O|A 11-8-85

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

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The respondents accept the statement of the case as set forth in the briefs of petitioners with the addition of the following:

The Florida Fourth District Court of Appeal certified to this Court the following question:

> In cases in which a prisoner claims that improper calculation of his presumptive parole release date entitles him to immediate release, is his remedy properly pursued through a petition for a writ of mandamus or habeas corpus?

In each of these cases the petitioner, referred to herein as the Commission, does not contest the correctness of the decision below on the merits, but instead the Commission challenges the procedure through which the court below considered the cause and issued its writ of habeas corpus. Since the court below determined that the Commission had improperly calculated the presumptive parole release dates of the respondents, and due to the fact that a proper calculation would result in a release date that had already passed, the district court concluded that habeas corpus was a proper remedy.

STATEMENT OF THE FACTS

The respondents accept the statement of the facts contained in the briefs of petitioners.

SUMMARY OF ARGUMENT

Respondents assert that both mandamus and habeas corpus are remedies to be utilized by the courts in actions challenging illegal parole decisions. The courts have distinguished between petitions alleging an entitlement to a current presumptive parole release date from those in which an improper date was set but in which the proper date would still be in the future. In the former situation habeas corpus is the proper remedy. In the latter the writ of mandamus is the correct remedy. Neither remedy interferes with the statutory responsibility of the Parole Commission.

ARGUMENT

ISSUE INVOLVED

WHETHER THE DISTRICT COURT OF APPEAL PROPERLY HELD THAT CHALLENGE TO COMPUTATION OF A PRESUMPTIVE PAROLE RELEASE DATE, WHERE THE PETITIONER CLAIMS ENTITLEMENT TO IMMEDIATE RELEASE ON A PROPER CALCULATION, IS CORRECTLY SOUGHT THROUGH A PETITION FOR WRIT OF HABEAS CORPUS?

The district court of appeal has decided that when an inmate challenges his presumptive parole release date that relief may be sought through mandamus when the action does not claim entitlement to immediate release on a proper calculation of the presumptive release date. The court also decided that when it is claimed that proper calculation of a presumptive parole release date does result in entitlement to immediate release that relief may be sought by a petition for writ of habeas corpus. It is this determination of procedural remedies that the petitioner has contended is erroneous. This Court determined in Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), that application for a writ of mandamus is a proper method to challenge Parole Commission actions.

In Roberson v. Florida Parole and Probation Commission, 444 So.2d 917 (Fla. 1983), this Court referred to the "seminal decision" of Moore in which it was found that jurisdiction to review discretionary acts of the Commission exists by application for a writ of mandamus. It was noted that mandamus jurisdiction was substantially changed by the decision in Moore which

removed the conceptual stumbling block that only ministerial acts were subject to mandamus.

The petitioners base their contention that mandamus is the only appropriate remedy upon an assertion that discretionary acts of the Commission are not reviewable by the judiciary. However, in Roberson this Court held that the "discretionary acts of the Commission were allegedly so abusive of the law that this Court to broadened the scope of review" available by mandamus. The need for judicial review of administrative actions was discussed in Roberson, at 919. The unprecedented expansion and growth of government resulted in a "wide array of administrative requirements" that seemed to "confuse and intimidate the citizenry, who apparently felt they had almost no control or voice in the actions taken by this branch", referring to the administrative branch of government. Id.

As noted in Roberson the advent of objective parole criteria, coupled with the revision of administrative review procedures, inevitably led to the judicial determination that commission actions were reviewable under the Administrative Procedures Act. With the repeal of the statutory provision providing for direct appeal from Parole Commission review decisions, resort to one of the extraordinary writs is the method by which inmates may obtain what this Court determined was the

"only way to assure a proper respect for the right prisoners," namely judicial review. Roberson v. State, at 921, citing to Oishi v. Florida Parole and Probation Commission, 418 So.2d 329 (Fla. 1st DCA 1982).

Prior to the time that the First District Court of Appeal held in Daniels v. Florida Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981), that direct appellate review was available from parole decisions, this Court noted that the First District Court of Appeal was "constantly policing the work of the Commission either by mandamus or habeas corpus." Roberson v. State, supra at 920.

Thus use of both the writ of mandamus and the writ of habeas corpus have traditionally been available to challenge Parole Commission decisions. The Court stated in Sneed v. Mayo, 66 So.2d 865 (Fla. 1953), that habeas corpus is a writ obtainable under the Constitution by all person who claim to be unlawfully imprisoned against their will. In that case Sneed had filed a letter with a justice of this Court stating the alleged unlawfulness of his incarceration. He requested that the application be considered for whatever procedure was appropriate to the circumstances. This is now contained in Florida Rule of Appellate Procedure 9.040(c), which provides as follows:

> **(c) Remedy.** If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

Rule 9.040(c) implements Article V, Section 2(a), of the Florida Constitution, which requires that no cause shall be dismissed because an improper remedy has been sought. In light of the above authorities the district court below did not err in failing to dismiss the petition filed by the respective respondents.

The question of whether the remedy should have been issuance of a writ of mandamus instead of the writ of habeas corpus has been answered differently according to the circumstances of the particular case. In Means v. Wainwright, 299 So.2d 577 (Fla. 1974), this Court issued a writ of habeas corpus when a prisoner showed that the Parole Commission had improperly revoked a grant of parole. This Court determined that the due process standards normally applicable to parole revocation proceedings have application in the determination of whether to rescind an unexecuted grant of parole, citing Morrissey v. Brewer, 408 U.S. 471 (1972). This Court ordered that Means be placed upon parole unless the Commission afforded a parole recision hearing conforming to due process of law. The issuance of the writ in Means had the practical effect of directing that Means be placed on parole unless the Commission exercised its power to rescind parole for good cause. Thus the Commission was left free to exercise its subsequent responsibility, but the Commission action which preceeded the habeas proceeding was held to be an invalid basis for denying parole release.

In the present cases the district court determined, in a similar manner to Means, that the Commission action which preceeded the habeas proceeding was invalid under the law and the rules governing Commission actions. Since only the action of the Commission which preceeded the habeas proceeding was or could have been ruled upon in issuing the writ of habeas corpus, the issuance of the writ did not interfere with the power of the Commission to exercise its authority subsequent to the setting of the proper presumptive parole release date, which in these cases had already passed.

Since it is well-established that an inmate has a right to proper consideration for parole, the distinction made by the district court is a sensible one. In Lobo v. Florida Parole and Probation Commission, 433 So.2d 622 (Fla. 4th DCA 1983), the court held that a petition for habeas corpus should have been styled as a petition for writ of mandamus because the challenge was to the Commission's use of the wrong guidelines. In that case the action sought an order directing the Commission to act under the proper guidelines. Since the petition in that case did not contend that a proper parole date would have already passed, thus entitling the petitioner to parole release under the law, the habeas petition was treated as a motion for writ of mandamus. To the same effect is Johnson v. Turner, 436 So.2d 291 (Fla. 4th DCA 1983), where the Commission was ordered to recompute a presumptive parole release date and where the habeas petition was treated as a petition for mandamus. Thus the district court

below continues to distinguish between petitions alleging that invalid Commission action has denied parole release from petitions alleging mere error in Parole Commission action.

The significance of the setting of a presumptive parole release date, even one year in the future, is that Chapter 947, Florida Statutes, contemplates an objective parole granting process. The criteria for parole is based almost entirely on factual determinations that are retrospective. The offense severity characteristic is determined by the type of offense involved. The salient factor score is based upon the prior criminal record of the inmate. These two main criteria intersect to establish a time range which a presumptive parole release date is to be assessed. See Florida Administrative Code Rule 23-19.05. Since these determinations are objective in nature, the Commission no longer has the kind of discretion it had under the former system. This is clear by the fact that Section 947.172 (2), Florida Statutes, provides that the presumptive parole release date must be based upon the objective parole criteria and that decisions outside of the recommended range must be based upon evidence relevant to aggravation or mitigation as established in the rules. Section 947.16(3) provides that once established a presumptive parole release date shall become the effective parole release date for the inmate provided that the inmate's institutional conduct remains satisfactory. See Section 947.174(6), Florida Statutes.

Accordingly, the only basis upon which the Commission could deny parole in these cases where the district court has issued a writ of habeas corpus, or even in a case where the court has issued a writ of mandamus to recalculate the presumptive parole release date, would be upon a finding of new institutional misconduct which would constitute a new and independent ground for the Commission to act. See Section 947.1745, which provides that when the inmate's institutional conduct has been satisfactory the presumptive parole release date shall become the effective release date except when the inmate's institutional conduct has been unsatisfactory. On that base alone may the Commission determine not to authorize the effective parole release date. See Section 947.175(1), Florida Statutes.

The issuance of the writ does not interfere with the duty of the Commission under Section 947.18, Florida Statutes to determine prior to placing an inmate on parole that there is a reasonable probability that he will live and conduct himself in a law-abiding manner and that his or her release will be compatible with both the welfare of the inmate and the welfare of society. Nothing in the district court decision purports to interfere with this responsibility of the Commission.

Nothing in the decision of the district court below in either of these cases purports to divest the Commission of its responsibility to determine the separate and independent matter that the inmate maintained a good institutional record nor with

the requirement for all grants of parole that there be a reasonable probability of success on parole and that the parole is in the interest of the inmate in society. This determination is independent of the grounds on which the writ of habeas corpus was granted in these cases. The duty of the Commission to determine that the inmate should be paroled is an independent function that occurs subsequent to the setting of the proper presumptive parole release date.

Thus the respondents are of the view that this Court should not disable inmates from seeking alternatively writs of habeas corpus or mandamus in challenging invalid Parole Commission decisions respecting their presumptive parole release dates. In one case the First District Court of Appeal has held that there is no provision for waiver of the filing fee in mandamus actions. Latisi v. Florida Parole and Probation Commission, 382 So.2d 1355 (Fla. 1st DCA 1980). The writ of habeas corpus is available without cost by specific provision of Article I, Section 13, of the Florida Constitution. Since many prisoners do not have the means to pay a filing fee to initiate judicial review of Parole Commission decisions, the district courts should be permitted to receive petitions for writs of habeas corpus and to treat them as such when the allegations, if true and when well-pled, entitle the inmate to a presumptive parole release date that would have already passed thus entitling him to presumptive release under the objective criteria. The courts have treated petitions seeking recalculation of a presumptive parole release date, when

the proper date is not alleged to have already passed, as petitions for writs of mandamus. This is in accord with the power of the courts generally to establish their own procedures. Since petitions for writs of habeas corpus receive more immediate attention from a court than routine filings, a prisoner who is entitled to a presumptive release date that has already passed should receive the prompt attention that a petition for habeas corpus receives. On the other hand a petitioner seeking recalculation of a presumptive release date which may be months or years in the future, should proceed by seeking a writ of mandamus, and the district courts have consistently treated those petitions, however styled, as petitions for mandamus.

Accordingly, the respondents submit that this Court should maintain the present law providing that inmates may utilize the petition for writ of habeas corpus. The district courts should be free to treat petitions seeking writs of habeas corpus when under the rules governing parole decisions a current parole date should have been established. Likewise, the district courts should be free to treat as petitions for writs of mandamus any habeas petition which does not allege and adequately plead an entitlement to a current parole release date. The relief granted under either of these methods of seeking extraordinary writs is the same. The Commission is in neither case divested of its responsibility to determine that the inmate is suitable for parole, but the order of the district court simply directs the Commission to reach that point and barring good cause to make

such an adverse determination to actually grant the parole whose date has arrived under application of the objective criteria.

In Extraordinary Writs in Florida, the Florida Bar CLE (1979), pages 69-70, it is stated that habeas corpus is the proper remedy for a wrongful denial of parole. It is incumbent in such actions that the petitioner prove that his rights have been violated and that his liberty is being restrained by the setting of the improper presumptive release date.

CONCLUSION

Habeas corpus has traditionally been a viable remedy utilized by both this Court and the district courts of appeal in circumstances where an immediate date, as distinguished from a future date, is the proper presumptive release date. The writ of mandamus is inadequate to provide a prompt, effective and complete remedy under such circumstances. Accordingly, the respondents submit that the decision of the district court of appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail, to ENOCH J. WHITNEY, ESQ. and DORIS E. JENKINS, ESQ., Counsel for Petitioners, Florida Parole and Probation Commission, 1309 Winewood Blvd., Bldg. 6, Tallahassee, Florida 32301, this 19th day of July, 1985.

Louis G. Carres

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