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IN THE SUPREME COURT OF FLORIDA

Case Number 83,955

On Petition for Discretionary Review
From The First District Court of Appeal

VINCENT GRAMEGNA,

Petitioner,

vs.

FLORIDA PAROLE COMMISSION,

Respondent.

Answer Brief of Respondent, Florida Parole Commission

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INTRODUCTION

This proceeding originated as a petition for writ of mandamus, filed in the Second Judicia1 Circuit Court, in and for Leon County, Florida. The Petitioner, Vincent Grarnegna, sought easly release from incarceration through Control Release, a prison overcrowding program administered by the Florida Parole Commission. The Circuit Court judge found that Mr. Gramegna failed to demonstrate entitlement to relief and denied the petition for writ of mandamus.

Mr. Gramegna took an appeal of the Circuit Court order denying relief, to the First District Court of Appeal. **On June 8**, 1994, the District Court rendered an opinion which affirmed the Circuit Court's Order denying the petition for writ of mandamus. Gramegna v. Florida Parole Commission, 638 So.2d 205 (Fla. 1st DCA 1994). In addition, the District Court certified to this Court the following two questions which it considered to be of great public importance:

(1 Whether an arresting officer's affidavit may be used to deny control release eligibility, under Section 947.146(3)(c), Florida Statutes (1993), where the information, indictment, bill of particulars and judgment of conviction do not establish a disqualifying conviction?

(2 Whether, for purposes of control release eligibility determinations under Section 947.146(3)(c), Florida Statutes, a child under the **age** of sixteen can consent to sexual acts that constitute a violation of Section 800.04, Florida Statutes?

Vincent Gramegna, the Petitioner/Appellant in the courts below, will be referred to in this brief as "Mr. Gramegna" or as "Petitioner." The Respondent/Appellee below was the Florida Parole Commission, sitting in its capacity as the Control Release Authority. It shall be referred to in this brief as the "Commission" or as "Respondent." References to the record will be designated "R" followed by the appropriate page number. References to the Petitioner's initial brief will be designated "IB" and references to Petitioner's Appendix will be designated "A" followed by the corresponding page number.

STATEMENT OF THE CASE AND THE FACTS

The Respondent, Florida Parole Commission, accepts the Petitioner's Statement of the Case and Facts set forth on pages 1 through 6 of the initial brief. However, in order to more completely frame the issues under review, Respondent would submit the following additional information:

On April 23, 1991, the Petitioner entered a plea of nolo contendere to three (3) counts of lewd and lascivious acts upon or in the presence of a child under the age of 16 years, as follows:

> 1. Vincent Gerald Gramegna, between and including August 1, 1989 and of the County of Pasco and State of Florida, on the 30th day of November in the year of our Lord, one thousand nine hundred eighty nine in the County and State aforesaid did handle and fondle one L[redacted] K[redacted] a child under the age of sixteen years, in a lewd, lascivious and indecent manner, to wit: by placing the hand **of VINCENT GERARD GRAMEGNA** on the female sexual organ of the said L[redacted] K[redacted] said act being willfully and knowingly done in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said L[redacted] K[redacted] contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.
>
> **2.** And the State Attorney aforesaid, under oath as aforesaid, further information makes that **VINCENT GERARD GRAMEGNA**, of the County of Pasco, State of Florida, between and including August 1, 1989 and the 30th day of November, in the year of our Lord, one thousand nine hundred eighty nine, in the County and State aforesaid, did handle and fondle one L[redacted] K[redacted] a female child under the age of sixteen years, in a lewd, lascivious and indecent manner, to wit: by placing the hand of **VINCENT GERARD GRAMEGNA** on or about the female breast(s) of the said

L[redacted] K[redacted] said act being willfully and knowingly aone in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said L[redacted] K[redacted] contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity af the State of Florida.

3. And the State Attorney aforesaid, under oath as aforesaid, further information makes that VINCENT GERARD GRAMEGNA, of the County of Pasco, State of Florida, between and including August 1, 1989 and the 30th day of November, in the year of our Lord, one thousand nine hundred eighty nine, in the County and State aforesaid, did handle and fondle one L[redacted] K[redacted], a child under the age of sixteen years, in a lewd, lascivious and indecent manner. to wit: by placing the hand of L[redacted] K[redacted] on the male sexual organ of the said VINCENT GERARD GRAMEGNA, said act being willfully and knowingly done in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said L[redacted] K[redacted] contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

(R 16-17)

The Court sentenced Mr. Gramegna to ten (10) years imprisonment on each count, with the sentences running concurrently. (R 18-23) Upon the Petitioner's placement in state custody, the Commission considered his Control Release eligibility. Section 947.146(3)(c), Florida Statutes, however, precluded Control Release for any inmate who:

> (c) Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person...

Accordingly, the Commission determined that Mr. Gramegna was statutorily ineligible for Control Release, based upon the aforementioned crimes.

On July 27, 1993, Mr. Gramegna filed a petition for writ of rnandamus in the Second Judicial Circuit Court, challenging the Commission's determinatian that he was statutorily ineligible for Control Release. (R 1-4) The Court directed the Commission to respond to the allegations of the Commission, and the Commission filed its response on September 24, 1993. (R 10-32) The Petitioner/Appellant submitted his Reply on October 8, 1993. (R 33-36)

On October 22, 1993, the circuit court entered an Order Denying Mandamus Relief, which stated:

> Petitioner, Vincent Gramegna, seeks rnandamus relief against the Respondent, Florida Parole Commission, sitting as the Control Release Authority. Gramegna claims entitlement to control release consideration on the rationale he was not "convicted" of a disqualifying crime as set forth in Florida Statute Section 947.146(4)(c). After reviewing all the pleadings and the submissions of the parties, the Court finds that Gramegna is not entitled to mandamus relief.
>
> On April 23, 1991, Gramegna was convicted and received a ten-year sentence for lewd and lascivious acts prohibited by Florida Statute Section 800.04(1). The gravamen of these offenses was the "non-consensual handling or fondling of the sexual organs of another person." Gramegna claims that such activity was consensual and therefore he should be entitlsd to control release consideration. However, the acts were committed with a fourteen year old child who, as a matter of law, cannot consent. [Fla. Stat. Section

800.04(4)] Thus, the criminal acts for which Petitioner was convicted were "non-consensual." Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Mandamus filed by Petitioner Vincent Gramegna, is denied.

(R 37-38)

It is from this order that Mr. Gramegna took his appeal to the First District Court. Mr. Gramegna raised the same issues on appeal as he raised in the circuit court proceeding: (1) that the sexual activity underlying his convictions was in fact consensual and (2) that he was never convicted of nonconsensual handling or fondling of the sexual organs of another person. Mr. Gramegna, however, never challenged the Commission's authority to rely on the arresting officer's affidavit in Control Release eligibility determinations. The issue was not raised in either the circuit court pleadings (R 1-4, 33-36) or the appellate briefs, by either of the parties involved.

The District Court, however, decided the case on the basis of this very issue, holding that an arresting officer's affidavit could be used to deny control release eligibility "even though information, indictment, bill of particulars and judgment of conviction did not establish disqualifying conviction." Accordingly, the denial of the petition for writ of mandamus was affirmed.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its jurisdiction, since the questions certified by the district court do not really present issues of great public importance. These questions are easily resolved merely by reference to the appropriate statute. Furthermore, this Court has previously answered one of the certified questions, in the case of **Dugger v. Grant**, 610 So.2d 428 **(Fla. 1993).**

The Petitioner in this proceeding never challenged the Commission's authority to rely on the arresting officer's affidavit in Control Release eligibility determinations. Had it been an issue, the Respondent would have cited the statutory section that specifically authorizes the Commission to rely on any information contained in arrest reports relating to the circumstances of the offense. Furthermore, in **Dugger v. Grant**, supra, this Court held in no uncertain terms that information taken from an arrest report may serve as the sole basis far an inmate's eligibility determination.

In any event, the arrest report was not really an issue in this **case.** Mr. Gramegna was ineligible for Control Release regardless of the arrest report. Section 947.146(3)(c), Florida Statutes, specifically precludes early release for any inmates **who are** convicted of lewd and lascivious assaults or acts which involve noncansensual handling or fondling of the sexual organs of another person. The charging documents to which Mr. Gramegna pleaded guilty, clearly indicate that Mr. Gramegna placed his

hand on the female sexual organ of the victim. The victim was fourteen years ald, and could not legally consent to any lewd and lascivious assault. The assault was nonconsensual.

Mr. Gramegna was forty years old at the time af his conviction. The Court imposed three concurrent ten year sentences on April 2, 1991. As of this date, he has served less than four years of his sentence. Mr. Gramegna's sentence will expire upon his reaching his tentative release date (TRD), which is currently set at June 12, 1995. Mr. Gramegna's offense disqualified him from the Control Release program. However, even if he were eligible for early release, there is currently no prison overcrowding, and the prison population is projected to remain within legal limits for the foreseeable future. Accordingly, no one is being released early under the Control Release program. The issue of eligibility is o moot issue at this time.

ISSUES PRESENTED

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION SINCE THE QUESTIONS CERTIFIED BY THE DISTRICT COURT ARE NOT OF GREAT PUBLIC IMPORTANCE.

II. THE DISTRICT COURT AND CIRCUIT COURT BELOW PROPERLY DENIED MANDAMUS RELIEF WHERE THE PETITIONER FAILED TO DEMONSTRATE THAT HE QUALIFIED FOR EARLY RELEASE FROM INCARCERATION UNDER THE CONTROL RELEASE STATUTES.

A. THE PETITIONER DOES NOT QUALIFY FOR CONTROL RELEASE UNDER SECTION 947.146(3)(C), FLORIDA STATUTES.

B. THE FLORIDA STATUTES SPECIFICALLY AUTHORIZE THE COMMISSION TO RELY ON ANY INFORMATION CONTAINED IN ARREST REPORTS RELATXNG TO THE CIRCUMSTANCES OF THE OFFENSE.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION SINCE THE QUESTIONS CERTIFIED BY THE DISTRICT COURT ARE NOT OF GREAT PUBLIC IMPORTANCE.

This Court should decline to exercise its jurisdiction in this case. The District Court below certified two questions to this Court as being of great public importance. However, both of these "questions" are easily resolved merely by reference to the appropriate statute. Moreover, out of the hundreds of Control Release cases pending in the circuit and district courts of this state, the issues raised for review by the district court would impact only a very small fraction of the total number of cases. In short, this case neither presents a significant question, nor does it affect a substantial number of cases in litigation.

It is appropriate at this point to look closely at the issues certified for this Court's consideration. The first question presented asks the following:

> Whether an arresting officer's affidavit may be used to deny control release eligibiiity, under Section 947.146(3)(c), Florida Statutes (1993), where the information, indictment, bill of particulars and judgment of conviction do not establish a disqualifying conviction?

Prior to addressing this issue, the Court should review the pleadings submitted in the lower court proceedings. A close inspection will reveal that the Petitioner never challenged the Commission's authority to rely on the arresting officer's affidavit in Control Release eligibility determinations. It was

never an issue in contention, and therefore, it was not addressed in any of the appellate briefs filed.

Had this specific issue been raised in the lower court praceedings or on appeal, counsel for the Commission most certainly would have pointed out the statutory provision in Section **947.146(3),** Florida Statutes, located a few paragraphs below the statutory excluder in question, which states in pertinent part:

> In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any psesentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense. (emphasis added)

So, the answer to the district court's question is right in the statute. The Commission may certainly rely on an arresting offices's affidavit in making Control Release eligibility determinations, because the statute clearly says it can. There was absolutely no reason for the district court to agonize over the issue, or to question its own prior opinion in Fulkroad v. Florida Parole Commission, 632 So.2d 148 (Fla. 1st **DCA 1994).** The district court answered the question correctly the first time it considered the issue.

The district court below, however, went on to **decide** this case based on an issue which had never been raised by either of the parties. In addition, the district court failed to discuss the issues which had been properly raised, and which served as

the basis for the trial court's decision. Instead, the district court merely certified a second question for this Court's consideration, which asked the following:

> Whether, for purposes of control release eligibility determinations under Section 947.146(3)(c), Florida Statutes, a child under the age of sixteen can consent to sexual acts that constitute a violation of Section 800.04, Florida Statutes?

Once again, the Florida Statutes provide the answer to this question. Section 800.04, Florida Statutes, makes lewd, lascivious, or indecent assault or acts upon or in the presence of a child a crime, and states in pertinent part that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section." Consent is not a defense to the crime of lewd and lascivious assault for a very good reason -- that is, a child is not in a position to give consent where an adult is involved because children of tender years do not understand the nature of sexual offenses against them. The Legislature stated this quite clearly in the preamble to Chapter 84-86, Laws of Florida:

* *

> WHEREAS, the intent of the Legislature was and remains to prohibit lewd and lascivious acts upon children, including sexual intercourse and other acts defined as sexual battery, without regard either to the victim's consent or the victim's prior chastity, and
>
> WHEREAS, the children of tender years do not understand the nature of sexual offenses against them and, through fear, guilt, or immaturity may fail to report the occurrence of a sexual offense.

It should be clear that the statute under which the Petitioner was convicted has eliminated consent as a defense because the Legislature recognized "consent" of a child victim is in reality no consent at all. Thus, Petitioner's convictions for three counts of lewd and lascivious assaults or acts -- that is, the handling and fondling of the child victim's breasts and vaginal area and placing the child's hand on his own sexual organ -- falls within the tenor and meaning of the exclusion in Section 947.146(3)(c). That section prohibits early release from incarceration through Control Release, where there has been a conviction for a lewd or indecent assault or act, which involves the non-consensual handling or fondling of the sexual organs of another person.

Thus, as was the case with the first question, the second question is also answered by statute. The district courts of appeal should certify a question as one of great public importance only where there is truly a question, and where the outcome would be of some significance. Out of 918 lawsuits, filed against the Commission which pertain to the Control Release program, less than 15% of those cases even involve eligibility determinations, such as in the case at bar. Only a very small number of these cases raise any challenge to the Commission's use of arrest affidavit or whethes a child can "consent" to lewd and lascivious assaults. The statute is clear and the law appears settled in this area.

There are, however, other related issues which are of vital

importance, which impact large numbers of inmates, and which are in dire need of resolution by this Court. Over 70% of the Control Release cases currently pending in court involve inmates who have been found eligible for the Control Release program, but who are seeking earlier Control Release Dates (CRD's) than that assigned by the Commission. The District Court has, in effect, sanctioned mandamus as a means by which a prison inmate may assert his right to an advanceable CRD. See, Hibbott v. Florida Parole Commission, 616 So.2d 194 (Fla. 1st DCA 1993). The question is, does an inmate have a right to any particular CRD? Anothes way of stating the question is this: Do the Florida Statutes create a "liberty interest" in Control Release? The answer to this question is even more critical at this juncture because right now, and well into the foreseeable future, there appears to be adequate prison capacity in order to maintain the inmate population within legal limits. No inmates are being released under the program. Accordingly, the Commission faces tidal wave of litigation from prison inmates asserting their rights under the Control Release statutes via mandamus.

The issue of whether Control Release involves a "liberty interest" has been squarely before the First District Court in numerous appeals. However, in every case, the Court has rendered per curium affirmed decisions without written opinion[1],

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[1]See eg., Berqelson v. Florida Parole Commission, Case No. 93-3061 (Fla. 1st DCA, per curium affirmed June 27, 1994); McLeod v. Florida Parole Commission, Case No. 93-227 (Fla. 1st DCA, per curium affirmed April 15, 1994); McCabe v. Florida Parole Commission, Case No. 93-2386 (Fla. 1st DCA, per curium affirmed

precluding any appellate review by this Court.

The issue of whether the statutes create a liberty interest in Control Release is fundamental to every Control Release case, including the case at bar. This is so because one must know what rights exist before making any attempt to enforce those rights in court. The district court has perpetuated a system whereby Control Release Dates are litigated without any clear idea as to the rights involved. It is complete chaos.

The question certified by the district court in the **case** at **bar** is one more example of an attempt to resolve procedural issues without any definition **or** understanding of the rights involved. There is a remarkable similarity between the question certified in this case at bar, and the question certified to this Court in the case of Duqqer v. Grant, **587** So.2d 608 (Fla. 1st DCA 1991), as can be seen in this comparison:

Question Certified in Duqqer v. Grant	Question Certified in Grameqna v. Florida Parole Commission
May the Department of Corrections 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.	Whether an arresting officer's affidavit may be used to deny control release eligibility, under Section 947-146(3)(c), Florida Statutes (1993), where the information, indictment, bill of particulars and judgment of conviction do not establish a disqualifying conviction?

April 18, 1994); Sheehan v. Florida Parole Commission, **Case** No. 93-104 (Fla. 1st DCA, **per** curium affirmed March 16, 1994)

It should be noted that Control Release is the statutory successor[2] to Provisional Credits, another mechanism which was previously used to manage the state prison population. Both programs had precisely the same function and purpose. The main difference between Control Release and Provisional Credits is the agency which administers the program. The Department of Corrections administered Provisional Credits (prior to its repeal), while the Florida Parole Commission administers Control Release. It seems quite obvious and logical that the two programs should be interpreted in a like manner, yet the district court has presented the same question (but different agencies) to this Court for the second time. It may be that the district court has a fundamental disagreement with this Court's decision in Dugger v. Grant, supra, with regard to whether the statutes create a liberty interest. That is the only explanation for the district court's reluctance to address the issue.

In Dugger v. Grant, 610 So.2d 428 (Fla. 1993), this Court did not attempt to address the inmate's procedural claims without first defining his rights -- and the district should not have tried to do so in the case at bar. Instead of following this Court's teachings, the district court instead chose once again to assume the existence of procedural rights, and then attempted to

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[2]The statutory prerequisites for control release are almost identical to those contained in the provisional credits statutes. Cf. Section 944.277(1), Florida Statutes (1991) with Section 947.146(3), Florida Statutes (1993). Control release, however, was designed to "kick in" prior to any award of provisional credits, thereby eliminating the need for provisional credits. The provisional credits statute has now been repealed.

distinguish the facts from those presented in Grant. This was improper. The district court was well aware of this Court's prior analysis of rights stemming from early release statutes:

> As stated previously, section 944.277 is permissive, rather than mandatory, and is strictly an administrative mechanicm to relieve prison overcrowding. Because provisional credits are solely implemented to relieve prison ovescrowding, are in no way tied to an inmate's overall length of sentence, and create no reasonabie expectation of release on a qiven date, no substantive or procedural "liberty" due process rights vest in an inmate under the statute. We note, however, that, even if section 944.277 did vest due process rights in an inmate, the level of evidence necessary to deny provisional credits would not rise to that necessary to convict; nor would the Secretary's determination necessarily be subject to second-guessing on review. As the United States Supreme Court held in Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 456, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985), only a "modicum" of evidence is necessary to support an administrative decision regarding inmates even when such a decision does involve due process rights.
>
> We find 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. In this case, we conclude that the Secretary could consider Grant's conduct to be that of committing or attempting a sex act even though the jury found him guilty of a battery rather than a sexual battery under the evidence and even though Grant's conduct may not have risen to the level of criminal offense. We emphasize that section 944.277 is purely an administrative procedural mechanism in which no due process rights are implemented. Consequently, we hold that provisional credit awards under the statute are properly within the Secretary's discretion and that pre-sentence

> investigation reports in the record may be used by the Secretary in making that discretionary determination.

610 So.2d 432 (Emphasis added)(footnote omitted)

Like provisional credits, control release is **awarded** solely for the purpose of controlling prison overcrowding and is permissive, rather than mandatory in nature. The purpose of control release is entirely administrative. It was not enacted as an inmate benefit. Because control release was solely implemented to relieve prison overcrowding, and is in no way tied to an inmate's overall length of sentence, **and** creates no reasonable expectation of release on a given date, no substantive or procedural "liberty" **due** process rights vest in an inmate under the Control Release statute.

The Court should have no doubt that its decision in Dugger v. Grant, supra, was correct, and that no substantive or procedural due process rights arise in early release determinations. This position was most recently conf rmed by the Eleventh Circuit Court of Appeals in the case of Hock v. Singletary, _____ Fla.L.Weekly Fed. _____ (11th Cir. Jan. 9, 1995), where the Court stated:

> In order to have a protectible right under the Due Process Clause, "'a person clearly must have more than an abstract need or desire for [the right]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, **442** U.S. **1, 7, 99** S.Ct. **2100, 2103-2104, 60** L.Ed.2d **668** (1979) (quoting **Board** of Reqents v. Roth, **408** U.S. 564, **570-571, 92** S.Ct. **2701, 2705-2706, 33** L.Ed.2d **548 (1972)).**

> Here, Florida Statutes, Section **947.277** and **947.146** are administrative, designed solely to relieve prison overcrowding. The petitioner had no reasonable expectation that the prison population would ever reach a level that would trigger the use of these early release mechanisms; he had no reasonable expectation of release on any given date. Thus, no liberty interest vests under these statutes. Retroactively applying Section **947.146** to petitioner and determining him ineligible for control release, therefore, does not deprive him of any liberty interest protected by the Due Process Clause.

Id. at 870.

It should be very clear to al1 that the protections of due process do not arise without **a** protectible liberty interest. See, Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981); and Sultenfuss v. Snow, **8 Fla.** L.Weekly Fed. **C753** (11th Cir. Oct. **5**, 1994). Thus, the fundamental issue here is whether the Florida Statutes created a liberty interest in Control Release. The Eleventh Circuit Court of Appeals stated that no liberty interest was created. The district court below, however, will continue to have doubts until this Court specifically rules on the issue.

The Respondent contends that the questions certified by the district court below do not present issues of great public importance. However, should this Court decide to exercise jurisdiction, the Commission would **urge** the Court to first consider the more fundamental issue of whether a libesty interest is involved in these early release determinations, as this will have a significant impact on a large number of Control Release

cases, currently pending in the circuit courts and district courts in this state.

II. THE DISTRICT COURT AND CIRCUIT COURT BELOW PROPERLY DENIED MANDAMUS RELIEF WHERE THE PETITIONER FAILED TO DEMONSTRATE THAT HE QUALIFIED FOR EARLY RELEASE FROM INCARCERATION UNDER THE CONTROL RELEASE STATUTES.

It is well-settled that in order to show entitlement to the extraordinary writ of mandamus, a petitioner must demonstrate a clear legal right on his part, an indisputable legal duty on the part of the respondent, and that he has no other legal remedies available to him. See, Hatten v. State, 561 So.2d 562 (Fla. 1990); Heath v. Becktell, 327 So.2d 3 (Fla. 1996); State ex rel. Eichenbaum v. Cochran, 114 So.2d 797 (Fla. 1959). This Court has also held that mandamus is available to enforce an established legal right that is both clear **and** certain, but not to establish the existence of a right. Florida League of Cities v. Smith, 607 So.2d 397 (Fla. 1992). Petitioner failed to meet the requirements or demonstrate any entitlement to mandamus relief, in the lower court proceedings. The order denying extraordinary relief should therefore be affirmed.

In Dugger v. Grant, 610 So.2d **428** (Fla. 1993), this Court held that the statute providing for grants of provisional credits to relieve prison overcrowding is strictly an administrative mechanism which does not create any liberty interest in inmates protected by due process. The Court further stated that only a modicum of evidence would be necessary to support an administrative determination regarding inmates even when such a

decision does involve due process rights. Id. at 432. Similarly, the Control Release statutes do not create either a reasonable expectation of release or substantive or procedural due process rights. See, Hock v. Singletary, _____ Fla.L.Weekly Fed. _____ (11th Cir. Jan. 9, 1995)

The Petitioner, in his initial brief, specifically acknowledges that he has no right to Control Release. "Gramegna recognizes there is no liberty or substantive due process right to control release." (IB 9) Yet, in the next breath he makes it clear that he is attempting to use this mandamus praceeding as a means to establish due process rights, by claiming he is "entitled to proper consideration of his eligibility for the control release program." (IB 9) This is a whole lot of double-talk, plain and simple. Proper consideratian is due process, and vice-versa. Either you have due process rights or you don't. It cannot be bath ways. The protections of due process do not arise without a protectible liberty interest. See, Sultenfuss v. Snow, 8 Fla.L.Weekly Fed. C753 (11th Cir. Oct. 5, 1994). Since there is no liberty interest in Control Release, the Petitioner has no right to any particular type of consideration, as he claims. No due process rights means no due process rights.

A. THE PETITIONER DOES NOT QUALIFY FOR CONTROL RELEASE UNDER SECTION 947.146(3)(C), FLORIDA STATUTES.

The Petitioner clearly does not qualify for Control Release under the Statute. Section 947.146(3)(c), Florida Statutes, precludes from Control Release any inmate who:

> (c) Is convicted, or has been previously convicted, of committing ar attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a pesverted manner; or nonconsensual handling or fandling of the sexual orqans of another person;

The Petitioner was convicted of the fallowing lewd, lascivious, or indecent assaults or acts upon or in the presence of a child under sixteen yeass of age:

> 1. Vincent Gerald Gramegna, between and including August 1, 1989 and of the County of Pasco and State of Florida, on the 30th day of November in the year of our Lord, one thousand nine hundred eighty nine in the County and State aforesaid did handle and fondle one L K , a child under the age of sixteen years, in a lewd, lascivious and indecent manner, to wit: by placing the hand of VINCENT CERARD GRAMEGNA on the female sexual organ of the said L K ; said act being willfully and knowingly done in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said L contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.
>
> 2. And the State Attorney aforesaid, under oath as aforesaid, further information makes that VINCENT GERARD GRAMEGNA, of the County of Pasco, State of Florida, between and including August 1, 1989 and the 30th day of November, in the year of our Lord, one thousand nine hundred eighty nine, in the County and State aforesaid, did handle and fondle one L K , a female child

under the age of sixteen years, in a lewd, lascivious and indecent manner, to wit: by placing the hand of VINCENT GERARD GRAMEGNA on or about the female breast(s) of the said L K , said act being willfully and knowingly done in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said L K contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

3. And the State Attorney aforesaid, under oath as aforesaid, further information makes that VINCENT GERARD GRAMEGNA, of the County of Pasco, State of Florida, between and including August 1, 1989 and the 30th day of November, in the year of our Lord, one thousand nine hundred eighty nine, in the County and State aforesaid, did handle and fondle one L K a child under the age of sixteen years, in a lewd, lascivious and indecent manner, to wit: by placing the hand of L Y on the male sexual organ of the said VINCENT GERARD GRAMEGNA, said act being willfully and knowingly done in a lewd, lascivious and indecent manner, but without committing the crime of sexual battery upon said contrary to Chapter 800.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

Section 800.04, Florida Statutes, provides as follows:

Lewd, lascivious, or indecent assault or act upon or in presence of child. -- Any person who:

(1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;

(2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

> (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chactity nor the victim's consent is a defense to the crime proscribed by this section. (emphasis added)

Although other larger issues have now been raised in this proceeding, the only claims Mr. Gramegna ever really made in the courts below were: (1) that the sexual activity underlying his convictions was in fact consensual and (2) that he was never convicted of nonconsensual handling or fondling of the sexual organs of another person. It should be noted that Mr. Gramegna only alleged that the child victim consented to the assaults he made upon her -- he never offered any proof of her consent. There is absolutely nothing in the record which would indicate that any of the acts or assaults were consented to by the child victim, assuming *a* child could consent to such acts.

Despite a lack of any basis in the record, Petitioner continues to insists that the child victim "consented" to the lewd and lascivious assaults. Such a claim is almost totally belied by definition:

> The term "lewd and lascivious" has been referred to as generally and usually involving "an unlawful indulgence in lust, eager for sexual indulgence." (citation omitted) That term has also been said to connote "wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator." (citation omitted) The term "imports more than a negligent disregard of the decent proprieties and consideration due to others." (citation omitted)

Egal v. State, 469 So.2d 196 (Fla. 2d DCA 1985).

The Petitioner would have this Court rule, without any offer of proof, that a child "consented" to such acts. Mr. Gramegna was forty years old at the time he committed his lewd and lascivious assauits upon the fourteen year old child victim. The claim that she consented, or could consent to such assaults, simply is not credible.

Upon consideration of all the allegations in the petition, and other pleadings submitted, the circuit court below entered the following order denying mandamus relief:

> Petitioner, Vincent Gramegna, seeks mandamus relief against the Respondent, Florida Parole Commission, sitting as the Control Release Authority. Gramegna claims entitlement to control release consideration on the rationale he was not "convicted" af a disqualifying crime as set forth in Florida Statute Section 947.146(4)(c). After reviewing all the pleadings and the submissions of the parties, the Court finds that Grarnegna is not entitled to mandamus relief.
>
> On April 23, 1991, Gramegna was convicted and received a ten-year sentence for lewd and lascivious acts prohibited by Florida Statute Section 800.04(1). The gravamen af these offenses was the "non-consensual handling or fondling of the sexual organs of another person." Gramegna claims that such activity was consensual and therefore he should be entitled to control release consideration. However, the acts were committed with a fourteen year old child who, as a matter of law, cannot consent. [Fla. Stat. Section 800.04(4)] Thus, the criminal acts for which Petitioner was convicted were "non-consensual." Accordingly, it is
>
> ORDERED AND ADJUDGED that the Petition for Writ of Mandamus filed by Petitioner Vincent Gramegna, is denied.

The district court apparently agreed with the rationale provided in the circuit court opinion, affirming the decision, without addressing the issue of minor consent. The Petitioner, however, continues to assert that a fourteen year old child can somehow legally consent to the commission of lewd and lascivious assaults upon herself. He cites this Court's decision in Jones v. State, 640 So.2d 1084 (Fla. 1994) in support of this proposition. However, that case appears to entirely refute the Petitioner's claim. The Court stated:

> As evidenced by the number and breadth of the statutes concerning minors and sexual exploitation, the Florida Legislature has established an unquestionably strong policy interest in protecting minors from harmful sexual conduct. As we stated in Schmitt v. State, 590 So.2d 404 (Fla. 1991), cert. denied, _____ U.S. _____, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992), "any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents ... [S]ociety has a compelling interest in intervening to stop such misconduct."
>
> * * *
>
> ...The statutory protection offered by Section 800.04 assures that, to the extent the law can prevent such activity, minors will not be sexually harmed. "[S]exual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home. The state unquestionably has a very compelling interest in preventing such conduct."

640 So.2d at 1085-1086 (citatians and footnotes omitted)

Even more to the point, Justice Kogan, in his concurring opinion, stated as follows:

Given the grave risks at stake here, I think this Court must look very, very carefully at the notion of children and young adolescents "consenting" to sex. . . [E]ven those who sincerely argue that T.W. authorizes minors to consent to sex surely must concede that some minimum age exists at which a minor simply is incapable of consenting. I cannot believe, for example, that any responsible adult seriously thinks a six-year-old legally could consent to sex. Children of that age always lack the experience and mental capacity to understand the harm that may flow from decisions of this type. They may unwittingly "consent" to something that can ruin their lives, jeopardize theis health, or cause emotional scars that will never leave them. I think most concerned adults and experts in the field would agree that this lack of prudent foresight continues in youths well into the teen years.

* * *

I therefore think the legislature is both reasonable and prudent in creating a bright-line cut-off at a specific age. There most probably is no better way of eliminating the vagueness problem.

In other words, the legislature has acted pursuant to its authority to protect children and young adolescents when it set that the age of consent for present purposes at sixteen. The legislature, I believe, can choose any age within a range that bears a clear relationship to the objectives the legislature is advancing. Some reasonable age of consent must be established because of the obvious vulnerabilities of most youngsters and the impossibility of legally defining "maturity" for allegedly precocious teens in this context. Because an age of consent is necessary, there is no good reason why the legislature cannot set it at sixteen for present purposes, which clearly is reasonable in light of the available psychological and medical literature.

Furthermore, the concept that children and young adolescents can "consent" to sexual activity is highly problematic on a purely

> psychological level: It ultimately rests on the mistaken assumption that children and young adolescents think the same way adults do and thus can make a meaningful choice in sexual matters. Because of this assumption, some adults erraneously conclude that a young person who did not actively resist or who seemed to have agreed to sex has consented -- a notion that uncritically accepts the Same general excuses many molesters offer for their misconduct. In this way the victim is given the blame...

640 So.2d at 1089-1090. (emphasis added)

These were precisely the concerns which motivated the Legislature to eliminate consent as a defense to lewd and lascivious assaults or acts against children under sixteen years of age. Children of tender years do not understand the nature of sexual offenses against them and cannot make a meaningful choice in sexual matters. The "consent" of a child is essentially no consent at all. Children are legally and psychologically incapable of consenting to the commission of lewd and lascivious assaults against them, even if they did not actively resist or seemed to have agreed to the assault or act. It is clear that children cannot legally consent to lewd and lascivious assaults committed against them.

In Dugger v. Grant, Supra, this Court held that the "[s]tatute prohibiting a grant of provisional credits to [an] inmate who attempted or completed any sexual act in [the] course of committing certain enumerated crimes mandates denial of credits, regardless of whether [the] sexual act itself constitutes a crime." 610 So.2d at 428. (emphasis added) It was the legislative intent **not** to provide early release to

inmates who have committed or attempted sex acts during the course of their crimes. The Court stated:

> The Legislature, under section 944.277, has clearly established a policy of prohibiting the grant of provisional credits to any inmates who have been convicted of sexual offenses. See Section 944.277(1)(c). For those inmates who have committed to attempted sexual acts in the course of certain other enumerated nonsexual offenses such as battery, the Secretary has the duty to evaluate the record of each individual inmate to determine whether "a sex act was attempted or completed during the commission of the nonsexual **offense.**" The Legislature, in effect, made **a** major policy decision that those administrative credits to reduce inmate population must not be given to any inmate who has committed or attempted any **type** of sexual act during the crimina1 offense for which the inmate is incarcerated regardless of whether that sexual act itself constituted a crime.

Id. at 432 (emphasis added).

The type of offenses committed by Mr. Gramegna are precisely the **ones** which **the** Legislature intended to exclude from early release by Section 947.146(3)(c). Contrary to Petitioner's claim, there was no "drastic narrowing" of the statutory excluder for lewd and lascivious assaults. The excluder hac remained exactly as it was upon implementation of the Control Release program in 1990. Moreover, the amendment altering the excluder for Provisional Credits **was** far from "drastic" or "substantial." The sole point of the rewording **was** to provide Provisional Credit eligibility to those persons convicted of lewd and lascivious acts whose behavior involved, for example, urinating in the park. Urinating in the park is not the type of offense that poses the

potential threat and danger to society that should preclude early release from incarceration, even though such behavior sometimes results in a conviction for lewd and lascivious acts. There are many convictions like this, and Legislature did not view these crimes sufficient to warrant exclusion from early release programs. However, the type of behavior in which Mr. Gramegna engaged -- handling and fondling the breasts and vagina1 area of a child, and forcing the child to fondle his genitals -- does present a grave threat and danger to society. It is precisely the type of offense for which the Legislature intended to preclude any early release prior to completion of the court-imposed sentence. The rewording of the Provisional Release statute was never intended to provide early release for persons, like the Petitioner, who commit lewd **and** lascivious assaults upon children.

The exclusions found in Section 947.146(3), Florida Statutes, were basically intended to exclude all violent and sexual offenders from early release on Control Release. The Legislature determined that these offenders pose special safety concerns for the public, and should not be released from prison early because of overcrowded conditions. **The** particular portion of 947.146(3)(c) in question was specifically intended to exclude those offenders who commit lewd or indecent assaults upon victims who do not **or** cannot consent to these acts. Mr. Gramegna does not qualify for Control Release because he committed lewd and lascivious assaults or acts upon a child victim who did not

consent, because she could not legally give her consent. Mr. Gramegna's disqualification is easily determined from a review of the charging documents and conviction. In short, the information, indictment, bill of particulars and judgment of conviction in this case do indeed establish a disqualifying conviction under Section 947.146(3)(c), Florida Statutes.

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 Control Release 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 nonethelesa be canstrued 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).

B. THE FLORIDA STATUTES SPECIFICALLY AUTHORIZE THE COMMISSLON TO RELY ON ANY INFORMATION CONTAINED IN ARREST REPORTS RELATING TO THE CIRCUMSTANCES OF THE OFFENSE.

The Commission contends that the charging documents and judgment af conviction in this case alone are sufficient to disqualify Mr. Gramegna from Control Release under the provisions of Section 947.146(3)(c), Florida Statutes. However, if for any reason these documents were not sufficient, the Commission is clearly authorized to rely on any information contained in arrest reports which relate to the circumstances of the offense. Section 947.146(3), Florida Statutes, states in pertinent part as follows:

> In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense. (emphasis added)

This statutory provision makes it absolutely clear that the Commission may rely on any information contained in arrest reports relating to the circumstances of the offense regardless of whether or not the information, bill of particulars or judgment of conviction establishes a disqualifying conviction.

In Dugger v. Grant, 610 So.2d **428** (Fla. 1993), this Court held in no uncertain terms that information taken from an arrest report may serve as the sole basis for an inmate's eligibility for early release. Yet, even though it was not an issue raised by the parties, the district court below saw fit to certify to

this Court almost the same question which it had previously certified in Grant. It appears that the district court simply disagrees with this Court's decision in Grant, and the court has obviously gone to **great** lengths in an attempt to factually distinguish this case. It is a distinction without significance. The district court below stated:

> Under the supposed authority of Grant, the Commission relied in this case on an affidavit never attached to an accusatory pleading or even offered into evidence as grounds to conclude that Gxamegna was convicted of an offense listed in Section 947.146(3)(c), Florida Statutes (1991). But the Grant court never held that a conviction could be proven except by a copy of the judgment. Under Section 947.146(3)(c), Florida Statutes (1991), the Legislature has provided that control release eligibility will be withheld from persons convicted of certain types of lewd or indecent assaults or acts.

638 So.2d at 207. (emphasis added)

If the Florida Statutes and this Court say that information contained in an arrest report may be used in eligibility determinations, what difference could it possibly make whether or not "it was attached to an accuaatory pleading?" Furthermore, the Commission did not use the arrest affidavit in this case to establish the conviction. The judgment of convictkon proves the conviction, Mr. Gramegna was convicted of lewd and lascivious acts in the presence of a child under the age of sixteen years, **(A 18-23)**

Section 947.146(3)(c) essentially requires a two-step process in such cases. First, **the** Commission determines whether

the inmate has been convicted of lewd or indecent assaults or acts. Mr. Gramegna meets this criteria, as indicated by his judgment of conviction. The second step is to determine whether the offense involved "nonconsensual handling or fondling of the sexual organs of another." A review of the charging documents clearly shows that Mr. Gramegna placed his hand on the female sexual organ af the victim. (A 16) The victim was under the age of sixteen and could not legally consent. Mr. Gramegna was clearly convicted of a lewd or indecent assault or act which involved the nonconsensual handling or fondling of the sexual organs of another person. He does not qualify for Control Release.

In this case, there was really no need to reference the arrest report at all. Mr. Gramegna was ineligible for Control Release regardless of the report. The undersigned counsel simply referred to the arrest report in his response and answer brief to counter Mr. Gramegna's repeated assertion that his handling and fondling of the fourteen year old victim was "entirely consensual." Even if one assumes that a fourteen year old child could legally consent to these lewd and lascivious acts, they were not "entirely consensual." Otherwise, Mr. Gramegna would not have to force the victim to fandle his genitals. This was an argument over the facts more than anything else.

Somehow though, the district court concluded that the Commission had made Mr. Gramegna "ineligible for control release solely on the strength of the word 'forced' in the arresting

officer's affidavit." 638 So.2d at 206. Mr. Gramegna never made this argument. It was the district court's argument, in an attempt to find a case of egregious extreme, for this Court's reconsideration of the certified question in Dugger v. Grant. The arrest affidavit in this **case** was not particularly well-written or informative, but it does not matter. This case does not hinge on the use of arrest affidavits. The arrest affidavit is irrelevant here.

In a case where the arrest affidavit is relevant, the Commission most certainly can rely on the document in its eligibility determinations. The statutes specifically provide that the Comission may rely on "any document leading to or generated during the course of the criminal proceeding." The district court, however, would limit the Commission to the use of arrest affidavits only where they were "attached to an accusatory pleading" or "offered into evidence" prior to conviction. Gramegna, at 207. This does not comport with this Court's ruling in Dugger v. Grant, 610 So.2d 432 (Fla. 1993). This Court held that no substantive or procedural liberty due process rights vest in an inmate under early release statutes. The Court further stated, "the level of evidence necessary to deny provisional credits would not rise to that necessary to convict, nor would the Secretary's determination be subject to second-guessing on review...only a modicum of evidence is necessary to support an administrative determination regarding inmates..." Id. at 432 (citations omitted) It appears that the district court's fdeas

as to the level of evidence required for these early release determinations is quite different from those stated by this Court.

In the initial brief, Counsel for the Petitioner has suggested even more severe limitations on what kind of information the Commission can consider in its eligibility determinations. First, for something he calls a "simple statutory disqualifier," Petitioner contends the Commission should not be permitted to "delve into factual matters apart from the nature of the specific conviction at issue." He claims Grant does not authorize it. (IB 23) Does Grant preclude it? Obvfously not. Petitioner would **also** prevent the Commission from relying "on information obtained after the date of conviction." He contends that "such belatedly obtained information would be irrelevant in attempting to establish the nature of the earlier conviction." (IB 24) Is that so? It would seem that the information would be relevant to eligibility determinations no matter when it was obtained.

Petitioner also asserts "the Commission is limited to reviewing **and** relying upon only that evidence which forms the basis for the inmate's actual conviction." (IB 24) Why? The statute specifically allows the Commission to rely on any information contained in arrest reports relating to circumstances of the offense. Finally, Petitioner suggests that "in plea cases," the Commission "must look solely to the content of the information to determine the nature of the offenses to which the

inmate pleaded and was convicted." (IB 26) There is absolutely no basis in the law for any of these new restrictions or limitations the Petitioner would like to impose. Certainly, Duqger v. Grant, does not provide any legal basis for these assertions. Petitioner would like to require eligibility determinations be based on evidence sufficient to convict. However, all these inmates have already been convicted. The issue facing the Commission is whether they should be released early from incarceration due to prison overcrowding.

CONCLUSION

This Court should decline to exercise jurisdiction in this **case,** since the questions certified do not really present issues of great public importance. There is no doubt that the Commission may rely on information contained in arrest reports, in making eligibility determinations. The statutes specifically authorize it. These determinations do not require evidence as would be required for a conviction. After all, the inmate has already been convicted and sentenceà. The eligibility determinations are simply for purposes of deciding which inmates might be released in the event of prison overcrowding.

Mr. Gramegna was statutorily excluded from Control Release. Section 947.146(3)(c), Florida Statutes, specifically precludes early release for any inmates who are convicted of lewd and lascivious assaults or acts which involve nonconsensual handling or fondling of the sexual organs of another person. The charging documents to which Mr. Gramegna pleaded guilty, clearly indicate

that Mr. Gramegna placed his hand on the female sexual organ of the victim. The victim was fourteen years old, and could not legally consent to any lewd and lascivious assault.

Mr. Gramegna was forty years old at the time of his conviction. The Court imposed three concurrent ten year sentences, on April 2, 1991. As of this date, Mr. Gramegna has served less than four years of his sentence. Mr. Gramegna's sentence wil1 expire upon his reaching his tentative release date (TRD), which is currently set at June 12, 1995. Mr. Gramegna's offense disqualified him from early releasea via the Control Release program. However, even if he were eligible for early release, there is currently no prison overcrowding, and the prison population is projected to remain within legal limits for the foreseeable future. Accordingly, no one is being released early under the Control Release program. The issue of eligibility is a moot issue at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this is a true copy *of* the foregoing furnfshed by U.S. mail *to* Scott D. Makar, Holland & Knight, 50 North Laura Street, #3900, Jacksonville, Florida 32202, this 20th day of January, 1995.

KURT E. AHRENDT
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KEA/sm