IN THE SUPREME COURT OF FLORIDA

HARRY K. SINGLETARY, JR., Secretary
Department of Corrections,

Petitioner,

v. **Case No. 80,752**

BENJAMIN J. WARD,

Respondent.
_____/

ON PETITION FOR REVIEW FROM CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
CASE NO. 91-3414

PETITIONER'S BRIEF ON THE MERITS

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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 Ward's Petition for Writ of Mandamus. (App. 1.) The trial court granted the petition for writ of mandamus on the grounds that Ward could not be deprived of provisional credits since he was not convicted as charged of battery during which a sex act was attempted or completed, but only of the lesser included crime of simple battery. (App. 2-4.) Pursuant to Florida Rule of Appellate Procedure 9.030(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.

(App. at 1.)

The district court noted that the question certified was the same as certified in Dugger v. Grant, 587 So. 2d 608 (Fla. 1st DCA 1991), review granted, Fla. Supreme Court case number 78,844;[1] Hubbard v. Dugger, 590 So. 2d 1031 (Fla. 1st DCA 1991), review granted, Fla. Supreme Court case number 79,151;[2] and Schmidt v.

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[1] This Court has just rendered its opinion in Dugger v. Grant, 17 F.L.W. S744 (Fla., December 10, 1992). In Grant, this Court answered the certified question in the affirmative and quahsed the decision of the district court of appeal.

[2] On December 10, 1992, this Court, following its decision in Dugger v. Grant, 17 F.L.W. F744 (Fla., December 10, 1992), answered the certified question in Hubbard affirmatively and quashed the decision of the district court of appeal.

State, 17 F.L.W. D1741 (Fla. 1st DCA 1992), review granted, Fla. Supreme Court case number 80,287.

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) or other documents such as the charging information and the arrest report that substantiates that Ward's conviction for "battery" included an attempted or completed sex act contemplated and excluded under Section 944.277(1)(d), Florida Statutes (1991). Use of that information led to Ward's disqualification from receiving early release credits which are awarded purely to control prison overcrowding.

At the time Ward filed his petition, he was serving an overall term of twenty-two (22) years. (R. 26-27). Ward had initially been received by the Department in 1982, but he was paroled in 1986 and returned to the Department's custody in 1989 as a parole violator with a new sentence. (R. 26.) When Ward was first received, he was determined eligible for provisional credits (R. 27); however, during a reaudit of Ward's record, information was obtained on a previous battery conviction out of Escambia County case number 89-509 CFA4S. (Id.) Through the presentence investigation, the Department was apprised that Ward's battery offense was originally charged as a lewd and lascivious act upon a child. (R. 31.) The Department sought and obtained documentation setting forth the circumstances of the battery conviction. (R. 29-33.) The circumstances of the offense supported that the

battery was of a sexual nature in that Ward had fondled the victim's breast and vaginal area on top of her clothing. (Id.) The circumstances were obtained from the information, which originally charged Ward with Lewd and Lascivious Assault Upon a Child and the arrest report leading to the charges. (R. 29-33.)

DOC officials relied on the conviction indicated within the PSI and the circumstances outlined in the arrest report and charging information to determine whether Ward fell within the proscriptions of Section 944.277(1)(d).

The arrest report, sworn to by the complainant, gave the following circumstances:

> [The victim] state that . . . Benjamin Ward had fondled her breast and vaginal area on top of her clothing. She stated that this occurred approximately five to six months ago at a house her father was renting in Navy Point. She stated that her uncle has tried to do this to her again, but that she told him no. [The victim] was afraid to tell anyone what had happened when it occurred.

(R. 29.)

On the basis of these circumstances, the Department redetermined that Ward was ineligible for provisional credits and voided those credits previously awarded. (R. 27.)

SUMMARY OF THE ARGUMENT

Section 944.277(1)(d), Florida Statutes (1991), precludes the award of provisional credits to an inmate who is convicted of certain types of offenses, where during commission of that offense a sex act was attempted or completed. Because these types of sex offenses are not charged as "attempted or completed sex acts", the conviction, on its face, does not generally provide for clear automatic disqualification. Thus, the Department must utilize other documents to make the necessary eligibility determination. In determining the factual circumstances underlying a conviction, the Department does no fact-finding in the sense of weighting certain portions of these documents or assessing the quality of information contained within the presentence (PSI) report, nor does it seek to conduct evidentiary hearings or mini-trials by obtaining affidavits of victims, witnesses, arresting officers, or attorneys or extraneous documents produced by the defendant. Instead, the Department relies upon documents generated during the course of criminal proceeding from which the conviction results. Those documents include but are not limited to pre and post-sentence investigations, arrest reports, informations and indictments, or other such documents typically generated during a criminal proceeding. The Department presumes these documents to be competent as they were generated for specific purposes during the course of the criminal proceedings, in accordance with statutes and rules governing such documents, and are relied upon the Court in the disposition of its duties.

In the instant case, both the arrest report and the original charging information outline the factual circumstances surrounding the battery offense to which Ward pled. In administrative disciplinary matters involving prisoners, the Department is only required to demonstrate that there is a modicum of evidence present and the nature of that evidence need not be direct evidence nor evidence which meets the evidentiary standards required in a criminal proceeding. To require something more for administrative eligibility determinations for early release credits would be inconsistent since (1) there is no protected liberty interest in receiving early release credits, (2) the determination that an inmate is ineligible for provisional credits is not punishment, (3) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public, and (4) the eligibility decision is one committed to the administrative expertise of the Department, and as such, presumptively correct.

For these reasons, factual circumstances contained in a charging information or in an arrest report, which are articulated in a pre or post sentence investigation should be determined to be competent evidence which can be relied upon to make an administrative eligibility determination required under Section 944.277, Florida Statutes.

On December 10, 1992, this Court rendered its opinion in Dugger v. Grant, 17 F.L.W. F744 (Fla., December 10, 1992), which answered the identical certified question affirmatively.

Specifically, this Court held that

> [T]he Secretary, in his discretion under the statutory scheme has the authority to examine the entire record, including the PSI, to determine whether an inmate has committed or attempted a sex act.

Id. at 746.

In light of the Grant opinion, the certified question in this cause must also be answered in the affirmative and the decision of the district court quashed.

ARGUMENT

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

The issue presented by the certified question is whether the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) taken from an arrest report or a charging information as an aid in determining whether conviction for a battery falls within the exclusions of Section 944.277(1)(d), a provision which determines eligibility for early release credits. Although the certified question of the district court of appeal implies that the Department relied on a presentence investigation which referenced factual circumstances taken from an arrest report, in actuality the Department relied on the arrest report itself. The presentence report contained in the Department's files for Ward's present conviction listed a prior conviction for battery, which had originally been charged as a lewd and lascivious assault upon a child. (R. 31.) Because it was necessary for the Department to ascertain the nature of the battery in order to decide whether the conviction fell within the exclusions of Section 944.277(1)(d), the Department requested and obtained additional documents from the court file on Ward's Escambia County battery conviction. The documents obtained from the Escambia County clerk's office were the arrest report and charging information.

As in the Grant, Hubbard, and Schmidt cases, supra, which preceded this cause, the district court's concern is the quality of the evidence relied upon by the Department in making its eligibility determination, and in particular, the use of information contained within an arrest report. The arrest report led to a charging information for the offense of lewd and lascivious assault upon a child, and the circumstances outlining the offense are contained in the sworn statement of the arrest report. The district court now indicates that the Department should somehow be required to provide something more substantial. The Department disagrees.

The Department emphasizes that making eligibility determinations for the award of early release credits is not equivalent to a criminal proceeding. It is an administrative determination. This Court has recognized that very important aspect in its recent decision in Dugger v. Rodrick, 584 So.2d (Fla. 1991), cert. denied, 112 S. Ct. 886 (1992), in which the Court was required to determine whether Florida's early release statutes were substantive statutes related to punishment or reward. This Court concluded that the early release statutes were essentially remedial, not penal in nature. There can be no doubt from the legislative history[3] of the early release statutes that the sole

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[3] The provisional credits statute is one of several mechanisms enacted by the Florida Legislature to address the overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass

purpose of the statutes is to provide an interim administrative solution to prison overcrowding. There also can be no doubt that the Legislature intended to provide this solution without jeopardizing the public safety. There has never been any intent expressed in the statutes that would lead one to believe that these

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release of Florida inmates at the direction of the federal courts. (The consent decree in Costello v. Singletary, Case Nos. 72-109-Civ-J-14, 72-94-Civ-J-14, has been in place almost two decades.) The first emergency mechanism, enacted in 1983, provided for the emergency release of prisoners, after the declaration of a state of emergency, by the application of up to 30 days gaintime, in 5-day increments, to the overall term of each inmate in the system until the inmate population reaches 97% of lawful capacity. See § 944.598, Fla. Stat. (1983). There were no exclusionary provisions contained in the emergency release statute. Although the emergency release statute is still in effect, its provisions have never been implemented. See Blankenship v. Dugger, 521 So.2d 1097, 1098 (Fla. 1988).

Because of the legitimate and compelling concern for public safety, the Legislature enacted a second early release mechanism which was designed to be triggered prior to the emergency release statute. The administrative gaintime statute, enacted at Florida Statute Section 944.276 (1987), became operational at 98% of lawful capacity, and the emergency gaintime statute's triggering level was raised to 99% of lawful capacity, as defined by the statute. The administrative gaintime statute contained a number of exclusions which eliminated from eligibility certain types of violent or repeat offenders. See § 944.276(1)(a)-(d), Fla. Stat. (1987). The administrative gaintime statute was repealed effective July 1, 1988, by Chapter 88-122, Laws of Florida, and was supplanted with a more comprehensive early release statute, which excluded more classes of violent or habitual offenders, and which, in later versions, added a limited period of supervision after release. See § 944.277, Fla. Stat. (1988 - 1990). Most recently, the Legislature enacted another early release program, called control release, which is administered by the Florida Parole Commission, sitting as the Control Release Authority. See §947.146, Fla. Stat. (1989 - 1990). The eligibility exclusions for control release are identical to those contained in the provisional credits statute; however, the control release program affords the Control Release Authority more discretion in establishing control release dates for early release. Cf. § 944.277, Fla. Stat. (1990 Supp.) with § 947.146, Fla. Stat (1990 Supp.). The provisional credits statute now serves as a backup early release mechanism to the control release program. § 947.146(3), Fla. Stat. (1990 Supp.)

statutes have been enacted, through the generosity of the Legislature, as a benefit to the prison population. Since it is now clear that the statutes are remedial in nature -- see Rodrick, supra -- the statutory provisions should be construed liberally, and the Department should be given latitude in making these administrative decisions.

The Department 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), (e) (1991).

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. With this in mind, the Department submits that the "quality" or "weight" of the evidence utilized to make these determinations should be viewed in the context of the administrative determination being made. The district court expresses its concern that the "evidence" utilized by the Department -- that is, the field arrest report -- is not competent. Presumably this is because the details of the offense contained in

the arrest report are "sketchy". However, the Department points out that the Supreme Court of the United States has determined that 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, 86 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). While the Petitioner notes there may be a distinction between the amount of evidence to be necessary to support the administrative determination and the quality or competency of the evidence, the facts of the Hill case are instructive as to the type of evidence which may be considered competent.

> [In Hill,] [t]he disciplinary board received evidence in the form of testimony of the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates fleeing together down an enclosed walkway. No other inmates were in the area. The Supreme Judicial Court found that this evidence was constitutionally insufficient because it did not support an inference that more than one person had struck the victim or that either of the respondents was the

> assailant or otherwise participated in the assault. (citations omitted) This conclusion, however, misperceives the nature of the evidence required by the Due Process Clause.
>
> The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. Although the evidence in this case might be characterized as meager, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary.

Hill, 472 U.S. at 456-457; 105 S.Ct. at ___; 86 L.Ed.2d at 365-366. (Emphasis added.)

It would be inconsistent to hold the Department to a higher standard of evidence, both in weight and competency, in reviewing its decision regarding provisional credits as contrasted with disciplinary loss of gaintime since (1) there is no protected liberty interest in receiving early release credits, see Blankenship, supra, (2) the determination that an inmate is ineligible for provisional credits is not punishment, (3) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public and (4) 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).

The decision of the Department to exclude Ward from the receipt of provisional credits based upon an arrest report, which provided the basis for the arrest, is not arbitrary and capricious. If the arrest report was the document relied upon and considered competent by the sentencing court in disposing of the charges, it certainly must be considered sufficient for the Department to make an administrative determination as to Ward's eligibility for early release credits.

Although the question certified by the district court in this case is identical to that certified by the district court in Grant case (Docket No. 78,844), the Department recognizes that in actuality the use of the arrest report is somewhat different. In Grant, the arrest report was used during preparation of the presentence investigation to outline the factual circumstances of the offense. The independent charging information did not contain the factual specifics of the crime. In the instant case, the presentence investigation for Ward's present offense revealed a conviction for battery, but did not outline the factual circumstances of the offense. However, it is the Department's

position that it is appropriate for the Department to use information in an arrest report, regardless of whether it appears in the PSI or is taken from the arrest report itself, to make these eligibility determinations, as these documents are generated in accordance with statutes and rules governing criminal proceedings. While use of these documents as evidence to secure a conviction would not be appropriate, use of the documents by the sentencing courts for post-conviction sentencing and by the Florida Parole Commission and the Department in the administration of their respective duties is clearly a different matter.

The Department again 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 or to utilize the arrest report in misdemeanor settings where the report actually serves as the charging document, 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.

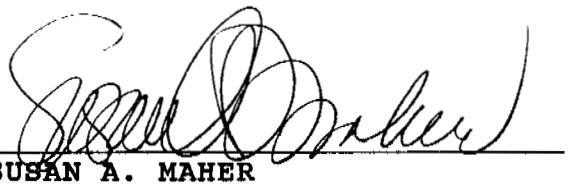
This Court has recently entered its opinion in Grant, supra, which embraces the arguments of the Department as to its discretion in utilizing documents which are generated during the course of criminal proceedings as aids in determining whether a

sexual offense as defined by the statutory exclusions of Section 944.277 has occurred. In Grant, this Court stated that the "Secretary, in his discretion under the statutory scheme has the authority to examine the entire record, including the PSI, to determine whether an inmate has committed or attempted a sex act." Grant, 17 F.L.W. at 746. (Emphasis supplied.) There is no factual difference which would prompt the Court to rule otherwise in this cause.

CONCLUSION

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

Respectfully submitted,



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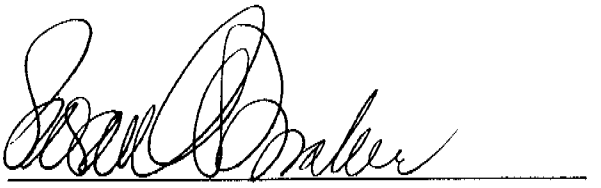
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** has been furnished by U.S. Mail to **BENJAMIN J. WARD, DC#847444**, Holmes Correctional Institution, Post Office Box 190, Bonifay, Florida 32425, on this 14th day of December, 1992.



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