01a 4-2-87

FILED

IN THE SUPREME COURT OF FLORIDA

JAN 14 1987

CLERK, SUPREME COURT
By _____ Deputy Clerk

RONALD J. FLOYD,

Petitioner,

vs.

CASE NO: 68,878

FLORIDA PAROLE AND PROBATION COMMISSION, et al.

Respondents.

# PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On October 22, 1974, Petitioner was committed to the Department of Corrections for a period of ninety-nine (99) years as a result of being convicted of the offense of robbery (see Exhibit E to response filed by respondent).

On August 18, 1981, Petitioner was released on parole (see Exhibit G to response filed by respondent).

On March 29, 1985, the respondent issued a warrant charging petitioner with violating the following conditions of parole in the following respects:

(1) violated condition 2 by changing his residence without first procuring the consent of his parole supervisor in that on or about December 12, 1984, he did leave his residence at 11851 S.W. 220 Court, Miami, Florida and/or leave the county of his residence, abscounded from supervision and his whereabouts are currently unknown to the Commission.

(2) violated condition 3 by failing to make a full and truthful report to his parole supervisor before the 5th day of each month in that he did fail to make a full and truthful report for the months of December, 1984, January and February, 1985.

(3) violated condition 8 by failing to live and remain at liberty without violating the law in that he has failed to comply with Florida Statutes 945.30 and is currently $225 in arrears.

(See Exhibit L to response filed by respondent)

Petitioner was arrested on August 6, 1986 (See Exhibit K of response filed by respondent).

Respondent found that petitioner failed to meet the requirements for appointment of counsel at his preliminary hearing and at his final revocation hearing. Consequently, counsel was not made available to appellant. (See page 3 and Exhibits M and O of response filed by respondent).

At petitioner's preliminary and final revocation hearings he denied having violated condition 2 of his parole but admitted violation of conditions 3 and 8 (see Exhibits N and P of response filed by respondent).

By order dated October 30, 1985, respondent revoked petitioner's parole based upon violation of conditions 3 and 8 only (see Exhibit P of response filed by respondent).

On May 19, 1986, petitioner filed a petition for writ of habeas corpus or alternative writs alleging that he was being deprived of his liberty unlawfully. Among other assertions petitioner contended that he was denied assistance of counsel at his preliminary and final revocation hearings in violation of his rights under state and federal law.

On June 12, 1986, this Court entered its order to show cause. The said order recited this Court's determination that the petition demonstrated a preliminary basis for relief and commanded the State of Florida to show cause why the petition should not be granted.

A response was filed on June 27, 1986 by the respondent.

Petitioner responded on July 9, 1986.

On November 19, 1986, the undersigned was appointed to serve as counsel for petitioner.

## SUMMARY OF ARGUMENT

This Court held in State v. Hicks, 478 So.2d 22 (Fla. 1985), that a person subject to probation revocation has an absolute right to counsel in such proceedings and such right must be afforded the probationer before he is required to admit or deny the revocation charges. Herein the petitioner urges this Court to extend its holding in Hicks so as to afford parolees subjected to revocation proceedings a right to counsel which is co-equal with that afforded to probationers. Petitioner advances five arguments for such extension. All five arguments revolve around the central theme that basic fairness would seem to call for the rule urged.

First, parole and probation are very similar procedurally and substantively. Because they are so similar, basic fairness would seem to dictate application of the same rule relating to right to counsel.

Secondly, a uniform rule requiring counsel in all parole revocation proceedings would be more easily understood and applied than the largely subjective Gagnon "test". Standards which are largely subjective often tend to unequal application, and resulting unfairness.

Thirdly, the providing of counsel in all parole revocations would serve to better protect the basic rights of the parolees. The current parole revocation format facilitates infringement of basic rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. Appointed counsel could serve to guard against such unlawful infringements and inject more fairness

into the proceedings.

Fourthly, a substantial number of parole revocation proceedings are based on alleged commissions of new criminal offenses. Since counsel will have to be appointed to represent an indigent parolee on the new criminal charges anyway, it seems only fair that such counsel be appointed to represent the parolee in his revocation proceedings growing out of the same circumstances.

Finally, federal parolees have an absolute right to counsel in federal parole proceedings. In fairness, parolees in the state system should have a right to counsel co-equal with that enjoyed by federal parolees.

## ARGUMENT

### ISSUE

THE HOLDING OF THIS COURT IN STATE V. HICKS, 478 SO.2D 22 (FLA. 1985), SHOULD BE EXTENDED TO APPLY TO PAROLE REVOCATION HEARINGS.

Following the decision of the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), several Florida cases dealt with the issue of whether the right to appointed counsel would be extended to parole or probation revocation proceedings against indigents. Those cases held that there was no constitutional right to appointed counsel in such cases. Thomas v. State, 163 So.2d 328 (Fla. 2d DCA 1964); Phillips v. State, 165 So.2d 246 (Fla. 2d DCA 1964); and Shiplett v. Wainwright, 198 So.2d 647 (Fla. 1st DCA 1967).

Then, in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court held that indigent probationers and parolees have a constitutional right to appointed counsel at revocation hearings under certain circumstances. The Supreme Court, through Justice Powell, articulated those circumstances as follows:

> It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variations, and a considerable discretion must be allowed the responsible agency in making the decision. Presumtively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i)

> that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.
> (Gagnon, supra, at 411 U.S. 790 and 791)

After a dozen years of application of the Gagnon test by the courts of this jurisdiction, this Court decided State v. Hicks, 478 So.2d 22 (Fla. 1985). Therein this Court held that a person subject to probation revocation has an absolute right to counsel in such proceedings and such right must be afforded the probationer before he is required to admit or deny the revocation charges. The holding in Hicks, supra, was founded not upon constitutional requirement but rather upon this Court's belief that "a uniform rule in all probation revocation hearings is more easily understood and easy to administer than requiring attorneys in some cases but not in others." In Hicks, supra, this Court adopted and approved of the Fourth District opinion in Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984), wherein that Court, through Judge Downey, expressed the view that "as a policy matter an entitlement to counsel is essential to insure reasonable fairness in revocation proceedings."

The petitioner herein urges this Court to extend its holding in Hicks to include parole revocation hearings. Petitioner advances five arguments for such extension. All five of the arguments

revolve around the central theme that basic fairness would seem to call for the rule urged.

I.

Parole and probation are very similar procedurally and substantively. Because they are so similar, basic fairness would seem to dictate application of the same rule relating to right to counsel.

Even the early cases dealing with the right to counsel in parole revocation hearings recognized the many similarities between probation revocations and parole revocations and recognized that the rule as to right to counsel in one should be the same in the other. In Shiplett, supra, the First District Court of Appeal, through Judge Spector, cited Thomas, supra, and Phillips, supra, as authority for denying counsel in a parole revocation hearing and said:

> While both the Thomas and Phillips cases, supra, concerned hearings to determine revocation of probation, the Court is of the view that such proceedings are sufficiently analogous to a parole revocation proceeding so as to warrant application of the same rule.

In Gagnon, supra, the United States Supreme Court found that the two proceedings were so similar as to be "constitutionally indistinguishable" for purposes of due process considerations. Gagnon at 411 U.S. 782 and footnote 3.

Perhaps the greatest similarity between parole revocation hearings and probation revocation hearings is in the issues to be resolved at each. The issues to be resolved in each are virtually identical; e.g. whether a probationer or parolee has changed his

residence without advising his parole and probation supervisor, whether a probationer or parolee has submitted his monthly reports, whether the probationer or parolee has willfully failed to pay his cost of supervision, whether the probationer or parolee has committed a crime while on probation or parole, or whether the probationer or parolee has violated some other standard or special condition of probation or parole.

II.

A uniform rule requiring counsel in all parole revocation proceedings would be more easily understood and applied and would be more fair than the largely subjective Gagnon "test".

This Court's holding in Hicks, supra, was founded squarely upon the rationale that a uniform rule would be more easily understood and easier to administer than requiring attorneys in some cases and not in others. This rationale is equally applicable in the parole revocation setting for obvious reasons.

As this Court recognized in its opinion in Hicks, the inherent fairness and equality of a uniform rule is far preferable to the indefinite standard of the Gagnon opinion. Justice Powell acknowledged in Gagnon that the facts and circumstances in revocation hearings are susceptible of almost infinite variations and it is impossible to provide a precise standard to be followed in determining when the providing of counsel is necessary in order to meet the constitutional requirements of due process. The Supreme Court has therefore left us with a subjective and indefinite standard which is often difficult to apply. Such standards sometimes lead to mischief and almost always lead to unequal and inconsistent

applications and protections for affected persons. The potential for such results are as great in parole revocation hearings as in probation revocation hearings for the issues to be resolved in each are, as indicated above, virtually identical.

III.

The providing of counsel in all parole revocation hearings would serve to better protect the basic rights of the parolees. The current parole revocation format facilitates infringement of basic rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. Appointed counsel could serve to guard such unlawful infringements and inject more fairness into the proceedings. One of the greatest risks of infringement upon a parolee's consitutional rights is in the area of the Fifth Amendment protection against self-incrimination. The Fourth District in its opinion in Hicks, supra, touched upon this when it said the following:

> We are particularly impressed with the problem of infringing on a probationer's protection against self-incrimination where, as below, a revocation hearing is conducted prior to the disposition of criminal charges forming the basis of the affidavit of violation. See State v. Heath, 343 So.2d 13 (Fla. 1977), cert. denied, 434 U.S. 893, 98 S.Ct. 269, 54 L.Ed.2d 179 (1977).

A review of this Court's opinion in Heath, supra, reveals that there is a very fine line between a lawful assertion of a probationer's right to remain silent and an unlawful refusal to answer questions in accordance with the standard conditions of probation or parole. An uncounseled probationer or parolee's inability to recognize this fine line will inevitably lead to catastrophic

results since saying too little may itself result in a violation of parole or probation and saying too much may well result in forfeiture of rights under the Fifth Amendment. Such risks are perhaps even greater in parole revocation hearings than in probation revocation hearings since a legally educated judge, who presides in probation revocation hearings, would presumably be more sensitive to the protection of constitutional rights than would a lay hearing officer of appellee.

Another example of potential infringement on constitutional rights is where the revocation hearing is conducted after the parolee's arrest on other criminal charges and an identification by the alleged victim of the new charge is part of the revocation hearing. Without counsel present, the parolee would likely be unable to properly preserve and later present a Fifth Amendment suggestive lineup or showup claim under authority of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); and Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Further, such identification of the accused may itself be a violation of the Sixth Amendment right to counsel or the parolee's right to counsel under the Florida Rules of Criminal Procedure.

The United States Supreme Court held almost twenty years ago that a defendant has the right to counsel in a post-indictment or post-information lineup or showup, since the filing of the charge institutes adversary criminal proceedings, and every subsequent event is a "critical stage" of those proceedings. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d

(1967). Therefore, if the revocation hearing follows the filing of the charging document, there is a Sixth Amendment right to counsel at any hearing involving an identification of the parolee by the alleged victim of a new criminal offense.

There is an even earlier right to counsel at lineups or showups under Florida law, i.e. from first appearance forward. This is the case because Rule 3.111(a), Florida Rules of Criminal Procedure, requires the appointment of counsel at a first appearance hearing and the accused has a right to the presence of his counsel at any lineups or showups conducted thereafter. See Simmons v. State, 389 So.2d 262 (Fla. 1st DCA 1980); and Phillips v. State, 432 So.2d 197 (Fla. 2d DCA 1983). Therefore, denial of counsel at an indigent parolee's post-first appearance parole revocation hearing violates Florida law on right to counsel where, as part of the hearing, the alleged victim of the new crime identifies or attempts to identify the parolee as the perpetrator.

Still another area where there is potential for infringement upon a parolee's constitutional rights by denying him counsel at his revocation hearing is the Fourth Amendment right of freedom from unlawful searches and seizures. A parolee does not forfeit his rights under the Fourth Amendment and under Article I, Section 12, of the Florida Constitution, and evidence of unlawful searches and seizures are inadmissible in revocation hearings. State v. Cross, 487 So.2d 1056 (Fla. 1986); State v. Dodd, 419 So.2d 333 (Fla. 1982); and Kinsler v. State, 360 So.2d 24 (Fla. 2d DCA 1978). It is unrealistic to expect a lay hearing officer, in the absence of counsel who might bring such to his attention, to be sufficiently

knowledgable of the law so as to properly protect the parolee's rights under the Fourth Amendment and under Article I, Section 12, of the Florida Constitution.

Finally, it is equally unrealistic to expect such protection as it relates to reasonable protection of the parolee's basic right to confront his accusers as guaranteed by the Sixth Amendment. Even though it is clearly the law of this jurisdiction that a parolee may not have a parole revoked solely upon hearsay evidence, a lay hearing officer cannot reasonably be expected to understand and properly apply this rule of law. See Jones v. Florida Parole and Probation Commission, et al., 348 So.2d 681 (Fla. 1st DCA 1977).

Counsel should be given to indigent parolees so that they can be given a fair and reasonable opportunity to assert the basic rights, constitutional and other, which are guaranteed to them by the Constitution of the United States and the laws of Florida.

IV.

A substantial number of parole revocation proceedings are based on alleged commissions of new criminal offenses. Since counsel will have to be appointed to represent an indigent parolee on the new criminal charges anyway, it seems only fair that such counsel be appointed to represent the parolee in his revocation proceedings growing out of the same circumstances.

Undersigned counsel has requested that counsel for the respondent provide statistical data as to the precentages or numbers of parole revocations annually which are based, in whole or in part, upon alleged commissions of new criminal offenses.

Undersigned counsel has been advised that such statistics are not kept by respondent; but counsel for respondent does acknowledge that a substantial portion of the revocation proceedings each year are founded upon alleged commissions of new criminal offenses.

V.

Finally, it is worthy of note that Congress has provided for appointed counsel in all federal parole revocation hearings involving indigents. 18 U.S.C. 4214. This provision of federal law is an obvious recognition of the unsatisfactory standard provided in Gagnon and of the inherent fairness of an absolute rule.

This Court has looked to federal practice in the past in determining right to counsel issues. For example, in State v. Weeks, 166 So.2d 892 (Fla. 1964), this Court analogized proceedings under 28 U.S.C. 2255 to those under the old criminal procedure Rule 1 and held that there would be no absolute right to counsel under Rule 1 since the federal courts gave no such right under Section 2255. This Court should again adopt the federal practice and extend an absolute right to counsel in state parole revocation proceedings since such right is given in federal parole revocation proceedings. Basic fairness demands no less.

## CONCLUSION

Upon the arguments and authorities cited herein, this Court should extend its holding in Hicks so as to grant parolees a right to counsel which is co-equal with that of probationers.

Respectfully submitted,

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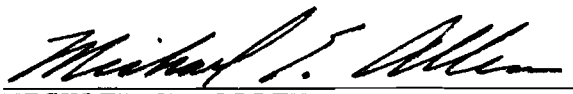
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished to Kurt E. Ahrendt, Esq., Assistant General Counsel, Florida Parole and Probation Commission, 1309 Winewood Blvd., Bldg. 6, Tallahassee, Florida 32301 and to Ronald J. Floyd, #025874, Polk Correctional Institution, 3876 Evans Road - Box 50, Polk City, Florida 33868, this 15th day of January, 1987.



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