

IN THE SUPREME COURT OF FLORIDA

FLORIDA PAROLE AND)
 PROBATION COMMISSION,)
)
 Petitioner,)
)
 vs.)
)
 WILLIAM H. PAIGE,)
)
 Respondent.)

CASE NO. 64,144

DCA Case No. AO-351

FILED

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BRIEF OF PETITIONER ON THE MERITS

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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 Petitioner. References to the Appendix accompanying this brief will be cited as App. p. _____. References 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

Respondent was originally incarcerated in the custody of the Florida Department of Corrections on September 12, 1979, having been sentenced to a term of two and one-half (2½) years for the offense of breaking and entering with intent to commit a misdemeanor, to-wit: petty larceny. (R. 41-42). Records from the juvenile division, Escambia County Circuit Court, indicate that Respondent had previously committed several offenses as a juvenile. (R. 22, 23, 27, 28 and 33). Pre-sentence and post sentence investigations reveal that Respondent had previously been arrested and convicted as an adult for numerous crimes including two violations of the Federal Dyer Act (8-19-66 and 8-11-67); grand larceny (6/14/68); larceny of auto - three counts (8-26-68); and two escapes (1/16/69 and 6/20/69). (R. 22, 23, 27, 28, 33 and 34). To say that Respondent has an extensive prior criminal record would be clearly in accord with the record on appeal. (R. 22-68).

Respondent was placed on mandatory conditional release (MCR) in accordance with §944.291, Florida Statutes (1960), on April 30, 1971 (R. 69) to remain under parole supervision until February 27, 1972. Thereafter, Respondent's MCR was revoked for violation of the terms and conditions thereof effective June 2, 1972, said violation

having occurred in June and July of 1971. (R. 97). He was released from incarceration by expiration of sentence on November 1, 1972. (R. 102). Thereafter, Respondent was reincarcerated with the Department of Corrections with two ten (10) year concurrent sentences he received beginning July 16, 1973, for convictions of the offenses of breaking and entering a dwelling with intent to commit a felony: rape; and assault with intent to commit a felony: rape.

Thereafter, Respondent received a fifteen (15) year consecutive sentence for escape on March 4, 1974 (R. 11) and a five (5) year concurrent sentence for possession of a stolen vehicle. (R. 6). He was also adjudged guilty of disobeying a stop sign, hit and run (property damage), driving without a license, and fleeing or attempting to elude a police officer, for which he was sentenced to time already served. (R. 10).

Respondent was interviewed under the Objective Parole Guidelines Act on December 20, 1979, and a presumptive parole release date (PPRD) of May 11, 1982 was established for him. (R. 125-126).

Respondent received a biennial interview on January 19, 1982, resulting in no change in his PPRD of May 11, 1982. (R. 153).

Respondent was interviewed for the purpose of establishing an effective parole release date (PPRD) on March 16, 1982. (R.156).

On April 21, 1982, three Commissioners voted to parole Respondent on May 11, 1982 and three Commissioners voted to extend Respondent's PPRD under §947.18, Florida Statutes. (R. 158). Thereafter, following full Commission review on April 28, 1982, Respondent's PPRD was extended until May 13, 1989 for the following reason:

Effective Parole Date Interview Results:
The Commission is unable to make a finding that there is reasonable probability that, if he is placed on parole, Inmate Paige will live and conduct himself as a respectable and law abiding citizen and that his release will be compatible with his own welfare and the welfare of society as required by Florida Statute 947.18, in that, Inmate Paige, 33 years of age, has consistently been arrested and convicted for auto theft, escape and breaking and entering; that is, 8/29/69, sentenced to 2½ years for breaking and entering; escaped and received 3 months, escaped second time and sentenced to 2½ more years; 4/20/71 released on MCR, 6/2/72 MCR revoked, he had been sentenced to one year county jail for larceny of motor vehicle; 7/16/73 sentenced to 10 years for breaking and entering with intent to commit felony; rape and assault with intent to commit felony, rape; 8/9/74, sentenced to 15 years for escape; 5/13/74, sentenced to 5 years for possession of stolen vehicle, he escaped from Niceville prison 3/4/74, stole a truck in Niceville and stopped by police in Pensacola and apprehended. (R. 160).

Respondent timely exhausted his right to administrative review in accordance with §947.173, Fla. Stat., resulting in no change in the established PPRD of May 13, 1989. (R. 182). His appeal was then timely commenced by notice filed with the First District Court of Appeal September 27, 1982.

Following remand to Petitioner with directions to again review Respondent's case "for purposes of adequately explaining the reasons for denial of Petitioner's parole" (App. p. 1) and receipt of a Special Commission Action further explaining the reasons for denial of parole for Respondent (App. p. 2-5), the Court below rendered its per curiam decision in an Opinion filed June 17, 1983 (App. p. 6-7), Page v. Florida Parole and Probation Commission, Case No. AO-351 (Fla. 1st DCA) ___So.2d___ [8 F.L.W. 167], vacating the Petitioner's decision declining to authorize an effective parole release date (EPRD) for Respondent, and remanded the cause to Petitioner with instructions to establish Respondent's EPRD subject to the standard provisions of parole. Judge Nimmons dissented and filed an opinion (App. p. 8). Concurrent with its Order denying Petitioner's Motion for Rehearing (App. p. 9), the Court below certified to the Florida Supreme Court, pursuant to Florida Appellate Rule of Procedure 9.030(2)(A)(V), the following question as one of great public importance:

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. (App. p. 10).

Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction. (App. p. 11).

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, CHAPTER 947 OF THE FLORIDA STATUTES AUTHORIZES THE COMMISSION TO DENY PAROLE RELEASE PURSUANT TO SECTION 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 (PPRD) NOTWITHSTANDING THE FACT THAT THE COMMISSION'S DECISION TO DENY RELEASE IS NOT BASED ON ANY INFORMATION OR REPORTS OF UNFAVORABLE INSTITUTIONAL CONDUCT RECEIVED AFTER THE PPRD IS ESTABLISHED AND NOTWITHSTANDING THE FACT THAT SUCH ACTION RENDERS THE PPRD INEFFECTIVE FOR OBTAINING PAROLE RELEASE.

Prior to 1979 when the Objective Parole Guidelines Act, contained in Chapter 947 of the Florida Statutes, became effective, parole in Florida was within the unbridled discretion of the Florida Parole and Probation Commission (Petitioner). See e.g. Sellars v. Bridges, 15 So.2d 293 (Fla. 1943). The actual decision of whether to grant parole was primarily directed to whether the inmate had been sufficiently rehabilitated so that he could, under parole supervision, be safely returned to society as a productive member thereof. §947.18, Fla. Stat. The terms of the above statute, in effect since the concept of parole was implemented in Florida in 1941, provide:

CONDITIONS OF PAROLE - No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison. No person shall be placed on parole until and unless the commission

shall find that there is reasonable probability that, if he is placed on parole, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. No person shall be placed on parole unless and until the commission is satisfied that he will be suitably employed in self-sustaining employment, or that he will not become a public charge. The commission shall determine the terms upon which such persons shall be granted parole. In addition to any other lawful condition of parole, the commission may make the payment of the debt due and owing to the state under §960.17 a condition of parole subject to modification based on change of circumstances.

Section 947.18, Fla. Stat. (1982). This discretionary statutory scheme of parole subsequently underwent a major overhaul with the adoption of the Objective Parole Guidelines Act of 1978.

Effective beginning in 1979, the above legislation delineated a different emphasis for parole decision-making and specified different procedures to be followed by Petitioner in granting parole consideration. Noting that the past system of discretionary parole review lacked "objective criteria for paroling and thus [was] subject to allegations of arbitrary and capricious release," §947.002(1), Fla. Stat., the Legislature mandated a structured parole review process based on objective criteria. Likewise, the former emphasis solely on

rehabilitation was supplemented through the use of "objective parole criteria designed to give primary weight to the seriousness of the offenders present criminal offense and his past criminal record." §947.002(2), Fla. Stat. Further, to implement this objective parole review, Petitioner was directed to develop and implement objective parole guidelines "based on the seriousness of offense and the likelihood of favorable outcome." §947.165(1), Fla. Stat. The structured review procedures contained in this new legislation also provided Florida prisoners with a clearer idea of when, if ever, they would actually be released on parole.

With the adoption of the objective guidelines, all inmates eligible for parole consideration were to receive a tentative or presumptive parole release date (PPRD), calculated under the Petitioner's guidelines. §947.172, Fla. Stat. Although this presumptive parole release date was, by definition, only tentative, §947.005(4), Fla. Stat., it was binding on Petitioner in the sense that, once set, the PPRD was not to be modified except for reasons of institutional conduct, the acquisition of new information not available at the time the initial interview was conducted, or upon good cause and exceptional circumstances. §§947.16(4), 947.173(3); Baker v. Florida Parole and Probation Commission, 384 So.2d 746 (Fla. 1st D.C.A. 1980).

Furthermore, inmates were to be afforded continual review of this PPRD, at least biennially, to consider any new information which might require modification of this date. §947.174 Fla. Stat. Also, inmates were to be given a final interview and review, shortly before the PPRD arrived, at which time Petitioner was to determine whether to make the presumptive date an actual or effective parole release date (EPRD). §947.174(5), Fla. Stat. (1982). Once established, this EPRD would require that the prisoner either be released on parole or that Petitioner conduct a hearing, complete with limited constitutional due process protections, to consider rescission of the order of parole. See Demar v. Wainwright, 354 So.2d 366 (Fla. 1978); Pannier v. Wainwright, 423 So.2d 533 (Fla. 5th D.C.A. 1982). Unchanged by the structured review provided by the Objective Parole Guidelines Act, however, was Petitioner's concurrent duty to society, i.e., that no prisoner be paroled unless and until the terms of §947.18, Fla. Stat. were satisfied. See May v. Florida Parole and Probation Commission, ___ So.2d ___, Case No. 63,108 (Fla., Opinion filed July 21, 1983) [8 FLW 259]. Chapter 947 of the Florida Statutes, as amended by the Objective Parole Guidelines Act, did not, however, specifically explain how Petitioner was to exercise its discretion under §947.18 of the Florida Statutes, regarding the ultimate granting of parole in the context of its structured decision-making under the guidelines. This

question has been the subject of several recent court opinions reviewing attempts by Petitioner, prior to the adoption of rules, *infra*, to exercise its seemingly conflicting statutory duties.

In Gobie v. Florida Parole and Probation Commission, 416 So.2d 838 (Fla. 1st D.C.A. 1982), the First District Court of Appeal recognized an apparent conflict in the Petitioner's statutory duties under the objective guidelines and under 947.18, Florida Statutes. Reviewing the various statutory provisions of Chapter 947, the District Court recognized that the ultimate decision to parole rested within the sound discretion of Petitioner, but noted that this previously unbounded discretion was somehow restricted by the adoption of the Objective Guidelines Act. Id. at 840. In disposing of the case on procedural grounds, the Court noted that "neither the statutes or the commission's rules provide[d] guidelines concerning the invocation of §947.18 to refuse to authorize an EPRD and directed the commission, in future cases, to "explicate its reasons for its actions in a manner to permit judicial review for determination of whether the commission ha[d] over reached the legislative grant of discretion provided in the Objective Parole Guidelines Act." Id. at 840. The First District Court had a second opportunity to revisit

this issue in Moats v. Florida Parole and Probation Commission, 419 So.2d 775 (Fla. 1st D.C.A. 1982).

In Moats, the District Court was reviewing an order by Petitioner which corrected a previous error made in calculating an inmate's PPRD. Although the corrected PPRD had already passed, Petitioner relying upon its authority under §947.18, refused to grant parole release and instead extended the inmate's PPRD and stated its reasons for so doing. Referring to its previous decision in Gobie, the District Court again "recogniz[ed] the authority of the commission in its discretion, to override or amend a PPRD established in accord with the guidelines", Id. at 776, and held that there "appear[ed] to be no abuse of discretion in the commission's determination not to allow petitioner's PPRD (already passed) to become his effective parole release date". Id. at 777. Nevertheless, the Court held that the setting of the new PPRD was erroneous apparently because Petitioner had done so without first interviewing the inmate and reviewing the recommendations of the interviewing examiner as required by §947.174 of the Florida Statutes and Florida Administrative Code Rule 23-21.15. Similar to the Moats decision was a subsequent opinion by the First District Court of Appeal in Jackson v. Florida Parole and

Probation Commission, 424 So.2d 930 (Fla. 1st D.C.A. 1983)
(referred to herein as Jackson I¹).

In Jackson as in Moats, the inmate sought review of a Commission order refusing to make his PPRD an EPRD and instead extending his PPRD far into the future. Vacating that portion of Petitioner's order extending the PPRD, because the extension had not been based on new information or institutional conduct as required by the objective guidelines, the District Court remanded the case back to the Petitioner for further explication of its reasons for denying parole under §947.18 of the Florida Statutes. Further, the District Court ordered that Jackson's expired PPRD be reinstated and offered their suggestions as to how Petitioner must proceed when it denies parole release under the above statute. The District Court directed that:

F The December 15, 1981 PPRD should be reinstated. Although effectively this action makes Jackson an inmate without a meaningful PPRD, it appears to be the only action acceptable under the Objective Parole Guidelines Act. The

¹In a subsequent opinion, Jackson v. Florida Parole and Probation Commission, 429 So.2d 1306 (Fla. 1st D.C.A. 1983) (referred to herein as Jackson II), the District Court, just as it did in the instant cause, reviewed the commission's explanation, on remand, for refusing to grant parole release and held that denial of parole for the reasons stated amounted to an abuse of the commission's discretion and ordered the agency to establish Mr. Jackson's EPRD.

commission is still bound by §947.174(1) to review Jackson's case biennially. The commission would therefore have to consider him for parole at least biennially, the only other viable alternative we see is to extend the PPRD 2 years, to the biennial review; this however, is not contemplated by Chapter 947 and since the commission has not promulgated rules governing its use of §947.18 and integrating that section with the rest of the Objective Parole Guidelines Act, we do not think any extension of the already passed PPRD is authorized.

Id. at 931, Fn. 3.

In sum, as the above opinions have recognized, Petitioner has ultimate authority under §947.18, Florida Statutes, to refuse to allow a PPRD to become an EPRD, despite the absence of new information or institutional conduct, and this decision will be subject to subsequent judicial review to determine if the reasons offered by Petitioner for so doing amount to an abuse of discretion.

All eligible inmates are assured of being scored under a uniform set of guidelines and are given a tentative parole release date. Nevertheless, as the Legislature has recently reaffirmed in modifying the intent of §947.002(6) of the Florida Statutes, parole is a matter of grace, not a right, and a tentative parole release does not guarantee actual parole on that date. Parole release is only to be

afforded when Petitioner can find a reasonable probability that releasing the inmate on parole is consistent with the interests of both the inmate and of society. §947.18, Fla. Stat. As the Court recently noted in May, supra, considering the relative importance of PPRDs determined under the objective guidelines:

It is true that the commission has developed and implemented, as required by law, objective parole guidelines as the criteria upon which parole decisions are made. Nevertheless, Chapter 947, Fla. Stat. taken as a whole, leaves the ultimate parole decision to the discretion, albeit guided by its own administrative rules, of the commission.

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

May v. Florida Parole and Probation Commission, ___ So.2d ___, Case No. 63.108, slip op. at 5 (Fla. opinion filed July 21, 1983) [8FLW259]

In the instant cause, Respondent's PPRD was re-established on remand to remain May 11, 1982 (App. p.4) under the holding of Jackson I, supra. However, as held in Kirsch v. Greadington, et al., 425 So.2d 153, 155 (Fla. 1st DCA 1982), "...the placement of an inmate on parole on the

date his PPRD arrives, or legally should have arrived, is not automatic." The District Court then stated:

Section 947.174(6) requires the Commission, at least 46 days prior to arrival of the PPRD, to decide whether it will authorize an EPRD, a decision which appears to lie within the sound discretion of the Commission. See Gobie v. Florida Parole and Probation Commission, 416 So.2d 838 (Fla. 1st DCA 1982). Additionally, §947.18 requires the Commission to make a finding of reasonable probability that, if [the inmate] is placed on parole, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society.

(425 So.2d at page 155)

Thus, as recognized in the foregoing cases, §947.18 ultimately places the exercise of discretion of whether or not to grant parole release with Petitioner. Cf. §947.002(6), Fla. Stat., supra. As held by the District Court in Jackson I, supra:

When the Commission is unable to make that finding, it should so state and give its reasons, as it has done in Jackson's case. Further, in order to aid a court in reviewing the Commission's decision for abuse of discretion, the Commission should provide record support.

Petitioner argues that ample record support exists in the case at bar to support the Commission's reasons for

inability to make the required finding under §947.18. See the Joint Supplement to Record, accepted by the District Court as tendered, and R. pp. 22-68.

It is important to note that the matrix for Respondent's offenses scored at R. 125-126 has substantially higher ranges today (Rule 23-21.09(5), Fla. Admin. Code), than in December, 1979 when Respondent was interviewed (Rule 23-19.05, Fla. Admin. Code 1979). If Respondent were to be interviewed under the current matrix, he would have a salient factor scoring under the Recidivist Criminal Factor (Rule 23-21.02(35), F.A.C. -- four or more prior felony convictions, at least two of which resulted in incarceration), and his aggregated number of months for his scored offenses could range as high as 240 months (Rule 23-21.09(5)) instead of the 110 months used to set his PPRD (R. 120); and the 240 months would be without applying any aggravators.

Although these matters cannot be the basis for current aggravation of the Respondent's PPRD (§947.165, Fla. Stat.), clearly they were properly considered when Petitioner chose not to authorize his EPRD (Joint Supplement to Record on Appeal).

Thus, Petitioner submits it has compiled with Jackson I, supra, and the determination not to parole Respondent is in accordance with §947.18 and the proper exercise of discretion. Cf. May, supra.

Petitioner, like all state agencies, is required to adopt rules informing the public of the procedures followed by the agency in both its formal and informal actions. §120.53(1)(b), Fla. Stat. Furthermore, under §947.20, Florida Statutes, the Commission is directed to "adopt general rules on the terms and conditions of parole and what shall constitute the violation thereof and may make special rules to govern particular cases."²

Subsequent to the decision of the Court below in the instant cause, Petitioner adopted Rules 23-21.02(12) and (15), 23-21.15, and 23-21.155, Florida Administrative Code, effective August 1, 1983, App. pp.12-18, which allows Petitioner in the context of the structured parole review under the guidelines, to fulfill its duty to see that prisoners satisfy the statutory conditions for parole before being released. All inmates eligible for parole

²Adopted in 1941 as a companion statute to §947.18, it is apparent that the language of §947.20 regarding "conditions of parole" makes reference to identical language in the title of §947.18, Florida Statutes.

consideration will receive PPRDs which will be periodically reviewed and which will ordinarily become their EPRDs absent new information or unfavorable institutional conduct. In a small number of extraordinary cases however, and pursuant to the procedures contained in the subject rules, the full Commission may decline to authorize an EPRD solely upon its determination that the prisoner does not meet the requirements of §947.18; Florida Statutes.

Thereafter, consistent with the statutory provisions precluding modification of an established PPRD absent new information or unfavorable institutional conduct and the statute which requires periodic review, the PPRD will remain unchanged and the inmate will be afforded biennial review to determine whether he can be found to be eligible for parole release under §947.18. Fla. Admin. Code. Rule 23-21.155.

Accordingly, the certified question should be answered in the affirmative, based upon the foregoing matters and authorities. As noted by Judge Nimmons in his dissenting Opinion filed in the District Court below in the instant cause:

This inmate's substantial criminal history of felony offenses, along with his previous violations of the conditions of his prior mandatory conditional release (MCR), as explicated by the Commission on remand, are such

that I am unable to conclude that the Commission abused its discretion in concluding that the inmate does not qualify for release under the above-referred Section 947.18 criteria. See Gobie v. Florida Parole and Probation Commission, 416 So.2d 838, (Fla. 1st DCA 1982). The fact that this inmate's criminal history and prior violations of MCR were considered in establishing his presumptive parole release date (PPRD) should not preclude the Commission from according heavy weight to such factors in exercising its discretionary authority under Section 947.18 in determining whether the inmate should be released on parole. I, therefore, dissent from the majority's opinion requiring the Commission to set an effective parole release date for Paige.

CONCLUSION

Petitioner submits that its decision to deny Respondent a parole under Section 947.18 must be viewed in light of the latter's criminal history and his previous violations of mandatory conditional release (MCR), and that the absence of new information received subsequent to the establishment of the inmate's presumptive parole release date does not prevent Petitioner, in the sound exercise of its discretion, from determining that Respondent does not qualify for parole at this time under Section 947.18 criteria due to his criminal history and prior violations of MCR.

Petitioner requests that the certified question be answered in the affirmative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing to Thomas B. Woodward, Esquire, Lager & Woodward, P. C., P. O.Box 494, Tallahassee, Florida 32302, by U. S. mail, on this the 22nd day of September, 1983.

Enoch J. Whitney

ENOCH J. WHITNEY

General Counsel

Florida Parole & Probation

Commission