IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,016

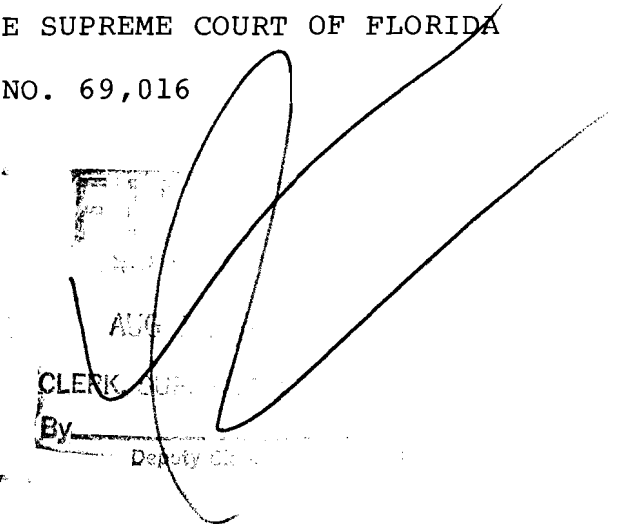
JESSE HILL,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.
_____/



ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

For the sake of clarity, the following symbols will be used in this brief:

The symbol PB will denote the page or pages of Petitioner's initial brief.

The symbol PA will denote the page or pages of the Petitioner's appendix.

The symbol TR will denote the page or pages of the original transcript of testimony.

The Petitioner, Jesse Hill, will be referred to simply as Hill. The Respondent, The Department of Corrections, State of Florida, will be referred to simply as the D.O.C.

STATEMENT OF THE CASE

The only area of material disagreement with Hill's Statement of the Case is the statement regarding jurisdictional aspects (PA-4).

There is no doubt as to this Court's jurisdiction over the question certified to it by the District Court of Appeal, Third District (PA-4). While perhaps authorized to accept jurisdiction of the other issue that is separate and only incidentally related to the certified question regarding waiver of Eleventh Amendment and State common law immunity concerning suits under 42 U.S.C. §1983, this Court is urged in the exercise of its discretion to decline jurisdiction to review that other issue. ISSUE TWO (PB-17).

Issue Two as raised by Hill seeks review by this Court of a finding by the District Court of Appeal, Third District, that because of jury instructions that were misleading and prejudicial to D.O.C., Hill's false imprisonment claim was reversed for new trial on the issue of damages.

There is no assertion by Hill that the aforesaid holding of the district court of appeal conflicts with any decision of this Court or another district court of appeal. This court has repeatedly pointed out that under the constitutional plan, the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. Diamond Berk Insurance Agency, Inc. v. Goldstein, Fla.,100 So. 2d 240; Sinnamon v. Fowlkes, Fla., 101 So. 2d 375; Sanchez v. Wimpey, 409 So. 2d 20 (Fla. 1982).

Hill really seeks a second appeal of Issue Two, and it is therefore respectfully argued to this Court that since this Court operates as a supervisory body in the judicial system for Florida, exercising appellate power in specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, a review of Issue Two is contrary to the announced policy of this Court. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). The two issues before this Court are inescapably inapposite, and do not involve even similar issues,

a situation entirely different from those cases where this Court disposes of all common issues at one time. See, for example, Rowe v. Pinellas Sports Authority, 461 So.2d 72 at 74 (Fla.1984).

STATEMENT OF THE FACTS

The only areas of material disagreement as to Hill's statement of the facts are those which relate to an alleged "custom or policy within the Department of Corrections which condoned, tolerated or permitted the supervision of probationers without due regard, knowledge, or concern about their status as non-reporting or reporting probationers." (PB 6-8).

The evidence simply fails to show that it was the policy or custom of the D.O.C. that gave rise to Hill's imprisonment or injury.

D.O.C. former employee MacEachern testified, essentialy, that it was through individual mistakes that brought about the causative chain of events that led to the imprisonment of Hill. For example, the testimony of the D.O.C. through certain ot its Dade County employees (TR-130-283), while productive of confusion with regard to Jesse Hill, did not reach a point of showing a custom or policy of that department in dealing with probationers such as Hill.

Mac Eachern simply made an incorrect assumption that Hill was on reporting probation without having seen the probation order itself relating to him. Such order stated that Hill was on non-reporting probation. Thus, MacEachern sent letters to Hill asking him to report to her (TR-179-182), but the letters were ignored.

SUMMARY OF ARGUMENT

There is no quarrel as to this Court's jurisdiction of the question certified to it by the District Court of Appeal, Third District. On the other hand, jurisdiction of any issue other than the question certified to this Court should be declined because any such issue merely involves an attempted "second appeal" and nothing more.

The Eleventh Amendment to the United States Constitution was not itself an abrogation by Congress of this State's sovereign immunity. Nor did the State of Florida by any legislative enactment waive this State's sovereign immunity. The Supreme Court of the United States has held that in deciding whether a state has waived its constitutional protection under the Eleventh Amendment, such waiver must be legislatively stated by the most express language or by such overwhelming implication as will leave no room for any other reasonable construction.

The limited waiver of immunity by the State of Florida and its agencies through the enactment of Section 768.28 Fla. Stat. (1985) does not override Florida's Eleventh Amendment immunity, nor did the legislature waive common law immunity or immunity from civil rights actions brought pursuant to 42 U.S.C. §1983.

ARGUMENT

ISSUE I

Has the State of Florida, pursuant to §768.28, Fla. Stat. (1983), waived its Eleventh Amendment and State common law immunity and consented to suits against the State and its agencies under 42 U.S.C. §1983 ?

The identical question has been certified to this Court by the District Court of Appeal of Florida, First District, by way of the recent case of Spooner v. Department of Corrections, State of Florida, 488 So. 2d 897 (Fla. 1st DCA 1986). In holding that there has been no such waiver of Eleventh Amendment and State common law immunity, the District Court of Appeal, First District, in Spooner adopted the reasoning and analysis of the United States Court of Appeals for the Eleventh Circuit in Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986).

Hill invites this Court's attention to the case of Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 42 (1890), where it was held that Eleventh Amendment[1] immunity extends beyond the words of the amendment itself and includes suits where a state is being sued by its own citizen. (PB-12). Hill is correct in this observation.

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[1] The Eleventh Amendment reads as follows:

> 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.

The United States Court of Appeals for the Eleventh Circuit in Gamble v. Florida Department of Health and Rehabilitative Services, 779 F. 2d 1509 (11th Cir. 1986), has adopted two fundamental reasons why there is not a waiver by Florida of Eleventh Amendment immunity. First, Gamble says that even though Congress may abrogate a state's immunity by explicit inactment, it has been held that §1983 is not a Congressional abrogation of the state's immunity from damage suits. Citing Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), and Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), the Gamble Court concluded that there is no Congressional abrogation such as will waive Florida's Eleventh Amendment immunity.

The very same legal principles apply in Gamble just as the very same legal principles apply in Spooner v. Department of Corrections, State of Florida, 448 So. 2d 897 (Fla. 1st DCA 1986), and as they apply here.

The second fundamental reason upon which Gamble refused to hold that there was an Eleventh Amendment waiver in §1983 suits was due to no waiver by the State itself of its Eleventh Amendment immunity. This second fundamentsl reason was predicated upon the authority of Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) where the Eleventh Circuit Court of Appeals quoted Edelman as follows:

> "In deciding whether a State has waived its constitutionsl protection under the

> Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Gamble, in construing Florida's waiver of sovereign immunity law, §768.28 Fla. Stat. (1983), found that §768.28 does not provide the express language or the overwhelming implications of waiver necessary to override Florida's Eleventh Amendment immunity.

Hill has placed unfounded emphasis upon Maine v. Thiboutot, 481 U.S. 1, 100 S. Ct. 2502, 65 L.Ed. 2d 555 (1980) in arguing that the Eleventh Amendment does not apply to actions maintained in state court. (PB-12-13). This is simply not the holding in Maine. What Maine does refer to in the context of footnote 7 is a construction of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.§1988, which provides (as quoted by the Court):

> "No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only " [t]he Judicial power of the United States."

While the language as quoted by Hill (PB-13) is correct as far as it goes, it is out of context, and does not form a basis for a proposition other than one that fee awards under 42 U.S.C. §1988 are part of costs and have traditionally been awarded without regard for the state's Eleventh Amendment immunity. It is obvious that by following with "no Eleventh 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," the Supreme Court was referring only to a consideration of attorney's fees under 42 U.S.C. §1988.

Hill next appears to argue that some conclusion must be inferred from Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981), that if sovereign immunity should apply equally to all constitutionally authorized governmental entities, then there can be no immunity from §1983 actions in Florida courts because municipalities do not have the same immunity. (PB-16-17). Again, this argument is misplaced by Hill. Florida's legislature promulgated §768.28(5) Fla. Stat. (1977) which by its terms limited the amount of money damages recoverable in tort against a municipality. This Court held in Cauley that §768.28(5) was constitutional, and that the statute brought fairness, equality and consistency in the law by providing a statutorily uniform cap on damage by tort recovery whether involving a municipality, the State or a county. This Court, nor any other court that the D.O.C. knows of, has held what Hill proposes to be the law; that under a uniform theory of sovereign immunity, neither the State nor its agencies have State common law immunity.

The case of Skoblow v. Ameri-Manage, Inc., 483 So. 2d 809, 811 (Fla. 3d DCA 1986) states that:

> "Absent an unequivocal expression of intent by either the United States Congress to overturn a state's eleventh amendment immunity, or a state legislature to waive the state' s sovereign immunity, a state and its agencies are immune from civil rights actions brought against them pursuant to section 1983 in both federal and state courts."
>
> (Citations omitted).

The reasoning in Skoblow has for its foundation the very cases cited in this brief along with added citations by the District Court of Appleal, Third District.

Florida has not waived its Eleventh Amendment immunity. It has waived its common law immunity only to the extent mandated by §768.28 Fla. Stat. (1985).

ISSUE II

> Was the District Court of Appeal, Third District, in error by remanding the within action to the trial court for a new trial on the issue of damages resulting from the false imprisonment of Hill, without consideration of the negligence of either party ?

The D.O.C. previously set out in this brief on pages 1-3 a statement as to why the D.O.C. contends that this Court should not accept jurisdiction of any issue in this case other than Issue I concerning immunity.

Hill seemingly takes the position that he is not only entitled to an affirmance of the trial court judgment below based on a $750,000 jury verdict, but is additionally entitled to pursue a civil rights action. The case of Besett v. Basnett, 437 So. 2d 172 (Fla. 2d DCA 1983) cited by the District Court of Appeal,

Third District, in the case here, is again a statement of fundamental law that double recovery based upon the same element of damages is prohibited. Little more need be said in this respect, because in this case, Hill is prohibited from pursuing a civil rights case in any event because of the Eleventh Amendment prohibition to the maintenance of such an action.

The question thus presented by Issue Two, even should the Court exercise its discretion to decide it, may also be stated as whether or not the trial court misled the jury so that in the interest of justice, a new trial must be granted.

For a showing of jury confusion brought about on the trial level, this Court is invited to review the form of verdict itself (PA-7-8). It is clear that the trial court made an allowance for a jury finding of false imprisonment, but even so, stated in the verdict form:

> "In determining the total amount of damages, do not make any reduction because of negligence, if any, of plaintiff Jesse Hill. If you have found Jesse Hill negligent in any degree, the court in entering judgment will reduce Jesse Hill's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Jesse Hill."

While the jury found Hill to have been 25% comparatively negligent, the trial court nevertheless refused to do what it told the jury it would do; it refused to reduce the damages awarded to Jesse Hill.

Certainly there was no objection to the form of verdict by the D.O.C. It had a perfect right to rely upon the statement of the trial court to the jury as contained at the end of the verdict form. (PA-8).

All this was briefed and argued in the District Court of Appeal, Third District, and to virtually append a copy of the brief of the D.O.C. to the District Court of Appeal is an unnecessary imposition upon this Court. Suffice it to say that the District Court of Appeal applied the well recognized test in determining whether under the particular facts of this case the instructions (here the form of verdict) could have misled the jury or prejudiced the right of the D.O.C. to a fair trial. ITT-Nesbitt, Inc. v. Valle's Steak House, Inc., 395 So. 2d 217 (Fla. 4th DCA 1981); American National Bank v. Norris, 368 So. 2d 897 (Fla. 1st DCA 1979); Lafleur v. Castlewood International Corp., 294 So. 2d 21 (Fla. 3d DCA 1974); Veliz v. American Hospital, Inc., 414 So. 2d 226, 228 (Fla. 3d DCA 1982) and Staff v. Soreno Hotel Co., 60 So. 2d 28 (Fla. 1952) (court may not mislead a jury in outlining the issues that body is to try).

The District Court of Appeal fully and fairly applied the test and remanded this case for a new trial as to damages for false imprisonment, a result that is actually beneficial to Hill in that the District Court of Appeal has made it clear that there can be no reduction of damages by Hill's comparative negligence as a result of his false imprisonment.

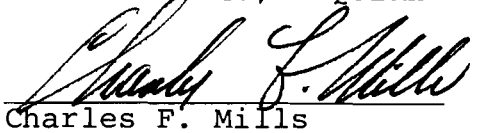
CONCLUSION

The question certified to this Court, based upon the prior federal and state authority, as cited in this brief should be answered in the negative.

This Court is urged to decline to exercise its discretion with regard to a review of the merits of all other issues in this case for the reasons stated in this brief.

Respectfully submitted,

CHARLES F. MILLS, ESQUIRE

BY: 

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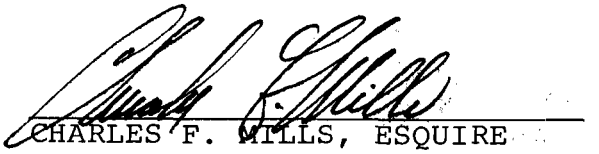
CERTIFICATE OF SERVICE

I CERTIFY that a true copy hereof was furnished Gregg J. Ormond, Esquire, fo the firm of LISK & ORMOND, ESQUIRES, Attorneys for the Petitioner, 200 Aragon Avenue, Coral Gables, Florida, 33134, by mail this 18th day of August, 1986.



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