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PRELIMINARY STATEMENT

William H. Paige, Appellant below, will be referred to herein as Respondent. The Florida Parole and Probation Commission, Appellee below, will be referred to herein as Commission. Referenced to the Appendix accompanying this brief will be cited as App. p. _____. Reference to the Record-on-Appeal in the Court below will be cited as R, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The following area of disagreement with the Statement Of The Case And Facts found on pages 2 through 6 of the Brief Of Petitioner On The Merits are respectfully specified:

Pursuant to a remand ordered by the First District Court Of Appeals (App. 1) to the Petitioner "for purposes of adequately explaining the reasons for denial of Petitioner's [Respondent herein] parole", the Petitioner held a meeting on May 18, 1983, on Respondent's Presumptive Parole Release Date (PPRD). As a result of this meeting, the Petitioner certified its action on May 24, 1983, which action vacated the previous extension of Respondent's PPRD to May 11, 1989 and reestablish his original PPRD of May 11, 1982. However, the Petitioner declined to set an effective parole release date, justifying their decision on the grounds upon which these appellate actions are based. (App. 2, 3)

ISSUE PRESENTED

WHETHER THE COMMISSION MAY DECLINE TO AUTHORIZE A RECOMMENDED EFFECTIVE PAROLE RELEASE DATE, AND THEREBY DENY PAROLE, PURSUANT TO §947.18, FLORIDA STATUTES, SOLELY UPON THE BASIS OF INFORMATION WHICH WAS PREVIOUSLY CONSIDERED, OR AVAILABLE FOR CONSIDERATION, IN SETTING THE INMATE'S PRESUMPTIVE PAROLE RELEASE DATE.

ARGUMENT

READ AS A WHOLE, THE 1979 OBJECTIVE PAROLE GUIDELINES ACT (CHAPTER 947, FLORIDA STATUTES) REQUIRES THE COMMISSION TO SET AN INITIAL PRESUMPTIVE PAROLE RELEASE DATE (PPRD) BASED UPON THE OFFENSE OF CONVICTION, AGGRAVATING CIRCUMSTANCES AND PAST CRIMINAL HISTORY, AND ONCE SET TO EXTEND SAID PPRD ONLY UPON THE SHOWING OF UNSATISFACTORY INSTITUTIONAL CONDUCT, ACQUISITION OF NEW INFORMATION NOT AVAILABLE AT THE TIME OF INITIAL INTERVIEW OR FOR GOOD CAUSE IN EXCEPTIONAL CIRCUMSTANCES, AND SECTION 947.18 CANNOT, IN AND OF ITSELF, BE USED TO CIRCUMVENT THIS LEGISLATIVE INTENT.

Prior to the effective date of the Objective Parole Guidelines Act (The Act) in 1979, parole in Florida was placed solely in the subjective eyes of the Commission members. Webster's Third New International Dictionary, 1966, G & C Merriam, Co. defines subjective as

".... of, relating to, or being whatever in experience or knowledge is conditioned by merely personal characteristics of mind or by particular states of mind as opposed to what is determined only by universal conditions of human experience and knowledge."

As suggested in this definition and in Florida case law [See e.g. Sellars v. Bridges, 15 So.2d 293 (Fla. 1943)] prior to

1979, Florida's parole system was left to the unbridled discretion of the Commissioners. The potential for abuse and the obvious inequities of the subjective system was recognized by the Florida Legislature, when in 1978, the Objective Parole Guideline Act was passed (Chapter 78-417, Vol. I, Part Two, LAWS OF FLORIDA, 1978).

Webster's Third New International Dictionary, 1966, G & C Merriam, Co. defines objective as

".... expressing or involving the use of facts without distortion by personal feelings or prejudices (an -- analysis)."

This definition as applied to the Act as well as the intent as set forth in the Act is a clear and unambiguous message from the Legislature that the previous unbridled discretion of the Commission ceased to exist.

In looking at the legislative intent of the Act (§947.002), it is clearly seen that the legislature intended to eliminate the previously used subjective method of determining parole dates and in its place implement an objective guideline which would not be a method whereby the Commission could arbitrarily or capriciously grant or deny parole dates through whimsical but cleverly worded justifications. Section 947.18, when read in pari materia with the rest of the chapter,

clearly sets forth the reasoning and method of the legislature's coming to the use of the term "objective". In setting off Respondents PPRD under authority of §947.18 (App. 2), the Commission has usurped the clear legislative intent of the Act by aggravating Respondent based upon his past criminal history record by stating that the Commission was unable to make a finding that there was a reasonable probability if the inmate is placed on parole, he will live and conduct himself as a respectable and law-abiding citizen, that his release will not be compatible with his own welfare and the welfare of society. The Commission has taken the obvious position that this section of the Act is separate and apart from the rest of the Act and need not be applied "in pari materia" with the other sections of the Act.

When interpreting statutes, the Court must, out of necessity, look at the whole statute to determine its effect.

The Florida Supreme Court in the case of Ozark Corporation v.

Pattishall
Habershaw, 185 So. 2d 333 (Fla. 1938) at page 337 stated:

H In construing a statute, effect must be given to every part, if it be reasonably possible to do so. Each part or section should be construed in connection with every part or section so as to produce a harmonious whole.

In the case of Wiggins v. State, 101 So.2d 833 (1st D.C.A. 1958), the Court held when addressing the question of interpreting a statute that if possible, the statute must be so construed as to reconcile any inconsistencies and give meaning and effect to language employed of the whole. Also see Conascenta v. Giordano, 143 So.2d 682 (3rd D.C.A. 1962); City of Ft. Lauderdale v. Des Camps, 111 So.2d 693 (2nd D.C.A. 1959); Payne v. Payne, 89 So. 538 (Fla. 1921); Jai Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So.2d 522 (Fla. 1973); State v. Gayle Distributors, Inc., 349 So.2d 150 (1st D.C.A. 1963); Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980); State ex rel School Board v. Department of Education, 317 So.2d 68 (Fla. 1975). It is axiomatic that one must look to the four corners of Chapter 947, Florida Statutes, and not just the four corners of §947.18.

Section 947.172, Florida Statutes, requires that a PPRD be set for each inmate in the custody of the Department of Corrections. Further, under subsection (3) of §947.172, the

"presumptive parole release date SHALL (emphasis added) become binding on the commission when agreement on a presumptive parole release date is reached...."

And, under subsection (4) of §947.16, a review of the presumptive parole release date can result in changes to that date only

".... for reasons of institutional conduct or the acquisition of new information not available at the time of the initial interview."

Logic dictates that these sections be read in pari materia. As such, it would be patently inconsistent that this Court would hold that subsection (4) of §947.16 and subsection (3) of §947.172 are to be read in pari materia and in the same breath segregate §947.18 by itself.

In the case of Gobie v. Florida Parole and Probation Commission, 416 So.2d 838, 840 (1st D.C.A. 1982), the Court stated,

"However, we agree with Payton¹, supra, and find that Florida's Objective Parole Guidelines Act has restricted the Commission's previously unbounded discretion in granting parole. The Objective Parole Guidelines Act ultimate intent is to prevent arbitrary and capricious action by the Commission. §947.002(1), Florida Statutes (1981). §947.165(1), Florida Statutes (1981) requires the Commission to develop and implement objective guidelines "which SHALL (emphasis added) be criteria upon which parole decisions are made". However, neither statutes nor the Commission's rules provide guidelines concerning the invocation of §947.18 to refuse to authorize an EPRD.

1. Payton v. United States, 636 F.2d 132, on rehearing, 649 F.2d 385 (5th CIR. 1981).

In the instant case and in the future, the Commission should explicate its reasons for its actions in a manner sufficient to permit judicial review for a determination of whether the Commission has overreached the legislative grant of discretion provided in the Objective Parole Guidelines Act."

The intent of the Legislature is further amplified in subsection (3) of 947.173 wherein it is stated,

"... It is the intent of this legislation that, once set, presumptive parole release dates be modified only for good cause and exceptional circumstances."

The Court needs to take the statutory interpretation concept of "in pari materia" and address §947.174, Florida Statutes, more particularly subsection (6) which states,

"Provided that the inmate's institutional conduct has been satisfactory, presumptive parole release date SHALL (emphasis added) become the effective parole release date as follows: ...".

The Legislature's use of the mandatory word "shall" in §947.174, Florida Statutes, creates a situation where invocation by the Commission of §947.18 to justify extension of a PPRD or refusal to grant an Established Presumptive Parole Date (EPRD) based solely upon information contained in the inmate's file prior to setting of the initial PPRD is totally incongruous. Under the concept of statutory construction it is more than apparent that §947.16 through §947.19 necessarily

have to be interpreted and viewed not only by the Commission but the Courts in pari materia with each other. Unless this statutory interpretation is followed, the underlying legislative intent of the Act will be totally usurped with the obvious result that the Commission would have the unlimited and free discretionary powers to use personal feelings or prejudices for parole dates both in denying and in setting dates.

Apparently the Commission feels it can carve out §947.18 from its underlying chapter, thereby creating themselves as knights in shining armor destined in their infinite wisdom to carry out a duty to society. As justification for this position, the Commission relies on the case of May v. Florida Parole and Probation Commission, 433 So.2d 834 (Fla. 1983). However the facts in the May case are entirely at odds with the facts presently before the Court. In the May case, the inmate, incarcerated under several sentences, had his initial PPRD set under the 1979 guidelines. Subsequent to this, he was convicted of a new criminal offense (new information) which vacated his previous PPRD. The Commission then reinterviewed the inmate, scored him on his original offenses and the new offense under the new (1981) Commission guideline and then set an aggregated PPRD. The legal challenge in this case dealt with an alleged ex post facto application of a different guideline when the inmate

was interviewed after his subsequent conviction. The Court in this case held at page 837,

"We are unable to assume, as May would have us, that the implementation of objective guidelines has rendered section 947.18 mere surplusage. Indeed, the use of the terms "guidelines" and "presumptive parole release date" clearly conveys the message that the final parole decision will depend upon the Commission's findings that the prisoner meets the conditions provided in section 947.18."

This holding is obviously stated in relation to May's new conviction (new information).

In several recent cases, the Courts have begun the process of analyzing §947.18. If the Commission does extend a PPRD or refuse to grant an EPRD then such action must be accompanied by an explication of reasons for the action in such a manner so as to permit judicial review for determination of whether the Commission had overreached the legislative grant of discretion provided in the Act. See Gobie v. Florida Parole and Probation Commission, 416 So.2d 838 (Fla. 1st D.C.A. 1982). The First District Court again looked at this very issue in Moats v. Florida Parole and Probation Commission, 419 So.2d 775 (Fla. 1st DCA 1982).

In Moats, the Commission explicated its reasons for extending the PPRD. But as the District Court stated,

at page 776,

"However, it has failed to point out, specifically, whether any of the circumstances given in explanation of its action were based on "newly acquired information" (Section 947.16(4), Rule 23-21.15(5), Florida Administrative code), or if not, whether there was "good cause in exceptional circumstances" (Section 947.173(3)) for the Commission's action in establishing a PPRD beyond the date arrived at by use of the Guidelines...."

Further, the Commission had set the inmates PPRD on November 12, 1981, to be August 9, 1981. This action prevented the §947.174 interview and the Commission declined to set an EPRD. The District Court found no apparent abuse in the Commission's not authorizing an EPRD, but stated, in dicta, at page 777,

"... On the other hand, it may be more reasonably argued that, notwithstanding the inability to comply with the time limits prescribed for the parole release date interview (see above), both the petitioner and the Commission would have been better served, and the disposition of the case brought more closely into conformity with the statute and the rules, if the Commission had referred the matter to a Hearing Examiner for interview and recommendations to the Commission, pursuant to Section 947.174 of the statutes, and Rule 23-21.15."

Also, see Jackson v. Florida Parole and Probation Commission,
424 So.2d 930 (Fla. 1st D.C.A. 1983).

*Only 3 factors justify changing
PPRD.*

The above decisions are the evolutionary process whereby the intent of the Florida Legislature in enacting the Objective Parole Guideline Act of 1978 will be realized. They show that the manifest intent of the Legislature and the obvious intent of the Chapter is to very narrowly limit the Commission's discretion. Further, that the Commission cannot carve §947.18 from the Chapter and use it to justify whimsical word games in subjectively setting inmate's PPRD's. It is clear from the decisions that the Commission must have a showing of new information, unsatisfactory institutional conduct or good cause and exceptional circumstances to invoke its limited discretion under §947.18.

*Earlier crimes
& escape
attempts
do not
qualify*

In the cause before this Court, the explication given by the Commission is nothing more than information on Respondent's criminal history record which was contained in the Respondent's official file and reviewed by the Commission at the initial PPRD hearing and at the subsequent biennial PPRD hearing. This explication did not satisfy the District Court which relinquished jurisdiction back to the Commission for thirty (30) days to conduct another review for purposes of adequately explaining the reasons for denial of Respondent's parole. (App. 1) The Commission then reestablished Respondent's PPRD to May 11, 1982 (App. 2) at a meeting held

on May 18, 1983, and declined to set an EPRD, and as reason for their action restated their previous explications. As a direct result of this action by the Commission, the District Court affirmed the reestablished PPRD and vacated the non setting of the EPRD and remanded the cause to the Commission for the purposes of establishing Respondent's EPRD (App. 4). See Paige v. Florida Parole and Probation Commission, 434 So.2d 7 (Fla. 1st D.C.A. 1983). The end result of the Commissions action was nothing more than a cleverly disguised method whereby the Commission attempted, through tomfoolery, to usurp the clear legislative intent of the Act and return to its previously enjoyed unbounded discretion in granting or denying paroles.

Respondent is well aware that there is no absolute right to parole but he is also aware that there is a right to proper consideration for parole in that the Legislature of the State of Florida has seen fit to extend the privilege of parole to the general inmate population. See Moore v. Florida Parole and Probation Commission, 298 So.2d 719 (Fla. 1974). In the Moore case it was stated by the Florida Supreme Court at page 270 that

"The Parole Commission is required, as any other body, to comply with constitutional requirements, it cannot deny parole upon illegal grounds or improper considerations."

No such Case

While a PPRD is not something chiseled in stone and unchangeable, the legislature has seen fit to allow the Commission to change that date only in limited and specifically set forth circumstances (§947.16 and §947.172). Section 947.18 comes into play first when an inmate has his initial PPRD set and subsequent to that only when the above referenced specifically set forth circumstances are present.

In the cause before this Court, those circumstances are not present. Section 947.18, of necessity, must be read in pari materia with the entire Chapter 947, for to do otherwise would be to create a mockery of the legislative intent enumerated in §947.002. In James v. Florida Parole and Probation Commission, 395 So.2d 197 (Fla. 1st D.C.A. 1981) the Court stated at page 198

"The chapter contemplates an objective system, Section 947.02, Florida Statutes (1980); the Commission may exercise its discretion only in limited circumstances with adequate explanation."

Before this Court is another example of the Commissions continuing arbitrary and capricious abuse of discretion. The Commission's abuse and improper use of §947.18 is beyond unfortunate or harmless error and cannot be overlooked by this Court. The Court should necessarily enter its order affirming the order as filed in this cause on June 17, 1983, by the First District Court of Appeal.

CONCLUSION

Respondent submits that the decision by the Commission to deny the Respondent a parole under §947.18, based solely upon information of Respondent's past criminal history and MCR violation, all of which was known to the Commission when Respondent's initial PPRD was set, is a clear abuse of discretion by the Commission and that the Commission cannot decline to authorize a recommended EPRD, and thereby deny parole, solely upon the basis of information, previously considered or available for consideration, in setting an inmate's PPRD.

Respondent respectfully requests that the certified question be answered in the negative.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing to Enoch H. Whitney, General Counsel, Florida Parole and Probation Commission, 1309 Winewood Boulevard, Building 6, Third Floor, Tallahassee, Florida 32301, by HAND DELIVERY this 12th day of October, 1983.

A handwritten signature in black ink, appearing to read 'Thomas B. Woodward', is written over a horizontal line.

THOMAS B. WOODWARD
ATTORNEY FOR RESPONDENT