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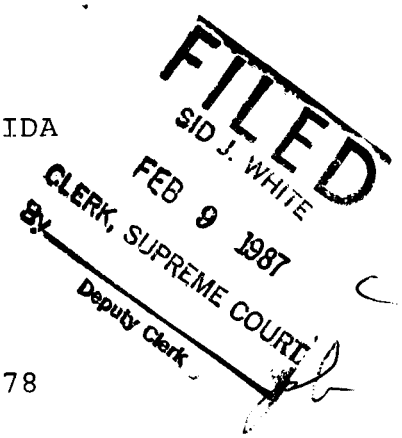

IN THE SUPREME COURT OF FLORIDA

RONALD J. FLOYD,

Petitioner,

vs. CASE NO. 68,878

FLORIDA PAROLE AND
PROBATION COMMISSION, et al.

Respondents.

_____/

RESPONDENT'S BRIEF ON THE MERITS

BY: KURT E. AHRENDT
Assistant General Counsel
Florida Parole and
Probation Commission
1309 Winewood Boulevard
Building 6, Room 338
Tallahassee, FL 32399
(904) 488-4460

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STATEMENT OF THE CASE AND THE FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as set forth at pages 1-3 of Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

In the case of Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed 2d. 656 (1973), the United States Supreme Court held that a state is not under a constitutional duty to provide counsel for indigents in all probation or parole revocation proceedings, but the right to counsel should be determined on a case-by-case basis. The Commission has incorporated the Gagnon test for such determinations in its rules. This is consistent with Section 947.23(1)(d), Fla. Stat. (1985), which permits assistance of counsel in parole proceedings, but does not require appointment of counsel for every indigent parolee.

This Court in State v. Hicks, 478 So.2d 22 (Fla. 1985) held that a person subject to probation revocation is entitled to counsel, which must be afforded him prior to requiring a response in any manner to revocation charges. There are important differences between probation and parole hearings which should be considered. Parole revocation hearings are conducted by non-lawyers and are therefore more similar to proceedings described in Gagnon. Unlike probation revocation, parole revocation does not lead to a sentencing hearing, which necessarily requires appointment of counsel.

However, should this Court be inclined to require appointment of counsel for all indigent parolees, the public defender system would provide the most effective means of representation. Public defenders are available locally throughout the state to represent parolees at preliminary hearings and initial interviews.

ARGUMENT

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

The sole issue presented in Petitioner's brief on the merits is whether this Court's decision in State v. Hicks, 478 So.2d 22 (Fla. 1985), should be extended to parole revocation hearings. In State v. Hicks, supra, this Court held that a person subject to probation revocation has an absolute right to counsel in such a proceeding, and that the right must be afforded before the probationer is required to admit or deny the revocation charges. The Court noted that Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973) did not require appointment of counsel in all probation revocation cases, but that a uniform rule in all probation revocation hearings is more easily understood and easier to administer. Hicks, supra at 23.

The Court in Hicks granted leave for the Florida Parole and Probation Commission to file a belated brief as Amicus Curiae. Therein the Commission inquired as to whether the holding in Hicks also applied to parole revocation proceedings conducted by the Commission under Section 947.23, Florida Statutes. At that time the Court declined to decide the applicability of its holding to parole violations. Hicks, at 24. The Court did decide, however, that its holding with regard to other probation violation hearings would have prospective application only. Id.

In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed 2d 484 (1972), the United States Supreme Court held that revocation of parole is not part of a criminal prosecution; thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. The Court further explained that:

> Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to prison without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483, 33 L.Ed. 2d at 495. (Emphasis added) The Morrissey decision delineated the minimum requirements of due process for parole revocation proceedings, but did not reach or decide the question whether a parolee is entitled to appointment of counsel if he is indigent. 408 U.S. at 489, 33 L.Ed. 2d at 499.

This question was answered by the United States Supreme Court in the case of Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973). That case held that a state is not under a constitutional duty to provide counsel for indigents in all probation or parole revocation proceedings, but that the decision as to the need for counsel must be made on a case-by-case basis. The Court stated:

> The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.
>
> 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 their 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.

411 U.S. at 790, 36 L.Ed. 2d at 666 (Emphasis added); (footnote omitted)

Section 947.23(1)(d), Fla. Stat. provides that a parolee who is charged with a violation of the terms or conditions of his parole, and who elects to proceed with a preliminary hearing "... may be represented by counsel." The statute allows for the assistance of counsel, it does not require it. Unless this court interprets this statute in a manner such that "may" means "shall," the legislation

must be said to have already delineated the scope of that right as it applies to parolees. It is notable that there is no comparable statutory provision which would apply to probationers. Pursuant to Section 947.23(1)(d), Fla. Stat., the Commission has promulgated Rule 23-21.22(4), Florida Administrative Code, with regard to preliminary hearings, which provides parolees with:

> (4) "The opportunity to be represented by counsel provided by the parolee's or releasee's own initiative or by appointed counsel should the parolee or releasee qualify for such appointment as set forth in the guidelines enunciated in Gagnon v. Scarpelli, 411 U.S. 778."

Similarly, the Commission has specifically adopted the Gagnon criteria for appointment of counsel at final parole revocation hearings. Rule 23-21.22(13)(e), F.A.C. affords the parolee:

> (e) "The opportunity to be represented by counsel either retained or appointed, provided that such appointment is made consistent with the guidelines of the United States Supreme Court case of Gagnon v. Scarpelli, 411 U.S. 778."

The Gagnon Court thoroughly considered the benefits and disadvantages of establishing an absolute right to counsel in all parole revocation proceedings, and stated:

> While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel. In most cases, the probationer or parolee has been convicted of committing

> another crime or has admitted charges against him. And while in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.
>
> The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State-for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review -will not be insubstantial.

411 U.S. at 787-788, 36 L.Ed. 2d at 664-665. (Emphasis added); (footnote omitted)

The Fourth District Court of Appeal in Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984) noted several differences between the revocation procedures described in Gagnon and those utilized in Florida probation revocation cases. The

District Court pointed out that in probation revocation proceedings, the state is represented by an assistant state attorney, acting on its behalf, and the hearing body is a circuit judge acting very much akin to a judge at trial. Id. at 608. However, this is not the case in parole revocation proceedings. A Commission representative, who is not an attorney, is responsible for conducting the preliminary hearing. See, Rule 23-21.22(7), F.A.C. Similarly, the final revocation hearing is conducted by a hearing Commissioner or duly authorized representative. See, Section 947.23 Fla. Stat. (1985). Thus, parole revocation proceedings are conducted by non-lawyers. See, Morrissey, supra. Parole revocation proceedings in Florida are therefore very similar to proceedings described in Gagnon.

In Hicks, this Court found an anomaly in not affording counsel for probation revocation hearings, but requiring counsel at a subsequent sentencing hearing. See, Hicks, footnote at 23. Unlike probation revocation proceedings, parole revocation proceedings do not lead to sentencing. Thus, part of the rationale for requiring appointment of counsel in probation revocation cases does not apply to the parole situation. See also, Thomas v. State, 452 So.2d 609 (Fla. 4th DCA 1984).

Petitioner contends that parole and probation are very similar procedurally and substantively. Indeed numerous court decisions have made analogies between the two types of proceedings, and found due process considerations for one

applicable to the other. However, in State v. Hicks, 478 So.2d 22 (Fla. 1985) this Court found there was no constitutional requirement for the appointment of counsel in all probation revocation cases. Rather, the Court predicated its decision on the ground that a uniform rule in all probation revocation hearings is more easily understood and easier to administer. This may not be the case with parole revocation proceedings. Further, Section 947.23(1)(d), Fla. Stat. stands as a clear expression of legislative intent as to parolees, which does not have a statutory counterpart relating to probationers.

Section 947.23(1), Fla. Stat. (1985) provides in pertinent part:

> "Within 30 days after the arrest of a person charged with violation of the terms and conditions of his parole, the parolee shall be afforded a prompt preliminary hearing, conducted by a member of the commission or its duly authorized representative, at or near the place of violation or arrest to determine if there is probable cause or reasonable grounds to believe that the parolee has committed a violation of the terms or conditions of his parole..." (Emphasis added)

Commission Rule 23-21.22(1), F.A.C. currently reduces the time frame in which to conduct the preliminary hearing to within 14 days of service or filing of the Commission's warrant. Furthermore, Rule 23-21.22(2), F.A.C. provides that:

> "Prior to the preliminary hearing, an interview with the alleged violator will be held at which time an explanation of all rights and procedures will be

> afforded. The interview and preliminary hearing may be held by a Commission representative, such as a Parole Examiner, provided such representative is neutral and detached."

This "initial interview" is uniformly conducted upon the parolee's apprehension on a parole violation warrant. It is also at this initial interview that the parolee is first required to admit or deny the revocation charges. Thus, if the ruling in Hicks is extended to encompass parolees, then every parolee would have a right to counsel at the initial interview, immediately after the parolee's arrest on the parole violation warrant.

As Section 947.23(1) Fla. Stat. (1985) makes clear, the preliminary hearing must be conducted "at or near the place of violation or arrest." The preliminary hearings, as well as the initial interviews, are therefore conducted in locations throughout the State of Florida. During Fiscal Year 1984-1985, 1,753 initial interviews were conducted along with 975 preliminary hearings. See, Florida Parole and Probation Commission 45th Annual Report, page 32. Obviously, providing counsel to all indigent parolees charged with violations in locations throughout the state, would be a tremendous financial burden.

Petitioner is correct when he asserts that a substantial number of parole revocation proceedings are based on alleged commissions of new criminal offenses. Often a parolee is convicted on criminal charges, and the conviction may serve as a basis for parole revocation. In Morrissey v.

Brewer, supra, it was held that a parolee cannot relitigate issues determined against him, as in the situation where the revocation is based on conviction of another crime. See also, Albritton v. Wainwright, 313 So.2d 763 (Fla. 1975). Petitioner also points out that "since counsel will have to be appointed to represent indigent parolees 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." Should this Court decide to expand its ruling in Hicks to encompass parole proceedings, the Commission contends that the public defender system should be required, by appropriate order of the Court, to furnish representation at the preliminary hearing and at the initial interview, at which time the parolee is required to respond to the revocation charges. This is essential for a number of reasons.

As previously indicated, the large number of initial interviews and preliminary hearings spread throughout the state would require that local attorneys be available for representation of indigent parolees upon relatively short notice. It would be too great of a financial burden for any state agency to enter into individual contracts with attorneys in every county in the State. The public defender system is already providing representation in the vast majority of those cases where the indigent parolees are currently entitled to appointed counsel pursuant to Gagnon

v. Scarpelli, supra. Further, since public defenders are already representing many of those individuals in criminal proceedings, they are already familiar with the circumstances surrounding many of the alleged violations, and would be in the best position to provide effective representation to indigent parolees.

In Hicks v. State, supra, this Court stated, "We do not believe that a uniform requirement will unduly tax the resources of the public defender system..." 478 So.2d at 22. If this be the case, and it is this Court's intention to extend the holding in Hicks to parole revocation proceedings, then the public defender system should be required to represent indigent parolees at both the initial interview and the preliminary hearing. The Public Defender has, in the past, been authorized to represent inmates where the Commission is an adversary. See eg., Florida Parole and Probation Commission v. Alby, 400 So.2d 864 (Fla. 4th DCA 1981).

Recently, in the case of State ex rel. Smith v. Jorandby, _____ So.2d _____, 11 FLW 647 (Case No. 68,213, Opinion rendered Dec. 18, 1986) this Court held that public defenders are authorized to represent defendants whose liberty interests are threatened by the State of Florida:

> Florida's public defender's office was established in this state by statute and later by an express constitutional provision, to provide defendants the right of counsel guaranteed by the sixth amendment. Article V, section 18, of the Florida Constitution establishes the public defender as a constitutional

> official and states: "He shall perform duties prescribed by general law." Section 27.51, Florida Statutes (1985), sets forth the circumstances under which the public defender in Florida shall represent indigent defendants who face loss of liberty because they are: (a) under arrest for or charged with a felony; (b) under arrest for or charged with a misdemeanor; (c) children alleged to be delinquent; and (d) facing the prospect of involuntary hospitalization as a mentally ill or mentally retarded person. Each circumstance is directed toward an event that could result in incarceration, and the statute also authorizes the public defender to represent these indigent defendants in appeals.
>
> This statutory authority permits representation by a public defender only in circumstances entailing prosecution by the state threatening and indigent's liberty interest...

11 FLW at 648.

Clearly a parole revocation involves state action which threatens the parolee's liberty interests. Accordingly, if the Court determines the Commission's revocation proceedings are governed by the decision in Hicks, supra, the Commission respectfully urge that the public defender system be required, by appropriate Order of the Court, to furnish representation for indigent parolees at initial interviews and preliminary parole revocation hearings.

CONCLUSION

On the basis of the arguments and authorities cited herein, Respondent would contend that the rationale underlying the requirement for appointment of counsel for all indigents charged with probation violations, does not apply to those charged with parole violations. However, should this Court be inclined to extend the ruling in Hicks to encompass parolees, Respondent would suggest that the public defender system provides the only viable means for effective representation of indigents at preliminary hearings and initial interviews, at which time the parolee must first respond to charges of parole violation.

Respectfully submitted,

KURT E. AHRENDT
Assistant General Counsel
Florida Parole and Probation Commission
1309 Winewood Blvd., Bldg. 6
Tallahassee, FL 32399-2450
(904) 488-4460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Michael E. Allen, Public Defender, Second Judicial Circuit, P. O. Box 671, Tallahassee, FL 32302 this 9th day of February, 1987.

Kurt E. Ahrendt

KURT E. AHRENDT
Assistant General Counsel
Florida Parole and Probation
Commission