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IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary
Department of Corrections,

Appellant,

v. Case NO. 78-844

WILEY JEROME GRANT,

Appellee.

CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
CASE NO. 91-483

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the First District Court of Appeal affirming an Order of the Circuit Court for Leon County granting Appellee's Petition for Writ of Mandamus. Pursuant to Florida Rule of Appellate Procedure **9.0309** (a)(2)(A)(v), the panel certified as a question of great public importance the following:

> MAY THE DEPARTMENT OF CORRECTIONS RELY ON INFORMATION TAKEN FROM AN ARREST REPORT WHICH IS INCLUDED IN THE PRESENTENCE INVESTIGATION (PSI) AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION **944.277**, FLORIDA STATUTES.

At issue in this case is whether the Department of Corrections (DOC) is entitled to rely on information contained within a presentence investigation report (PSI) derived from an arrest report that substantiates that Appellee's conviction for battery involved sex acts that were attempted or completed during commission of the offense. Use of that information has led to Appellee's disqualification from receiving that type of gaintime which is awarded purely to control prison overcrowding.

Grant is currently serving a ten (10) year sentence for Burglary of a Dwelling, Person Assaulted. (R. 32, 37, 41). He is also serving a one year concurrent sentence for Battery. (R. 41, 44). He was originally charged with Sexual Battery, but was found guilty of the lesser included crime of Battery. (R. 41, 46).

Two of several exceptions to eligibility for provisional credits provide that an inmate is not entitled to provisional credit awards if the inmate,

> (d) Is convicted ... of committing ... battery ..., and a sex act was attempted or completed during commission of the offense; or
>
> (e) Is convicted ... of committing ... burglary ... and the offense was committed with the intent to commit sexual battery
> Fla. Stat. S944.277 (1989).

DOC officials relied on the circumstances contained within the PSI to supply the information that sex acts were attempted or completed during commission of the battery and that the burglary was committed with the intent to commit sexual battery. (R 32-49). Their determination led to Grant's inability to qualify for consideration for credits.

The PSI states that:

> Pertaining to this particular incident the offense report shows that she [the victim] returned home at approximately 11:00 on 9-2-88. As she opened her front door she felt the door being forced open, the defendant entered her apartment stating that he was going to "Screw (sic) her. He then undressed her. ...He ordered her to the bedroom ... He tried to pluck pubic hairs with a pair of tweezers so that she would be embarrassed to be with other men. ... He continued to attempt to have sexual intercourse with her both vaginally and anally. He slapped her several times when she would not get into some positions he wanted to try. ... When the defendant had sexual intercourse with her he urinated inside her and continued to urinate on the bed and the cedar chest at the foot of the bed. She was then allowed to take a shower. During the sexual attack the victim related that the defendant told her he was going to pinch her breasts off. The report indicated that this was evident by the bruising on her breasts.
>
> (R.49)

SUMMARY OF THE ARGUMENT

Section 944.277(1)**(d)**, Florida Statutes (1989) prevents the award of provisional credits to any inmate who is convicted of battery and a sex act was attempted or completed during commission of the offense. Section 944.277(1)(e) prevents the award of credits to any inmate convicted of burglary and the offense was committed with the intent to commit sexual battery. Appellee Grant, Petitioner below, was convicted of both battery and burglary. For cases of this nature, where the conviction itself is not an automatic disqualification, the Department must turn to other documents to make the eligibility determination. Those documents include but are not limited to pre and post sentence investigations. **The** Department makes no fact finding determination concerning the quality of information contained within the presentence (PSI) report. The Department presumes it is correct. Here officials found Grant ineligible because the PSI disclosed that sex acts such as plucking pubic hairs and pinching breasts were both attempted and completed during commission of the battery and that the burglary was committed with the intent to commit sexual battery.

Imposing quality restrictions on the use of these reports will render the Department unable to satisfactorily perform its legislatively mandated administrative duty to determine who qualifies for credits and who does not. Contrary to the lower court opinion and inferences in the district court opinion, the PSI is not being used to establish crimes which the jury found not to

be proven. The awarding of credits has nothing to do with punishment or reward of inmates. Rather, prison overcrowding forced the Legislature to create unpalatable mechanisms for early release of inmates. The Legislature has directed the Department to exclude those inmates who commit certain crimes that have sexual overtones in an attempt to protect society.

One should not lose sight of the fact that an inmate is not harmed if credits are withheld. He only serves his original sentence. The public, however, can be harmed if the Department is prevented from performing its statutorily mandated duty of withholding credits from inmates whose crimes had associated sexual overtones. These inmates present legitimate threats to Florida citizens and should be required to serve their original sentences. A reversal of the decision of the First District Court of Appeal will allow that to happen.

ARGUMENT

IN PERFORMANCE OF ITS STATUTORY DUTIES, THE DEPARTMENT OF CORRECTIONS MAY RELY ON INFORMATION TAKEN FROM *AN* ARREST REPORT WHICH IS INCLUDED IN THE PSI **AS THE** SOLE BASIS **FOR** DETERMINING *AN* INMATE'S ELIGIBILITY **FOR** PROVISIONAL CREDITS PURSUANT TO SECTION **944.277**, FLORIDA STATUTES.

The issue before this Honorable Court is whether the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) taken from an arrest report as an aid in determining whether a sex act was attempted or completed during commission of the battery and whether the burglary was committed with the intent to commit sexual battery.[1] Grant sought mandamus relief against the Appellant, as Secretary of the Department of Corrections (DOC), alleging entitlement to provisional credits pursuant to Section **944.277,** Florida Statutes **(1989). He** argued that his conviction of the lesser included offense of battery rather than the charged offense of sexual battery made Section **944.277** (1)(d) **or** (e)[2] inapplicable to him.

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[1] The First District Court did not address basing the ineligibility determination on the burglary. Appellant argued at oral argument that even if the Court were to apply the holding in Bishop v. State, 16 F.L.W. **D1573 (Fla. 1st** DCA June **11,** 1991) to the burglary conviction which may remove that conviction for disqualification purposes, the battery conviction remained. The District Court chose to focus on the battery conviction.

[2] Section **944.277** reads in pertinent part:

Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity as defined in s. **944.096,** the Secretary **of** Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing the Secretary may grant up **to** 60 days **of** provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

The Department urged the trial court that it could use the PSI to supply the **"evidence"** to establish that sex acts were attempted or completed as well as to establish that the burglary was committed with the intent to commit sexual battery. The trial court and appellate court disagreed and stated that use of the presentence report did not appear to be the type of "evidence" the First District Court of Appeal contemplated in the Mayo v. Dugger, 535 So.2d 300 (Fla. 1st DCA 1988) decision. (R. 52 - 54). In Mayo the Department denied Mayo's request for administrative gaintime on the basis that he had been convicted in Alabama of assault and/or battery involving an attempted or completed sex act and was thus ineligible for administrative gaintime under Section 944.276 (1)(c). The Mayo court determined that "there is not evidence in the record on appeal in the instant case to establish that a sexual act was either attempted or completed in connection with the assault and battery for which the appellant was convicted in Alabama. Mayo, 535 So.2d at 301. Appellant asserts that Mayo is distinguishable from the facts in this case. Appellant would agree that if the record is devoid of any **"evidence"** of sex acts being performed **as** a part of the circumstances surrounding the crime, then the department is powerless to withhold credits where a battery has occurred. That is simply not the case before this Court. There is evidence and that is contained within the PSI,

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(d) Is convicted ... of committing ... battery..., **and** a sex act was attempted or completed during commission of the offense; (or)

(e) Is convicted ... of committing ... burglary ..., and the offense was committed with the intent to commit sexual battery;

Since 1983[3] Florida laws have provided for additional gaintime to be awarded when the prison system nears capacity to control overcrowding. In February 1987, the Florida Legislature enacted Section 944.276 which provided an early release mechanism to alleviate prison overcrowding. By cross-referencing existing statutory provisions regarding the classification and sentencing of convicted criminals, Section 944.276 established a selective early release scheme allowing for the alleviation of overcrowding while protecting the public from the early release of certain violent offenders.

A year and a half later, the Legislature replaced the administrative gaintime law with Section 944.277, Florida Statutes (Supp. 1988), which provided for the award of "provisional credits" instead of "administrative gaintime" to control prison overcrowding. The Legislature added a wide range of crimes which would disqualify an inmate from receiving provisional credits.

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[3] Section 944.598, Florida Statues (1983) read in pertinent part:

> (1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 98 percent of the lawful capacity of the system for males or females, or both.
>
> (2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gaintime shall be reduced ....
>
> Note: Neither the DOC nor the Governor has ever taken the steps necessary to activate the reduction of sentences under this section.

Therefore, it is apparent that because of severe prison overcrowding problems, the Legislature has been forced to create mechanisms which lead to the very early release of some segments of the Florida prison population. A close reading of the exclusions in both the administrative gaintime statute (Section 944.276) and the provisional credits statute (Section 944.277) leads one to conclude that the Legislature is intending to prevent the very early release of offenders who commit particularly violent, abhorrent and heinous crimes. Sex crimes, as well as other crimes with associated sexual overtones, fall within this category. The Eleventh Circuit Court of Appeals has even stated that "sex offenders are subject to a continually recurring physiological urge which is part of their nature and requires the imposition of effective restraints in order to curb the habitual repetition of episodes producing the harmful consequences to the public resulting from the propensities of their nature". Hendking v. Smith, 781 F.2d 850, 852 (11th Cir. 1986). Because very few inmates participate in sex offender programs while in prison that may reduce or eliminate deviant behavior upon release, the only way the public can be effectively protected is to keep these offenders behind bars as long as possible.

A review of the provisional credits statute reveals that the Legislature decided that the commission of certain offenses would automatically lead to disqualification for receipt of credits. Section 944.277(1)(c), for example, immediately disqualifies

inmates who have committed sexual battery or incest.[4] The commission of other crimes, however, i.e., assault, aggravated assault, battery or aggravated battery, does not automatically disqualify the inmate but would necessitate turning to additional documents to establish whether a sex act was attempted or completed during the commission of the primary offense. Fla. Stat. § 944.277 (1)(d) (1989).[5]

Since the inception of the administrative gaintime statute in February of 1987, when making eligibility determinations the Department has routinely relied on any official investigative report or document that outlines the circumstances surrounding the offense, such as, pre or postsentence reports, violation report forms (etc.). Engaging then in a two step process, the Department reviewed Grant's record to determine the types of crimes that were committed. Because Grant was incarcerated for both burglary and battery, proper adherence to the statute required the Department to turn to other documents to determine whether sex acts were attempted or completed in conjunction with the battery and whether the burglary was committed with the intent to commit sexual

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[4] Section 944.277(1)(c), Florida Statutes (1989) reads in pertinent part that an inmate will not qualify for credits if he:

Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest. ...

[5] Section 944.277(1)(d), Florida Statutes (1989) reads in pertinent part that an inmate will not qualify for credits if he:

Is convicted or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, <u>and</u> a <u>sex act</u> was <u>attempted</u> or <u>completed</u> during commission of the offense; (emphasis supplied)

battery.[6] Because the PSI contained information that Grant did perform sex acts, i.e., plucking pubic hair, urinating on and inside the victim and pinching her breasts, the Department determined he must be disqualified from **receiving credits.** Moreover, because Appellee Grant stated he was going to "screw her" (the victim) after he broke into her apartment, the Department used this statement to support a decision that the burglary was committed with the intent to commit sexual battery. The information in the **PSI** came from a Leon County Sheriff**'s** Department arrest report. Thus the First District Court while agreeing with the DOC that it should normally be allowed to utilize information in the PSI in performing its duties as to provisional credits, ruled that under these circumstances, "there was insufficient competent evidence to establish that the inmate was not entitled to provisional **credits."** Dugger v. Grant, 16 **F.L.W.** D2668 (Fla. 1st DCA Oct. **18,** 1991).

DOC is responsible for preparing a PSI under the provisions of Section **921.231,** Florida Statutes (Supp. 1990). This statute sets forth the information that should be included in the report. Subsection **(3)** provides:

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[6] **As** of September **16, 1991,** a computer run of the Florida state prison inmate population reflected that there **were 6,381** inmates incarcerated for burglary and 1,720 incarcerated for aggravated assault and aggravated battery. **The** eligibility credit determination then for these 8,551 inmates required that the Department turn to whatever documents existed, i.e., pre/post sentence investigations, violation report forms, (has same information as PSI and if one of these reports is completed, the PSI is not) probable cause affidavits, indictments, pre-trial investigations, etc., to find the circumstances surrounding the commission of the incarcerated offense.

> All information in the presentence investigation report should be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification shall bear the burden of explaining why it was not possible to verify, the challenged information.

Pursuant to Florida Rule of Criminal Procedure 3.712 , the PSI is not a public record, and copies held by the trial court, the reviewing court, and counsel for the two parties cannot disclose the contents of the report to third parties. When a judge orders a probation and parole officer to prepare a presentence investigation, the officer routinely incorporates portions of the arrest or other investigative document reports into the block which deals with the circumstances surrounding the crime. Sometimes the officer notes, as occurred in the instant case, that the circumstances came from an arrest report. Often, however, when the circumstances do come from an arrest report, the preparer makes no reference to that in the body of the report.

The appellate court appears to impose a qualitative requirement into the process by finding that information in an arrest report is inherently suspect. Yet, the preparer of the PSI is required by statute to verify the facts, if reasonably possible, contained within the PSI. Fla. Stat. §921.231(3) (Supp. 1990). The Appellee, Mr. Grant, also should have had an opportunity at the sentencing hearing to dispute those facts. Dickens v. State, 368 So.2d 950 (Fla. 1st DCA 1979); Bronson v. State, 345 So.2d 872 (Fla. 2d DCA 1977); Carnabell v. State, 342 So.2d 1010 (Fla. 4th DCA

1977) (reviewing courts have reversed for sentencing where they found that the confidential section of a PSI contained factual material not revealed to the defense).

Contents of a presentence report should be presumed correct unless disputed at the sentencing hearing. "The presentence report is an integral part of the judicial function of sentencing." Turner v. Bary, 856 F.2d 1539, 1540 (D.C. Cir. 1988); ~~see also~~ Hushes v. Chesser, 731 F.2d 1489 (11th Cir. 1984). When preparing presentence reports, the probation officer acts at the specific request of the court and submits the results of its investigation and information gathering to the sentencing court for its evaluation. Turner, 856 F.2d 1540.

Charged with the duty of impartial fact-finding, the officer may prepare a report based on many and varied types of reports that have become part of a criminal investigation. If the contents of the PSI, which rely on other reports, do not constitute sufficiently "competent evidence", Appellant asserts that it will be impossible to administer those subsections of the provisional credit statute which require the DOC to turn to other documents when making eligibility determinations. For example, many of the PSI's are ten to twenty years old because prior convictions are also reviewed. If the courts required DOC to find the victims and obtain affidavits, it would be impossible to locate victims after twenty years have elapsed. Furthermore, the victim's recollection of the crime would have faded as time passed and thus the degree of reliability would not be enhanced.

The Department is not using the information to establish crimes which the jury found not to be proven as the district court inferred. Dugger v. Grant, 16 F.L.W. at D2668. The Department is simply trying to discriminate between those inmates who committed batteries with sexual overtones and those who did not and those inmates who burgled a home with the intent to commit sexual battery as contrasted with those who burgled with the intent to steal a television. Obviously, the Legislature, reluctantly forced to reward some inmates with very early release prospects, intended to keep the more violent offenders who committed crimes with sexual overtones in prison longer.

In Dugger v. Rodrick, 585 So.2d 2 (Fla. 1991), this Court found Section 944.277, Florida Statutes, was designed solely for the purpose of reducing overcrowding in the prisons and did not create any substantive rights in an inmate. The district court cautions, however, in the instant case that the DOC "must still administer the statute in accordance with statutory guidelines." Dugger v. Grant, 16 F.L.W. at D2668.

Appellant asserts that the DOC is administering the statute in accordance with the Department's informed knowledge of the legislature's intent. The legislature made clear, through the various exclusions enacted, that it did not intend to reduce overcrowding at the expense of public safety. Thus, any questions regarding an inmate's eligibility for provisional credits should be resolved in favor of protecting the public's interest in safety. It is well settled that statutes enacted for the public's welfare

should be construed so that the public interest may be fostered to the fullest extent. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (Fla. 1944); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). Even where a statute enacted to protect a public interest has penal aspects, the statute should nonetheless be construed liberally in favor of the public interest. State v. Hamilton, 388 So.2d 561 (Fla. 1980); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

The provisional credits statute provides an administrative mechanism for resolving a problem. Although inmates ultimately receive the "benefit" of earlier release, the statute was not enacted with the rights, needs, or concerns of inmates in mind. Because a remedy for prison overcrowding had to be found, the Legislature was faced with decisions regarding the kinds of inmates who were less of a risk for early release. The exclusions found in Section 944.277, Florida Statutes, which for the most part concern violent and sexual offenders, demonstrate that the Legislature determined that these offenders pose special safety concerns for the public. The danger posed by individuals prone to commit, to attempt, or who intend to commit, nonconsensual sexual acts has been recognized by Florida courts. Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990): Henderson v. State, 543 So.2d 344 (Fla. 1st DCA 1989), review denied, 551 So.2d 461 (Fla. 1989). Further evidence of the Legislature's determination that inmates prone to commit nonconsensual sexual acts pose significant dangers to the public is that a conviction for a sexual crime is not

necessary to deny an inmate provisional credits. See Fla. Stat. §§944.277(1)(d) and (e).

Because credits are not earned but are simply awarded as an administrative tool to relieve overcrowding, a decision that an inmate is ineligible is not punishment or in any way related to punishment. The exclusions were enacted to protect the public interest. Because it is well settled that statutes enacted for the public's welfare should be construed liberally in favor of the public interest, the Department asserts that it is administering the statute in accordance with statutory guidelines. Any doubt about whether an inmate is eligible for credits should be resolved in favor of protecting the public.

The presence of a modicum of evidence is sufficient for a court to uphold the decision to revoke good time credits. Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 80 L.Ed.2d 356 (1988). The Supreme Court rejected the argument that there must be substantial evidence in the record. "Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context." Hill 472 U.S. at 456 (citations omitted). The court held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached ...." Hill 472 U.S. at 455-6 (emphasis supplied).

It would be inconsistent to hold the Department to a higher

standard of evidence in reviewing its decision regarding provisional credits as contrasted with disciplinary loss of gaintime since (1) the determination that an inmate is ineligible for provisional credits is not punishment, (2) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public and (3) the eligibility decision is one committed to the administrative expertise of the Department, (See Section 944.277, Florida Statutes), and as such, presumptively correct. State ex rel Seigendorf v. Stone, 266 So.2d 345, 346 (Fla. 1972) ("the decisions of public administrators made within the ambit of their responsibilities, and with due regard to law and due process, are presumptively correct and will be upheld, if factually accurate and absent some compelling circumstances, clear error or overriding legal basis ...."); City of Hollywood v. Fla. Pub. Employees Relations Comm'n, 476 So.2d 1340, 1342 (Fla. 1st DCA 1985) ("the general rule in Florida is that a decision by an administrative body if made within its area of authority will be upheld if factually correct, absent some compelling circumstances).

Just as the sentencing judge relies on the PSI as an aid in determining the length of sentence and the Florida Parole Commission relies on the report to set an appropriate parole release date, the Department must be allowed to use the contents whether derived from an arrest report or not to make eligibility determinations while providing society the added protection against the very early release of violent, sexually deviant individuals.

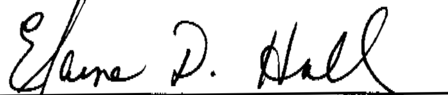
The Department emphasizes that making eligibility decisions is not a part of criminal proceeding. This is an administrative determination. Dugger v. Rodrick, Supra. The inmate has already been adjudged guilty of a crime and been afforded all the attendant due process protections. Eliminating the ability to use a PSI simply because **the** preparer has noted the circumstances were derived from an arrest report will prevent the Department from effectively administering large portions of the provisional credits statute **and** will lead to the retroactive application of credits to significant portions of the present inmate population.

Appellant strongly contends that the Legislature intended to protect society from being preyed upon by inmates who committed crimes with sexual overtones. Allowing the Department to use the PSI without qualifications will further that goal. The inmate is not punished. He is simply required to serve his original sentence.

CONCLUSION

Wherefore, for the foregoing reasons, Appellant respectfully requests that the certified question be answered in the affirmative and the decision of the First District Court of Appeal in Dugger v. Grant be disapproved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLANT'S INITIAL BRIEF has been furnished by U.S. Mail to Sharon Bradley, Esquire, Post Office Box 1177, Tallahassee, Florida 32302, this 25th day of November, 1991.

Elaine D. Hall

ELAINE D. HALL