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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 1611 - Representative Arza
Relief of Mary Beth Wiggers

THIS IS A CLAIM AGAINST THE DEPARTMENT OF CORRECTIONS FOR $450,000 BASED ON THE CRIMINAL ACTIONS OF ANTHONY NEIL WASHINGTON AGAINST MARY BETH WIGGERS.

FINDINGS OF FACT:

On August 25, 1989, Anthony Neil Washington was an inmate participating in a Department of Corrections work release Program at Largo Correctional Center (LCC), in Pinellas County, Florida. On that date, Washington left LCC to go to work at Cocoa Masonry at 6:05 a.m. and returned to LCC at 5:30 p.m.

On that same day, Mary Beth Wiggers was at work as a housekeeper at the nearby Residence Inn. According to the investigating detective's sworn deposition testimony, law enforcement was summoned to the Residence Inn at 5:36 p.m., August 25, 1989, to respond to a sexual battery complaint. Mary Beth Wiggers had been sexually battered and twice choked to the point of unconsciousness as she cleaned one of the rooms at the Residence Inn. The attack occurred sometime between 5:00 and 5:25 p.m.

Mary Beth Wiggers was able to give a description of the man who committed the crimes and a composite sketch was prepared by law enforcement. Anthony Neil Washington was later identified as the perpetrator, through the composite sketch and the clothing among his belongings at LCC that matched clothing described by Wiggers. Washington entered a nolo contendere plea to the sexual battery committed upon Mary Beth Wiggers on August 25, 1989 and was sentenced to 15 years in prison. He is currently on death row for a murder,

burglary with battery, and sexual battery committed on August 17, 1989.

Washington's prior 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 DOC 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 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. 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.

Sworn deposition testimony received as evidence at the hearing on the claim bill reveals that Washington usually walked to work at Cocoa Masonry, which was within 500 yards of LCC, 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 that would leave Cocoa Masonry to travel to various jobs off-site. He was not late

returning from work on August 25, 1989 since, as previously noted, he checked in at LCC at 5:30 p.m.

Mary Beth Wiggers testified at the hearing on the claim bill that she believes she had what could be characterized as a "normal reaction" to the sexual battery committed against her by Washington. She experienced trouble sleeping, a fear of using public transportation, depression, and concern over the results of the HIV test she underwent because of the assault.

Ms. Wiggers reports that although she had a problem with alcohol abuse, she had been sober since January 1989, and remains so today. She was out of work for approximately a year after the crime. She took advantage of counseling for approximately 8 years, which she feels helped her overcome the trauma of this event. Ms. Wiggers does not suffer any physical after effects, nor is she on any medication. She is currently employed as a teacher with the Pinellas County School system, teaching emotionally handicapped children, and also works for the City of St. Petersburg. She has successfully finished college, attaining her degree in Special Education since the crime occurred.

Ms. Wiggers' counseling, medical care and lost wages were paid by worker's compensation. With a settlement she received from Cocoa Masonry, the worker's compensation lien was paid after which Ms. Wiggers received approximately $12,500, after attorney fees and costs.

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 Argument

The Department of Corrections was negligent by providing a window of opportunity for Anthony Neil Washington to commit the crimes described herein against Mary Beth Wiggers.

- 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 which 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 Argument

1. There was no legal duty of care owed to Mary Beth Wiggers, 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 First District Court of Appeal opinion, which held that the department could not be held liable for the criminal acts of an escaped prisoner because it had no common law duty to protect a particular individual from such potential harm. Without a duty of care, there is no actionable negligence claim.

2. Even assuming 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 were not 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. See 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 that 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. The respondent further argued that passage of this claims bill would hold the State to a higher standard than other persons or entities. General tort law provides that individuals are not liable for the intervening criminal acts of another. See Restatement (Second) of Torts, ss.440-453. Nor is there a common law duty to prevent the misconduct of third persons. See Restatement (Second) of Torts, 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.

5. 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.

The respondent objected to the language in the claim bill as follows:

- On page 1, lines 17-18, the respondent stipulated that the inmate was "unescorted," but objected to the phrase "totally unsupervised," as not an accurate portrayal of the facts.

- On page 2, lines 11-15, respondent raised the same objection to the phrase "totally unsupervised."

- On page 2, lines 16-19, respondent asserted 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, respondent objected to the phrase "failed to establish any procedures for contact."

- On page 2, line 31 through page 3, line 7, the respondent claimed that 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 18, the respondent argued that the term "premature placement" is inaccurate because there is no proof that the Department of Corrections violated any regulations, rules or statutes in placing Washington in the Work Release Program.

- On page 4, line 9, respondent objected to the phrase "due to the negligence of the Department of Corrections" in that there has been no legal negligence established.

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 April 1996. The trial court based its ruling on Vann. The claimant did not appeal the trial court's order.

CONCLUSION 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. See Vann v. Department of Corrections, 662 So. 2d 339 (Fla. 1995). "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." Vann 662 So. 2d at 340 (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. §945.091 (1)(a)2, §945.091(1)(b), and §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 therefrom are precluded by sovereign immunity. See 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 SB 12, a claim bill based upon the facts reported herein. There was no companion House Bill filed.

ATTORNEYS FEES: Section 768.28(8), F.S., limits claimant's attorney's fees to 25 percent of claimant's recovery. Claimant's attorney has presented a fee agreement acknowledging this limitation.

RECOMMENDATIONS: Although the injuries sustained by the claimant were significant, in this particular case, an equitable claim bill is an inappropriate remedy for several reasons. First, the Department of

Corrections has 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 HB 1611 be reported unfavorably.

Respectfully submitted,

L. Michael Billmeier
House Special Master

Stephanie Birtman
Staff Director

cc: Representative Ralph Arza
Senator Donald Sullivan
Connie Cellon, Senate Special Master
House Claims Committee