IN THE SUPREME COURT OF FLORIDA

THE FLORIDA PAROLE COMMISSION,

Petitioner,

vs. **Case No. SC06-1252**
L.T. No. 1D05-3506

JOSEPH ROBERT SPAZIANO, DC# 115223,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

On review from a decision of the
District Court of Appeal, First District of Florida

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PRELIMINARY STATEMENT

The Respondent, Joseph Robert Spaziano, will be referred to as "Spaziano" or the "Respondent" in this brief. Petitioner, the Florida Parole Commission, will be referred to either as the "Petitioner" or "the Commission".

STATEMENT OF THE CASE AND THE FACTS

1. Spaziano is currently incarcerated in Taylor Correctional Institution serving a Life sentence for Forcible Carnal Knowledge and a consecutive 5 year sentence for Aggravated Battery imposed in 1975, (FPC App. Exh. A) and was further sentenced in 1998 to a concurrent 23 year sentence for Second Degree Murder. (FPC App. Exh. B)

2. On October 24, 2004, Spaziano, submitted a Petition for Writ of Mandamus before the Second Judicial Circuit challenging the aggravators used in establishing his presumptive parole release date as unwarranted and/or excessive. Under "Relief Sought" Spaziano requested that the Commission be directed to respond, the matter be set for hearing, and a writ of mandamus be issued directing the Commission to correct Spaziano's presumptive parole release date. (FPC App. Exh. C)

3. On December 28, 2004, the Commission responded to the Petition asserting that Spaziano's violent history was highly relevant in

determining parole suitability and the Commission properly assessed these factors in arriving at the aggravators. In addition, the Commission argued that Spaziano's challenge to a PPRD established in 1999 should be barred under the doctrine of laches as he waited five years before presenting his claim. (FPC App. Exh. D)

4. On January 7, 2005, Spaziano submitted a Reply, again arguing that the aggravating factors should be stricken as unwarranted and/or excessive. Spaziano also argued that the Petition should not be viewed as untimely. (FPC App. Exh. E)

5. On June 24, 2005, the Honorable Jonathan Sjostrom of the Second Judicial Circuit in and for Leon County, Florida entered an Order Denying Mandamus relief. (FPC App. Exh. F)

6. On November 22, 2004, the lower court directed the Department of Corrections to place a lien on Spaziano's trust account for $280.00 for court costs and fees as Spaziano had been declared indigent by the court's clerk. (FPC App. Exh. G)

7. On January 27, 2005, Spaziano submitted a Motion to Vacate the lien order asserting his filings should be exempt from court ordered liens pursuant to Florida Statute §57.085(10). (FPC App. Exh. H) Spaziano's Motion was denied on February 8, 2005 with the lower court determining

that he had not timely sought relief from an interlocutory judgment. In the denial, the lower court explained that challenges to administrative actions of the Commission are not collateral criminal proceedings, like gain-time forfeiture cases have been established to be by case law. The court also offered that even if the mandamus petition was considered a collateral criminal proceeding, Florida Statute §28.246(4), now provided for periodic payments and the imposition of a lien on Spaziano's inmate bank account was a valid method of collecting the payments.

8. On July 21, 2005, Spaziano filed a Petition for Writ of Certiorari. (FPC App. Exh. I)

9. On June 13, 2006, the First District Court of Appeal issued a "CORRECTED" Opinion, per curiam, stating, in part: (FPC App. Exh. J)

> We, however, agree that the lower court departed from the essential requirements of law by denying petitioner's motion for relief from the order imposing a lien on his prison trust account for the purpose of covering his appellate costs. In our judgment, a petition for writ of mandamus challenging a PPRD is a "collateral criminal proceeding." In Schmidt v. Crusoe, 878 So.2d 361, 367 (Fla. 2003), the supreme court concluded "that a gain time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding because the end result is the same – the inmate's time in prison is directly affected." Under such circumstances, the general indigency statute, section 57.01, Florida Statutes, applies.
>
> Although this court has not specifically addressed the question whether the collateral criminal proceeding exclusion from the imposition of a lien on a prisoner's trust account applies to challenges to actions of the Parole Commission, the

> Fourth District Court of Appeal in Thomas v. State, 904 So. 2d 502 (Fla. 4th DCA 2005), has. Thomas decided that a mandamus challenge to the parole statutes is a collateral criminal proceeding exempt from the section 57.085, Florida Statutes, prison lien provision. We are of the same opinion.

10. This case, and case no. SC06-1328, followed the above denial. However, the cases were previously stayed pending the resolution of McNeil v. Cox, 997 So.2d 343 (Fla. 2008).

STATEMENT OF THE ISSUE

WHETHER A CHALLENGE TO A DISCRETIONARY PAROLE DECISION WHICH DOES NOT AFFECT THE LENGTH OF TIME AN INMATE WILL SPEND IN PRISON IS A COLLATERAL CRIMINAL PROCEEDING FOR PURPOSES OF FILING FEE REQUIREMENTS.

SUMMARY OF THE ARGUMENTS

The Circuit court originally held that the mandamus challenge to parole was not a "collateral criminal proceeding." The District Court overturned this ruling, holding that Spaziano's challenge to the parole decisions of the Commission was in fact a "collateral criminal proceeding" for purposes of filing fee requirements. The Court certified the question to this Court.

This Court's decision in McNeil v. Cox, 997 So.2d 343 (Fla. 2008) held that "all claims that, if successful, will directly affect 'the length of time the inmate will actually spend in prison' …[are] 'collateral criminal proceedings'." Discretionary parole decisions of the Commission will not

'directly affect the length of time the inmate will actually spend in prison.' The Commission's decisions will not change the life sentence given to Spaziano by the courts.

ARGUMENT

For conclusions of law, the Court reviews the decision *de novo*. Thomas v. Florida Parole Commission, 963 So.2d 777, 778 (Fla. 1st DCA 2007). As such, this Court is not required to pay any deference to the lower court's decision. Walter v. Walter, 464 So.2d 538 (Fla. 1985).

Upon filing the Petition for Writ of Mandamus in the Circuit Court, Spaziano was declared indigent and in accordance with Florida Statute § 57.085, a lien was placed on his prison account in the amount of $280.00. Spaziano suggests that his mandamus action challenging his presumptive parole release date (PPRD) was a collateral criminal proceeding and therefore, under Florida Statute 57.085(10) no fees or costs should have be assessed on his filing citing to Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003) and Cason v. Crosby, 892 So.2d 536 (Fla. 1st DCA 2005).

Florida Statute § 57.085, authorizes clerks of courts to require prisoners, who do not have funds available to pay the full court fees, to make an initial partial payment and have the Department of Corrections place a lien on the inmate's account for the balance. Subsection 10 of Florida Statute

§57.085 specifically states "This section does not apply to a criminal proceeding or a collateral criminal proceeding."

This Court in Schmidt, *supra,* examined the prisoner indigency statute and held an inmate challenge to a prison disciplinary report resulting in a loss of gain time was analogous to a collateral criminal proceeding because gain time was part of the computation of the criminal sentence. Id. at 366-367. The court concluded that to avoid, "an unlawful 'chilling' of a criminal defendant's right to challenge his overall sentence length," a gain time challenge should be considered to be a type of collateral criminal proceeding and the prisoner indigency statute should not apply. Schmidt at 367, *quoting* Geffken v. Strickler, 778 So.2d 975, 977 n.5 (Fla. 2001).

The District Court followed the Schmidt decision in Cason v. Crosby, 892 So.2d 536 (Fla. 1st DCA 2005), and vacated an order placing a lien on an inmate account because the petition challenging a loss of gain-time following a disciplinary report was a collateral criminal proceeding and a lien on prisoner accounts was only authorized for the filing of civil lawsuits.

Spaziano suggests that a petition challenging the establishment of a PPRD should also be viewed as a collateral criminal proceeding and no fees or liens should be assessed on him as an indigent. The Fourth District Court of Appeal apparently agreed with Spaziano's view in Thomas v. State, 904

So.2d 502 (Fla. 4th DCA 2005). In Thomas, an inmate challenged a circuit court's decision to treat his Motion to Correct an Illegal Sentence challenging both his criminal sentence and parole statutes as a mandamus petition. The Court determined that the inmate had not demonstrated he received an illegal sentence and the challenge to a parole statute was properly brought as a mandamus action. Id. The Court in Thomas, went on to state based on Cason v. Crosby, *supra*, that the lower court erred in requiring the inmate to comply with the indigency requirements because collateral criminal proceedings were exempt from the prisoner indigency statute. Id. The indigency issue was not raised on appeal and the Fourth District Court of Appeal made its determination without the benefit of briefing by the parties.

Parole proceeding are different from disciplinary proceedings and other actions pertaining to gain time because parole is discretionary, separate and distinct from the court imposed sentence. The United States Supreme Court in Wilkinson v. Dotson, 125 S.Ct. 1242, 161 L.Ed. 253 (2005) recognized the distinction between sentencing and parole matters. In Dotson, two Ohio prisoners sought declaratory and injunctive relief under 42 U.S.C.S. §1983 asserting that parole officials improperly concluded that inmate Dotson should not have a parole hearing for at least another five

years and inmate Johnson was not suitable for parole at that time. Id at 1244-1245. Ohio officials moved to dismiss the action claiming that Spaziano's only available remedy was through a petition for writ of habeas corpus because the lawsuits "in effect, collaterally attacked the *duration* of their confinement". Id. at 1246. The Court rejected the state's supposition finding:

> A consideration of this Court's case law makes clear that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.

Id. at 1247. The Court in Dotson contrasted cases dealing with restoration of good-time credits which in effect demand an earlier release from confinement and thus lie at the "core" of habeas corpus proceedings. Parole proceedings however, the Court reasoned, do not invalidate or necessarily shorten a court-imposed sentence and therefore did not lie at the core of habeas corpus proceedings. Success for the Ohio litigants would not necessarily mean a speedier release, as the most relief they could receive were new parole hearings. Id. at 1248. The Court found Ohio's contention that parole review was an "aspect" of sentencing unpersuasive. Id . at 1249.

Similarly, the District Court has recognized that habeas corpus relief is not available to challenge parole determinations because a successful litigant would not be entitled to immediate release, but at most, a new parole review.

In Williams v. Florida Parole Commission, 625 So.2d 926, 934 (Fla. 1st DCA 1993), the Court found that mandamus was the appropriate method of challenging suspension of a presumptive release date, stating:

> It is now well settled that the Parole Commission's suspension of [a] PPRD is properly reviewable by mandamus filed in an appropriate circuit court, with the right to appeal to the district court of appeal . . . Although the proper remedy to obtain review of a Commission's decision *after* it has set an EPRD is by habeas corpus for release, a Commission order suspending an inmate's PPRD and thereby refusing to set an EPRD is appropriately reviewed by mandamus. *Griffith; Pannier v. Wainwright,* 423 So.2d 533, 534 (Fla. 5th DCA 1982)
>
> **Review by mandamus does not authorize the court to substitute its judgment for the Commission's delegated discretion under section 947.18 and order the inmate released on parole, because the writ of mandamus may only order the Commission to reconsider its decision and the petitioner's eligibility for parole. .**

Williams, at 934 (emphasis in original).

Similarly in Myers v. Florida Parole and Probation Commission, 705 So.2d 1000 (Fla. 4th DCA 1998), the Fourth District Court of Appeal stated:

> Mandamus is the proper remedy for challenging the Commission's refusal to set an EPRD. On a petition for writ of mandamus, the circuit court must determine whether the Commission complied with the applicable statutes and administrative rules. The court cannot order the prisoner's release; it can only require that the Commission reconsider parole in conformance with those rules and statutes. *See Williams v. Florida Parole* Commission, 625 So.2d 926, 934 (Fla. 1st DCA 1993)

See also Sheley v. Florida Parole Commission, 720 So.2d 216 (Fla. 1998), *aff.* 703 So.2d 1202 (Fla. 1st DCA 1997) (a parole eligible inmate's challenge to the Commission's action in suspending his presumptive parole release date and declining to authorize an effective parole release date is properly reviewable by mandamus and further review by the appellate court should be through certiorari as opposed to an appeal.)

In proceeding below, Spaziano filed a Motion to Vacate the Order imposing the lien. The circuit court denied the motion finding it was not timely filed and noted that the Schmidt, *supra* and Cason, *supra,* cases were not persuasive as they dealt only with loss of gain-time due to disciplinary proceedings. The court also noted that Florida Statute §28.246(4) authorized the court to accept partial payments and a lien on an inmate account was a valid way of entering Spaziano into the payment plan.

The District Court considered the Circuit Court's argument in its decision reversing the lien. Specifically, the District court referenced its certified question in Cox v. Crosby, 31 Fla. L. Weekly D 310 (Fla. 1st DCA 2006). This Court rephrased the question in Cox as:

> Does the holding in Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003), extend to all gain time actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien on the inmate's trust account to recover applicable filing fees?

McNeil v. Cox, 997 So.2d 343, 344 (Fla. 2008).

Actions affecting gain time have an actual and direct affect on the length of an inmate's sentence. Case law developed over the past two years or so has determined that inmates challenging these types of actions are not subject to the prisoner indigency statute, § 57.085, Fla. Stat., but are subject to the general indigency statute, § 57.081, Fla. Stat. *See* Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003); and Schmidt v. McDonough, 951 So.2d 797 (Fla. 2006). This case law was extended in this court's opinion in McNeil v. Cox, 997 So.2d 343 (Fla. 2008) to apply to all gain time actions.

However, this does not answer the question as to whether challenges to the discretionary parole decisions of the Florida Parole Commission are collateral criminal proceedings or not. This Court has throughout maintained that the Department of Corrections, and its policies and procedures, is a separate and distinct agency from the Commission. Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997).

Furthermore, the Courts have drawn a distinct line between the actions of the Commission which may result in immediate release, and should be filed as a habeas petition, and those actions which will not result in immediate release and should be filed as a mandamus petition. Parole decisions should be filed as mandamus petitions since a grant of relief, for instance ordering the

Commission to recalculate a presumptive parole release date, would not necessarily result in any release and it certainly will not affect the length of the sentence the inmate received in his or her original conviction. *See* Kirsch v. Florida Parole & Probation Commission, 425 So.2d 153, 154 (Fla. 1st DCA 1983).

Release from prison to parole supervision is not a matter of right, it is a matter of legislative grace. Cochran v. State, 476 So.2d 207 (Fla. 1985). Section 947.002(6), Florida Statutes states that, "it is the intent of the Legislature that the decision to parole an inmate from the incarceration portion of his sentence is an act of grace of the state and shall not be considered a right." If sentenced to life in prison, any release earlier would be discretionary.

Additionally, unlike gain time, there are no liberty interests in parole. Losses to gain time have specific procedural due process rights. *See* Osterback v. Crosby, 16 Fla. L. Weekly Fed. D 513 (N.D. Fla. 2003). Revocation of parole has due process rights. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

However, parole itself does not have any due process rights. In Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir. 1994), the Eleventh Circuit Court of Appeals, in an *en banc* decision, considered the ramification of

language in the Georgia statute which is identical to that incorporated into Section 947.18 of the Florida Statutes. The Court stated:

> ...Where the statute or regulation creates a presumption that release will be granted upon a finding that the substantive predicates have been met, a liberty interest in parole exists...
>
> We do not find such a mandate in the Georgia statutes and regulations. Neither the relevant statutes nor the Guidelines contain any language mandating the outcome that must be reached after application of the specified procedures. Conversely, the Georgia statutes actually create a presumption against parole. Section 42-9-42, O.C.G.A., provides that "[n]o inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, 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." O.C.G.A. Section 42-9-42(c). This section must be read as a qualification of section 42-9-40, the provision requiring adoption of the parole guideline system. Thus, while the legislature has required the Board to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also has maintained the authority of the Board to use its discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the Guidelines criteria is met.

Id. at 1501-1502 (footnotes omitted). The Eleventh Circuit Court of Appeals concluded as follows:

> The district court found that Georgia's parole system does not create a liberty interest in parole implicating the protections of the Due Process Clause. Georgia's parole system contains a statutory presumption against parole and fails to limit meaningfully the discretion of state officials. We therefore agree with the district court that Georgia inmates do not have a legitimate expectation of parole. Because the protections of the Due Process Clause do not arise without a protectable liberty interest, the district court properly granted summary judgment to the Board.

Id. at 1503 (emphasis added). *See also* Stanton v. Wainwright, 665 F.2d 686 (5th Cir.), *cert. denied*, 456 U.S. 909, 102 S.Ct. 1757, 72 L.Ed.2d 166 (1982).

In Damiano v. Florida Parole and Probation Commission, 785 F.2d 929, 931 (11th Cir. 1986) the Court held that Petitioner's claims with respect to the salient factor score and aggravating factors do not rise to the level of a constitutional violation. Specifically, the Court stated:

> Section 947.002 specifically provides that parole is granted only when the Commission finds a reasonable probability that a prisoner will live as a respectable law-abiding person, that he will be suitably employed and that his release is compatible with the best interests of society and himself. Thus, even though the PPRD is binding on the Commission, (citations omitted) it does not create a liberty interest or require due process protections.

Id. at 931-932. In the absence of a liberty interest, no rights arise. Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981).

The mandamus petition filed in the circuit court, therefore, should not be viewed as a collateral criminal proceeding, as the relief sought has no bearing on Spaziano's criminal conviction. The mandamus action filed sought to compel the Florida Parole Commission to reevaluate its discretionary determination. As in the case of Dotson, *supra,* any connection to an earlier release is too tenuous to create a presumption that

the criminal sentence would be impacted. The circuit court, therefore, properly found that the mandamus petition was not a collateral criminal proceeding and imposition of fees and costs was authorized by Florida Statute §57.085(4) and (5).

CONCLUSION

Gain time is significantly different from parole. The decision in McNeil v. Cox should not be applied like a blanket over all prisoner actions, like parole challenges, without more consideration or the purpose and intent of § 57.085, Fla. Stat. will be nullified.

Based on the foregoing arguments and citations of legal authorities, Petitioner respectfully urges this Honorable Court to overrule the District Court's decision setting aside the lien imposed by the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing was furnished by U.S. Mail to **Terrence E. Kehoe**, Law Offices of Terrence E. Kehoe, Tinker Building, 18 West Pine Street, Orlando, Fl 32801 and **James M. Russ**, Law Officers of James M. Russ, P. A., Tinker Building, 18 West Pine Street, Orlando, Fl 32801, this_____ day of August , 2009.

_____
SARAH J. RUMPH
General Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT the instant pleading was produced in Times New Roman, 14-point font.

_____
SARAH J. RUMPH
General Counsel