IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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

Appellees/Petitioners,

vs. CASE NO. 63,950

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

Appellants/Respondents.

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

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ARGUMENT

MAY PRISONER CLASSIFICATION DECISIONS GIVE RISE TO TORT LIABILITY, AND IF SO, UNDER WHAT CIRCUMSTANCES?

The Attorney General of the State of Florida has urged this Court to conclude that prisoner classification decisions are planning level and policy implementing in nature, thus precluding the sovereign from being subjected to tort liability.

We have supported our position with a thorough review of judicial decisions on the issue of sovereign immunity, beginning with this Court's opinion in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). Since Commercial Carrier, relied heavily on the four-pronged test created by Evangelical United Brethern Church v. State, 407 P.2d 440 (Wash. 1965) and the guidelines announced in Johnson v. State, 447 P.2d 352 (Cal. 1968), we have incorporated these cases into our application of Commercial Carrier to the case at hand. Instead of ending our analysis there, we have also utilized this Court's more recent decision in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) to lend additional weight to our position.

In response to our argument, Respondents and Amicus James M. Johnson have ignored the majority of our reasoning. For the most part, they have limited their challenge to our position by taking issue with our conclusions regarding the Evangelical test, specifically the second and third prongs.

Therefore, the focus of this brief will be on the Evangelical test and demonstrating how our conclusions stand impervious to the challenges lodged by the Respondents and Amicus Johnson. In doing so, we will tie in those portions of our intitial brief which were not addressed by our adversaries, since the unrefuted portions of our brief serve to demonstrate the lack of merit in the challenges which have been made.

With this in mind, let us turn to the Evangelical test and, once again, apply it to the question of whether prisoner classification decisions are shielded from liability by the doctrine of sovereign immunity.

As an overview, we would point out that Evangelical did not only create a four-prong test. It set forth four questions which must be asked of governmental acts, and if one can answer affirmatively to the specific questions, then the governmental act at issue must be afforded immunity from liability.

Starting with the first question, we are asked to decide whether prisoner classification decisions involve a basic governmental policy, program or objective. Our discussion on this query need not be lengthy since Respondents graciously concede that the first prong can be answered affirmatively. Of course, their concession is hardly suprising in light of Florida Statutes, Section 944.012(c), which requires that prisoners must be classified to the least costly, least restrictive environment

possible in order to maximize rehabilitation. In effect, then the Florida Legislature has created a basic governmental policy, objective, and/or program which is necessarily involved in prisoner classification decisions.

Case law and reasoned logic permits us to respond with a yes to the second prong ofthe Evangelical test. If DOC is not given the requisite discretion to classify an inmate as it deems appropriate, the realization of the requisite legislatively-created policy, objectives and programs will never take place. Martinez v. United States, 444 U.S. 277 (1980) emphatically predicts that with the threat of tort liability prevalent, the state will be inevitably inhibited in its ability to implement programs promoting the rehabilitation of inmates. Simple logic persuades one to conclude that if tort liability is imposed on prisoner classification decisions, the incentive for classifying inmates to the least costly, least restrictive environment maximizing rehabilitation is destroyed. With the possibility of lawsuits stemming from escapes, the incentive is necessarily diverted to classifying inmates to the most restrictive custody possible so as to mitigate the chance of escape.

Amicus Johnson takes issue with our reliance upon the chilling effect noted above. Failing to distinguish Martinez v. U.S., supra and relying upon Johnson v. State, supra, he denies that there is a basis for concluding that a chilling effect would result from tort liability on prisoner classification decisions.

Unfortunately, Johnson does not permit Amicus to make such an argument. Taking Johnson in the context in which it was intended, this argument is untenable.

The issue before the Johnson Court was an extremely narrow one. It was only concerned with whether a ministerial decision of government could be immunized from liability, and that decision was whether to warn prospective foster parents about the potential violent tendencies of a foster child. Johnson, supra, at 355.

In this limited context, the Court rejected the state's argument that liability would impair the proper exercise of discretion, and thus, immunity was not warranted. However, it was never intended for this limited holding to mean that governmental decision-making could never be adversely affected by a liability-created chilling effect. In fact, the Court expressly recognized that in ascertaining whether governmental decision-making was shielded by immunity, a factor to be weighed was the extent to which governmental liability might impair free exercise of the process. Johnson, supra at 357.

While the performance of a ministerial function such as warning foster parents about the violent tendencies of a foster child is arguably unaffected by the possibility of liability, the Johnson Court implicitly acknowledged that the same conclusion could not be reached with regards to policy decisions such as parole decisions. In that respect, the Court found:

> "The decision to parole thus comprises the resolution of policy considerations, entrusted by state to a coordinate branch of government, that compels immunity from judicial reexamination."
>
> Johnson, supra at 361
> (Emphasis added)

Thus, taking Johnson in the context in which it was intended, we must conclude that parole decisions can and are so detrimentally affected by potential liability so as to necessitate immunity. The same argument can be made for prisoner classification decisions since the Johnson Court found that the decision by the California Youth Authority in placing the foster child would not give rise to liability. Johnson, supra at 362.

Moreover, we would parenthetically note that not only does Johnson support our position with reference to a chilling effect, but the Court also recognized that the decision to parole comprises the resolution of policy considerations. Prong number two of the Evangelical test asked us to consider whether the governmental act at issue results in the realization of policy or objectives. Johnson makes it clear that the decision to parole, as would a decision to classify an inmate to a particular level of custody, realizes policy and/or objectives.

Thus, the second prong of the Evangelical test must be answered with an affirmative response. Our conclusion is supported not only with our analysis and the case law we have relied on, but also with the case law relied upon by Amicus Johnson.

As for prong three of the test, we have cited to a plethora of statutory law in support of our affirmative response. Respondents have conceded in their brief that prisoner classification decisions could and should involve evaluation, judgment and expertise on the part of DOC (Respndents' Brief at 9, 10). Our documentation, coupled with the Respondents' concession, should end discussion of prong three.

However, respondents attempt to qualify their concession by arguing that in the case at hand, the decision to classify inmate Prince was made without proper evaluation and/or expertise, since it was allegedly based upon favoritism.

We would strongly emphasize that for purposes of the Evangelical test, whether favoritism was involved in classifying inmate Prince is irrelevant. If the act at issue requires the use of judgment or expertise, then an affirmative response is required to prong three of the test. In conceding that expertise and judgment is inherent to the act of prisoner classification, Respondents concede the affirmative response. Therefore, answering the question as posed by Evangelical and not the one posed by Respondents, it is readily apparent that the third prong warrants an affirmative reply.

Finally, prong four of the Evangelical test was thoroughly addressed in our initial brief and an affirmative answer was reached in response to the query. For the sake of brevity, and

since Respondents generously concede that DOC has the requisite authority to classify prisoners, we will not waste judicial time by summarizing our argument.

Having focused our attention on the four prongs of the Evangelical test and applying them to prisoner classification decisions in general, we have provided four affirmative responses to the four queries and have given reasoned support therefore.

We would note that for all practical purposes both Respondents and Amicus Johnson join us in our ultimate conclusion that prisoner classification decisions, as a general rule, should be immune from liability. They have both conceded in their respective briefs that when DOC implements its procedure of prisoner classification, even when injury results, the doctrine of sovereign immunity protects the Department from liability (Respondents' Brief at page 10; Amicus Johnson's Brief at page 3).

As a result, the parties have laid the foundation for an answer to the First District's certified question. Based on the glaring concessions which have been made, the parties agree, at minimum, that when DOC follows its guidelines in classifying prisoners, even if the custody level deemed appropriate by DOC

appears inappropriate to a layperson, the Department is immune from liability in the event of injury stemming from the decision.

Applying the concensus of the parties to the specific facts at issue, we can immediately reject the notion that the Respondents stated a cause of action in their second amended complaint since they failed to allege that DOC did not follow its classification guidelines in classifying inmate Prince. While they alleged that Prince's classification was the result of favoritism, it is respectfully submitted that said allegation is legally insufficient in light of the concessions made by Respondents.

DOC has been given wide latitude by the legislature in classifying inmates. It has also been directed to draft guidelines for the classification of inmates. The following hypothetical demonstrates why Respondents have failed to allege sufficient facts to create liability on the part of DOC.

Let us assume Prince comes before DOC for classification. Pursuant to the guidelines established by DOC, in spite of the fact that Prince is an armed robber/murderer, DOC guidelines permit it to classify Prince to minimum custody. Applying the guidelines, DOC assigns Prince to minimum custody. Is the state liable for any injuries caused by Prince's classification to minimum custody? Obviously not. Clearly, any argument to the contrary stems only from a difference of opinion as to the <u>wisdom</u>

of the guidelines established by DOC, not on any basis which would justify judicial intervention into the executive's decision-making process.

Adding an additonal factor to the hypothetical, let us further assume that Prince is favored by DOC employees. Is judicial intervention now justified, all other factors remaining intact? No, because Prince still meets the guidelines for minimum custody classification, notwithstanding any favoritism.

Consequently, the second amended complaint clearly fails to state a cause of action against DOC and was properly dismissed by the trial court. Respondents failed to allege that Prince did not meet DOC's guidelines for minimum custody, thereby failing to state a cause of action. Accordingly, for purposes of answering the certified question in terms of the facts which give rise to this appeal, one must conclude that the classification of Prince cannot give rise to liability on the part of DOC, at least not based on the allegations which form the second amended complaint.

For the sake of argument, let us assume further that Repondents had alleged a failure on DOC's part to enforce its classification guidelines in classifying Mr. Prince. Would that serve as sufficient justification for judicial intervention by imposition of liability? We would submit not, and that brings us to the answer to the certified question.

It is the Attorney General's position that even if DOC exercises its discretion by not applying its guidelines to a particular classification decision, the conscious decision not to do so requires immunity as well.

In support of our position, we refer this Court to that portion of our initial brief wherein we discussed Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). In Everton, the Second District went to great lengths to demonstrate why a decision by law enforcement not to invoke the criminal process did not subject the sovereign to liability. The holding was premised on the recognition that discretion is necessary for the government to properly exercise its police power in the criminal justice field. If this discretion is judicially affected by requiring strict adherence to rules of law, individualized treatment of an offender would not be possible, which would in turn diminish the prospects of rehabilitation.

This very concern is at stake in prisoner classification decisions. Therefore, DOC must be given immunity when it conciously exercises its discretion to individualize offenders. In some instances, DOC may decide that strict adherence to its guidelines may not serve the purpose of rehabilitating an inmate due to his/her particular circumstances. In a situation such as this, immunity from liability for exercising said discretion is imperative.

The Second District is not alone in determining that certain types of discretionary governmental decision-making should not subject the sovereign to liability when discretion is exercised and rules are not adhered to. In Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981) and Carter v. City of Stuart, 8 F.L.W. 1765 (Fla. 4th DCA 1983), the Court agreed with the Second District and held that he decision of these cities not to enforce valid municipal ordinances was shielded from liability.

The foregoing case law serves as additional authority for the argument which we have made. The judiciary has recognized that even when a governmental entity conciously decides not to adhere to its rules, laws or guidelines, liability is still foreclosed. Applying the case law to the certified question, this Court should find that even if DOC decides not to strictly adhere to its classification guidelines, this decision does not give rise to tort liability.

Only if a prospective claimant can allege tha DOC never exercised its discretion in whether to apply its guidelines will a cause of action exist. At this point, judicial intervention is arguably justified since the four prongs of the Evangelical test cannot be answered affirmatively. However, with regards to the position we advance, a DOC decision not to apply its guidelines does meet the criteria of Evangelical and must be shielded from liability.

CONCLUSION

For the reasons which we have set forth, we ask this Court to reverse the ruling of the lower court and hold that the only exception which would give rise to immunity for prisoner classification decisions is when DOC fails to exercise its discretion in whether to apply its classification guidelines.

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 14th day of October, 1983.

MIGUEL A. OLLIVELLA