ORIGINAL

IN THE SUPREME COURT OF FLORIDA

Case No. 89,0 18

JUAN LUIS GARCIA, JR., and
DARLENE GARCIA, minors,
by their father and next friend,

Petitioners,

vs.

CRISTOBAL REYES and
CITY OF FT. LAUDERDALE,

Respondents.
_____/

ON CERTIFICATION OF A QUESTION OF
GREAT PUBLIC IMPORTANCE BY THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

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INTRODUCTION

This case presents the question of whether the children of a man whose drug conspiracy conviction was reversed on the grounds of entrapment may assert a federal civil rights claim for damages to recover for the loss of their father's companionship during the time he was imprisoned. The trial court dismissed the children's claim. The district court affirmed, but certified the question to this Court.

While Respondents agree with the Petitioners' statement of the case and facts, their statement omits important points regarding the background facts and the proceedings in this case. These are described below.

STATEMENT OF THE CASE AND FACTS

Appellant Juan Luis Garcia, Sr., was tried and convicted, along with a co-defendant, of attempted armed trafficking in cocaine and conspiracy to traffic in cocaine. *Garcia v. State,* 582 So. 2d 88, 88 (Fla. 4th DCA), *review denied, 592 So.* 2d 682 (Fla. 1991). On appeal, his conviction was reversed on the grounds of entrapment. *Id.* at 88-89. *See also Londono v. State,* 565 So. 2d 1365 (Fla. 4th DCA 1990) (co-defendant's appeal, setting forth the relevant facts of the criminal case).

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Garcia and his two children then filed this lawsuit against the investigating police detective and the City of Fort Lauderdale, The Plaintiffs' First Amended Complaint for Damages contained six counts (R. 70-80). All but one (Count III) asserted causes of action on behalf of the father, Juan Luis Garcia, Sr., for damages he suffered from the entrapment. Garcia alleged malicious prosecution (Count I); false arrest and imprisonment (Count 11); negligent training and supervision (Count IV); failure to train, supervise, and control informants (Count V); and the City's *Cruz*[1] violation in entrapping him (Count VI) (R. 70-80). Count III alleged a "violation of right of family unity and association" on behalf of both Garcia and his children (R. 76). The trial court dismissed Count III, and the Plaintiffs appealed (R. 1 01-02).[2]

On appeal, the Fourth District affirmed, noting that no court had found such a cause of action in these circumstances:

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[1] *See Cruz v. State,* 465 So. 2d 5 16 (Fla. 1985).

[2] The dissent below argued that the dismissal was final and appealable only as to the children, because it dismissed the only count in which they were involved, while Garcia still had several claims pending. *Garcia* v. *Reyes,* 677 So. 2d 1293, 1294 (Fla. 4th DCA 1996) (Pariente, J., dissenting). *See Biasetti v. Palm Beach Blood Bank, Inc.,* 654 So. 2d 237 (Fla. 4th DCA 1995). Although apparently the district court reviewed the order as to both Garcia and his children, only the children are petitioners here. The remaining counts have since been dismissed, and a separate appeal was filed.

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> The trial court correctly recognized that no Florida court, nor the federal Eleventh Circuit or the United States Supreme Court, has recognized a cause of action under 42 U.S.C. § 1983 based on state interference with the right of familial association. Other federal circuits have been divided on this issue, but none of the other circuits that have recognized such a cause of action have done so in a situation such as the one at bar where the right to familial association has been only temporarily rather than permanently taken away.

Garcia v. *Reyes*, 677 So, 2d 1293, 1293-94 (Fla. 4th DCA 1996) (footnote and citations omitted). Contrary to the Petitioners' characterization (brief at 8), therefore, the district court did not simply distinguish this case on the ground that it did not involve death; it also recognized that neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals, nor any Florida court, has recognized a cause of action under section 1983 based on interference with the right of familial association.

The district court certified the following question:

> WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CLAUSE [sic] OF ACTION UNDER 42 U.S.C. SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

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Reyes, 677 So. 2d at 1295. This petition follows.

SUMMARY OF ARGUMENT

The United States Supreme Court has never recognized a civil rights action for loss of family companionship. The Court has recognized a liberty interest in the family relationship in only two situations, neither of which applies here. In the first type of case, the Court has prohibited, under substantive due process analysis, government regulation of certain private family decisions. This is not a case of government regulation. In the second type of case, the Court has required, under procedural due process analysis, procedural safeguards (such as hearings) before the state may determine parental rights. The Petitioners here do not allege a procedural due process violation.

Most federal courts of appeal that have considered the issue have refused to recognize a federal civil rights claim for loss of companionship where the governmental conduct was aimed specifically at a family member, and only indirectly affected the family relationship. *See Shaw v. Stroud*, 13 F.2d 791 (4th Cir. 1994); *Harpole v. Arkansas Dep't of Human Serv., 820* F.2d *923* (8th Cir. 1987); *Ortiz v. Burgos, 807*

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F.2d 6 (1 st Cir. 1986); C*oon v. Ledbetter, 780* F.2d 1158 (5th Cir. 1986); *Trujillo v. Bd. of County Comm'rs of Santa Fe* County, 768 F.2d 1186 (10th Cir. 1985). Several federal district courts also have refused to recognize such a claim.

The plain language of section 1983 limits claims to those who actually suffered the loss. Thus, the governmental action must be intentionally directed toward the family member asserting the right. Governmental actions directed at an individual, which only indirectly affects that person's family, cannot form the basis of a section 1983 claim for the family's loss of companionship.

Only three circuit courts of appeal have recognized this cause of action. *See Smith v. City of Fontana,* 818 F.2d 1411 (9th Cir.), *cert. denied, 484* U.S. 935 (1987); *Estate of Bailey by Oare v. County of York, 768* F.2d 503 (3d Cir. 1983), *overruled on other grounds, DeShaney v. Winnebago County Dep 't of Soc. Serv., 489* U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Bell v. City of Milwaukee, 746* F.2d 1205 (7th Cir. 1984). Even those cases, however, considered the issue in the context of a wrongful death, which of course involves a permanent loss of companionship. No court has recognized a claim involving only a temporary loss.

Even if the Petitioners possess a liberty interest in Garcia's companionship, the entrapment of Garcia cannot form the basis of a federal civil rights claim.

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Entrapment simply does not violate federal constitutional rights. Federal courts have unanimously rejected a civil rights claim for damages arising from entrapment. While entrapment may violate the *Florida* Constitution, section 1983 only provides a remedy for violation of *federal* rights.

ARGUMENT

I. NO COURT EVER HAS RECOGNIZED A CIVIL RIGHTS CLAIM UNDER SECTION 1983 FOR TEMPORARY LOSS OF COMPANIONSHIP

42 U.S.C. section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The issue presented is whether that statute grants a claim for loss of companionship to the children of an individual whose drug conviction was reversed on the grounds of entrapment. For Petitioners to prevail, they must convince this Court to recognize a civil rights damages claim for loss of companionship although the United States

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Supreme Court has never done so; and *further*, to stretch the claim beyond where even the minority of courts have gone -- to a temporary, as opposed to a permanent, loss of companionship.

As shown below, (A) the United States Supreme Court has never recognized such a claim; (B) most courts have rejected it; and (C) every case that has recognized such a claim involved *apermanent* loss of companionship.

A. The United States Supreme Court has never recognized a civil rights action under section 1983 for loss of companionship

Both the Plaintiffs (brief at 5) and their *amicus curiae* the ACLU (brief at 3-5) cite several United States Supreme Court cases in support of their argument for a right under 42 U.S.C. section 1983 to sue for temporary loss of companionship. In truth, however, as many federal courts have acknowledged, the Supreme Court has never ruled on the issue.[3] The cases Plaintiffs and their *amicus* cite involved entirely different issues, and their reasoning does not apply here.

[3] In two cases presenting the issue, the Court dismissed certiorari as improvidently granted. See *Jones v. Hildebrandt, 550* P.2d *339* (Colo. 1976), *cert. dismissed, 432* U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d *209* (1977); *Espinoza v. O'Dell, 633* P.2d 455 (Colo. 1981), *cert. dismissed,* 456 U.S. 430, 102 S.Ct. 865, 72 L.Ed.2d 237 (1982).

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The United States Supreme Court has recognized a liberty interest in the family relationship in two types of circumstances, one involving substantive due process protections, and the other procedural due process.[4] In the first type of case, the Court has prohibited the government's intrusion into certain private family decisions. See, e.g., Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (a state law that required teaching only in English unconstitutionally deprived teachers and parents of liberty); *Pierce v. Society of the Sisters of the Holy Names of Jesus and May*, 268 U.S. 5 10, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (state law requiring all children to attend public school deprived parents and children of their right to select school); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (state law prohibiting the use of contraceptives unconstitutionally intruded on the right to marital privacy); *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (Amish parents did not have to comply with state compulsory education law for their children, which would endanger their free exercise of religion); *Moore v. City of*

[4] "Procedural due process" concerns the procedures the government must provide before taking away certain rights; "substantive due process" involves certain conduct in which the government can never engage, no matter how much "process" it provides. *See Monroe v. Pape, 365* U.S. 167, 171, 81 S.Ct. 473,475, 5 L.Ed.2d 492 (1961); *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed.2d 183 (1952).

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East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (ordinance outlawing grandmother from living with grand-children declared unconstitutional).

None of these cases were suits for damages. As one court has said in analyzing these cases:

> [t]hese substantive due process cases do not hold that family relationships are, in the abstract, protected against all state encroachments, direct or indirect, but only that the state may not interfere with an individual's right to choose how to conduct his or her family affairs. The emphasis in these cases on choice suggests that the right is one of preemption; rather than an absolute right to a certain family relationship, family members have the right, when confronted with the state's attempt to make choices for them, to choose for themselves.

Ortiz v. *Burgos, 807* F.2d 6, 8 (1st Cir. 1986). This case does not involve the regulation of some particular aspect of the family relationship. Therefore, the Supreme Court's substantive due process cases do not support the Petitioners' claim.

In the second type of case, the Court has required rigorous procedural safeguards before the state may deliberately infringe on the parent-child relationship. See, *e.g, Santosky* v. *Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599

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(1982) (termination of parental rights); *Little v. Streater, 452 U.S. I,* 101 S.Ct. 2022, 68 L.Ed.2d 627 (198 1) (determining paternity); *Stanley v. Illinois, 405* U.S. 645, 92 S.Ct. 1208, 3 1 L.Ed.2d 55 1 (1972) (unwed father's right to custody). Again, these cases do not involve suits for damages. Courts have interpreted them simply as protecting individuals from direct, intentional government intervention into the parent-child relationship:

> we think it significant that the Supreme Court has protected the parent only when the government directly acts to sever or otherwise affect his or her legal relationship with the child. The Court has never held that governmental action that affects the parental relationship only incidentally . . . is susceptible to challenge for a violation of due process. Moreover, as in the substantive due process cases involving parents and children, the right to procedural due process has not been extended beyond settings in which the state was attempting to affect the relationship between a parent and his or her minor child,

Ortiz, 807 F.2d at 8-9, The Petitioners do not assert a procedural due process claim; they do not claim that the government's procedures for prosecuting Garcia were somehow inadequate. Therefore, the Supreme Court's procedural due process cases do not support the Petitioners' claim.

In both types of cases, the Supreme Court has protected family relationships from *deliberate* government interference. On the other hand, the Court has never

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recognized a civil rights claim where government's action is aimed at an individual, and that action *indirectly* affects the individual's family relationship. *See Jackson v. Marsh,* 55 1 F.Supp. 1091, 1094 (D. Colo. 1982) ("the Supreme Court has never addressed, nor has it created, a right of constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intrafamily relationship").

Although the Supreme Court has not directly addressed this issue, it *has* held, in other contexts, that government conduct, to be held unconstitutional, must be intentional. *See Daniels v. Williams, 474* U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986) (due process clause not implicated by a *negligent* act of an official causing unintended loss). In *Daniels*, the Supreme Court noted that the guarantee of due process historically has been applied to *deliberate* governmental decisions. 474 U.S. at 33 1. Here, whatever conduct the Respondents directed at Garcia, they certainly did not direct their conduct at the children, and any injury to them was an unintentional consequence of their conduct toward Garcia. Therefore, Respondents doubt that the Supreme Court would recognize the children's claim.

This Court historically has hesitated to create rights under the United States Constitution which the United States Supreme Court itself has yet to recognize.

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See Shevin v. Byron, Harless, Schaffer, Reid&Associates, Inc., 379 So. 2d 633, 638 (Fla. 1980). It should not deviate from that policy now, when the United States Supreme Court has given no sign that it would recognize this new claim, and has given every indication that it will not.

B. Most federal courts of appeals and several district courts have refused to recognize a claim under section 1983 for loss of companionship where the state action was not aimed at the person seeking the redress

In determining whether to recognize a claim for damages for the Garcia children's loss of companionship because of their father's imprisonment, we must 'keep firmly in mind the well-settled principle that a section 1983 claim must be based upon the violation of plaintiffs personal rights, and not the right of someone else." *Archuleta* v. *McShan*, 897 F.2d 495,497 (10th Cir. 1990). Therefore, we look not to the rights of Garcia -- he asserts his own claims -- but of the children.

It simply is not true, as the ACLU argues, that the "overwhelming majority of lower federal court decisions support the right of familial association in this context" (brief at 7). In fact, if by "this context" the ACLU means temporary deprivations such as occurred here, then ***no*** court has ever supported this right. Even in the context of permanent deprivations, however, most of the federal circuit courts of appeal

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considering the issue have refused to recognize a claim for damages. See *Shaw v. Stroud,* 13 F.2d 79 1, 805 (4th Cir. 1994) (wife and minor children of individual shot and killed by state trooper); *Harpole v. Arkansas Dep 't of Human Serv., 820* F.2d 923, 927-28 (8th Cir. 1987) (grandmother of child who died, allegedly due to state's negligence); *Ortiz,* 807 F.2d at 6 (stepfather and siblings of individual beaten by prison guards); *Coon v. Ledbetter, 780* F.2d 1158, 1160-61 (5th Cir. 1986) (wife of man shot inside his trailer home by deputies). See *also Trujillo v. Bd. of County Comm 'rs of Santa Fe County,* 768 F.2d 1186, 1190 (10th Cir. 1985) (to state a claim under section 1983, relatives must allege that the state *intended* to interfere with their rights to a particular familial relationship).

In *Trujillo,* 768 F.2d at 1186, which the ACLU cites as supporting its argument (brief at 8), while the Tenth Circuit held that family members have a constitutionally-protected interest in the family relationship, *Id.* at 1189, it also held that this interest is not violated unless the government *intentionally* interferes with the relationship. *Id.* at 1190. This intentional interference occurs only when the government intended to affect the relationship, not when the government's actions indirectly caused the interference. *Id.* The *court* in *Trujillo* recognized its decision conflicted

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with cases recognizing a claim even when the injury was unintented -- the same cases the ACLU argues are consistent with *Trujillo* (brief at 8). *Id.* (citations omitted).[5]

The ACLU also argues that the Eighth Circuit has recognized a right of familial association, citing *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974) (brief at 8). In *Mattis*, however, the court did not hold that a family member could sue for damages under section 1983, but that a father could *sue* for a *declaratory judgment* to determine the constitutionality of a police shooting of his son. *Id.* at 592-93. The court specifically noted that damages were not available. *Id.* at 595. Later, in *Harpole*, *820* F.2d at 927-28, the Eighth Circuit sided with *Ortiz* and other cases refusing to recognize a right to seek damages under section 1983.

Therefore, contrary to the ACLU's contention, the Eighth and Tenth Circuits have not recognized this right, and only three circuits have. *See Smith v. City of Fontana,* 818 F.2d 1411 (9th Cir.), *cert. denied, 484* U.S. *935* (1987); *Estate of*

[5] The Tenth Circuit has since re-affirmed *Trujillo. See Berry v. City of Muskogee, Okl.*, *900* F.2d 1489, 1504 (10th Cir. 1990) ("In *Trujillo* [], we held a mother and sister had no Sec. 1983 cause of action arising out of a victim's death unless the unconstitutional act was directed at and intended to deprive them of their personal constitutional rights"); *McShan*, 897 F.2d at 498-99 (child had no liberty interest to be free of emotional trauma suffered from observing excessive police force directed at father).

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Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1983), *overruled on other grounds, DeShaney v. Winnebago County Dep't of Soc. Serv., 489* U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d *249* (1989); *Bell v. City of Milwaukee, 746* F.2d 1205 (7th Cir. 1984). As demonstrated above, five circuits -- the First, Fourth, Fifth, Eighth, and Tenth -- have not.[6]

Several federal district courts also have refused to recognize such a claim. *See Broad& v. Webb,* 892 F.Supp. 188 (E.D. Mich. 1995) (no section 1983 claim for children of individual who swallowed baggie of cocaine during police raid and fell into persistent vegetative state); *Norton* v. *Cobb,* 744 F.Supp. 798 (N.D. Ohio 1990) (father did not have civil rights claim for fraudulent allegations of sexual abuse to prevent him from visiting *with his* son); *Willard v. City of Myrtle Beach, S.C.,* 728 F.Supp. 397 (D. SC. 1989) (parents had no civil rights claim against police who detained their son for four hours after allegedly unlawful arrest); *White v. Talboys,* 573 F.Supp. 49 (D. Colo. 1983) (parents had no civil rights claim against police who shot and killed their son);

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[6] The Eleventh Circuit has not even come close to *ruling* on *this* issue. *Gilmere v. City of Atlanta, Ga.,* 774 F.2d 1495 (11th Cir. 1985), which the ACLU cites as "strongly suggest[ing]" a constitutional right to familial association (brief at 9), simply held that the estate of someone killed by police officers could sue under section 1983 despite the existence of a state law remedy. It did not discuss whether the decedent's relatives could assert a section 1983 claim.

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Evain v. *Conlisk*, *364* F.Supp. 1188 (N.D. Ill. 1973) (daughter had no civil rights claim against police who shot and killed her father).

Several courts base their refusal to recognize a section 1983 claim for loss of companionship on the express language of section 1983, which limits claims to those who actually suffered the loss. See *McShan*, *897* F.2d at 497-98; Coon, 780 F.2d at 1160-61; *Broadnax*, 892 F.Supp. at *190. See also Dohaish v. Tooley*, *670* F.2d 934, 936 (10th Cir. 1982) (section 1983 action is a personal suit; it does not accrue to a relative); *White,* 573 F.Supp. at 5 1 (plaintiffs may only recover for deprivation of their own constitutional rights); *Evain*, 364 F.Supp. at 1190 (one cannot sue for deprivation of another's civil rights). The state action, therefore, must be intentionally directed toward the family member asserting the right. See *Harpole*, *820* F.2d at 928; *Ortiz*, *807* F.2d at *8-9; Trujillo*, *768* F.2d at 1190; *Broadnax,* 892 F.Supp. at 190; *Willard*, 728 F.Supp. at 404. Here, the government actions were not directed at Garcia's children; the entrapment was directed only at Garcia,

The ACLU suggests (brief at 9-10) that the language in these cases holding that no section 1983 exists where the government's actions "affect the parental relationship only incidentally" is illogical because a permanent separation is not incidental. These cases speak of "incidental," however, not in the sense of being

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"slight," but in the sense of being *indirect*. See Websters New Collegiate Dictionary 580 (defining "incidental" first as "occurring merely by chance or without intention or calculation"). Thus, the *court* in *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991) held that "only the person toward whom the state action was directed, and not those *incidentally* affected, may maintain a Sec. 1983 claim,"

In sum, most courts have refused to recognize the type of claim the Petitioners assert. As one court has noted, "[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct." *Harpole*, *820* F.2d at 928. In *Ortiz*, the court noted that recognizing a protected liberty interest in circumstances such as these "would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny, ..." 807 F.2d at 9. Courts realize that recognizing a cause of action in these circumstances would further expand the already hydra-like tentacles of section *1983. See Broadnax*, 892 F.Supp. at 190.

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C. No court ever has recognized a civil rights claim for temporary loss of comnanionshin

As noted above, only three federal circuit courts of appeal have recognized a civil rights claim for loss of companionship. See *Bailey, 768* F.2d at 503 (3d Cir.); *Bell, 746* F.2d at 1205 (7th Cir.); *Smith,* 818 F.2d at 1411 (9th Cir.).[7] These cases all involved the death of a family member. In both *Smith* and *Bell* police officers shot and killed someone, and relatives sued under section 1983. In *Bell,* the court emphasized that "this deprivation was far more substantial than the unlawful removal of a child from the parent's custody; it was the *annihilation* of the parent-child relationship." *Id.* at 1245 (emphasis added). In *Bailey,* a child died at the hands of his mother's boyfriend. The court followed *Bell* in holding "that a parent *whose child has died* as a result of unlawful state action may maintain an action under § 1983 for the deprivation of liberty." *Id.* at 509 n.7 (emphasis added). These decisions implied that their holdings were limited to wrongful death suits. See *also Greene v. City of New*

[7] Other cases the ACLU cites (brief at 8) did not involve this issue. In *Duchesne v. Sugarman,* 566 F.2d 8 17 (2d Cir. 1977), the issue was whether welfare authorities could seize a mother's children without a hearing or court order. In *Grandstaff v. City of Borger, Texas,* 767 F.2d 16 1, 172 (5th Cir. 1985), a father recovered damages under Texas law for the wrongful killing of his son. *Id.* at 164 ("We uphold . . . the damages award because of Texas law").

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York, 675 F.Supp. 110, 114 (S.D. N.Y. 1987) (following *Bell, Smith,* and *Bailey* in case involving death).

As the district court noted in this case, 677 So. 2d at 1293-94, no court has recognized a claim where the loss was temporary. Therefore, even if this Court follows the minority of jurisdictions that allow section 1983 claims for loss of companionship, recognizing the Petitioners' claim would expand section 1983 beyond anything courts have allowed, and would remove any logical limit. Once this Court recognizes the right to recover for loss of companionship, and once it holds that one could recover for a temporary loss, no reason would remain to foreclose a section 1983 claim, such as the one attempted in *Willard,* 728 F.Supp. at 397, based on a four-hour unlawful detention after an arrest. Although the Petitioners take pains to distinguish such a case from Garcia's 30-month imprisonment (brief at 9-10), the difference is only one of degree. Once this Court allows the claim, the same reasoning dictates that any temporary deprivation, no matter how slight, would violate the Constitution. It would then be for a jury to decide how much damage a four-hour detention caused.[8]

[8] The ACLU admits that differences of degree "may be taken into account at the damages stage" (brief at 14). If, as the ACLU argues, the difference between a permanent and a temporary loss of companionship is only one of degree, then the difference between a long temporary loss and a short one must also be one of degree.

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Federal courts have recognized that "we must provide a logical stopping place for [section 1983] claims." *Trujillo*, 768 F.2d at 1190. Assuming a civil rights claim exists for one deprived of a family member's companionship, courts have found a logical stopping place for such claims to be permanent, physical separation. See *Norton*, 744 F.Supp. at 802; *Willard*, 728 F.Supp. at 404.

II. ENTRAPMENT CANNOT FORM THE BASIS OF A SECTION 1983 ACTION

Even if the Petitioners possess a liberty interest in Garcia's companionship, entrapment cannot form the basis of a civil rights claim for damages.[9] As demonstrated below, (A) no court ever has held that entrapment violates federal constitutional rights so as to allow a section 1983 claim; and (B) a violation of the Florida Constitution is not actionable under section 1983.

[9] Although the trial court did not base its dismissal on this ground, this Court can affirm the dismissal on a ground not stated. *See Applegate v. Burnett Bank of Tallahassee, 377 So.* 2d 1150 (Fla. 1977). Moreover, although this issue was not part of the certified question, once this Court accepts jurisdiction, it need not limit its review to the certified question. *Feller v. State,* 637 So, 2d 911 (Fla. 1994).

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A. Entrapment does not constitute a violation of due process rights under the United States Constitution

"The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'" *Baker v. McCollan*, 443 U.S. 137, 145, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979). The Constitution does not guarantee that only the guilty will be arrested or convicted:, otherwise, every acquitted defendant and every person whose conviction is overturned would have a claim for damages for the period they were incarcerated. See id. Claims under section 1983 must allege that the deprivation was without due process as protected by the Fourteenth Amendment. *Burch v. Apalachee Comm. Mental Health* Sew., 840 F.2d 797,800 (1 lth Cir. 1988), *affd, 494* US. 113, 110 *S.* Ct. *975, 108* L. Ed. 2d *100* (1990); *Mazzilli* v. *Doud, 485* So. 2d 477, 481 (Fla. 3d DCA), *review denied, 492* So. 2d 1333 (Fla. 1986).

Entrapment does not violate federal due process rights. The United States Supreme Court first recognized the entrapment defense in *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). The focus of the defense, at least under federal law, is on the intent, or "predisposition," of the defendant to commit the crime. *United States v. Russell*, 411 U.S. 423, 429, 93 S. Ct. 1637, 1642-43, 36 L. Ed.

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2d 366 (1973). The defense is not constitutionally based and does not raise due process concerns, *Id.* at 431-32.

Federal courts have unanimously rejected a civil rights claim for damages arising from entrapment. *See Vennes v. An Unknown Number of Unidentified Agents, 26* F.3d 1448, 1451-52 *(8th* Cir. 1994), *cert. denied,* __ U.S. __, 115 S. Ct. 721, 130 L. Ed. 2d *627* (1995); *Gunderson v. Schlueter, 904* F.2d 407 (8th Cir. 1990); *Jones v. Bombeck, 375* F.2d *737,738* (3d Cir. *1967); Mullinax v. McElhenney, 672* F. Supp. *1449,* 1451 (N.D. Ga. 1987); *Schieb v. Humane Soc. of Huron Valley, 582* F. Supp. *717,725* (E.D. Mich. *1984); Johnston v. National Broadcasting* Co., 356 F.Supp. 904 (E.D. N.Y. 1973).

Courts have been reluctant to find that entrapment violates due process because it would "convert[] every successful entrapment defense into a section 1983 action for damages." *See Gunderson,* 904 F.2d at 411. Therefore, even where "the government conceived and initiated the crime, and the defendant merely fell into place with the government's scheme," the courts have refused to find that such entrapment violated due process. *Id.* at 410-11 . This Court, too, should hesitate to recognize such a claim, when every other court considering the issue has rejected it. See *Shevin, 379* So. 2d at 633.

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B. A violation of the Florida Constitution cannot give rise to a federal civil rights claim

To maintain a cause of action under section 1983, Petitioners must allege a deprivation of federal rights. *Parratt v. Taylor, 45* 1 U.S. 527,535, 101 S. Ct. 1908, *19* 13, 68 L. Ed. 2d *420* (198 *1); Higdon v. Metropolitan Dade County, 446 So.* 2d 203, 205 (Fla. 3d DCA 1984); *Penthouse, Inc. v. Saba,* 399 So. 2d 456,458 (Fla. 2d DCA), *review denied,* 408 So. 2d 1095 (Fla. 1981). But as demonstrated in the previous section, entrapment does not violate the United States Constitution.

In *Sorrells*, 287 U.S. at 435, the United States Supreme Court described two distinct concepts of the entrapment defense, later characterized as the "subjective" and "objective" views. *Sorrells*, 287 U.S. at 442-48, 457-59. The subjective view, which the Supreme Court adopted, focuses on the defendant's predisposition to commit the crime. The objective view, endorsed by the concurring justices, focuses on the government's conduct. *Id.* The Supreme Court has never adopted the objective view. See *Russell,* 411 U.S. at 43 1-32 ("While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, the instant case is distinctly not of that breed.").

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In *Cruz v. State,* 465 So. 2d 516 (Fla. 1985), this Court adopted the objective test, which focuses on the government's conduct. The legislature later overruled it in favor of the subjective test. See § 777,201, Fla. Stat. (1987). In *Munoz v. State,* 629 So. 2d 90 (Fla. 1993), however, this Court held that to the extent that law enforcement conduct is so egregious that it violates due process rights protected by Article I, section 9, of the Florida Constitution, section 777.201 could not limit the defense. Id. at 98-99. Therefore, government conduct leading to entrapment can violate due process rights under the Florida Constitution.

Section 1983, however, only provides a remedy for violation of *federal* rights. *Parratt,* 451 U.S. at 535. No cause of action exists under section 1983 for violation of the *Florida* Constitution. *See Schieb,* 582 F. Supp. at 725 (rejecting section 1983 action even though state courts had adopted the objective test and determined that entrapment violated the state constitution). *See also Smith v. Sullivan,* 611 F.2d 1039, 1045 (5th Cir. 1980) (a person does not state a cause of action under section 1983 by alleging a violation of state constitutional law).

The same holds true here, A violation of the Florida Constitution, which is all Petitioners can demonstrate, cannot form the basis for a section 1983 claim.

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CONCLUSION

For the reasons stated, this Court should approve the decision of the District Court of Appeal, Fourth District, and affirm the dismissal of Count III of the Complaint.

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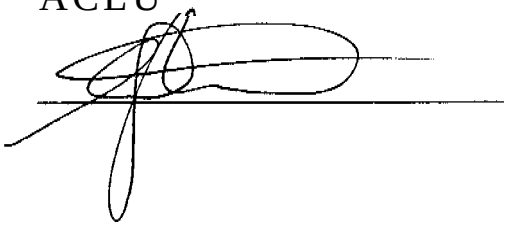

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