No. 10-12170

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERONZA L. BOWERS, JR.,

Petitioner-Appellant,

v.

JEFFREY KELLER, Warden, and
UNITED STATES PAROLE COMMISSION,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

PETITIONER-APPELLANT'S REPLY BRIEF

Theodore D. Frank
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5790
Facsimile: (202) 942-5999

Charles D. Weisselberg
UC Berkeley, School of Law
Berkeley, California 94720-7200
Telephone: (510) 643-8159
Facsimile: (510) 642-3856

A. Stephens Clay
C. Allen Garrett Jr.
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4528
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

Other Counsel Listed on Signature Page

Attorneys for Petitioner-Appellant Veronza L. Bowers, Jr.

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INTRODUCTION

This case represents the only time in the existence of the U.S. Parole Commission ("Commission") that an Attorney General has told agency members – who already decided a case *en banc* – to go back and "render a new decision." This "request" came after a member of the Commission wrote the Attorney General, encouraging him to participate to "get[] credit … with crime victims and law enforcement" (R1-1 attachment 54 (Ex. 53) at 14), and at a time when the Commission's future hung in the balance – a "time[] of crisis" according to the Commission Chairman. (R3-23 attachment 18 (Ex. 103) at 2.) The Magistrate Judge correctly found that the Commission acceded to this pressure, made arbitrary, capricious, and result-oriented decisions, and was improperly influenced by the Commissioner who had solicited the Attorney General's intervention. (R4-38-43-49.)[1]

Although it did not object to the Magistrate Judge's factual findings before the District Court (*see* R5-41) and does not appear to contest them here, the Commission claims: (a) the Attorney General had authority to appeal; (b) the agency had inherent power to consider the appeal; (c) the Parole Act gives the agency unfettered discretion to deny parole as long as a person remains in prison; and (d) the Commission properly revoked Mr. Bowers' parole based on a careful,

[1] Volume numbers were unavailable when Appellant's Brief was filed but are included here. "R4-38-43-49" refers to volume 4, docket number 38, pages 43-49.

unbiased analysis of the relevant criteria under 18 U.S.C. § 4206(d). None of these claims has merit. Before turning to these arguments, however, a few statements in the Commission's Statement of the Case require comment:

1. The Commission describes at length the crime for which Mr. Bowers was convicted. But the nature of the offense is not relevant to the mandatory parole criteria set forth in Section 4206(d), the subsection applicable here. The Parole Act provides two different parole criteria: (a) the "discretionary parole" standard in 18 U.S.C. § 4206(a), which applies until the person has served two-thirds of his sentence or thirty years of a life term; and (b) the "mandatory parole" standard in Section 4206(d), which applies thereafter. The nature of the offense is relevant under Section 4206(a), but not under Section 4206(d). Rather, Section 4206(d) requires an inmate to be released unless "he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any … crime." The facts of the conviction are not relevant to these questions.[2]

2. Contrary to the Government's assertion, Judge Hodges, who granted Mr. Bowers' prior habeas petition, did not find Mr. Bowers attempted a waiver of mandatory parole that "was ineffective." Appellees' Br., at 5. Using clear and

[2] Although not relevant, Mr. Bowers can address the Commission's recitation of the facts at oral argument, if the Court wishes.

harsh language, he found the Commission's waiver claim was meritless and that Mr. Bowers had ***never*** waived his right to a mandatory parole hearing. (R1-1 attachment 26 (Ex. 25) at 4-6.)

3. In discussing the proceedings prior to the filing of the present petition, the Commission conveys the impression it offered Mr. Bowers the opportunity for a new full and fair mandatory parole hearing after Commissioner Spagnoli left the Commission. Appellees' Br., at 15-16. This is not correct. At the request of the Department of Justice, the Commission postponed a parole hearing scheduled for August 3, 2007 – on the ***very morning*** it was to be held, without advance notice to Mr. Bowers or his lawyer, who had traveled to Florida from Colorado for the proceeding, and over their objection. (R2-10 (Appellees' Ex. 68).) As Mr. Bowers' counsel told the Commission, "the Commission's willingness to accede to [the Department's] demands reflects a lack of the independence Congress contemplated when it established the Commission." *Id.* at 2. And while the Commission still claims to offer Mr. Bowers a *de novo* hearing, it has never acknowledged its arbitrary and capricious decision-making or that its members acceded to political pressure. The Magistrate Judge correctly concluded that "it does not appear that Petitioner could obtain a hearing by impartial decision-makers if the Court were to order a new hearing . . .." (R4-38-59.)

REPLY ARGUMENT

I. THE ISSUES BEFORE THIS COURT ARE COGNIZABLE ON HABEAS CORPUS AND ARE REVIEWED *DE NOVO*

Contrary to the Commission's assertion, Mr. Bowers has never argued that the District Court inadequately reviewed the Magistrate Judge's Report and Recommendation. Appellees' Br., at 21-22. Rather, he argues the District Court applied the wrong legal standard when it denied the petition on the sole ground that the Parole Commission had jurisdiction over him.

This decision conflicts with basic habeas principles. *See* Appellant's Br., at 29-30. Indeed, the Commission itself concedes that federal courts may reverse Commission decisions that involve "flagrant, unwarranted, or unauthorized action that constitutes an abuse of the Commission's discretion." Appellees' Br. at 17 (quoting *Glumb v. Honsted*, 891 F.2d 872, 873 (11th Cir. 1990)); *see also Taylor v. U.S. Parole Comm'n*, 734 F.2d 1152 (6th Cir. 1984) (finding abuse of discretion).

The Commission also agrees the issues before this Court are questions of law reviewed *de novo*. The Commission never objected to the Magistrate Judge's findings of fact (either before the District Court or here), and the District Court did not reverse any of those findings. It said only it was "not persuaded that the Parole Commission . . . was without jurisdiction or authority" to deny parole. (R5-52-2.) That is a conclusion of law which is reviewed *de novo*. Appellees' Br., at 17; Appellant's Br., at 25. *De novo* review is also vital to protect Mr. Bowers'

constitutionally-protected liberty interest with respect to his right to mandatory parole. *See* Appellant's Br., at 31.

II. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT THE COMMISSION VIOLATED THE PAROLE ACT, APPLICABLE REGULATIONS, AND THE DUE PROCESS CLAUSE

A. The Attorney General Was Not Authorized to Appeal an Original Jurisdiction Decision

The Commission's May 2005 decision granting Mr. Bowers parole was a final action. As the Magistrate Judge found, neither the Parole Act nor the Commission's rules authorized the Attorney General to appeal a decision by the full Commission.

The Commission argues that 18 U.S.C. § 4215(c) – which empowers the Attorney General to appeal from a decision of a ***Regional*** Commissioner – also authorizes an appeal from a decision by the full Commission sitting *en banc*. Appellees' Br., at 26-34. But the Commission offers no legitimate reason for disregarding the plain language of the statute or the agency's own regulations.

First, "courts must presume that a legislature says in a statute what it means, and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992). When Congress includes language in one section of a statute but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 951 (2002)

(citations omitted); *see also* Appellant's Br., at 34. The Commission has not offered any explanation for Congress' use of different language in Section 4215(c) of the Parole Act, which permits the Attorney General to appeal only decisions made by Regional Commissioners, and Section 4215(a), which authorizes broader appeals by inmates. There is nothing to overcome the presumption Congress intentionally limited the Attorney General's appeal right by using different language in these two sections of the same statute.

Second, while the Commission refers to the legislative history of the Parole Act, a court may "look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that [plain] language, which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12, 107 S. Ct. 1207, 1213 n.12 (1987) (citations omitted); *see also Ardestani v. INS*, 502 U.S. 129, 135-36, 112 S. Ct. 515, 520 (1991) (citing *Cardoza-Fonseca*). The legislative history cited by the Commission does not meet that standard. The history indicates that Congress was aware when it passed the Act that the Commission's predecessor agency occasionally employed an "original jurisdiction" process. The history also shows that Congress expected many inmates to appeal from decisions of Regional Commissioners. Appellees' Br., at 27-30. Yet there is no statement, much less "a clearly expressed legislative

intention," that Congress intended to authorize the Attorney General to appeal from decisions made by the full Commission. Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 325 (1990); *Griffith v. United States*, 206 F.3d 1389, 1393 (11th Cir. 2000) (quoting *Miles*). The only proper conclusion to draw from the legislative history is that, despite ***knowing*** the old Parole Board treated some cases as original jurisdiction matters, Congress nevertheless expressly gave the Attorney General the right to appeal only decisions of a Regional Commissioner.

Third, the suggestion Section 4215(c) may be interpreted differently today because the Commission has been reduced in size and regions have been abolished is meritless. Appellees' Br., at 27. Although there are no more regions, the Commission continues to employ a tiered decisional process. A "Regional Commissioner" is still a single Commissioner who makes a first-level decision:

> The term *Regional Commissioner* refers to Commissioners who are assigned to make initial decisions, … in respect to prisoners and parolees in regions defined by the Commission.

28 C.F.R. § 2.1(e).[3] "Upon review of the examiner panel recommendation, the Regional Commissioner may make the decision by concurring with the panel recommendation . . . " (28 C.F.R. § 2.24(a)), as Commissioner Mitchell did when

[3] *See also* 28 C.F.R. § 2.1(d) ("National Commissioners" are the Chairman and "the Commissioner who is not serving as the Regional Commissioner in respect to a particular case").

he adopted the recommendation of the examiners following Mr. Bowers' December 2004 parole hearing. Neither the change in the size of the Commission nor the abolition of regions changes the limitation in Section 4215(c) of the Parole Act.

Fourth, the Commission's regulations do not permit the Attorney General to appeal an original jurisdiction decision. They authorize appeal of full Commission decisions only by inmates and parolees. The Attorney General has always been limited to appeals from Regional Commissioner decisions. *Compare* 28 C.F.R. § 2.26(a)(1) *with* 28 C.F.R. § 2.54. Since those regulations were adopted contemporaneously with the enactment of the Parole Act, they are entitled to substantial deference in any interpretation of the Act itself. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414, 113 S. Ct. 2151, 2159 (1993) ("Of particular relevance is the agency's contemporaneous construction …").

The Commission claims that 28 C.F.R. § 2.27, which describes the process for petitions for reconsideration of original jurisdiction decisions, now authorizes the Attorney General's appeal. Appellees' Br., at 31-32. That is inconsistent with the Commission's own explanation when it recast Section 2.27 as a petition for reconsideration; it then said "the appeal from such [original jurisdiction] decisions ***that is available to prisoners*** under 28 C.F.R. § 2.27 is replaced by a petition for reconsideration." 61 Fed. Reg. 13,763 (Mar. 28, 1996) (emphasis added). And while the Commission has discretion to adopt regulations governing its processes,

those regulations must still conform to the requirements of the Parole Act. *See Terrell v. United States*, 564 F.3d 442 (6th Cir. 2009) (Commission's videoconferencing regulation conflicts with the Parole Act). Because the Act allows the Attorney General to challenge only decisions by a Regional Commissioner, the Commission's regulations cannot expand those rights.

Finally, the Commission argues "there is no reason to deny the Attorney General" an appeal from an original jurisdiction decision "just because the entire Commission membership initially votes on the decision and there is significant public interest in the case." Appellees' Br., at 33. Aside from ignoring Congress' decision not to authorize such appeals, the argument also ignores the substantial policies supporting Congress's decision. When the Attorney General asks the National Commissioners to review a decision by a Regional Commissioner, other members of the Commission review the original decision, and the appeal is a routine matter. But where, for the first time in the Commission's history, the Attorney General instructs the very agency members – who have already sat *en banc* – to "render a new decision" (R1-1 attachment 55 (Ex. 54)), that sends a powerful and chilling message, especially to Commissioners who lack life tenure and whose agency will soon sunset without the support of the Attorney General and the passage of reauthorization legislation.

The language of the statute, established principles of statutory construction, and substantial policy considerations all support the Magistrate Judge's conclusion that the Attorney General does not have the right to appeal decisions by the full Commission acting *en banc*. The District Court erred in rejecting her recommendation. (R4-38-34-36.)

B. The Commission Had No Inherent Authority to Act Contrary to the Parole Act or Its Own Regulations

The Commission argues Section 4203(b)(1) of the Parole Act gives the agency inherent and unfettered power to grant or deny parole. Appellees' Br., at 23-24. The Commission's argument rests on a quote that omits qualifying language requiring the agency to exercise its parole power "pursuant to the procedures set out in this chapter."[4] As shown above, the Parole Act not only does not provide for the Attorney General to appeal a decision by the full Commission, it precludes it.

Even assuming *arguendo* the Commission is not precluded from considering the Attorney General's appeal, the agency's inherent authority does not empower it to ignore the Parole Act or its own rules. Administrative agencies are creatures of the statutes that created them and their powers are limited by those statutes. *See*

[4] With the omitted language included, the section reads: "The Commission, by majority vote, ***and pursuant to the procedures set out in this chapter***, shall have the power to …. (1) grant or deny an application or recommendation …" 18 U.S.C. § 4203(b)(1) (emphasis added).

La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 106 S. Ct. 1890, 1901 (1986); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002). They can only act in the manner provided by statute. "[W]here a statute . . . expressly provide[s] for reconsideration of its decisions, the agency is obligated to follow the procedures for reconsideration set forth in the statute." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) ("*Tokyo Kikai*"); *NRDC v. Abraham*, 355 F.3d 179, 202-04 (2d Cir. 2004).

Where the statute is silent, agencies have inherent power to reconsider their decisions only under limited circumstances. *See Tokyo Kikai*, 529 F.3d at 1360; *NRDC*, 355 F.3d at 203*; Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989). Reconsideration is proper to correct inadvertent ministerial and similar errors (*Am. Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 145, 79 S. Ct. 170, 177 (1958)), or where the initial decision was tainted by fraud, material misrepresentation, or similar grounds. *See Tokyo Kikai*, 529 F.3d at 1361-62. But "[a]n agency's inherent authority to reconsider its decisions is not unlimited. An agency may not reconsider its own decision if to do so would be arbitrary or capricious or an abuse of discretion." *Macktal*, 286 F.3d at 826. Nor may it rely on its inherent reconsideration power "as a guise for changing previous decisions because the wisdom of those decisions appears doubtful" (*Am. Trucking Ass'ns*, 358 U.S. at

146, 79 S. Ct. at 177), or to amend the rules after the fact and apply them retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988).[5]

Furthermore, an agency may not ignore its own regulations in acting on its own motion. "[T]he general right of a board to reconsider its prior decisions exists only 'in the absence of a controlling statute ***or regulation*** to the contrary.'" *King v. United States*, 65 Fed. Cl. 385, 398 (Fed. Cl. 2005) (citation omitted; emphasis added). In *Chen v. General Accounting Office*, 821 F.2d 732, 737 (D.C. Cir. 1987), the D.C. Circuit overturned a decision by an agency's appeal board, concluding that "the [board's] reconsideration regulations do not permit the full board simply to reopen the decisions of individual members at any time to correct any errors." Through its regulations, "[t]he [board] has limited its rehearing authority . . .." *Id*. at 737-38.

The Parole Commission likewise has limited by regulation its ability to reconsider an otherwise final parole decision. Section 2.28(f) allows the Commission to reopen a decision granting parole where there is "new and

[5] Changing the substantive rules applicable to a prisoner's eligibility for parole after a prisoner has been convicted also raises serious questions under the *Ex Post Facto* Clause. *See Lynce v. Mathis*, 519 U.S. 433, 441-45, 117 S. Ct. 891, 896-98 (1997). Similarly, adopting a special rule to govern whether Mr. Bowers specifically may be granted parole is manifestly arbitrary and capricious. *See, e.g., Commc'ns & Control, Inc. v. FCC*, 374 F.3d 1329 (D.C. Cir. 2004); *Teva Pharms., USA, Inc. v. FDA*, 182 F.3d 1003, 1012 (D.C. Cir. 1999).

significant adverse information."[6] The Attorney General did not provide any such information. He requested the Commission to "review and consider the Veronza L. Bowers matter and render a new decision …" without providing any justification save that the initial decision was based on a 2-2 vote. The Commission effectively admits that the Attorney General did not provide any new information when it characterizes the Attorney General's request as Commission Spagnoli's means of informing the other Commissioners of their "legal error" in granting Mr. Bowers parole. Appellees' Br., at 25-26.

But the Attorney General did not advise the Commission of a legal error, either. The Attorney General's Memorandum was devoid of substance. Although the Department of Justice's later letters (R1-1 attachments 68, 71 (Ex. 67, 70)) argued that the Commission misread Section 4206(d) in not finding that Mr. Bowers seriously violated prison rules, that argument was not made in the Attorney General's June 9 Memorandum. It therefore could not have been the basis of the Commission's action postponing Mr. Bowers' parole and reopening the matter.[7] Consequently, whatever limited authority the Commission might have had to

[6] 28 C.F.R. § 2.28(f). Other parts of Section 2.28 provide additional grounds for reopening, but none is applicable here.

[7] The Commission now concedes that the Department's reading of Section 4206(d) was wrong, as it argues here that the Commission did not accept the Department's construction of the statute. Appellees' Br., at 39-40.

reopen the case on its own motion under Section 2.28(f), that authority does not support its actions here.

Additionally, the Commission's claim it was acting on its own motion (Appellees' Br., at 25-26) is belied by the record. There is nothing to indicate that any member of the agency requested the other Commissioners to reconsider the decision. Rather, the Commission acted only after the Attorney General intervened. And notwithstanding the Commission's creative characterization of Commissioner Spagnoli's Memorandum (*id.* at 26-27), it was not a request to her fellow Commissioners. As the Commission's Notice of Action provided, Mr. Bowers' release was postponed so that the Commission could "consider [the] petition of the Attorney General for reconsideration of original jurisdiction decision." (R1-1 attachment 57 (Ex. 56).) Indeed, the Commission did not claim initially that it acted pursuant to some inherent authority. (*See generally* R2-10.) The argument surfaced for the first time in the Commission's objections to the Magistrate Judge's Report and Recommendation. (R5-41-8-11; R5-R44-5-7.)

Nor do the cases cited by the Commission support its claim of inherent authority to reopen Mr. Bowers' parole. *Goble v. Matthews,* 814 F.2d 1104, 1108 (6th Cir. 1987), involved the question of whether information contained in a Commission file, which had not been considered in reaching an initial parole decision, could be deemed "new" under Section 2.28(f). The Court found that

treating the information as new was "in harmony with the spirit of [the regulations] …." 814 F.2d at 1109. Here, in contrast, the Attorney General did not provide any new information, nor did the Commission act "in harmony with the spirit" of its rules when it acted on the Attorney General's request.[8] Instead, the Commission's action was utterly inconsistent with Section 2.28(f).

Finally, that the Commission was faced with "an unprecedented situation" – a 2-2 split – did not somehow expand its powers, as Appellees imply. Appellees' Br., at 24. The Commission was still required to comply with the Act and its regulations and, as its General Counsel advised, the 2-2 vote required that Mr. Bowers be released. (R1-1 attachment 50 (Ex. 49).) The 2-2 vote did not authorize the agency to act on the Attorney General's request.

Ultimately, the Commission's decision to revoke Mr. Bowers' parole cannot be reconciled with the Parole Act or the agency's own regulations. Moreover, the limitations in Section 2.28(f) on the Commission's power to reopen recognize an inmate's substantial liberty interest in an established release date and, in the case of mandatory parole, the potential parolee's constitutionally-protected liberty interest. *See* Appellant's Br., at 31; R4-38-28-29. By constraining its own ability to revisit

[8] The cases cited in footnote 10 of the Government's brief all address the question of when the Government's 30-day period to appeal under Federal Rule of Appellate Procedure 4(b) begins to run. Whatever may be the inherent authority of an Article III court, agencies are creatures of statute, and their powers are limited by statutes and regulations.

an *en banc* parole decision, the Commission safeguards these interests, promotes orderly decision-making, and enables inmates and the Bureau of Prisons to plan for release. The Commission's claim of inherent authority ignores these important policies.

C. The Magistrate Judge Correctly Held that the Commission Did Not Act as a Neutral Decision-Maker and that Its Decision Was Arbitrary and Capricious

The Magistrate Judge found after a careful review of the record that:

- Commissioner Spagnoli had an immutable bias and served as an advocate. (R4-38-45-46.)
- Commissioners Cushwa and Spagnoli voted to deny mandatory parole on the basis of the letter to Mrs. Lee; their conclusion was "not . . . founded in reason or fact" but was instead arbitrary and capricious. (R4-38-53.)
- Commissioners Reilly, Cushwa, and Spagnoli concluded, without any rational basis, that Mr. Bowers "continued to hate the government and was thus likely to commit another crime." (R4-38-55.)
- The Commissioners overreached and converted a narrowly-focused reconsideration proceeding into a *de novo* process. (R4-38-50.)
- And the Commission changed its interpretation of the mandatory parole statute, Section 4206(d), in response to pressure, and later returned to its original interpretation of the statute. (R4-38-52-53.)

The Commission admits that Commissioner Spagnoli appeared biased. Appellees' Br., at 44. The Commission also does not dispute (although it also does not affirmatively accept) that the Commissioners' findings about the letter to Mrs. Lee and Mr. Bowers' alleged hatred and future dangerousness were irrational, arbitrary, and without foundation. The Commission ignores the Magistrate Judge's

findings and argues that this Court should defer to the agency's unique construction of Section 4206(d) in this case, and that the decision below should be upheld because three other Commissioners voted for the result-oriented interpretation of the statute. Neither of these arguments can stand.[9]

1. Section 4206(d) Requires the Commission to Evaluate Inmates' Compliance With Institution Rules Over the Entire Term of Imprisonment

The Commission contends that if a rule violation could be deemed "serious" at the time it was committed, that "requires a parole denial under § 4206(d) despite the passage of time from the date of violation was committed to the date of the parole consideration." Appellees' Br., at 36. That construction is not faithful to the language, structure, or purpose of the provision, nor is it consistent with the Commission's decisions before and after its decision here.

As the Commission admits, Section 4206(d) establishes a more lenient standard for granting parole than Section 4206(a) and is forward looking. Appellees' Br. at 36 n.18; *see also* R3-23-36-37. Section 4206(d) uses an individual's institutional record to assess the risk that person may pose upon release. To facilitate such an assessment, it is reasonable for Congress to allow the

[9] The Commission also argues Mr. Bowers abandoned his argument that the Commission unlawfully transformed a limited reconsideration hearing into a *de novo* proceeding. Appellees' Br.. at 26 n.11. Mr. Bowers' Opening Brief expressly makes that argument, albeit briefly. Appellant's Br., at 39-40. He has not abandoned the claim.

Commission to treat bad conduct more seriously if it takes place shortly before a proposed release than at the beginning of a sentence. A person such as Mr. Bowers – who violated a rule early in his incarceration but then had over 20 years of perfect behavior – has shown through his conduct that he does not present a risk to the community. In contrast, someone who has recently attempted to escape may present a risk.[10] Deciding whether someone has "seriously or frequently violated institution rules and regulations" requires an assessment at the time an inmate approaches his thirty-year date, and necessarily is determined in light of his entire institutional record. *See* Appellant's Br. at 49-50.[11]

As the Magistrate Judge found, this is exactly how the Commission construed the statute before ***and*** after it denied Mr. Bowers parole. The Commission's argument to the contrary, relying upon purported distinctions between the cases of Mr. Bowers, Sara Jane Moore, and Zvonko Busic, does not withstand scrutiny.

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[10] Contrary to the Commission's contention, this construction does not render any part of the statute superfluous. Appellees' Br., at 35. A person who attempts to escape shortly before he is eligible for a mandatory parole may have "seriously violated" institution rules, even if the violation was not "frequent."

[11] Any other interpretation would result in the mandatory parole standard being more harsh, not more liberal, than the discretionary parole standard, since the Commission has never claimed that escape attempts preclude discretionary parole under Section 4206(a).

Without support in the record, the Commission hypothesizes that there are "distinctions that a rational decision-maker ***could*** draw in evaluating the severity of the three escapes." Appellees' Br., at 38 (emphasis added). But the Commission did not deny Mr. Bowers parole in October 2005 on the grounds that his escape attempt was more serious than either Ms. Moore's or Mr. Busic's escapes, nor did it hold that Ms. Moore's or Mr. Busic's actual escapes were not serious violations of prison rules. Instead, the Commission considered ***all three*** to have committed serious rule violations. The only difference is that for Ms. Moore and Mr. Busic, the Commission returned to its original (pre-Attorney General intervention) interpretation of the statute: it granted mandatory parole after weighing their rules violations in light of their complete institutional records. That is how the Commission originally approached Mr. Bowers' case; it determined that Mr. Bowers' escape attempt did not preclude mandatory parole when it granted him parole in January and May 2005. (R1-1 attachments 30 & 51 (Exhs. 29 & 50).)

As the 2006 and 2007 Notices of Action denying Mr. Busic mandatory parole make plain, the Commission considered Busic's escape a serious violation, although that was not the only reason for the denial. (R3-1-23 attachments 32, 33 (Ex. 117, 118).) His subsequent release on mandatory parole can only mean that the Commission did not consider itself barred from weighing the violation in light of his decades of good conduct after his escape. The Commission's suggestion –

that Mr. Busic's escape never was considered a serious violation – is contradicted by the record and common sense.

Ms. Moore escaped in 1979. She was convicted of escape and received a consecutive three-year sentence. (R3-20 attachment 1 (Ex. 84) at 2.) Mr. Bowers, in contrast, received only six months for his 1979 attempted escape. It is impossible to believe, as the agency now suggests, that her escape was not a serious rule violation. Instead, as Commission Chief of Staff Tom Hutchison said in explaining the decision to grant Ms. Moore mandatory parole in 2007, "nothing in her recent record blocked her release." (R3-20 attachment 2 (Ex. 85) at 1-2.)

Consequently, the Commission did not deny Mr. Bowers mandatory parole because it concluded that his escape attempt was more serious than Mr. Busic's or Ms. Moore's actual escapes. Instead, as the Magistrate Judge found, it adopted one construction of the statute for Mr. Bowers and a different construction for everyone else.[12] Such a unique interpretation of a statutory mandate epitomizes arbitrary and capricious action. *See also* Appellant's Br., at 51-53.[13]

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[12] Mr. Bowers does not assert, as the Commission argues, that he is entitled to release because of the different dispositions in these cases. Appellees' Br., at 38. The point is that the Commission adopted a temporary construction of the Parole Act at the urging of Commissioner Spagnoli and the Attorney General, and then returned to its original construction of the statute after denying Mr. Bowers parole.

[13] Chairman Reilly's findings concerning Mr. Bowers' escape attempt do not cure this defect. Although he explained why the escape was serious, he relied on the

Nonetheless, the Commission asks this Court to defer to its temporary construction of the statute, saying all this Court can do is determine "[i]f a rational basis exists for the Commission's action . . . ." Appellees' Br., at 39. A court is not obliged to defer to an agency's interpretation when it has expressed contradictory views. *See United States Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858 n.25, 95 S. Ct. 2051, 2063 n.25 (1975) ("In view of this unexplained contradiction in the [SEC's] position, we accord no special weight to its views.")

Even more importantly, this Court ought not shut its eyes to the circumstances in which the Commission reinterpreted Section 4206(d). The Magistrate Judge noted the Commission conducted its October 2005 meeting "with Assistant General Counsel Thiessen making the case for denial of parole 'after working closely with the Attorney General's Office back and forth regarding this review' and under the suasion of Commissioner Spagnoli . . . ." (R4-38-51.) She also noted that the legislation reauthorizing the Commission was pending for much of this time, and that the support of the Attorney General was needed. (R4-38-55-56.) Commissioner Spagnoli took the lead in urging the new construction of the statute, and voted for it. Commissioners Cushwa and Spagnoli made findings about Mr. Bowers' letter to Ms. Lee that were arbitrary and wholly unsupported by

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escape as the basis for denying parole, ignoring Mr. Bowers' exemplary record since then.

the record, a point not contested by the Commission. Nor does the Commission dispute the Magistrate Judge's finding that Commissioners Reilly, Cushwa, and Spagnoli concluded, without any rational basis, that Mr. Bowers hated the government and was likely to commit another crime. Under these circumstances, this Court cannot simply look for a "rational basis" for the Commission's construction of Section 4206(d). Rational basis review must presuppose that the decision-makers were not motivated by bias or influenced by improper considerations before the decision-making can be deemed rational.

Finally, Section 4206(d) gives Mr. Bowers a liberty interest in his mandatory parole that is protected by the Due Process Clause. A core requirement of due process is a neutral decision-maker. *See* Appellant's Br., at 31, 40-41. When a court or agency is biased or acts in response to improper pressure, the question is not whether an unbiased tribunal rationally could have reached the same result. In *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 445 (1927), where a judge was found to have a pecuniary interest in a case, the Supreme Court rejected the same suggestion apparently being offered by the Commission here:

> It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge.

Such has been the law ever since. Any other holding would render the requirement of a neutral decision-maker meaningless.

2. The Votes of Other Commissioners Do Not Eliminate the Taint

The Commission also suggests the decision below should be affirmed because three Commissioners other than Spagnoli voted for this temporary construction of the statute. Appellees' Br., at 40-44.[14] Given the unfounded conclusions of at least two of those three other Commissioners concerning the likelihood that Mr. Bowers might commit a crime, it is impossible to say that they were not influenced by Commissioner Spagnoli or the pressure from the Attorney General. For that reason alone, the Commission's action must be reversed.

But even if the only evidence was of Commissioner Spagnoli's bias, the decision cannot be upheld. The Commission functions as a collective body, and when one member is biased, the proceedings violate due process. *See* Appellant's Br., at 43. "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970) (quoting *Berkshire Emps.*

[14] This argument may be an effort to limit a grant of relief. But the Commission does not concede that the petition should be granted even in part, and has asked the Court to affirm the decision below. Appellees' Br., at 48.

Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941)).[15] The Commission does not discuss these cases or say why their holdings do not apply here, other than to offer a citation for the proposition that Commission officials may be presumed to act in good faith. Appellees' Br., at 44 (citing *Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992)). *Bridge* does not address the effect of one biased Commissioner upon the others, and the presumption urged by the Commission is simply not relevant in light of the record here.

Indeed, the Commission conceded this very point in the District Court:

> After reviewing the case law cited by the petitioner in his supporting memorandum, the Commission does not contest the proposition that if a court finds a lack of impartiality of one among several decision-makers, such impartiality would so undermine the integrity of the decision-making process that the decision must be vacated.

(R2-10-40.) The Magistrate Judge noted this concession. (R4-38-57-58.) Given the settled law on this point (which the Commission previously acknowledged), as well as the disturbing record in this case, it is difficult to understand how the Commission can ask this Court to ignore the taint and affirm the decision below.

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[15] The social science literature supports this point. In addition to the obvious influence that one person may have on another during group discussions and deliberations, even the sequencing of individuals' decision-making can affect outcomes. *See* Angela A. Hung & Charles R. Plott, *Information Cascades: Replication and an Extension to Majority Rule and Conformity-Rewarding Institutions*, 91 AM. ECON. REV. 1508 (2001).

III. THE COURT SHOULD GRANT THE PETITION AND ORDER MR. BOWERS' RELEASE ON PAROLE

The Magistrate Judge correctly concluded the appropriate remedy is to grant the petition and release Mr. Bowers on mandatory parole. Since the Attorney General had no authority to appeal and the Commission had no power to consider that appeal, the Commission's May 2005 grant of parole was final. As shown in *Ellard v. Ala. Bd. of Pardons & Paroles*, 928 F.2d 378, 383-83 (11th Cir. 1991) and *Bono v. Benov*, 197 F.3d 409, 416, 421 (9th Cir. 1999), where a parole authority acts illegally after entering a final order of parole, the appropriate remedy is to restore the parole.

The Commission counters with two cases, arguing that where procedural error is found, the approved remedy is a conditional writ of habeas corpus. Appellees' Br., at 44. Both of those cases, however, concerned errors prior to the entry of a final order by the agency. *See Guerra v. Meese*, 786 F.2d 414 (D.C. Cir. 1986) (error in applying discretionary parole guidelines); *Billiteri v. U.S. Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976) (same). Here, the May 2005 order granting parole was final under the Commission's rules and could be reopened only if "new and significant adverse information" was obtained. No such information was provided.

The Commission also attempts to distinguish *Ellard* because it involved a state parole board rather than the U.S. Parole Commission, but this distinction is

not relevant; it does not diminish the power of a habeas court. "[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority . . . to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2271 (2008). Granting the petition and releasing Mr. Bowers on parole would do no more than restore his status prior to the Attorney General's unlawful intervention and the Commission's subsequent unauthorized actions. Such an order is well within the power of a habeas court.

Releasing Mr. Bowers on parole is also the appropriate remedy even if this Court agrees only that the Commission acted arbitrarily or was biased. In contrast to the cases cited by the Commission (Appellees' Br., at 45), the Magistrate Judge found that "the impartiality of the Commission as a whole was affected" and that "the taint on the Commission's decision-making could not be eradicated simply by an order from this Court directing the Commission to grant Petitioner a new parole hearing." (R4-38-60.) This finding is amply supported by the record. As Mr. Bowers has shown, the Commission has not taken any meaningful action to cure the improper influences on agency staff and members. *See* Appellant's Br. at 55-56.

The Commission's arguments before this Court reinforce this conclusion. The Commission has acknowledged only that Commissioner Spagnoli's actions

created an "appearance" of impropriety. Appellees' Br., at 16, 34. While the Commission does not affirmatively contest the Magistrate Judge's findings that other Commission members acted arbitrarily and capriciously, neither has the Commission acknowledged or addressed them. Instead, without seeing the need to take any meaningful remedial action, the Commission faults Mr. Bowers for not accepting a *de novo* parole hearing with review of the hearing examiners' finding by the two remaining unrecused[16] Commissioners. Appellees' Br., at 47.

This is perhaps the Commission's most cynical argument. Since Judge Hodges ordered the Commission to consider Mr. Bowers for mandatory parole, he has had two parole hearings, each time with favorable findings. There are no facts left to find. After the first hearing, Mr. Bowers was granted parole. His case was again before examiners in March 2005 to determine if that decision should be reconsidered on the basis of allegedly new and significant adverse information. The hearing examiners found that there was no new information and no basis to reconsider the grant of parole. There was likewise no new information before the Commission when it denied Mr. Bowers parole in October 2005. In this posture, there is no reason for the Commission to conduct a *de novo* proceeding now.

[16] The Commission now has only three Commissioners, and Chairman Fulwood has recused himself.

Nor, as the Magistrate Judge expressly found, could Mr. Bowers receive a fair and unbiased hearing even if one was ordered. (R4-38-59-60.) In April 2004, the Commission stopped Mr. Bowers' release on the day he was to leave the prison on grounds Judge Hodges summarily rejected; postponed it again in February 2005 on the basis of the mere promise of new and significant information (which never materialized); cancelled it a third time in June 2005 when the Attorney General intervened with a vacuous request; expanded a reconsideration hearing into a *de novo* hearing; and then denied him parole on grounds that it had previously considered and rejected, applying a makeshift interpretation of the mandatory parole statute and making irrational findings. The Commission's continuing refusal to acknowledge that any of this was wrong only reinforces the Magistrate Judge's conclusion, for the Commission still reserves to itself the ability to make the same arbitrary and capricious findings based upon the same tainted record. It is difficult to envision a scenario that is less likely to provide either Mr. Bowers or this Court any comfort that a new parole hearing and review by two of the same Commissioners will be fair and unbiased. The Magistrate Judge correctly concluded a new parole hearing was not a suitable remedy.

Mr. Bowers has been held over 6 years beyond his mandatory parole release date. He should be released.

CONCLUSION

For all of the reasons set forth in the Appellant's Brief and this Reply, Petitioner-Appellant Veronza L. Bowers, Jr. respectfully asks this Court to reverse the decision below, and remand with instructions to grant his petition and release him forthwith on mandatory parole.

Respectfully submitted this 9th day of September, 2010.

/s/ C. Allen Garrett Jr.

KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

A. Stephens Clay
Georgia Bar No. 129400
C. Allen Garrett, Jr.
Georgia Bar No. 286335

Charles D. Weisselberg
California Bar No. 105015
UC Berkeley
School of Law
Berkeley, California 94720-7200
Telephone: (510) 643-8159
Facsimile: (510) 642-3856

Theodore D. Frank
D.C. Bar No. 23903
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5790
Facsimile: (202) 942-5999

Bryan Gaynor
California Bar No. 47875
1160 G Street, Suite A
Arcata, California 95521
Telephone: (707) 826-8544
Facsimile: (707) 826-8545

Thomas W. Stoever, Jr.
ARNOLD & PORTER LLP
(Colorado Bar No. 25434)
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Telephone: 303-863-2328
Facsimile: 303-832-0428

Attorneys for Petitioner-Appellant Veronza L. Bowers, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that, excluding the materials authorized to be excluded from the word count by 11th Cir. R. 32-4, this brief contains 6,872 words. I have relied on a word-processing system for the word count.

I further certify that, other than certain letters in the names of law firms in the signature blocks, this brief has been prepared in a proportionally spaced typeface utilizing 14-point Times New Roman font.

This 9th day of September, 2010.

/s/ C. Allen Garrett Jr.
C. Allen Garrett Jr.
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30080
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

One of the Attorneys for Petitioner-Appellant Veronza L. Bowers, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 25(a)(2)(B), I filed "**PETITIONER-APPELLANT'S REPLY BRIEF**," by dispatching same to a third-party commercial carrier for delivery to the clerk within three calendar days, addressed to:

Clerk's Office – Appeal No. 10-12170
U.S. Court of Appeals – Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303

I further certify that I served "**PETITIONER-APPELLANT'S REPLY BRIEF**" upon counsel of record for Respondents-Appellees, by dispatching same to a third-party commercial carrier for delivery within three calendar days, addressed to:

R. David Powell
Assistant U.S. Attorney
Richard B. Russell Federal Building
75 Spring Street, S.W., Suite 600
Atlanta, GA 30303-3309

This 9th day of September, 2010.

/s/ C. Allen Garrett Jr.
C. Allen Garrett Jr.
Georgia Bar No. 286335

One of the Attorneys for Petitioner-Appellant Veronza L. Bowers, Jr.