WCCA

047

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 65,523

BARBARA URSIN,

Plaintiff/Petitioner,

vs.

LAW ENFORCEMENT INSURANCE COMPANY, LTD., a foreign corporation; FLORIDA SHERIFFS' SELF-INSURANCE FUND; AUBREY ROGERS, individually and as Sheriff of Collier County, Florida; AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida; and GEORGE SNIDER, individually and as Deputy of Collier County, Florida

Defendants/Respondents.
_____/

BRIEF OF RESPONDENTS FLORIDA SHERIFFS' SELF-INSURANCE FUND, AUBREY ROGERS, AL BEATTY AND GEORGE SNIDER

APPEAL FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

CITATIONS OF AUTHORITY (cont.)

SUMMARY OF ARGUMENT

Argument I

The Circuit Court and the District Court of Appeal, Second District of Florida, should be affirmed for upholding sovereign immunity in the area of discretionary functions. Both of these courts correctly applied the tests of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), to the governmental function of the trustee program. Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), is a far better reasoned analysis of the law applicable to sovereign immunity than is Smith v. Dept. of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983), although the instant case is factually distinguishable from both cases and is dependent upon neither. This case satisfies all of the four tests pronounced in Commercial Carrier.

Argument II

Sovereign immunity should apply to "planning" functions of government. Section 768.28, Florida Statutes, is appropriately subject to judicial interpretation by this Court, and has been properly so interpreted. This Court has carefully analyzed law from foreign jurisdictions and has established standards which should be

followed here. The rules adopted in Commercial Carrier, supra, do not contravene any legislative provisions, but, rather, interpret them.

Argument III

The Petitioner mistakenly places reliance upon Payton v. United States, 679 F.2d 475 (1982), by referring to a panel decision. In fact, the panel was reversed by the full court on rehearing en banc. The full court in Payton ruled that the "decision to release a prisoner on parole is a discretionary function . . ." Id. at 483. Similarly, in Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553, reh. den. 445 U.S. 920, 63 L.Ed.2d 606, 100 S.Ct. 1285 (1980), the Supreme Court of the United States held that judicial review of parole classifications would inhibit the exercise of discretion. The Petitioner's argument would eliminate the entire trustee concept.

ARGUMENT I

THE PRINCIPLES SET FORTH BY THIS COURT IN COMMERCIAL CARRIER, PRECLUDE THE CAUSE OF ACTION AS SET FORTH IN THE COMPLAINT, UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY.

While having considerably altered her arguments, the Petitioner mistakenly presents here the decision of this Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), as supportive of her position. Instead, said decision clearly calls for the imposition of sovereign immunity for the cause of action sought in the Complaint. Commercial Carrier, supra, was thoroughly examined in Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), which also dealt with the issue of the scope of sovereign immunity for the actions of a deputy sheriff acting within the scope of his employment. The Second District Court of Appeal, knowing full well the limitations and principles set forth in Commercial Carrier, supra, applied correctly that case first to Everton, supra, and later to this case in Ursin v. Law Enforcement Insurance Co., Ltd., etc., et al., 450 So.2d 1282 (Fla. 2d DCA 1984).

The Second District Court of Appeal was met with the factual allegations of Petitioner, which presented an appealing scenario for the imposition of liability.

Regardless, that court was not overcome by emotion, but instead logically faced the task of analyzing a most perplexing issue - government immunity. Indeed, as noted in Everton, supra, it seems that sovereign immunity is one of those areas of the legal world which "[S]eems to become more tangled each time the courts attempt to untangle it." Id. at 999.

As in the instant case, it is generally agreed by the courts that immunity exists on two different levels, governmental immunity for the state and its subdivisions and personal immunity for officers and employees of the state and its subdivisions. Each "stands on its own" and is governed by different tests.

As a principle of both case law and state statutes, initially it is widely accepted that immunity for the state must exist for some functions so that the government can govern. As one would expect, the disagreement centers on the breadth of the protective net of immunity. Commercial Carrier, supra, contains two tests for determining which governmental immunity attaches to the state or its political subdivisions. Under these two tests, it is clear that the Respondents are protected by governmental immunity in this case. At the heart of the decision is the policy consideration of whether the extension of immunity vel non for a particular action would hamper the

ability of the government to govern. Thus, this decision must be guided by that consideration. Id. at 1018-1019. In defending this concept of immunity, this Court stated, "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." Id. at 1019. With this statement in mind, this Court proceeded to formulate two touchstones which could be used to decide whether immunity should attach.

The first test is the discretionary function test formulated in Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965). This formula consists of answering a series of four questions directed to the act upon which liability is sought to be imposed. If the answer to each is affirmative, then governmental immunity is found. These four questions are:

(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?

Id. at 445.

Insofar as the Petitioner has conceded, correctly, that the answer to question four is in the affirmative (Brief of Petitioner, as Appellant, filed in District Court of Appeal, Second District, p. 7), the inquiry here will be directed to ascertaining answers to the first three questions.

The first question is whether the challenged act, i.e., making Baumgardt a trustee, involves a basic governmental policy, program or objective. The answer to this question must be an unequivocal "yes". The reason is that the trustee system is an important ingredient in maintaining order and discipline in the county jail.

All persons incarcerated in jails, except pretrial detainees, are criminals and, therefore, all are a risk to society in some form. If Petitioner's contention is correct, there could be no trustee system because all

inmates and prisoners represent a risk to society to some degree. Without some established system of rewarding good behavior, as well as punishing improper behavior in the jail, it would be impossible to maintain order without resulting in the use of force. Thus, the trustee system does involve a basic governmental objective, i.e., the maintenance of order and discipline in the jail. The court in Sands v. Wainwright, 357 F.Supp. 1062, 1078 (M.D. Fla.) vacated on other grounds (5th Cir. 1973), cert. denied 94 S.Ct. 2403 (1974), noted,

> Only a few must control the very many. Therefore, simply in order to maintain control of the prison society generally and of its individual constituents on a day to day basis, it becomes necessary for those entrusted by the state with the custodial function to utilize rewards and punishments.

Thus, it is beyond cavil that the trustee system forms an integral part of the plan for order and discipline in the jail and, if this Court were to open the door to liability, the ability of Respondents to properly perform their functions would be severely impaired. Finally, it is unquestionably true that the decision to make Baumgardt a trustee, and to classify trustees generally, was and is a part of the aforementioned governmental objectives.

The next task facing the Court is deciding whether the act of making Baumgardt a trustee was essential to the attainment of the governmental policy discussed above or whether the decision was a nonessential element of the attainment of the goals of that policy. In Everton, supra, the court noted that allowing police officers the discretion to arrest or not arrest was extremely important in attaining a workable system of law enforcement and that the failure to provide for this discretion by the courts, if they chose to impose liability for the exercise of this discretion, would work a radical change on law enforcement. An equally undesirable result would also occur here if liability were premised on the decisions of the sheriff and his deputies as to who are to become trustees in the jail. Thus, the exercise of discretion as to which persons are named as trustees furthers the goal of encouraging satisfactory conditions in the jail. To foreclose the exercise of this discretion would essentially end the trustee program for all practical purposes.

Lastly, this Court must determine whether the act was dependent upon the exercise of policy evaluation, judgment or expertise by the sheriff and his deputies. Without question, the answer to this inquiry is positive. In Harrison v. Escambia County School Board, 419 So.2d 640 (Fla. 1st DCA 1982), the court was faced with the issue of

whether or not immunity attached to the Board's decision as to the location of school bus stops. That case, which has been cited by the Petitioner in discussing the answer to this question, noted that the location of school bus stops involves the consideration of innumerable factors, e.g., number of stops, the existing bus routes, number of pupils at each stop, etc. As a result, the court held this question would be answered affirmatively in that case. Id. at 643.

Surely, if the location of bus stops involves the exercise of basic policy evaluation, judgment and expertise, then the selection of trustees in the jail entails such considerations. As has been mentioned previously, the trustee system dramatically improves the ability of jailers to control the prison population under their charge. The unhampered discretion to select inmates as trustees is a powerful incentive for the inmates to conform their behavior to that which will make the administration of the jail feasible. Were this Court to allow the imposition of liability in this case, it would result in the curtailment of the trustee program and a concomitant rise in the difficulty of successfully managing the inmate population.

This Court ruled on the issues in Harrison v. Escambia County, 419 So.2d 640 (Fla. 1st DCA 1982),

affirmed 434 So.2d 316 (Fla. 1983), which had been certified to it as being of great public importance. This Court approved the District Court's affirming of the trial court's ruling. The trial court had dismissed the Complaint.

Smith v. D.O.C., 432 So.2d 1338 (Fla. 1st DCA 1983), a First District Court of Appeal case, relied upon by Petitioner, is not totally inconsistent with the decisions of this Court in Commercial Carrier, supra, and Rupp v. Bryant, 417 So.2d 658, S.Ct. Fla. 1982. Additionally, particular circumstances of Smith v. D.O.C. are unusual, which may account for the overreaching of the First District Court of Appeal in its attempt to permit recovery by the plaintiff. A single Department of Corrections employee caused the inmate to be classified and transferred to serve as his "houseboy" in spite of a prior escape record. The multiple escapes and the apparent direct intervention by defendant Reddish in that case conceivably caused the First District Court to produce a strained interpretation of the Florida Supreme Court's holdings. The opinion by Judge Mills was concurred in specially by one judge and dissented to by the third judge. The specially concurring opinion of Judge Ervin in Smith candidly recognizes a conflict with the Second District Court of Appeal, when he states:

> The majority's opinion would seem, however, to conflict with those of the Second District Court of appeal in Everton v. Willard, et al., 426 So.2d 996 (Fla. 2d DCA 1983), and City of Cape Coral v. Duvall, 8 F.L.W. 366 (Fla. 2d DCA January 19, 1983), which absolved certain governmental bodies from any liability to persons injured by intoxicated motorists who, some time before the accidents, had been released by the public employer's law enforcement officers notwithstanding their knowledge of the inebriates' condition.

Smith at 1341.

Judge Thompson, in a well reasoned dissent in Smith, stated at pages 1341 through 1343:

> . . . If there is any governmental sector in which immunity for judgmental decisions must be maintained, it is in our criminal justice and penal systems. Judges place convicted criminals on probation when, in their judgment, it is warranted. . . .
>
> Under the foreseeability test approved by the majority, it is foreseeable that all inmates who escape or are released through official channels will commit a crime again simply because they have previously done so at least once. Under such a foreseeability test, judges and the state could be liable for injury or damage caused by a probationer. The Commission and the state could be liable for injury or damage caused by a parolee. The DOC and the state could be liable for injury or damage caused by an escapee or by an inmate whose confinement status has been changed in accordance with DOC rules and regulations. The majority's forseeability test is simply not applicable to

judgmental decisions such as those outlined above because they are immune from traditional theories of tort liability.

In Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1020 (Fla. 1979), the court said "even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgment governmental functions cannot be the subject of traditional tort liability." Commercial Carrier relied heavily on Evangelical United Brethren v. State, 67 Wash.2d 246, 407 P.2d 440 (1966), involving a claim against the state of Washington by plaintiffs whose buildings had been destroyed by a fire set by an escapee from a state-maintained juvenile correctional facility. The plaintiffs in Evangelical United Brethren alleged the state of Washington was negligent in maintaining an "open program" or minimum security at the facility, in assigning the escapee to the "open program", in assigning the escapee to a particular work detail within the facility, in failing to timely notify local law enforcement agencies of the escape. The Evangelical United Brethren court held the state was immune from liability for its decision to have an "open program" and for the assignment of the escapee to that program. It further held that although the assignment of the escapee to the particular work detail of the facility and the failure to timely notify local law enforcement agencies of the escape did not involve immune conduct, the state was not liable on standard tort principles of lack of foreseeability and causation.

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

"The reason most frequently assigned is that in any organized society there

> must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat of 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). . . . Evangelical United Brethren at 444.
>
> Commercial Carrier commended the four-point test adopted by Evangelical United Brethren to determine those acts or functions which remain immune from tort liability. While this test might appear difficult to apply in some situations, it is easily applied in this case. First, the challenged decision of a reclassification in the prison system necessarily involves the basic governmental program of rehabilitation. Second, the decision to reclassify Prince is essential to the realization of the rehabilitation program and objective. Third, the decision to reclassify Prince required the exercise of basic policy judgment and expertise on the part of the DOC. Fourth, the DOC has the requisite authority and duty to classify or reclassify an inmate's prison status. Accordingly, I disagree with the majority's conclusion that not all of the four can be answered in the affirmative and conclude that the challenged decision is immune from liability.

Judge Thompson's language is both logical and consistent with the opinions of the Second District Court of Appeal.

In summary, the Court should find that the answers to all of the questions posed in Commercial Carrier are in the affirmative, the fourth being conceded by the Petitioner and accordingly hold that the Respondents, in their official capacities, are protected by governmental immunity.

The second prong of analysis presented in Commercial Carrier was the planning versus operational test outlined in Johnson v. State, 69 Cal.2d, 73 Cal. Rptr. 240, 447 P.2d 352 (1968). Under this, governmental immunity attaches to decisions made at the planning level, but not to decisions made at the operational level. Planning level decisions were defined as "[T]hose requiring basic policy decisions. . . ." 371 So.2d 1021. Operational level functions are defined as "[T]hose that implement policy." 371 So.2d 1021 (footnote omitted). While the decision to make Baumgardt a trustee in the instant case may arguably have been an operational decision, it is also true that, as the Second District noted in Everton, supra:

> We believe that merely because an activity is "operational" it should not necessarily be removed from the "category of governmental activity which involves broad policy or planning decisions."

Slip Op. at 12 (citing Commercial Carrier). Accord, City of Cape Coral, supra (arrest-nonarrest decision, although

operational, is proper subject of governmental immunity, citing Everton).

A second point for holding that governmental immunity attaches in the instant case is that this Court, in Commercial Carrier, supra, noted that it was not so much the label of "planning versus operational" that was determinative of the outcome, but rather that the Court wished to avoid the judicial scrutiny of certain coordinate branches of government so as to not violate the doctrine of separation of powers. 371 So.2d at 1022. Clearly, this consideration mandates that governmental immunity attach here because any other decision would involve the Court in spelling out jail policies, something which courts, quite correctly, have been reluctant to do.

Accordingly, using both prongs of analysis, as delineated in Commercial Carrier, this Court must find that immunity attaches to the Respondents in their official capacities.

ARGUMENT II

THE JUDICIAL EXEMPTION TO THE WAIVER OF SOVEREIGN IMMUNITY SHOULD BE UPHELD AND APPLIED TO THOSE ACTIONS OF THE GOVERNMENT LABELED "PLANNING".

Sovereign immunity has its roots in the common law and is premised on logic. A government, to function properly, must be able to govern. It must be able to make policy and, along with that, decisions as to the best system to institute that policy. However, sovereign immunity should not be absolute. In response to this, the Florida Legislature enacted §768.28, Florida Statutes, in 1975. This statute waived sovereign immunity in line with the Federal Torts Claim Act, 28 U.S.C. §§2671-2680(a). Section 768.28, Florida Statutes, was similar to the Federal Torts Claim Act, but lacking in one respect, the broad "discretionary" exemption had been omitted. This exception was broad, perhaps so overly broad that the Legislature foresaw the pitfalls of making it a part of §768.28, Florida Statutes. Thus, it was omitted because no other reasonable alternative was available and, in essence, the area was left open for future development and was intended to be judicially interpreted.

Development came in the form of judicial interpretation by this Court in Commercial Carrier Corp.

v. Indian River County, 371 So.2d 1010 (Fla. 1979). It was apparent that the Legislature had not wished §768.28, Florida Statutes, to be unrestricted. In fact, in Huhn v. Dixie Insurance Co., 453 So.2d 70 (Fla. 5th DCA 1984), a case relied upon substantially by the Petitioner, the court, in an examination of §768.28, F.S., said that it "was intended to waive sovereign immunity for liability for torts on a broad, but qualified, scale." Id. at 73.

The Commercial Carrier, supra, exemption was not presented lightly and this Court examined states similarly situated and borrowed from their law. The Court did not want an all inclusive exemption, one which would in essence make the waiver of §768.28, Florida Statutes, moot. If it had, it would quite easily have adopted the exception language of the Federal Tort Claims Act found at 28 U.S.C. §2680(a). Instead, this Court adopted two tests to be read together which would cause any court interpreting an issue of the breadth of sovereign immunity to carry out a careful step-by-step analysis.

This Court looked to a trio of states (New York, Washington and Ohio) which had statutory waiver provisions and court-created exceptions. In each state, careful deliberation had resulted in a determination that certain decisions by government agencies and officials could not be the basis for tort liability. It had been determined

that a non-restricted waiver of governmental immunity would inevitably interfere with the government's ability to govern. From one of these states a test for exempted activity was borrowed. Evangelical United Brethren Church v. States, 67 Wash. 246, 407 P.2d 440 (1965). In that case, the Supreme Court of Washington had decided that it was "necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins." Id. at 444.

The court determined that governmental immunity was necessary to facilitate a functioning government, stating:

> The reason most frequently assigned is that in an 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).

Id. at 444.

From here was taken the four-point test discussed in Argument I.

This Court was not satisfied with this test alone and, in turn, looked to the State of California for another limiting feature upon its exemption. From that jurisdiction, the "operational versus planning" test was borrowed. Johnson v. State, 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968). This test was to be used after a determination had been made labeling something as "discretionary". This Court had already deemed "discretionary - nondiscretionary" as not restrictive enough and now added to the Evangelical United Brethren, supra, standard. Thus, if an activity was properly labelled discretionary, to enjoy immunity it would need to characterized as a "planning" activity. Commercial Carrier, supra, at 1021.

This Court further set forth that:

> Planning level functions are generally interpreted to be those requiring basic policy-making decisions. Id.

The rule adopted in Commercial Carrier was not in contravention of any legislative provisions, but rather was created in a legislative vacuum. An extensive and well reasoned alternative was created and adopted to take the place of nothing. This Court did not move to create a

broad exemption to take the place of the rule. In fact, as was stated in Huhn, supra:

> The supreme court in Commercial Carrier expressly rejected the idea that the legislature intended to carve out a broad general exception for discretionary acts. Rather, the court concluded that immunity would obtain in the limited class of cases where the state, or its agencies or subdivisions, exercises "discretionary" governmental functions. The court noted that all governmental functions, no matter how seemingly ministerial, could be characterized as embracing the exercise of some discretion in the manner of their performance. This does not mean a blanket rule of immunity should apply. Rather, it is only those functions undertaken by coordinate branches of government that impact on the free exercise of the operation of government which will continue to be vested with immunity. Id. at 75.

Essentially, the Commercial Carrier, supra, rule provides an alternative standard in an area where no other standard exists. It is to be applied on a case-by-case basis and the burden is on the lower courts of this state to apply Commerical Carrier properly as opposed to interjecting their own opinions and tests. The standard is there now as it was in Everton, supra; Davis v. Dept. of Corrections, 460 So.2d 452 (Fla. 1st DCA 1984); Ralph v. City of Daytona Beach, 412 So.2d 878 (Fla. 5th DCA 1982), and it must be adhered to.

If anything, this test simply needs to be clarified once again. Petitioner challenges the actions of this Court in defining this exemption and then paradoxically bases a great deal of her argument on the actions of the Washington Supreme Court in Evangelical United Brethren, supra; Mason v. Abbitton, 75 Wash.2d 321, 534 P.2d 1360 (1975); Hassilon v. City of Seattle, 86 Wash.2d 607, 547 P.2d 1221 (1976); Miatky v. City of Spokane, 101 Wash.2d 307, 678 P.2d 803 (1984); and Chambers-Castanes v. King County, 100 Wash.2d 275, 669 P.2d 451 (1983).

In essence, Petitioner condemns the actions of this Court in creating a judicial exemption where no reasonable alternative existed, while at the same time endorses the same activity by a foreign court. In fact, the standard promoted by the Washington Court is a less restricted provision than that of Commercial Carrier, supra.

The standard promoted by Commercial Carrier, supra, is one well set out in an area where such a provision is necessary. This Court has acted in a manner commensurate with its position. If the area of sovereign immunity and the §768.28, Florida Statutes, waiver was left without judicial interpretation, a multitude of problems would arise and government would be faced with constant assaults from all directions. As was stated by the Court of Appeal

in New York 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 has seen fit to entrust to experts. . . ." Id. at 66.

ARGUMENT III

THE SPECIAL NEEDS OF THE PENAL SYSTEM REQUIRE SOME RESTRICTION ON THE OVERLY BROAD §768.28, FLORIDA STATUTES, WAIVER OF SOVEREIGN IMMUNITY. 28 U.S.C. §2680(a) OF THE FEDERAL TORT CLAIMS ACT, EXEMPTING FROM JURISDICTION CLAIMS BASED UPON EXERCISE BY A GOVERNMENTAL AGENCY OR EMPLOYEE OF A DISCRETIONARY FUNCTION OR DUTY, SHOULD BE USED AS A GUIDE TO FORM A VIABLE EXEMPTION TO §768.28, FLORIDA STATUTES.

The American criminal justice system is unique in its workings from any other functioning part of government. It possesses different goals and must be free to acheive those goals if it is to operate efficiently. Within this system exists a unique branch unlike any other operational organization. The penal system of this nation was created to carry out a trio of objectives: (1) punishment, (2) protection of society, and (3) rehabilitation. Each is a key goal and of equal importance to facilitate the functioning of an ordered society. Rehabilitation can only be achieved from within the walls of the prison society. To reach this objective, numerous systems have developed with an eye toward making prisoners functioning members of society. One such system is herein challenged by the Petitioner, the trustee system, common to all prisons. The world inside the walls of a penal institution is a society of its own. To function as such,

a system of punishment and rewards needs to exist. One such reward is that of trustee status and with it comes a semblance of responsibility and fulfillment.

The Petitioner herein is attacking the trustee system. The Petitioner, while challenging the actions involving Baumgardt, is in fact asking this Court to render a decision which would negate the entire trustee policy, an important part of the rehabilitative system. All individuals who are incarcerated pose a threat of some kind to the population at large. A murderer poses a danger to life, an armed robber to life and property, a child molester to the welfare of our children, a drunk driver to the welfare of others on the road, etc. The list is exhaustive. If a standard is created here that any individual who could cause harm to the public at large cannot be placed in the position of trustee without subjecting one to liability, then there would be no trustees, no system of punishment and reward and, in essence, no incentive for prisoners to behave favorably.

If this standard is allowed to be set forth, it could go a step further. If the state and/or its subdivisions are held liable for dangers posed by a trustee, they would also be subjected to liability for the actions of a probationer or parolee. Probation and parole must flourish for the penal system to function. If the penal system is

forced to keep an inmate for the maximum of his sentence or else face tort liability for any of his actions, the overcrowding problem that now plagues the system would be increased ten-fold and the system would cease to function. Fear of recidivism would leak down to the judiciary and eventually all prisoners would be sentenced to the maximum at trial. The judiciary enjoys immunity for its discretionary decisions as to the sentencing of individuals, so too should the penal system, with its discretionary programs that facilitate rehabilitation and enable the system to operate.

Within the penal system, a policy of classification must be permitted to operate unimpeded by the fear of tort liability. In order for few to govern and control many, they must be able to make policy ("planning") decisions as to their charges without the threat of liability constantly hanging over their heads.

Petitioner relies heavily upon decisions of the First District Court of Appeal as supporting her position. One case of substantial importance to Petitioner is Smith v. Dept. of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983) (now certified to this Court). Herein an inmate, Prince, was negligently reclassified to minimum security from which he escaped and caused injury to the plaintiffs. This case is considerably different than that which is now

before this Court. When deciding whether immunity should attach to the classification, the lower court focused on the Evangelical United Brethren, supra, four-point test. The court determined that the action involving Prince could not be classified as discretionary in that it was quite apparent that the decision made had been based on some preferential treatment levied by a single DOC employee. Prince had been made a "houseboy" for that employee, J. R. Reddish. The lower court's determination focused on this by saying

> In particular, while inmate classification is necessary to the maintenance of a prison system, this inmate's reclassifcation appears to have been made for reasons unrelated to the functioning of the prison system and without use of agency expertise. Id. at 1340.

Thus, the scenario involved in Smith is significantly different than that involved herein. Here, no personal decision was presented and the classifcation was solely related to the functioning of the prison system. In fact, the case here more closely parallels the recent First District Court of Appeal decision handed down in Davis v. Dept. of Corrections, 460 So.2d 452 (Fla. 1st DCA 1984). In that case, the plaintiff was an inmate who was stabbed by another inmate, while standing in his cell. Plaintiff had been incarcerated for breaking and entering and his

assailant had been incarcerated for first degree murder. Evidence had shown that the assailant had in the past been guilty of acts of extreme violence in the prison population and during processing had been recommended for "close custody classification". Plaintiff alleged that the Department of Corrections had been negligent in its classification of the assailant and in placing him in close proximity to the plaintiff in the open population. Plaintiff stated that the classification involved was not a discretionary function of the Department of Corrections, but rather it was an operational function and did not involve a basic policy evaluation.

The First District Court determined that:

> The classification and placement of inmates within the prison system constitutes a discretionary planning level function under the tests set forth in Commercial Carrier, therefore sovereign immunity applies. Id. at 453.

The court went on to distinguish the case facts of Davis v. Dept. of Corrections, supra (which are very similar to those in the instant case), from that of Smith v. Dept. of Corrections, supra. It stated that in Smith the inmate had been reclassified for "improper reasons unrelated to the prison function", Id. at 454, and as such

those actions did not enjoy the protection of sovereign immunity.

It has been conclusively decided by the federal courts that the discretionary function exception of 28 U.S.C. §2680(a) immunizes a governmental body from liability when it releases a prisoner on parole. Petitioner's argument incorrectly presents the law in this area, stating in her brief that the;

> Federal Tort Claims Act . . . does not allow immunity nor shield the government from responsibility for negligently releasing a homicidal prisoner on parole. Id. Brief of Petitioner, pg. 12.

The United States Court of Appeals, Fifth Circuit, on July 1, 1982, decided the case of Payton v. United States, 679 F.2d 475 (1982). The decision as described and relied upon by Petitioner in Petitioner's brief was the panel decision which was actually reversed on that point by the full court sitting on rehearing en banc. The facts of the case were that a parolee from federal custody, with an extensive medical history indicating him to be a homicidal psychotic, brutalized and murdered three women, including the appellant's decedent. The court was faced with a determination of whether the decision to release this individual, in light of the extensive evidence as to his propensity for violence, was immunized from liability by

28 U.S.C. §2680(a) of the Federal Torts Claims Act. The court was faced with a five count complaint and it ruled that the first three counts were insufficient and dismissed them. Each of these counts involved the discretionary decision as to whether to place the inmate on parole or not. The court ruled that the "decision to release a prisoner on parole is a discretionary function within the meaning of 28 U.S.C. §2680(a)." Id. at 483. The court went on to say:

> To withstand a motion to dismiss, an allegation challenging the Board's performance of any ministerial act must be sufficiently distinguishable from a complaint disputing the Board's exercise of its discretionary function. The plaintiff must therefore allege that the Board breached a duty sufficiently seperable from the decision-making function to be non-discretionary and outside the exception. The plaintiff may not withstand a motion to dismiss by alleging that the Board's decision was wrong. Id. at 482.

Thus, the Payton court set the burden upon the claimant to completely disassociate the activity complained of from the discretionary activities involved in the policy-making processes of the governmental body.

It is quite apparent that this court foresaw the danger of permitting liability to be actionable as to the

discretionary classification policies of a penal institution.

In 1980, the United States Supreme Court was confronted with the issue of whether judicial review of parole classifications would be beneficial. In Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553, reh. den. 445 U.S. 920, 63 L.Ed.2d 606, 100 S.Ct. 1285 (1980), the Supreme Court held such judicial review of a parole officer's decisions would inhibit the exercise of discretion. The court went on to state:

> That inhibiting effect could impair the state's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officers in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. Id. at 488.

Once again a federal court, this time the highest in the land, had determined that the threat of tort liability to discretionary policy implementation decisions of parole agencies and employees would inhibit the effective administration of the penal system and its associated organizations.

The discretionary labeling of activities does not restrict itself solely to the level of policy enactment. It must filter down to the implementation of that policy if there is to be a peaceful existence of that policy decision. As stated by the Supreme Court in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953):

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also included determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. Id. 346 U.S. at 35-36, 73 S.Ct. at 967-968.

The decision involved herein to make Baumgardt a trustee was part of the planning-discretionary activity which had filtered down from the policy-making level, as described in Dalehite, supra, above.

The sovereign immunity waiver of §768.28, Florida Statutes, derived from the Federal Tort Claims Act, is

incomplete without the limiting language of 28 U.S.C. §2680(a). This Court should, if discontented with Commerical Carrier, supra, look to the provisions set forth in 28 U.S.C. §2680(a) as a guide to limit the effect of §768.28, Florida Statutes. That section was in no way meant to be unqualified, as stated in Huhn, supra, and will lead to an infringement on the effective administration of government if allowed to exist in its overbroad form. This Court must address the peculiar needs of the penal system as was done by the federal courts in Payton, supra; Martinez, supra; and Dalehite, supra. This system must be able to act, as was done in regard to Baumgardt, free from threat of tort liability for discretionary planning activities for it to function. Further, this exemption to waive must be applied in accordance with the provisions of Dalehite, supra, and not be limited to the upper eschelon policymaking, so as to have no effect.

The judiciary is insulated from liability on the basis of its decisions in criminal cases and the reason for this is premised on infallible logic. This immunization must be extended to the discretionary planning activities of penal institutions and their emloyees as per the decisions set forth by this Court and the federal courts of the United States.

CONCLUSION

It is clear that the action of making Baumgardt a trustee, and of classifying trustees generally, was a discretionary act and, therefore, it would be in error to hold these Respondents liable for that action. Petitioner's argument would eliminate the entire trustee concept.

For the reasons advanced, Petitioner's Complaint was properly dismissed with prejudice, and the lower court and the opinion of the Florida Second District Court of Appeal should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of March, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished by hand delivery to The Honorable Syd J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, and that a true and correct copy of the foregoing has been furnished by U.S. Mail to John B. Cechman, Esquire, Attorney for Petitioner, P. O. Box 2366, Ft. Myers, Florida, 33902, this 7th day of March, 1985.

GAYLE SMITH SWEDMARK