65,495

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 66,495

CARL LEE HICKS,

Respondent.
_____/

AMICUS BRIEF OF FLORIDA PAROLE AND PROBATION COMMISSION

By: ENOCH J. WHITNEY
General Counsel
Florida Parole and Probation
Commission
1309 Winewood Blvd., Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

TABLE OF CONTENTS

CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

Amicus Curiae, Florida Parole and Probation Commission, will be referred to herein as "amicus curiae" or "Commission". Petitioner State of Florida will be referred to herein as the "Petitioner" or the "State". Respondent Carl Lee Hicks will be referred to herein as the "Respondent". The issues presented in this case are restated.

STATEMENT OF THE CASE AND FACTS

The facts in this case are set forth in the Opinion of the Fourth District Court of Appeal in Hicks v. State, reported at 452 So.2d at pages 606 and 607.

The Supreme Court entered its Opinion in this case May 23, 1985 (10 FLW 292), and a Petition for Rehearing was filed by the State on May 31, 1985, which is currently pending herein.

Amicus curiae was granted permission to file its belated brief on or before July 25, 1985, by Order of the Court entered July 15, 1985.

SUMMARY OF ARGUMENT

The holding of the opinion of May 23, 1985 in this case should be appropriately limited in application to probation revocation proceedings. The test for appointment of counsel for indigent parolees announced in Gagnon v. Scarpelli, infra, adequately protects the interest of alleged parole violators in light of the nature of parole and should be continued.

Were the decision in Hicks v. State, supra, held to apply to parole revocation cases, existing decisional law could support a requirement for the public defender system to provide counsel for indigent parolees facing preliminary revocation hearings. The Commission is not funded to provide such representation.

The rule of law announced in Hicks, supra, replaces the Gagnon rule and does not require retrospective application.

ISSUES PRESENTED

I. IS THE HOLDING STATED IN THE OPINION OF MAY 23, 1985, APPLICABLE TO PAROLE REVOCATION HEARINGS CONDUCTED BY THE COMMISSION UNDER SECTION 947.23, FLORIDA STATUTES?

II. IF THE ANSWER TO ISSUE NO. 1 IS IN THE AFFIRMATIVE, WHAT PROCEDURE EXISTS TO AFFORD COUNSEL TO ALL INDIGENT PAROLEES WHO DESIRE REPRESENTATION AT PRELIMINARY PAROLE REVOCATION HEARINGS?

III. IF THE ANSWER TO ISSUE NO. 1 IS IN THE AFFIRMATIVE, IS THE COURT'S DECISION PROSPECTIVE ONLY IN APPLICATION?

ARGUMENT

I. IS THE HOLDING STATED IN THE OPINION OF MAY 23, 1985, APPLICABLE TO PAROLE REVOCATION HEARINGS CONDUCTED BY THE COMMISSION UNDER SECTION 947.23, FLORIDA STATUTES?

The issue in this case as stated in the Opinion of May 23, 1985 is "whether a person subject to probation revocation has an absolute right to counsel in such a proceeding, and, if so, whether the right must be afforded him before he is required to admit or deny the revocation charges." The Opinion then decides the issue as follows:

> We hold that unless there has been an informed waiver thereof such a person is entitled to counsel, and it must be afforded him before he is required to respond in any manner to the revocation charges. (10 FLW 292.)

In the case of Gagnon v. Scarpelli, 411 U.S. 778, 782, 36 L.Ed.2d 656, 661, 662, 93 S.Ct. 1756 (1973), the U.S. Supreme Court held there was no difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation. The U.S. Supreme Court then held, concerning the requirement of counsel in parole and probation revocation hearings, as follows:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence

> and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness-the touchstone of due process-will require that the State provide at its expense counsel for indigent probationers or parolees. (Emphasis supplied.) (36 L.Ed.2d at page 666.)

The Florida Legislature has recognized that the Gagnon decision did not mandate the appointment of counsel for indigent parolees in all cases. Following the Gagnon decision, it enacted an amendment to Section 947.23, Fla. Stat., to provide that the parolee who is charged with a violation of his terms or conditions and who elects to proceed with a preliminary hearing "...may be represented by counsel." Section 947.23(1)(d), id. (the original text of the amendment appears in Chapter 74-241, Laws of Fla., Sec.1).

The Commission has interpreted this legislative statement concerning the presence of counsel in parole revocation cases as recognizing the Gagnon v. Scarpelli, supra, test for appointment of counsel to represent indigent parolees in parole revocation cases. See Rules 23-21.22(4)(d) and (13), Fla.Admin. Code.

The distinction between probation and parole was recognized early on by this Court in the case of Marsh v.

Garwood, 65 So.2d 15, 21 (Fla. 1953), in which it was observed:

> While a court having jurisdiction of the defendant in a criminal proceeding may order probation after a defendant has been convicted, it has no jurisdiction or power to place a defendant on parole, for that is strictly a function of the executive branch of the government to be exercised only after the defendant has been convicted and sentenced and hence after the judicial labor has come to an end.
> (Emphasis supplied.)

Another distinction between probation and parole is that a probationer has not been sentenced until the probation is revoked. See, asterisk footnote in Hicks, 10 FLW 292; and Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984). However, parole is that procedure by which a prisoner is allowed to serve the last portion of his sentence outside prison under strict supervision. Marsh v. Garwood, supra, at page 19.

Moreover, a parole may be refused. See, Todd v. Florida Parole and Probation Commission, 410 So.2d 584 (Fla. 1st DCA 1982).

Accordingly, in light of the foregoing distinctions between parole and probation, the Commission urges the Court to find that the test of Gagnon v. Scarpelli, supra, should continue to be applied in parole revocation cases for the purpose of determing when an indigent parolee is entitled to be represented by counsel at preliminary and final parole

revocation hearings conducted under Section 947.23, Fla. Stat. Amicus curiae asks that the decision in Hicks be limited to probation revocation proceedings.

II. IF THE ANSWER TO ISSUE NO. 1 IS IN THE AFFIRMATIVE, WHAT PROCEDURE EXISTS TO AFFORD COUNSEL TO ALL INDIGENT PAROLEES WHO DESIRE REPRESENTATION AT PRELIMINARY PAROLE REVOCATION HEARINGS?

Assuming, however, that the first issue is answered in the affirmative, it becomes essential to identify a procedure through which counsel may be provided to all indigent parolees who desire representation at preliminary parole revocation hearings.

The Commission currently operates under the decisional requirements of Gagnon v. Scarpelli, 411 U.S. (1973), and it is not funded to provide counsel to indigent parolees in every case. See, Rule 23-21.22(4) and (13), Fla.Admin. Code. The Commission has no authority to require the public defender system to provide counsel to indigent parolees in parole revocation hearings. During Fiscal Year 1983-1984, some 763 paroles were revoked, and a much higher number of parolees were arrested as parole violators. During this period of time some 6, 200 persons were under community supervision as parolees. See, Florida Parole and Probation Commission 44th Annual Report, page 74. The Commission's legislative appropriation under Other Personal Services

provides funds for legal representation for indigent parolees for final revocation hearings. (Appendix A.)

The opinion of May 23, 1985 in this case is mindful of the limitations of available resources to provide counsel, as it holds:

> We do not believe that a uniform requirement will unduly tax the resources of the public defender system; we believe it will result in a more orderly and uniform administration of the criminal justice system.*
>
> *Further, a probation revocation usually leads to sentencing; an attorney is required at a sentencing proceeding. It seems illogical not to mandate an attorney when revocation is likely to lead to incarceration and to require an attorney only when the length of that incarceration is being decided. (10 FLW 292.)

Although the Commission lacks authority to utilize the public defender system in parole revocation proceedings, the public defender's office has been authorized to represent inmates in proceedings in the Courts in which the Commission is an adversary. See, Order of the Court entered June 19, 1985, in Parole and Probation Commission v. Bruce Fuller and Simmons v. Shannon, Case Nos. 66,427 and 66,503; and Florida Parole and Probation Commission v. Alby, 400 So.2d 864 (Fla. 4th DCA 1981). In the case of Graham v. Vann, 394 So.2d 176, 177, 178, (Fla. 1st DCA 1981), the First District sustained inmates' right to be represented by the Public Defender, as follows:

The appellants also challenge the appellees' representation by the Public Defender's Office. They correctly point out that the office did not exist at common law and is a creature of Article V, § 18 Florida Constitution, with no authority outside of that provided by statute. Section 27.51(1), Florida Statutes, provides that the Public Defender shall represent, without additional compensation as provided in § 925.035, any person who is determined to be insolvent, as provided in the Act, and who is under arrest for, or is charged with a felony, or is charged with a misdemeanor or violation of a municipal or county ordinance in the county court. It is the thrust of the appellants' argument that the statute does not encompass or contemplate civil representation by the Public Defender's Office when convicted felons challenge the constitutionality of their confinement.

Rule 3.111(b)(2), Fla.R.Crim.P., states, in pertinent part, that counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including post-conviction proceedings and appeals therefrom, extradition proceedings, mental competency proceedings, and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal. It thus appears that the supreme court in its wisdom envisioned post-conviction representation of indigent prisoners. Such representation is not without precedent. Graham v. State, 372 So.2d 1363 (Fla. 1979); State v. Weeks, 166 So.2d 892 (Fla. 1964); Garrett v. State, 229 So.2d 1 (Fla. 1st DCA 1969).

The trial judge in this instance has obviously decided that the claims presented are substantial and that the

> assistance of counsel is essential to accomplish a fair and thorough presentation of the prisoners' claims. Under such circumstances, the court possesses the authority to appoint counsel to represent the indigent appellees. Graham and Garrett, supra. (394 So.2d 177, 178 Emphasis Supplied.)

Accordingly, if the Court determines the Commission's revocation proceedings are governed by the decision in Hicks, supra, the Commission respectfully suggests that the public defender system be required, by appropriate Order of the Court, to furnish representation at preliminary parole revocation hearings for indigent parolees who desire counsel to represent them.

III. IF THE ANSWER TO ISSUE NO. 1 IS IN THE AFFIRMATIVE, IS THE COURT'S DECISION PROSPECTIVE ONLY IN APPLICATION?

Amicus curiae respectfully suggests that the Opinion of May 23, 1985, be clarified to provide that the decision therein is not one of fundamental significance requiring its retroactive application to revocation cases that were final when the decision was rendered. Williams v. State, 421 So.2d 512 (Fla. 1982). As held in the case of Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied 101 S.Ct. 796, 499 U.S. 1067, 66 L.Ed.2d 612, the essential

considerations, in determining whether a new rule of law should be applied retroactively, are:

1. The purpose to be served by the new rule;
2. Extent of the reliance of the old rule; and
3. Effect on the administration of justice of a retroactive application of the new rule.

The Commission urges the Court to find that the purpose of the new rule, more uniform administration of the criminal justice system, does not require a retrospective construction of Hicks, supra; that the old rule of Gagnon, supra, has been extensively relied upon as the law of the land since 1973; and that thousands of revocations previously concluded would be suspect were Hicks applied retrospectively, thus severly hampering the administration of justice.

CONCLUSION

Amicus curiae suggests there is a sufficient difference between the inherent natures of parole and probation in Florida to limit the new rule of law announced in State v. Hicks, supra, to probation revocation proceedings. The Gagnon v. Scarpelli, decision should be continued as the basis for determining when indigent alleged parole violators require the assistance of counsel to represent them in revocation hearings conducted under Section 947.23, Fla. Stat., and Rule 23-21.22, Fla. Admin. Code.

Should the Court determine the new rule of law announced in Hicks, supra, is applicable to parole revocation cases, amicus curiae requests the Court to designate the public defender system to be the provider of counsel at all preliminary parole revocation hearings where the alleged parole violator is indigent and does not waive the appointment of counsel. Amicus curiae further requests the Court to determine the rule of law announced in Hicks, supra, to be prospective only in application.

Respectfully submitted,

ENOCH J. WHITNEY
General Counsel
Florida Parole and Probation Commission
1309 Winewood Blvd., Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn V. McCann, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 and Margaret Good, Assistant Public Defender, 13th Floor Harvey Building, 224 Datura, West Palm Beach Florida 33401 by U.S. mail this 24th day of July, 1985.

Enoch J. Whitney

ENOCH J. WHITNEY
General Counsel
Florida Parole and Probation
Commission