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.

REPLY BRIEF OF PETITIONER VINCENT GRAMEGNA

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NOTE: [AB #] for the Answer Brief of the Respondent.

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REPLY ARGUMENT

The First District has certified two questions in this case[1] which it deems of sufficiently great public importance to invoke this Court's jurisdiction. Rather than address the merits of the important questions certified by the First District, the Florida Parole Commission ("Commission") attempts to misdirect the Court's attention to issues neither certified nor raised below. As a consequence, this reply brief is correspondingly brief.

A common theme in the Commission's Answer Brief is avoidance of the certified questions and dissatisfaction with the First District's well-founded concerns. The Commission claims that the certified questions are insignificant and so "easily resolved" that no reason exists for the First District to "agonize" over the issues presented. [AB 10-11] As fully expressed in Gramegna's brief on the merits and in the First District's opinion, the first certified question raises legitimate concerns regarding the Commission's interpretation and application of the control release statute. The Commission's view of the scope of its statutory authority appears to be unbounded, thereby raising the First District's concerns. Particularly unsettling is the Commission's view that inmates are entitled to no due process in the statute's administration. [AB 21] Rather than having a "fundamental disagreement" with Dugger v. Grant, as suggested by

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[1] One of the questions has been certified in another case. Wilson v. Florida Parole Comm'n, 638 So. 2d 205 (Fla. 1st DCA 1994) (certifying identical question regarding permissible use of arresting officer's affidavit).

the Commission [AB 16, 33], the First District's concern appears to be with the Commission's unchecked exercise of its already broad statutory authority.

As to the second certified question, the Commission's hollow response -- without any analysis of, or citation to, applicable law or legislative history -- is simply that a fourteen-year-old "could not legally consent" to any sexual activities that fall within section 800.04. [AB 8] While states may enact "bright line" statutes which mandate that minors of a certain age are legally incapable of consenting to sexual activities, the Florida Legislature has chosen not to do so.[2] Instead, Chapters 794 and 800, as currently worded and interpreted by Florida courts, explicitly recognize that minors can consent to sexual activity including sexual intercourse, but that such consent is not a defense in certain cases. The Commission ignores the plain language of these statutes and resorts to rhetorical appeals to emotion.[3] Florida law, however, simply does not support the

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[2] In fact, almost all states have chosen not to enact such laws. Extensive research has located only one currently effective state statute which provides that minors under a specified age cannot legally consent to sexual activity. Section 163.415(1)(b), Or. Stat. Ann. (1993) ("victim is incapable of consent by reason of being under 18 years of age").

[3] For example, the Commission boldly states -- without any citation of authority -- that the Legislature "never intended to provide early release for persons . . . who commit lewd and lascivious assaults upon children." [AB 30] The Commission, however, chooses to ignore the unequivocal language of section 947.146(3)(c) which -- rather than proscribing early release for all lewd and lascivious acts -- sets forth only three narrow categories of disqualifying conduct.

position of the Commission and the trial court that minors cannot consent to the sexual activity at issue.

Next, much of the Commission's brief is devoted to questions neither certified by the First District nor raised below. Rather than move to strike such portions, Gramegna merely suggests that the Commission's diatribe on issues the First District has not certified in prior cases [AB 13-15] as well as its constitutional arguments regarding the scope of due process and liberty interests (not raised below) [AB 15-21] be disregarded.[4]

In addition, throughout its response the Commission repeatedly misstates that Gramegna never challenged the Commission's authority to rely on the arrest report at issue. In fact, as the Commission concedes [AB 6], Gramegna specifically contended that (1) the sexual activities underlying his conviction were consensual and (2) he was not convicted of the "nonconsensual handling or fondling of the sexual organs of another person" as specified in section 947.146(3)(c). The propriety of the Commission's use of the arrest report at issue is easily subsumed within these two broad contentions (made by a pro se litigant). Further, because the Commission itself

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[4] Whether or not a constitutionally protected interest is present is irrelevant. This Court, as well as the First District, both recognize that judicial review is available where the Commission abuses its discretion in the implementation of a statute. 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). In fact, the Commission concedes that mandamus has been sanctioned "as a means by which a prison inmate may assert his right" to control release. [AB 14] (emphasis added) (citing Hibbott v. Florida Parole Comm'n, 616 So. 2d 194 (Fla. 1st DCA 1993)).

introduced the arrest report at the trial level, it cannot now complain.

The Commission also improperly attempts to shift its own burden of proof by suggesting that Gramegna has not proven that the fourteen-year-old consented. [AB 24] The Commission, however, has the evidentiary burden of proving that Gramegna was convicted of the "nonconsensual handling or fondling of the sexual organs of another person" under section 947.146(3)(c). Gramegna has fully demonstrated the Commission's lack of evidence to support such a conclusion.[5] Besides ignoring its own evidentiary burden, the Commission also unfairly suggests that Gramegna has failed to offer proof of consent. Because the trial court ruled that minors cannot legally consent, and thereby provided no evidentiary hearing, Gramegna has not been afforded such an opportunity. In short, it is incumbent on the Commission -- not Gramegna -- to proffer relevant evidence in support of its disqualification of Gramegna from control release consideration.

The Commission circuitously suggests in its summary and conclusion (with no argument or citation of authority) that this matter is moot. [AB 8, 38] The Commission overlooks that this Court may retain jurisdiction in cases involving questions of great public importance -- even if the cases are otherwise moot. In a long line of cases, this Court has "recognized that an

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[5] The Commission misstates that "Petitioner would like to require eligibility determinations to be based on evidence sufficient to convict." [AB 37] Gramegna recognize that the Commission's burden is to produce a "modicum" of evidence in support of its factual conclusions. The Commission simply has not done so in this instance.

appellate court is not under a duty to dismiss an appeal because of mootness of the issues if the issues are of sufficient importance for retention of jurisdiction."[6]

For instance, in Holly v. Auld, 450 So. 2d 217 (Fla. 1984), which involved a certified question, the parties settled and filed a suggestion of mootness. This Court held that intervening "mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur." Id. at 218 n.1.[7] This Court has the prerogative to review "a matter of great public importance in the administration of the law" even where the controversy is rendered moot due to death of the parties. In re Byrne, 402 So. 2d 383, 384 (Fla. 1981). Perhaps most persuasively, in Dugger v. Grant, 610 So. 2d 428 (Fla. 1992) this Court retained jurisdiction and answered the certified question related to the early release statute at issue despite the inmate's death prior to oral argument.

A compelling rationale for the retention of jurisdiction is that the "incorrect resolution of the [certified] question will

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[6] Phibro Resources Corp. v. Dep't of Env. Reg., 579 So. 2d 118, 125 (Fla. 1st DCA), dismissed, 592 So. 2d 679 (Fla. 1991). In Phibro, the First District "decided issues before it on review even though the parties had settled and stipulated the case for dismissal before oral argument." 579 So. 2d at 125.

[7] See Enterprise Leasing Co. v. Almon, 559 So. 2d 214 (Fla. 1990) (retention of jurisdiction even though "parties settled and stipulated for the dismissal of the case" prior to oral argument); Nichols v. Nichols, 519 So. 2d 620, 621 n.1 (Fla. 1988) (retention of jurisdiction over "question of general interest and importance in the administration of law, and is likely to recur" even where the parties settle their dispute after acceptance of jurisdiction).

only cause more problems in the future." Holly, 450 So. 2d at 218 n.1. Even assuming that the control release statute has been temporarily suspended, the resolution of the two certified issues could avoid future confusion in the law in two respects. First, resolution would provide guidance to the Legislature in drafting statutory disqualifiers (whether related to early release programs or in other contexts)[8] and to the judiciary in its interpretation of such statutes. Second, resolution is particularly needed on the certified question related to minor consent due to apparent widespread misconceptions of the law in this area.

Finally, Gramegna does not contest that his release date is currently scheduled for approximately June 12, 1995. Due to the present unavailability of control release, Gramegna agrees that a decision by this Court may not affect the term of his current incarceration. As such, Gramegna may wish to file a notice of dismissal of this action upon his release. Of particular concern to Gramegna is that the ultimate resolution of this case not adversely affect his safe transition back to the community. Should the Court decided to render a decision on the merits, Gramegna respectfully requests that a pseudonym or initials be used in order to shield him from publicity or notoriety.

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[8] Florida Statutes set forth simple and compound statutory disqualifiers in the background screening criteria and standards for many contexts (e.g., regulated professions, nursing home personnel, child care personnel, etc.).

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 to Kurt Ahrendt, Esq., Florida Parole Commission, 1309 Winewood Blvd., Building 6, Third Floor, Tallahassee, Florida 32399-2450, this 13th day of February, 1995.

Scott D. Makar
Attorney

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