# THE FLORIDA SENATE

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| SPECIAL MASTER'S FINAL REPORT | DATE | COMM | ACTION |
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| President of the Senate<br>Suite 409, The Capitol<br>Tallahassee, Florida 32399-1100 | 11/16/00 | SM<br>CJ<br>FR | Unfavorable |

Re: SB 16 – Senator Donald C. Sullivan
Relief of the Estate of Alice Berdat

THIS IS A CLAIM AGAINST THE DEPARTMENT OF CORRECTIONS FOR $250,000 BASED ON THE CRIMINAL ACTIONS OF ANTHONY NEIL WASHINGTON AGAINST ALICE BERDAT.

FINDINGS OF FACT:

On August 17, 1989, Anthony Neil Washington was an inmate participating in a Department of Corrections Work Release Program, at Largo Correctional Center, in Pinellas County, Florida. On that date, Washington checked out of the Largo Correctional Center (LCC) at 6:00 a.m. to go to work at his job at Cocoa Masonry, which was within 500 yards of LCC. Washington returned to LCC at 9:17 a.m.

Alice Berdat, a 92-year-old widow, lived alone in a nearby subdivision called the Lakes. She was brutally assaulted and murdered on the morning of August 17, 1989. On July 17, 1992, a jury convicted Washington of Murder in the First Degree, Burglary with a Battery, and Sexual Batter upon Alice Berdat. The trial judge sentenced Washington to death. He is currently on Death Row awaiting execution.

Washington's criminal history was extensive. He had been arrested on 18 separate occasions for 31 different charges prior to the age of 32. Washington was sentenced to 6 years in prison in August of 1988 for burglary of an occupied structure with an assault. He was serving that sentence when, consistent with Department of Corrections guidelines under Chapter 33-9, Florida Administrative Code (1987), Washington was placed in the Work Release Program at

LCC. Washington began his employment with Cocoa Masonry in late July 1989.

A representative of Cocoa Masonry signed the Employer's Community Work Agreement, which explained the policies of the Work Program, on July 27, 1989. Those policies included that the inmate must return to the institution immediately upon the conclusion of each day's work, and that the employer would notify the institution in the event of any unusual incident involving the inmate or in the event of any unexplained absence.

Sworn deposition testimony admitted as evidence at the Hearing on the claim bill indicates that it is highly unlikely that any representative from the Department of Corrections actually discussed the Community Work Agreement with Washington's employer prior to his employment beginning. Although he was unable to recall clearly, it appears from the testimony of the Correctional Probation Officer who supervised Washington's employment for LCC that the form was sent to Cocoa Masonry, filled out by a representative of Cocoa Masonry and returned to LCC, most likely by Washington himself. The Correctional Probation Officer's testimony indicates he may have contacted someone at Cocoa Masonry to ascertain how Washington was performing, after Washington had been on the job for some period of time.

Washington likewise signed an agreement, entitled Community Release Agreement, which set forth the requirements of the Work Release Program. The requirements included that Washington proceed directly to and from his designated place of employment by the approved method of transportation and route, that he return to LCC immediately if work ceased prior to the end of his regular shift, that he contact LCC in the event of any unusual circumstances, and that he contact LCC if he was relieved from work early or terminated from employment.

It is unknown whether Washington reported to Cocoa Masonry on August 17, 1989, after leaving LCC at 6:00 a.m. He may not have reported at all or may have reported and been sent back to LCC due to a lack of work that day. Sworn deposition testimony received as evidence at the Hearing on the claim bill reveals that Washington usually walked to Cocoa Masonry in the morning and either walked

back to LCC after work or was dropped off at LCC by Cocoa Masonry employees on their way back to the main office. Because of the nature of Washington's work, he did not work on site at the Cocoa Masonry main office. Washington worked with a crew which would leave Cocoa Masonry to travel to various jobs off-site.

Detectives were investigating a sexual battery which occurred a week after the Berdat murder and obtained a physical and clothing description from the sexual battery victim (see claim bill SB 18). Washington was identified as the perpetrator of that crime by the composite sketch based on the sexual battery victim's description and the clothing found among his possessions at LCC. Washington entered a nolo contendere plea to the August 25, 1989 Sexual Battery and has been sentenced to 15 years in the Department of Corrections.

During the course of the investigation of the August 25 sexual battery at the Residence Inn and the August 17 murder of Mrs. Berdat, Washington was linked to the Berdat murder through physical evidence left on the scene as well as the fact that he had sold a watch that belonged to Mrs. Berdat the day after she was killed. The watch had been taken from her ransacked home.

Henry Berdat, the only child of Alice Berdat, has endured the emotional turmoil of the violent death of his mother, cleaning up her home in the aftermath, as well as the gruesome testimony presented during the criminal trial of the case.

The Department of Corrections submitted public records at the Hearing which indicate the following facts:

- As of June 1999 there were 197,554 offenders "on the street" who were technically under the supervision or custody of the Department of Corrections. These offenders are included in the categories of felony (104,552), misdemeanor (1,877), drug offender (12,348), administrative (1,708), and sex offender probation (217), community control (14,540), pretrial intervention (8,560), post-prison release (6,538), absconders from supervision (47,054) and escapees (160 - 137 of which had been recaptured).

- During fiscal year 1998-1999, 13,062 offenders on community supervision by the Department of Corrections had their supervision revoked because they committed a felony offense while under supervision, 5,492 committed a new misdemeanor offense, and 27,332 committed technical violations of their supervision conditions.

As of December 1999, the recidivism rates for all offenders released from prison since 1993 indicate a 12.1 percent recidivism rate within the first 6 months, a 20.1 percent recidivism rate within the first 12 months and a 30.1 percent recidivism rate within the first 24 months after release.

CLAIMANT'S ARGUMENTS: (paraphrased)

1. The Department of Corrections was negligent by providing a window of opportunity for Anthony Neil Washington to commit the crimes described herein against Alice Berdat.

   - The Department of Corrections placed Washington in the minimum custody Work Release Program at the Largo Correctional Center despite his extensive criminal history and the short amount of time he had served on his prison sentence.

   - Washington was allowed to travel about in the community without direct supervision, wearing street clothes.

   - The Department of Corrections did not have a system whereby the department could supervise Washington while he was away from LCC. There should have been a better system of checking up on Washington, or alternatively, the department should have followed the procedures that were in place.

   - The employer's responsibilities were not made clear to the employer by the Department of Corrections.

   - The surrounding community was not warned of the presence of the Work Release Program at LCC.

RESPONDENT'S ARGUMENTS: (paraphrased)

1. There was no legal duty of care owed to Alice Berdat, as an individual citizen, by the Department of Corrections therefore the department was not negligent.

- In *Vann v. Department of Corrections*, 662 So.2d 339 (Fla. 1995) the Florida Supreme Court took up the question of whether the State of Florida, Department of Corrections, may be held liable as a result of the criminal acts of an escaped prisoner. The Court agreed with the findings of the First District Court of Appeal which found that the department could not be held liable for the criminal acts of an escaped prisoner because no common law duty was owed by the department to protect a particular individual from such potential harm. Without a duty of care, there is no actionable negligence claim.

2. Assuming *arguendo* there was an actionable negligence claim, the claim would be barred by sovereign immunity because the decisions made as they relate to the underlying claim were made at the planning level. *see Trianon Park Condominium Association, Inc. v. City of Hialeah,* 468 So.2d 912 (Fla. 1985).

   - Claimant has not cited one rule, in effect at the time of the attack by Washington, which the department failed to follow. Claimant has argued that the rules should have been different, not that the rules weren't followed.

   - Work Release was created by the Legislature with the intent to reassimilate inmates into society. The policy level decisions regarding allowing the inmates to be out among the public in street clothes, taking public transportation, and not warning the local community were weighed against the goal of reassimilation.

   - The classification and assignment of inmates is a planning level decision. *Reddish v. Smith,* 468 So.2d 929 (Fla. 1985).

3. Although the facts are appalling and tragic, it would be bad fiscal policy for the Legislature to pass the claim bill.

   - There are almost 200,000 inmates and offenders under the supervision of the Department of Corrections while in our communities. Of the inmates released, 30 percent are recidivists within 2 years. There are potentially 70,000 victims of the crimes of

those inmates which could seek redress through the claim bill process.

- If this precedent is established, the same logic might apply in situations where foster children or the mentally ill, who are in the control of the State, either commit crimes or injure others, resulting in even more claim bills.

4. Although the facts are appalling and tragic, it would be bad public policy for the Legislature to pass the claim bill.

   - The State would be held to a higher standard than the rest of the world by the passage of the Bill.

   - General tort law provides that individuals are not liable for the intervening criminal acts of another. *Restatement of Torts 2d, ss.440-453*. Nor is there a common law duty to prevent the misconduct of third persons. R*estatement of Torts 2d, s. 315.*

   - The State should not be the guarantor of the safety of individuals from persons who have entered the criminal justice system.

   - If the Legislature "cracks the door" on the planning level immunity carved out by the courts, it would open a floodgate of potential litigation and claim bills.

   - Should the Legislature choose to pass the claim bill, the agency should not suffer fiscal consequences, particularly when the Department of Corrections has not been negligent. The money should be appropriated from the State's General Revenue, not the department's operating budget.

5. The respondent objects to the language in the claim bill as follows:

   - On page 2, line 3, the respondent objects to the phrase "totally unsupervised," as it is not an accurate portrayal of the facts.

   - On page 2, lines 6-8, respondent asserts that Chapter 33-9, Florida Administrative Code (1987), which was in effect at the time of the events underlying this claim

bill, provided for contact between the institution and the employer in the event of an inmate's unexplained absence, therefore the term "failed to establish any procedures for contact" is objectionable.

- On page 2, line 20, the suggestion that there was no orientation program is factually inaccurate because the employer was provided with the Employer's Community Work Agreement which sets forth the employer's requirements as they relate to the inmate and the work release program.

- On page 3, line 3, the term "premature placement" is inaccurate because there is no proof that the Department of Corrections violated any regulations, rules or statutes by placing Washington in the Work Release Program.

- On page 4, lines 18-19, respondent objects to the phrase "due to the negligence of the Department of Corrections" in that there has been no legal negligence established.

With regard to the issue of damages as it relates to any pain and suffering, mental anguish, or loss of companionship by Alice Berdat's son, Henry Berdat, respondent asserts that an adult child of a decedent was not entitled to recover damages under §768.21(3), F.S. (1989), when the cause of action accrued. The law was amended in 1990 allowing adult children to recover such damages for the first time.

LEGAL PROCEEDINGS: The claimant's legal remedies have been exhausted. The civil suit underlying the claim bill was dismissed by the entry of a Summary Judgment in the Circuit Court of Pinellas County in April, 1996. The trial court based its ruling on the Florida Supreme Court's ruling in *Vann v. Department of Corrections,* 644 So.2d 339 (Fla. 1995) noting that the department did not owe a duty of care to the claimant. The claimant elected not to appeal the Summary Judgment.

CONCLUSIONS OF LAW: Based upon the record, the following Conclusions of Law are made:

1. No common law duty of care existed between the Department of Corrections and the claimant; therefore the Department was not negligent. Relying on *Vann v.*

*Department of Corrections,* 662 So.2d 339 (Fla. 1995), the Circuit Court of Pinellas County found, as a matter of law, that the department had no legal liability for the criminal acts of Anthony Neil Washington.

> "A governmental duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public, there is no duty of care to an individual citizen which may result in liability." *Id.* at 340, *Department of Corrections v. Vann,* 650 So.2d 658 (Fla. 1st DCA 1995) quoting *Everton v. Willard,* 468 So.2d 936 (Fla. 1985).

2. Where there is no duty, there can be no breach of duty or proximate cause issue, and no liability; therefore it is unnecessary to reach the issue of damages.

3. Section 945.091, F.S., authorizes the Department of Corrections to adopt regulations permitting extension of an inmate's limits of confinement, allowing the inmate to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to aid in the inmate's rehabilitation. *s. 945.091 (1)(a)2, s. 945.091(1)(b), and s.945.091(3), F.S.*

4. The decisions made by the employees of the Department of Corrections as they related to Anthony Neil Washington's assignment to the Work Release Program, and the rules implemented with regard to the operation of the Program were discretionary planning level functions. Claims against the department based on negligence in the decision-making process or events that flow there from are precluded by sovereign immunity. *Reddish v. Smith,* 468 So.2d 929 (Fla. 1985), *Trianon Park Condominium Association v. City of Hialeah,* 468 So.2d 912 (Fla. 1985).

LEGISLATIVE HISTORY: In 1998, the Senate passed Senate Bill 10, a claim bill based upon the facts reported herein. There was no companion House Bill filed.

ATTORNEY'S FEES: Section 768.28(8), F.S., limits claimant's attorney's fees to 25 percent of the claimant's recovery. The claimant's attorney has acknowledged this limitation and has presented a fee agreement.

RECOMMENDATIONS:

Although the injuries sustained by the claimant were significant and ultimately fatal, in this particular case, an equitable claim bill is an inappropriate remedy for several reasons. First, the Circuit Court of Pinellas County found, as a matter of law, that the Department of Corrections had no legal liability under the facts of this case. Second, granting the requested relief is not in the best interest of the State of Florida in that it would:

1. Strengthen similar claims for equitable relief in cases where state agencies have no legal liability. This would increase the costs to the state to defend and potentially satisfy these claims;

2. Punish the Department of Corrections for the criminal acts of Anthony Neil Washington, in a situation where the department did not violate any legal duties;

3. Impose a financial hardship upon the State of Florida and its tax payers in a case which, while tragic, had no legal merit; and

4. Potentially provide restitution to a claimant for the planning level functions of the Department of Corrections, contravening established case law. See *Commercial Carrier v. Indian River County,* 371 So.2d 1010 (Fla. 1979), *Trianon Park Condominium Association v. City of Hialeah,* 468 So.2d 912 (Fla. 1985), and *Reddish v. Smith,* 468 So.2d 929 (Fla. 1985).

For the foregoing reasons the undersigned Special Master recommends that Senate Bill 16 be reported UNFAVORABLY.

Respectfully submitted,

Connie J. Cellon
Senate Special Master

cc: Senator Donald C. Sullivan
Faye Blanton, Secretary of the Senate
House Claims Committee