IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,289

The FLORIDA PAROLE AND PROBATION COMMISSION,

Petitioner,

vs.

ROBERT BRUCE,

Respondent.

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

ELLIOT H. SCHERKER
Counsel for Respondent

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INTRODUCTION

The respondent, Robert Bruce, was the petitioner in the District Court of Appeal of Florida, Third District, and the petitioner, the Florida Parole and Probation Commission, was the respondent. In this brief, the petitioner will be referred to as the Commission.

The symbol "R" will be utilized to designate the record transmitted by the District Court of Appeal to this Court, and the symbol "A" to designate the Commission's appendix. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Respondent was charged by information filed January 31, 1980, in the Circuit Court of the Seventh Judicial Circuit of Florida in and for Volusia County with burglary with intent to commit sexual battery and committing an assault during the course of the offense (A. 1). Respondent entered a no contest plea on July 31, 1980, and was sentenced to 30 years of imprisonment (R. 153). The sentence was mitigated to 15 years of imprisonment on September 18, 1980 (R. 155).

On July 1, 1981, the Commission set a presumptive parole release date of December 29, 1981, for respondent (R. 159). On November 25, 1981, the Commission extended the presumptive parole release date to January 3, 1995 (R. 161-62). Respondent's timely request for administrative review was denied on March 10, 1982 (R. 172).

Respondent filed his petition for writ of habeas corpus in the District Court of Appeal on April 19, 1983 (R. 140-51). The court appointed the Public Defender to represent respondent on April 27, 1983 (R. 139), and substituted the Secretary of the Department of Corrections as the party-respondent on May 27, 1983 (R. 99). On motion of the Attorney General, the Commission was re-joined as a party on August 25, 1983 (R. 86, 91-94).

The District Court of Appeal issued its decision granting the petition and directing that respondent be released on parole on April 3, 1984 (R. 187-88). Bruce v. Florida Parole and Probation Commission, 450 So.2d 520 (Fla. 3d DCA 1984). On April 24, 1984, the court granted the Commission's request to certify

to this Court that its decision passed upon a question of great public importance (R. 1-2). The Commission filed its notice invoking this Court's discretionary review jurisdiction on May 9, 1984 (A. 15). This Court dismissed this cause for failure to timely file a notice invoking discretionary-review jurisdiction on August 6, 1984. The Commission filed a timely motion for reinstatement, which this Court granted on October 29, 1984.

QUESTION PRESENTED

WHETHER THE FLORIDA PAROLE AND PROBATION COMMISSION MAY NOT DECLINE TO AUTHORIZE A RECOMMENDED EFFECTIVE PAROLE RELEASE DATE, AND THEREBY DENY PAROLE, PURSUANT TO SECTION 947.18, FLORIDA STATUTES (1983), SOLELY UPON THE BASIS OF INFORMATION WHICH WAS PREVIOUSLY CONSIDERED, OR AVAILABLE FOR CONSIDERATION, IN SETTING THE INMATE'S PRESUMPTIVE PAROLE RELEASE DATE.

STATEMENT OF THE FACTS[1]

Respondent was charged with burglary of a structure with intent to commit sexual battery and committing an assault therein, and he entered a no contest plea to that charge on July 31, 1980 (A. 1; R. 153). In imposing sentence, the court found that respondent "suffer[s] from a psychosexual disorder" and that he was "competent and amenable to treatment", and accordingly

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1 The Commission's Statement of the Case and Facts is a recitation of the procedural history of the case, omitting any reference to the factual matters which underpin the decision of the District Court of Appeal. Brief of Petitioner at 1-4. Respondent will accordingly set out the factual history of the case in his Statement of the Facts. See Fla.R.App.P. 9.210(c).

recommended that defendant be treated in a Department of Health and Rehabilitative Services facility during the course of the 30-year sentence (R. 153). The court also retained jurisdiction pursuant to Section 947.16(3), Florida Statutes (1983), finding that respondent "has a compulsion to commit sex act[s] against women" and is a "danger to society" (R. 153).[2] The court made the same findings in its subsequent order mitigating the sentence to 15 years of imprisonment (R. 155), and forwarded certified copies of that order to the Department of Corrections with a cover letter, in which the judge stated that he was "strongly recommending that [respondent] be placed in a HRS facility for treatment" (R. 178).

Respondent was not transferred to a Health and Rehabilitative Services treatment facility, but was given appropriate treatment at Dade Correctional Institution, where he was incarcerated (R. 105-10).[3] Respondent was interviewed by a parole examiner at the institution on May 20, 1981, pursuant to Sections 947.16(1) and 947.172(1), Florida Statutes (1981), and a

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2 These findings were based upon a presentence investigation and psychiatric reports (R. 153). The psychiatric reports had been provided by respondent's counsel to the probation officer who prepared the presentence report (R. 179).

3 In letters to respondent's counsel and the trial judge, the mental health program coordinator for the Department of Corrections advised that respondent did not meet the department's criteria for transfer to a treatment fcility under Chapter 917, Florida Statutes (R. 105-08). The trial judge was assured that officials at the institution, including the prison psychiatrist, had been requested to and were providing respondent with appropriate treatment (R. 107-08).

presumptive parole release date of December 29, 1981, was recommended by the examiner (R. 157). The Commission affirmed that recommendation on July 1, 1981, setting a presumptive release date of December 29, 1981, and setting a further interview of respondent for October of 1981 (R. 159).

An effective parole release date interview, see § 947.174(6), Fla.Stat. (1983), was conducted on October 21, 1981 (R. 162). At a meeting on November 25, 1981, the Commission ordered that petitioner's presumptive parole release date be extended to January 3, 1995, on the following basis:

> Offender was sentenced on July 31, 1980 to a sentence of 30 years with credit for 210 days county jail time for the offense of burglary with the Court retaining jurisdiction for one [third] of said sentence and the Court entering finding[s] that the defendant has a compulsion to commit sex acts against women; is a danger to society; needs to be supervised; and the further recommendation that the offender be placed in protective custody while in any correctional facility. The Commission provided an initial Presumptive Parole Release Date interview on May 20, 1981 wherein the Presumptive Parole Release Date was established by Commission Action of July 1, 1981 at December 29, 1981.
>
> The Commission through its examiners conducted an effective parole release date interview on October 21, 1981 and whereas as a result of the overall case of the offender the Commission finds in accordance with Florida [Statute] 947.18 that the offender should not be paroled as there is not a "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 not be compatible with his own welfare and the welfare of society," in that the Commission is in receipt of information of 3 psychiatrists that the offender [is] in need of treatment as a mentally disordered sex offender. (2) The Court announced the finding that the offender

> suffers from psychosexual disorder and is in need of treatment and under compulsion to commit sex acts against women. (3) The Commission is without any information bearing on the offender's receipt of any psychiatric treatment since his incarceration (4) on July 24, 1981 the offender was placed in the Administrative Confinement for "fantasizing sexual feelings toward female employees at Dade Correctional Institution."
>
> Irrespective of the previous application of the Objective Guidelines, therefore, under the authority of 947.18 Fla. Stat. the Presumptive Parole Release Date is extended to January 3, 1995. (R. 162).

Respondent sought review of this order, see § 947.173, Fla.Stat. (1981), in a submission prepared by this trial counsel (R. 167-69). The request for review was accompanied by documentation of the treatment received by respondent in prison (R. 105-08, 113-15, 165-66, 183). Included in the supporting documentation was a memorandum dated October 14, 1981, from the chaplain at Dade Correctional Institution, a member of the treatment team assigned to respondent, which stated as follows:

> Recently I participated with Dr. Luis Hernandez, Psychiatrist, and Mr. Claude Tournay, Psychologist, in multi-discipline therapy group. Robert Bruce was one of the group members. He made good contributions to the group.
>
> Robert Bruce was involved in individual counseling sessions with Mr. Tournay and myself. Mr. Tournay was using a female staff member and a female citizen volunteer to help counsel Robert. He was instructed to be honest about his feelings and to express them in this structured situation. Robert followed these instructions with the female citizen volunteer with no problem developing. She had a major in psychology. He did the same thing with the female staff member and she was not able to handle the situation. I believe this was due to her having no training in psychology. The incident resulted in Robert

> Bruce being placed in confinement for following the instructions given to him in counseling.
>
> Robert Bruce is active in the chapel program. We have numerous female volunteers participating in the program. He has always been courteous and polite to these visitors. I have never viewed any questionable behavior on his part. No female volunteer has ever complained or expressed any feeling of uneasiness around him. I have known Robert since he arrived at this institution. He has made marked progress in improving his self-image, developing confidence, performing assigned tasks, and relating to other people. This progress needs to be noted in his record. (R. 165).

A letter from a woman who was serving as a citizen volunteer at the institution, submitted with the request, stated that respondent was "a pleasant, polite and respectful young man", and that his "speech and conduct in my presence has always been above reproach." (R. 113). Two female teachers at the institution also submitted letters, stating that they had had daily contact with respondent, and never felt threatened by or uncomfortable with him (R. 114-15). A letter to respondent's mother from the prison psychologist, Claude Tournay, in which he explained the circumstances surrounding the incident with the female employee, was also included in the documents supplied to the commission (R. 166); that letter states, in pertinent part:

> At the onset of the first session, I had told him to be honest in his statements, as he had been since he came to the State Prison system, in 1980. He readily agreed to do that, and we were both very pleased with our first session. In view of his uneasiness with females, the institutional psychiatrist and I felt that observing him interact with a female counselor would probably help us assess more accurately his emotional controls. Subsequently, two female counselors were

> included in our sessions with your son, and we were pleased with the interactions taking place during these sessions between your son and the female counselors. As evidenced by the attached memo written by one of them, you will see that things were evolving well within the expectations of a counseling session. However, the second counselor felt uncomfortable with what had been said in her first session with your son, and the security Department was consulted. At that point, an investigation had to be made, and your son was isolated as a matter of procedure. The institutional major explained to your son the reason why he was confined, and he released him to the general population at the conclusion of the investigation. (R. 166).

The request for review was received by the Commission on February 19, 1982, and considered at a meeting on March 10, 1982 (R. 172). The Commission reaffirmed the release date of January 3, 1995, finding that it was "unable to make [the] required finding that your release would be compatible to the welfare of society." (R. 172).

Respondent filed a pro se petition for writ of habeas corpus in the District Court of Appeal on April 19, 1983, asserting that the Commission could not invoke Section 947.18 to extend his presumptive parole release date, and, even if the statute were properly invoked for this purpose, the extension was based upon information known or available to the Commission at the time that the initial presumptive date had been set (R. 140-51). The court appointed the Public Defender of the Eleventh Judicial Circuit to represent respondent on April 27, 1983, directing counsel to file a supporting memorandum of law, and granting the state ten days following the filing of the memorandum to respond (R. 139).

Counsel filed a memorandum of law on May 9, 1983 (R. 118-38), and also moved the court, under controlling Third District precedent, to substitute the Secretary of the Department of Corrections as the party-respondent in the cause (R. 116-17).[4] The motion to substitute was granted on May 27, 1983 (R. 99).

The Attorney General, on behalf of the secretary, filed a motion to dismiss and/or transfer the petition on August 9, 1983, asserting that the proper remedy was mandamus and the proper forum the District Court of Appeal of Florida, First District (R. 95-98). The Attorney General also sought to have the Commission re-joined as a respondent (R. 91-94). On August 25, 1983, the court ordered that the Commission be joined as a respondent and denied the motion to dismiss (R. 86).

The Commission filed a response on October 4, 1983, in which it asserted the proper remedy was mandamus and the proper forum the Leon County Circuit Court (R. 72-85). The Attorney General filed a pleading joining in this response (R. 70-71).

On October 12, 1983, prior to any ruling by the court on the petition, the Commission reconsidered respondent's parole status (R. 58, 60). Although a hearing examiner who had interviewed respondent on August 18, 1983, recommended that his presumptive parole release date be changed to January 3, 1990, because respondent had been "participating in [a] counseling program and [his] performance has improved greatly as indicated by [the]

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4 The pro se petition had named the Commission as the respondent (R. 140).

psychiatrist during interview", the Commission did not accept that recommendation (R. 58). Instead, the Commission nullified its prior order of November 25, 1981, setting the January 3, 1995, presumptive parole release date and "reinstated" the original presumptive release date of December 29, 1981, but refused to set an effective parole release date, stating, "At this time we cannot make a positive finding for parole release as [required] by F.S. 947.18 and the Presumptive Parole Release Date will remain 12/29/81 based on the same findings made by the Commission in its 11/25/81 order." (R. 55-60).

The District Court of Appeal issued an order on October 28, 1983, treating the petition as a petition for writ of mandamus and denying the petition (R. 54). Counsel for respondent filed a timely motion for rehearing on November 14, 1983, which the court granted on January 20, 1984, directing the Commission to respond to the merits of respondent's claims (R. 44-52, 53). The Commission filed a response on February 10, 1984, asserting the following: 1) that the petition should be treated as seeking a writ of mandamus, 2) that the proper forum was the Leon County Circuit Court, and 3) that "if the Commission's findings and the record evidence offered in support of those findings are subject to the question . . . the case should be remanded to the Commission with instructions to clarify or further explicate its findings." (R. 41). The Commission explicitly requested the court "to deny the relief sought . . . and remand the case to the Commission with directions that the Commission clarify its actions." (R. 41).

The District Court of Appeal issued its decision on April 3, 1984 (R. 187-88). The decision states, in pertinent part:

> Some time after the petition was filed, the Commission reinstated Bruce's original PPRD. Thus, the only issue which remains for our consideration is whether the Commission has improperly refused to convert Bruce's PPRD to an effective parole release date (EPRD). Its refusal to do so was based upon section 947.18, Florida Statutes (1981). This statute has been interpreted by the First District as granting the Commission discretion to refuse to set an effective date [citations omitted], but such discretion is not unlimited. Rather,
>
> > The limited discretion remaining with the Commission under the provisions of section 947.18 must be considered in pari materia with other provisions of the Objective Parole Guidelines Act of 1978, permitting the Commission to change a PPRD only upon a showing of new information, institutional conduct or extraordinary circumstances.
>
> Paige v. Florida Parole and Probation Commission, 434 So.2d 7, 8 (Fla. 1st DCA 1983).
>
> In refusing to set an EPRD, the Commission in the instant case, as in Jackson [v. Florida Parole and Probation Commission, 429 So.2d 1306 (Fla. 1st DCA 1983)] and Paige, has relied on the same information it had before it when it originally established the PPRD and when it later revised the date. Because the Commission has done so, we conclude that it has abused its discretion. (R. 188).

The court accordingly vacated the order refusing to grant an effective release date and directed the Commission "to discharge the [respondent] subject to the standard provisions of parole in such cases." (R. 188).[5]

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5 The court stayed the effect of its order pending the final disposition of this cause in this Court when it subsequently granted the Commission's motion to certify its decision (R. 1-2).

ARGUMENT

THE FLORIDA PAROLE AND PROBATION COMMISSION MAY NOT DECLINE TO AUTHORIZE A RECOMMENDED EFFECTIVE PAROLE RELEASE DATE, AND THEREBY DENY PAROLE, PURSUANT TO SECTION 947.18, FLORIDA STATUTES (1983), SOLELY UPON THE BASIS OF INFORMATION WHICH WAS PREVIOUSLY CONSIDERED, OR AVAILABLE FOR CONSIDERATION, IN SETTING THE INMATE'S PRESUMPTIVE PAROLE RELEASE DATE.

The Objective Parole Guidelines Act of 1978, §§ 947.001 et seq., Fla.Stat. (1983), established a comprehensive structure for establishing specific and enforceable parole dates for all persons sentenced to terms of imprisonment in this state.[6] The first step in this process is the computation of a "presumptive parole release date" (PPRD), which is defined as "the tenative parole release date as determined by objective parole guidelines", under the procedures set forth in Sections 947.172 and 947.173, Florida Statutes (1983).[7] Under the Act, "[a]

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With the adoption of guideline sentencing in Section 921.001, Florida Statutes (1983), as subsequently enacted in Rule 3.701 of the Florida Rules of Criminal Procedure, persons sentenced for crimes which occurred after October 1, 1983, (or, by the defendant's election, for crimes occurring prior to that date when sentencing takes place after October 1st) are no longer eligible for parole. § 921.001(8), Fla.Stat. (1983). Chapter 947 remains in effect for all inmates sentenced prior to the effective date of guideline sentencing. See Ch. 83-131, § 35, Laws of Florida.

The acts of the Commission which are at issue in this case occurred between 1981 and 1983; although the pertinent statutes were amended in 1982, the amendments are not of significance for the purposes of this case, and, in the interest of clarity, these statutes will be cited as set forth in the 1983 Florida Statutes.

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The process under which respondent's PPRD was computed was that prescribed by the 1980 version of Fla.Admin.Code 23-19. That process is described in Jenrette v. Wainwright, 410 So.2d 575, 576 n.2 (Fla. 3d DCA 1982), review denied, 419 So.2d 1201 (Cont.)

presumptive parole release date shall become binding on the commission when agreement on the presumptive parole release date is reached." § 947.172(3), Fla.Stat. (1983). Indeed, the Legislature specifically stated that "[i]t is the intent of this legislation that, once set, presumptive parole release dates be modified only for good cause in exceptional circumstances." § 947.173(3), Fla.Stat. (1983). The only such circumstances specified in the Act are "reasons of institutional conduct or the acquisition of new information not available at the time of the initial interview." § 947.16(4), Fla.Stat. (1983). See also Moats v. Florida Parole and Probation Commission, 419 So.2d 775, 776 (Fla. 1st DCA 1982); Bizzigotti v. Florida Parole and Probation Commission, 410 So.2d 1360, 1362 (Fla. 1st DCA 1982).

The PPRD is thereafter converted into an "effective parole release date" (EPRD), defined as "the actual parole release date as determined by the presumptive parole release date, satisfactory institutional conduct, and an acceptable parole plan", § 947.005, Fla.Stat (1983), pursuant to the procedure established by Section 947.1745, Florida Statutes (1983):

> If the inmate's institutional conduct has been satisfactory, the presumptive parole release date shall become the effective parole release date as follows:
>
> (1) Within 90 days prior to the presumptive parole release date, a hearing examiner shall conduct a final interview with the inmate in order to establish an effective

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(Fla. 1982). The Code was amended in 1981, pursuant to Section 947.165(2), Florida Statutes (1983), which requires yearly review of the parole guidelines and "any revisions considered necessary by virtue of experience." As will be set forth in this brief, there is no issue as to the propriety of the process by which respondent's PPRD was set.

> parole release date. If it is determined that the inmate's institutional conduct has been unsatisfactory, a statement to this effect shall be made in writing with particularity and shall be forwarded to a panel of no fewer than two commissioners appointed by the chairman. Within 30 days after receipt of the recommendation, the panel shall determine whether or not to authorize the effective parole release date; and the inmate shall be notified of such decision . . . .
>
> (2) When an effective date of parole has been established, release on that date shall be conditioned upon the completion of a satisfactory plan for parole supervision. An effective date of parole may be delayed for up to 60 days by a commissioner without a hearing for the development and approval of release plans.
>
> (3) An effective date of parole may be delayed by a commissioner for up to 60 days without a hearing based on:
>
> (a) New information not available at the time of the effective parole release date interview.
>
> (b) Unsatisfactory institutional conduct which occurred subsequent to the effective parole release date interview.

In this case, respondent's PPRD was originally set -- and now remains -- at December 29, 1981 (R. 58, 60, 159), and no issue is now presented as to the propriety of the process by which the date was established.[8] The Commission has, however,

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Such was not always the case. Respondent's PPRD was established at December 29, 1981, by a Commission order entered on July 1, 1981, pursuant to the statutory procedures (R. 157, 159). Thereafter, on November 25, 1981, the Commission extended the PPRD to January 3, 1995 (R. 161-62). In his petition for writ of habeas corpus and supporting memorandum, respondent challenged the lawfulness of this extension (R. 124-37, 144-49), and the Commission never defended its action in the lower court. Rather, during the pendency of the litigation in the District Court of Appeal, the Commission sua sponte nullified the November 25th order and "reinstated" the original PPRD of December 29, 1981, albeit while refusing to authorize an EPRD (R. 58, 60). The Commission tacitly conceded that the reinstatement of the long-passed PPRD was an effort to bring its orders in (Cont.)

refused to authorize an EPRD, despite the conceded absence of any basis for doing so under Section 947.1745; that is, the Commission has never asserted that its refusal to set an EPRD is based upon new information or respondent's unsatisfactory institutional conduct. Rather, the Commission's only defense of its actions in this case is the provisions of Section 947.18, Florida Statutes (1983), which provides in pertinent part:

> No person shall be placed on parole until and unless the commission shall find that there is reasonable probabililty 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 that of society. . . .

The central question thus presented is whether this statute, first enacted in 1941, see Ch. 25019, § 14, Laws of Florida (1941), some 37 years before the promulgation of the objective parole guidelines, establishes a lawful basis upon which the Commission can rest a refusal to convert a PPRD into an EPRD for an inmate who is otherwise entitled to an EPRD under Section 947.1745. The Commission's position before this Court is that Section 947.18 is "the final arbiter" of whether an inmate should be paroled, and that it may invoke that statute for virtually any reason in refusing to set an EPRD. Brief of Petitioner at 12, 21-24. This position flies in the face of the express legislative intent underlying the Objective Parole Guidelines Act.

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compliance with Florida law (R. 41).

The point of departure in construing this statute is legislative intent. E.g., Reino v. State, 352 So.2d 853, 860 (Fla. 1977). In this instance, the Legislature has expressly stated its intent in enacting the Objective Parole Guidelines Act of 1978, as follows:

> The present system lacks objective criteria for paroling and, thus, is subject to allegations of arbitrary and capricious release and, therefore, potential abuses. It is the intent of this act to establish an objective means for determining and establishing parole dates for inmates. § 947.002(1), Fla.Stat. (1983).

Where, as here, the Legislature has "expressed its specific intention", the courts "are not permitted . . . to read into the resulting statute a contrary meaning and effect." McDonald v. Roland, 65 So.2d 12, 14 (Fla. 1953). Rather, the expressed intent of the Legislature "is the law." Small v. Sun Oil Company, 222 So.2d 196, 201 (Fla. 1969).

The emphasis upon objective guidelines certainly militates against the broad discretionary power which the Commission would read into the Act under Section 947.18. Moreover, the Legislature effectuated its declared intent by enacting the previously-detailed comprehensive scheme for setting parole dates, under which a PPRD is binding on the Commission and an inmate entitled to conversion of the PPRD into an EPRD unless certain statutory exceptions apply. §§ 947.172(3), 947.173(3), 947.1745, Fla.Stat. (1983). The interpretation of Section 947.18 urged by the Commission would entitle it to refuse to release an inmate otherwise qualified therefor, without any regard for the dictates of the parole guidelines, based solely upon a naked

finding that the nebulous standards of Section 947.18 were satisfied. Such a result is clearly contrary to the express legislative intent underlying the Act, and the Commission's interpretation must therefore be rejected:

> In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect. . . . The primary prupose designated should determine the force and effect of the words used in the act, and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers.

State v. Sullivan, 95 Fla. 191, 116 So. 255, 261 (1928)(citations omitted); accord, Smith v. Ryan, 39 So.2d 281, 284 (Fla. 1949); Ozark Corporation v. Pattishall, 135 Fla. 610, 185 So. 333, 337 (1938); In Interest of D.F.P., 345 So.2d 811, 812 (Fla. 4th DCA 1977); George v. State, 302 So.2d 173, 176 (Fla. 2d DCA 1967).

But the Commission urges that a rejection of its interpretation of Section 947.18 would mean that "the statute would serve no useful purpose." Brief of Petitioner at 7. It is, of course, "never presumed that the Legislature intended to enact purposeless or useless legislation", Dickinson v. Davis, 224 So.2d 262, 264 (Fla. 1969)(citation omitted), and Section 947.18, which was re-enacted when the Legislature adopted the Objective Parole Guidelines Act, must therefore have some purpose. However, a proper construction of the statute belies the Commission's claim that it must be construed as a final hurdle in the parole process or have no function at all.

Since, as previously discussed, the legislative intent underlying the Act is clear, the purpose of Section 947.18 is

determined by reading that provision in the context of the entire act:

> It is to be presumed that different acts on the same subject passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy, and they should be construed each in the light of the other. The legal presumption is that the Legislature did not intend to keep really contradictory enactments in the statute books. . . . The rule of construction in such cases is that if the courts can, by any fair, strict, or liberal construction, find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so.

Curry v. Lehman, 55 Fla. 847, 47 So. 18, 21 (1908); accord, State v. Hayles, 240 So.2d 1, 3 (Fla. 1970); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 698 (Fla. 1969); Markham v. Blount, 175 So.2d 526, 528 (Fla. 1965); Panama City Airport Board v. Laird, 90 So.2d 616, 619 (Fla. 1956).

Most of the provisions of Section 947.18 are not incompatible with the remainder of the Act, such as the language regarding conditions of parole and the statement of the Commission's authority to determine the terms of parole. In reviewing Chapter 947 for indicia relating to the language at issue here, providing that "[n]o person shall be placed on parole" unless the Commission finds that release of the individual "will be compatible with . . . the welfare of society", § 947.18, Fla.Stat. (1983), the provisions of Section 947.156(1), Florida Statutes (1983), directing the promulgation by the Commission of objective parole guidelines, are

instructive:

> The commission shall develop and implement objective parole guidelines which shall be the criteria upon which parole decisions are made. The objective parole guidelines . . . shall be based on the seriousness of the offense and the likelihood of favorable parole outcome. . . .

The "likelihood of favorable parole outcome" obviously requires consideration of whether the release of an inmate "will be compatible with . . . the welfare of society", as stated in Section 947.18. And the Commission has, as required by Section 947.165, promulgated specific provisions in the parole guidelines for consideration of this factor. See Fla.Admin.Code Rule 23-21.07(5)(salient factor score increased if inmate has prior parole or probation revocations); Fla.Admin.Code Rule 23-21.10(4)(a)(2)(providing for aggravation of PPRD beyond matrix range for "[r]easons related to the likelihood of favorable parole outcome, negative indicants of parole prognosis").

Thus, a reading of Section 947.18 which is also consistent with legislative intent is that this statute requires the Commission, in setting a PPRD, to consider the welfare of society in determining the inmate's fitness for parole. And this interpretation has been endorsed by this Court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983).

In May, the inmate challenged the application to him of the 1981 revision of the parole guidelines, which were harsher than the pre-existing guidelines, in setting his PPRD on the ground that the newer rules had been adopted subsequent to his offense and thus constituted an ex post facto application of the

guidelines under the rule of Weaver v. Graham, 450 U.S. 24 (1981). Weaver had held unconstitutional the application of less-beneficial gain-time statutes to inmates whose offenses had occurred prior to the modification of the statutes. In holding that Weaver did not apply to parole consideration, this Court relied upon Section 947.18, characterizing it as allowing the Commission "a repository of discretion in the ultimate parole decision." 435 So.2d at 837 n.7. This Court held that this discretion could be exercised by the Commission in setting a PPRD, thus obviating any ex post facto claim as to the application of the revised guidelines:

> In sharp contrast to . . . Weaver's statutorily based expectations of earning gain time at a statutorily prescribed rate, Florida law at the time of May's offense provided him with only eligibility for parole consideration (assuming good behavior during confinement) [original emphasis]. 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, Florida Statutes, 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 the objective parole 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 commissions finding that the prisoner meets the conditions provided in section 947.18. It is precisely this discretionary element that distinguishes May's circumstances from Weaver's and which mandates a fundamentally different ex post facto analysis and outcome.
>
> We conclude that, had the commission applied the pre-1981 guidelines in setting May's PPRD following his 1981 offense, it

> could still have exercised its discretion to delay the PPRD beyond that provided by the guidelines. . . . It can make no possible difference to May whether his PPRD . . . was determined by retrospective application of the 1981 guidelines, as promulgated by the commission, or by reasonable exercise of the commission's discretion in enhancing the parole date suggested under the 1979 guidelines. . . .

435 So.2d at 837-38 (footnotes omitted). May thus construed Section 947.18 as applicable to the process of setting a PPRD, rather than to establishing or refusing to establish an EPRD, as it was employed in the present case.

Prior to May, the First District had construed Section 947.18 in a very different manner in Gobie v. Florida Parole and Probation Commission, 416 So.2d 838 (Fla. 1st DCA 1982). That case involved three inmates whose challenges to the Commission's refusal to set effective release dates for them were consolidated before the court. 416 So.2d at 839. The court held that Section 947.18 could be invoked to refuse an inmate an EPRD, reasoning as follows:

> On its face, Section 947.174(6), Fla.Stat. (1981), which prescribes the procedure for making the PPRD the EPRD, indicates that the only proper criterion for consideration is whether the inmate's institutional conduct has been satisfactory. However, § 947.18 provides: "No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison."
>
> Section 947.18 was originally enacted by the Florida Legislature in 1941; it was adopted as part of the Objective Parole Guidelines Act in 1978, thereby reflecting a legislative intent to retain ultimate discretion in paroling an inmate with the Commission. . . . Further, Florida law has consistently found that there is no right to parole, even subsequent to the enactment of

> the Objective Parole Guidelines Act. Parole lies within the sound discretion of the Commission.

416 So.2d at 839-40 (citations omitted).

Although thus construing Section 947.18 as a final hurdle to be cleared before an EPRD could be set, the court did set some limits on its application. The court found that the Act "restricted the Commission's previously unbounded discretion in granting parole", and directed the Commission to "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 . . . ." Id. at 840. However, the history of the litigation on behalf of one of the inmates involved in Gobie was to prove the futility of this broad rule as a check on the Commission's unbridled discretion, and, ultimately, the absurdity of construing Section 947.18 as a major component of the EPRD-setting process.

The subsequent decision in Jackson v. Florida Parole and Probation Commission, 424 So.2d 930 (Fla. 1st DCA 1983), issued on an appeal by one of the Gobie inmates after the review which the court had ordered in that decision. On that review, the Commission had, in addition to refusing to set an EPRD for Jackson, extended his previously-set PPRD by approximately 10 years, invoking Section 947.18 as its authority for both actions. Id. at 931. The court invalidated the PPRD extension,[9]

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9 The court held that Section 947.18 could not be invoked to extend a previously-set PPRD when the information upon which the extension was based did not support an extension under the (Cont.)

ordered the Commission to reinstate the original PPRD, and also directed yet another review of the reasons for refusing to set an EPRD. Id. at 952. Although the court candidly conceded that "this action makes Jackson an inmate without a meaningful PPRD", it concluded that its disposition "appears to be the only action acceptable under the Objective Parole Guidelines Act. Id. at 931 n.3.

This result is patently contrary to the legislative intent underlying the Act; indeed, it is contrary to the letter of that act, which specifically provides that "[o]n or before January 1, 1980, a presumptive parole release date developed pursuant to this section shall be established for each inmate in the custody of the department" who was not subject to release prior to that date. In light of the provisions of Chapter 947, it was not the intent of the legislature to have set wholly-meaningless release dates, i.e., dates on which an inmate cannot be paroled because they have long passed and he or she remains in custody without an EPRD. And subsequent decisions of the First District have recognized the error in this application of Section 947.18.

In the third appearance by Jackson before the First District, Jackson v. Florida Parole and Probation Commission, 429 So.2d 1306 (Fla. 1st DCA 1983), the court found that the Commission had failed to explicate its reasons for denying him an

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statutes governing PPRD extensions. Id. at 931; see §§ 947.173(3), 947.16(4), Fla.Stat. (1983). In the present case, the Commission also relied on Section 947.18 to justify its extension of respondent's PPRD (R. 161-62); as previously noted, it thereafter vacated that extension to comply with the Jackson holding. See n.8, supra.

EPRD, and ordered his release on parole:

> We have now received the Commission's response which we find to be no more compelling than its original explanation which we previously found insufficient. In fact, the Commission has done no more than reiterate the same reasons relied on originally to deny Jackson parole -- other than the addition of only minor embellishments.
>
> Because the Commission is apparently incapable of offering any reasonable basis for its conclusory statement that it is unable to find that, if Jackson is placed on parole, he will live and conduct himself as a respectable and law-abiding citizen and that his release will be incompatible with the welfare of either Jackson or society, we find the Commission's actions in this case to be wholly arbitrary and capricious and to amount to an abuse of the discretion granted to it by the legislature.
>
> Accordingly, the Commission's order extending Jackson's PPRD is VACATED and this cause is REMANDED to the Commission for the purpose of establishing Jackson's effective parole release date subject to the standard provisions of parole in such cases.

Id. at 1308.

The disposition in Jackson II represents a significant departure from the premise of Gobie that the courts cannot direct the Commission to set an EPRD because of Section 947.18. And the First District thereafter ordered the same relief in Paige v. Florida Parole and Probation Commission, 434 So.2d 7 (Fla. 1st DCA 1983), without requiring the repetitive litigation that occurred in the Jackson cases.[10]

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10 Paige is currently pending before this Court in Case No. 64,144, in which the same question of law certified by the court below was certified by the First District.

In Paige, the Commission originally established a PPRD of May 11, 1982, which it thereafter revised to May 13, 1989, refusing to set an EPRD under the authority of Section 947.18. Id. at 8. The inmate sought review, and the court relinquished jurisdiction during the pendency of the appeal for the Commission to explain its reasons for its actions. The Commission thereafter reinstated the original PPRD, as in the present case, but refused to set an EPRD, and the court reversed:

> The Commission in that instant case, as in Jackson v. Florida Parole and Probation Commission, [citation omitted] has done no more on remand than it did previously, by relying on the same information it had before it when it first established appellant's PPRD as of May 11, 1982, and when it later revised the date as of May 13, 1989.
>
> Accordingly, the special commission action taken on May 18, 1983, reestablishing appellant's presumptive parole release dates as of May 11, 1982, is affirmed. That portion of the order declining to set an effective parole release date is vacated and this cause is remanded to the Commission for the purpose of establishing appellant's effective parole release date, subject to the standard provisions of parole in such cases.

434 So.2d at 8. The court below relied upon Jackson II and Paige in granting respondent relief (R. 187-88).

Jackson II and Paige are a total departure from Gobie. While these decisions are facially somewhat inconsistent with this Court's interpretation of Section 947.18 in May, as previously discussed, the two constructions can readily be harmonized. Jackson II, Paige, and the decision of the court below limit the statute's application in an EPRD-setting context to new information which was not available to the Commission at the time that it sets a PPRD. The basis for this construction is

stated in Paige as follows:

> [T]he limited discretion remaining with the Commission under the provisions of section 947.18 must be considered in pari materia with other provisions of the Objective Parole Guidelines Act of 1978, permitting the Commission to change a PPRD only upon a showing of new information, institutional conduct or extraordinary circumstances. . . .

434 So.2d at 8.

There are similar provisions in Section 947.1745(3), Florida Statutes (1983), which establishes the procedure for setting an EPRD, and permits the Commission to delay establishment of an EPRD "for up to 60 days" due to the acquisition of "[n]ew information not available at the time of the effective parole release date interview" or unsatisfactory institutional conduct. §947.1745(3)(a), (b), Fla.Stat. (1983). The construction afforded Section 947.18 in Jackson II, Paige, and the decision of the court below gives the Commission authority beyond the strict parameters of Section 947.1745(3), that is, they allow the Commission to refuse to set an EPRD at all, but limit that authority to the bases set forth in the Act for extending a previously-set PPRD or delaying the establishment of an EPRD.

These decisions thus carve out a limited role for Section 947.18 in the EPRD process, without impinging upon other provisions of Chapter 947 or the legislative intent which controls the interpretation of the Act by the courts. This dual role is not inconsistent with May or the legislature's intent, so long as the part played by Section 947.18 is limited in a manner consistent with the other provisions of the Act relevant to

establishing effective release dates. If the Commission had the unbridled authority to invoke Section 947.18 in refusing to set an EPRD which it urges upon this Court, the provisions of Section 947.1745 would be rendered meaningless; the principles of statutory construction adverted to earlier in this brief prohibit that result.

In sum, the construction of Section 947.18 adopted by this Court in May stands as the primary function of that statute, with a limited role for it in the EPRD-setting process, as set forth in Jackson II, Paige and the decision of the court below. Any other construction would defeat the intent which underpins the Act and would impinge upon - indeed, would eviscerate -- other major provisions of the Act. The construction given Section 947.18 in these decisions must accordingly be endorsed by this Court.

The disposition of the present case under these principles is not difficult. The Commission never asserted in the court below that its proffered reasons for refusing to set an EPRD for respondent satisfied the standards announced in Jackson II and Paige. The only argument made by the Commission was that the court, if it found that the Commission's "finding and the record evidence offered in support of those findings are subject to question", should remand "with instructions to clarify or further explicate" its findings (R. 41).[11] No challenge to the finding

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11 The Commission's order of November 25, 1981, which generated the litigation in this case, cited four reasons for its actions: 1) three psychiatrists had found respondent in need of treatment (Cont.)

of the court below that the Commission's findings were inadequate to support a denial of EPRD can therefore be presented here. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Simmons v. State, 305 So.2d 178, 180 (Fla. 1974). The decision of the District Court of Appeal, denying the Commission a third opportunity to state a coherent basis for its refusal to set an

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as a mentally disordered sex offender; 2) the trial court had, at the time of sentencing, found respondent to be suffering from a "psychosexual disorder" and in need of treatment; 3) respondent had not received such treatment in prison; and 4) respondent had been placed in administrative confinement "for 'fantasizing sexual feelings toward female employees'" of the correctional institution where he was confined (R. 162). In respondent's request for administrative review, it was established: 1) that respondent was in fact undergoing psychiatric treatment at the prison and was making excellent progress; 2) that his institutional conduct was similarly excellent; and 3) that the disciplinary incident noted by the Commission was the result of respondent having been directed "to be honest about his feelings" during therapy, a female staff member involved in the counseling program having been unable to "handle the situation" and reporting it, and that an investigation had resulted in a finding of no wrongdoing or misconduct on respondent's part (R. 113-15, 165-66).

In rejecting the request for review, the Commission merely stated that it was "unable to make [the] required finding that your release would be compatible to the welfare of society", based upon its prior order (R. 172). Thereafter, when it revisited respondent's status during the pendency of the litigation in the court below, the Commission stated its reason for refusing to set an EPRD as follows: "At this time we cannot make a positive finding for parole release as [required] by F.S. 947.18 . . . based on the same findings made by the Commission in its 11/25/81 order." (R. 60). Thus, the only basis for the Commission's action in this case were the original findings made on November 25, 1981, upon which it has been unable to expand despite two opportunities.

The first two findings -- the psychiatric diagnoses and the trial court's statements in imposing sentence -- were before the Commission at the time that the first PPRD was set, see §§ 947.13(2)(a), 945.25(1), Fla.Stat. (1983), and accordingly could not be relied upon to invoke Section 947.18 under Jackson II and Paige. The remaining reasons upon which the Commission continued to rely -- that respondent was not receiving counseling and that his disciplinary confinement was a negative indicant of good behavior on parole -- were proven to be simply untrue in the first administrative review proceedings.

EPRD for respondent, is completely in accord with the decisions in Jackson II and Paige, represents a proper application of Section 947.18, and should be approved by this Court.

CONCLUSION

Based upon the foregoing, respondent requests this Court to approve the decision of the District Court of Appeal and to order that he be afforded the relief granted by that court in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of respondent was forwarded by mail to DORIS E. JENKINS, Assistant General Counsel, Florida Parole and Probation Commission, 1309 Winewood Boulevard, Building 6, Tallahassee, Florida 32301 this 16th day of November, 1984.

ELLIOT H. SCHERKER
Assistant Public Defender