature. Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981). The Berry court saw fit to apply the Evangelical test to parole decisions and answered each prong as we have done here -- in the affirmative. Accordingly, it is extremely persuasive for our purposes here.

Since parole decisions are analagous, if not identical, to classification decisions, we would submit that in light of the weight of judicial authority, this Court must conclude that classification decisions are immune from liability.

C.

PRISONER CLASSIFICATION IS A PLANNING-LEVEL GOVERNMENTAL FUNCTION WHICH IS IMMUNE FROM LIABILITY PURSUANT TO JOHNSON v. STATE, SUPRA

Now that we have applied the Evangelical test to the case at bar, have made the determination that prisoner classification involves a discretionary governmental process, and have supported the determination with additional case authority, we return our attention to Commercial Carrier.

Resolving the certified question by utilizing the Evangelical test should, for all practical purposes, obviate the need for any further discussion. Nevertheless, since this Court attached a great deal of significance to the California Supreme Court's analysis in Johnson v. State, it warrants application this case.

In order to determine whether an act of government required immunity from tort liability, the Johnson Court decided that of the act was "planning-level" in nature, it should be immune. If, on the other hand, the act in question was "operational-level" in nature, immunity from liability would not result.

Defining these terms was a much more difficult task. Upon considering how to define what constituted an immune, "planning-level" decision, the Court ruled that any basic policy decision which has been entrusted to a coordinate branch of government must be afforded immunity:

> A workable definition nevertheless will be one that recognizes that "[m]uch of what is done by officers and employees of the government must remain beyond the range of judicial inquiry" (3) Davis, Administrative Law Treatise (1958) §25,11, p. 484); obviously "it is not a tort for government to govern" (Dalehite v. United States (1953) 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (Jackson, J., dissenting)). Courts and commentators have therefore centered their attention on an assurance of judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government. Moreover, the potentiality of such review might even in the first instance affect the coordinate body's decision-making process. (See, generally, Jaffe, Judicial Control of Administrative Action, supra, 241, 259; James, Tort Liability of Governmental Units and Their Officers, supra, 22 U.Chi.L.Rev. 610, 651; Peck, The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception, supra, 31 Wash.L.Rev. 207, 240; Note, The Discretionary Function Exception of the Federal Tort Claims Act, supra, 66 Harv.L.Rev. 488,489-490.)
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> 447 P.2d at 360 (Emphasis added).

While in no way claiming that the foregoing definition presented a panacea, the Court believed that it would provide basic guideposts.

The Court made no qualms about the fact that even with the guideposts, the judiciary would still be required to make

"delicate decisions", recognizing that the very process of making an official determination called for sensitivity into the considerations that led to it and appreciation of the judiciary's ability to reexamine it.

Applying its test to the facts before it, the Court in Johnson found that the decision to grant parole was an immune, planning-level decision entrusted to the executive. The same rationale supports the conclusion that prisoner classification enjoy immunity herein.[1]

Inherent within prisoner classification decisions are basic policy considerations that have been imposed on DOC by the Florida Legislature. For the sake of brevity, the policy considerations will not be repeated here since they were thoroughly identified and documented during discussion of the Evangelical test. Accepting the premise that prisoner classification decisions involves basic policy considerations, for the judiciary to second-guess DOC's decisions would place the judicial branch of government in the predicament discouraged by Johnson.

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[1] Naturally, since decisions to parole and decisions to classify are indistinguishable for purposes of the sovereign immunity question, the Johnson decision is of immeasurable support for the proposition that the case at hand involves planning-level decisions.

Furthermore, as visualized by the Johnson Court, such judicial review could affect the coordinate branch's ability to make the necessary planning-level decisions. In this respect, we need only recall the holding in Martinez v. United States, supra, for documentation that judicial review of prisoner classification would inhibit the decision-making process. The chilling effect caused by such judicial review would prevent implementation of a classification scheme that would further reasonable legislative policy, i.e., less costly and less restrictive confinement maximizing an inmate's rehabilitation.

Without question, application of Johnson and its underlying analysis to the instant case permits only one result here -- the finding by this Court that prisoner classification is a planning-level function which may not be subjected to liability.

D.

PRISONER CLASSIFICATION IS AN IMMUNE, PLANNING-LEVEL DISCRETIONARY FUNCTION OF GOVERNMENT PURSUANT TO COMMERCIAL CARRIER, SUPRA.

As recommended by this Court in Commercial Carrier, we have utilized the test created by Evangelical as an aid to distinguishing between discretionary, immune decisions and those which give rise to liability. We have also considered the analysis set forth in Johnson v. State, adopted by this Court in Commercial Carrier, to determine whether prisoner classification is a planning-level or operational level function of government.

In both instances, the conclusions reached are favorable to our position. We have documented every premise and logically drew conclusions. In the final analysis, applying Commercial Carrier to the case at hand and responding to the certified question, prisoner classification may never give rise to tort liability.

E.

PRISONER CLASSIFICATION INVOLVES BASIC GOVERNMENTAL POLICY AND IMPLEMENTATION THEREOF AND THUS DOES NOT GIVE RISE TO LIABILITY PURSUANT TO DEPARTMENT OF TRANSPORTATION v. NEILSEN, SUPRA.

In 1982, this Court revisited the issue of sovereign immunity and decision-making in an effort to clarify which governmental acts were immune from liability and which were not. Rejecting the notion that it should modify its holding in Commercial Carrier, this Court handed down its decision in Department of Transportation v. Neilsen, 419 So.2d 1071 (Fla. 1982) and emphatically held steadfast to the position that basic governmental policy and implementation thereof was immune from tort liability.

As if anticipating that in the future it would be confronted with a question such as the one certified sub judice, this court expressly singled out the governmental use of its police power as one area that must never succumb to tort liability:

> With regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers and, as such, an operational-level function, to be without merit. Many municipalities and counties make these decisions, including even the installation of single traffic lights, within the ambit of their legislative function. Moreover, traffic control is strictly within the police power of the governmental entity. Questioning this function necessarily raises the issue of the government's proper use of its police power. In Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), it was determined that the city could not be held accountable for how the police force was deployed. By analogy to Wong, the failure to deploy patrolmen to congested intersections to control traffic would not subject a governmental entity to negligence liability. In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisons which implement the entity's police power and are judgmental, planning-level functions.
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> 419 So.2d at 1077 (Emphasis added).

This Court is not alone in singling out police power decision-making as an area sacrosanct. In Garza v. United States, 413 F.Supp. 23 (W.D. Okla. 1975), the Court held that the decision to station more guards in a particular portion of the prison involved discretionary action on the part of prison officials which resulted in no liability. In Relyea v. State, 385 So.2d 1378 (Fla. 4th DCA 1980), the Fourth District concluded that the decision to provide security guards on campus, parking attendants and security gates did not give rise to liability. In

Jenkins v. City of Miami Beach, 389 So.2d 1195 (Fla. 3d DCA 1980), the Third District held that the decision not to provide supervision in a city park at night was not actionable since it was a planning-level, discretionary function.

The thrust of the foregoing cases is quite evident. As so eloquently stated by Honorable Justice Carlton in Wong v. City of Miami, supra:

> [I]nherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers... The sovereign authorities ought to be left free to excercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.
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> 237 So.2d at 134
> (Emphasis added)

For this reason, the Second District Court of Appeal recently decided that the failure of a police officer to detain a suspected drunken driver did not give rise to liability when the driver was subsequently involved in a collision. In Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), the Second District had no qualms about applying the Neilsen test to the facts before it and reach a conclusion negating liability.

As evidenced by Neilsen and other case law, the exercise of police power by the state is an area which requires protection from liability since it clearly involves judgmental, planning-level decisions. Prisoner classification is no less an exercise

of police power by the state than traffic control. Thus, in accordance with Neilsen, it involves immune decision-making.

Beyond even that, since prisoner classification is directly related to the criminal justice system, it is a part of the state's police power which requires greater protection from immunity than traffic control.

Much like this Court singled out police power decision-making as an area which involves the planning-level function of government, the Everton decision cited above singled out the criminal justice system as a sub-set of police power which requires immunity from liability. The Second District conducted an exhaustive analysis of decisions peculiar to the criminal justice system and reached the foregoing conclusion, but not before citing to Professor Wayne R. LaFave's study of the system:

> 4. The need for discretion. It is obvious that in practice some discretion must be employed somewhere in the existing criminal justice system. The exercise of discretion in interpreting the legislative mandate is necessary because no legislative mandate is necessary because no legislature has succeeded in formulating a substantive criminal code which clearly encompasses all conduct intended to be made criminal and which clearly excludes all other conduct.
>
> ...[T]he exercise of discretion seems necessary in the current criminal justice system for reasons unrelated to either the interpretation of criminal statutes or the allocation of available enforcement resources. This is because of the special circumstances of the individual case, particularly the characteristics of the

individual offender which 'differentiate him from other offenders in personality, character, sociocultural background, the motivations of his crime, and his particular potentialities for reform or recidivism.' The infinite variety of individual circumstances complicates administration by mere application of rules. Justice Charles D. Breitel, who has had extensive administrative, legislative, and judicial experience, stresses this point:

> If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.

Individualized treatment of an offender, based upon the circumstances of the particular case, is well recognized at the sentencing stage, where discretion is provided. These same circumstances may be apparent at the arrest stage and may seem to the police to dictate that the criminal process not be invoked against a particular offender. While sentence discretion is widely recognized, arrest discretion is not. This may reflect an assumption that, while individual circumstances may justify mitigation, the individualization of criminal justice should never go so far as to result in the complete exoneration of a particular offender. The contrary view is that the individual circumstances sometimes make conviction and even arrest excessive, so that proper administration requires the exercise of discretion at the early as well as at subsequent stages in the process.

426 So.2d at 1002, 1003 (Emphasis added).

In classifying inmates, DOC must utilize the same type of discretion noted above. Each individual that comes before DOC for classification is unique. He posses characteristics which differentiate him from all others. This discretion must not be stifled or else the classification process would suffer from the dangers foreseen by Professor LaFave. By imposing tort liability on classification decisions, the incentive to view each individual in light of his differentiating factors would be eradicated.

For these reasons, we would submit that this Court should continue to distinguish police power decision-making as it did in Neilsen. It should reaffirm its position that exercise of police powers by the state calls for immune, planning-level decisions. It should expressly apply the Everton decision and its underlying rationale which is predicated upon the theory that discretion in the exercise of the state's police power cannot be detrimentally harnessed with tort liability. Pursuant to Neilsen and Everton, it must find that prisoner classification involves basic governmental policy objectives and implementation thereof, which is an immune, planning-level function of the state.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that prisoner classifications should not give rise to tort liability. The governmental function involved is clearly discretionary, policy making/implementing, and planning-level in nature. Applying every conceivable test to the function, the only conclusion which can be drawn is that liability is barred by the doctrine of sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Richard L. Randle, Esquire, Slater & Randle, P.A., Suite 920, Atlantic Bank Building, Jacksonville, Florida 32202; Kenneth Vickers, Esquire, Vickers & Rohan, P.A., 437 East Monroe Street, Jacksonville, Florida 32202; and Barry Richard, Esquire, Roberts, Baggett, LaFace, Richard & Wiser, 101 East College Avenue, Tallahassee, Florida 32301, this 22nd day of August, 1983.

FOR MIGUEL A. OLIVELLEA