IN THE SUPREME COURT OF FLORIDA

Case No. 83,955

On Petition For Discretionary Review
From The First District Court Of Appeal

VINCENT GRAMEGNA,

Petitioner,

v.

FLORIDA PAROLE COMMISSION

Respondent.

INITIAL BRIEF OF PETITIONER VINCENT GRAMEGNA

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INTRODUCTION

Vincent Gramegna ("Gramegna") petitions the Court to review a decision of the First District Court of Appeal which certified two questions of great public importance. Gramegna v. Florida Parole Comm'n, 638 So. 2d 205 (Fla. 1st DCA 1994). Gramegna, who had been representing himself pro se in the lower tribunals, moved this Court to appoint appellate counsel. The undersigned was appointed to file briefs on behalf of Gramegna addressing the questions the First District has certified.

STATEMENT OF THE CASE AND FACTS

On April 6, 1990, Gramegna -- then a waiter at a Tarpon Springs, Florida, restaurant -- was arrested for alleged sexual touchings of a fourteen-year-old female. The State's information charged Gramegna with three violations of Section 800.04(1), Florida Statutes (1991), which makes it unlawful for a person to handle, fondle, or assault any child under the age of sixteen in a lewd, lascivious, or indecent manner without committing the crime of sexual battery. The three acts alleged in the information were the:

- placement of his hand "on the female sexual organ" of the minor (Count One);
- placement of his hand "on or about the female breast(s)" of the minor (Count Two); and
- placement of the hand of the minor "on the sexual organ" of Petitioner (Count Three).

[R 16-17]. Neither the information, indictment, bill of particulars nor judgment assert or establish that the acts were without the minor's consent (i.e., nonconsensual). [R 16-17] On

April 23, 1991, Gramegna entered a plea of nolo contendere to the three counts and was thereby convicted and sentenced to three concurrent ten year terms of incarceration. [R 18-23]

On July 19, 1993, Gramegna filed a pro se mandamus petition with the Circuit Court, Second Judicial Circuit, in and for Leon County, challenging the determination of the Florida Parole Commission ("Commission") that he was ineligible for control release consideration under section 947.146(4)(c), Florida Statutes (1991) (now renumbered as 947.146(3)(c)). [R 1-3] This subsection of the statute provides that control release is unavailable to an inmate convicted of:

> committing or attempting to commit sexual battery, incest, or any of the following lewd and lascivious acts: masturbating in public, exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the genitals of another person.

(Emphasis added). In his petition, Gramegna contended that the sexual activity underlying his convictions was consensual and that he was neither charged with nor convicted of an act involving the "nonconsensual handling or fondling of the genitals of another person." [R 2-3]

In its response to the trial court's August 27, 1993 order to show cause [R 8-9], the Commission claimed that Gramegna was ineligible under section 947.146(3)(c) for two reasons. First, the Commission asserted that the placement of the minor's hand on Gramegna's genitals as alleged in Count Three was "nonconsensual" based solely upon the word "forced" contained in a probable cause statement in an arrest report which the Commission attached as an

exhibit to its response. [R 12-13] The statement, in its entirety, provides:

> Affiant conducted an investigation in which it was reported that the above subject had on several ocasions [sic], while alone with the 14 year old victim, did fondle the breasts, underneath her clothing, did fondle her vaginal area on the outside of her clothing, and did take the victim's hand and forced her to fondle his genitals. Writer advised the subject Miranda by card, after which he did admit to these allegations.

[R 25]. (Emphasis added). The report does not indicate who was interviewed or what evidence was considered during the investigation. The report is not attached to or otherwise included or referenced in the State's information or other charging document contained in the record. In addition, neither the report nor other record evidence indicate that the touchings of the minor's breasts or genitals alleged in Counts One and Two of the information were nonconsensual.[1]

Second, the Commission asserted that the fourteen-year-old "could not have consented" as a matter of law to touching Gramegna's sexual organ. In support, the Commission relied upon trial court orders from two unrelated proceedings. [R 13] The first order holds that the Commission can rely upon "information obtained from investigative reports as the sole basis for determining an inmate's eligibility for control release." Gary Wilson v. Florida Parole Comm'n, No. 92-3786 (Second Judicial

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[1] The arresting officer's statement indicates only that Gramegna allegedly "forced" the minor to touch his sexual organ. The report does not contain any indication that the other two touchings at issue were other than nonconsensual. The alleged acts occurred at some unspecified times during the period August to November 1989. [R 25].

Circuit, in and for Leon County, May 10, 1993) (Smith, J.) [R 27-29]. The First District affirmed this decision but certified to this Court the same question in this proceeding related to the use of arrest reports. Wilson v. Florida Parole Comm'n, 638 So. 2d 205 (Fla. 1st DCA 1994). The second order merely holds, without factual or legal discussion, that the petitioner therein was "convicted of acts which constitute '. . . non-consensual handling or fondling of the sexual organs of another person;'" Steven L. Bracken v. Florida Parole Comm'n, Case No. 93-2452 (Second Judicial Circuit, in and for Leon County) (Davey, J.) [R 31-32].

The trial court denied Gramegna's petition without an evidentiary hearing.[2] The court's ruling, in relevant part, states:

> On April 23, 1991, Gramegna was convicted and received a ten-year sentence for lewd and lascivious acts prohibited by Florida Statute § 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 entitled to control release consideration. However, the acts were committed with a fourteen-year-old child who, as a matter of law, cannot consent. [F.S. § 800.04(4)] Thus, the criminal acts for which Petitioner was convicted were "non-consensual."

[R 37-38]. The trial court did not address the Commission's argument that the arresting officer's report provided a basis for denial of control release to Gramegna based upon the allegedly

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[2] Unless Gramegna's petition and the Commission's response conclusively establish no entitlement to control release consideration, Gramegna is entitled to an evidentiary hearing. Cridland v. Singletary, 605 So. 2d 170 (Fla. 1st DCA 1992).

"forced" nature of the minor's touching of Gramegna's sexual organ as asserted in Count Three.

Gramegna appealed to the First District which affirmed on the authority of its recent decision in Fulkroad v. Florida Parole Comm'n, 632 So. 2d 148 (Fla. 1st DCA 1994) which permitted reliance on a probable cause affidavit to establish the nature of the inmate's conviction for control release purposes. Although the First District felt constrained to follow Fulkroad, it questioned whether this Court's decision in Dugger v. Grant, 610 So. 2d 428 (Fla. 1992) authorized the Commission to deny control release based solely on an "arrest affidavit, rather than on the judgment of conviction, as the statute appears to mandate." 638 So. 2d at 207. The First District noted that this Court in Grant permitted the Commission to rely on information, such as a presentence investigative report, to determine "factual matters apart from the nature of the conviction" but that "the Grant court never held that a conviction could be proven except by a copy of the judgment." Id. (Emphasis in original). The First District, therefore, certified the following question as being of great public importance:

> 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 DO NOT ESTABLISH A DISQUALIFYING CONVICTION?

In recognition that the trial court held that a fourteen-year-old could not, as a matter of law, consent to sexual activity which

violates section 800.04, the First District also certified the following question:

> 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?

Gramegna thereafter sought timely review of these certified questions by this Court.

SUMMARY OF THE ARGUMENT

Gramegna is eligible for control release consideration because his conviction for a lewd or indecent act under section 800.04, Florida Statutes, is not a disqualifying offense. Under prior early release systems, any conviction for a lewd or indecent act rendered an inmate ineligible. In 1990, however, the range of disqualifying convictions for lewdness or indecency was drastically narrowed to only three types, none of which apply to Gramegna's conviction.

Specifically, Gramegna was not convicted of the narrowly proscribed offense of "nonconsensual handling or fondling of the sexual organs of another person" as set forth in section 947.146(3)(c), Florida Statutes (1993). Under this simple statutory disqualifier, the Commission may not look beyond the information, indictment, or other charging or sentencing document to determine the nature of Gramegna's conviction. Unlike Dugger v. Grant, 610 So. 2d 428 (Fla. 1992), where factual matters apart from the conviction under a compound statutory disqualifier were at issue, the Commission is limited to consideration of only that evidence which could reasonably form the basis of the conviction in the first instance. In this case, no record evidence establishes that the lewd act to which Gramegna pleaded nolo contendere (i.e., the handling or fondling of the genitals of another) was "nonconsensual."

Even if the Commission could look behind the judgment of conviction, the arrest report at issue provides no basis for concluding that the touching of the sexual organ of another was

"nonconsensual." The report, which Gramegna had no opportunity to contest and which would be inadmissible hearsay at trial, merely states that Gramegna "forced" the touching of his own sexual organ. This lewd act, even if nonconsensual, is not a disqualifying offense for control release purposes.

Finally, the case and statutory law of the State of Florida provides no basis for the trial court's overbroad holding that a fourteen-year-old, as a matter of law, cannot consent to sexual activities which otherwise violate section 800.04. The "consent not a defense" portion of section 800.04, upon which the trial court relied and which was upheld in Jones v. State, 640 So. 2d 1084 (Fla. 1994), does not logically or reasonably support the conclusion that all violations of section 800.04 are "nonconsensual" as a matter of law. In fact, the Legislature has explicitly indicated that persons twelve and older can consent to sexual intercourse and other sexual activities that fall within the definition of sexual battery under Chapter 794. Because minors twelve and older can factually and legally consent to the most consequential of sexual activities, it is apparent that minors from ages twelve to sixteen can consent to those less serious acts proscribed under section 800.04.

ARGUMENT

I. SECTION 947.146(3)(C) DOES NOT DISQUALIFY GRAMEGNA FROM CONTROL RELEASE CONSIDERATION.

The central issue in this proceeding is whether Gramegna is statutorily ineligible for consideration for control release[3] based upon his conviction under section 800.04, Florida Statutes, for a lewd and lascivious act with a fourteen-year-old. Gramegna is entitled to consideration[4] for control release unless the Commission establishes that his conviction is a disqualifying offense under the limited statutory criteria the Legislature has enacted. Specifically, the sole inquiry is whether Gramegna's conviction was for the narrowly proscribed offense of "non-consensual handling or fondling of the sexual organs of another person" set forth in section 947.146(3)(c), Florida Statutes

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[3] Gramegna recognizes that there is no liberty or substantive due process right to control release. He is, however, entitled to proper consideration of his eligibility for the control release program. Moore v. Florida Parole and Probation Comm'n, 289 So. 2d 719, 720, cert. denied, 417 U.S. 935, 94 S.Ct. 2649, 41 L. Ed. 2d 239 (1974); King v. Florida Parole Comm'n, 614 So. 2d 1183, 1184 (Fla. 1st DCA 1993).

[4] Simply because an inmate is eligible for control release consideration does not automatically result in his early release. Instead, each statutorily eligible inmate is given a control release date and is subject to at least two levels of additional scrutiny. Rule 23-22.008, Fla. Admin. Code (1994). First, inmates are assessed to determine their suitability for release under risk-assessment criteria and a scoring matrix and grid. Id. Rule 23-22.008(b)-(d). Those deemed suitable are recommended for classification as "advanceable" while those deemed unsuitable are recommended as "non-advanceable" (the latter not receiving any advance control release date). Second, even those inmates recommended as "advanceable" under risk-assessment criteria can be placed in the "non-advanceable" classification based upon aggravating factors the Commission has adopted. Id. Rule 23-22-008(e). Mitigating factors may also be considered to advance release to an earlier date. Id. Rule 23-22-008(f).

(1993). For the reasons set forth below, neither the language of section 947.146(3)(c) nor the record evidence disqualify Gramegna from control release consideration. The initial sections of this Brief address the first certified question as well as other grounds establishing Gramegna's eligibility. The second certified question is addressed in the final section.

A. An Arrest Report Cannot Establish the Nature of a Disqualifying Conviction.

The first certified question addresses whether the Commission can rely upon an arresting officer's affidavit in an arrest report to deny control release under section 947.146(3)(c), Florida Statutes, where the information, indictment, bill of particulars and judgment do not establish a disqualifying conviction. In order to resolve this question, a brief overview of Florida's control release system and this Court's decision in Dugger v. Grant is necessary.

Florida's control release system was established in response to the need for an early-release mechanism due to overcrowded prison conditions. Like prior early-release systems,[5] control release consideration is available to inmates unless their convictions render them statutorily ineligible. Each of these systems excluded from consideration those inmates whose offenses and prior records indicated they might pose an unreasonable risk

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[5] The three prior systems included emergency release, administrative gain time, and provisional release credits. The first two are discussed in Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988), while the latter is discussed in Dugger v. Grant, 610 So. 2d 428 (Fla. 1992).

of harm to the public. Because prior early-release systems gave the Commission limited discretion and resulted in the release of sometimes violent offenders, the Legislature in 1989 revised the then-existing provisional release system and adopted the control release system.[6]

Under the control release system, the Legislature delegated to the Control Release Authority[7] the authority to make early release decisions based on a system of uniform criteria.[8] As with prior systems, control release consideration was made available to all inmates except those whose offenses rendered them ineligible. The specific disqualifying offenses were statutorily specified in section 947.146(3) which provides that a control release panel "shall establish a control release date for

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[6] Chapter 89-256, Laws of Florida, codified at section 947.146, Florida Statutes (1989).

[7] Because the Authority is composed of the members of the Parole Commission, it will be referred to herein as the Commission unless such reference is otherwise inapplicable.

[8] Section 947.146(4) provides that:

> Control release dates shall be based upon a system of uniform criteria which shall include, but not be limited to, present offenses for which the person is committed, past criminal conduct, length of cumulative sentences, and age of the offender at the time of commitment, together with any aggravating or mitigating circumstances.

§ 947.146(4), Fla. Stat. (1994).

each parole ineligible inmate" except those convicted of certain enumerated offenses. (Emphasis added).[9]

The control release system, to a great extent, merely reestablished the same disqualifying offenses that rendered inmates ineligible under its predecessor, provisional release. The Legislature in 1990, however, significantly narrowed the scope of the types of sexual offenses that previously disqualified inmates from early release. Importantly, under the provisional release system any inmate "convicted, or . . . previously convicted, of committing or attempting to commit sexual battery, incest, or a lewd or indecent assault or act" was statutorily ineligible. § 944.277(1)(c), Fla. Stat. (1988) (emphasis added). As highlighted, a conviction for any type of lewd or indecent act rendered the inmate ineligible for early release, regardless of whether the acts were consensual or not. Lewd or indecent assaults or acts in violations of Chapter 800, Florida Statutes, which proscribes lewd acts and indecent exposure,[10] were disqualifying offenses. As such, convictions under section 800.04 fell within this ban on early release.

This blanket prohibition, however, was substantially narrowed in the 1990 legislative session. In 1990, the broad

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[9] The mandatory nature of the highlighted language raises the question of whether the control release system creates a liberty or due process interest. This issue, however, has not been raised in this proceeding.

[10] In addition to the proscriptions of section 800.04, Chapter 800 also provides that an "unnatural and lascivious act with another person" and the "vulgar or indecent" exposure or exhibition of sexual organs are punishable as misdemeanors under sections 800.02 and 800.03, respectively.

prohibition on early release of inmates convicted of any lewd or indecent acts was eliminated and replaced with a more narrowly restricted range of offenses. First, the prohibition in section 944.277(1)(c) of the provisional release statute was replaced with new language which excluded from consideration any inmate who was:

> convicted, or has been previously convicted, of committing or attempting to commit a lewd or indecent assault or act as a result of masturbating in public, exposing the sexual organs in a perverted manner or non-consensual handling or fondling of the sexual organs of another person.

Chapter 90-187, § 1, Laws of Florida. In recognition of this significant narrowing amendment, the Legislature explicitly stated that inmates previously ineligible under the blanket prohibition were eligible for,[11] and should retroactively receive,[12] provisional credits (unless their offenses fell within the three enumerated categories of lewd or indecent acts). As the Second District noted in Searcy v. Singletary, 590 So. 2d

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[11] Section 2 of Chapter 90-187, Laws of Florida, provides:

> A person who is convicted, or has been previously convicted, of committing prior to the effective date of this act a lewd or lascivious assault or act specified in 944.277(1)(c), Florida Statutes, is eligible for provisional credits.

(Emphasis added).

[12] Section 19 of Chapter 90-377, Laws of Florida, states:

> Effective July 1, 1990, an inmate convicted of a lewd or indecent act not listed in s. 944.277(1)(c), Florida Statutes, shall receive retroactive benefit of all provisional credit awards made during the service of his sentence, provided he is not otherwise ineligible for, or excluded from, receiving such an award.

1034, 1034 (Fla. 2d DCA 1991), it appears "that a onetime blanket proscription against awarding provisional credits to persons convicted of lewd assault now has been narrowed to some extent by this rewording." Consequently, only those inmates convicted of the narrower range of lewd or indecent offenses such as masturbating in public, exposing their sexual organs in a perverted manner, or nonconsensual handling or fondling of another's sexual organs remained statutorily ineligible for provisional release.

Simultaneously, the Legislature amended the control release statute to include only these same three narrowly limited types of lewd and indecent acts. Chapter 90-337, § 12, Laws of Florida. Specifically, section 947.146(4)(c) (now (3)(c)) was enacted and precluded control release consideration of any inmate who:

> 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 <u>non-consensual handling or fondling of the sexual organs of another person</u>.

Chapter 90-337, § 12, Laws of Florida (emphasis added). The Legislature specifically limited the scope of disqualifying offenses to only three types of lewd and indecent acts or assaults (of which only the latter category is at issue in this proceeding).

Under this substantially narrower range of disqualifying offenses, it bears emphasis that only certain limited types of convictions under section 800.04 render an inmate ineligible for

control release consideration. Section 800.04 prohibits a wide range of lewd, lascivious, or indecent assaults or acts upon or in the presence of children under the age of sixteen. Although section 800.04 was drafted to encompass acts involving contact with minors as well as acts involving no contact with minors,[13] many of the former and latter types of acts are not disqualifying offenses under section 947.146(3)(c). For example, certain lewd, lascivious or indecent acts in the presence of minors under age sixteen are not disqualifying offenses. A husband and wife engaging in sex in the presence of a minor may violate section 800.04,[14] but such conduct would not necessarily disqualify a person from control release consideration.[15] Similarly, masturbation in the presence of a minor may violate section 800.04,[16] but such conduct would not necessarily disqualify a person from control release consideration unless the conduct occurred in public.[17]

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[13] Worling v. State, 484 So. 2d 94, 94 (5th DCA 1986).

[14] See, Cheseborough v. State, 255 So. 2d 675 (Fla. 1971), cert. denied, 406 U.S. 976, 92 S. Ct. 2427, 32 L. Ed. 2d 676 (1972) (1972).

[15] Such conduct could conceivably render an inmate ineligible if sexual organs were actually exposed "in a perverted manner" during the course of the act. § 947.146(3)(c), Fla. Stat. (1994).

[16] See Bergen v. State, 552 So. 2d 262 (Fla. 2d DCA 1989) (masturbation in presence of five children); cf. Werner v. State, 590 So. 2d 431 (Fla. 4th DCA 1991) (masturbation in room with 13-month old insufficient to support conviction), approved, 609 So. 2d 585 (Fla. 1992).

[17] § 947.146(3)(c), Fla. Stat. (1994). Of course, if sexual organs were actually exposed "in a perverted manner" during the course of the act, the inmate could be ineligible.

Similarly, acts which violate section 800.04 involving the actual touching of minors under age sixteen are not necessarily disqualifying offenses. As an example, Count Two in the information charges Gramegna with touching the minor's breasts in a lewd, lascivious and indecent manner. [R 16] Although this act violates section 800.04, it does not fall within any statutory disqualifier in section 947.146. Similarly, Count Three in the information charges Gramegna with placing the minor's hand on his sexual organ in a lewd, lascivious or indecent manner. [R 16-17] Again, although this act violates section 800.04, it does not fall within any statutory disqualifier in section 947.146.[18] Consequently, the nature of the conviction under section 800.04 must be carefully scrutinized to determine whether it fits within the limited range of disqualifying sex offenses specified in section 947.146(3)(c).

Id.

[18] The Commission may argue that the minor's touching of Gramegna's penis is the "nonconsensual handling or fondling of the sexual organs of another person" within the meaning of section 947.146(3)(c). This interpretation, however, reverses the plain meaning of the statute which clearly states that "an inmate who . . . [i]s convicted of . . . [the] . . . nonconsensual handling or fondling of the sexual organs of another person" is ineligible. (Emphasis added). As drafted, subsection (3)(c) specifically limits itself to "inmates" who touch the genitals "of another person." It is not susceptible of any other reasonable interpretation as currently written. If the Legislature had not included the restrictive phrase "of another person", subsection (3)(c) could be read to include the type of touching alleged in Count Three of the information. The Legislature, however, has not done so. Count Three therefore does not provide a basis for denial of control release consideration.

One additional point is necessary before further addressing Gramegna's eligibility for control release. This case involves the critical distinction between what information the Commission can rely upon to determine the nature of a conviction versus what information the Commission may reply upon to determine other factual matters apart from the conviction.[19] Section 947.146 contains a list of the offense that disqualify inmates from control release consideration. Some disqualifiers ("simple statutory disqualifiers") require only that a conviction for a specified offense be demonstrated. For example, control release is unavailable to an inmate who:

> (i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4), or has ever been convicted of any degree of murder or attempted murder in another jurisdiction[.]

§ 947.146(3)(i), Fla. Stat. (1994) (emphasis added). Under this simple statutory disqualifier, a judgment of conviction for third degree murder would render an inmate ineligible without any further inquiry into the facts surrounding the offense.

Certain other types of disqualifiers ("compound statutory disqualifiers"), however, require that a conviction for a specified offense be demonstrated as well as factual matters apart from the conviction. For instance, control release is unavailable to an inmate who:

> (d) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, **and** a sex act

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[19] The First District in Fulkroad v. Florida Parole Comm'n, 632 So. 2d 148 (Fla. 1st DCA 1994) did not make this distinction.

> was attempted or completed during commission of such offense;
>
> (e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, **and** the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense; [or]
>
> (f) Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 **and**, in the course of committing the offense, the inmate committed aggravated child abuse, sexual battery against the child, or a lewd, lascivious, or indecent assault or act upon or in the presence of the child[.]

§ 947.146(3)(d)-(f), Fla. Stat. (1994) (emphasis added). The highlighted language indicates that these type of compound statutory disqualifiers require the Commission to demonstrate a specified conviction and, in addition, demonstrate specified facts surrounding the offense beyond the nature of the actual conviction. For example, a conviction for false imprisonment of a child under age thirteen is not a disqualifying offense unless the Commission also establishes that certain sexual, lewd or abusive acts were committed in the course of the offense. Id. § 947.146(3)(f).

This distinction between simple and compound statutory disqualifiers has tremendous practical importance, particularly where the Commission attempts to rely upon arrest reports to establish the nature of actual convictions. As an example, under the simple statutory disqualifier set forth in section 947.146(3)(h), Florida Statutes,[20] inmates convicted of battery

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[20] Subsection (3)(h) prohibits control release to an inmate who:

> Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated

against public officers, judges or state attorneys are ineligible for control release. Next, assume two situations. In the first, an inmate was charged with battery of a law enforcement officer but convicted at trial of only simple battery. In the second, an inmate was charged and convicted of simple battery at trial where no evidence was entered that the battery was against a law enforcement officer. Both inmates are eligible for control release consideration because they were not convicted of "battery . . . against a public officer" as required under section 947.146(3)(h). Assume that the Commission denies each inmate control release based upon arrest reports which contain statements that each inmate hit a law enforcement officer. This use of arrest reports would circumvent the clear language of section 947.146(3)(h) and impermissibly transform simple battery convictions into the disqualifying offense of "battery against a public officer."

Regarding the distinction between simple and compound statutory disqualifiers, this Court has only addressed what evidence the Commission may rely upon in the latter situations. In Dugger v. Grant, the inmate had been convicted of burglary and, although charged with sexual battery, the jury returned a verdict for the lesser-included offense of battery. 610 So. 2d

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> assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against a state attorney or assistant state attorney; or against a justice or judge of a court described in Article V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction[.]

at 430. Neither of the convictions, by themselves, statutorily disqualified the inmate for provisional release credits under the early-release system then in effect. The Commission, however, relied upon the content of an arrest report contained in a presentence investigative report (PSI) to conclude that the inmate was not entitled to provisional credits based on two compound statutory disqualifiers in section 944.277. These disqualifiers, in relevant part, prohibited the award of provisional credits to an inmate who:

> (d) Is convicted . . . of committing . . . battery, . . . **and** a sex act was attempted or completed during commission of such offense;
> (e) Is convicted . . . of committing . . . burglary, . . . **and** the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense[.]

§ 947.277(1)(d) & (e), Fla. Stat. (1989) (emphasis added). The information in the PSI indicated that the inmate intended, attempted or completed sex acts during the course of the battery and burglary. The trial court and the First District, however, granted the inmate's petition for writ of mandamus because "the jury had specifically rejected the events set forth in the PSI" and found the inmate not guilty of sexual battery. The First District certified the question whether reliance on the arrest report in the PSI as the sole basis for determining the inmate's eligibility for provisional release credits was permissible. 610 So. 2d at 429-31.

In a four-three decision,[21] this Court held that the Department may rely upon information, including PSIs, in making the administrative determination whether to grant provisional credits to inmates in the context of the compound statutory disqualifiers at issue.[22] Because there was no dispute as to the nature of Grant's convictions, this Court did not address what evidence can be relied upon to establish the nature of a conviction under a simple statutory disqualifier. Instead, at issue in Grant was what evidence the Commission may consider to establish "facts apart from the conviction."

In contrast, the simple statutory disqualifier at issue in this case focuses solely on whether Gramegna's conviction was for the "nonconsensual handling or fondling of the sexual organs of another." Unlike Grant where this Court permitted the Commission

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[21] Justice Kogan, in an opinion joined by Chief Justice Barkett and Justice Shaw, dissented. The dissenters argued that the provisional credit system created "a liberty interest in those who qualify for provisional credits." 610 So. 2d at 433. As such, the Department was required to afford inmates procedural due process protections including the opportunity to be heard in those situations where the Department is required to "independently review evidence and determine whether the inmate falls into the classification or not." Id. The dissenters urged that "[w]henever the Department is required to rely on evidence or findings of fact not contained within the four corners of the sentencing order, it must give the inmate notice and the opportunity to respond to this evidence." Id.

[22] The Court emphasized that such credits are permissive, "create no reasonable expectation of release on a given date," and do not vest substantive or procedural "liberty" due process rights in inmates. 610 So. 2d at 432. The Court also recognized the Department's need to rely upon PSIs to realistically perform its duties. Under the "administrative procedural mechanism" of the provisional credit system at issue, therefore, the Court held that the Department has discretion whether to award credits and may rely upon PSIs "in making that discretionary determination" under the disqualifiers at issue. Id. at 432.

to look beyond the judgment to determine whether a sex act was intended or completed in conjunction with a burglary and battery conviction, here the only question is the nature of Gramegna's conviction itself. Nothing in Grant authorizes the Commission to go behind the judgment of conviction in this type of situation. As the First District noted, although this Court in Grant ruled that the Commission "may rely on information in an inmate's presentence investigative report, to determine eligibility for provisional credits, when factual matters apart from the nature of the conviction were at issue[,]" this Court "never held that a conviction could be proven except by a copy of the judgment." Id. at 206 (emphasis in original).

In fact, the trial court undertook no review of the record to determine whether the Commission met its burden. The First District, however, determined that the only record evidence supporting a finding that Gramegna is ineligible for control release was the arresting officer's report stating that Gramegna "did take the victim's hand and forced her to fondle his genitals." As the First District noted, this report was "never attached to an accusatory pleading or even offered into evidence as grounds to conclude that Gramegna was convicted of an offense listed in section 947.146(3)(c)[.]" 638 So. 2d at 207. A threshold question, therefore, is whether the Commission may rely upon the arresting officer's report to establish the nature of Gramegna's conviction for purposes of control release. For the following reasons, the report is not a legally or factually

sufficient basis to disqualify Gramegna from control release consideration.

First, section 947.146(3)(c) is a simple statutory disqualifier which, unlike the situation in Grant, does not authorize the Commission to delve into factual matters apart from the nature of the specific conviction at issue. Under section 947.146(3)(c), the disqualifying conviction must be for the "nonconsensual" fondling or handling of another's sexual organs. Under section 800.04, however, the consensual or nonconsensual nature of the offenses is simply not an element of the conviction. See Coley v. State, 616 So. 2d 1017, 1023 n.15 (Fla. 3d DCA 1993) ("Consent is not an issue . . . under section 800.04, Florida Statutes (1989)"). There are, of course, a number of sexual offenses involving minors which specifically require proof of the minor's lack of consent.[23] A conviction for one of these nonconsensual offenses may fall within the ambit of section 947.146(3)(c). But a conviction under section 800.04 is not "nonconsensual" as a matter of law as the trial court concluded. Instead, Gramegna's convictions are not facially disqualifying offenses under section 947.146(3)(c) and do not render him ineligible for control release consideration. For this reason alone, the first certified question should be answered in the negative.

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[23] See §§ 794.011(3)-(5), Fla. Stat. (1994) (sexual battery on persons twelve and older requires proof of victim's lack of consent); see also discussion infra (regarding minor consent to sexual acts).

Second, the Commission is limited to reviewing only that evidence which could have formed the basis for Gramegna's conviction in the first instance. As an example, the Commission could not rely on information obtained after the date of conviction. Such belatedly obtained information would be irrelevant in attempting to establish the nature of the earlier conviction. Similarly, what inmates are initially charged with or alleged to have done in arrest reports would not necessarily establish the nature of their ultimate convictions. Much is initially alleged that is not ultimately proven or pled to. For these reasons, the Commission is limited to reviewing and relying upon only that evidence which forms the basis for the inmate's actual conviction.[24]

In this regard, because the arrest report was not attached to any accusatory pleading it cannot form a basis for Gramegna's conviction. Unlike the procedure in some jurisdictions where arrest reports are used as charging informations in misdemeanor actions,[25] no such procedure was utilized here. As such, there

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[24] See Tyson v. Dugger, 547 So. 2d 240, 241 (Fla. 1st DCA 1989). In Tyson, an inmate who was charged with both disqualifying sexual offenses and non-disqualifying offenses, pleaded guilty to only non-disqualifying offenses pursuant to a negotiated plea agreement. Id. The First District, based upon the "plain language" of the statutory disqualifiers at issue, found that because the "record on appeal does not indicate that the [inmate] was convicted of sexual battery or any of the sexual offenses listed" as statutory disqualifiers, he was eligible for administrative gain-time. Id.

[25] At oral argument in Dugger v. Grant, the Department of Corrections ("DOC") discussed this use of arrest reports:

C.J. Barkett: But you do use arrest reports in some instances?

is no basis other than mere surmise that the content of the arrest report at issue was grounds for Gramegna's actual conviction.

In fact, the arrest report and its contents would be inadmissible hearsay at trial. Section 90.803(8), Florida Statutes, permits the admission of certain public records and reports but expressly excludes "in criminal cases matters observed by a police officer or other law enforcement personnel[.]" As such, "[p]olice reports themselves are specifically excluded from the exception for public records and reports." Hendrieth v. State, 483 So. 2d 768, 769 (Fla. 1st DCA 1986). This exclusion:

> is based on the belief that observations by officers at the scene of a crime or when a defendant is arrested are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant.

Charles Ehrhardt, Florida Evidence, § 803.8, at 646 (1994). Because the arrest report would have been inadmissible at trial, it could not form the basis for Gramegna's conviction. It would

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DOC: . . . One aspect of the statute is a lewd act, and lewd acts often are misdemeanor acts. And we've found that an arrest report is used as a charging information often where there has been a prior misdemeanor, and so we'll use an arrest report to see the circumstances where that has been the charging information for that crime.

Transcribed from oral argument tape in Dugger v. Grant, Florida State University Library.

be anomalous, therefore, to permit its use to establish the nature of Gramegna's conviction in this proceeding.[26]

Third, in plea cases there will generally be little or no documentary or tangible evidence and, in some instances, no transcript of the plea colloquy. Under these circumstances, 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. This procedure makes logical sense because the relevant evidence of the nature of an inmate's conviction are the factual averments in the information to which he pleaded. See, e.g., Thomas v. Singletary, 611 So. 2d 1343, 1345 (Fla. 1st DCA 1993) (inmate ineligible for provisional credit under section 944.277 because the count of information to which he "pled nolo contendere specifically charges that [burglary was committed] with intent to commit sexual battery").

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[26] Gramegna recognizes that the control release statute provides that:

> 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.

§ 947.146, Fla. Stat. (1994). This provision was added in the 1992 Special "H" Session, apparently in response to the lower court decisions in Grant. Chapter 92-310, Laws of Florida. Gramegna does not contest that arrest reports and PSIs may be used to make determinations of facts apart from a conviction, as was done in Grant. Gramegna, however, asserts that reliance on an arrest report to establish the basis of a conviction would be an abuse of discretion in light of the statute's use of simple and compound disqualifiers.

In this case, the information provides a basis for concluding that Gramegna was convicted for: touching the minor's sexual organ with his hand (Count One); touching the minor's breasts with his hand (Count Two); and having the minor touch his sexual organ (Count Three).[27] Only Count One, which involves the touching of the minor's sexual organ, could plausibly be relevant as a basis for denial of control release consideration. Nothing in the information, judgment, or sentencing order, however, provides a basis for concluding that this touching was nonconsensual. Because there is no evidence that the touching was nonconsensual, the Commission may not engage in conjecture and surmise to conclude that the touching was nonconsensual.[28]

In addition, unlike the situation in Grant, Gramegna had no realistic opportunity to challenge the allegations in the arrest report. In Grant, the inmate was able to contest statements in the arrest report because they were included in a PSI that had been prepared. When courts order PSIs, offenders have some limited opportunity to contribute to and challenge their content.

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[27] Gramegna concedes that his plea of nolo contendere to the three counts is an implicit admission to the allegations in the information for purposes of the pending prosecution and punishment directly related thereto. See Stewart v. State, 586 So. 2d 449, 450-51 (Fla. 1st DCA 1991) ("plea of nolo contendere (or no contest) admits the facts for the purpose of the pending prosecution and to that extent has the same effect as a plea of guilty insofar as it gives the court the power to punish.").

[28] See Mayo v. Dugger, 535 So. 2d 300, 301 (Fla. 1st DCA 1988) (denial of petition for writ of mandamus reversed where "no evidence in the record on appeal in the instant case to establish that a sexual act was either attempted or completed in connection with the assault and battery for which" the inmate was convicted).

§ 921.231, Fla. Stat. (1993) (offender may include in PSI his version and explanation of the criminal act and his criminal history and may challenge verification of facts asserted in PSI). In contrast to Grant, the record here does not indicate whether a PSI was even prepared such that Gramegna simply never had an opportunity to dispute the content of the arrest report.

Finally, methods exist for avoiding the type of situation present in this case which are administratively feasible and protect inmates from inappropriate inquiries into the nature of their convictions for control release consideration. In plea cases, one simple method is for the plea agreement to be conditioned on the defendant admitting that the offense was nonconsensual. This admission can be recorded in the sentencing order thereby sparing the Commission from having to make a independent inquiry on the issue of consent at a later and sometimes remote date. The admission can also be obtained prior to or at the plea colloquy and memorialized in a transcript or other written order. Each of these methods provide a reasonable means of resolving the nature of a conviction under section 800.04 and affords a fair opportunity to inmates to admit or deny whether their offenses were consensual or otherwise.

B. The Arrest Report Does Not Establish a Disqualifying Offense Under Section 947.146(3)(c).

Even if the Commission is permitted to rely upon the arresting officer's report, which Gramegna does not concede, its contents do not establish a disqualifying offense under section

947.146(3)(c). First, the arrest report does not support the conclusion that a "forced" or "nonconsensual" touching of the minor's genitals occurred. Instead, the arrest report is silent on the nature of the touching of the minor's sexual organ. The report states that Gramegna allegedly "did fondle [the minor's] vaginal area on the outside of her clothing[.]" No modifier or adjective is used to describe the touching. As such, the arrest report provides no indication whether the touching was consensual or nonconsensual, forced or unforced.

In fact, the arresting officer's report does not say that Gramegna touched the minor's genitals directly. Instead, the report states that he touched the "genital area" on the outside of her clothing. This type of touching, although perhaps sufficient to establish a violation of section 800.04,[29] does not satisfy the requirement of section 794.146(3)(c) which specifies that the touching must be of "the sexual organs of another person." Touching the outside of another person's clothing in his or her "genital area" is not equivalent to touching that person's sexual organ.

Second, the arresting officer's report states that Gramegna allegedly "forced" the minor to touch Gramegna's sexual organ. [R 25] This touching, even if "forced," is not the type of act

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[29] Lewis v. State, 626 So. 2d 1073 (Fla. 1st DCA 1993) (conviction for lewd and lascivious act requires showing that defendant touched minor's vaginal area); State v. Mitchell, 624 So. 2d 859 (Fla. 5th DCA 1993) (evidence that defendant kissed minor on her mouth, played in her hair, and rubbed her buttocks was sufficient to establish prima facie case of lewd, lascivious or indecent act upon a child).

proscribed under section 947.146(3)(c). As discussed above,[30] subsection (c) relates solely to inmates convicted of the "nonconsensual handling or fondling of the sexual organs of another." (Emphasis added). As the highlighted language indicates, the Legislature limited the scope of subsection (c) to situations where the conviction is based on the nonconsensual touching of another's sexual organs. The statute's clear language excludes situations where the nonconsensual touching is of one's own sexual organ.[31] Here, the allegedly "forced" touching was of Gramegna's own genitals and not those "of another." Consequently, the arresting officer's report does not provide a basis for concluding that Gramegna's conviction falls within section 947.146.

In summary, no record evidence establishes that Gramegna's convictions were for the "nonconsensual handling or fondling of the sexual organs of another." Gramegna's plea of nolo contendere to the charge of touching the minor's sexual organ is not a disqualifying offense. The Commission may not look beyond the information, indictment, or other charging or sentencing document to determine the nature of the conviction. None of these documents establish that he was convicted of a disqualifying "nonconsensual" offense. Even if the Commission

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[30] See supra note 18.

[31] In light of the fact that section 947.146(3)(c) does not disqualify an inmate convicted of touching a minor's breasts, this interpretation is neither strained nor inconsistent with the Legislature's intent to substantially narrow the range of disqualifying offenses.

may look beyond the judgment of conviction, the arrest report provides no factual basis for concluding the touching of the minor's sexual organ was "nonconsensual."

II. MINORS CAN CONSENT TO SEXUAL ACTIVITY FOR PURPOSES OF CONTROL RELEASE DETERMINATIONS.

The second certified question relates to whether a child under the age of sixteen can consent to sexual acts that violate section 800.04, Florida Statutes. This question relates to matters discussed in Jones v. State, 640 So. 2d 1084 (Fla. 1994) which the First District did not address in its opinion.[32] Because the trial court concluded that minors under sixteen cannot consent to sexual activities "as a matter of law," it viewed any conviction under section 800.04 as "nonconsensual" for control release purposes. For the reasons discussed below, however, neither Jones nor Florida case or statutory law support the trial court's ruling.

In Jones, this Court considered whether the constitutional privacy rights of minors who consent to sexual intercourse may be raised by defendants prosecuted under section 800.04, Florida Statutes. Specifically, at issue was the constitutionality of a portion of section 800.04(4) which provides that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section." The Fifth District

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[32] The First District, which issued its opinion on June 8, 1994, did not analyze the issue of minor consent. As a consequence, it may not have been aware of Jones which was issued on May 26, 1994.

ruled that this section of 800.04 did not substantially burden the privacy rights of minors to engage in consensual sexual activity and was thereby constitutional. Jones v State, 619 So. 2d 418, 422 (Fla. 5th DCA 1993). In response to the Fifth District's certified question,[33] this Court affirmed based upon the legislative interest in protecting children "from potential harm when such harm outweighs the interests of the individual." 640 So. 2d at 1086.

The Court in Jones, however, did not hold that all minors, as a matter of law, cannot consent to sexual activity. Instead, Jones merely affirmed that defendants charged with unlawful sexual intercourse with a minor may not raise the minor's consent as a defense as prohibited by section 800.04. Under Jones, the factual question of whether alleged sexual activity was "nonconsensual" is simply not an issue in actions under section 800.04. Gramegna's eligibility for control release is therefore not affected by Jones. In fact, Jones supports Gramegna's argument, as discussed in an earlier section, that the determination of whether sexual activity is "nonconsensual" under section 947.146(3)(c) for control release purposes cannot be determined from a review of the record in a section 800.04

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[33] The issue involved in the certified question was:

> whether the expansive constitutional right of privacy of minors our supreme court announced in In re T.W., 551 So. 2d 1186 (Fla. 1989), renders unconstitutional that portion of section 800.04, which provides that consent is not a defense to a prosecution for sexual activity with a minor under sixteen.

619 So. 2d at 419.

conviction because consent is simply not an element of a conviction.

In this proceeding, the sole basis for the trial court's refusal to grant mandamus relief to Gramegna was its contention that "the criminal acts for which [Gramegna] was convicted were 'non-consensual'" because "a fourteen-year-old child . . ., as a matter of law, cannot consent." [R 37-38] The trial court relied upon the "consent not a defense" portion of section 800.04 for this expansive proposition. But, as just discussed, section 800.04 merely prohibits a consent defense from being asserted; it does not establish the far broader proposition that minors are legally incapable of consenting to sexual activity. The legislature's ability to punish those who engage in sexual activity with minors by eliminating consent as a defense does not logically translate into the broad legal conclusion that such activities are "nonconsensual" as a matter of law.

In fact, this Court and other lower courts have acknowledged that minors can consent to sexual activities. In State v. Lanier, 464 So. 2d 1192 (Fla. 1985), this Court addressed the certified question whether a conviction under the then-existing version of section 800.04 was constitutional "where the undisputed facts reveal that the twelve-year-old was previously unchaste and the sexual intercourse was consensual." Id. at 1193 (emphasis added). While the case was pending in this Court, section 800.04 was amended during the 1984 Legislative Session to provide that "the victim's consent is [not] a defense" to conduct

proscribed under the statute.[34] The preamble to the chapter law indicated the Legislature's intent that lewd and lascivious acts upon children violate section 800.04 "without regard to the victim's consent or of the victim's prior chastity." (Emphasis added). In holding that the amendment merely clarified existing law, this Court held that prohibited sexual intercourse with a minor is a violation "despite the fact . . . the sexual intercourse was consensual." Id. (emphasis added). These statements implicitly, if not explicitly, acknowledge that minors can consent. Six years later, this Court in Schmitt v. State, 590 So. 2d 404 (Fla. 1991), cert. denied, 112 S. Ct. 1572, 118 L. Ed. 2d 216 (1992), addressed the scope of section 800.04 and other statutes dealing with sexual acts involving children. The Court again stated that a violation of the section occurs "whether or not the child consents" to the act, thereby acknowledging that consent can be present. Id. at 411.[35] In light of these statements, it is fair to say that this Court has never held that minors cannot legally consent to any acts which might violate section 800.04.

Perhaps most importantly, the Legislature has specifically acknowledged that minors twelve and older are capable of consenting to the most serious and significant form of sexual

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[34] Chapter 84-86, Laws of Florida.

[35] In dicta, the Court stated that "minor children are legally incapable of consenting to a sexual act in most circumstances." Id. at 411 n. 10. The Court noted that exceptions such as a minor who is lawfully married may exist. Id.

activity: sexual intercourse. Under Chapter 794, Florida's "Sexual Battery" statute, the Legislature has stated in clear language that an individual who commits those acts defined as sexual battery (primarily sexual intercourse)[36] on a person twelve years of age or older "without that person's consent" engages in a criminal offense. §§ 794.011(3)-(5), Fla. Stat. (1994) (emphasis added). For instance, section 794.011(3) specifies that:

> A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added). The highlighted language, which is also used in subsections (4) and (5), clearly indicates that the lack of consent[37] of persons twelve and older is an element of the offense. This Court has approved and memorialized this element in its standard jury instructions[38] such that proof of consent defeats a sexual battery claim, even if the victim is a minor age twelve and older.

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[36] Subsection (1)(h) defines "sexual battery" to mean "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." § 794.011(1)(h), Fla. Stat. (1994).

[37] Under the statute, "consent" is defined as the "intelligent, knowing, and voluntary consent and does not include coerced submission." § 794.011(1)(a), Fla. Stat. (1994).

[38] Standard Jury Instructions -- Criminal Cases No. 92-1, 603 So. 2d 1175, 1222-23 (Fla. 1992).

As such, Chapter 794 is the Legislature's affirmative recognition that persons twelve and older can, factually and legally, consent to sexual activity that constitutes a sexual battery. To hold, as the trial court did, that every child under the age of sixteen is legally incapable of giving consent to sexual activities would render most of Chapter 794 meaningless. Instead, the Legislature made lack of consent an element of sexual battery on persons over twelve because it understood that minors from twelve to sixteen could actually consent to such acts.

Florida case law makes this point clear. For example, in Bullington v. State, 616 So. 2d 1036 (Fla. 3d DCA 1993), the Third District reversed a sexual battery conviction involving a fifteen-year-old female based on the minor's consent. The minor had engaged in what the Third District characterized as an "orgy" involving sexual acts (including intercourse) with a number of acquaintances, male and female, during which the minor's hands had been placed in restraints.[39] On the issue of consent, the Third District stated:

> Consent may be actual or implied. The evidence in this case was generally uncontroverted that [the minor] initially agreed to participate in a group sex act, and that if she ever withdrew her consent to participate in specific sexual acts, she never communicated a withdrawal of that consent. At trial, . . . a State witness who was not involved in the sexual episode but was a witness to it, testified that everything was done with [the minor's] consent. Another state witness . . . concurred that [the minor] did not object to what was going on. [The minor]

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[39] Id. at 1038. The minor had asked that the restraints be purchased and used because "she liked to be tied down" and found it sexually fulfilling. Id.

> admitted that [the defendant] never forced her to do anything, and none of the evidence presented suggested that she was an unwilling participant.

Id. at 1038 (citation omitted). Based upon this evidence it was clear that "[a]t no time did [the minor] indicate she did not want to participate" and instead, she was "a willing participant in the carnal revelry[.]" Id. The Third District, therefore, ruled that "the evidence presented was insufficient to support a conviction under [section 794.011(4)(a)] because the State failed to prove lack of consent." Id. at 1038.[40] In a companion case, the Third District reversed a similar conviction of a female defendant under section 794.011(4)(a) based upon the "consensual sexual acts" of the fifteen-year-old. Coley v. State, 616 So. 2d 1017, 1020 (Fla. 3d DCA 1993) (minor consented to multiple oral sex acts and anal penetration with vibrator).[41]

It would be anomalous for minors to be capable of consenting to activities constituting sexual battery, such as those in Bullington and Coley, but not be capable of consenting to many of

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[40] On the day in question, the minor and others had consumed cocaine, but the evidence failed to show that at any point the minor was unable to "physically unable to resist" or that "anyone violated [the minor] . . . during a period of unconsciousness." Id. Further, the "State offered no evidence to show that the use of cocaine caused the loss of an ability to communicate disapproval of any of the sexual acts." Id. at 1039.

[41] Notably, even the dissenting judge in Bullington and Coley agreed that a minor could consent to sexual activities. 616 So. 2d at 1030 ("The courts of this state, in scrutinizing the ability of a minor to consent, have held that a minor's valid consent is to be determined: (1) according to that child's abilities, and (2) the totality of the circumstances[.]"). Instead, he felt that consent was not demonstrated under the circumstances based on the minor's experience, age and drug use. Id. at 1030 & 1034.

the less serious "lewd and lascivious" activities that violate section 800.04. Quite clearly, if the fifteen-year-old in Bullington and Coley could legally consent to the "carnal revelry" described in those cases, a fourteen-year-old can consent to the acts alleged herein against Gramegna. In fact, the statutory frameworks of Chapters 794 and 800 make sense only if minors over twelve years of age can consent to sexual activities. Chapters 794 and 800 dovetail with one another in this regard. Sections 794.011(3)-(5) penalize as felonies specified nonconsensual sexual activities with persons age twelve and older.[42] These same sexual activities, if consensual, may violate section 800.04(3) which prohibits "an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years" without committing sexual battery (i.e., without satisfying the element of lack of the minor's consent).

In essence, section 800.04, in large part, penalizes consensual sexual activities with minors, some of which would otherwise constitute sexual battery if they were nonconsensual. The Second District in Kolaric v. State, 616 So. 2d 117 (Fla. 2d DCA 1993) explicitly recognized this point by noting that allegations therein of a "lewd and lascivious act" with a fourteen-year-old "would be the crime of sexual battery but for the teenager's consent." Id. at 119. Similarly, in Bullington the prosecution charged the defendant with sexual battery (which

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[42] Convictions for these types of nonconsensual offenses, if they involved touching of another's sexual organs, would render an inmate ineligible under section 947.146(3)(c).

requires proof of non-consent) but failed to charge a violation of section 800.04. The Third District, in reversing the sexual battery conviction based on the fifteen-year-old's consent, noted that "the State should have charged the defendant with a violation of section 800.04, Florida Statutes" because "the victim's consent" is not a defense under that statute. 616 So. 2d at 1039. Because section 800.04 includes a broad range of consensual sex offenses, it is evident that the trial court's claim that minors are not legally capable of consenting to the activities at issue is insupportable.

In summary, the broad proposition that minors cannot consent to sexual activities which violate section 800.04 finds no support in Florida case law or statutes.[43] Simply because consent is not a defense under section 800.04 does not mean that violations of the statute are "nonconsensual" as a matter of law. Because the Legislature has clearly indicated that persons twelve and older can consent to sexual intercourse and other activities that fall within the definition of sexual battery, it is apparent that minors from ages twelve to sixteen can consent to those less

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[43] Petitioner recognizes that, as discussed in Justice Kogan's concurrence in Jones, there is some age below which a minor is not capable of knowing, intelligent consent to sexual activity. If a line must be drawn, it is respectfully submitted that the Legislature and not the judiciary should do so. In fact, it appears that the Legislature has implicitly made such a determination by eliminating the necessity of proof of non-consent as to persons under the age of twelve. § 794.011(2), Fla. Stat. (1994). The fact the Legislature requires proof of non-consent as to persons over the age of twelve, but not under twelve, indicates that if any line is to be drawn as to the "legal incapacity" of minors to consent, it should be at age twelve.

serious acts proscribed under section 800.04. For these reasons, the second certified question must be answered in the affirmative.

CONCLUSION

Based upon the foregoing, Gramegna respectfully requests that this Court direct that a writ of mandamus be issued to the Florida Parole and Probation Commission ordering that he be considered eligible for control release.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by ~~United States mail~~ hand delivery to Kurt Ahrendt, Esq., Florida Parole Commission, 1309 Winewood Blvd., Building 6, Third Floor, Tallahassee, Florida 32399-2450, this 30th day of December, 1994.

Scott D. Makar
Attorney

JAX-130862.1