**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.**
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# PETITIONER'S BRIEF ON JURIDICTION

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**On petition for discretionary review from a decision of the District Court of Appeal, First District of Florida**

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## PRELIMINARY STATEMENT

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

## 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 five (5) year sentence for Aggravated Battery imposed in 1975, and was further sentenced in 1998 to a concurrent twenty-three (23) year sentence for Second Degree Murder.[1]

2. On October 24, 2004, Spaziano, submitted a Petition for Writ of Mandamus before the Second Judicial Circuit in and for Leon County, Florida 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.

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

[1] (*See* http://www.dc.state.fl.us/InmateInfo/InmateInfoMenu.asp)

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.

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 because he is "seeking review of the February, 24, 2004, establishment of his PPRD, not the 1999 Commission action".

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.

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. [2]

7. On January 27, 2005, Spaziano submitted a Motion to Vacate the lien order asserting his filings should be exempt from court ordered liens

[2] *See* http://cvweb.clerk.leon.fl.us/

pursuant to Florida Statute §57.085(10). 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.[3]

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

> 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

[3] *See* http://199.242.69.70/pls/ds/ds_docket_search?pscourt=1

> 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

**THIS COURT SHOULD ACCEPT DISCRETIONARY JURIDICTION IN THIS CASE BECAUSE McNEIL V. COX, 997 So.2d 343 (Fla. 2008) IS NOT CONTROLLING IN THIS CASE.**

## 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

Pursuant to Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, the District court expressly stated that the issue presented a question of great public importance. Specifically, in this case, 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).

## 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 accept discretionary jurisdiction in this case.

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.

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SARAH J. RUMPH
General Counsel