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IN THE CIRCUIT COURT OF THE STATE OF FLORIDA
FOR THE SECOND CIRCUIT IN AND FOR LEON COUNTY

CROSLEY ALEXANDER
GREEN, DC #902925

Petitioner.

v.

CASE NO. ______________

FLORIDA COMMISSION ON OFFENDER REVIEW

Filed pursuant to Fla. R. App. Proc. 9.100(f)

Respondent.

____/

PETITION FOR WRIT OF MANDAMUS

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Pursuant to Rule 1.630 of the Florida Rules of Civil Procedure, and Rule 9.100 of the Florida Rules of Appellate Procedure, Petitioner, Crosley Alexander Green, respectfully petitions this Court for a writ of mandamus compelling the Florida Commission on Offender Review (the Commission) to compute his Presumptive Parole Release Date (PPRD) in compliance with the law and to begin the Effective Parole Release Date (EPRD) process immediately.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission abused its discretion and failed to follow its own rules three times now on Mr. Green's parole eligibility. Mr. Green was convicted of felony murder, with the underlying felony offenses of that murder conviction being kidnapping and robbery. Yet the Commission improperly extended Mr. Green's PPRD date by using Mr. Green's underlying kidnapping convictions as aggravating factors on top of his felony murder conviction. The mistake arbitrarily and capriciously added 45 years to Mr. Green's PPRD. Mr. Green is now in his sixties. If the Court does not correct the Commission's mistake now, Mr. Green, who has been a model inmate, is more likely to die in prison than he is to get a chance at parole. "While there is no absolute right to parole," Mr. Green

certainly has “a right to a proper consideration for parole.” *Moore v. Fla. Parole & Probation Comm'n*, 289 So.2d 719, 720 (Fla. 1974). The Commission has denied Mr. Green that right.

The Commission also abused its discretion when it refused without any explanation to apply its own Rule 23-21.013(3) requiring a new setting of Mr. Green’s PPRD after he exited and reentered incarceration. Mr. Green has always maintained his innocence and, following its prior ruling that Mr. Green had been wrongfully convicted, a U.S. federal court in 2021 ordered him released from prison. That ruling was overturned on appeal and, after exhausting his appeals, Mr. Green surrendered back to the State of Florida and was re-incarcerated in April of 2023. The Commission has twice now entirely overlooked the direct applicability to its own Rule 23-21.013(3) that, because Mr. Green “exit[ed]” incarceration for two years, require it to reset Mr. Green’s PPRD, and to set it correctly without over-aggravating the underlying felonies of Mr. Green’s felony murder count.

But there is even more evidence of the Commission’s arbitrariness. At the November 8, 2023 hearing, the Commission Chairwoman, Melinda N. Coonrod, voted in dissent to grant the full

relief Mr. Green requested, and, recognizing the inconsistent treatment of Mr. Green's case, even identified on the record the legal precedent that confirms the Commission's actions were arbitrary and capricious:

> Based on what we've done in the past, especially on *Taylo*r *Wells*, my vote would be to remove the firearm aggravation one, which is 60 months[,] and remove aggravation number three in the amount of 480 months. That would be a total of 540 months that would be removed.

App. 39.

The Commission Chairwoman was right. The time to fix the Commission's mistakes is now. This Petition should be granted.

NATURE OF RELIEF SOUGHT

The Commission should be ordered to take the following actions: (i) rescind the inappropriately assessed aggravators for the elements and underlying offenses of felony murder, thereby removing a total of 540 months and setting his PPRD to June 14, 2014, as required by case law and Rules 23-21.010(2)(a), 23-21.010(3), and 23-21.013(3), Fla. Admin. Code; and (ii) to begin the EPRD process immediately. The relief sought is based on the following two independent grounds:

<u>Mandamus Petition Ground 1</u>: The Commission Abused its Discretion by Extending Petitioner's PPRD Based on Underlying Felonies

Under well-settled law and the Commission's own rules and practice, the Commission cannot extend an inmate's PPRD based on aggravating factors that are "element[s] of the crime" or, specifically in the case of felony murder, "the underlying offense(s)." *See* Rules 23-21.010(2)(a), 23-21.010(3), Fla. Admin. Code. In Mr. Green's case, the felonies underlying his conviction for felony murder were two counts of kidnapping and two counts of robbery, none of which could be assessed time by the Commission. But here, the Commission treated underlying felonies in opposite ways: it expressly assessed zero months to both robbery convictions "since they're the underlying felonies," while improperly applying 480 months to the other underlying felonies of kidnapping. App. 6-7. The Commission had no discretion to add time to Mr. Green's PPRD based on any underlying felony or to treat underlying offenses in such dramatically different ways as it did here. If the Commission had properly zeroed out the underlying kidnapping felony as it did the robbery felony, Mr. Green's PPRD would have been July 14, 2014.

<u>Mandamus Petition Ground 2:</u> The Commission Abused its Discretion by Failing to Apply Rule 23-21.013(3) to Establish a New PPRD Because Mr. Green Exited State Custody for Two Years.

Under Rule 23-21.013(3), the Commission was required to recalculate Mr. Green's PPRD in 2023, when he "return[ed] to incarceration" after having left such incarceration for approximately two years. Mr. Green is the rare inmate who was incarcerated by the State but was released from incarceration by a U.S. federal court order in April 2021. By operation of law, this "vacate[d] any established [PPRD]." Rule 23-21.013(3). For the next two years, Mr. Green was able to work, visit family, and attend church, while his federal habeas case wound its way through the appellate courts. When that court order was vacated, Mr. Green surrendered himself to State custody. He "return[ed] to incarceration" in April 2023.

Rule 23-21.013(3) requires the Commission to establish a new PPRD for Mr. Green upon that reincarceration, not continue to use his old, vacated one:

> The exiting of an inmate from the incarceration portion of his sentence … shall vacate any established [PPRD]. *Any subsequent return to incarceration shall require an initial interview to establish a [PPRD].* (emphasis added)

Petitioner has twice requested that the Commission follow its own rules, which the Commission has refused, without explaining why. This Court should direct the Commission to follow its own rules and to set a new PPRD for Mr. Green. And, for the reasons discussed herein, that PPRD should be no later than June 2, 2014.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a writ of mandamus under Article V§5(b) of the Florida Constitution and Rule 9.030(c) of the Florida Rules of Appellate Procedure. Mandamus is proper remedy to challenge a PPRD set by the Commission. *See Johnson v. FPC,* 841 So. 2d 615, 617 (Fla. 1st DCA 2003) (Judicial review is available through the common law writs of mandamus, for review of PPRDs).

TIMELINESS OF PETITION AND EXHAUSTION OF REMEDIES

Under Florida Statute § 95.11(5)(f), a petition for writ of mandamus challenging a PPRD must be sought within one year after the agency action of the Commission became final. *See Lewis v. FPC,* 112 So. 3d 534, 535 (Fla. 1st DCA 2013).

Mr. Green filed his Administrative Appeal on March 17, 2023 asserting Ground One. App. 43-70. He supplemented this with a

letter on June 21, 2023 asserting Ground Two. App. 88-89. He asserted both Grounds in a hearing before the Commission on June 21, 2023, at which the Commission voted to "take no action" on either Ground. App. 9-28. This action was certified June 30, 2023. App. 29.

Mr. Green filed a Request for Proper Consideration on September 8, 2023 reasserting both Grounds, App. 90-139, and again argued both Grounds in a hearing before the Commission on November 8, 2023, at which the Commission majority again voted to "take no action" on either Ground, App. 30-41. This action was certified on November 17, 2023. App. 42.

All of the Commission's actions occurred within one year of the filing of the instant Petition, making the Petition timely. Both Grounds were brought before and voted on by the Commission, making them exhausted. App. 10-18, 31-40.

STATEMENT OF FACTS

Mr. Green's Underlying Conviction and Sentence

1. On September 5, 1990, Crosley Green was convicted of one count of felony murder, two counts of kidnapping, and two counts of armed robbery. App. 140-44, 309-19. He was found to

have robbed two victims at gunpoint, to have transported them to an orange grove and, when one victim produced and fired a gun at him, to have returned fire and killed that victim as the other fled. *See Green v. Sec'y, Dep't of Corr.*, No. 6:14-cv-330, 2018 U.S. Dist. LEXIS 234644, at *2-*4 (M.D. Fla. July 27, 2018), *rev'd*, 28 F.4th 1089 (11th Cir. 2022). Mr. Green maintains his innocence, and on July 20, 2018, his conviction was vacated because the prosecution had suppressed investigative reports implicating the survivor and sole eyewitness as the true perpetrator. *See id.* at *8-*23.

2. In the penalty phase of Mr. Green's 1990 trial, the court ruled that the robberies and kidnappings were both predicate felonies of Mr. Green's murder conviction, and it issued certain jury instructions on that basis. App. 224-34, 293-95. *See also* App. 313-14. Accordingly, the State told the jury, "[H]e committed this murder not just during the felony of robbery but also during the felony of kidnapping, and that kidnapping was not just an adjunct robbery." App. 267-71. Mr. Green was sentenced to death. App. 318. This sentence was vacated due to ineffective assistance of counsel, *Green v. State*, 975 So. 2d 1090, 1109-14 (Fla. 2008), and on August 31, 2009, Mr. Green was resentenced to life

imprisonment, with eligibility for parole, for felony murder, App. 320-25. He was further sentenced to 17 years for all remaining counts, to run concurrently with one another and consecutively to the life sentence. App. 320-25.

3. On April 6, 2021, Mr. Green was released from incarceration pending appeal of a federal court's grant of his habeas petition and began residing with his brother-in-law under the supervision of the U.S. Probation Office's Home Detention program. App. 332-35. On March 14, 2022, his conviction was ordered reinstated, *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089 (11th Cir. 2022), effective on March 8, 2023, and Mr. Green surrendered himself to reincarceration on April 17, 2023, as ordered. App. 336-38.

Mr. Green's Initial Parole Decision

4. Mr. Green's Initial Hearing before the Commission occurred September 23, 2015. App. 4-7. Mr. Green was not present or represented. App. 4. When calculating Mr. Green's PPRD, the Commission assessed 300 months to the felony murder count and identified three aggravating factors. App. 6. It recognized that "counts two and three, robbery with a firearm" were

predicate felonies for the scored offense. App. 6. It therefore applied the "[m]ultiple separate offense" aggravator to these counts but assessed "zero since they're the underlying felonies." App. 6. However, for the predicate kidnapping felonies, the Court applied them as "[m]ultiple separate offense" aggravating factors and assessed 240 months to each count. App. 6-7. For the use of a firearm, the Court applied it as an aggravating factor and assessed 60 months to it. App. 6. This set Mr. Green's PPRD as June 2, 2059. App. 7.

5. The Commission's certified Order on Initial Review of September 29, 2015 (the "2015 Order") reflects the foregoing calculations. App. 8. It contains the note "Certified and mailed by [signature], Commission Clerk," but it does not state to whom it was mailed[1] or at what address. App. 8. As repeatedly explained to the Commission, there is no evidence that Mr. Green received notice of the 2015 Order until March 15, 2023, when his representatives requested it from the Commission. *See* App. 32-33, 100-01. A 2023 public records request revealed that the Commission has no

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[1] By contrast, the Commission's Certified Commission Action on June 30, 2023 adds "1 copy to inmate; 1 copy to institution file; original to Central Office file." App. 29.

record that it had notified Mr. Green of the 2015 Order or the calculations made at the September 23, 2015 Initial Hearing. *See* App. 339-43.

The Administrative Appeal

6. On March 17, 2023, two days after receiving the 2015 Order pursuant to the March 2023 request, Mr. Green through counsel filed an Administrative Appeal (the "Appeal"), accompanied by a cover letter (the "Cover Letter") and supporting materials including the underlying 2015 Order. App. 43-87. It was his first request for review of the 2015 Order.

7. This Appeal began "Pursuant to Section 947.173 … inmate Crosley Green (DC # 902925) administratively appeals the September 23, 2015 action by the [Commission] in which it set Mr. Green's [PPRD] as June 2, 2059 by inappropriately considering aggravating factors, thereby extending Mr. Green's PPRD by 540 months." App. 43. The Cover Letter similarly stated the Appeal "request[ed] the Commission exercise its discretionary authority under Florida Administrative Code Rule 23-21.0051(1) to re-docket Mr. Green's initial setting of parole date in the interest of justice to address an error in the calculation of Mr. Green's [PPRD]." App. 71.

Nowhere in either the Appeal or Cover Letter was there reference to "new information" or the legal authority to reopen a PPRD calculation based on new information. App. 43-87.

8. The Appeal argued that it was improper for the Commission to assess any time to the kidnapping counts because they were predicate felonies of the scored felony murder offense. In support, the Appeal cited Fla. Admin. Code Rule 23-21.010(2)(a) (prohibiting use of "any element of the crime" as an aggravating factor), Fla. Stat. § 947.165 ("Factors used in arriving at the salient factor score and the severity of offense behavior category shall not be applied as aggravating circumstances."), and Rule 23-21.010(3) ("[C]onsecutive sentence(s) for the underlying offense(s) in a felony murder conviction shall be used as an aggravating factor(s), but the number of months assessed for these sentences shall be zero."). App. 43-46.

9. The Appeal further argued it was improper for the Commission to assess any time for use of a firearm "because it is an element of the underlying charge of Felony Murder," again citing Rules 23-21.010(2)(a) & (3). App. 46-47. It also stated that it would have been inappropriate to do so under the Robbery charge

for the same reason, citing Fla. Stat. § 812.13(1) and *Mattingly v. Fla. Parole & Prob. Comm'n*, 417 So. 2d 1163 (Fla. 1st DCA 1982). App. 46-47.

10. Based on an incorrect assumption by counsel, the Cover Letter erroneously stated that the time to appeal the 2015 Order had lapsed, but "urge[d] the Commission to exercise its discretionary power to re-docket Mr. Green's case in the interest of fairness and justice, as this is a clear error that substantially affects Mr. Green's PPRD." App. 71. At the June 21, 2023 hearing on Mr. Green's case, Mr. Green's representatives elaborated on these written arguments, stressing that "for forty years in practice before this agency, … this institution has consistently accepted late appeals" by applying Rule 23-21.0051(1). App. 12-13.

11. By letter dated June 21, 2023, counsel for Mr. Green submitted "additional information in support of the [Commission's] Administrative Appeal" being heard that day. App. 88-89. That additional information cited Commission Rule 23-21.013(3), argued that the Rule applied to Mr. Green's circumstances, and requested that the Commission reset his PPRD accordingly. App. 88-89. At the June 21, 2023 hearing, counsel elaborated that, regardless of

his appeal, Mr. Green's PPRD had already been vacated "by operation of law" under Rule 23-21.013(3) when he was released from incarceration in 2021, and the Commission was required to set a new PPRD that would be "consistent with the arguments made in our administrative appeal." App. 10-12.

The Commission's First and Unanimous "Take No Action" Decision

12. During the June 21, 2023 hearing Mr. Green's representatives made the above arguments regarding the merits of his PPRD determination and his exit from and return to incarceration. App. 10-15. After Mr. Green's representatives concluded their arguments, each Commissioner stated that they considered the Appeal to have been premised on "new information" but found no "new information" presented. App. 16-17. Two Commissioners further stated that they did not believe Rule 23-21.013(3) applied, but they did not explain why beyond attributing the view to Commission legal counsel. App. 16-17. With this as the full extent of their reasoning, the Commissioners voted unanimously to "take no action," with two Commissioners stressing that this was legally distinct from "making no change." App. 16-17.

13. Counsel objected immediately. First, they requested "any more clarity you can provide" why Rule 23-21.013(3) did not apply, to which the Commissioners deferred to Commission legal counsel. App. 17. Second, they pointed out to the Commissioners that the filing was an appeal that "said you've got the law wrong" and nowhere that it was a request for review based on "new information." App. 18. The Chairwoman admitted: "[W]e do know that." App. 18.

14. The Commission's June 30, 2023 Certified Action, headed "Administrative Appeal," stated "the Commission's decision was to take no action in this case in reference to the Administrative Appeal" with no further reasoning. App. 29.

The Request for Proper Consideration

15. On September 8, 2023, Mr. Green filed a request for "Proper Consideration of Administrative Appeal and Appeal Based on New Information" (the 'Request'). App. 90-139. The Request repeated arguments regarding the miscalculation of Mr. Green's PPRD and his exit from incarceration previously made to the Commission in writing and orally. App. 90-93. The Request then elaborated why it was improper for the Commission to disregard

these points and to "take 'no action'" as it had. App. 92, 94. First, there is no basis in law, statute or regulation for the Commission to "take no action" in the absence of a deadlocked vote, and the effect of taking "no action" is not to dispose of the case but to reschedule it for the next hearing. App. 92, 94. Further, because the Administrative Appeal was manifestly a Section 947.173 request for review that the Commission had properly docketed for a vote under Rule 23-21.0051(1), the Commission lacked discretion to rule on the improper basis that it lacked "new information" or to re-docket it under a different legal basis. App. 92, 94-97. Second, Rule 23-21.013(3) indisputably applied and the Commission had yet to provide any reasoning why it did not. App. 97-100.

16. Mr. Green's Request also argued that Mr. Green's 2023 Appeal was timely because he did not receive notice of the 2015 Order until March 15, 2023. App. 100-01. In support, the Request attached evidence that Mr. Green's counsel had submitted a June 2023 public records request for such a notice, and the official search pursuant to that request failed to find any such notice to Mr. Green. App. 100-01, 134-39.

The Commission's Second and Split "No Action" Decision

17. On November 8, 2023, the Commission heard Mr. Green's Request. Mr. Green's representatives repeated the foregoing arguments, explaining the Commission "abused its discretion and failed follow its own rules in 2015" resulting in an "arbitrar[y] and capricious[]" PPRD. App. 31-32. Counsel then presented "two opportunities to fix that mistake." App. 32.

18. First, Mr. Green's representatives asked the Commission properly to consider his Appeal, both because it lacked discretion to rule as it had and because all evidence showed the Appeal to have been timely. App. 32, 36-37. His representatives further demonstrated that both robbery and kidnapping were predicate offenses that could not extend his PPRD. App. 33-35. In support, they cited and quoted from the transcript of Mr. Green's trial, referred to his Presentence Investigation Report, and referred to the Commission's established standards citing the *Taylor Wells* opinion. App. 33-35.

19. Second, Mr. Green's representatives repeated why the exit-reentry rule plainly applied, noting it was "quite troubling" that the Commission's conclusion to the contrary had no articulated

basis and relied on supposed legal advice that "is still forthcoming" and "might not have ever been provided." App. 35-36.

20. After oral argument, Commissioners Davison and Wyant stated their votes were to "take no action," providing no explanation. App. 39-40. However, Chairwoman Coonrod dissented as follows: "Based on what we've done in the past, especially on *Taylo*r *Wells*, my vote would be to remove the firearm aggravation one, which is 60 months[,] and remove aggravation number three in the amount of 480 months. That would be a total of 540 months that would be removed." App. 39-40.

21. The November 17, 2023 Certified Action again stated without explanation the Commission "t[ook] no action in this case." App. 42.

LEGAL STANDARDS

The Florida Legislature, through Chapter 947, Florida Statutes, conceived a design by which both the Parole Commission and State inmates would be freed from the arbitrary and capricious decisions that had historically plagued parole. Chapter 23-21 of the Florida Administrative Code is the vehicle by which the Legislature's intent was implemented, and the courts have long held that the

parole guidelines must conform to objective standards to pass legal and constitutional muster. Indeed, the courts have observed that Chapter 947, Florida Statutes, contemplates an objective system in which "the Commission may exercise its discretion only in limited circumstances with adequate explanation." *James v. Florida Parole and Probation Comm'n*, 395 So. 2d 197, 198 (Fla. 1st DCA 1981).

Review in this case is limited to whether the Commission abused its discretion. *See Earley v. Fla. Comm'n on Offender Rev.*, 152 So. 3d 692, 693 (Fla. 1st DCA 2014). "[A]n abuse of discretion may be established in various ways, including a showing that the Commission deviated from the legal requirements imposed upon it, such as the obligation to review the inmate's complete record and to articulate a basis for its decision." *Thomas v. Fla. Parole Comm'n*, 107 So. 3d 517, 518 (Fla. 1st DCA 2013) (citing *Fla. Parole Comm'n v. Brown*, 989 So. 3d 723 (Fla. 1st DCA 2008) (also stating that an abuse of discretion occurs if the denial of parole is based upon illegal grounds or improper considerations)). Relevant case law from the First District Court of Appeal has defined arbitrary and capricious in the following way:

> A capricious action is one which is taken without thought or reason or rationally. An arbitrary decision is one not supported by facts or logic, or [is] despotic.

Agrico Chemical Co. v. State Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

The Supreme Court of Florida has long recognized that, "[w]hile there is no absolute right to parole, there is a right to a proper consideration for parole." *Moore*, 289 So. 2d at 720; *accord Young v. Harper*, 520 U.S. 143, 145-49 (1977); *Morrisey v. Brewer,* 408 U.S. 471, 477-80 (1972); Art. I, Sec. 9, Florida Constitution; Am. XIV, U.S. Constitution. This right demands the Commission's adherence to the established rules and principles enumerated in Chapter 23-21, Fla. Admin. Code, and Florida Statutes Chapter 947, known as the Objective Parole Guidelines Act of 1978. Section 947.002 clearly states that objectivity in parole decisions is the intent of the Act:

> It is the purpose of this chapter to establish an objective means for determining and establishing parole dates for inmates.

ARGUMENT

GROUND ONE: THE COMMISSION MUST CORRECT ITS UNLAWFUL AGGRAVATION OF MR. GREEN'S PPRD.

The PPRD was Miscalculated and Must Be Set Aside.

The merits of this case are simple and undisputed: Mr. Green was convicted of felony murder based on two underlying counts of robbery and two underlying counts of kidnapping. It is the presumption that all such counts were predicate felonies because they occurred in a single episode, App. 360, the Penalty Phase Transcript confirms this is what was argued to the jury, App. 267-71, the Trial Court issued jury instructions it could not have issued without so ruling, App. 224-34, 294-95, its sentence explained that kidnapping, too, had been an underlying offense, App. 312-14, and the Florida Supreme Court agreed on that specific point, *see Green v. State*, 641 So. 2d 391, 393, 395 (Fla. 1994). There is no dispute of fact that kidnapping was an underlying offense of felony murder.

There is no dispute of law either. Rule 23-21.010(2)(a) prohibits using elements of the crime as aggravating factors, and Rule 23- 21.010(3) mandates that the number of months the Commission can add for underlying offenses in a felony murder conviction "*shall be zero.*" Recognizing this, the Commission in fact

assessed zero months to the robberies "since they're the underlying felonies." App. 6. But the Commission still added 540 months (45 years) to Mr. Green's PPRD by using Mr. Green's other underlying offenses as "aggravating factor(s)." App. 6-8. They shouldn't have, and subtracting that erroneously added 540 months from Mr. Green's incorrectly calculated date of June 2, 2059 (App. 7-8), the correct PPRD is June 2, 2014.

The Commission's position in *Wells v. Commission*, No. 2019-CA-1415 (Fla. Cir. Ct. 2d Cir. Sept. 6, 2019) is directly on point. There, a mandamus petitioner alleged the Commission abused its discretion by assessing time to underlying felonies in calculating a PPRD for felony murder, contrary to Rule 23-21.010(3). App. 344-56. After the petitioner conditionally consented to a Commission request for remand, the Court ordered the Commission to promptly reconsider and notify the Court of its action, based on which action the Petitioner could supplement the Petition. App. 357-58. On remand, Commission General Counsel advised: "After extensive case law research, it appears that in the absence of a designation as to which felony or felonies the trial court or appellate courts consider the underlying felonies, all felonies that occurred as part of

the episode … will be considered underlying felonies" and may not be assessed time. App. 359-60. General Counsel further advised the Commission to "determine whether the inmate will … be due for an immediate effective interview." App. 360. The Commission ultimately struck the aggravators and proceeded to an immediate effective interview.

The Commission has not disputed any of this. As a result of the undisputed facts and well-settled law, as well as the Commission's own rules, practice, and precedent, the Commission is obligated to correct Mr. Green's PPRD to a date that passed *almost ten years ago*. Accordingly, the Commission is also obligated to begin the EPRD process immediately. Rule 23-21.015(1).

The Commission Does Not Have Discretion to Deny Relief for Lack of New Information.

Because it articulated no reasoning at Mr. Green's November 2023 hearing, the Commission majority's extant reasoning is that it takes "no action" because the Administrative Appeal does not present "new information." This determination violated the Commission's own rules.

Mr. Green submitted his Administrative Appeal as a Section 947.173 request for review, requesting re-docketing under Rule 23-21.0051(1) (permitting a Commissioner to docket any case "[u]pon receipt of significant information impacting parole decision-making."). His Administrative Appeal and Cover Letter explicitly rely on these provisions, App. 43, 71, and the gravamen of his request wholly concerns the improper action the Commission took in its 2015 Decision. Nowhere does he refer to Rule 23-21.0051(3) (governing docketing based on "new information") or purport to present "new information." There was no non-arbitrary way to deem this a "new information" case.

The Commission docketed Mr. Green's case under Rule 23-21.0051(1). That rule permits a single Commissioner (rather than a panel) to docket a case for full vote, regardless of timeliness, if it presents "significant information impacting on parole decision-making." That is what occurred here – twice. In contrast, a "new information" case proceeds under a separate rule that has several prerequisites, none of which occurred. *See* Rule 23-21.0051(3) (requiring panel review, referral by panel, and recommendation with statement of reasons). Further, the Certified Action continued to

designate it an “Administrative Appeal,” not a new information case, App. 29, and, indeed, the Chairwoman admitted “we do know that” it was a Section 947.173 appeal rather than a new information case. App. 18. And if there is any doubt as to the basis under which it was docketed the *first* time, there can be none as to the *second*, where no Commissioner suggested it was a “new information” case. Thus, at least one of the Commission’s votes was on the merits of a Section 947.173 appeal under Rule 23-21.0051(1), not a Rule 23-21.0051(3) “new information” case.

“While there is no absolute right to parole, there is a right to a proper consideration for parole .... The ... Commission is required, as any other body, to comply with constitutional requirements; it cannot deny parole upon illegal grounds or upon improper considerations. It is answerable in mandamus if it does.” *Moore*, 289 So. 2d at 720. Commission action may be set aside where “the Commission deviated from the legal requirements imposed upon it” or took action “based upon illegal grounds or improper considerations.” *Fla. Parole Comm’n v. Huckelbury*, 903 So. 2d 977, 978 (Fla. 1st Dist. Ct. App. 2005). *See also Williams v. Fla. Parole Comm’n*, 625 So. 2d 926, 937 (Fla. 1st Dist. Ct. App. 1993) (“[T]he

Commission's exercise of [its] delegated discretion cannot be arbitrary or capricious, for it must conform to the requirements of applicable statutes and rules setting objective guidelines.").

Nothing in Section 947.173, Rule 23-21.0051(1), case law, or Commission practice under those authorities requires new information to grant relief or permits the Commission to deny relief because none is presented. The absence of new information was an "illegal ground[] or improper consideration" on which to deny relief, making the action an abuse of discretion.

Mr. Green's Appeal Was Timely.

The Commission's "taking no action" determination was not a determination that Mr. Green's Appeal was untimely, and it relied on other grounds – or none. To the extent the Commission now claims to have ruled that Mr. Green's Appeal was untimely, this would also be an abuse of discretion.

Under Florida Statute Section 947.173(1), "the determinative fact in deciding whether [a] request for review [is] timely" is when the requesting party "was 'notified' of the Commission's action," not when the action occurred. *Thorne. v. Dep't of Corr.*, 36 So. 3d 805, 806, 35 Fla. L. Weekly D 1170 (Fla. 1st Dist. Ct. App. 2010).

Here, the Commission set Mr. Green's PPRD in 2015, but it did not notify him within the requirements of the statute. He was not present or represented at the hearing, and there is no indication Mr. Green was ever sent or ever received the 2015 Decision or learned how his PPRD had been computed until his counsel obtained the Certified Commission Action on March 15, 2023. App. 32-33, 100-01. His counsel filed his first request for review under Section 947.173 on March 17, 2023, two days later. App. 43. That request was therefore timely.

At that time, Mr. Green's counsel erroneously assumed Mr. Green had previously received a notification letter regarding his PPRD. App. 71. But Mr. Green's counsel later learned that assumption to be wrong, as confirmed by a public records request submitted June 27, 2023. On that date, counsel sought from the Commission "The notification letter sent to Mr. Green informed [*sic*, informing] him of the results of his parole hearing held on September 23, 2015. The Commission Action was certified on September 29, 2015." App. 339-40. The Commission provided "[a]ll non-confidential and non-exempt responsive records" on June

28, 2023. App. 341-43. No notification letter or other correspondence with Mr. Green was included.

Mr. Green cannot be expected to have appealed a document there is no evidence he ever received. The Commission has never contended that inmates may be notified of its decision within the meaning of Section 947.173 by something less than the notification the applicable statutes and rules require, *i.e.*, the "writing with individual particularities" that Section 947.172(3) requires the Commission to make and Rule 23-21.006(14)(b) requires the Commission to send to the inmate. *See, e.g.*, *Thorne*, 36 So.3d at 806 ("No argument [was] made that [the inmate] received such notice other than through the … order."). Regardless, the principles of statutory construction, the statutory scheme adopted by the Florida legislature, and the administrative scheme adopted by the Commission itself each confirm that an inmate cannot be considered notified for the purposes of appeal if they have not received the particularities they would appeal and which, indeed, the Commission's rules *require them to specify* in that appeal. *See, e.g.*, *Baker v. Fla. Parole & Prob. Comm'n*, 384 So.2d 746, 748-49 (Fla. 1st Dist. Ct. App. 1980) (Notification of the elements

potentially subject to appeal is necessary in order for Section 947.173 and Commission rules granting right of appeal to be given effect.); Rule 23-21.012 (requiring inmate to address and include the same matters the Commission must specify under Rule 23-21.006(14)(b)).

The Commission has a "well-established responsibility to see that its orders are *received* by the party or parties to the cause." *Thorne*, 36 So. at 806-07 (emphasis supplied). For this reason, it may not claim "routine practice" or a "duty to inquire" is a substitute for evidence it has in fact notified the inmate in accordance with statute. *Id.* Nor does evidence that the Certified Action was "mailed" create any presumption that it was received if there is no evidence of *where* it was mailed. *Id.* Controlling law holds that permitting such substitutes for evidence of notification would be "a substantial departure from the essential requirements of the law." *Id.*

At Mr. Green's November 8, 2023 hearing, Mr. Green's counsel presented the foregoing information to the Commissioners and specifically asked whether "there is any dispute from the Commission" that Mr. Green's Administrative Appeal was timely, or

whether there were "any questions or any discussion to be had on the time bar issue." App. 32-33. The Commission raised none and asked Mr. Green's counsel to proceed to the merits instead. App. 32-33.

The record thus contains no evidence, and not even a contention, that Mr. Green received notice of the Commission's PPRD decision any earlier than two days before he filed his March 17, 2023 Administrative Appeal. All evidence in the record is that Mr. Green's Administrative Appeal was timely and, insofar as the Commission claims to have relied on an unstated finding to the contrary, it abused its discretion.

But even if there *were* evidence Mr. Green had been "notified" of the decision within the meaning of Section 947.173, the Commission docketed his case for review of his PPRD under Rule 23-21.0051(1). There is no timeliness requirement for the docketing of a case or review of a PPRD under Rule 23-21.0051(1). "[T]he 60-day time limit" in Section 947.173 "is not jurisdictional" and the Commission may – and in certain circumstances *must* – perform plenary review notwithstanding untimeliness. *Gobie v. Fla. Parole & Probation Comm'n*, 416 So. 2d 838, 840 n.4 (Fla. 1st Dist.

Ct. App. 1982). And the Commission does it all the time – proceeding under Rule 23-21.0051(1). Indeed, in forty years of practice before the Commission, Petitioner's representatives are not aware of a previous case under this Rule where the Commission has purported to deny relief on that ground. App. 12-13.

The Commission may not choose "as it sees fit" to impose procedural requirements that do not normally apply. *Earley*, 152 So. 3d at 693. *See Cankaris v. Cankaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (discretionary action must have "logic or justification for the result"). It certainly cannot do so without explaining why or even saying it was actually doing so. *See Thomas*, 107 So. 3d at 518. And it especially cannot claim to have done so as a post-hoc justification to insulate from review a decision it did not actually make on that ground.

GROUND TWO: THE COMMISSION MUST ESTABLISH A NEW PPRD FOR MR. GREEN BECAUSE HE "EXITED" AND REENTERED INCARCERATION.

Mr. Green Exited State Custody for Two Years and Under Rule 23-21.013(3) Is Entitled to Have A New PPRD Established.

Mr. Green also requested that the Commission fulfill its duty to follow the Rules set forth by the Florida Legislature and set a new PPRD for Mr. Green pursuant to Rule 23-21.013(3), because Mr.

Green had exited incarceration in 2021 and reentered in 2023. That Rule mandates "[v]acation of presumptive or effective parole release date" and provides:

> The exiting of an inmate from the incarceration portion of his sentence, which shall include bond, escape, expiration of sentence, or transfer to a mental health facility, *shall vacate any established presumptive parole release date*. Any subsequent return to incarceration *shall require an initial interview* to *establish a presumptive parole release date*.

(emphases added).

Mr. Green exited the custody of the State of Florida and the Florida Department of Corrections on April 6, 2021, after a federal court (the U.S. District Court for the Middle District of Florida in Orlando) ordered him to be released from State incarceration and custody into federal probationary supervision following the court's finding that Mr. Green's conviction was unconstitutional due to the State's withholding of material exculpatory evidence. App. 326-35. Mr. Green's release by the federal court was over the objection of the State of Florida, who filed a memorandum in opposition to Mr. Green's release from State custody—demonstrating that the State

had an interest in *not* allowing Mr. Green to exit its custody and incarceration. App. 326-35.

The federal court's order was based on its finding that Mr. Green had been unconstitutionally convicted and "the Court conditionally granted the writ of habeas corpus as to Issue One of Claim One." App. 327. The federal court also held that Mr. Green had "been incarcerated over thirty years and has been described as a 'model prisoner' by the Warden of [his prison]." App. 331. Further, the court found that "the public has a strong interest in the release of a prisoner whom the Court has found to be incarcerated in violation of the Constitution" and that the State had "failed to establish that [Mr. Green] poses any risk to the public." App. 331. The federal court thus granted Mr. Green's motion for his "immediate release" because, among other things, his "custody [was] in violation of the Constitution." App. 331.

From that moment, on April 6, 2021, Mr. Green walked out of prison, "exited," and was no longer incarcerated. He was no longer in the custody of the State of Florida or behind bars at Calhoun Correctional Institution or any other jail or prison of the State of Florida. He was no longer subject to any requirements or conditions

of the State of Florida at all; his conditions for release were set entirely by a *federal* judge, he reported solely to a *federal* probation officer, and he had no duty whatsoever to the State of Florida or its agents. App. 332-35. It was only when he voluntarily surrendered on April 17, 2023 to the State of Florida that Mr. Green returned to incarceration. That return is the triggering event in Rule 23-21.013(3) that obligates the Commission to set an *initial interview* and to "establish" (*i.e.*, determine anew) a PPRD.

There can be no dispute that Mr. Green "exited" prison and was not incarcerated by the State of Florida (or any government authority, for that matter), from April 2021 to April 2023. Any dictionary will define "exiting" as leaving or departing. Nor can there be any dispute that from April 2021 to April 2023, Mr. Green was no longer "incarcerated." For two years Mr. Green was able to live with his family in Titsuville, Florida, to work a full-time job, attend his church, and to go shopping on the weekends. He was not "incarcerated."

Rather than "establish" Mr. Green's PPRD in compliance with its duties under Rule 23- 21.013(3), however, the Commission stated twice that Rule 23-21.013(3) did not apply, providing no

further explanation. App. 16-17, 35, 39-40. All the Commission did was make a vague reference to the General Counsel's office, but the General Counsel's office has been notably silent, never having provided Mr. Green, his counsel, or the People of the State of Florida any reasoning to support the Commission's inaction. App. 16-17, 35, 39-40. That is likely because by its plain language, Rule 23-21.013(3) applies to Mr. Green's release from incarceration. It is solely the responsibility of the Commission, not its Office of General Counsel, to give full and proper consideration to Mr. Green's request that Rule 23-21.013(3) be applied to require the calculation of a new PPRD.

THE COMMISSION ABUSED ITS DISCRETION IN DENYING MR. GREEN'S REQUESTED RELIEF.

Rather than consider and rule on Mr. Green's two appeals on the two grounds, in each instance the Commission hid behind what can only be described as a procedural dodge: It announced that it would "take no action" and gave scant explanation why—other than to slyly "make clear for the record that … to take no action is legally distinct from … making no change." App. 16-17. The Commission

cannot use that procedure to evade its legal duties or prevent mandamus review.

The Commission's disregard for applying the objective parole criteria required is not only an abuse of discretion, but it harkens to the days of arbitrary and capricious decisions that had historically plagued parole decisions before the Legislature ordered the Commission to enact and follow Chapter 23-21 of the Florida Administrative Code. Mr. Green has already been incarcerated almost ten years longer than he presumptively should have been, and the Commission's erroneous actions (and refusals to "take action" at all) essentially pile another life sentence onto Mr. Green's back. This Court should right the injustices the Commission has committed and grant Mr. Green's petition.

Commission action is an abuse of discretion if it is arbitrary and capricious or if it fails to conform to the requirements of the applicable statutes and rules setting objective guidelines. *See Williams*, 625 So. 2d at 937. To determine whether Commission action is arbitrary and capricious, Florida courts have applied the standards of *Cankaris*, 382 So. 2d at 1203 (discretionary action must have "logic and justification for the result"), and *Agrico*, 365

So. 2d at 763 ("A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic."). *See Ulm v. Fla. Comm'n on Offender Rev.*, No. 2018-CA-001632, 2019 Fla. Cir. LEXIS 10006, at *4-5 (Fla. Cir. Ct. 2d Cir., Leon Cty. Aug. 5, 2019). Where "the Commission deviate[s] from … the obligation to review the inmate's complete record and to articulate a basis for its decision," it has failed to conform to the requirements of statutes and rules and thereby abused its discretion. *Thomas*, 107 So. 3d at 518.

The Commission abused its discretion in its resolution of Mr. Green's Appeal in no fewer than <u>six</u> distinct ways.

First, the Commission has twice voted on Mr. Green's case on the merits and each time refused to apply its objective parole criteria as required. To add 540 months to Mr. Green's sentence when the Rules mandate that the Commission to add zero months can only be viewed as an abuse of discretion. Indeed, it meets the very definition of despotic. *See Agrico*, 365 So. 2d at 763. The Commission has simply denied the relief the law and its own rules require, which it does not have discretion to do. *See Williams*, 625 So. 2d at 937.

Second, as the Chairwoman ultimately recognized, Commission precedent in the *Taylor Wells* case and the publicly available advice of Commission counsel provided in that case are plainly controlling. Without explanation, it refuses to follow them. *See Cankaris*, 382 So. 2d at 1203 ("Different results reached from substantially the same facts comport with neither logic nor reasonableness."). Tellingly, even in that case, the Commission acted only when forced to by mandamus proceedings.

Third, despite the mandate of its plain language, the Commission failed to apply Rule 23-21.013(3), even though Mr. Green exited incarceration in 2021 and reentered in 2023.

Fourth, the Commission has twice voted to "take no action" and removed Mr. Green's case from the docket, which it has stressed is "legally distinguishable" from "making no change" to his PPRD. This is an abuse of discretion in itself because it violates the Commission's own rules. The only instance the Rules permit the Commission to take "no action" is under Rule 23-21.0051(13): "*When the Commission cannot reach a majority vote*, the action of the Commission is no action *and the case will be placed on the next docket*." (emphases added). Here, neither Commission vote was

deadlocked, so Rule 23-21.0051(13) does not apply and the Commission cannot take "no action," nor can taking "no action" strike a case from the docket. The Commission had a duty to fully and properly adjudicate the Administrative Appeal it had docketed. It simply refused to act on it, contrary to its own rules and without explanation, the very definition of arbitrary and capricious. *See Williams*, 625 So. 2d at 937.

Fifth, there was no basis in fact or logic to deem Mr. Green's Appeal a "new information" case and deny relief on that ground. It was not a plausible interpretation of Mr. Green's Appeal. The Commission had to violate their procedural rules to treat it thus. *See* Rule 23-21.0051(3); *Williams*, 625 So. 2d at 937. No Commissioner has "articulated a basis for its decision" to do so, *Thomas* 107 So. 3d at 518; to the contrary, the Commission admitted it "kn[e]w" the classification was wrong, App. 18. Nonetheless, the Commission interrupted Mr. Green's argument when it had barely begun in order to insert the new classification – gratuitously – into the record. App. 10. It then denied relief because of that baseless classification. App. 16-18. *See Cankaris*, 382 So. 2d at 1203; *Agrico*, 365 So. 2d at 763.

Sixth, after two requests, two hearings, and several months, the Commission refuses to provide the supposed legal reasoning it claims to rely on to make Rule 23-21.013(3) inapplicable, even though its plain meaning encompasses Mr. Green's situation. This is the opposite of "articulat[ing] a basis for its decision" to permit judicial review. *Thomas*, 107 So. 3d at 518.

CONCLUSION

It is one thing for the Commission to make a mistake; it is another to keep a man behind bars until he is 100 years old to avoid having to correct that mistake. The Commission lacked the discretion to refuse to properly apply Rule 23-21.010(2)(a), Rule 23-21.010(3), and Rule 23-21.013(3) to Mr. Green's case. This Court should direct the Commission to do the job the Legislature gave it, under the law. The Petition should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2024, I electronically filed this Petition for a Writ of Mandamus with the Clerk of the Court by using the Court's Electronic Filing System, which will serve Rana Wallace, General Counsel, Office of General Counsel, Florida Commission on Offender Review, 4070 Esplanade Way, Tallahassee, FL 32399-2450; ranawallace@fcor.state.fl.us; Mark Hiers, Assistant General Counsel,Florida Commission on Offender Review, 4070 Esplanade Way, Tallahassee, Florida 32399-2450, MarkHiers@fcor.state.fl.us

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the applicable font requirements of Fla. R. App. P. 9.045(b) and word-count requirements of Fla. R. App. P. 9.100(g), and that the word count as calculated by Microsoft Word is 7,685 words, excluding the portions specified in Fla. R. App. P. 9.045(e).

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