

**IN THE SUPREME COURT OF FLORIDA**

**FLORIDA PAROLE COMMISSION,**

**Petitioner,**

**vs.**

**SC11-**

**L.T. CASE NO.: 1D11-2081**

**ROBERT TAYLOR, DC #337117,**

**Respondent.**

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**PETITIONER'S BRIEF ON JURISDICTION**

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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 either “Petitioner” or “the Commission” in this brief. Respondent, Robert Taylor, will be referred to as the “Respondent”.

### **STATEMENT OF THE CASE AND THE FACTS**

1. The Respondent is currently incarcerated in Madison Correctional Institution, Florida Department of Corrections.

2. On or about December 8, 2010, the Respondent filed a Petition for Writ of Habeas Corpus in the Circuit Court of the Third Judicial Circuit, in and for Madison County, case number 2010-588-CA, challenging the revocation of his conditional release by the Commission.

3. The Third Judicial Circuit Court entered its Order Denying Writ of Habeas Corpus.

4. On or about April 19, 2011, the Respondent sought further review by filing a Petition for Writ of Certiorari in the District Court of Appeal, First District of Florida, case number 1D11-2081.

5. On October 6, 2011, the District Court issued its opinion granting the Petition for Writ of Certiorari, quashing the lower court’s order denying habeas relief. (Appendix, Exhibit A)

6. Following the Order of the First District Court of Appeal, the Circuit Court issued an Order to Show Cause,<sup>1</sup> stating, in part,

THIS CAUSE comes before this Court upon the First District Court of Appeal's mandate reversing this Court's "Order Denying Petition for Habeas Corpus" issued on March 17, 2011. Upon consideration of the mandate, the record, and the applicable law, this Court finds and concludes as follows:

On December 6, 2010, the Petitioner filed a habeas petition arguing that the FPC "abused its discretion" by disregarding the recommendations of his conditional release officer and the parole examiner. The Petitioner maintained that it was improper for the FPC to disagree with the recommendations without offering a basis for its decision.

Accordingly, on January 3, 2011, this Court directed the FPC to respond to the petition. In its response, the FPC argued that the finding of a willful violation was supported by competent and substantial evidence, namely the Petitioner's own admission. Furthermore, the FPC emphasized that it was well within its discretion in rejecting in a non-binding recommendation from the parole hearing examiner.

Upon receipt of the response, this Court concluded that it was bound by the precedent that the FPC is within its discretion to reject a parole hearing examiner's *recommendation* of reinstatement of conditional release. This Court reasoned:

The finding of a willful violation by the Petitioner was supported by competent and substantial evidence, namely the Petitioner's own admission. Second, although the FPC is prohibited from reweighing evidence elicited during the violation hearing and come to a different factual determination, such was not the situation here. Instead, the FPC merely chose not to accept a non-binding recommendation from the parole hearing examiner.

*Order Denying Petition for Habeas Corpus.*

Thus, because the violation was found supported by evidence and because the FPC did not reweigh this evidence, citing Lopez v.

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<sup>1</sup> A Motion to Stay is pending.

Florida Parole Commission, this Court held that FPC failure to follow the examiner's recommendation did not constitute an "abuse of discretion." See Lopez v. Florida Parole Commission, 943 So.2d 199 (Fla. 1st DCA 2006) (Petitioner failed to show that he was denied his procedural due process rights, or that trial court failed to observe the essential requirements of law, when it denied petitioner relief from Parole Commission's decision denying petition to restore conditional release supervision, although Commission rejected hearing examiner's non-binding recommendation to restore conditional release supervision, where Commission accepted hearing examiner's finding of guilt, upon petitioner's admission of guilty but rejected examiner's recommendation).

Upon certiorari review, the First District Court of Appeal (First DCA) concluded that "under the facts of this case as determined by the parole examiner, the Commission abused its discretion in revoking Petitioner's supervision, resulting in a miscarriage of justice." *First DCA Mandate*. Accordingly, the First DCA quashed this Court's January 3, 2011 Order, and remanded for expedited reconsideration.

Although not explicitly stated in the opinion, due to its standard of review, this Court assumes the First DCA concluded that this Court failed to observe the "essential requirements of law." To reach this conclusion, the First DCA determined that, under the facts presented, the FPC's decision to reject the parole examiner's recommendation constituted an "abuse of discretion." However, the opinion fails to adequately explain why this case is materially distinguishable from past precedent. As explained in this Court's previous Order, in cases where the DCAs have reversed circuit courts on similar issues, the FPC or the Court has improperly re-weighed the factual findings of the parole examiner. See Ellis v. Florida Parole Com'n, 911 So.2d 831, 833 (Fla. 1st DCA 2005) (emphasis added) ("The FPC may not reject a *factual* finding of the hearing officer unless it reviews the entire record and states its determination that the finding is not based on competent substantial evidence."); Tedder v. Florida Parole Com'n, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003) ("In this case, it is apparent that the Parole Commission merely reweighed the evidence considered by the examiner, finding that evidence sufficient to satisfy it that Tedder had moved on August 3, as alleged. Because it is also apparent that the examiner's finding to the contrary was supported by competent, substantial evidence, the Parole Commission was not permitted to disregard the examiner's finding in favor of its own, and

to revoke Tedder's conditional release on that basis."); compare Lopez, 943 So.2d at 200 ("[Here,] [t]he Commission accepted the hearing examiner's finding of guilt upon the petitioner's admission of guilt, but the Commission elected to revoke conditional release supervision. The petitioner misplaces his reliance on the materially distinguishable holding in Ellis v. Fla. Parole Com'n, 911 So.2d 831, 832-33 (Fla. 1st DCA 2005), in which the Commission improperly rejected the hearing officer's factual determination that Ellis' violation was not willful (which was supported by competent substantial evidence) and made its own determination that Ellis had acted willfully and, thus, had violated conditional release. The petitioner has not met his extraordinary burden to show that the circuit court denied him procedural due process and failed to observe the essential requirements of law.").

However, such was not situation presented. Here, both the hearing officer and the parole examiner found that the Petitioner willfully and substantial violated the terms of his release. Despite this, due to good behavior, they recommended that conditional release be reinstated. Thus, the FPC did not re-weigh the factual findings of the parole examiner and, instead, simply disagreed with the recommendations and concluded revocation was proper. See Lopez, 943 So.2d at 200.

This Court is unable to find a case where the refusal to follow a nonbinding recommendation constitutes an abuse of discretion. Therefore, in concluding that despite there being a willful violation, the FPC's failure to follow the parole examiner's recommendation constituted an abuse of discretion, the First DCA opinion seems to have greatly expanded the scope of judicial review of agency action.

*(footnotes omitted)*

7. The Commission submitted its Notice to Invoke the Discretionary Jurisdiction of this Court soon after the denial of its Motion for Rehearing by the First District Court of Appeal on November 30, 2011. (Appendix, Exhibit A)

## **STATEMENT OF THE ISSUE**

**THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION IN THIS CASE WHERE THERE IS A DIRECT CONFLICT IN THE COURTS CREATED BY THE DISTRICT COURT'S OPINION EFFECTIVELY ANNOUNCING A NEW STANDARD OF REVIEW.**

## **SUMMARY OF THE ARGUMENT**

The opinion of the First District Court of Appeal states that the Florida Parole Commission, a state agency, abused its discretion in revoking the supervision of a conditional releasee for using an illegal drug simply because the hearing examiner recommended reinstatement of the supervision instead of revocation. This ignores the fact that under precedent from this Court, the First District Court of Appeal should not have treated the certiorari petition as a second plenary appeal. The district court greatly exceeded its scope of review in granting the writ of certiorari.

## **ARGUMENT**

For this Court to accept discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, it must be established that the decision of the district court “expressly and directly conflict[s] with a decision of another district court of appeal or of the supreme court on the same question of law.”

The First District Court of Appeal created direct conflict by stating, “[w]e find that under the facts of this case as determined by the parole examiner, the



Commission abused its discretion in revoking Petitioner’s supervision, resulting in a miscarriage of justice.” (See Appendix) The initial issue is that the district court analyzed the facts of the particular case. Second, it analyzed those facts, as determined by the parole examiner; the parole examiner was the trial court for purposes of these proceedings. Third, it determined that the Commission abused its discretion in revoking the inmate’s conditional release supervision. Fourth, and finally, it held that this abuse of discretion resulted in a miscarriage of justice. Each phrase of this statement, taken separately and together, “expressly and directly” conflicts with multiple opinions.

First and foremost, this opinion directly contradicts the opinion of this Court in Sheley v. Florida Parole Commission, 720 So.2d 216 (Fla. 1998). Sheley, *supra*, started in the Circuit Court as a petition for a writ of mandamus challenging the Commission’s decisions involving presumptive parole release dates. Id. When the decision of the circuit court was appealed to the district court, the district court treated it as a petition for a writ of certiorari instead of as an appeal. Id. at 217. This was based on the Florida Rules of Appellate Procedure, Rule 9.030, which states that certiorari jurisdiction may be involved for review of orders of circuit courts acting in their review capacity. Id. The reasoning for this was because the inmate already had a full review of the merits of the Commission’s actions via the extraordinary writ petition, and he or she should not be allowed a second chance to

argue the entire merits of the Commission's actions in another action. Id. One appeal was the limit. Id. This Court upheld the district court's interpretation that the case properly proceeded as a certiorari petition. This standard of review was recently reaffirmed by this Court in Sutton v. State, 975 So.2d 1073, 1078 (Fla. 2008).

The limits of certiorari review were again set out by this Court in Williams v. Oken, 62 So.3d 1129, 36 Fla. L. Weekly S202 (Fla. May 5, 2011), whereby this Court stated that certiorari review should not be used to determine the sufficiency of the evidence. In Williams v. Oken, 23 So.3d 140, 143 (Fla. 1st DCA 2009) the First District Court of Appeal found that a particular doctor could not provide the particular expert testimony requested and granted a certiorari petition which overturned the lower court's denial of a motion to dismiss. This Court found that the First District Court abused its discretion in granting certiorari where there was no violation of a clearly established principle of law. Williams, 62 So.3d 1129.

Since the case at hand came before the district court for certiorari review, then the district court was limited in the scope of review established by Florida precedent. This means that the district court must determine if the circuit court either denied due process or departed from the essential requirements of the law. See Sheley, 720 So.2d at 217-18. Instead, the district court in this case conducted a de novo review by reanalyzing the facts of the case. The district court did the

circuit court's duty. It was the circuit court's duty, in its appellate capacity, to analyze the Commission's action under the less stringent standard of review. The district court's review under certiorari should have been even narrower.

As the First District Court of Appeal stated in its opinion in Sheley v. Florida Parole Commission, 703 So.2d 1202, 1206 (Fla. 1st DCA 1997), the first review of the administrative agency action completed by the circuit court is on the merits. The district court review then "by certiorari [is] under a more restrictive standard of review." Id. The district court then concluded by finding that the circuit court "properly fulfilled its appellate function."

This is not the standard that it followed in the case at bar. In the instant case, the district court reviewed the "facts of [the] case" as those facts were "determined by the parole examiner," two steps below it, and then stepped in the shoes of the circuit court and made the finding that "the Commission abused its discretion." (Appendix) This Court in Williams, 62 So.3d at 1133, quoted Globe Newspaper Co. v. King, 658 So.2d 518, 520 (Fla. 1995), stating that, "certiorari review is appropriate to determine whether a court has conducted the evidentiary inquiry required...but not so broad as to encompass review of the sufficiency of the evidence considered in that inquiry." The district court went too far outside its scope of review.

The district court also held that there was a miscarriage of justice, hinting at a departure from the essential requirements of the law, although it did not expressly state that the circuit court so departed. (Appendix) As the circuit court correctly stated in its subsequently issued order to show cause, the essential requirements of the law is that the Commission is required to accept findings of fact made by the parole examiner, but not recommendations (See above). In this case, the Commission did not reject the facts as determined by the parole examiner, only the recommendation.

The Fourth District Court of Appeals stated in Florida Parole Commission v. Chapman, 919 So.2d 689, 690-691 (Fla. 4th DCA 2006), *rev. den.* 941 So.2d 367 (Fla. 2006):

While the trial court is generally correct that an agency may not reject the factual findings of a “hearing officer” except when they are not based upon competent substantial evidence, that rule has no application to the recommendations of a parole examiner... Nothing in the administrative rules or in the statute binds the Commission to “findings of fact” or requires the parole examiner to make findings of fact. Therefore, the Commission is not bound by any determinations of the parole examiner.

In Lopez v. Florida Parole Commission, 943 So.2d 199 (Fla. 1st DCA 2006), *rehearing den.*, the court held that hearing examiner’s recommendation to restore the offender to supervision or revoke the supervision is a recommendation, and not a finding of fact. Therefore, the Commission could reject the hearing examiner’s non-binding recommendation of restoration to supervision. Id.

For the district court to state now, via the opinion it issued, that to reject the recommendation of the hearing examiner is a departure from the essential requirements of the law, changes the law as it currently stands. It gives more weight to the examiner's recommendations than what was given previously and it allows for more extensive circuit court review of the recommendations and the Commission's, or any agency's, review of such recommendations.

### **CONCLUSION**

The decision of the First District Court in this case expressly and directly conflicts with the decisions of this Court and the Fourth District Court of Appeal.

Based on the foregoing arguments and citations of legal authorities, the Commission 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 *pro se* Respondent: **Robert L. Taylor, DC# 337117**, Madison Correctional Institution, 382 SW MCI Drive, Madison, Florida 32340 on this \_\_\_\_\_ day of December, 2011.

\_\_\_\_\_  
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