IN THE SUPREME COURT OF FLORIDA

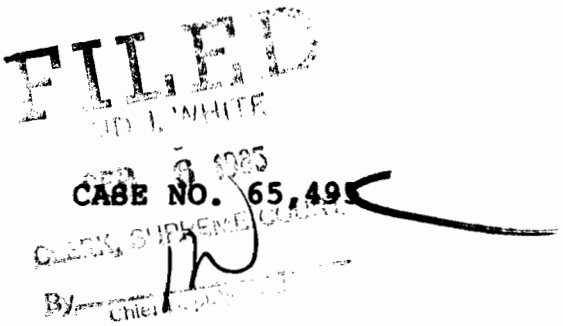
STATE OF FLORIDA,

Petitioner,

vs.

CARL LEE HICKS,

Respondent.



CASE NO. 65,495

RESPONDENT'S REPLY TO AMICUS BRIEF OF FLORIDA PAROLE AND PROBATION COMMISSION

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AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

This Court's decision in State v. Hicks was issued on May 23, 1985. The decision of the district court in Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984), was approved and the Court observed, "Judge Downey, writing for the district court, has cogently stated the reasons to adopt the ruling we make." The State of Florida, petitioner, filed a timely motion for rehearing and clarification on the sole ground that this Court "failed to state whether the absolute right to counsel in these proceedings would be retroactive or prospective in application." In response to this motion, the respondent contended that this question could not be raised on a rehearing motion since it was not raised nor briefed by the parties nor mentioned at oral argument. Therefore, it was not overlooked by the court.

While the motion for rehearing was still pending, the Florida Parole and Probation Commission filed a motion for leave to file a belated brief as amicus curiae on July 11, 1985. In this motion the Commission noted that respondent did not consent to the filing of an amicus brief. Before respondent could file his objection to the motion, the Court granted the Commission permission to file a belated brief as amicus curiae on July 15, 1985. Thereafter, respondent filed a motion to reconsider the order allowing a belated amicus brief, an objection to the amicus

brief and a motion to strike. That motion was denied by this Court on July 24, 1985. Amicus filed its belated brief on July 24, 1985, and on August 22, 1985, this Court entered an order allowing petitioner and respondent to and including September 6, 1985, to serve a brief in response. This brief follows.

ARGUMENT

THE HOLDING AS STATED IN THE OPINION OF MAY 23, 1985, DOES NOT MENTION AND IS NOT APPLICABLE TO PAROLE REVOCATION HEARINGS CONDUCTED BY THE COMMISSION.

There is nothing in this Court's decision of May 23 that suggests this Court is deciding the standard for appointment of counsel at parole violation hearings. The opinion discusses the standard for appointment of counsel at violation of probation hearings where a defendant has not yet been sentenced. The decision approves of the district court's decision in Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984), which held, "because of the differences between the revocation procedure described in Gagnon [v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)], and that utilized in Florida, a per se rule does not conflict with or remain at odds with the rationale of that case." Id. at 608.

At page 5 of its brief, amicus states that in Gagnon v. Scarpelli, the Supreme Court held there was no difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation. If such truly were the holding of Gagnon, it is understandable how the Commission worries over the effect of Hicks on its violation of parole proceedings. But amicus' representation on the holding of Gagnon v. Scarpelli is not entirely correct and totally overlooks the opinion of the district court in Hicks, which distinguished

Gagnon. Actually, Gagnon v. Scarpelli presented "the related questions whether a previously sentenced probationer is entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such hearing." 411 U.S. at 779. (Emphasis supplied).

First of all, the Commission's argument fails to note that in Florida probation is not a sentence. Peek v. State, 395 So.2d 492 (Fla. 1980); Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980); Florida Rule of Criminal Procedure 3.790(a); and Sections 921.187 and 948.01, Florida Statutes. Where a defendant has not been sentenced, but placed on probation, the holding of Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) applies. The Supreme Court, prior to Gagnon, had held in Mempa v. Ray, that sentencing is a critical stage at which appointed counsel is constitutionally required. In Gagnon, the Court explained its holding in Mempa:

> In Mempa [supra] the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected" . . . and that sentencing is one such stage, the Court concluded that counsel must be provided to an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial.

411 at 781 (Emphasis supplied).

The decision of the district court in Hicks and its approval by this Court in the opinion of May 23, 1985, makes it abundantly clear that probation is significantly different from parole in Florida because at a violation of probation hearing the defendant has not yet faced the critical stage of sentencing. Jerry Douglas Mempa had entered a guilty plea to joy riding in Washington state court with court-appointed counsel. He was placed on two years probation, and the imposition of sentence was deferred, as it would be in Florida. When his probation was revoked, he was immediately sentenced to ten years imprisonment without the offer of counsel. The Supreme Court held that, whether the proceeding was labeled a probation revocation or a deferred sentencing, it was necessary for counsel to be appointed, since Mempa was not sentenced at the time of his original guilty plea. Because in Florida a defendant is not yet sentenced at the time he is placed on probation, Mempa requires that counsel be appointed at a combined probation revocation and sentencing proceeding. Gagnon simply does not apply in Florida where a sentence has not been imposed at the time probation is revoked.

In Gagnon, the Court equated the revocation of Scarpelli's Washington probation with the revocation of the Iowa parole of Morrissey in Morrissey v. Brewer, 408 U.S. 471 (1972), since both were done by administrative bodies which did not actually impose the sentence. Therefore, the Court found no federal constitutional right to counsel in every state parole or probation

revocation hearing. However, Gagnon did not overrule Mempa but made a distinction between the relevant due process requirements for administrative revocation of a grant of probation or parole where the defendant had already been sentenced and a defendant's right to counsel at a probation revocation proceeding where sentence had previously been deferred.

The issues raised by the Probation and Parole Commission are in no way involved in this particular appeal. The Probation and Parole Commission should not be allowed to litigate these additional issues that it has formulated and presented for this Court's consideration upon a belated brief as amicus curiae. The issues raised by the Parole and Probation Commission are not matters that were raised or briefed by the parties. The Commission's worries over the ramifications of the Hicks decision in future litigation, to which this respondent will not be a party, are extraneous to this Court's decision on the merits of this case and unjustifiably delay Mr. Hicks' entitlement to a new violation of probation hearing where he will be represented by counsel. Amicus curiae do not have standing to raise issues not available to the parties nor may they inject issues not raised by the parties. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982); Keating v. State ex rel. Ausebel, 157 So.2d 567 (Fla. 1st DCA 1963). Previously this Court has said it will

not consider questions presented by amicus curiae where there is no justiciable controversy involved in the record as propounded by amicus and where counsel for the parties to the cause did not present the questions raised. Higby v. Housing Authority of Jacksonville, 197 So. 479 (Fla. 1940).

Because the second and third issues raised by amicus are in no way involved in this record, were not raised nor briefed by the parties nor mentioned at oral argument, respondent will not engage in further briefing on legal issues that are not germane to this litigation. Furthermore, as neither respondent nor petitioner, much less amicus, contend that Hicks applies to parole revocation proceedings, extended discussion on the legal concerns of the Commission would be pointless. Accordingly, this Court should deny the state's motion for rehearing, refuse to answer the irrelevant legal issues posed by the Commission and issue its mandate so that the circuit court may proceed to hold a new and fair violation of probation hearing for Mr. Hicks, where his right to be represented by appointed counsel will be respected.

CONCLUSION

Based on the foregoing, and for the reasons advanced in Respondent's Answer Brief on the Merits, this Court should deny the state's motion for rehearing, refuse to answer the issues propounded by the Commission and issue its mandate. The decision in this case is clear and no further exposition is necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CAROLYN V. McCann, Assistant Attorney General, Counsel for Appellee, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, and by mail, to ENOCH J. WHITNEY, Florida Parole and Probation Commission, 1309 Winewood Boulevard, Tallahassee, FL 32301 this 5th day of September, 1985.

Margaret Good

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