O/a 9-5-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,268

DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

IVIA JEAN NEWSOME,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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I

STATEMENT OF THE CASE AND FACTS

We disagree with the petitioner's statement of the case and facts. It is much too sketchy to provide this Court with sufficient background for its decision, and it erroneously states the facts in a light most favorable to the petitioner. We remind the Court that the petitioner obtained a summary final judgment in the trial court. Because of this procedural posture of the case, it is axiomatic that the respondent is entitled to have the evidence viewed in a light most favorable to her position, with all reasonable inferences drawn and all conflicts resolved in her favor here. Because the petitioner has failed to heed this settled rule of appellate review, we must briefly restate the case and facts in the proper light.

In March, 1979, Eddie Dixon, Jr., who had a long history of juvenile offenses, committed two armed robberies in Polk County (R. 80-129).[1/] For those violent crimes, he was sentenced in July, 1979, to concurrent split sentences of five years (two years imprisonment, three years in the Community Control Program) (R. 80-129). After his incarceration in the Hillsborough Correctional Institution, he was involved in numerous violations of prison rules and was an acknowledged "behavior problem" (R. 80-129, 206-07, 216). According to the "Report[s] of Administrative Segregation" contained in his file, two of those incidents occurred while Dixon was on loan to the Department of Transportation (hereinafter DOT) for work details, where he assaulted fellow inmates in October, 1979, and April, 1980 (R. 80-129). Because of these

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1/ Portions of Dixon's Department of Corrections file are in the record at R. 80-129. Because we are uncertain as to the precise order in which each document appears in the original record, we will refer the Court to the entire file when citing to a document in it. We apologize for the inconvenience.

Our sketch of the facts will be brief. If the Court desires elaboration, it is referred to the plaintiff's memorandum at R. 266-94, where the contents of Dixon's file and the testimony elicited in the depositions is summarized in considerable detail.

infractions, Dixon was apparently prohibited from participating in further DOT work details (R. 174, 191). Dixon was placed in administrative confinement for two more infractions on May 20, 1980, and June 9, 1980 (R. 80-129).

Twenty-one days after the June 9, 1980, administrative confinement, and notwithstanding Dixon's background of violence and behavior problems, a classification specialist for the Department of Corrections (hereinafter DOC), Joe Butler, recommended that Dixon's classification be reduced from medium to minimum risk for custody purposes (R. 80-129). Although §945.081, Fla. Stat. (1979), requires the DOC to "adopt regulations for the classification of all offenders" (and that requirement has apparently been in existence since at least 1957), the regulations initially adopted concerning the classification of prisoners by custody status were not being used at the time the recommendation was made (R. 211, 231-32). Dixon's reclassification recommendation was made simply as a matter of "judgment" on the part of the classification specialist (R. 234-35). In addition, although DOC policy required the approval of Mr. Butler's recommendation by two of his superiors, the classification supervisor and the prison superintendent (R. 241-42), Dixon's reclassification recommendation was "approved" by Mr. Butler himself, rather than his supervisor (R. 40-41, 236-37, 241-42). On September 4, 1980, the recommendation was finally approved by the assistant superintendent, not the superintendent, who acknowledged that he rubber-stamped 98% of these recommendations because he relied primarily on his subordinates in the area of reclassifications (R. 40-41, 206, 209-10, 236-37).

Concurrent with his reclassification, Dixon was made eligible for assignment to a DOT work detail once again (R. 47). Notwithstanding §945.081's requirement for written regulations governing such a classification, the DOC had none (R. 211, 231-32). The authority for Dixon's assignment to the DOT is contained in §945.11, Fla. Stat. (1979), which reads as follows:

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> (1) The department is authorized to enter into agreements with such political subdivisions of the state, as defined by s. 1.01(9), and with such agencies and institutions of the state as might, under supervision of employees of the department, use the services of inmates of correctional institutions and camps when it is determined by the department that such services will not be detrimental to the welfare of such inmates or the interests of the state in a program of rehabilitation.
>
> (2) The budget of the department may be reimbursed from the budget of any political subdivision of the state, as defined by s. 1.01(9), state agency, or state institution for the services of inmates and personnel of the department in such amounts as may be determined by agreement between the department and the head of such political subdivision, agency, or institution.

(Emphasis supplied).[2/]

The record contains an agreement between the DOC and the DOT setting forth the various responsibilities of the two State agencies (R. 30). Despite the statutory requirement that prisoners loaned by the DOC to the DOT be "under supervision of the employees of the department [of corrections]", the agreement provides that prisoners loaned to the DOT from the Hillsborough Correctional Institution were to be supervised only by employees of the DOT (R. 37, 54-56, 216).[3/] The agreement prohibits DOT employees from carrying arms, and requires them only to keep prisoners within "sight or sound contact" (R. 31, 34-35, 64-65, 165, 171-73, 204-05, 212-13, 253). In contrast to the educational and training requirements for DOC supervisors--which consisted of 480 hours (or, according to another witness, 160 hours) of initial

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2/ "'Department' means the Department of Corrections". Section 945.01 (2), Fla. Stat. (1979). For ease of reading, and because of this statutory definition, we will simply insert the words "[of corrections]" after the word "department" whenever the statute is quoted in this brief.

3/ The agreement does provide for DOC supervision of 80 DOT work details involving prisoners from other DOC institutions. Curiously, according to the DOC employee responsible for the agreement, the DOT decided which work details would be supervised by DOC personnel and which would be supervised solely by DOT personnel (R. 52-56). Even more curiously, the DOC employee responsible for the agreement had no idea what criteria were utilized to determine which agency would supervise which work detail (R. 55-56).

training, and annual refresher training of 80 hours (R. 76, 214-15)--DOT employees received one DOC briefing of less than three hours (two years prior to the incident in suit) concerning their delegated responsibility of supervision over loaned prisoners (R. 163, 171-72, 189, 200, 215).

The DOC had no policy whatsoever concerning which prisoners should and should not be released to work details; the matter was simply left to each correctional institute to decide (R. 211). And, although it was the Hillsborough Correctional Institution's unwritten policy (or "preference", as the DOC would have it in its brief) not to allow prisoners who had committed crimes of violence, or who had been behavioral problems, to be released to DOT work details (R. 59-60, 217, 240, 243), Dixon was loaned to the DOT on September 11, 1980 (R. 43). On the first day of his return to the DOT (R. 43), he was assigned to a small work detail (consisting of three prisoners, two DOT personnel, and one or two transport drivers) to remove appliances and other heavy items from some apartment buildings which the DOT had purchased to remove for a proposed expressway (R. 43, 156-57, 175-76, 252). Some of the apartments were still occupied by their residents, who were in the process of moving out of them (R. 158, 186, 252, 259-60). The DOT supervisor in charge testified that it was "impossible" to keep the DOC prisoners within "sight and sound" (R. 167-68, 177-78), and the DOT admitted precisely that in an affidavit filed below (R. 44).

Consistent with this admission, the record also reflects that escapes from DOT work details had occurred in the past and were predictable in the future (R. 44, 73-74, 240). Dixon's own "classification specialist" conceded, in fact, that "[a]ny time you send a person out of the fence, it's [i.e., escape is] a risk" (R. 240). Moreover, a DOC report itself acknowledges the risk of escape in precisely the circumstances presented in the instant case:

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> Because the Legislature elected not to provide funds requested for staff to supervise inmate road crews, such work details are under control of D.O.T. staff. Under this highly undesirable situation, inmates have been abandoned and have had to call the institution to be picked up from work sites. Inmates have been allowed to become intoxicated. Inmates have been allowed to escape.

(R. 73-74).[4/]

Dixon disappeared during (or near the end of) the work detail's lunch break (R. 166, 193-94, 200-01, 253, 258-60). After the lunch break, some members of the work detail began searching the apartments for him (R. 183-85, 194, 254-55). He was found shortly thereafter in the apartment of Ivia Jean Newsome (less than 100 yards from the site of the lunch break), after he had cut, battered, and raped her (R. 185-87, 198-99, 203-04, 255-57).

Ms. Newsome thereafter filed suit against the DOT and the DOC, seeking damages for their negligence in failing to supervise Dixon (R. 1). The complaint alleged that Dixon was under the joint supervison of both agencies at the time of the rape; that the supervision of both agencies was negligent; that the sexual assault was foreseeable under the circumstances; that the negligence of both agencies caused compensable damage; and that the conditions precedent to bringing suit against the two State agencies had been satisfied (R. 1). The DOC and the DOT answered. The answers denied liability; asserted that Dixon was under the supervision of the DOT only; and asserted that the DOC is immune from suit because "[t]he decision to place Eddie Dixon on Work Release was a planning level function" (R. 18, 21).

Both defendants thereafter moved for summary judgment (R. 27). The DOC sought summary judgment on three grounds: (1) its decision to loan

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4/ In the event the DOC attempts to rely on this aspect of the record and plead "lack of funds" as a defense here, we remind it in advance that there is a simple, and much more reasonable, alternative to loaning its prisoners out without DOC supervision: don't loan them out at all where funds do not exist to supervise them properly.

Dixon to the DOT was a "planning level" decision, immune from suit; (2) it could not be held liable for DOT's negligent supervision of Dixon; and (3) Dixon's assault on the plaintiff was an unforeseeable, independent intervening act sufficient to break the causal chain between any negligence on its part and the damage sustained by the plaintiff. The DOT sought summary judgment only on the latter ground--that its negligent supervision was not a "proximate cause" of the plaintiff's damage because Dixon's assault was an unforeseeable, independent intervening act. The trial court rejected the third ground, and denied the DOT's motion as a result.[5/] The trial court granted the DOC's motion, however, on the ground that the DOC's alleged negligence involved "planning level" decisions, and that it was immune from suit as a result (R. 318-21). A summary final judgment was entered in the DOC's favor (R.)--and an appeal followed (R. 326).[6/]

The District Court of Appeal, First District, reversed the summary final judgment, holding as follows:

> Section 945.11 is a clear legislative mandate that DOC is responsible for the supervision of inmates assigned to DOT work details such as this. To the extent that DOC relies upon DOT or other agencies to carry out its statutory responsibility of providing adequate supervision of its inmates while on Section 945.11 work details, it does so at its peril. Regardless of whether DOC's reclassification of Dixon from medium to minimum security may properly be regarded as a "discretionary" decision under Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), and its recent progeny, DOC is not entitled to the shield of sovereign immunity in carry-

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5/ Because this ground was rejected below, it is not in issue here. The DOC has raised it indirectly, however, in its contention that there is no evidence from which a jury could find that it knew or should have known of a danger to the public when it assigned Dixon to the "highly undesirable situation" of a DOT-supervised work detail. We will respond to this argument in the appropriate portion of the argument which follows.

6/ The original summary final judgment was apparently misplaced or lost, and was not indexed as a result. The record was supplemented with a copy of the final judgment by motion and order below.

> ing out its statutory operational duty of supervising such inmates whether through its own employees or those of any other agency to whom it purports to delegate such responsibility.

NEWSOME v. DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, 435 So.2d 887, 888-89 (Fla. 1st DCA 1983). Notwithstanding that the DOC had never asserted in the litigation below that the DOT was its "independent contractor", and notwithstanding that the District Court's decision decides only that the DOC was not immune from suit under the doctrine of sovereign immunity, the DOC petitioned this Court for discretionary review, claiming "express and direct conflict" with a decision concerning liability for the negligent acts of an "independent contractor": MASTRANDREA v. J. MANN, INC., 128 So.2d 146 (Fla. 3rd DCA), cert. denied, 133 So.2d 320 (Fla. 1961). This Court voted four to three to accept review.

II
ISSUES PRESENTED FOR REVIEW

We restate the issues presented for review as follows:

> A. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DOC WAS NOT IMMUNE FROM SUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY FOR BREACH OF ITS OPERATIONAL LEVEL DUTY TO SUPERVISE INMATES LOANED TO THE DOT.

If the District Court's conclusion is upheld, the Court need not reach the additional issue presented here. If the Court quashes the District Court's decision, however, there is a further issue presented by the pleadings and the evidence which was not resolved by the District Court below. The Court may either remand to the District Court for resolution of this additional issue, or decide it itself:

> B. WHETHER, EVEN IF THE DOC WERE FREE TO DELEGATE ITS STATUTORY DUTY OF SUPERVISION TO THE DOT COMPLETELY AND WITHOUT RECOURSE, THE DOC WAS NEVERTHELESS GUILTY OF OPERATIONAL LEVEL NEGLIGENCE IN ITS ASSIGNMENT OF DIXON TO THE DOT.

III
ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DOC WAS NOT IMMUNE FROM SUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY FOR BREACH OF ITS OPERATIONAL LEVEL DUTY TO SUPERVISE INMATES LOANED TO THE DOT.

The facts in this case and the legal conclusion reached by the trial court are, to be frank, frightening. Although required by Act of the legislature (signed into law by the head of the executive branch) to have a set of written regulations governing classification of prisoners, the DOC had none. Its employee simply exercised his "judgment" in reclassifying Dixon and recommending that he be allowed out of custody, and then he approved his own recommendation. Although required by Act of the legislature (signed into law by the head of the executive branch) to loan prisoners to other departments only "under supervision of employees of the [DOC]", the DOC loaned Dixon to the DOT without providing any DOC supervisors to supervise him. It simply abdicated that statutory responsibility to others who had no training whatsoever for that task. Although required by order of the judicial branch to incarcerate Dixon for a minimum of two years to protect society from his violent and destructive nature, the DOC simply turned him loose to roam in persons' homes with instructions to its delegee simply to watch him, even though it knew that watching him at all times was impossible, and that it was predictable that he might escape.

Dixon then raped an innocent woman--an act which all of those laws and orders were purposefully designed to prevent. A perfectly understandable tort action followed. Notwithstanding that the legislature (with the endorsement of the head of the executive branch) had previously waived the immunity of the State from suit for its negligence, the DOC insisted that, because it was not supervising Dixon at the time of his brutal and loathsome act (in

violation of the law requiring it to supervise him), it was immune from suit. And finally, a judicial officer agreed with the DOC's defense and held that the DOC's violation of the law rendered it immune from suit. We argued below that the law had been stood squarely on its head in this case, and the District Court agreed. We trust that this Court will similarly fulfill its obligation to the people of this State to ensure that its laws are followed by the State itself.

1. The DOC was required by statute to supervise Dixon; its failure to do so was ministerial, not discretionary; and it was therefore not immune from suit.

In COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979), this Court held (notwithstanding the waiver of sovereign immunity contained in §768.28, Fla. Stat.) that some, but not all, "discretionary" actions of governmental entities were immune from suit under the doctrine of sovereign immunity. "Planning level" discretionary acts were held immune, but "operational level" discretionary acts were held actionable. Implicit in COMMERCIAL CARRIER is this Court's conclusion that non-discretionary, or so-called "ministerial", acts of governmental entities are not immune from suit. As a result, it has uniformily been held that governmental entities are not immune from suit where they have breached a duty imposed upon them by statute or regulation. A. L. LEWIS ELEMENTARY SCHOOL v. METROPOLITAN DADE COUNTY, 376 So.2d 32 (Fla. 3rd DCA 1979); HOLLIS v. SCHOOL BOARD OF LEON COUNTY, 384 So.2d 661 (Fla. 1st DCA 1980); JONES v. CITY OF LONGWOOD, 404 So.2d 1083 (Fla. 5th DCA 1981), review denied, 412 So.2d 467 (Fla. 1982); BRYAN v. STATE OF FLORIDA, DEPT. OF BUSINESS REGULATION, 438 So.2d 415 (Fla. 1st DCA 1983). See RUPP v. BRYANT, 417 So.2d 658 (Fla. 1982); STATE OF FLORIDA, DEPARTMENT

OF TRANSPORTATION v. COOPER, 408 So.2d 781 (Fla. 2nd DCA), review dismissed, 413 So.2d 875 (Fla. 1982).[7/]

Although only implicit in COMMERCIAL CARRIER, the same conclusion can be reached by utilizing the "four-question test" of EVANGELICAL UNITED BRETHEREN CHURCH v. STATE, 67 Wash.2d 246, 407 P.2d 440 (1965), as COMMERCIAL CARRIER suggests. The fourth question contained in that test is "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?" 371 So.2d at 1019. Before an act or omission can be judged a "planning level", discretionary act or omission--and thereby be immunized from suit--this question, according to COMMERCIAL CARRIER, must be answered affirmatively. In the instant case, if §945.11, Fla. Stat. (1979), required the DOC to supervise Dixon while he was on loan to the DOT, the DOC clearly had no statutory authority to choose not to supervise him there--and the fourth question in the test clearly must be answered negatively as a result, resulting in no immunity from suit. Put another way, COMMERCIAL CARRIER'S "four-question test" makes it clear that the decision to violate a positive statutory duty is never immune from suit.

7/ See GRIFFIN v. UNITED STATES, 500 F.2d 1059, 1068-69 (3rd Cir. 1974):

> The violation of a non-discretionary command takes what otherwise might be characterized as a "discretionary function" outside the scope of the statutory exception . . . . Liability, in such cases, is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated . . . . [W]e hold only that the Government may be liable where its employees in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements.

Compare CITY OF JACKSONVILLE v. DeRAY, 418 So.2d 1035 (Fla. 1st DCA 1982), review denied, 429 So.2d 5 (Fla. 1983) (although violation of mandatory regulations is "operational", violation of permissive regulations not necessarily "operational"); HARRISON v. ESCAMBIA COUNTY SCHOOL BOARD, 434 So.2d 316 (Fla. 1983) (same).

The DOC does not quarrel with this principle of the law, and has implicitly conceded here that its failure to supervise Dixon is actionable if §945.11, Fla. Stat. (1979), required it to supervise Dixon on the day he raped Ms. Newsome. In our judgment, that is the only issue presented here--whether the statute required the DOC to supervise Dixon. If it did, the DOC clearly breached a statutorily imposed duty--and, as a result, the DOC is clearly not immune from suit. If it did not, then the DOC breached no duty--and, because there can be no liability absent the breach of a duty, the DOC cannot be liable to Ms. Newsome (whether it is immune from suit or not). The propriety of the District Court's conclusion in this case must therefore stand or fall solely upon the propriety of its reading of §945.11, Fla. Stat. (1979).[8/] The DOC contends that §945.11 does not require it to supervise inmates on loan to the DOT. We, like the District Court below, disagree.

The DOC did have a statutory duty to supervise Dixon directly on September 11, 1980. First, §944.09(1), Fla. Stat. (1979), provides in unambiguous terms that "[a]ll persons committed to the department shall be supervised by it".[9/] Similarly, §945.04, Fla. Stat. (1979), which defines the "general function" of the DOC, states as follows:

> The Department of Corrections shall be responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all buildings, grounds, property of, and matters connected with, the correctional system.

And finally (as we noted previously at page 3, supra), although §945.11(1), Fla. Stat. (1979), authorizes the DOC to loan inmates to the DOT, the unam-

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8/ It is for this reason that we think the DOC's "independent contractor" argument is irrelevant here, and that no "express and direct conflict" exists with MASTRANDREA, supra, as a result. Although the DOC has woven its argument concerning MASTRANDREA into its argument on the issue of immunity, we think it will be more fruitful to separate the arguments. We will therefore ignore MASTRANDREA for the moment, and address it separately in the next subsection of this argument.

9/ "'Department' means the Department of Corrections." Section 944.02(2), Fla. Stat. (1979).

biguous language of that statute requires that the loaned prisoners remain "under supervison of employees of the department [of corrections]".

Because §945.11(1) plainly and unambiguously requires the DOC to supervise prisoners loaned to the DOT, it cannot be construed to authorize a total abdication of that duty to the DOT--since plain and unambiguous language in a statute cannot be construed to mean something other than what it plainly says. See STATE v. EGAN, 287 So.2d 1 (Fla. 1973) (and numerous decisions collected at fn. 4); HEREDIA v. ALLSTATE INSURANCE CO., 358 So.2d 1353 (Fla. 1978); REINO v. STATE, 352 So.2d 853 (Fla. 1977); FLORIDA REAL ESTATE COMMISSION v. McGREGOR, 268 So.2d 529 (Fla. 1972); VAN PELT v. HILLIARD, 75 Fla. 792, 78 So. 693 (1918).10/

10/ This settled principle also renders irrelevant that the DOC has "construed" (or, more accurately we think, ignored) the statute otherwise in the past--since an agency's "construction" of a statute is entitled to no weight where it is contrary to the plain language of the statute:

> It is true that a regulatory agency's construction of a statute the agency is assigned to enforce is entitled to considerable weight. . . . However, when the language of a statute is plain and its meaning clear, resort to this or any other rule of statutory construction is unnecessary.

KIMBRELL v. GREAT AMERICAN INSURANCE CO., 420 So.2d 1086, 1088 (Fla. 1982). Accord, SOUTHEASTERN UTILITES SERVICE CO. v. REDDING, 131 So.2d 1 (Fla. 1961).

It is also worth noting that an agency's "construction" of a statute would appear to be relevant only to statutes which an agency is "assigned to enforce". When, as in the instant case, a statute simply defines an agency's responsibilities, rather than assigning it responsibility to administer and enforce a more general statutory scheme, it seems to us that it is for the judiciary to decide the meaning of the statute, and the agency's construction of it is simply irrelevant.

Finally, reading between the lines of the DOC's brief, it seems to us that the DOC has not actually construed the statute to allow total abdication of its supervisory duty to the DOT. What the DOC has done is consistently dragged its feet in effecting the transition between DOT supervision and DOC supervision required by the 1957 statutes organizing the DOC. This reading of the DOC's position is confirmed by the quotation at p. 5, supra, which indicates that the sole reason DOC employees do not supervise DOT work details is that the DOC does not have the money to do so. The answer to that, of course, is (as noted previously) not to loan its prisoners where no money is available to supervise them.

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Even if this Court were free to "construe" §945.11(1) because of some perceived "ambiguity" in it, it is clear that the legislature did not intend to allow the DOC to abdicate its duty of supervision totally to inexpert hands for at least four reasons. In the first place, the legislature knows how to authorize delegation of the duty to supervise with plain and unambiguous language when it intends to do so--as evidenced, for example, by §958.08, Fla. Stat. (1979): "Community control programs shall be supervised by the Department [of Corrections] or other public or private agencies designated by the Department . . .". The fact that similar language does not appear in §945.11(1) is convincing evidence that delegation of the duty to supervise was not intended there. Secondly, and more importantly, it is inconceivable that the legislature would have authorized the DOC to release its prisoners (confined from society for the violent propensities they have directed against society) to anyone not specially trained and fully qualified to deal with them, except under the watchful eye of trained, professional correctional officers--which, incidentally, is precisely what the plain language of §945.11(1) requires.

Third, it is clear that budget constraints were not meant to justify a loan of prisoners without DOC supervision (which is the only arguable "justification" we can think of for the DOC's abdication of its duty in this case)--because subsection (2) of §945.11 provides that the borrowing agency is to reimburse the DOC "for the services of . . . personnel of the department". And, of course, even if the DOT had no money to reimburse the DOC, the simple way to comply with the statute in that situation is not to loan out prisoners where no DOC supervision is available. Fourth, and finally, in the only decision previously construing the statute, the District Court of Appeal, First District, held (albeit in a different context) that prisoners loaned to other State agencies under authority of §945.11(1) remain under DOC super-

vision and control, notwithstanding that they are loaned temporarily to another agency: "A cursory reading of Section 945.11 reveals the legislative intent that inmates shall remain under supervision of the DOC even while "on loan" to another agency". STATE, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES v. O'NEAL, 400 So.2d 28, 29 (Fla. 1st DCA 1981). We take it, then, that the DOC is required by law to supervise its prisoners at all times, whether they are locked safely away in a correctional institution or roaming around removing appliances from persons' homes.

Notwithstanding the plain and unambiguous language of §945.11, Fla. Stat. (1979), the DOC argues here that the words "under supervision of employees of the department [of corrections]" can be construed to mean "under supervision of employees of the Department of Transportation". For this curious proposition, it first relies upon STATE DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES v. O'NEAL, 400 So.2d 28 (Fla. 1st DCA 1981)--which, as noted above, holds that "inmates shall remain under supervision of the DOC even while 'on loan'." In our judgment, the question presented and decided in O'NEAL was altogether different than the question presented here, and the decision simply does not support the DOC's reading of it. In O'NEAL, the DOC had loaned an inmate to the Department of Health and Rehabilitative Services (HRS) under a contract similar to the one made with the DOT in this case. The inmate was injured and sought workers' compensation benefits, claiming that he was an "employee" of the HRS because he was under the direct supervision of HRS personnel. The deputy commissioner found as a fact that the DOC provided no direct supervision over the inmate, and that the inmate's supervision was provided solely by the HRS--and he held that the inmate was therefore an "employee" of the HRS for purposes of the Workers' Compensation Act.

The District Court disagreed. Although it agreed that the District Court's factual finding--that the inmate was directly supervised only by HRS personnel--was supported by the record, it noted that §945.11 required considerably more:

> A cursory reading of §945.11 reveals the legislative intent that inmates shall remain under supervision of the DOC even while "on loan" to another agency.

400 So.2d at 29. The District Court also squarely rejected the inmate's contention that, "because no DOC employee directly supervised [his] work at W. T. Edwards", §945.11 was inapplicable--and it held in no uncertain terms that §945.11's requirement of supervision meant that the inmate remained under the control of the DOC and therefore could not be considered an "employee" of the HRS for workers' compensation purposes.

The conclusion reached in O'NEAL is fully consistent with our reading of §945.11 here. Unfortunately, there are two sentences in the District Court's opinion which create a modicum of ambiguity upon which the DOC has attempted to capitalize here. Those two sentences read as follows:

> The record establishes that the employees of the DOC at the Tampa Correctional Center maintained overall administrative supervision over its inmates. We feel that such supervision meets the requirements of Section 945.11.

400 So.2d at 29. From these sentences, the DOC argues that the First District has held that §945.11 requires only administrative supervision of inmates on loan, not direct supervision. We must respectfully disagree with this reading of O'NEAL. Mr. O'Neal did not escape from the HRS and rape a member of the public, so the issue of DOC's ultimate responsibility for its determination to supervise Mr. O'Neal only "administratively", leaving his direct supervision to the HRS, was neither implicated, discussed, nor resolved in O'NEAL--and nowhere in O'NEAL did the District Court approve the DOC's decision to delegate direct supervision over Mr. O'Neal to the HRS; it merely noted that

the DOC had done so--and then held that this decision did not make Mr. O'Neal an "employee" of the HRS for workers' compensation purposes. At best, the two sentences upon which the DOC relies are dictum of the first order, and it is perfectly clear from the First District's decision in the instant case that the First District has rejected the DOC's reading of O'NEAL in the context presented here. For all of these reasons, we think O'NEAL is no authority for the DOC's position here.[11/]

As additional "authority" for its peculiar reading of §945.11, the DOC musters a number of ancient statutes, some not-so-ancient statutes, and some obscure language from two appropriations bills--all of which demonstrate only that the transition from DOT supervision (once authorized, at least until 1957) to the DOC supervision required by §945.11 after 1957 has taken the DOC an inordinately (and inexcusably) long time--22 years, or nearly a quarter of a century, from Ms. Newsome's perspective. None of this has any bearing on the meaning of the plain language of §945.11, however. All that it demonstrates is that the DOC has not been complying with the statute, and that the legislature has not held its feet to the fire.

We insist, however, that the continuing violation of a statute without being called to account is simply not a legitimate excuse for the violation itself, once called to account. Section 945.11 allowed the DOC to loan Mr. Dixon to the DOT--but, plainly and unambiguously, only under the supervision of DOC employees. The legislature's apparent one-time acquiescence in the 1979 budget to the DOC's violation of the statute does not change the plain language of the statute--and this Court is clearly obligated to enforce the plain language of the statute, whether the budget committee of the legislature has seen fit to insist upon its compliance or not. The District

11/ Even if it were, of course, this Court is free from its vantage point as a superior appellate court to disagree with it.

Court recognized its obligation to enforce the plain language of the statute below, and we trust that this Court will follow suit.

The DOC has also noted that §945.11 was amended and renumbered in 1983, to eliminate the requirement that inmates loaned by the DOC be supervised by DOC personnel, and to authorize expressly the delegation of supervision to the contracting agency under rules promulgated by the DOC. Ch. 83-175, Laws of Florida; §946.40, Fla. Stat. (1983). Although the DOC does not assert that the amended statute is relevant here (and cannot make such an assertion, since Ms. Newsome was raped in 1979, at a time when the statute required supervision by DOC personnel), it notes the existence of the amendment anyway, as if that might somehow inform the "legislative intent" behind former §945.11. If the amendment had been enacted in response to the District Court's decision, the DOC might have an argument here that the legislature meant all along that supervision of loaned inmates could properly be delegated, and that a clarifying amendment was necessary to overrule the District Court's construction of the statute. The DOC can make no such argument, however, because the amendment became law in June, 1983--before the District Court's decision was rendered in this case.[12/] The amendment therefore fully supports our reading of §945.11--since, if the legislature had intended that supervision of loaned inmates could be delegated under §945.11, there would have been no reason for the legislature to change the statute to state otherwise. We think the plain language of §945.11 speaks plainly enough for itself, but if there is any doubt on that score, the legislature's determination to change the statute in 1983 certainly should resolve that doubt in our favor here.

Finally, the DOC contends that §945.11 is actually irrelevant here, since, according to the DOC, it had authority to assign Dixon to a DOT supervised

12/ The District Court's decision was filed on July 13, 1983.

work crew under §958.09(4), Fla. Stat. (1979). This attempted finesse of the issue here deserves no more than a brief response, because it is undisputed on the record that Mr. Dixon was loaned to the DOT under a contract drawn pursuant to §945.11, not under a contract with a "public . . . agency for the confinement or community supervision of youthful offenders . . .", as §958.09(4) allows. In fact, because Dixon had been sentenced to two years imprisonment, and was not yet eligible for assignment to the community control program, any attempt by the DOC to assign him to "community supervision" would have been illegal. We therefore take it that the DOC's final contention is both irrelevant and wrong.

In sum, §945.11, Fla. Stat. (1979), plainly and unambiguously allows the DOT to "use the services" of DOC's prisoners "under supervision of employees of the department [of corrections]". There is simply no way, as the District Court held, that this language can be read to mean that the DOT may "use the services" of DOC's prisoners "under supervision of employees of the DOT". The DOC indisputably violated the plain language of the statute in the instant case; its omission was ministerial; and its negligent failure to supervise Dixon was, as a result, not an omission immune from suit under the "planning level" exception to the state's recent waiver of sovereign immunity. The failure to provide proper (and required) supervision over a dangerous criminal entrusted to officials of the State is clearly actionable at the "operational level" under §768.28, Fla. Stat.--as the State, in fact, conceded with respect to the DOT below--and the District Court's determination that the DOC was not immune from suit on the facts in this case was clearly correct as a result. See WHITE v. PALM BEACH COUNTY, 404 So.2d 123 (Fla. 4th DCA 1981). Cf. RUPP v. BRYANT, 417 So.2d 658 (Fla. 1982) (duty imposed by regulation upon school officials to supervise high school students is ministerial, not discretionary, and negligent supervision is therefore not immune from suit).

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2. MASTRANDREA v. J. MANN, INC., 128 So.2d 146 (Fla. 3rd DCA), cert. denied, 133 So.2d 320 (Fla. 1961), is irrelevant here, and the District Court's decision is not in express and direct conflict with it.

Although the DOC never claimed below that the DOT was its "independent contractor", it now urges here that it had no ability to "control" the DOT's supervision of its inmates, arranged by contract; that the DOT was therefore its "independent contractor"; that it therefore cannot be held liable for the DOT's negligent supervision of Dixon; and that no exception to the general rule of non-liability for the negligent acts of an "independent contractor" arises from §945.11's requirement that inmates on loan to the DOT be supervised by DOC personnel. We disagree with each and every step of the DOC's newly-raised argument.

In the first place, if we are correct that §945.11 means what it says, it is simply impossible that the DOT can be an "independent contractor", within the legal meaning of that term. An "independent contractor" is one who is hired by another to perform a specific function, who is accountable to the other only for the result of his work, and over whom the other has no power to control the manner and means by which the work is accomplished. See, e. g., MAGARIAN v. SOUTHERN FRUIT DISTRIBUTORS, 146 Fla. 773, 1 So.2d 88 (1941); PETERSON v. HIGHLAND CRATE CO-OP, 156 Fla. 539, 23 So.2d 716 (1945). See generally, 2 Fla. Jur.2d, Agency & Employment, §§106-08 (and numerous decisions cited therein). In our judgment, it would strain the notion of a "government agency" beyond its breaking point if this Court were to hold that an executive-branch agency, charged by statute with certain duties unique to its area of expertise, is free to hire another agency with no such expertise as an "independent contractor", with no right to control the manner in which that agency discharges the first agency's statutory duties. In a nutshell, however, that is what the DOC has asked this Court

to do. If this Court accepts that peculiar invitation, it will have opened the door to allowing the DOT to hire the Department of Banking and Finance as the only accountable overseer of the State's roads, the DOC to hire the Department of Education to staff its prisons, and the like. We trust that this Court will be quick to recognize that the concept of an "independent contractor" simply has no place in the context of the discharge of an executive agency's statutory duties.

In this case, the legislature has given the DOT no authority to supervise the State's prisoners. Instead, the DOC has been charged by statute with a duty of supervision over its loaned inmates, and it therefore has statutory authority and power (indeed, it is subject to a statutory directive) to control the manner and means by which the DOT supervises its inmates.[13/] The DOC cannot relinquish that authority to the DOT without violating the statute. Put another way, the DOT can be an "independent contractor" in this case only if the mandate of the statute is completely ignored. Neither the DOC nor this Court may ignore the statute, however--and, in our judgment, because of the statute, the DOC and the DOT occupy a principal-agent relationship on the facts in this case, not a contractor-independent contractor relationship. It is axiomatic, of course, that the DOC is liable for the DOT's negligence if a principal-agent relationship exists between them. See, e. g., STUYVESANT CORP. v. STAHL, 62 So.2d 18 (Fla. 1953); MAULE INDUSTRIES, INC. v. MESSANA, 62 So.2d 737 (Fla. 1953); PEAIRS v. FLORIDA PUBLISHING CO., 132 So.2d 561 (Fla. 1st DCA 1961).

13/ This observation is applicable even to the recent amendment to §945.11. Although §946.40, Fla. Stat. (1983), now authorizes DOT supervision of DOC work crews, the authorization is qualified by a requirement that the DOT provide "proper supervision pursuant to the rules of the Department of Corrections". If the DOT must comply with the rules of the DOC, the DOC clearly has control over the "manner and means" by which its loaned inmates are supervised--and the DOT therefore cannot be an "independent contractor" even under the new statute.

Because §945.11 gives the DOC power to control the manner and means of the DOT's supervision of loaned inmates, the DOT cannot be an "independent contractor". If the DOT is not an "independent contractor", then MASTRANDREA is clearly irrelevant here and the Court need read no further, because MASTRANDREA deals only with the liability of an employer for the negligence of an "independent contractor". Even if we assume arguendo that the DOT can be an "independent contractor", however, the MASTRANDREA exception to the general rule of non-liability for the negligence of an "independent contractor" clearly applies. (Indeed, the MASTRANDREA exception appears to be the twin sister of the argument which we made immediately above).

The issue in MASTRANDREA was whether a general contractor could be found liable in a personal injury action for its independent masonry contractor's negligence, which was evidenced by violation of a local ordinance regulating the height of materials stacked on a construction site. The ordinance itself did not impose any direct obligation upon the general contractor to stack the materials; it simply regulated the height of materials stacked on the construction site. The building permit, however, required the general contractor to comply with the Building Code. The general contractor argued that it could not be held liable for the negligence of its independent contractor. The District Court disagreed, and held that statutory duties were "non-delegable":

> . . . As a general rule, if a statute or municipal ordinance requires one to do a certain thing or to take certain precautions for the protection of persons on or near his property, he cannot delegate such duty to an independent contractor and be released from liability in case the contractor fails to perform it. In order that the employer may be charged with liability, however, the terms of the statute or ordinance in question must be of such a tenor as to subject him to a definite obligation . . . .

128 So.2d at 148.

This holding is in accord with the universal rule, set forth in the Restatement (Second) of Torts, §424, as follows:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

See, in addition, BIALKOWICZ v. PAN AMERICAN CONDOMINIUM NO. 3, INC., 215 So.2d 767 (Fla. 3rd DCA 1968), cert. denied, 222 So.2d 751 (Fla. 1969). The same rule applies where one has assumed a contractual duty. See MILLS v. KRAUSS, 114 So.2d 817 (Fla. 2nd DCA 1959), cert. denied, 119 So.2d 293 (Fla. 1960); MUSSELMAN STEEL FABRICATORS, INC. v. CHANNELL, 208 So.2d 639 (Fla. 2nd DCA 1968), rev'd on other grounds, 224 So.2d 320 (Fla. 1969).

In the instant case, §945.11 requires in plain and unambiguous language that inmates loaned to the DOT be "under supervision of the employees of the department [of corrections]", and it therefore imposes a "definite obligation" upon the DOC to supervise its inmates.[14/] In fact, it imposes a far more definite obligation than the statute involved in MASTRANDREA, because the statute involved in MASTRANDREA imposed only a general duty concerning the stacking of construction materials, without mentioning upon whom that duty devolved. When the MASTRANDREA rule is applied to the facts in this case, the result is that the DOC "cannot delegate such duty [of supervision]

14/ In its jurisdictional brief, the DOC substituted the phrase "direct obligation" for MASTRANDREA's phrase, "definite obligation", in an apparent effort to influence the Court's vote. The tactic was clever (and successful, in light of the 4 to 3 vote), since the notions of "direct obligation" and "no duty to directly supervise" are more easily contrasted. We called the DOC to account for this unwarranted substitution in our responsive brief, however, and the DOC has avoided the unwarranted substitution in its brief on the merits. If the phrase "direct obligation" should appear in the DOC's reply brief, we ask the Court to remember that MASTRANDREA makes no use of that phrase.

to an independent contractor [the DOT] and be released from liability in case the contractor fails to perform it". 128 So.2d at 148.

That is precisely what the District Court held below:

> Section 945.11 is a clear legislative mandate that DOC is responsible for the supervision of inmates assigned to DOT work details such as this. To the extent that DOC relies upon DOT or other agencies to carry out its statutory responsibility of providing adequate supervision of its inmates while on §945.11 work details, it does so at its peril . . . . DOC is not entitled to the shield of sovereign immunity in carrying out its statutory operational duty of supervising such inmates whether through its own employees of those of any other agency to whom it purports to delegate such responsibility.

435 So.2d at 888-89. In short, even if the DOT could be considered an "independent contractor" on the facts in this case, the District Court's decision is perfectly consistent with §424 of the Restatement (Second) of Torts, and perfectly consistent with the adoption of §424 as the law in Florida by MASTRANDREA.

In the final analysis, we think the DOC's argument here rests upon a misreading of both the decision sought to be reviewed and MASTRANDREA. If we understand the DOC's argument correctly, the DOC contends that the District Court held in the instant case that §945.11 allows it to delegate its supervisory authority to the DOT. Having read the District Court's opinion thusly, the DOC argues that the decision therefore finds that §945.11 does not impose a "definite obligation" upon it to supervise its inmates. To complete its syllogism, it then argues that the MASTRANDREA exception therefore does not apply. We must respectfully disagree with the DOC's reading of both cases.

A fair reading of the text of the District Court's decision in the instant case is that §945.11 does not authorize the DOC to delegate its statutory duty to the DOT. There is arguably some ambiguity on this point created by footnote 2 of the decision, in which the Court acknowledged that it had held

in another case that §945.11 did not require "that DOC employees 'directly supervise' the inmates while at the work detail". 435 So.2d at 888 n. 2.[15/] Fairly read, however, both the remainder of the footnote and the text accompanying it reject the holding in the other case, and hold that the DOC must directly supervise loaned inmates. But even if footnote 2 of the decision is read to mean that the DOC may delegate its supervisory duty to the DOT, it does not follow that the MASTRANDREA exception does not apply. What the DOC misunderstands is that a "non-delegable duty" is not a duty which cannot be delegated to another by contract; a "non-delegable duty" is one which, if breached by one to whom it has been delegated by contract, results in liability to the party delegating it to the other:

> This duty is non-delegable. . . . That is, the performance of the contract may be delegated to another, but this delegation does not relieve the contractor of the duty to act, or of his duty to act with due care.

MUSSELMAN STEEL FABRICATORS, INC. v. CHANNELL, 208 So.2d 639, 643 (Fla. 2nd DCA 1968), rev'd on other grounds, 224 So.2d 320 (Fla. 1969).

The concept of "non-delegable duty" is explained similarly in the Introductory Note to Topic 2 of Chapter 15 of the Restatement (Second) of Torts as follows:

> The rules stated in the following §§416-429, unlike those stated in the preceding §§410-415, do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for

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15/ The other case referred to in the footnote is STATE, DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES v. O'NEAL, 400 So.2d 28 (Fla. 1st DCA 1981). As we have argued previously, we do not believe that O'NEAL contains the "holding" which the District Court purported to find in it in footnote 2. Be that as it may, for purposes of this particular argument, we will accept the District Court's observation that O'NEAL actually "holds" that §945.11 does not require the DOC to "directly supervise" inmates on loan to the DOT.

> the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.
>
> The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted. . . .

Because MASTRANDREA follows §424 of the Restatement (Second) of Torts, this Introductory Note is an appropriate explanation of the MASTRANDREA exception.

In MASTRANDREA, the Court did not hold that the general contractor could not delegate its statutory duty to stack construction materials in a certain way to a subcontractor; it held merely that the duty was "non-delegable" because imposed by statute, and that the general contractor was therefore vicariously liable as a matter of public policy for the negligence of the subcontractor to whom it had delegated the statutory duty. Because we do not believe the DOT can be an "independent contractor" on the facts in this case, we think this principle of the law is irrelevant here. But if the DOT is an "independent contractor", and if the decision under review authorizes the delegation of the DOC's duty of supervision to the DOT, the decision nevertheless reaches a conclusion perfectly consistent with MASTRANDREA--that the DOC may delegate its supervisory duty to the DOT by contract, but because the duty is imposed by a statute it is "non-delegable" and the DOC is therefore vicariously liable for the negligence of the DOT.

For all of the foregoing reasons, we think MASTRANDREA is irrelevant to the issue presented here--or, if relevant, that the decision under review is consistent with it in every respect. Most respectfully, no express and direct conflict exists between the decision under review and MASTRANDREA, and since that is the only conflict claimed by the DOC, review should be

denied as having been improvidently granted. If this Court chooses to resolve this case on the merits, however, nothing in MASTRANDREA requires that the District Court's straightforward reading of the plain language of §945.11 be quashed--and the decision should therefore be affirmed.

B. EVEN IF THE DOC WERE FREE TO DELEGATE ITS STATUTORY DUTY OF SUPERVISION TO THE DOT COMPLETELY AND WITHOUT RECOURSE, THE DOC WAS NEVERTHELESS GUILTY OF OPERATIONAL LEVEL NEGLIGENCE IN ITS ASSIGNMENT OF DIXON TO THE DOT.

If review is to be denied or the District Court's decision affirmed, the Court need not reach this second, alternative issue. If the District Court's decision is to be quashed, however, an alternative theory of liability was argued in the trial court which was not disposed of by the District Court, and which is therefore still alive in this litigation. At minimum, if the District Court's decision is to be quashed, the case should be remanded to the District Court for determination of the alternative argument which we made there. The Court may choose to decide the issue itself, however, in view of its general jurisdiction to decide all issues in a case, once review has been accepted. As a simple matter of efficiency and economy, we urge the latter course upon this Court if the District Court's decision is to be quashed on the first issue presented here.

We argued below, and we continue to insist here that, even if §945.11 allows the DOC to delegate its supervisory duty completely and without recourse, a material issue of fact nevertheless exists on this record which precludes a finding that the DOC's decision to loan Dixon to the DOT was a "planning level" decision as a matter of law. The record in this case reflects far more than a simple decision to loan Dixon to the DOT.[16/] It reflects that

16/ The record must, of course, be construed in a light most favorable to Ms. Newsome here, in view of the procedural posture of the case. The DOC has construed the record in a light most favorable to it, however. We trust that the Court will pay more attention to this settled rule of appellate review than the DOC has.

the DOC had no regulations regarding the classification of prisoners, notwithstanding a positive statutory mandate requiring the DOC to adopt such regulations.[17/] It reflects that Dixon, who had been convicted of violent crimes and who had been a behavioral problem, was loaned to the DOT notwithstanding an unwritten policy of the lending institution prohibiting the loan of prisoners who fell into either category. It reflects that Dixon's reclassification was effected without the approvals required by DOC policy. It reflects that the DOC gave only the most cursory "training" to the DOT employees to whom it delegated its statutory duty of supervision. And it reflects that all of this was done with full knowledge that it was impossible for the DOT to supervise the borrowed prisoners, and that escapes were perfectly predictable under the circumstances.

17/ The mandate is contained in §945.081, Fla. Stat. (1979), which requires the DOC to adopt "regulations for the classification of all offenders according to age, sex, and such other factors as it may deem advisable . . .". The record reveals that the DOC classifies its prisoners in three classes of custody: maximum, medium, and minimum--and that it classifies prisoners as eligible and ineligible for release to DOT work details. Having classified its prisoners in those fashions, the statute requires that the DOC adopt regulations governing those classifications.

The record reflects that the written regulations in existence concerning custody reclassifications were not used (R. 231-32), and that there were no written regulations governing the classification of prisoners as eligible for assignment to the DOT (R. 211, 235). Both classifications are relevent here because the record fully supports an inference that Dixon's reclassification from medium to minimum custody played a significant part in the DOC's ultimate decision to reassign Dixon to the DOT.

As noted previously, Dixon had been previously assigned to the DOT while in a medium custody status. After twice assaulting fellow inmates, his assignment to the DOT was revoked. It was not until his custody status was reduced from medium to minimum thereafter that he was reconsidered for assignment to the DOT. Mr. Butler admitted on the record that a prisoner's custody classification was one of the factors considered in determining whether an assignment to the DOT was possible (R. 234)--and the DOC made both decisions, reducing Dixon's custody status and assigning him to the DOT, at about the same time (R. 47, 236-38). The record therefore fully supports an inference that Mr. Butler's decision to reduce Dixon's custody status (made without following the written guidelines in existence, and therefore made without any specific guidelines at all), played a significant part in Dixon's ultimate release to the DOT (a decision which was also made without any specific guidelines).

In short, the record reflects (1) that the DOC's decision to release Dixon to the DOT was undeniably sloppy by any set of standards--including the DOC's own set of unwritten standards, such as they were; and (2) that the decision to release him to the DOT undeniably created a "known dangerous condition" which the DOT did nothing to rectify.[18/] Because both of these conclusions are fully supported by the facts in this case, the trial court's determination that all of the DOC's actions in this case were "planning level" acts as a matter of law was clearly erroneous.

With respect to the first conclusion supported by the record, we concede that, in the abstract at least, a decision to loan Dixon to the DOT could arguably be a "planning level" decision, immune from suit. See BERRY v. STATE, 400 So.2d 80 (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981). But that abstract proposition gives way in the face of the concrete facts in this record, which demonstrate, at the very least, that a jury question is presented concerning whether the DOC made a considered decision in conformity with its own unwritten standards, or whether (as the evidence tends to show) its decision was sloppily made in violation of those unwritten standards (not to mention the fact that the decision was made in violation of a statute requiring that such decisions be made according to written regulations). Given the existence of that question, the summary judgment was erroneous, according to BELLAVANCE v. STATE, 390 So.2d 422 (Fla. 1st DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981).

In BELLAVANCE, the State was charged with negligently releasing a mental patient before he was sufficiently treated and cured, resulting in inju-

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18/ The record contains a number of additional "factual issues" relevant to the DOC's liability which we need not belabor here to make our point. They are listed in the plaintiff's extensive "Memorandum in Opposition to Defendants' Motion for Summary Judgment" at R. 266, 282-84--and the list is preceded by a thorough analysis of the facts supporting each item in the list. In the interest of economy, we simply incorporate that memorandum here.

ries to the minor plaintiff. The trial court entered summary final judgment in favor of the State on the ground that its decision to release the mental patient was a "planning level" decision, immune from suit. The District Court reversed, in language which is peculiarly appropriate to the instant case:

> . . . [W]hile the State's standards for releasing mental patients may be discretionary and thus immune from review, the subsequent ministerial action of releasing Riccardelli pursuant to those standards does not achieve the status of a "basic policy evaluation." Accordingly, a further inquiry must be made into additional factors and considerations: i. e., "the importance to the public of the function involved, the extent to which government's liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."
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> The sparse record before this Court . . . indicates that Ricardelli had a long and troubled history of fights and other violent acts while in prison. During the approximately two months of his stay at the Northeast Florida State Hospital, he attempted to escape on two occasions. Further, he was released from the Hospital on December 25, 1976, this despite being subject to "homicidal precautions" by the staff as recently as December 10, 1976. These and other factors could reasonably suggest to the judge and jury that the State, by and through its employees, did not render a considered decision in releasing Ricardelli. The State may yet show that it did do so, and the record itself hints of factors in explanation or mitigation of the above. However, such a showing was not made and could not have been made by the State at the summary judgment stage of the trial court's proceedings. [Citation omitted]. On the contrary, such matters are factual issues more suitably governed by appropriate jury instructions than by standards for summary judgment.
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> In sum, the equities of the instant factual situation do not present a compelling justification for the invocation of sovereign immunity. The specific, individual act of releasing Ricardelli simply does not rise to the level of "basic policy decisions" which call for judicial restraint. Further, the State has not demonstrated that the personnel involved, after consciously balancing risks and advantages, made a considered decision in releasing Ricardelli. Therefore, we think that this cause must be heard on its merits.

390 So.2d at 424-25. If BELLAVANCE is the law in this State, the summary final judgment entered in the instant case clearly must be reversed.

The continued vitality of BELLAVANCE is proven by the more recent decision in SMITH v. DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA, 432 So.2d 1338, 1340 (Fla. 1st DCA 1983), in which the District Court reaffirmed BELLAVANCE and held as follows:

> After consideration of these cases, we conclude that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement. The fact that prison officials have some discretion in assignments of inmates does not require immunity. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982).

This conclusion fully supports reversal in the instant case, and a remand for further development of the facts surrounding Dixon's assignment to an "inadequately supervised" DOT work crew. See KIRKLAND v. STATE, 424 So.2d 925 (Fla. 1st DCA 1983).

With respect to the second conclusion supported by the record (that the decision to release Dixon to the DOT created a "known dangerous condition" which the DOC did nothing to rectify) we refer this Court to its recent refinement of COMMERCIAL CARRIER--CITY OF ST. PETERSBURG v. COLLOM, 419 So.2d 1082 (Fla. 1982). In that case, this Court held, in essence, that although an initial governmental decision to act in a certain manner may be immune from suit, if that decision creates a dangerous condition, a subsequent duty arises to "protect the public" from the danger, the breach of which is actionable:

> We hold that when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.
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> . . . .

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> . . . We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a judgmental, planning-level decision. We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly create a trap or a dangerous condition and intentionally fail to warn or protect the users of that improvement from the risk. In our opinion, it is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level.

419 So.2d at 1083, 1086.

In the instant case, even if it is assumed arguendo (and in the abstract) that an initial decision to loan an inmate to the DOT can be a "planning level" decision, the fact nevertheless remains that the record will fully support a jury finding that the DOC knew that Dixon's release from incarceration under the limited and inexpert supervision of the DOT posed a substantial danger to the public, and that it did little or nothing to protect the public from the danger after the initial decision was made.[19/] Although the facts in COLLOM are distinguishable from those in this case, the legal question decided there cannot be distinguished from the legal question presented here. COLLOM, like BELLAVANCE, clearly requires a reversal of the summary final judgment exonerating the DOC from liability for all of its negligent acts and omissions in this case.

The DOC seeks to avoid COLLUM by arguing that there is no evidence in the record that the DOC knew or could have known that Dixon would rape Ms. Newsome. The argument misses the point for at least two significant rea-

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19/ The DOC's knowledge of the danger is contained in one of its own reports (quoted at p. 5, supra), in which it acknowledged that DOT supervision of its inmates had resulted in numerous escapes, and that DOT supervision was a "highly undesirable situation".

sons. First, it was the DOC's burden to conclusively prove lack of foreseeability on its motion for summary judgment, not our burden to prove foreseeability. That showing clearly was not made in this case. See HOLL v. TALCOTT, 191 So.2d 40 (Fla. 1966); WILLS v. SEARS, ROEBUCK & CO., 351 So.2d 29 (Fla. 1977). Nor could such a showing have been made, since foreseeability is ordinarily a question for a finder-of-fact. See STEVENS v. JEFFERSON, 436 So.2d 33 (Fla. 1983); GIBSON v. AVIS RENT-A-CAR SYSTEM, 386 So.2d 520 (Fla. 1980).

More importantly, it is irrelevant that the DOC did not know for certain that Dixon would commit a rape upon Ms. Newsome. Such a showing is not required. In view of Dixon's convictions for armed assault, his prior history of assaults on DOT work details, and the DOC's recognition that escapes from DOT work details were fully foreseeable, the DOC certainly should have known, in the exercise of reasonable care, that Dixon's reassignment to a DOT work detail created a substantial risk that some member of the public might be assaulted if Dixon were not properly supervised. See STATE OF FLORIDA, DEPT. OF TRANSPORTATION v. KENNEDY, 429 So.2d 1210 (Fla. 2nd DCA 1983); SMITH v. DEPARTMENT OF CORRECTIONS, supra, 432 So.2d at 1340: "A jury could reasonably conclude that violence to third parties was a foreseeable consequence of placing Prince in minimum custody".

Foreknowledge of the particular assailant, the precise victim, or the precise nature of the assault, is simply irrelevant to the DOC's potential liability for its negligence. STEVENS v. JEFFERSON, 436 So.2d 33 (Fla. 1983); ALLEN v. BABRAB, INC., 438 So.2d 356 (Fla. 1983); CRISLIP v. HOLLAND, 401 So.2d 1115 (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981); GOODE v. WALT DISNEY WORLD CO., 425 So.2d 1151 (Fla. 5th DCA 1982), review denied, 436 So.2d 101 (Fla. 1983); BRYAN v. STATE OF FLORIDA, DEPT. OF BUSINESS REGULATION, 438 So.2d 415 (Fla. 1st DCA

1983). See SOSA v. COLEMAN, 646 F.2d 991 (5th Cir. 1981). For all of thse reasons, we submit that the DOC was not entitled to a summary final judgment on our alternative theory of liability on the ground that all of its acts and omissions were "planning level" decisions immune from suit.

IV
CONCLUSION

It is respectfully submitted that the decision under review is not in express and direct conflict with MASTRANDREA, and that review should be denied. If review is accepted, the District Court's decision should be affirmed. If the decision is to be quashed, the case should be remanded to the District Court for resolution of the second issue presented here, or alternatively, the second issue should be decided by this Court. If the second issue is reached, we respectfully submit that the summary final judgment entered by the trial court is erroneous for the reasons expressed in our argument, and that the District Court should be directed upon remand to reverse the summary final judgment for those reasons.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of June, 1984, to: PAMELA LUTTON, Assistant Attorney General, Attorney General's Office, Suite 1502, The Capitol, Tallahassee, Fla. 32301, Attorney for Petitioner.

Respectfully submitted,

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