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IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary
Department of Corrections,

Appellant,

v. Case No. 70,044

WILEY JEROME GRANT,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

Point I

Appellee asserts that the jury finding contradicts the contents of the arrest report cited within the presentence investigation report and therefore, the arrest report is unreliable. He further argues that "the jury's verdict and the offenses of conviction differed from the factual statement." (Appellee's Brief at p. 3.) This is not a correct representation. The jury found the Appellee not guilty of sexual battery, but guilty of battery. A person commits battery if he "actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to an individual." Fla. Stat. §784.03(1)(a) and (b) (1989). The Department is using information contained within the PSI to support that sex acts occurred during the commission of the battery. Obviously, plucking pubic hairs or pinching breasts will not lead to a sexual battery conviction, but will lead to a battery conviction. Indeed, the District Court fully agreed with the Appellant that "[a]s the Department of Corrections points out, the jury verdict was not inconsistent with the finding that the Appellant [sic, appellee] had attempted or completed a sexual act during the commission of the battery". Dugger v. Grant, 16 F.L.W. D2668 (Fla. 1st DCA Oct. 18, 1991), footnote 2.

Appellee further argues that the offense report cannot be used in making provisional credit eligibility determinations because offense reports are generally not admitted into evidence at trial.

Whether offense reports are used at trial or not is irrelevant to the real question before this Court. Appellant once again emphasizes this is not a criminal proceeding. If the sentencing judge directs a PSI be prepared prior to sentencing and relies on the circumstance surrounding the commission of the crime as an aid in determining the length of an inmate's sentence, surely, the Department of Corrections (DOC) may rely on the contents as an aid in determining whether provisional credits are to be awarded. This is particularly true in this case because the relied upon contents do not contradict the jury verdict.

As much as both the lower courts and Appellee would like the eligibility determination treated as part of a criminal proceeding with all the attendant due process protections provided, the fact of the matter is that this is not a trial. Indeed, Appellee Grant, contrary to his assertions, possesses no constitutionally based liberty interest in early release through provisional credits. A state may create a protected liberty interest through its laws and regulations, which employ "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates [which] demands a conclusion that the state has created [such an interest]." Hewitt v. Helms, 459 U.S. 460, 472 (1983). The State of Florida did not create a liberty interest when the Department implemented the provisional credits statute. Appellee has no right to require the statute be implemented at any point in time. Section 944.277 does not require that the Secretary of DOC make awards of provisional credits whenever the triggering

percentage is reached. On the contrary, the statute leaves to the Secretary's full discretion the decision as to whether the statute may be implemented:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity the Secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the Secretary may grant up to 60 days of provisional credits . . . .

Fla. Stat., §944.277(1) (Supp. 1990). (Emphasis supplied.)

Because the Secretary retained full discretion over whether the statutory provisions would be implemented, Appellee never accrued a liberty interest in receiving benefits under its provisions,[1] See Francis v. Fox, 838 F.2d 1147, 1149 (11th Cir. 1988) (when the statute is framed in discretionary terms there is no liberty interest created).

Appellee argues that gaintime "is one determinant of (a) petitioner's prison term" citing, Weaver v. Graham, 450 U.S. 27, 32, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981) for the proposition that the state has created a liberty interest in provisional credits. Provisional credits, however, are not gaintime. The two are vastly different in purpose and effect. Regardless of whether early release awards are called "gaintime" or "credits" or

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[1] The Secretary could decline to certify the overcrowding situation to the Governor. Then Section 944.598, Florida Statutes (1983) could be activated which requires that the Secretary shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population exceeds 98 percent. Following the declaration the sentences of all inmates in the system who are eligible to earn gaintime shall be reduced....

"allotments", they are <u>not</u> the functional equivalent of basic and incentive gaintime awards.

This Court most recently reinforced this principle when stating in Dugger v. Rodrick, 564 So.2d 2 (Fla. 1991), that:

> [W]e reject Rodrick's attempt to liken the award of provisional credits to the basic gain time available for good conduct addressed in Weaver v. Graham and the incentive gaintime addressed in Waldrup v. Dugger. Both basic and incentive gain time relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of term meted out . . . . The sole purpose of the early-release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders.

Id. at 4.

Therefore, the Department is not denying the Appellee his due process rights. It is axiomatic that without a protectible liberty interest, Appellee has no right of due process.

Point II

For the first time in the Answer Brief, Appellee contends that the contents of the PSI were disputed at the sentencing hearing. Appellee cites to a supplemental record which is not a part of this record. Therefore, the Court should treat this statement as an unsubstantiated allegation. Even if the contents were disputed, there is no evidence in this record that reflects that the sentencing judge agreed with whatever changes may have been requested or issues raised. Because the contents of the PSI are used as the basis for a variety of decisions as to an inmate's

prison assignment, **work** release eligibility, parole possibilities, etc., Appellant assumes that Appellee's criminal attorney would want a corrected PSI prepared. To attack the **PSI**, years after its preparation, with no record substantiation is an argument that should not be entertained by this Court.

Point III

Finally, Appellee claims that the Department is making a floodgates argument. The First District Court of Appeal, however, has **just** ruled in Hubbard v. Richard Dugger, 16 **F.L.W.** ____, (Fla. 1st DCA Dec. 13, 1991) that reliance on an arrest report contained in a presentence investigation without an affidavit or otherwise sworn material lacks competent evidence to establish that Hubbard was not entitled to credits. It does appear that the district court is suggesting that the Department locate long lost victims and obtain a sworn statement as to the circumstances surrounding Hubbard's crime. Additionally, inmate legal attacks will be forthcoming claiming that preparation of presentence reports routinely rely on arrest reports so, therefore, are inherently suspect and should not be used which supports Appellant's position as to the difficulty of administering the statute. Appellant would argue that unless DOC's eligibility determinations are arbitrary and capricious, they should be left undisturbed by the courts. That should be the focus of judicial review.

CONCLUSION

Wherefore, for the foregoing reasons, the Department of Corrections respectfully requests that the decision of the First District Court of Appeal be disapproved.

Respectfully submitted,

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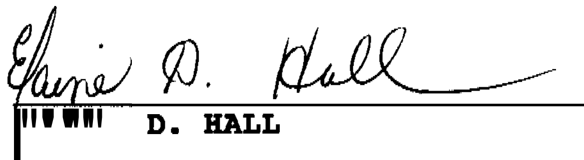
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT has been furnished by U.S. Mail to SHARON BRADLEY, ESQUIRE, Daley and Miller, Post Office Box 1177, Tallahassee, Florida 32302, this 23rd day of December, 1991.



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