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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 68,932

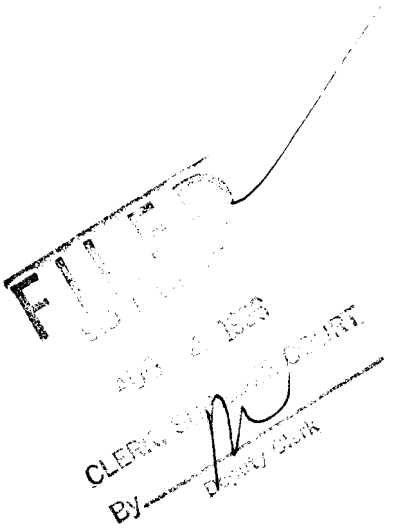
ROBERT EDWARD SPOONER,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.



BRIEF OF PETITIONER ON CERTIFIED QUESTION

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PREFACE

This is an appeal from a final order dismissing the Department of Corrections from Plaintiff's cause of action for violation of his constitutional and civil rights protected by 42 USC §1983. Appellant is the Plaintiff in the trial court and Appellee/Department of Corrections was the Defendant. Herein the parties will be referred to as they stood in the lower court or by proper name. The following symbol will be used:

(R)-Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

Plaintiff, a prison inmate at Raiford, filed an Amended Complaint against the Department of Corrections and its Director, Louis Wainwright, in two counts. Count I sought damages for negligence resulting from his having been severely and permanently injured as a result of his being brutally and visciously assaulted and battered by another inmate under the responsibility of the Defendants at Raiford Prison; that the assault and battery took place as a result of the negligence of Defendants in failing to adequately, properly and constantly supervise the comings and goings of inmates by means of properly trained guards and other supervisory personnel; in failing to properly and adequately man said facility and equip said facility with sufficient equipment and devices to monitor and supervise same; in failing to properly protect Plaintiff against this viscious assault by another inmate, who was known to have a dangerous propensity; in negligently providing such minimal and

shipshod protective measures that this attack, as others, was both probable and reasonably foreseeable; all of which resulted in Plaintiff and other inmates being so poorly protected that Plaintiff and others, had constantly lived in fear of bodily harm and/or death from other inmates without having any means of seeking protection (R15-18).

Count II of Plaintiff's Amended Complaint alleged that the above alleged negligent acts and omissions on the part of Defendants were done under color of state law and in violation of Plaintiff's constitutional and civil rights under 42 USC §1983 (R17-18).

The Department of Corrections filed a Motion to Dismiss Count II of the Amended Complaint arguing, inter alia (R26-27):

> 1. The Eleventh Amendment to the United States Constitution bars §1983 suits against states or their dependent agencies for monetary damages. The Department of Corrections is a dependent agency of the State of Florida, and Plaintiff is seeking monetary damages from it.

The trial court dismissed Plaintiff's 1983 action contained in Count II of his Amended Complaint as it pertained to the Department of Corrections (R46). The trial court's order did not explicitly state the rationale of its ruling.

Plaintiff appealed the trial court's dismissal of Count II to the First District Court of Appeal. On February 13, 1986, the First District Court of Appeal affirmed the trial court's ruling but certified the following question to this Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v) as being one of great public importance:

> Has the State of Florida, pursuant to §768.28, Fla. Statutes (1983), waived its 11th Amendment immunity and consented to suits against the State and its agencies under 42 USC §1983?

Judge Shivers dissented, agreeing with the analysis in MEEKER v. ADDISON, 586 F.Supp 216 (S.D. Fla. 1983) that Florida had waived sovereign immunity as to §1983 actions.

Both parties filed motions for rehearing and on May 19, 1986 the First District Court of Appeal withdrew the prior opinion and substituted another therefor. In the new opinion, the First District noted the recent case of GAMBLE v. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 779 So.2d 1509 (11th Cir. 1986) in which the court held that Florida had not waived its 11th Amendment immunity. The First District then stated: "We believe the analysis to be equally applicable whether the suit be brought in State or federal court," citing SKOBLOW v. AMERI-MANAGE, INC., 483 So.2d 809 (Fla. 3d DCA 1986). The court then amended the language of the certified question to read:

> Has the State of Florida, pursuant to §768.28, Fla. Statutes (1983), waived its 11th Amendment and State common law immunity and consented to suits against the state and its agencies under 42 USC §1983?

The Plaintiff then filed a notice to invoke discretionary jurisdiction on June 17, 1986.

POINTS ON APPEAL

POINT I

AS A MATTER OF LAW THE 11th AMENDMENT OF THE UNITED STATES CONSTITUTION CANNOT IMMUNIZE THE STATE FROM SUIT IN STATE COURTS SINCE IT EXPLICITLY APPLIES SOLELY TO THE FEDERAL COURTS AND HAS BEEN SO APPLIED BY THE COURTS.

POINT II

THE STATE OF FLORIDA'S "COMMON LAW" SOVEREIGN IMMUNITY CANNOT AS A MATTER OF LAW BAR A PLAINTIFF'S CLAIM UNDER 42 USC §1983 SINCE ONLY IMMUNITIES PROVIDED BY FEDERAL LAW CAN APPLY TO THE CIVIL RIGHTS ACT.

POINT III

AS A MATTER OF FLORIDA LAW, SOVEREIGN IMMUNITY CANNOT BE A DEFENSE TO A CIVIL RIGHTS ACTION BROUGHT PURSUANT TO 42 USC §1983.

POINT IV

FLORIDA HAS WAIVED ITS SOVEREIGN IMMUNITY AS TO §1983 ACTIONS.

SUMMARY OF ARGUMENT

The Eleventh Amendment of the Federal Constitution does not provide any immunity to the states in state court since by its own terms it is limited in application to the "Judicial Power of the United States." Consistent with that clear language, the United States Supreme Court has stated on numerous occasions that the Eleventh Amendment is a jurisdictional limitation which applies only to the Federal Courts. Since this case was filed in a Florida Circuit Court, the Eleventh Amendment, as a matter of law, cannot provide any immunity to the state.

The state's common law sovereign immunity cannot be a valid defense to a federal cause of action such as 42 USC §1983. Under

the Supremacy Clause the state is bound by the Federal Constitution and the laws enacted pursuant to it notwithstanding any provision of the constitution or law. Since 42 USC §1983 was enacted pursuant to the Fourteenth Amendment of the Federal Constitution, the states are bound by it and are precluded, as a matter of a law, from asserting sovereign immunity because they are not the "sovereign" as to federal rights.

Even under Florida law, it has been held that the state's sovereign immunity does not insulate the state from liability for unconstitutional acts. Sovereign immunity was never intended to place the state above the restrictions of the Federal or State Constitution. It is a fundamental principle of our constitutional government that our governmental entities are not above the law. Certainly, it should not be inferred from Article 3, Section 22 of the Florida Constitution that that principle was abandoned.

Furthermore, it is clear from the statutory scheme as to waiver of sovereign immunity and insurance for state departments that the legislature has waived sovereign immunity for actions brought pursuant to 42 USC §1983. The federal cases relied upon by the First District in this case relate solely to Florida's waiver of Eleventh Amendment immunity to actions in federal court and are therefore distinguishable. This Court recently held that when state subdivisions obtain insurance that constitutes a waiver of sovereign immunity and since the Florida Legislature has specifically provided for insurance against federal civil rights damages claims and judgments, Fla. Stat.

§§284.30, 284.31 and 284.38, it must be concluded that it has waived sovereign immunity as to §1983 claims.

Therefore, the certified question should be answered in the affirmative and the First District's decision should be reversed.

ARGUMENT

POINT I

AS A MATTER OF LAW THE 11th AMENDMENT OF THE UNITED STATES CONSTITUTION CANNOT IMMUNIZE THE STATE FROM SUIT IN STATE COURTS SINCE IT EXPLICITLY APPLIES SOLELY TO THE FEDERAL COURTS AND HAS BEEN SO APPLIED BY THE COURTS.

The Eleventh Amendment of the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. [Emphasis added.]

As the emphasized portion of the language clearly states, this amendment is solely applicable to the federal judiciary and does not address or limit the authority of state courts. Any doubt as to the scope of the amendment was eliminated by the U.S. Supreme Court when it stated in MAINE v. THIBOUTOT, 448 US 1, 9 fn. 7 (1980):

> No 11th Amendment question is present, of course, where an action is brought in a state court since the amendment, by its terms, restrains only "the judicial power of the United States".

Consistent with that interpretation, the United States Supreme Court has uniformally described the Eleventh Amendment as a limitation upon federal court's jurisdiction,[1] see EX PARTE YOUNG, 209 US 123, 150 (1908); SCHEUER v. RHODES, 416 US 232, 234 (1974). For example, in NEVADA v. HALL, 440 U.S. 410, 420 (1979), the Court stated with reference to the Eleventh Amendment:

> That Amendment places explicit limits on the powers of federal courts to entertain suits against a state. [Emphasis supplied, Footnote deleted.]

In EMPLOYEES OF PUBLIC HEALTH AND WELFARE v. MISSOURI PUBLIC HEALTH DEPARTMENT, 411 US 279 (1973), the issue before the court was whether an action for damages pursuant to the Fair Labor Standards Act, 29 USC §201-219, could be brought against a state agency in federal court or whether such an action was barred by the Eleventh Amendment. The majority opinion concluded that such an action was barred by the Eleventh Amendment. However, in its conclusion, the majority noted that the Fair Labor Standards Act specifically provided for concurrent jurisdiction in federal and state courts, see 29 USC §216(b); and that, "arguably, that permits suit in the Missouri courts and that is a question we need not reach." In a concurring opinion, Justice Marshall,

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1/ The Eleventh Amendment does not provide immunity to the states from Acts of Congress or the executive branch of the federal government. For example, the United States Supreme Court has held that the 11th Amendment is not a bar to a congressional enactment specifically authorizing damage awards against state governments under Title VII of the Civil Rights Act of 1964, see FITZPATRICK v. BITZER, 427 US 445 (1976); see also ELLIS FISCHEL STATE CANCER HOSPITAL v. MARSHALL, 629 F.2d 563, 567 (8th Cir. 1980).

(joined by Justice Stewart) expanded on that reference and noted that it was clear that the decision was limited to actions brought in federal courts and could not apply to a state forum since the Eleventh Amendment would not apply in that context (411 U.S. 297-298):

> This is not to say, however, that petitioners are without a forum in which personally to seek redress against the State. Section 16(b)'s authorization for employee suits to be brought "in any court of competent jurisdiction" includes state as well as federal courts. . . While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See TESTA v. KATT, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). See also GENERAL OIL CO. v. CRAIN, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see MARTIN v. HUNTER'S LESSEE, 1 Wheat. 304, 339-340, 4 L.Ed. 97 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see TESTA v. KATT, supra, 330 U.S., at 392-394, 67 S.Ct. at 813-815; SECOND EMPLOYERS' LIABILITY CASES, 223 U.S. 1, 57-58, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912). [Footnote deleted.]

Justice Marshall's concurrence was cited with approval in PENNHURST STATE SCHOOL & HOSPITAL v. HALDERMAN, 104 S.Ct. 900, 907 (1984) in a discussion of the limited scope of the Eleventh Amendment. In PENNHURST, the prior case of EDELMAN v. JORDAN, 415 U.S. 651 (1974) was discussed which held that a federal

court's order requiring the retroactive payment of benefits wrongfully withheld by a state violated the Eleventh Amendment. The court then stated (104 S.Ct. at 920):

> Under Edelman v Jordan, supra, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court. Challenges to the validity of state tax systems under 42 U.S.C. §1983 also must be brought in state court. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

Obviously, this reflects that the Eleventh Amendment bar to the jurisdiction of federal courts to render damage awards against a state does not apply in state courts.

Thus, the question as to a state's waiver of its Eleventh Amendment immunity can relate only to suits brought against it in federal court. In ATASCADERO STATE HOSPITAL v. SCANLON, 105 S.Ct. 3142, 3147 (1985), the court stated:

> [I]n order for a state statute . . . to constitute a waiver of Eleventh Amendment immunity, it must specify the state's intention to subject itself to suit in federal court (Emphasis in original.)

The federal cases relied upon by the First District Court of Appeal in this case all involved a waiver of 11th Amendment immunity and specifically limited their holdings to actions brought against the state in federal court. For example, in GAMBLE v. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 779 F.2d 1509 (11th Cir. 1986), the court consistently limited its language to cases brought against a state in federal court (779 F.2d at 1511, 1512):

> [A]bsent a legitimate abrogation of immunity by Congress or a waiver of immunity by the

> state being sued, the 11th Amendment is an absolute bar to suit by an individual against a state or its agencies in federal court.... Generally speaking, then, this will bar damage awards against state officers sued in their official capacities in suits brought in federal court pursuant to 42 USCA section 1983.... [T]he state itself may waive its 11th Amendment immunity and thereby, consent to suit in federal court. (Emphasis supplied.)

Additionally, in SHINHOLSTER v. GRAHAM, 527 F.Supp 1318, (N.D. Fla. 1983), the court quoted from a decision of that district court in SAULSBERRY v. FLORIDA STATE UNIVERSITY, No. TCA80-855 (N.D. Fla., January 9, 1981) in which it was concluded that "§768.28, 284.30, 284.31, and 284.38, Florida Statutes do not, in this court's opinion, constitute a waiver by the State of Florida of its Eleventh Amendment immunity to suit in federal court," (Emphasis supplied.) (527 F.Supp. at 1331).

In OSTROFF v. STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 554 F.Supp 347, 356 (N.D. Fla. 1983), the court concluded:

> Consequently, the court is unable to conclude that §768.28 was intended to authorize civil rights damages suits to be brought in federal court against the State of Florida. [Footnote deleted. Emphasis supplied.]

The issue of whether a state has waived its sovereign immunity is separate and distinct from the question of whether the state has waived its Eleventh Amendment immunity to suits in federal court. In FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES v. FLORIDA NURSING HOME ASSOCIATION, 450 US 147 (1981), the court held that despite the fact that the State of Florida had waived sovereign immunity as to the

Department of Health and Rehabilitative Services, the 11th Amendment was still a bar to any award in federal court of retroactive monetary relief to Florida nursing homes. The court stated (450 US at 150):

> As the court of appeals recognized, the state's general waiver of sovereign immunity for the Department of Health and Rehabilitative Services 'does not constitute a waiver by the state of its constitutional immunity under the 11th Amendment from suit in federal court.' [Citations omitted]. (quoting from Florida Nursing Home Assoc. v. Florida Department of Health and Rehabilitative Services, 616 F.2d 1355, 1363 (11th Cir. 1980).

See also TUVESON v. FLORIDA GOVERNOR'S COUNCIL on INDIAN AFFAIRS, INC. 734 F.2d 730 (11th Cir. 1984).

Therefore, it is clear that the Eleventh Amendment cannot be applied to immunize the state in this case since that constitutional provision has no application in state court. The issue as to waiver of sovereign immunity and the waiver of the Eleventh Amendment protection are separate and distinct issues and, therefore, the holdings in GAMBLE, SHINHOLSTER, and OSTROFF, supra, cannot be relied on as controlling on the issue now before this Court.

POINT II

THE STATE OF FLORIDA'S "COMMON LAW" SOVEREIGN IMMUNITY CANNOT AS A MATTER OF LAW BAR A PLAINTIFF'S CLAIM UNDER 42 USC §1983 SINCE ONLY IMMUNITIES PROVIDED BY FEDERAL LAW CAN APPLY TO THE CIVIL RIGHTS ACT.

The Supremacy Clause of the United States Constitution prohibits a state from attempting to immunize any party from the

legal effect of a federal statute since defenses and immunities to federal acts must be controlled by federal law. Article VI, §2 of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Clearly, the State of Florida does not have the authority to claim immunity from §1983 claims based upon a defense of sovereign immunity predicated on state law. Such a contention violates the clear language of the Supremacy Clause and is also inconsistent with the rationale of sovereign immunity.

The U.S. Supreme Court stated in MITCHUM v. FOSTER, 407 U.S. 225, 242 (1972) that §1983 was enacted for the express purpose of enforcing the Fourteenth Amendment of the United States Constitution. That Amendment provides in section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Fourteenth Amendment specifically provides that "the Congress shall have the power to enforce by appropriate legislation, the provisions of this article." In FITZPATRICK v. BITZER, supra, the court noted that these constitutional provisions by their express terms were directed at the states and that the Fourteenth Amendment was clearly intended to be a

limitation on the power of the states and an enlargement of the power of Congress. The court then quoted with approval from EX PARTE STATE OF VIRGINIA, 100 US 339, 346 (1880) in which it had stated:

> The prohibitions of the 14th Amendment are directed to the states, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.

It appears clear that since the entire thrust of §1983 was to provide a remedy for persons who are deprived of their federal rights pursuant to state action, a state's sovereign immunity cannot logically be imposed consistent therewith.

In the seminal case of Ex Parte Young, 209 U.S. 123 (1908), suit had been brought against, inter alia, the Attorney General of Minnesota, claiming that certain of his official actions violated the petitioners' federal constitutional rights. The Attorney General defended on the theory that his conduct as an officer of the state was not subject to judicial review in the federal court. The court rejected this contention stating (209 U.S. at 161):

> The state has no power to impart to him [the Attorney General] any immunity from responsibility to the supreme authority of the United States.

This was recently reiterated in OWEN v. CITY OF INDEPENDENCE, 445 U.S. 622, 674, Fn.30 (1980), in which the court quoted from HAMPTON v. CHICAGO, 484 F.2d 602, 607 (7th Cir. 1973):

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C.

> §1983 or §1983(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

This principle was explicitly recognized in RANKIN v. COLMAN, 476 So.2d 234, 238 (Fla. 5th DCA 1985) in which the court stated:

> The existence of a defense of sovereign immunity under state law does not restrict or prevent a federally-created cause of action. Defenses to federal rights of action are determined by federal law. Conduct by persons acting under color of state law which is wrongful under 42 USC [§] 1983 cannot be immunized by state law.

Citing, OWEN, supra and NELSON v. KNOX, 256 F.2d 312 (6th Cir. 1958). In RANKIN, the plaintiff sued the sheriff of Orange County pursuant to 42 USC §1983 alleging that the sheriff had a policy and procedure to strip search all females, even when there was no probable cause regarding the possession of contraband or dangerous materials, and that the plaintiff was searched pursuant to that policy and in violation of her federal constitutional rights. The trial court dismissed the complaint for failure to state a claim and the plaintiff appealed. The Fifth District reversed holding that the complaint did state a cause of action and that sovereign immunity as a matter of law was no defense to the suit.

This analysis is also consistent with the doctrine of sovereign immunity. The doctrine originated in the maxim "The King can do no wrong," see OWEN, supra, 445 U.S. at 645 fn. 28.

Its rationale was modified somewhat when it was applied in constitutional and democratic contexts. As Justice Holmes noted in KAWANANAKOA v. POLYBLANK, 205 U.S. 349, 354 (1907):

> A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends . . . the doctrine is not confined to powers that are sovereign in the full sense of judicial theory, but naturally is extended to those that in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.

(This quotation was cited with approval in NEVADA v. HALL, 440 U.S. 410, 415-416 (1979)).

The State of Florida is not the "sovereign" as to cases brought under §1983 because it neither originated that law nor does it have the power to alter it. It is not the "authority that makes the law on which the right depends" and therefore, under the sovereign immunity doctrine cannot be immune from the liability imposed by that federal statute. The United States Supreme Court stated in MONDOU v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., 223 U.S. 1, 58-59 (1912):

> The United States is not a foreign sovereignty as regards to the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty . . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it

> is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of ABLEMAN v. BOOTH, 21 How. 506, 16 L.ed. 169; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved.

The inapplicability of a state's sovereign immunity defense to a federal claim brought in state court was resolved in GENERAL OIL CO. v. CRAIN, 209 U.S. 211 (1908). In CRAIN, the plaintiff brought an action in state court seeking to enjoin state officials from imposing an inspection tax on an interstate shipment of oil. The basis of the plaintiff's claim was that the state tax violated the provisions of the Commerce Clause of the Federal Constitution. The Supreme Court of Tennessee ordered the dismissal of the case holding that the suit was against the state and therefore, under Tennessee's sovereign immunity principles the court had no jurisdiction to hear the plaintiff's claim. The United States Supreme Court accepted jurisdiction, rejected the sovereign immunity defense, but affirmed on the basis that, as a matter of law, there was no violation of the Commerce Clause. In rejecting the state court's conclusion that it did not have jurisdiction to enforce a federal claim against the state, the

court stated (209 U.S. at 225) (quoting from CHAMBERS v. BALTIMORE & OHIO R. CO., 207 U.S. 142, 149 (1907):

> [S]ubject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.

The Court concluded that under the Supremacy Clause of the Federal Constitution the state court could not decline to enforce federal rights against state officials on the basis that the state has not consented to be sued.

The rationale of CRAIN was reiterated in TESTA v. KATT, 330 U.S. 386 (1947). In that case, the Rhode Island Supreme Court had held that the state courts were not obligated to enforce a federal Emergency Price Control Act because the state had a policy against enforcing penal laws of a government which "is foreign in the international sense" (330 U.S. at 388). The United States Supreme Court rejected that conclusion as violating the Supremacy Clause of the United States Constitution (330 U.S. at 392-393):

> [T]he fact that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a "valid excuse." Cf. DOUGLAS v. NEW YORK, H.H. & H.R. CO., 279 U.S. 377, 388, 49 S.Ct. 355, 356, 73 L.Ed. 747. For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which chiefly relied upon the Chaflin and Mondou precedents, this Court stated that a state court cannot "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." MINNEAPOLIS & ST. L. R. CO. v. BOMBOLIS, 241 U.S. 211, 222, 36 S.Ct. 595, 598, 60 L.Ed.

961, L.R.A.1917A, 86, Ann. Cas. 1916E, 505. (Footnote deleted.)

In summary, the State of Florida cannot assert the defense of sovereign immunity against a federal claim because it is not an independent or superior sovereign in matters of federal law. The Supremacy Clause of the Federal Constitution, quoted, supra, p.10, clearly states that the Federal Constitution "and the Laws of the United States which shall be made in Pursuance thereof" are the "supreme Law of the Land" and are binding on the "Judges in every State" notwithstanding any statutory or constitutional provision of any state. To authorize such a defense in this case would require acceptance of the anomalous principle that the Florida Legislature, through its authority under the State Constitution (Article 10 §13), has the authority to nullify the effect of a federal statute designed to enforce the Fourteenth Amendment of the Federal Constitution. Simply put, such a holding would elevate the state constitution to a position paramount to the federal constitution; a concept that is obviously antithetical to the fundamental principles of constitutional federalism. Therefore, as a matter of law, sovereign immunity is no defense to this §1983 action.

POINT III

AS A MATTER OF FLORIDA LAW, SOVEREIGN IMMUNITY CANNOT BE A DEFENSE TO A CIVIL RIGHTS ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983.

If this Court does not accept the argument that, as a matter of federal law, sovereign immunity cannot constitute a defense to a §1983 action, see Point II, supra, then this Court should hold

that, as a matter of Florida law, such a defense cannot be maintained.

Article 10, Section 13 of the Florida Constitution provides:

> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

While that provision gives the legislature certain authority to expand or limit the state's sovereign immunity, it does not eliminate this Court's authority to construe the scope of that provision and thereby determine the actual scope of the sovereign immunity defense.

For example, in HARGROVE v. TOWN OF COCOA BEACH, 96 So.2d 130 (Fla. 1957) (en banc) (described in OWEN v. CITY OF INDEPENDENCE, 445 U.S. at 645 Fn. 28, as a "seminal opinion"), this Court rejected the contention that sovereign immunity extended to municipalities. In that opinion, this Court specifically rejected the City's argument that only the legislature had the authority to limit the scope of sovereign immunity, 96 So.2d at 132. This Court then relied on case law enacted prior to the adoption of the Florida constitutional provision on sovereign immunity (1868) to determine the intended scope of the common law sovereign immunity. Relying on CITY OF TALLAHASSEE, v. FORTUNE, 3 Fla. 19 (1850), this Court noted (96 So.2d at 134):

> Our judicial forebears there held that where an individual suffers a special personal damage not common to the community but proximately resulting from the negligence of the municipal corporation acting through its employees, such individual is entitled to redress. We think this general rule was

> sound when it was announced in 1850 and it should be reestablished as the law of Florida. . . . We now merely restore the original concepts of our jurisprudence to a position of priority in order to eradicate the deviations that have in our view detracted from the justice of the initial rule.

This Court also expressed a limitation as to the scope of sovereign immunity in STATE ROAD DEPARTMENT OF FLORIDA v. THARP, 1 So.2d 868, 869 (Fla. 1941) when it held that sovereign immunity does not apply to unconstitutional acts of the state:

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a State officer by statute, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assume to act under legal authority. It will not relieve the State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State.

In THARP, the plaintiff's mill was reduced 50% in operating capacity as a result of the State Road Department's erection of a bridge downstream from it. The plaintiff brought suit against the state agency seeking damages and injunctive relief. The trial court granted the relief requested, and the state agency appealed. The State Road Department argued on appeal that, as a matter of law, it could not be sued by the plaintiff since it possessed sovereign immunity. This Court rejected that defense holding that the State could not rely on sovereign immunity to insulate it from liability for unconstitutional acts. This Court stated (1 So.2d at 870):

> American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the state and all other assailants. . . . If American democracy survives and lives up to the function of its creation, it must do so by adherence to the code of moral and legal conduct promulgated by the Constitution, one provision of which is the sanctity of private property. . . . In the administration of constitutional guarantees, the State cannot afford to be other than square and generous. To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of non-suability of the State, is too anomalous and out of step with the spirit and letter of law to claim protection under the Constitution. As an anomaly, it is comparable to the classic instance in the civil law of the husband who sought a divorce from his wife on the grounds of adultery and predicated his charge on the fact that a rich merchant bequeathed a legacy as a tribute to her virtue.

Thus, THARP stands for the proposition that the sovereign immunity of Florida, as embodied in Article 10, Section 13 of the Florida Constitution, was not intended to, nor could it, insulate the State from liability when its conduct is unconstitutional under either state or federal standards. This principle applies with equal force to violations of the Federal Constitution enforced pursuant to 42 USC §1983.

The reasoning of THARP is virtually identical to the rationale underlying the enactment and implementation of §1983. Furthermore, the state of the law as it existed at the time of the enactment of the Florida Constitution does not support the proposition that sovereign immunity was considered to insulate the state from suits brought pursuant to federal law.

The United States Supreme Court in OWEN discussed the policy of the Civil Rights Act in terms similar to THARP (R445 U.S. at 650-651):

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" MONROE v. PAPE, 365 U.S. , at 184, 81 S.Ct., at 482 (quoted UNITED STATES v. CLASSIC, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." MONROE v. PAPE, supra, 365 U.S., at 172, 81 S.Ct., at 476.
>
> How "uniquely amiss" it would be, therefore, if the government itself -- "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" -- were permitted to disavow liability for the injury it has begotten. See ADICKES v. KRESS & CO., 398 U.S. 144, 190, 90 S.Ct. 1598, 1620, 26 L.Ed.2d 142 (1970) (opinion of BRENNAN, J.).

The Court also noted the compelling policy consideration which justified a damages remedy against governmental entities (Ibid):

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very right it has transgressed.

Furthermore, the Civil Rights Act was specifically intended to enable the state courts to provide remedies for federal civil rights violations (MITCHUM v. FOSTER, 407 U.S. 225, 240 (1972):

> Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. (Emphasis supplied.)

The participation of the state courts in the enforcement of federal constitutional rights is necessary in light of the limited jurisdiction of the federal courts over actions in which a state was a party (GENERAL OIL v. CRAIN, supra, 209 U.S. at 227):

> If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.

Since the policy underlying the Civil Rights Act must be deemed the paramount policy of Florida, see TESTA v. KATT, supra, and this Court has already expressed similar limitations in THARP, this Court should determine that, under Florida law, sovereign immunity does not extend to actions brought pursuant to §1983.

Furthermore, the law at the time of the enactment of the Florida Constitution did not support the proposition that the state possessed sovereign immunity as to federal enactments. Obviously, the Supremacy Clause of the Federal Constitution was in effect at that time and clearly provided that the Federal Constitution and laws enacted pursuant to it were the supreme law of the land and binding on state courts notwithstanding any

provision of a state constitution or law. Additionally, in MARTIN v. HUNTER'S LESSEE, 1 Wheat. 304, (1816), the United States Supreme Court held that state courts were bound to enforce federal rights and that such decisions were reviewable by that Court.

More importantly, the United States Supreme Court in CHISHOLM v. GEORGIA, 2 Dal. 41 (1792) had rejected the concept that a state could assert sovereign immunity in Federal Court. While that decision was effectively overruled by the enactment of the Eleventh Amendment, that Amendment was expressly limited to Federal Courts and did not address state court jurisdiction.

Therefore, it is apparent that based on the law as it existed prior to the enactment of the Florida Constitution and this Court's construction of sovereign immunity in THARP, this Court should conclude that Florida's common law immunity does not extend to actions brought pursuant to 42 USC §1983. Therefore, the First District Court of Appeal erred in determining that the Department of Correction was absolutely immune in this case.

POINT IV

FLORIDA HAS WAIVED ITS SOVEREIGN IMMUNITY AS TO §1983 ACTIONS.

In its opinion, the First District Court of Appeal relied on GAMBLE v. FLORIDA DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES, 779 F.2d 1509 (11th Cir. 1986) to support the conclusion that Florida has not waived sovereign immunity as to §1983 actions. As noted previously, GAMBLE involved a question as to whether Florida had waived its Eleventh Amendment immunity from suit in

federal court. That is a different issue from whether the state has waived its sovereign immunity to federal civil rights actions in general, since it requires a determination that the state has specifically consented to a suit for damages in federal court as opposed to simply permitting liability under a federal cause of action. See FLORIDA DEPT. OF HEALTH AND REHABILITATIVE SERVICES v. FLORIDA NURSING HOME ASSOC., supra:

> Fla. Stat. §768.28(1) waives sovereign immunity:
>
> > [F]or injury or loss of property, personal injury or death caused by the negligent or underlying wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state. . . .

The court in GAMBLE concluded that this provision only waived sovereign immunity for "traditional torts" and relied on the section of the provision quoted above to the effect that the state would be liable as if a "private person". The court's conclusion that this precludes civil rights actions is erroneous since, as it discussed previously in the GAMBLE opinion, a private individual can be sued for violation of a person's civil rights, see KENTUCKY v. GRAHAM, - U.S.-, 105 S.Ct. 3099 (1985); MONROE v. PAPE, 365 U.S. 167 (1961). Thus, since a private individual can be held liable for a civil rights violation, there is no reason for concluding that the language in Fla. Stat. §768.28(1) excludes liability for civil rights actions. Furthermore, the language in the statute relating to "the general laws of this state" does not preclude civil rights liability

since under the Supremacy Clause, §1983 has to be considered the "general law" of the state, see GENERAL OIL CO. v. CRAIN; TESTA v. KATT, supra.

This Court has recently held in AVALLONE v. BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, 11 FLW 312 (Fla., July 10, 1986) that when political subdivisions of the state spend public money for liability insurance, they will be deemed to have waived sovereign immunity to the extent of such coverage. Under the Florida Casualty Insurance Risk Management Trust Fund State, Fla. Stat. §284.30, et. seq., it is clear that the legislature has specifically provided for insurance for civil rights actions brought pursuant to 42 USC §1983 and therefore sovereign immunity is waived to the extent of that coverage. Fla. Stat. §284.30 states in part:

> A state self-insurance fund, designated as the "Florida Casualty Insurance Risk Management Trust Fund," is created to be set up by the Department of Insurance and administered with a program of risk management, which fund is to provide insurance, as authorized by §284.33, for worker's compensation, general liability, fleet automotive liability, federal civil rights actions under 42 USC §1983 or similar federal statutes,. . . (Emphasis added.)

Furthermore, in Fla. Stat. §284.31 the legislature provided that:

> . . .The Insurance Risk Management Trust Fund shall, unless specifically excluded by the Department of Insurance, cover all departments of the State of Florida and their employees, agents, and volunteers and shall provide separate accounts for worker's compensation, general liability, fleet automotive liability, federal civil rights actions under 42 USC §1983 or similar federal statutes, . . . (Emphasis added.)

In Fla. Stat. §284.38 the legislature provided that:

> The insurance programs developed herein shall provide limits as established by the provisions of §768.28 if a tort claim. The limits provided in §768.28 shall not apply to a civil rights action under 42 USC §1983 or similar federal statute. Payment of a pending or future claim or judgment arising under any of said statutes may be made upon this act becoming a law, unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally; however, the fund is authorized to pay all other court-ordered attorney's fees as provided under §284.31. (Emphasis added.)

Clearly this language contemplates that the state can be liable for violations of §1983 since it has specifically provided for an insurance fund to pay damages for claims or judgments arising under that statute.

In GAMBLE, supra, the court did not find that these provisions indicated any waiver of sovereign immunity but rather came to the conclusion that the statute only provided an insurance fund for prospective injunctive relief and/or the payment of judgments on behalf of individual state officials. The construction of these statutes is, of course, a matter of state law and therefore the GAMBLE case is not binding on this Court. Additionally, the court in GAMBLE did not have the benefit of this Court's decision in AVALLONE, supra, and therefore, in addition to other reasons discussed below, this conclusion in GAMBLE is erroneous.

The GAMBLE court concluded that the insurance fund was intended to provide insurance for the cost of a state agency's implementation of prospective injunctive relief ordered pursuant to a federal civil rights statute. This conclusion ignores the

clear language of Fla. Stat. §284.38 in which it specifically contemplates "payment of a pending or future claim or judgment arising under any of said statutes. . ." There is nothing in any of the statutes which address the question of the implementation of injunctive relief; the only language addressing the coverage intended is that quoted above regarding to "payment of . . . a claim or judgment".

The court in GAMBLE also came to the conclusion that Fla. Stat. §284.38 contemplated the payment of judgments against state officers when sued in their individual capacities. This is clearly inconsistent with the language of Fla. Stat. §284.31 in which the legislature specifically provided that the insurance would cover "all departments of the State of Florida and their employees, agents and volunteers . . .". Thus, it is clear that the legislature intended the coverage to include the departments themselves and not solely the state officials in their individual capacities.

In GAMBLE, the court also relied on the language of Fla. Stat. §284.38 which provided that the statutory damage limit provided in §768.28 shall not apply to 42 USC §1983 or other federal statutes to support its conclusion that the state did not intend to waive sovereign immunity as to federal causes of action. This is an erroneous conclusion, since, as the court specifically noted in its discussion of the state's indemnification of state officials for civil rights liability, that provision (779 F.2d at 1518) is fn. 11 "simply a recognition that the State of Florida may not limit the damages available

under §1983 which, of course, is a matter of federal law" (citations omitted.) Furthermore, if in fact, the state did not intend to waive sovereign immunity under §768.28 for civil rights actions, there would be no reason at all to include insurance for such damages actions or to state in Fla. Stat. §284.38 that the limits provided did not apply to §1983 actions.

In summary, it would appear obvious from the fact that the legislature has specifically provided for insurance to cover damages, judgments and claims under 42 USC §1983 that the legislature must have concluded that it had waived sovereign immunity as to federal civil rights actions. Under this Court's holding in AVALLONE, supra, such action by the legislature must be deemed in itself to constitute a waiver of sovereign immunity even independent of the statutory analysis discussed above. Therefore, the decision of the First District is erroneous and should be reversed.

CONCLUSION

For the reasons stated above, this Court should hold that, as a matter of law, the State of Florida cannot assert the Eleventh Amendment immunity to actions brought in state court, that the defense of sovereign immunity, as a matter of law, cannot be a defense to an action brought pursuant to 42 USC §1983 and answer the certified question in the affirmative that Florida has waived its sovereign immunity to federal civil rights actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: DAVID P. HEATH, P. O. Box 1879, Tallahassee, FL 32302; LOUIS F. HUBENER, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, FL 32301; SHARON WOLFE, 500 Roberts Bldg., 28 W. Flagler Street, Miami, FL 33130; MICHAEL EGAN, P. O. Box 1836, Tallahassee, FL 32302; and to JOEL V. LUMER, 1002 Concord Bldg., 66 W. Flagler Street, Miami, FL 33130; this 29th day of JULY, 1986.

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