UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-9131

(Summary Calendar)

ROBERT WALTER GOVERN,

Petitioner-Appellant,

VERSUS

UNITED STATES PAROLE COMMISSION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3-92-CV-1569-G)

(May 12, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Robert Walter Govern is a federal prisoner, serving a 45-year sentence for trafficking in marijuana. Govern filed a petition for a writ of habeas corpus, under 28 U.S.C. § 2241 (1988), challenging the extent to which the United States Parole Commission ("the Commission") departed from its guidelines in requiring that he serve 162 months of his sentence. The district court denied

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Govern's petition, and he appeals. Finding no reversible error, we affirm.

Govern's parole guideline range is 40-52 months. The Commission originally determined that Govern should serve at least 180 months of his sentence because he led a drug ring that distributed "up to 2 million pounds of marijuana" and involved "billions of dollars." However, the Commission reopened Govern's case and changed his presumptive parole date to 162 months. In its Notice of Action, the Commission explained:

> A decision above the guidelines appears warranted because your offense behavior involved the following aggravating factors: You had a leadership role in an offense of an unusual magnitude in that your marijuana organization was responsible for the distribution of no less than 400,000 pounds of marijuana and involved no less than $4 million in profits.

Govern filed a petition for a writ of habeas corpus, arguing that "the extent of the Commission's departure [from his guideline range of 40-52 months was] arbitrary and capricious." The magistrate judge recommended that the petition be dismissed, and the district court adopted the magistrate judge's recommendation.

The Parole Commission has "absolute discretion concerning matters of parole" and "may use all relevant, available information in making parole determinations." *Maddox v. U.S. Parole Comm'n,* 821 F.2d 997, 999 (5th Cir. 1987). "`[T]his Court cannot disturb a decision by the Commission setting the time for parole release absent a showing that the action is flagrant, unwarranted, or unauthorized.'" *Id.* at 1000. "Although the Commission's decisions must have a factual basis, judicial review is limited to whether

there is `some evidence' in the record to support the Commission's decision." *Id.*

"The Parole Commission guidelines provide instructions for rating the severity of various `offense behaviors.' Where circumstances warrant, a decision outside the guidelines may be appropriate." *Sheary v. U.S. Parole Comm'n,* 822 F.2d 556, 558 (5th Cir. 1987) (citing 28 C.F.R. § 2.20(d)).

> The Parole Commission for good cause may go outside its guidelines . . . . [G]ood cause means substantial reason and includes only those grounds put forward by the Commission in good faith and which are not arbitrary, irrational, unreasonable, irrelevant or capricious. It includes such factors as whether the prisoner . . . was part of a large scale conspiracy or continuing criminal enterprise.

Maddox, 821 F.2d at 1000-01 (footnotes and internal quotations omitted).

In arguing that the Commission's decision is arbitrary and capricious, Govern relies chiefly on *Butler v. U.S. Parole Comm'n,* 570 F. Supp. 67 (M.D. Pa. 1983), and its discussion of the unpublished decision in *Davis v. U.S. Parole Comm'n,* No. 81-0503 (M.D. Pa. Aug. 28, 1981). In *Davis* the Commission required the prisoner to serve 53 months in custody, more than three times the period he would have been required to serve under the guidelines. *See Butler,* 570 F. Supp. at 80-81. The district court concluded that "the degree to which the guidelines were exceeded demonstrate[d] that the Commission `threw reason to the wind.'" *Id.* at 81. Govern contends that his parole date is unreasonable because, like the parole date in *Davis,* it requires him to remain

in custody more than three times as long as he would under the guidelines.

Govern's reliance on *Davis* is misplaced. The district court in *Davis* was troubled by the amount of time required to be served in custody by the Commission. However, the district court also "found it `inconceivable' . . . that the Commission could justify such an extreme departure from the guidelines by stating merely that "a decision above the guidelines appears warranted.'" *Id.* (quoting *Davis*). *Davis* therefore does not support a mechanical rule that departures from the guidelines by a factor of three are necessarily arbitrary and capricious. A more precise statement of the *Davis* court's reasoning is to be found in its decision: "`[a]ny imposition of sentence, regardless of whether within or without the guidelines, must be founded upon fact and reason.'" *Id.* at 80 (quoting *Davis*). Therefore, the Commission's departure was not arbitrary and capricious merely because of its sheer magnitude.

Neither has Govern established that the Commission's decision was not based on fact and reason. The Commission's decision was predicated upon Govern's "leadership role in an offense of an unusual magnitude in that [his] marijuana organization was responsible for the distribution of no less than 400,000 pounds of marijuana and involved no less than $4 million in profits." Govern does not dispute these findings.

Instead, Govern argues that the arbitrariness of the Commission's decision is revealed by comparing the Commission's

first decision with its second decision. In its first decision, the Commission found that the offense conduct involved 2 million pounds of marijuana and set the presumptive parole date at 180 months. In its second decision, the Commission determined that 400,000 pounds of marijuana were involved and reduced the presumptive parole date by 18 months, to 162 months. Govern argues that the decision is arbitrary because, although the amount of marijuana attributed to Govern was reduced by 80%, the number of months Govern must serve before being considered suitable for parole was reduced by only 10%. Govern also contends that in its first decision the Commission "determined that Govern should serve 1 month in prison for approximately every 11,111 pounds of marijuana," whereas "in this latest notice of action, . . . the Commission determined that Govern should serve 1 month in prison for approximately every 2,469 pounds of marijuana involved in the offense." Govern contends that these figures demonstrate the arbitrariness of the Commission's decision.

We disagree. Govern's figures fail to reflect a rational decision-making process on the part of the Commission only because Govern's analysis fails to reflect accurately the Commission's actual reasons for its departure. Nothing in the record suggests that the Commission engaged in a number crunching program when deciding how long Govern should remain in prison. The Commission plainly stated that its departure was on account of Govern's leadership role in an offense of an unusual magnitude. The fact that 400,000 pounds of marijuana was involved rather than 2 million

does not change the fact that Govern had fulfilled a leadership role. Neither does it impugn the Commission's conclusion that the offense was one of unusual magnitude. Govern's comparison of the Commission's first and second decisions fails to demonstrate that the Commission's departure from the guidelines was flagrant, unwarranted, unauthorized, arbitrary, or capricious.

We therefore **AFFIRM**.