IN THE SUPREME COURT OF FLORIDA

PAROLE AND PROBATION COMMISSION,

Petitioner,

vs.

BRUCE FULLER,

Respondent.

CASE NO. 66,427

KENNETH W. SIMMONS, ETC., ET Al.,

Petitioners,

vs.

LARRY LEE SHANNON,

Respondent.

CASE NO. 66,503

PETITIONER'S REPLY BRIEF ON THE MERITS

ENOCH J. WHITNEY
General Counsel

DORIS E. JENKINS
Assistant General Counsel
1309 Winewood Blvd., Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

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PRELIMINARY STATEMENT

References to Respondent's answer brief shall be designated "AB" followed by the appropriate page number(s). References to the Appendix attached hereto shall be designated "App." followed by the appropriate page number(s).

THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY HELD THAT A CHALLENGE TO THE COMPUTATION OF A PRESUMPTIVE PAROLE RELEASE DATE IS CORRECTLY SOUGHT THROUGH A PETITION FOR WRIT OF HABEAS CORPUS

Respondents ask this Court to accept the notion that both the writ of mandamus and the writ of habeas corpus serve as appropriate means of challenging a tentative date, specifically a presumptive parole release date set pursuant to § 947.173, Fla. Stat. May v. FPPC, 424 So.2d 122 (Fla. 1st D.C.A. 1982) This Court has held, on several occasions, that under the Objective Parole Guidelines Act of 1978 the ultimate discretion in deciding whether to place an inmate on parole rests with the Parole Commission. May v. FPPC, 435 So.2d 834 (Fla. 1983); FPPC v. Paige, 462 So.2d 817 (Fla. 1985); FPPC v. Bruce, ___So.2d___, 10 F.L.W. 264 (Fla. Opinion filed May 2, 1985) Respondents' failure to give recognition to these cases is telling in and of itself. Nevertheless, Respondents' failure to reconcile the rationale behind these three decisions serves a fatal blow to the position espoused in their answer brief.

Each of the above-cited decisions is founded upon the very well-settled principle that there is no right to parole under Chapter 947, Fla. Stat. Respondents' position suffers from two basic weaknesses: (1) failure or refusal to acknowledge that the Florida Legislature has not seen fit to

grant them a right to early release from incarceration through parole, and; (2) failure to ascertain the difference between a tentative or anticipated release date for parole purposes and an actual grant of parole.

Respondents contend that the circumstances of their particular cases dictate the availability of the writs of mandamus and habeas corpus. (AB 7) Petitioner does not take issue with the contention itself; rather, Petitioner takes issue with what Respondents perceive as the "circumstances of the particular case". Reduced to the simplest terms, for Respondents "circumstances of the particular case" is a phrase synonymous with "allegations of the petition", however ill-founded they may be. To illustrate the point, Respondent Fuller claims he is entitled to habeas corpus relief because he has a presumptive parole release date which he believes was not correctly computed. He therefore reasons that because his PPRD (which is merely a tentative date) is not correct by his reckoning he should be released immediately. Petitioner hastens to add that Respondent Fuller and the Fourth District Court of Appeal have reached this curious conclusion despite the fact that there is no right to release on parole under Florida's statutory scheme! What the Fourth District and Respondent Fuller are actually

contending, then, is that in order to proceed in habeas an inmate need only claim that he is entitled to be released.[1] It goes without saying, then, that the actual right need not exist. Neither is the inmate who seeks a writ of habeas corpus to challenge a tentative release date required to make a reasonable demonstration of a right to immediate release. Nowhere in Chapter 947 did the Legislature decree that if the Commission erroneously computes a PPRD such error would result in the grand-prize award of a grant of parole.

Respondent Shannon has no more realistic claim to entitlement to immediate release than does Respondent Fuller. Respondent Shannon has only a PPRD; nonetheless, he and the Fourth District believe that an alleged error in the computation of that PPRD requires that Shannon be released on parole.

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[1] This fact is borne out by a recent decision by the Fourth District. In Bell v. FPPC, ___So.2d___, ___ F.L.W. ___ (Fla. 4th D.C.A. Case No. 1079, opinion filed July 24, 1985) the petitioner challenged the computation of his PPRD. The Fourth District stated:

> Johnny Lee Bell petitions alternatively for a writ of habeas corpus or writ of mandamus. Because immediate release is sought we treat the petition as one for habeas corpus. Shannon v. Mitchell, 460 So.2d 910 (Fla. 4th D.C.A. 1984). Id. (App. 1)

If Respondents and the Fourth District are correct in their analysis, then Petitioner submits that there is no longer any need to require the parties to plead facts in a petition which, if true, would give rise to habeas corpus relief. The moving party need only decide that he wishes immediate release as opposed to correction of the alleged error. The fact that he is not being unlawfully incarcerated would have no bearing on the matter.

Respondents cite to numerous decisions in support of their position. Unfortunately, most of the cases relied upon by Respondents contribute little by way of explaining why habeas corpus should lie to challenge the computation of a PPRD. To the extent that Respondents rely upon Moore v. FPPC, 289 So.2d 719 (Fla. 1974); Roberson v. FPPC, 444 So.2d 917 (Fla. 1983); and Daniels v. FPPC, 401 So.2d 1351 (Fla. 1st D.C.A. 1981) for the proposition that mandamus is available to challenge a PPRD, Petitioner quite agrees. Petitioner notes, however, that Respondents' reliance upon Roberson, supra may well be improvident inasmuch as it was that very opinion wherein this Court stated:

> We return to the wisdom of Moore wherein we said, "[w]hile there is no absolute right to parole, there is a right to a proper consideration for parole..".
> Id., at 920 (Citations omitted; emphasis added)

Further, in Roberson this Court quashed the opinion of the Third District. In a footnote to its decision, the Third District stated that habeas corpus would be available to an inmate when the issue regarding the computation of his PPRD became timely by virtue of his being otherwise entitled to immediate release. See, Roberson v. FPPC, 407 So.2d 1044 (Fla. 4th D.C.A. 1981), at 1046, n.5

While it is true that habeas corpus has been, as Respondents argue, available to challenge " parole decisions", (AB 6), Respondents have overlooked one very essential fact: at the various stages of the parole decision-making process very different rights attach. Prior to the actual granting of parole, which is effectuated by an Order of Parole, inmates who are eligible for parole consideration have only a right to proper parole consideration as is dictated by the statutory scheme. Once an inmate is granted parole a liberty interest attaches. It is at this point that due process attaches to protect the liberty interest. Accordingly, then and only then may it be fairly considered that alleged unlawful or erroneous action on the part of the Commission is answerable in habeas corpus.

Given these presentments, Petitioner submits that Means v. Wainwright, 299 So.2d 577 (Fla. 1974) does little to

advance Respondents' position, here. Means addresses rights which have not yet vested for Respondents as neither finds himself in the position of having an unexecuted grant of parole. As previously stated, both Respondent Fuller and Shannon have, at this juncture, the right to proper consideration for parole - no more, no less.

Respondents' interpretation of Lobo v. FPPC, 433 So.2d 622 (Fla. 4th D.C.A. 1983) is not borne out by the decision itself. The Lobo court merely stated that it agreed with the Commission's assertion that a petition which sought to compel the Commission to act (specifically to reduce a PPRD) should be treated as one for mandamus rather than habeas corpus relief. That Court made no representations respecting the availability of habeas corpus where a "proper parole date" has passed. (AB 8) In any case, this Court has cited with approval the reasoning of the First District in Kirsch v. Greadington, 425 So.2d 153 (Fla. 1st D.C.A. 1983). In that case, the First District stated:

> In our opinion, even if the Commission action extending Kirsch's PPRD 13 months is illegal, this does not mean the inmate is entitled to immediate release from incarceration. While we are aware[1] of conflict with other districts[1], we are compelled to follow cases which have found there is no right to parole in Florida[2]. Habeas corpus relief requires showing a right or entitlement to immediate release from custody.

* * * *

> ...Ordering the release by habeas corpus of an inmate when his PPRD arrives or should have arrive would prevent the Commission from exercising its discretion in the parole grant process. We decline to circumvent statutorily prescribed procedures. Id., at 154, 155 (Footnotes omitted); see, Paige, supra.

Turning finally to Latisi v. FPPC, 382 So.2d 1355 (Fla. 1st D.C.A. 1980) which Respondents rely upon to suggest that this Court should modify the office of the writ of habeas corpus for the purpose of providing more immediate judicial review of inmate claims, Petitioner submits that Respondents have their answer in that very decision. The First District very clearly stated:

> A petition for writ of mandamus is a civil action. Neither law nor rule provides a waiver of the filing fee for mandamus. Certain infringements of liberty interests of a constitutional magnitude are reviewable by this Court without cost to a petitioner under the terms of Article I, Section 13, of the Florida Constitution, when filed as a petition for writ of habeas corpus... [Complaints concerning the setting of a presumptive parole release date have not yet been considered to give entitlement to such relief...] Id., at 1356 (Citations omitted)

As an alternative to the position advanced before the district court, Respondents suggest to this Court that the question of whether mandamus or habeas corpus is available

to an inmate challenging his PPRD should be governed by how far in the future his PPRD happens to be. To this Petitioner can only respond that such a motion elicits new heights in creative jurisprudence.

CONCLUSION

Respondents have steadfastly maintained that the writ of habeas corpus will lie to challenge the computation of a PPRD. Respondents have said that some Florida courts have so held. Respondents have argued that a writ of habeas corpus should issue to compel the release of inmates whose PPRD's are imminent or have passed. Respondents, however, have not yet explained the quantum leap from mere parole eligibility to entitlement to immediate release where one has only a PPRD. We are left, then, asking the same question which has been unanswered by the Fourth District and Respondents despite their claim that habeas corpus is the appropriate writ to challenge a PPRD. Why?

Respectfully submitted,

Enoch J. Whitney
ENOCH J. WHITNEY
General Counsel

Doris E. Jenkins
DORIS E. JENKINS
Assistant General Counsel
Florida Parole and Probation Commission
1309 Winewood Blvd., Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Louis G. Carres, Assistant Public Defender, 15th Judicial Circuit, 224 Datura Street/13th Floor, West Palm Beach, Florida 34401 by U.S. Mail this 6TH day of August, 1985.

Doris E. Jenkins

DORIS E. JENKINS
Assistant General Counsel
Florida Parole and Probation
Commission