IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs. CASE NO. 80,752

BENJAMIN J. WARD,

Respondent.
_____/

ON PETITION FOR REVIEW FROM CERTIFIED
QUESTION, FIRST DISTRICT COURT OF APPEAL
Case No. 91-3414

RESPONDENT'S REPLY BRIEF ON THE MERTIS

Benjamin J. Ward
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In Propia Persona[1]

1/ Ward is assisted by fellow inmate pursuant to Johnson v. Avery, 89 S.Ct. 747 (1969).

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the statement of the case and facts in the Petitioner's Brief on Merits.

SUMMARY OF THE ARGUMENT

This is an appeal from the affirmance by the First District Court of Appeal of the Order entered by the Circuit Court for Leon County, Florida, granting Respondent's Petition for Writ of Mandamus. The trial court granted Respondent's Petition for Writ of Mandamus on the grounds Respondent could not be deprived of provisional credits since he was not convicted as charged of Battery during a sex act was attempted or completed, but only convicted of "simple" battery. Thus, such previous awarded credits were illegally forfeited. The Appellate Court, pursuant Fla.R.App.P. 9.030(a)(2)(A)(4), certified as 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 SECTION 944.277, FLORIDA STATUTES?

The Department of Corrections (DOC) submits that the issue in this case is whether DOC is entitled to rely on information contained within a presentence report or other documents such as the charging information and the arrest report that substantiates that Respondent's conviction for "simple battery" included an attempted or completed sex act contemplated and excluded under section 944.277(1)(d), Florida Statutes (1991). Use of that information, as DOC points out, led to the forfeiture of all previously awarded credits.

The Petitioner admits that DOC does no fact finding to determine whether an inmate is eligible to receive provisional

credits. Instead, DOC relies upon documents generated during the course of criminal proceedings from which the conviction resulted. Such documents consist of Pre and Post Sentence Investigations (performed by DOC personnel), arrest reports, informations or indictments. The Petitioner does not review plea agreements, depositions or transcripts of court proceedings.

The Petitioner mistakenly maintains that to require something more for administrative eligibility determinations for provisional 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 credit is not punishment, (3) the eligibility criteria is aimed at protecting society and the public, and (4) the eligibility decision is one committed to the administrative expertise of the Department of Corrections, and as such, presumptively correct.

The Petitioner ignores all constitutional protections of the Due Process Clause as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1 and 9 of the Florida Constitution. Any forfeiture of previously awarded provisional credits pursuant section 944.277, Florida Statutes (1989), violates all due process principles since a liberty interest does exist.

ARGUMENT

DID THE DEPARTMENT OF CORRECTIONS FORFEIT PREVIOUSLY AWARDED PROVISIONAL CREDITS PURSUANT TO SECTION 944.277, FLORIDA STATUTES, WITHOUT AFFORDING DUE PROCESS?

As the Petitioner notes, 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 charging information as an aid in determining whether conviction for a "simple battery" falls within the exclusions of Section 944.277(1)(d), a provision which determines eligibility for provisional credits. Since the District Court of Appeals certification of the question, this Court has ruled in **Dugger vs. Grant, ___So.2d___, 17 F.L.W. S744 (Fla., December 10, 1992)** (Kogan, J., dissents with an opinion, in which Barkett, C.J. and Shaw, J. concur), by answering the certified question in the affirmative.[2] The Petitioner further asserts that DOC based their actions on Respondent's prior conviction for Battery (IB, pg. 7), but no such prior exists.

Further reliance is made on Grant and Hubbard, which preceded this cause. The Respondent questions, first, the arguments made in Grant to be parallel to him; and secondly, how DOC's acts of forfeiture can be construed without having a liberty interest. Grant was arrested and initially charged with sexaul battery and burglary of a dwelling. It was alleged

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2/ This Court, following its decision in **Dugger vs. Grant, supra**, answered the certified question in **Hubbard** affirmatively and quashed the decision of the District Court of Appeal, **Hubbard vs. Dugger, 590 So.2d 1031 (Fla. 1st DCA 1991)** which this writer initiated.

that Grant entered the apartment of the victim stating he was going to screw her. After subduing the victim, he proceeded to have sexual intercourse with her both vaginally and annally. During the course of intercourse, Grant slapped his victim to get into position and urinated inside her, the bed, and the cedar chest. At trial, the Jury found him guilty of burglary, but rejected the sexual battery charge and returned, instead, a verdict for the lesser included offense of battery. Id. at S745.

In this case, Benjamin J. Ward [hereinafter Ward] was intially charged with Lewd and Lascivious Acts, in violation of Section 800.04, Florida Statutes (1988). It was alleged that Ward fondled his nieces breasts and vaginal area on top of her clothes. Such charges were both solely on unsupported statements of the victim without any factual basis to support the alleged charge. Ward entered a plea of guilty to "simple battery", a first degree misdemeanor, to run concurrent with his state time. (R. 1-15). There was never any finding that a sex act was attempted or completed during the commission of the alleged crime.

The Petitioner maintained that their actions to forfeit Ward's provisional credits are in accordance to section 944.277(d) which states: "Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the

offense (emphasis added)." The basis for such forfeiture was information in his PSI and the initial police report.

Ward now argues that even though this Court approved DOC's tactics in Grant, such tactics violates the Due Process Clause of the Fourteenth Amendment. Such is echoed in the dissenting opinion of Justice Kogan who so elegantly states:

> "It is well settled that an inmate has no substantive right to the provisional credits encompassed by section 944.277. Dugger v. Rodrick, 584 So.2d 2 (Fla. 1991) cert. denied, 112 S.Ct. 886 (1992). However, once the Department of Corrections elects to implement provisional credits the Department is instructed to grant them, equally to each inmate who is earning incentive-gain-time unless that inmate falls into one or more of ten enumerated classifications. §944.277 creates a liberty interest in those who qualify for these provisional credits. Art. I §§ 2, 9, Fla. Const.. Therefore, when the Department is required to review evidence in determining whether or not an otherwise qualified inmate falls into one of the ten enumerated classifications, it must afford that inmate the protection of procedural due process. "

Id. at S746 (Barkett, C.J. and Shaw, J. concur).

Justice Kogan concluded that to allow the Department of Corrections to forfeit previously awarded provisional credits "without affording the inmate notice and an opportunity to be heard, is a violation of the inmate's procedural due process rights protected under both our state and federal constitution." Cf. Rankin vs. Wainwright, 351 F.Supp. 1306 (M.D. Fla. 1972); Bretti vs. Wainwright, 360 So.2d 1299 (Fla. 1st DCA 1978).

Ward echoes Justice Kogan's dissenting opinion as the United States Supreme Court held in Wolff vs. McDonnel, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), that inmates are protected under the Due Process Clause for they may not be deprived of life, liberty or property without Due Process of Law. The Court went on to say:

> [A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of the government.

Id. 94 S.Ct. at 2975.

In Morrisey vs. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972), the Court held:

> "The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Once it is determined that due process applies, the question remains what process is due. (citations omitted).

Id. 92 S.Ct. at 2600.

To assist in determining what due process is required, we look for guidance in Cafeteria & Restaurant Workers Union vs. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), which clarified:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government involved as well as the private interest that has been affected by government action.

Id. 81 S.Ct. at 1748.

Within the authority of McElroy we answer the questions by saying: (1) the nature of the government involved is the Department of Corrections who is responsible for determining who is and who is not eligible to receive provisional credits, but, during the course of such actions, it forfeited such provisional credits previously awarded by determining non eligibility through PSI and arrest reports; and (2) such forfeiture affected a liberty interest of the person who once received the provisional credits, with the strong possibility that information used to base government action could be incorrect. Once meeting the standard of McElroy, a need for due process exists.

This Court has long held that "due process is met upon a provision for notice and opportunity to be heard." Ryan vs. Ryan, 277 So.2d 266, 274 (Fla. 1973).

The Courts have long held as in Wolff and Bretti, an inmate is entitled to due process safeguards of any form of forfeiture of time off a sentence. "Due process of law" means a course of legal proceedings according to rules and principles established is our system of Jurisprudence to protect private rights. South Florida Trust Co. vs. Miami Coliseum Corporation, 101 Fla. 1331, 113 So. 334 (1931); Ryan's Furniture Exchange vs. McNair, 120 Fla. 109, 162 So. 483 (1935). The Protection afforded the the constitutional guarantee of due process of law extends, of course, into every type of legal proceeding. In observing due process law, the opportunity

to be heard must be full and fair, not merely colorable or illusive. Tomayko vs. Thomas, 143 So.2d 227 (Fla. 3d DCA 1962).

Ward doesn't challenge DOC's duties invested in them by section 944.277, Florida Statute (1989). What Ward questions is how they go about to determine eligibility or forfeiture. The Petitioner relies heavily on Superintendant, Massachusetts Correctional Institution vs. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1988), but even in Hill, due process was afforded. 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." Id. at S746. But this Court did not address the possibility of inacurate information or PSI and the right to redress. The due process safeguards. Thus, there are factual difference which would prompt the Court to rule otherwise in this cause.

CONCLUSION

WHEREFORE, for the foregoing reasons, Ward respectfully requests that should the certified question be answered in the affirmative, it must be with minimum due process rights.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief on the Merits has been furnished by U.S. Mail to Susan A. Maher, Deputy General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500 on this 1ST day of ~~January~~ February, 1993.

Benjamin J. Ward

BENJAMIN J. WARD