UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MARCUS RODGERS,
FCI McKean
6975 PA-59
Lewis Run, PA 16738

Case No.

Petitioner,

vs.

BOBBIE MEEKS,
Warden, FCI McKean
6975 PA-59
Lewis Run, PA 16738

and

UNITED STATES PAROLE
COMMISSION,
90 K Street, N.E.
Third Floor
Washington, D.C. 20530

Respondents.
_____/

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Marcus Rodgers, through his undersigned attorneys, respectfully submits this Petition for a Writ of Habeas Corpus.

INTRODUCTION

Marcus Rodgers is being unconstitutionally detained and is entitled to be immediately released on parole. On November 6, 2017, the United States Parole Commission ("Commission") granted Mr. Rodgers parole and gave him an effective parole date of July 23, 2018. He was released to a halfway house, where he followed all rules and requirements, and had obtained employment. In April 2018, the Commission unlawfully reopened Mr. Rodgers'

parole grant case for no lawful reason and issued a warrant for his arrest. Mr. Rodgers was arrested in his halfway house and brought back to prison, having no idea why. Mr. Rodgers had not violated any rules or laws, and the Commission had not learned anything new or obtained any new information related to Mr. Rodgers or his parole grant.

Mr. Rodgers, now a 41 year old man, was 18 years old at the time of the offense. He had a clean record while incarcerated, demonstrated remorse to the victim's family, and has been documented as rehabilitated. On these and other bases, the Commission granted Mr. Rodgers' parole. Once granted, Mr. Rodgers' had an entitlement to and expectation of parole that was created by the United States Parole Commission's own regulations. Its failure to follow those regulations violated the Fifth Amendment Due Process Clause and the Administrative Procedures Act, ("APA"), 5 U.S.C. § 701, *et seq*.

After the Commission gave Mr. Rodgers an effective parole date of July 23, 2018, its own regulations prohibited it from reconsidering this decision unless and until it received "new and significant information concerning" Mr. Rodgers. *See* 28 C.F.R. § 2.75(e). Despite this regulation, the Commission reopened Mr. Rodgers' parole proceedings on April 23, 2018, after he had already been transferred to a halfway house in advance of his impending release on parole. The purported basis for reopening the parole proceedings was to hear a statement in opposition to Mr. Rodgers' release from the victim's mother, which did not constitute "new" information under the regulation. The Commission had long been aware of the victim's mother's opposition to release after she testified at a 2015 parole hearing, and expressly considered this testimony prior to its decision to grant parole in 2017.

Following its improper decision to reopen Mr. Rodgers' parole proceedings, the Commission held a special reconsideration hearing on June 4, 2018 to consider his release. The

Hearing Examiner recommended that Mr. Rodgers be re-released, but the Commission ignored that recommendation and rescinded Mr. Rodgers' parole, violating another of its own regulations. Under the regulations, rescission of an effective parole date is prohibited unless there is evidence of new and significant information concerning Mr. Rodgers, including new adverse information such as institutional misconduct. *See* 28 C.F.R. § 2.86(a)-(b); *see also* 28 C.F.R. § 2.80(o)(5). It is undisputed that Mr. Rodgers did not commit any institutional or criminal misconduct to warrant rescission of the parole decision, and that the information given by the victim's mother was not "new." Indeed, a memorandum from the Commission obtained by Mr. Rogers pursuant to a Freedom of Information Act request on August 24, 2018 revealed to him for the first time that the Commission's reasons to rescind parole were based on old information from a prior hearing.

For the reasons stated below, this conduct by the Commission violated Mr. Rodgers' procedural and substantive due process rights, and the APA. The proper remedy for these violations is to vacate the Commission's rescission of parole, reinstate its prior grant of parole, and issue a writ of habeas corpus ordering Mr. Rodgers' immediate release.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2242; 28 U.S.C. § 1331; and the Administrative Procedure Act, 5 U.S.C..§ 701, *et seq*.

2. This Court has jurisdiction over this Petition for a Writ of Habeas Corpus because Petitioner is detained within its jurisdiction in the custody of Bobbie Meeks, the Warden of FCI McKean. Petitioner is therefore in custody for the purposes of the federal habeas corpus statute, 28 U.S.C. § 2241. *Boling v. Smith,* 277 F.App'x 174, 176 (3d Cir. 2008); *McIntyre v. Ebbert,* 2011 U.S. Dist. LEXIS 22859, at *10 (M.D. Pa. March 7, 2011) (citing *Woodall v.*

Federal Bureau of Prisons, 423 F.3d 235, 242 (3d Cir. 2005) ("a Section 2241 motion properly challenges 'such matters as the administration of parole . . .'"); *Cambrel v. Bledsdoe,* 2011 U.S. Dist. LEXIS 86708, *2 (M.D. Pa. August 5, 2011) (same); *Reaves v. Hudson,* 2015 U.S. Dist. LEXIS 50244, at *2 (M.D. Pa. April 16, 2015) (same); *Miller v. U.S. Parole Comm'n,* 2015 U.S. Dist. LEXIS 43581, at *2 (M.D. Pa. April 2, 2014) (same); *Reynolds v. Williamson,* 2005 U.S. Dist. LEXIS 28986, at *2 (M.D.Pa. 2005) (same); *see also Blair-Bey v. Quick*, 151 F.3d 1036, 1046 (D.C. Cir. 1998) (finding a D.C. parolee's challenge to Parole Commission's determination under § 2241 to be proper).

3. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1), (e)(1) because Petitioner is detained in the custody of FCI McKean located in Lewis Run, Pennsylvania and Respondent Bobbie Meeks is the Warden at FCI McKean located in Lewis Run, Pennsylvania, and there is no real property involved in this action.

PARTIES

4. Petitioner Marcus Rodgers, Fed. Reg. 09938-007, a resident of the District of Columbia, is currently incarcerated at FCI McKean in Lewis Run, Pennsylvania.

5. Respondent Bobbie Meeks is the warden of FCI McKean. He is the federal official responsible for Mr. Rodgers' custody.

6. The Commission is a United States government agency. The Commission is responsible for administering parole proceedings for District of Columbia offenders.

STATEMENT OF FACTS

7. On April 30, 1997, Mr. Rodgers pled guilty to Second Degree Murder While Armed in connection with the death of Christian McNeil. Mr. Rodgers was sentenced to a term of 20 years to Life under District of Columbia Code (D.C. Code) § 22-2404 (currently § 22-

2103).

8. Mr. Rodgers was 18 years old at the time of the offense, which occurred on February 18, 1996 and has been in custody since March 24, 1996. Prior to his present conviction, Mr. Rodgers did not have a criminal record.

9. Mr. Rodgers began serving his sentence in prison in Virginia. After three years, Mr. Rodgers was transferred to federal custody after responsibility for District of Columbia prisoners was transferred to the federal government.[1] Mr. Rodgers served time in two federal facilities prior to his transfer to FCI McKean, a medium security prison, in 2008.

10. In the 23 years that he has been incarcerated, Mr. Rodgers has had just one disciplinary write-up, for a minor incident in 2003.

2015 Initial Parole Hearing

11. Mr. Rodgers first became eligible for parole on March 8, 2016. In advance of this date, the United States Parole Commission held an initial parole hearing for Mr. Rodgers on October 5, 2015.

12. At the initial parole hearing, Mr. Rodgers "accepted responsibility for the offense behavior" and "apologized to the victim's mother, stating he makes no excuses for what he did." *See* Ex. B, 10/7/2015 Post-Hearing Assessment at 3. ("The subject indicated his remorse for this offense to the victim, which this Examiner believes was sincere.").

13. In addition to hearing from Mr. Rodgers, the Hearing Examiner, Sandra

[1] In 1997 the District of Columbia was in deep financial crisis and the United States Congress enacted the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, § 11231(a), 111 Stat. 712, 745 ("Revitalization Act"); *see also* D.C. Code § 24-131(a), to provide financial stability. In exchange for financial relief, the District lost control over D.C. prisoners and critical functions were transferred to the federal government. As part of the Revitalization Act, all D.C. prisoners were transferred from the local Lorton Prison Complex in Virginia to federal Bureau of Prisons facilities across the country. The same law also abolished the D.C. Board of Parole, vesting decision-making authority in the U.S. Parole Commission for parole decisions of D.C. prisoners.

Hylton, took written and oral testimony from the victim's mother, Gwendolyn McNeil. *Id.* at 1-2.

14. Prior to the hearing, Ms. McNeil provided a victim impact letter to the Commission for consideration, which was read into the record at the hearing. *Id.* at 1.

15. At the hearing, Ms. McNeil expressed her opposition to Mr. Rodgers' release, and gave detailed testimony regarding the emotional effect of Mr. Rodgers' crime. She described how she often has dreams of her son in his last moments; Mr. McNeil was her only son and her parents' favorite grandchild; she has no children left to take care of her or to bury her when she passes away; Mr. McNeil was training to be a chef; while Mr. Rodgers is incarcerated, he is still alive, unlike Mr. McNeil; and she wished she could have pulled Mr. McNeil to safety. *See* Ex. C, 2015 Initial Parole Hearing Audio, 22:55-31:10.[2]

16. Using the 1987 Guidelines[3], Mr. Rodgers was given a point score of 2, indicating that parole should be granted.

17. Despite this score, Ms. Hylton deviated from the guidelines and recommended that Mr. Rodgers be denied parole in order to allow further time to complete his General Education Degree ("GED"). *See* Ex. B, 10/7/2015 Post-Hearing Assessment at 3.

18. This recommendation was adopted by the Commission in its December 7, 2015 decision denying parole. *See* Ex. D, 12/7/2015 Notice of Action. The Commission noted that Mr. Rodgers would be eligible for a parole rehearing in 24 months. *Id.*

[2] Audio of Mr. Rodgers' parole hearings, Exhibits C, J, and M, will be provided to the Court via thumb drives.

[3] In *Sellmon v. Reilly*, 551 F. Supp. 2d 66 (D.D.C. 2008), the court held that grants of parole for prisoners convicted under the D.C. Code for violations occurring before August 5, 1998 be evaluated under the District of Columbia's 1987 Parole Guidelines ("1987 Guidelines."). Because Mr. Rodgers' offense occurred between October 24, 1995 and August 4, 1998, the 1995 D.C. Board of Parole Policy Statement also applies to his parole proceedings. *See* Ex. S, 1995 D.C. Board of Parole Policy Statement.

2017 Parole Rehearing

19. The parole rehearing was subsequently scheduled for October 10, 2017 before Hearing Examiner Stephen Husk.

20. In accordance with the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, *et seq.*, the D.C. Code § 23-1901(b)(3)-(4), and the parole regulations that apply to D.C. prisoners, 28 C.F.R. § 2.72(c)(1)-(2), the Commission notified Ms. McNeil of the upcoming parole rehearing in order to give her an opportunity to attend and participate in the rehearing.

21. On September 18, 2017, "the pre-hearing examiner e-mailed USPC Victim Staff a copy of the pre-hearing assessment including the information pertaining to the victim's mother prior participation." *See* Ex. E, 10/10/2017 Post-Hearing Assessment.

22. After no response was received, Mr. Husk "checked back with USPC Victim Staff on 10/6/17 and no response had been received." *Id.*

23. Ms. McNeil later confirmed that "she received the victim notification letter relating to the subject-named offender." *See* Ex. F, 12/13/2017 USPC Memorandum.

24. The parole rehearing proceeded as scheduled on October 10, 2017, with Mr. Husk, Mr. Rodgers, and Mr. Rodgers' Case Manager at FCI McKean in attendance.

25. At the rehearing, Mr. Rodgers again admitted to the offense and did not excuse his actions. *See* Ex. E, 10/10/2017 Post-Hearing Assessment at 2.

26. Mr. Rodgers noted that, despite numerous attempts to obtain his GED, his difficulty with mathematics was preventing him from reaching that goal.

27. During the hearing, Mr. Husk acknowledged Ms. McNeil's absence, and made explicit reference to her past victim-impact testimony in 2015, noting that "it was pretty gut-wrenching statements and I see they read them into the record the last time. What would you

say to her if she was here today? It was gut-wrenching for them to have to lose their child like that." *See* Ex. J, 2017 Parole Hearing, at 25:05-25:40.

28. In his Post-Hearing Assessment, Mr. Husk noted that Mr. Rodgers had received a point score of 1 under the District of Columbia's 1987 Parole Guidelines, indicating that Mr. Rodgers should be granted parole.

29. Mr. Husk again acknowledged the absence of Ms. McNeil at the rehearing, and noted her previous statement at the 2015 parole hearing in which "she opposed parole[,] reading into the record a letter outlining her opposition to release" and describing her son's last moments. *See* Ex. E, 10/10/2017 Post-Hearing Assessment at 1-2.

30. Mr. Husk determined that Mr. Rodgers' explanation regarding his GED was credible and noted documentation supporting Mr. Rodgers' good-faith efforts to obtain his degree. *Id.* at 4.

31. Mr. Husk also noted that Mr. Rodgers' Case Manager confirmed Mr. Rodgers' completion of a six-month drug treatment program.

32. In light of the foregoing, Mr. Husk recommended that Mr. Rodgers be granted parole. *Id.*

33. On November 6, 2017, the Commission adopted this recommendation, issuing a Notice of Action granting Mr. Rodgers parole effective July 23, 2018. The Commission determined that parole was appropriate under the District of Columbia's 1987 Parole Guidelines, and that "[a]fter consideration of all factors and information presented, a departure from the guidelines . . . is not warranted." *See* Ex. G, 11/6/2017 Notice of Action.

34. The Commission voted to grant Mr. Rodgers parole by a vote of two Commissioners, J. Patricia Wilson Smoot and Patricia K. Cushwa, in favor of parole and one

Commissioner in opposition. The lone dissenting vote was cast by Commissioner Charles Massarone. *See* Ex. T, 2017 Commission Vote.

Release to Halfway House

35. In preparation for his release, Mr. Rodgers was transferred from FCI McKean to a Residential Reentry Center, the Hope Village Halfway House in Washington, D.C. on March 21, 2018.

36. While at the halfway house, Mr. Rodgers shared an apartment with three other individuals, and attended an orientation, drug counseling, a computer-programming course, and continued working towards his GED.

37. After completing these programs, Mr. Rodgers was permitted to search for employment. Mr. Rodgers passed a construction exam and was hired as a construction worker in the District of Columbia, where he was to be paid $13 an hour. On his first and only day on the job, sometime in May 2018, Mr. Rodgers worked from 4:00 a.m. to 3:00 p.m. before returning to Hope Village.

Arrest and Re-incarceration

38. At 8:30 p.m. that same day, Hope Village was placed on lockdown while two police officers entered Mr. Rodgers' apartment, placed him under arrest, and transferred him to the Piedmont Regional Jail in Farmland, Virginia.

39. Mr. Rodgers was not given a copy of the arrest warrant or informed of the reason for his arrest.

40. Mr. Rodgers was later transferred back to FCI McKean.

41. In the several weeks that he was housed at Hope Village, Mr. Rodgers had completed all required counseling, obtained gainful employment, and did not violate any

institutional rules or laws. *See* Ex. H, 6/4/2018 Hearing Summary at 2 ("He was subsequently transferred to a halfway house (RRC) and had not sustained any new incident reports.").

42. It was not until a week after his arrest that Mr. Rodgers was informed of the reason for his arrest and transfer back to FCI McKean: a request from Ms. McNeil.

2018 Special Reconsideration Hearing

43. On November 8, 2017, two days after the Commission had issued its Notice of Action granting Mr. Rodgers parole, Ms. McNeil contacted a victim specialist at the Commission. Ms. McNeil confirmed that she received the victim notification letter regarding Mr. Rodgers' October 10, 2017 parole rehearing, but was unable to attend due to medical concerns.

44. Ms. McNeil subsequently wrote a November 13, 2017 letter to the Commission opposing Mr. Rodgers' release, and followed up by phone with the victim specialist. Ms. McNeil conceded that "there has been no communication" between her and Mr. Rodgers, but stated that she was concerned about Mr. Rodgers' ability to find her via the Internet. While the victim specialist informed Ms. McNeil that the Commission had resources available to assuage her concerns, Ms. McNeil requested another parole rehearing so that she could appear. *See* Ex. F, 12/13/2017 USPC Memorandum.

45. After reviewing these communications, Najah Barton, the Commission's Supervisory Victims Coordinator, recommended that the Commission "[c]onduct a re-hearing at the next soonest available docket before the parole effective date . . . as her typed-written statement of November 13, 2017 could not be considered before or during the hearing process, and [Mr. Rodgers] presently has a presumptive parole date." *Id.*

46. On April 23, 2018, the Commission adopted this recommendation and issued a Notice of Action stating that "the following action was ordered pursuant to [28 C.F.R. §] 2.28(f): Reopen and reschedule for a special reconsideration hearing on the next available docket."

47. The reason given for this decision was that Ms. McNeil "was unable to exercise her right to participate in the parole hearing associated with the subject-named offender under D.C. Code and the Crime Victims' Rights Act." *See* Ex. I, 4/23/2018 Notice of Action; *compare* Ex. N, USPC Rules and Procedures Manual, at 281 (Appendix 1 - Standard Wording on Orders [Examples]) ("Pursuant to [28 C.F.R. 2.28(f)] [Pursuant to 28 C.F.R. 2.28(f) and 2.30], reopen and schedule for a special reconsideration hearing to consider new adverse information.").

48. Title 28 C.F.R. § 2.28(f) states that "[u]pon receipt of new and significant adverse information. . . a Commissioner may refer the case to the National Commissioners with his recommendation and vote to schedule the case for a special reconsideration hearing." *See also* 28 C.F.R. 2.75(e) ("[T]he Commission may reopen any case for a special reconsideration, as provided in § 2.28, upon the receipt of new and significant information concerning the prisoner.").

49. The information received from Ms. McNeil was not new, had been presented to the Commission at the prior hearing, was part of the record and was actually considered by the Commission when it granted parole.

50. On May 14, 2018, Congresswoman Eleanor Holmes Norton sent a letter to the Commission in response to a letter from Mr. Rodgers requesting information about the reopening of his case for a special reconsideration hearing. Ex. O, 5/14/2018 Letter from

Congresswoman Holmes.

51. Following the Commission's April 23, 2018 Notice of Action, it held a special reconsideration hearing before Mr. Husk on June 4, 2018.

52. At the commencement of the hearing, Mr. Husk acknowledged that the hearing was not being held based on the receipt of new and significant adverse information, stating:

> The primary purpose of the hearing is really for the victim participation, but I am going to have some questions for you myself . . . ***There isn't any new information. I've basically stated why we are doing this hearing – because the victim contacted the Parole Commission after your hearing.***

Ex. M, 2018 Special Reconsideration Hearing Audio, 1:52-2:29.

53. Mr. Husk also confirmed the lack of new information warranting a rehearing in his post-hearing summary, in which he noted that Mr. Rodgers' "parole grant was pulled back after the deceased victim's mother contacted the USPC and advised of her intent to exercise her right to testify at the hearing. *Thus, today's hearing was a special reconsideration hearing for that purpose*." *See* Ex. H, 6/4/2018 Hearing Summary at 1 (emphasis added).

54. Following Mr. Husk's opening statement, he took testimony from Ms. McNeil. Ms. McNeil read a letter dated May 29, 2018 into the record. *See* Ex. U, 5/29/2018 Letter From Ms. McNeil. While this statement reiterated the emotional effect of Mr. Rodgers' crime, it did not provide any new information to the Commission and was in substance identical to Ms. McNeil's testimony at Mr. Rodgers' 2015 initial parole hearing. The statements during the 2015 and 2018 hearings both informed the Commission that Ms. McNeil often dreams of her son in his last moments; Mr. McNeil was her only son and her parents' favorite grandchild; she has no children left to take care of her or to bury her when she passes away; Mr. McNeil was

training to be a chef; while Mr. Rodgers is incarcerated, he is still alive, unlike Mr. McNeil; and she wished she could have pulled Mr. McNeil to safety. *Compare* Ex. C, 2015 Initial Parole Hearing Audio, 22:55-31:10 *with* Ex. M, 2018 Special Reconsideration Hearing Audio, 9:13-31:40.

55. Mr. Rodgers also spoke at the hearing. He informed Mr. Husk that he had completed all required counseling, continued to work towards his GED, and had obtained a job working construction. He once again apologized to Ms. McNeil, noting that he made no excuses for his actions. He expressed disappointment over being transferred back to prison after he had obtained gainful employment, and expressed his desire to make amends to Mr. McNeil's family by becoming a productive citizen. *See* Ex. H, 6/4/2018 Hearing Summary at 2.

56. At the conclusion of the hearing, Mr. Husk again recommended that Mr. Rodgers be paroled. Mr. Husk reasoned that while Ms. McNeil gave a strong, emotional statement, "I must weigh this, however, against the facts that (1) Rodgers was 18 years old at the time; (2) had no prior criminal record; (3) did not randomly target the victim and; (4) has maintained clear prison conduct since 2003." *Id.* Mr. Husk also noted that Mr. Rodgers had served more than two years past his parole eligibility. Mr. Husk noted that in light of these facts, a departure from the parole guidelines, which counseled in favor of release, was not warranted. He recommended an effective parole date of December 23, 2018. *Id.*

57. In fact, while not mentioned in his recommendation, Mr. Husk was prohibited by federal regulations from recommending a reversal of Mr. Rodgers' parole grant. Title 28 C.F.R. § 2.86(b) states that the Commission may rescind parole after a parole effective date has been set only "upon receipt of any new and significant information concerning the prisoner, including disciplinary infractions."

58. Mr. Husk confirmed that Mr. Rodgers "had not sustained any new incident reports" since being granted parole.

59. The victim impact statement given by Ms. McNeil does not constitute "new" information.

60. Despite the plain language of this regulation, and Mr. Husk's second recommendation to grant parole, the Commission denied Mr. Rodgers parole and set a rehearing to take place after an additional 24 months of incarceration.

61. The additional 24 months, or the "set off" period, is the length of time until a prisoner is eligible for a new hearing after being denied parole. The 1987 Guidelines state that a prisoner ordinarily shall receive a rehearing one year after the last hearing. D.C. Mun. Regs., tit. 28, § 103.2 (1985).

62. The Commission departed from this presumption of a hearing one year after the parole decision without any factual basis.

63. There were only two Commissioners who voted to overrule the Commission's prior parole decision, Commissioner Massarone and Commissioner Cushwa. *See* Ex. V, 2018 Commissioners Votes.

64. In a June 7, 2018 memorandum, Commissioner Massarone wrote, quoting his October 12, 2017 dissenting opinion, "As stated on 10/12/2017 deny parole and continue for a rehearing in 10/2017 after the service of 24 months from your last hearing date [of] 10/10/2017." The rationale given in Commissioner Massarone's memorandum was "Reasons listed on the 10/13/2017 memo." *See* Ex. K, 6/7/2018 Massarone Memorandum; *see also* Ex. W, 10/13/2017 Massarone Memorandum.

65. Commissioner Massarone was not basing his denial on new adverse

information, as required by 28 C.F.R. § 2.86(b).

66. He instead simply incorporated by reference the exact reasons given for his dissenting vote in 2017. *See* Ex. K, 6/7/2018 Memorandum.

67. The Commission memorialized this decision in a June 14, 2018 Notice of Action. The Commission stated that, because Mr. Rodgers had a score of 1 under the 1987 guidelines, "[t]he guidelines indicate that parole should be granted at this time." However, the Commission stated that it was deviating from the guidelines "due to the nature of the violation, the aggravating circumstances and your actions while in the community. Your institutional experience such as your lack of success towards your educational development and victim's impact programming." *See* Ex. L, 6/14/2018 Notice of Action.

68. As discussed further below, each of these grounds is baseless and pretextual, and in violation of the Commission's own regulations, Mr. Rodgers' due process rights, and the APA.

69. D.C. Code offenders are unable to challenge the Commission's parole decisions through an administrative appeal. Additionally, D.C. Code § 23-110, which provides habeas remedies for attacking a D.C. Superior Court's sentence, is an inadequate remedy for Mr. Rodgers to test the legality of his detention because he is challenging a decision by the Commission, rather than challenging the legality of his sentence. *See Gant v. Reilly*, 224 F. Supp. 2d 26 (D.D.C. 2002)

70. On July 1, 2018, Mr. Rodgers sent a letter to the Commission requesting that his parole grant be reinstated, arguing that Notice of Action's reference to his "aggravated actions while in the community" was based on false statements by the victim during the 2018 hearing that he approached the victim in the community. *See* Ex. A, 7/1/2018 Letter to

Commission.

71. Although Mr. Rodgers misunderstood the victim's statements during the hearing, the Notice of Action's reference to Mr. Rodgers' "actions while in the community," implied that Mr. Rodgers somehow committed misconduct while released to the halfway house.

72. At the time Mr. Rodgers wrote this letter to the Commission, he did not have his parole file, which included, among other information, the victim's letters and the memoranda, including the memo from the victim specialist and the memo with the dissenting opinion of the Commissioner in 2017, and hearing assessments from 2015, 2017, and 2018 hearings. This information from his parole file was necessary to establish: (1) that no new information was considered at the 2018 hearing, (2) that the Commission actually considered the victim impact testimony in issuing its decisions in his 2015 and 2017 hearings, (3) that the reasons stated in the Notice of Action were based on old information included in a dissenting opinion by a Commissioner and that the basis of the denial was not due to statements by the victim in his 2018 special rehearing.

73. On July 5, 2018, Commissioner Smoot sent a letter in response to Congresswoman Norton's May 14, 2018 letter stating that it reopened Mr. Rodgers' case because the victim's mother contacted the Commission and that he was denied parole on June 4, 2018. Ex. P, 7/5/2018 USPC Response to Congresswoman Holmes.

74. On July 23, 2018, Mr. Rodgers' effective parole date passed and he remained unlawfully detained in custody at FCI McKean.

75. On August 9, 2018, the Washington Lawyers' Committee ('the Committee") submitted on Mr. Rodgers' behalf a Freedom of Information Act ("FOIA") request to obtain his parole file. Ex. Q, 8/9/2018 Committee FOIA Request.

76. On August 24, 2018, the Committee received a letter from the Commission's FOIA officer in response to the FOIA request disclosing Mr. Rodgers' parole file except for the victim's letters, citing FOIA privacy exemption 5 U.S.C. § 552(b)(1)-(9), and the audio recordings from the first two parole hearings. On this date, Mr. Rodgers obtained the information necessary to establish that there was no new information considered by the Commission. Ex. R, 8/24/2018 USPC Response to Committee FOIA Request.

77. Mr. Rodgers' next parole rehearing is currently ordered for June 2020.

CLAIMS

BY REOPENING AND RESCINDING MR. RODGERS' PAROLE-GRANT, THE UNITED STATES PAROLE COMMISSION VIOLATED MR. RODGERS' PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

Procedural Due Process

Liberty Interest

78. The Fifth Amendment's Due Process Clause states that no one shall be "deprived of life, liberty or property without due process of law." U.S. Const. amend. V. Accordingly, before determining whether a person is entitled to due process, courts must first examine whether there is a recognizable liberty or property interest with which the State has interfered. *See Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979) ("The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest."). A cognizable liberty or property interest "must be based on more than 'a unilateral hope.' Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it." *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458, 465 (1981) (quoting *Kentucky Dept. of Corrections v. Thompson*, 490

U.S. 454, 460 (1989)). It is well-settled that a protected liberty interest can arise from two sources: (i) the Due Process clause itself; or (ii) state law. *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

79. Mr. Rodgers has a liberty interest in his parole arising out of state law, namely, the parole regulations that govern the parole of District of Columbia prisoners. It is axiomatic that "state law may create enforceable liberty interests in the prison setting." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461 (1989). Indeed, in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), the seminal case governing prisoner liberty interests, the Court held that the state law governing parole proceedings for Nebraska inmates created a liberty interest in parole. *See id.* at 11-12 ("Respondents emphasize that the structure of the provision together with the use of the word 'shall' binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found . . . We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection.").

80. Whether parole regulations create a liberty interest turns on whether the regulations vest complete discretion in parole board officials, in which case there is no protected liberty interest, or contain mandatory language regarding release, in which case the individual has a cognizable liberty interest entitling him to process. *Id.*

81. The Supreme Court has held that "a State creates a liberty interest . . . by establishing 'substantive predicates' to govern official decisionmaking and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Thompson*, 490 U.S. at 462 (quoting *Hewitt*, 459 U.S. at 472). In other words, a protected liberty interest exists where "the regulations contain 'explicitly mandatory language,' i.e., specific

directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Id.* at 463 (quoting *Hewitt*, 459 U.S. at 471-472). The Third Circuit has held that a "state-created liberty interest" exists where there is "statutory language limiting the power of the power of the [State]" in the prisoner setting. *Evans v. Sec'y Pa. Dept. of Corr.*, 645 F.3d 650, 663 (3d Cir. 2011).

82. The federal regulations governing the parole of District of Columbia prisoners like Mr. Rodgers contain an express limitation on the discretion of parole officials to reopen a decision to grant parole by ordering a parole rehearing. The decision to reopen a case to order a parole rehearing is governed by 28 C.F.R. § 2.75(e), which states that "the Commission may reopen any case for a special reconsideration hearing, as provided in § 2.28, upon the receipt of new and significant information concerning the prisoner." *See also* 28 C.F.R. § 2.28(f) ("Upon receipt of new and significant adverse information . . . a Commissioner may refer the case . . . for a special reconsideration hearing."). Significantly, the regulation contains a "substantive predicate" to the ability of parole officials to order a rehearing following a grant of parole, i.e., the receipt of "new and significant information concerning the prisoner."

83. Courts have long recognized that 28 C.F.R. § 2.75(e) provides a limitation on the discretion of the Parole Commission to order a parole rehearing. In *Drayton v. McCall*, 584 F.2d 1208 (2d Cir. 1978), the court held that the regulation creates a liberty interest, reasoning that reconsideration of a parole grant is only permitted under "narrowly circumscribed conditions." *Id.* at 1215. The court held that the regulations constrict the Commission's authority to reconsider a parole grant to "carefully defined situations" and "[t]he regulatory structure, therefore, justifies the parole grantee's expectation of future liberty." *Id.*; *see also Green v. McCall*, 822 F.2d 284, 289 (2d Cir. 1987) (analyzing the updated federal regulations

and holding that "both the concreteness of the parole grantee's liberty expectation and the objective nature of the findings that must be made before that expectation may be eliminated are characteristics that, under *Greenholtz*, must be viewed as supporting the existence of a protectable liberty interest."); *see also* Ex. N, USPC Rules and Procedures Manual, at 288-289 (citing *Drayton v. McCall and Green v. McCall* in establishing special procedures for rescission of a parole effective date).

84. More recent rulings, including within the Third Circuit, have emphasized the limits the regulations place on the Commission to order a parole rehearing. In *Otts v. U. S. Parole Commission*, 2005 BL 67063, 6 (M.D. Pa. Aug. 31, 2005), the court denied a writ of habeas corpus where "Petitioner has not provided evidence of 'new and significant' information that could lead the Commission to use its discretion under Section 2.75(e) to schedule a reconsideration hearing." This ruling recognizes that the Commission only has discretion to order a rehearing if "new and significant" evidence has been produced.

Required Procedural Protections

85. Because the regulations set forth mandatory requirements that establish a liberty interest, Mr. Rodgers was entitled to due process before the Commission vacated his parole grant and ordered a rehearing. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."). It is axiomatic that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Id.*; *see also Greenholtz*, 442 U.S. at 11 (due process requires "an

opportunity to be heard" and if unsuccessful, the right to be "inform[ed] . . . in what respect he fell short.").

86. The government function at issue in this case is the ability of the Commission to reopen a case and order a parole rehearing, while the private interest at stake is Mr. Rodgers' effective parole date. Under the regulation, his effective parole date may not be reconsidered unless there has been a finding that "new and significant" information regarding Mr. Rodgers has arisen. *See* 28 C.F.R. §§ 2.75(e), 2.28(f). In order to protect his interest in his effective parole date, Mr. Rodgers was entitled to the procedural protections established in the governing law, before the parole date could be reconsidered.

87. There was no substantive or procedural due process in this case. Prior to ordering the reconsideration hearing, the Commission did not engage in *any* process, or make *any* finding that new and significant information had arisen. To the contrary, it expressly concluded that there was no new information.

88. The purported basis for ordering a rehearing — the desire of Ms. McNeil to give a statement — does not constitute new and significant information under the regulation.

89. The Third Circuit has held that information is only considered "new" if it was not already considered by the Commission. *See Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 104 (3d Cir. 1992); *see also Davis v. Brown*, 311 F. Supp. 2d 110, 113 (D.D.C. 2004) (holding that information is only considered "new" under the regulations if it "was not considered at the initial hearing."); *Patterson v. Gunnell*, 753 F.2d 253, 256 n.1 (2d Cir. 1985) ("[F]or purposes of reopening under 28 C.F.R. § 2.28(f), concerning 'new and significant adverse information,' 'new' means not previously considered by the Parole Commission."); *Fardella v. Garrison,* 696 F.2d 208, 211 (4th Cir. 1982) (same).

90. Ms. McNeil's phone calls to the Commission and her November 13, 2017 letter did not constitute "new" information because the Commission had been made aware of and expressly considered the information given in these communications during Mr. Rodgers' 2015 and 2017 parole hearings.

91. During the 2015 hearing, Ms. McNeil read a statement describing the emotional effect of Mr. Rodgers' offense that was virtually identical to the November 13, 2017 letter she sent to the Commission.

92. Ms. McNeil's 2015 statement was also expressly considered by Mr. Husk during Mr. Rodgers' October 10, 2017 hearing. After noting her absence at the hearing, Mr. Husk referred to Ms. McNeil's testimony at the 2015 hearing, stating that "it was pretty gut-wrenching statements and I see they read them into the record the last time. What would you say to her if she was here today? It was gut-wrenching for them to have to lose their child like that." *See* Ex. J, 2017 Parole Hearing Audio, at 25:05-25:40.

93. Ms. McNeil's letter and calls did not contain new information regarding Mr. Rodgers' actions while in prison or in the halfway house. As noted above, Ms. McNeil's 2015 statement had already made the Commission aware of the emotional effects of Mr. Rodgers' crime. Significantly, the hearing examiner, Steve Husk, acknowledged at the commencement of the 2018 special rehearing that the case had been reopened without new information. Mr. Husk stated that "the primary purpose of the hearing is really for the victim participation, but I am going to have some questions for you myself . . . *There isn't any new information*. I've basically stated why we are doing this hearing – because the victim contact[ed] the Parole Commission after your hearing." Ex. M, 2018 Special Reconsideration Hearing, 1:52-2:29.

94. Indeed, courts have held that statements from victims that do not contain new and significant information, but instead merely remind the Commission of the emotional impact of the inmate's crime, are not grounds for reconsidering a prisoner's parole date.

95. In *Bono v. Benov*, 197 F.3d 409, 413 (9th Cir. 1999), the petitioner had been given a presumptive parole date of July 17, 1997. However, after receiving a letter from the victim's daughter, the Commission remanded the case for a rehearing "purportedly . . . to afford Bono an opportunity to respond to the victim letter." *Id.* at 414. After reviewing the letter on remand, the examiner stated that "this examiner does not believe that it substantially changes the underlying nature of the offensive behavior. While the Commission may not have known the exact feelings of the family members of the victims, it was well aware that [Bono] caused the loss of life of two individuals." *Id.* However, despite the examiner's recommendation, the Commission extended the petitioner's presumptive parole date by twelve years, noting the brutality of his offense. *Id.* at 415.

96. The petitioner in *Bono* subsequently filed a habeas petition. The district court granted the petition, holding that the decision to extend the petitioner's presumptive parole date was vindictive. *Id.* at 416. On appeal, the government argued that "the relevant Commissioners were motivated not by vindictiveness but by a concern for the severity of petitioner's crime, as reinforced by the victim letter." *Id.* at 421. The Ninth Circuit rejected this argument, holding that "[t]he victim letter, although compelling and perhaps an emotional impetus for the Commission's decision, did not constitute new and significant adverse information." *Id.* The court reasoned that "[t]he letter did not provide the Commission with any information that was not available to it at the time it set Bono's original presumptive parole date. From the moment Bono entered the federal parole system" the Commission knew that the victim

had left behind a family that had been deeply affected by the petitioner's actions. While the letter provided a moving account of the family's difficulties, "it does not provide any information that was not before the Commission at the time Bono's original presumptive parole date was determined." *Id.*

97. As in *Bono*, the letter from Ms. McNeil and her phone calls to the Commission did not provide the Commission with any information that was not available to it when it granted Mr. Rodgers parole in 2017. The contents of the November 13, 2017 letter and Ms. McNeil's phone calls to the Commission were in substance identical to the statement given by Ms. McNeil to the Commission in 2015; the Commission was thus acutely aware of the emotional impact of Mr. Rodgers' crime when it granted parole. Because the 2017 communications from Ms. McNeil did not contain any new and significant information, and because Ms. McNeil had been properly notified prior to the 2017 hearing in accordance with the CVRA, the decision to schedule a special reconsideration hearing and suspend Rodgers' scheduled release date of July 23, 2018 violated his procedural due process rights. *See* 28 C.F.R. §§ 2.75(e), 2.28(f).

98. This violation of Mr. Rodgers' fundamental right to due process requires that the June 14, 2018 Notice of Action denying parole be vacated, the November 6, 2017 Notice of Action granting Mr. Rodgers parole be reinstated, and Mr. Rodgers be immediately released. *See Gambino v. Morris*, 134 F.3d 156, 164 (3d Cir. 1998) (permitting immediate release from custody where "good cause" is shown).

Substantive Due Process

99. In addition to violating his procedural due process rights, the Commission's reopening and rescission of Mr. Rodgers' scheduled parole date violated his

substantive due process rights.

100. "The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs." *Evans v. Sec'y Pa. Dept. of Corr.*, 645 F.3d 650, 659 (3d Cir. 2011). "To determine whether one has been deprived of substantive due process, we first define the exact contours of the underlying right said to have been violated. *Id*. (internal citation and quotation omitted.) The Third Circuit has held that "once a state institutes a parole system, all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." *Block v. Potter*, 631 F.2d 233, 236 (3d Cir. 1980). "Hence, a plaintiff has a substantive due process right in being treated fairly during the parole process." *Mitchell v. Kauffman*, 2019 BL 108579, 2-3 (E.D. Pa. Mar. 25, 2019) (citing *Jubilee v. Horn*, 975 F. Supp. 761, 764-765 (E.D. Pa. 1997)).

101. Where, as here, the substantive due process claim arises out of actions by the executive branch, "the threshold question is whether the [governmental] behavior . . . may fairly be said to shock the contemporary conscience." *Id.* at 660 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)).

102. In the context of decisions by parole boards, the Third Circuit has held that, in order to satisfy the requirements of substantive due process, there must be a basis for the Parole Board's challenged decision. *See Coady v. Vaughn*, 251 F.3d 480, 487 (3d Cir. 2001); *see also Block*, 631 F.2d at 236 n. 2 (a parole decision is constitutionally infirm if it is based on "frivolous criteria with no rational relationship to the purpose of parole."). Accordingly, the decision to reopen and rescind a parole-grant without a legitimate basis rises to the level of a substantive due process violation. *See Barnes v. Wenerowicz*, 280 F.R.D. 206, 218 (E.D. Pa.

2012) ("A federal habeas court may . . . grant relief in a case such as this one only 'if there is [no] basis for the challenged decision.'") (quoting *Hunterson v. Disabato*, 308 F.3d 236, 246 (3d Cir. 2002)).

Decision to Reopen Parole Proceedings

103. As discussed above, there was no basis for the Commission's decision to reopen the determination that Mr. Rodgers was entitled to and suitable for parole. Under the regulation, the only legitimate basis for ordering a special reconsideration hearing and suspending a prisoner's scheduled release date is if new and significant information comes to light. *See* 28 C.F.R. § 2.75(e) ("[T]he Commission may reopen any case for a special reconsideration, as provided in § 2.28, upon the receipt of new and significant information concerning the prisoner."); 28 C.F.R. § 2.28(f) ("Upon receipt of new and significant adverse information. . . a Commissioner may refer the case to the National Commissioners with his recommendation and vote to schedule the case for a special reconsideration hearing.").

104. The purported "new" information used to reopen Mr. Rodgers' parole proceedings – Ms. McNeil's phone calls to the Commission and her November 13, 2017 letter – does not constitute new information. As discussed above, the Third Circuit defines "new" information as information that was not considered by the Commission at the time it made its parole decision. *See Bridge*, 981 F.2d at 104. All of the information contained in Ms. McNeil's letter was considered during the 2015 hearing, after she gave a victim impact statement identical to the contents of the 2017 letter. This information was also considered by the Commission in its 2017 decision to grant parole. Indeed, Mr. Husk, the parole examiner, expressly noted during the 2017 hearing how impactful the statements by Ms. McNeil were, yet still ruled that Mr. Rodgers' impeccable conduct during his over 20 year incarceration demonstrated that he was suitable for

parole. *See* Ex. J, 2017 Parole Hearing, at 25:05-25:40; Ex. E, 10/10/2017 Post-Hearing Assessment.

105. Furthermore, at the 2018 special reconsideration hearing, Mr. Husk expressly admitted that the Commission was holding the rehearing without any new information, in contravention of the Parole Commission's own regulations. Ex. M, 2018 Special Reconsideration Hearing Audio, 1:52-2:29 ("The primary purpose of the hearing is really for the victim participation, but I am going to have some question for you myself . . . *There isn't any new information.*"). Accordingly, because the Parole Commission's basis for reconsidering its grant of parole were phone calls and a letter containing no new information, there was no legitimate reason for reopening Mr. Rodgers' parole grant and suspending his scheduled release date. Therefore, the Commission's failure to identify a legitimate basis for reconsidering its parole grant violated Mr. Rodgers' substantive due process rights. *See Coady*, 251 F.3d at 487.

106. The violation of Mr. Rodgers' fundamental right to substantive due process requires that the June 14, 2018 Notice of Action denying parole be vacated, the November 6, 2017 Notice of Action granting Mr. Rodgers parole be reinstated, and Mr. Rodgers be immediately released. *See Gambino*, 134 F.3d at 164.

Decision to Rescind Parole

107. The decision to rescind Mr. Rodgers' parole following the 2018 hearing also lacked any legitimate basis because it is wholly unsupported by the factual record.

108. Title 28 C.F.R. § 2.86 applies to parole rescission determinations for misconduct for D.C. prisoners who, like Mr. Rodgers, have already been granted an effective parole date. The regulation states that actual release on parole is conditioned upon the prisoner "maintaining a good conduct record in the institution or prerelease program to which the prisoner

has been assigned" and the prisoner shall not forfeit the parole effective date unless the parole effective date is rescinded "based upon the receipt of any new and significant information concerning the prisoner, including disciplinary infractions." 28 C.F.R. § 2.86(b).

109. The record in this case is completely at odds with the Commission's reasons for rescinding its grant of parole. Mr. Rodgers did not commit any institutional misconduct or criminal conduct and maintained good conduct in the halfway house. Mr. Husk confirmed this in his June 4, 2018 Hearing Summary, in which he noted that, following Mr. Rodgers' 2017 parole-grant, "[h]e was subsequently transferred to a halfway house (RRC) *and had not sustained any new incident reports*." (emphasis added).

110. Nothing had changed regarding his suitability for parole; Mr. Rodgers had been crime-free, gainfully employed, enrolled in GED courses; and he was otherwise meeting the conditions of parole while in the community.

111. Furthermore, the statement read into the record by Ms. McNeil during the 2018 hearing did not constitute new and significant adverse information. The statement was identical to the statement given to the Commission during the 2015 hearing, and considered again during the 2017 hearing. Because the Commission was aware of and considered this information when it made its decision to grant parole in 2017, it cannot be considered "new and significant" adverse information. 28 C.F.R. § 2.86(b); *See Bridge*, 981 F.2d at 104.

112. Despite undisputed evidence that Mr. Rodgers had not had an infraction since 2003, and had not committed any misconduct whatsoever while in the halfway house, the June 14, 2018 Notice of Action inexplicably stated that parole should be denied "due to the nature of your violation, the aggravating circumstances and *your actions while in the community*." *See* Ex. H, 6/14/2018 Notice of Action (emphasis added).

113. The reference to Mr. Rodgers' "actions while in the community," implying that Mr. Rodgers somehow committed misconduct while released to the halfway house, is a blatant falsehood. *See* Ex. H, 6/4/2018 Hearing Summary at 2 ("He was subsequently transferred to a halfway house (RRC) and had not sustained any new incident reports."); *Mickens-Thomas v. Vaughn*, 355 F.3d 294, 307-308 (3d Cir. 2004).

114. To the extent the Commission relied on the nature of Mr. Rodgers' 1996 crime and any aggravating circumstances, this information does not constitute "new and significant adverse information," as required by the regulations to rescind an effective parole date. *See* 28 C.F.R. § 2.86(b). Furthermore, the Third Circuit has held that reliance on "historical information not previously relied upon" is "designed to achieve a non-parole decision" and raises an inference of pretext and vindictiveness. *See Mickens-Thomas,* 355 F.3d at 307-308; *see also Marshall v. Lansing*, 839 F.2d 933, 948 (3d Cir. 1988) ("[T]he Commission's unexplained decision to add two months to Marshall's term of incarceration because of conduct that occurred before the time of the original sentencing proceeding, which it ignored until its parole release determination was judicially put into question, creates a sufficient appearance of vindictiveness to justify voiding the penalty.").

115. Finally, and perhaps most significantly, the June 7, 2018 memorandum from Commissioner Massarone expressly admits that the Commission was not rescinding parole based on any institutional misconduct, new criminal conduct, or new and significant adverse information that had arisen between the 2017 parole-grant and the 2018 special reconsideration hearing. Additionally, Commissioner Massarone's imposition of a longer set off period (two-years) without any basis to depart from the 1987 Guidelines that ordinarily provide the prisoner a rehearing a year after the parole decision raises an inference of pretext and vindictiveness.

116. In his memorandum, quoting directly from his memo from the 2017 hearing, Commissioner Massarone, who had been the lone dissenting vote against parole in the 2017 decision, wrote "[a]s stated on 10/12/2017 deny parole and continue for a rehearing in 10/20[19] after the service of 24 months from your last hearing date [of] 10/10/2017. *([For the] Reasons listed on the 10/13/2017 memo)*." (emphasis added).

117. Commissioner Massarone's own words demonstrate that the Commission was not relying on any of the necessary grounds for rescission required by § 2.86(b). He instead admitted that the Commission was rescinding parole for the same reasons he voiced when he was the sole dissenting vote in 2017.

118. The fact that the rescission decision flies in the face of an undisputed fact is evidence that the special reconsideration hearing was merely an opportunity for Commissioner Massarone to get a second bite at the apple. Because this decision lacked any legitimate basis, it makes it the type of governmental conduct that "shocks the conscience," and thus constitutes a violation of Mr. Rodgers' substantive due process rights.

119. This violation of Mr. Rodgers' fundamental due process rights requires that the June 14, 2018 Notice of Action denying parole be vacated, the November 6, 2017 Notice of Action granting Mr. Rodgers parole be reinstated, and Mr. Rodgers be immediately released. *See Gambino*, 134 F.3d at 164.

THE UNITED STATES PAROLE COMMISSION VIOLATED THE ADMINISTRATIVE PROCEDURES ACT WHEN IT VIOLATED ITS OWN INTERNAL REGULATIONS, ITS ORGANIC STATUTE, AND MR. RODGERS' DUE PROCESS RIGHTS

120. The Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq*., confers a general cause of action upon persons "adversely affected or aggrieved by agency action."

121. While the decision to grant or deny parole is generally not reviewable under the APA, courts have jurisdiction to review "whether the Commission has violated an explicit requirement of its organic statute, its internal regulations or the Constitution." *Cole v. Fulwood*, 879 F. Supp. 2d 60, 68 (D.D.C. 2012); *Wallace v. Christensen*, 802 F.2d 1539, 1551 (9th Cir. 1986) ("A court may consider whether the Commission has acted outside these statutory limits."). Furthermore, the Third Circuit has held that courts in habeas matters are to "insure that the [Parole] Board has followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious, nor based on impermissible considerations" or that it has not "abused its discretion." *Zannino v. Arnold*, 531 F.2d 687, 690-691 (3d Cir. 1976); *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984) ("An agency abuses its discretion if it fails to follow its own regulations and procedures.")

122. As noted above, the Commission has violated several of its own internal regulations.

123. For the reasons stated above, by reopening Mr. Rodgers' case to order a special reconsideration hearing without "new" information, the Commission clearly violated 28 C.F.R. §§ 2.75(e), 2.28(f).

124. Furthermore, by failing to engage in a process to determine whether "new and significant" information had arisen warranting reopening Mr. Rodgers' parole-grant, and by reopening the parole-grant without any legitimate basis, the Commission violated Mr. Rodgers' procedural and substantive due process rights.

125. Additionally, for the reasons stated above, by rescinding Mr. Rodgers' effective parole date without evidence of institutional misconduct, new criminal conduct, or new and adverse information, the Commission violated 28 C.F.R. § 2.86(b).

126. Because the rescission of Mr. Rodgers' parole lacked any legitimate basis, it also violated his substantive due process rights.

127. Moreover, the Commission's reliance on the same reasons and identical language from Commissioner Massarone's dissenting opinion in 2017 demonstrates that the Commission abused its discretion in denying parole in 2018.

128. In *Furnari v. Warden*, 218 F.3d 250 (3d Cir. 2000), the Third Circuit held that the Commission abused its discretion where, despite being presented with new and significant information, it merely restated its rationale from the initial parole hearing. The court found that this decision violated the Commission's own internal regulations, and accordingly constituted a violation of the APA.

129. Here, Commissioner Massarone's June 7, 2018 memorandum confirms that the Commission relied on the "[r]easons listed on [Massarone's] 10/13/2017 memo," rather than on institutional misconduct, new criminal conduct, or new and significant adverse information. *See* Ex. K, 6/7/2018 Memorandum.

130. Courts have also held that review is appropriate under the APA where an agency's finding contradicts its prior decision.

131. In *CityFed Financial Corp. v. Fed. Home Loan Bank Bd.*, 615 F. Supp. 1122, 1132 (D.D.C. 1985), the court held that a decision generally committed to agency discretion by law may be judicially reviewed under the APA when it contradicts the agency's earlier decision.

132. Commissioner Massarone's June 7, 2018 memorandum makes clear that the Commission relied on the same reasons he voiced in his 2017 dissenting vote. By

contradicting its 2017 decision to grant parole without any new information, or new evidence of misconduct, the Commission violated Mr. Rodgers' rights under the APA.

133. In accordance with 5 U.S.C. § 706, the Court should hold unlawful and set aside the Commission's rescission of Mr. Rodgers' effective parole date and release Mr. Rodgers immediately.

RELIEF REQUESTED

WHEREFORE, Mr. Rodgers respectfully asks this Court to:

134. Assume jurisdiction over this habeas petition;

135. Vacate the Commission's June 14, 2018 Notice of Action denying parole;

136. Reinstate the November 6, 2017 Notice of Action granting Mr. Rodgers parole;

137. Issue a writ of habeas corpus ordering Respondents to release Mr. Rodgers immediately.

Respectfully submitted,

/s/ Ralph C. Surman, Jr.

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