

RECEIVED, 7/8/2013 17:03:32, Thomas D. Hall, Clerk, Supreme Court

IN THE
SUPREME COURT OF FLORIDA

GEORGE LEWIS,

Petitioner,

v.

FLORIDA PAROLE COMMISSION,

Respondent.

Case No. SC13-

District Court Case No. 1D12-2806

JURISDICTIONAL BRIEF OF THE PETITIONER

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The question in this case is whether section 95.11(5)(f), Florida Statutes, violates the constitutional doctrine of separation of powers to the extent that it places a one-year time limitation on a petition for a writ of mandamus that challenges a presumptive parole release date (“PPRD”) determination made by the Florida Parole Commission. Prior to the opinion below, *no Florida court* had previously considered the constitutionality of section 95.11(5)(f) as it applied to mandamus petitions challenging PPRD determinations.

The procedural history of this case, as set forth in the opinion below, is as follows:

An initial parole interview was held on March 26, 2010, and at the following Florida Parole Commission (Commission) meeting, the PPRD was established as August 30, 2051. Appellant requested a review of the Commission’s action, and the review meeting was held on October 20, 2010. The decision of the Commission was filed with the clerk on October 29, 2010.

On January 20, 2012, appellant (through counsel) filed a Complaint for Writ of Mandamus with the circuit court to review the Commission’s decision. Finding the complaint/petition facially sufficient, the court issued an Order to Show Cause. The Commission filed a response which included an allegation that the petition was time-barred pursuant to section 95.11(5)(f) and *Moger v. Florida Parole Commission*, 22 So. 3d 138 (Fla. 1st DCA 2009).¹ Appellant filed a

¹ The appellant in *Moger* did not raise a challenge to the constitutionality of section 95.11(5)(f). See *Lewis v. Fla. Parole Comm’n*, 38 Fla. L. Weekly D529, D530 (Fla. 1st DCA Mar. 6, 2013) (“In *Moger*, 22 So. 3d 138, we applied the statute to such a situation but did not expressly reach the constitutional issue.”).

reply, arguing that section 95.11(5)(f) violated the separation of powers doctrine and was therefore unconstitutional. The lower court dismissed the petition as time-barred by statute

Lewis v. Fla. Parole Comm'n, 38 Fla. L. Weekly D529, D530 (Fla. 1st DCA Mar. 6, 2013) (footnote added). On appeal to the First District, the Petitioner again argued that section 95.11(5)(f) is unconstitutional, and in support of this argument, the Petitioner relied on the following language from this Court's decision in *Jones v. Florida Parole Commission*, 48 So. 3d 704, 708 (Fla. 2010):

However, we clarify our holding in *Kalway* [*v. Singletary*, 708 So. 2d 267 (Fla. 1998),] in order to make it clear that *this Court did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced*.

(Emphasis added) (quoting *Allen v. Butterworth*, 756 So. 2d 52, 62 n.4 (Fla. 2000)).

In the opinion below, the First District rejected the Petitioner's argument and adopted its own interpretation of the Court's language in *Allen* and *Jones*:

Appellant wishes this court to focus on the language from *Allen* and *Jones* that the court "did not cede" its power to control the time in which extraordinary writs actions must be commenced. We interpret this language to mean, as in *Kalway*, that while the supreme court could always override the Legislature in this area, absent action by the court, the "as provided by law" language in Florida Rule of Civil Procedure 1.630 gave the Legislature the opportunity to adopt reasonable time limitations.

Lewis, 38 Fla. L. Weekly at D531. The Petitioner timely filed a motion to certify the question in this case as one of great public importance. On April 10, 2013, the First

District denied the motion for certification. Chief Judge Robert T. Benton dissented from the order denying the motion for certification.

D. SUMMARY OF ARGUMENT

In the decision below, the First District held that section 95.11(5)(f), Florida Statutes, does not violate the constitutional doctrine of separation of powers. The decision below is within the discretionary jurisdiction of this Court because the decision (1) expressly declares valid a state statute, (2) expressly construes a provision of the state constitution, and (3) expressly and directly conflicts with decisions of this Court on the same question of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A).

E. ARGUMENT AND CITATIONS OF AUTHORITY

The decision below is within the discretionary jurisdiction of the Court because the decision (1) expressly declares valid a state statute, (2) expressly construes a provision of the state constitution, and (3) expressly and directly conflicts with decisions of this Court on the same question of law.

In the decision below, the First District held that section 95.11(5)(f), Florida Statutes – which places a one-year time limitation on a petition for a writ of mandamus that challenges a PPRD determination made by the Florida Parole Commission – does not violate the constitutional doctrine of separation of powers. As explained below, the First District’s decision is within the discretionary jurisdiction of this Court because the decision (1) expressly declares valid a state

statute, (2) expressly construes a provision of the state constitution, and (3) expressly and directly conflicts with decisions of this Court on the same question of law.

1. The history of the law regarding challenges to PPRD determinations made by the Parole Commission.

As explained by the Court in *Griffith v. Florida Parole Commission*, 485 So. 2d 818 (Fla. 1986), Florida law previously allowed criminal defendants the right to appeal (to a district court) presumptive parole release date (“PPRD”) determinations made by the Parole Commission. However, in *Griffith*, the Court explained that the Florida Legislature subsequently divested the district courts of jurisdiction over section 120.68 appeals of PPRD determinations. Thus, as established by the Court in *Moore v. Florida Parole Commission*, 289 So. 2d 719 (Fla. 1974), in the absence of a statutory right to appeal, the proper method to seek review of a PPRD determination is a complaint/petition for a writ of mandamus. Notably, in *Griffith*, the Court stated that a complaint/petition for a writ of mandamus seeking review of a PPRD determination is “subject to no rigid time requirement for filing.” *Griffith*, 485 So. 2d at 819 n.1

In the 1990s, the Legislature attempted to place time limits on certain pleadings filed by “prisoners.” For instance, in 1995, the Legislature adopted section 95.11(8), Florida Statutes, which placed a thirty-day limitation on petitions for writs of mandamus that challenge disciplinary action imposed by the Department of

Corrections. *See* ch. 95-283, Laws of Fla. In 1996, the Legislature adopted section 95.11(5)(f), which placed a one-year limitation on pleadings for extraordinary writs filed by prisoners. *See* ch. 96-106, Laws of Fla.

Following the passage of section 95.11(8), the district courts were divided regarding the constitutionality of section 95.11(8), and some courts concluded that the statute violated the separation of powers doctrine. *Compare Van Meter v. Singletary*, 682 So. 2d 1162, 1163-65 (Fla. 1st DCA 1996) *with Kalway v. Singletary*, 685 So. 2d 973 (Fla. 2d DCA 1996). In *Kalway v. Singletary*, 708 So. 2d 267 (Fla. 1998), the Court approved the thirty-day time limitation to file petitions for writs of mandamus that challenge disciplinary action imposed by the Department of Corrections. Notably, in *Kalway*, the Court explained that it *had recently adopted the same thirty-day time limitation within the Florida Rules of Appellate Procedure*. *See* Fla. R. App. P. 9.100(c)(4).

The district courts were also divided regarding the constitutionality of section 95.11(5)(f) as it applied to petitions for writs of habeas corpus that challenged parole revocation, and again some courts concluded that the statute violated the separation of powers doctrine. *Compare Martin v. Fla. Parole Comm'n*, 951 So. 2d 84, 85 (Fla. 1st DCA 2007) *with Cooper v. Fla. Parole Comm'n*, 924 So. 2d 966 (Fla. 4th DCA 2006). In *Jones v. Florida Parole Commission*, 48 So. 3d 704 (Fla. 2010), the Court resolved this conflict and concluded that the application of the statute of limitations

set forth in section 95.11(5)(f) to a habeas petition that challenges a parole revocation violates the separation of powers doctrine. In reaching this conclusion, the Court clarified its previous holding in *Kalway*:

In *Kalway*, the defendant filed a petition for a writ of mandamus that challenged disciplinary action imposed by the Department of Corrections. *See id.* at 268. *Kalway* claimed that the application of section 95.11(8) constituted a violation of the separation of powers doctrine which was rejected by this Court at that time. . . . In *Allen*, the State asserted the same argument as that advanced here. This Court specifically rejected the State's assertion that *Kalway* applies to habeas petitions and wrote:

It is important to note that, unlike the [Death Penalty Reform Act], which poses equal protection and due process problems, there were no constitutional infirmities with the thirty-day deadline at issue in *Kalway*. *However, we clarify our holding in Kalway in order to make it clear that this Court did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced.*

Allen, 756 So. 2d at 62 n.4.

In sum, the only argument and authority provided by the Parole Commission to support the notion that habeas petitions should be treated differently in parole revocation matters is this Court's decision in *Kalway*, which, in *Allen*, this Court clearly distinguished and rejected. The Parole Commission's claim both misstates this Court's decision in *Kalway* and ignores this Court's actual decision in *Allen*.

Jones, 48 So. 2d at 708 (emphasis added). In *Allen*, the Court further explained that

Prior to this Court's opinion in *Kalway*, rule 9.100, entitled "Original Proceedings," was amended to state:

. . . .
(c) . . . The following shall be filed within 30 days of rendition of the order to be reviewed:

....
(4) A petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings.

Amendments to Fla. Rules of App. Pro., 685 So. 2d 773 (Fla. 1996) (effective January 1, 1997). *Thus, it is clear that the Court agreed with the time limitations in section 95.11 and therefore adopted a rule of procedure that was consistent with those deadlines.*

Allen, 756 So. 2d at 62 n.4 (emphasis added).

As explained by the Court in *Jones*, *only the judicial branch* – pursuant to a judicial rule – can establish a time limitation on extraordinary writs (such as complaints/petitions for writs of mandamus). And unlike *Kalway*, where the Court adopted a thirty-day deadline to file petitions for writs of mandamus that challenge disciplinary action imposed by the Department of Corrections, *see Fla. R. App. P. 9.100(c)(4)*, *there is no judicial rule* establishing a deadline for filing a mandamus complaint/petition seeking review of the Parole Commission’s determination regarding a PPRD. Thus, a mandamus petition seeking review of determination regarding a PPRD is “subject to no rigid time requirement for filing.” *Griffith*, 485 So. 2d at 819 n.1.

2. The decision below expressly declares valid a state statute.

In the decision below, the First District expressly declared that section 95.11(5)(f) is valid. *See Lewis v. Fla. Parole Comm’n*, 38 Fla. L. Weekly D529, D530 (Fla. 1st DCA Mar. 6, 2013) (“We find the statute to be constitutional . . .”).

Thus, pursuant to article V, section 3(b)(3) of the Florida Constitution, the Court has jurisdiction to review this case. *See Cantor v. Davis*, 489 So. 2d 18, 19 (Fla. 1986) (“We have for review *Davis v. North Shore Hospital*, 452 So. 2d 937 (Fla. 3d DCA 1983), which expressly declares valid section 768.56, Florida Statutes (1981). We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.”). The Petitioner requests the Court to exercise its jurisdiction and answer the question of whether section 95.11(5)(f) violates the constitutional doctrine of separation of powers.²

3. The decision below expressly construes a provision of the state constitution.

In the decision below, the First District expressly construed the separation of powers clause³ of the state constitution. *See Lewis*, 38 Fla. L. Weekly at D531

² The Petitioner notes that the First District has – on several occasions – stated that

the Florida Supreme Court has not by rule adopted a similar time limit to challenge orders of the parole commission in revocation or PPRD proceedings, and that the question of timeliness must therefore be raised, if at all, by the affirmative defense of laches

Martin v. Fla. Parole Comm’n, 951 So. 2d 84, 85 n.1 (Fla. 1st DCA 2007) (emphasis added). *See also Roberts v. Fla. Parole Comm’n*, 951 So. 2d 75, 76 (Fla. 1st DCA 2007); *Johnson v. Fla. Parole Comm’n*, 841 So. 2d 615, 617 (Fla. 1st DCA 2003). Notably, all of these cases were decided *after* the effective date of section 95.11(5)(f).

³ *See* art. V, § 2(a), Fla. Const.

("[S]ection 95.11(5)(f) does not violate the separation of powers doctrine"). Thus, pursuant to article V, section 3(b)(3) of the Florida Constitution, the Court has jurisdiction to review this case. *See Foster v. State*, 613 So. 2d 454, 454 (Fla. 1993) ("We have for review *Foster v. State*, 596 So. 2d 1099 (Fla. 5th DCA 1992), which expressly construes the double jeopardy provision of the Florida Constitution. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const."). As explained above, the Petitioner requests the Court to exercise its jurisdiction and answer the question of whether section 95.11(5)(f) violates the constitutional doctrine of separation of powers.

4. The decision below expressly and directly conflicts with decisions of this Court on the same question of law.

Most notably, the decision below expressly and directly conflicts with decisions of this Court on the same question of law. In both the trial court and the district court, the Petitioner argued that section 95.11(5)(f) is unconstitutional because it violates the constitutional doctrine of separation of powers. In support of this argument, the Petitioner relied on the following language from this Court's decision in *Jones v. Florida Parole Commission*, 48 So. 3d 704, 708 (Fla. 2010):

However, we clarify our holding in *Kalway [v. Singletary]*, 708 So. 2d 267 (Fla. 1998),] in order to make it clear that *this Court did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced.*

(Emphasis added) (quoting *Allen v. Butterworth*, 756 So. 2d 52, 62 n.4 (Fla. 2000)).

In the decision below, the First District adopted its own interpretation of this Court's

language in *Allen* and *Jones* – *an interpretation that is in conflict* with the actual language in *Allen* and *Jones*:

Appellant wishes this court to focus on the language from *Allen* and *Jones* that the court “did not cede” its power to control the time in which extraordinary writs actions must be commenced. *We interpret this language to mean*, as in *Kalway*, that while the supreme court could always override the Legislature in this area, absent action by the court, the “*as provided by law*” language in *Florida Rule of Civil Procedure 1.630* gave the Legislature the opportunity to adopt reasonable time limitations.

Lewis, 38 Fla. L. Weekly at D531 (emphasis added). Contrary to the First District’s “interpretation,” the Petitioner submits that the Court intended for its statement in *Allen* and *Jones* to be given its “plain meaning” – “this Court did *not* cede (i.e., give or grant) to the Legislature the power to control the time in which extraordinary writ actions (i.e., petitions for a writ of mandamus) must be commenced.” Accordingly, the Petitioner respectfully requests the Court to accept jurisdiction in this case to resolve the conflict between the decision below and this Court’s decisions in *Allen* and *Jones*.

F. CONCLUSION

This case presents an important issue that potentially has an effect on numerous cases in this state. For all of the reasons set forth above, the Court has discretionary jurisdiction to review the decision below and the Petitioner prays that the Court will exercise its discretion and consider the merits of his argument.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has
been furnished to:

Assistant General Counsel Mark Hiers
Florida Parole Commission
Email address: markhiers@fpc.state.fl.us

by email delivery this 4th day of June, 2013.

Respectfully submitted,

/s/ Michael Ufferman
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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdictional Brief of the Petitioner complies with the type-font limitation.

/s/ Michael Ufferman

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IN THE
SUPREME COURT OF FLORIDA

GEORGE LEWIS,

Petitioner,

v.

FLORIDA PAROLE COMMISSION,

Respondent.

Case No. SC13-

District Court Case No. 1D12-2806

APPENDIX
TO
JURISDICTIONAL BRIEF OF THE PETITIONER

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guilt. The court allowed the testimony because there were no hearsay statements concerning the defendant, but only testimony about the fact that documents were turned over to the FBI. The record shows that defense counsel did not object at trial to the FBI agent's testimony as to why the papers were given to him. The documents contained the victim's name, but no one testified as to how those documents came into the non-testifying witness's possession. The record shows that, in context of the testimony, there was no mention of the defendant's name and no reference to any specific crime. We find that the error claimed was unpreserved by specific objection, and conclude, after a complete review of the record, that the trial court's error, if any, in admitting the testimony was harmless. *See Corona v. State*, 64 So. 3d 1232, 1242 (Fla. 2011) (holding that, for an appellate court to reverse a judgment or sentence on appeal, the asserted error must either be preserved by specific objection or constitute fundamental error); *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (requiring specific objection at trial to preserve issue for appeal); *State v. Calvert*, 15 So. 3d 946, 948 (Fla. 4th DCA 2009) (holding that, to properly preserve an issue for appellate review, a litigant must make a timely, specific, contemporaneous objection); *see also* § 90.104(1), Fla. Stat. (2010).

Williams correctly argues that his conviction on the count of possession of a firearm in the commission of a felony is illegal and must be vacated as it violates the double jeopardy clause. Williams also was convicted of carjacking (Count 1), attempted second degree murder (as a lesser included offense of Count 2), and attempted first degree felony murder (Count 3). The jury made specific findings that Williams possessed and discharged a firearm causing great bodily harm to the victim during the commission of these offenses. The trial court enhanced the sentences for carjacking and first degree murder counts for use of a firearm, and sentenced Williams to life imprisonment for Counts 1, 3 and 4, suspending entry of sentence for Count 2.

The State cannot, consistent with double jeopardy principles, charge, convict and sentence a defendant with two substantive offenses for the single act of possession of one weapon. *See Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991) (holding that when a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony); *see also Gracia v. State*, 98 So. 3d 1243 (Fla. 3d DCA 2012); *Williams v. State*, 83 So. 3d 929 (Fla. 3d DCA 2012); *Merrell v. State*, 841 So. 2d 677 (Fla. 3d DCA 2003); *Hall v. State*, 752 So. 2d 1245 (Fla. 3d DCA 2000); *Brown v. State*, 617 So. 2d 744 (Fla. 1st DCA 1993). We therefore reverse Williams' conviction and sentence for possession of a firearm while committing a felony. We affirm Williams' remaining convictions and sentences.

Affirmed in part, reversed in part.

* * *

Criminal law—Attempted murder—Attempted manslaughter—Jury instructions—Where defendant was charged with attempted first-degree murder and convicted of attempted second-degree murder, trial court did not commit fundamental error in instructing jury on attempted voluntary manslaughter—No merit to defendant's claim that attempted voluntary manslaughter is a nonexistent crime, as this question was recently settled by the Florida Supreme Court

EMANUEL WARE, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D11-2430. L.T. Case No. 10-25922. March 6, 2013. An Appeal from the Circuit Court for Miami-Dade County, Diane V. Ward, Judge. Counsel: Carlos J. Martinez, Public Defender, and Daniel Tibbitt, Assistant Public Defender, for appellant. Pamela Jo Bondi, Attorney General, and Michael W. Mervine, Assistant Attorney General, for appellee.

(Before SUAREZ, EMAS and FERNANDEZ, JJ.)

(EMAS, Judge.) Emmanuel Ware was charged with attempted first-degree murder of Dion Akeem Maycock. Following a jury trial, he was convicted of attempted second degree murder. Ware appeals his conviction, contending that the trial court committed fundamental error in instructing the jury on the crime of attempted voluntary manslaughter. We affirm.

On appeal, Ware does not contend that the trial court's wording of the jury instruction was erroneous.¹ Rather, Ware contends that attempted voluntary manslaughter is a non-existent crime, and that the trial court committed error in giving any instruction at all. Ware argues that, because the jury ultimately convicted him of attempted second-degree murder—an offense one step removed from attempted voluntary manslaughter—this unpreserved error² is fundamental, thus warranting a new trial.

Ware acknowledges the Florida Supreme Court, in *Taylor v. State*, 444 So. 2d 931 (Fla. 1983), held that attempted voluntary manslaughter is a viable offense in Florida. In doing so, the *Taylor* court distinguished the crimes of attempted voluntary manslaughter (manslaughter by act or procurement) and attempted involuntary manslaughter (manslaughter by culpable negligence):

We therefore hold that there may be a crime of attempted manslaughter. We reiterate, however, that a verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act. This holding necessitates that a distinction be made between crimes of "manslaughter by act or procurement" and "manslaughter by culpable negligence." For the latter there can be no corresponding attempt crime. This conclusion is mandated by the fact that there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence. On the other hand, when the underlying conduct constitutes an act or procurement, such as an aggravated assault, there is an intent to commit the act and, thus, there exists the requisite intent to support attempted manslaughter.

Id. at 934.

Ware argues, however, that *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), effectively overruled *Taylor* and eliminated the crime of attempted voluntary manslaughter. This question was recently answered by the Florida Supreme Court, in *Williams v. State*, No. SC10-1458 (Fla. Feb. 14, 2013), reaffirming that attempted voluntary manslaughter by act remains a viable offense after *Montgomery*.

Affirmed.

¹On the lesser included offense of attempted voluntary manslaughter, the trial court instructed the jury, in relevant part, that the State was required to prove "Emmanuel Ware intentionally committed an act which would have resulted in the death of Dion Akeem Maycock except that someone prevented Emmanuel Ware from killing Dion Akeem Maycock or he failed to do so." This instruction is consistent with the current state of the law of attempted voluntary manslaughter. *See State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) (holding that the crime of voluntary manslaughter does not require proof of intent to kill, but proof of the requisite intent to commit an act which caused death); *Taylor v. State*, 444 So. 2d 931 (Fla. 1983) (holding that the crime of attempted voluntary manslaughter does not require proof of intent to kill, but proof of the requisite intent to commit an unlawful act which could have, but did not, cause death).

²Ware did not raise this issue at the trial court; he raises it for the first time on appeal.

* * *

Mandamus—Criminal law—Prisoners—Presumptive parole release date—Limitation of actions—Application, to mandamus petition challenging PPRD, of statute establishing one-year limit on petitions for extraordinary writs filed by or on behalf of prisoners is not violation of separation of powers doctrine—Until Florida Supreme Court exercises its authority to control time in which a PPRD writ of mandamus must be commenced, rule 1.630 controls and the time shall be "as provided by law"

GEORGE LEWIS, Appellant, v. FLORIDA PAROLE COMMISSION, Appellee. 1st

District Case No. 1D12-2806. Opinion filed March 6, 2013. An appeal from the Circuit Court for Leon County. Kevin J. Carroll, Judge. Counsel: Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant. Mark Hiers, Assistant Attorney General, Florida Parole Commission, Tallahassee, for Appellee.

(WOLF, J.) George Lewis, appellant, appeals from the trial court's determination that his petition for writ of mandamus challenging his presumptive parole release date (PPRD) was untimely as a result of the application of section 95.11(5)(f), Florida Statutes (2011). He alleges that the statute constitutes an unconstitutional infringement on the Florida Supreme Court's rulemaking power pursuant to article V, section 2(a) of the Florida Constitution. We find the statute to be constitutional pursuant to the dictates of *Kalway v. Singletary*, 708 So. 2d 267, 269 (Fla. 1998), and affirm.

Appellant is serving a life sentence with a minimum mandatory twenty-five years in prison for first-degree murder and twelve years in prison for sexual battery. An initial parole interview was held on March 26, 2010, and at the following Florida Parole Commission (Commission) meeting, the PPRD was established as August 30, 2051. Appellant requested a review of the Commission's action, and the review meeting was held on October 20, 2010. The decision of the Commission was filed with the clerk on October 29, 2010.

On January 20, 2012, appellant (through counsel) filed a Complaint for Writ of Mandamus with the circuit court to review the Commission's decision. Finding the complaint/petition facially sufficient, the court issued an Order to Show Cause. The Commission filed a response which included an allegation that the petition was time-barred pursuant to section 95.11(5)(f) and *Moger v. Florida Parole Commission*, 22 So. 3d 138 (Fla. 1st DCA 2009), rev. denied 32 So. 3d 59 (Fla. 2010). Appellant filed a reply, arguing that section 95.11(5)(f) violated the separation of powers doctrine and was therefore unconstitutional. The lower court dismissed the petition as time-barred by statute, indicating that the First District already determined the applicability of section 95.11(5)(f) to parole determinations in *Moger*. The court also pointed out that, as mandamus is non-habeas relief, other cases finding the unconstitutionality of section 95.11 in the habeas context, such as *Jones v. Florida Parole Commission*, 48 So. 3d 704 (Fla. 2010), are not applicable. Constitutional challenges to statutes are pure questions of law, subject to de novo review. *Haddock v. Carmody*, 1 So. 3d 1133 (Fla. 1st DCA 2009).

In 1986, with the repeal of a prisoner's ability to file an appeal of an administrative proceeding, the Florida Supreme Court acknowledged that the proper method to seek review of a PPRD determination is a complaint or petition for writ of mandamus and, for review of effective parole release dates, a writ of habeas corpus. *Griffith v. Fla. Parole & Probation Comm'n*, 485 So. 2d 818, 820 (Fla. 1986). The court noted at that time that a petition for writ of mandamus was "subject to no rigid time requirement for filing." *Id.* at 819 n.1.

In 1996, the Florida Legislature adopted section 95.11(5)(f) establishing the one-year limit on petitions for extraordinary writs filed by or on behalf of prisoners. See Ch. 96-106, Laws of Fla.

Article V, section 2(a) of the Florida Constitution grants the supreme court the exclusive authority to adopt rules of "practice and procedure." Where the Legislature enacts a procedural law, it encroaches upon the judicial branch and violates the separation of powers doctrine. However, the supreme court has, at times:

deferred to the expertise of the legislature in implementing its rules of procedure. See, e.g., *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So. 2d 195, 195 (Fla. 1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So. 2d 1049, 1086 (Fla. 1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law").

Kalway, 708 So. 2d at 269.

In *Kalway*, the supreme court acknowledged such a deferral in Florida Rule of Civil Procedure 1.630, entitled "Extraordinary

Remedies," which provides in part:

(a) Applicability. This rule applies to actions for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus.

(c) Time. A complaint shall be filed *within the time provided by law*, except that a complaint for common law certiorari shall be filed within 30 days of rendition of the matter sought to be reviewed.

(Emphasis added).

The *Kalway* court relied on this rule language to find that section 95.11(8), Florida Statutes, which limits the time to challenge a disciplinary decision of the Department of Corrections to thirty days, was not a violation of the separation of powers doctrine and was, therefore, constitutional. *Kalway*, 708 So. 2d at 269.¹ It is the interplay of the rule and the statute that prevents a violation of the separation of powers doctrine. The Commission argues that the same reasoning should apply for section 95.11(5)(f).

The supreme court, however, has limited the broad language of *Kalway*. In *Allen v. Butterworth*, the supreme court considered a constitutional challenge to the Death Penalty Reform Act (DPRA), which attempted to alter drastically the postconviction procedure of Florida Rule of Criminal Procedure 3.850 motions, which are a substitute for habeas corpus petitions. The act was challenged as a violation of the separation of powers doctrine, a suspension of the writ of habeas corpus, and a violation of equal protection and due process. 756 So. 2d 52, 59 (Fla. 2000). The court rejected the argument that *Kalway* applied to habeas corpus petitions and wrote:

It is important to note that, unlike the DPRA, which poses equal protection and due process problems, there were no constitutional infirmities with the thirty-day deadline at issue in *Kalway*. However, we clarify our holding in *Kalway* in order to make it clear that *this Court did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced*.

Allen, 756 So. 2d at 62 n. 4. (emphasis added). Further:

[T]he writ of habeas corpus and other postconviction remedies are not the type of "original civil action" described in *Williams v. Law*, 368 So. 2d 1285 (Fla. 1979)], for which the Legislature can establish deadlines pursuant to a statute of limitations. Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, *we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions*.

Id. at 62 (emphasis added).

In *Jones*, the supreme court, applying the *Allen* analysis, concluded that *Kalway* and section 95.11(5)(f) did not apply to habeas corpus petitions filed to challenge parole revocation matters. 48 So. 3d at 708. Additionally, the *Jones* court found that a habeas corpus petition would always be timely:

The writ of habeas corpus is one of the most important and protected legal rights in both United States and Florida jurisprudence. "The purpose of a habeas corpus proceeding is to inquire into the legality of the petitioner's *present* detention." *Sneed v. Mayo*, 69 So. 2d 653, 654 (Fla. 1954) (emphasis supplied). The purpose of a habeas petition is not to challenge the judicial action that places a petitioner in jail; rather, it challenges the detention itself. Section 95.11(5)(f) does not provide for a specific time when causes of action subject to its statute of limitations accrue. Even if this Court were to find that section 95.11(5)(f) can constitutionally be applied to habeas petitions, which we do not, a new cause of action would accrue *each day* that a defendant is detained. If a petitioner alleges that he is unlawfully detained, "his claim [is] necessarily filed within the one-year time limitation established by the statute." *Martin v. Fla. Parole Comm'n*, 951 So. 2d 84, 86 (Fla. 1st DCA 1007)]. Here, *Jones* was detained at the time his habeas petition was filed, so it was timely even under an unconstitutional application of section 95.11(5)(f).

Jones, 48 So. 3d at 710-711.

We are, thus, faced with the question of whether the reasoning of *Kalway* applies to a non-habeas petition which does not challenge the prisoner's present detention. In *Moger*, 22 So. 3d 138, we applied the statute to such a situation but did not expressly reach the constitutional issue.

Appellant wishes this court to focus on the language from *Allen* and *Jones* that the court "did not cede" its power to control the time in which extraordinary writs actions must be commenced. We interpret this language to mean, as in *Kalway*, that while the supreme court could always override the Legislature in this area, absent action by the court, the "as provided by law" language in Florida Rule of Civil Procedure 1.630 gave the Legislature the opportunity to adopt reasonable time limitations.

The reason Florida Rule of Civil Procedure 1.630 and *Kalway* did not apply in *Jones* and *Allen* was because of the special constitutional protections related to habeas corpus. The application of section 95.11(5)(f) in the instant situation does not raise the same concerns.

Appellant also relies on language contained in *Johnson v. Florida Parole Commission*, 841 So. 2d 615 (Fla. 1st DCA 2003). We find that any language in *Johnson* related to writs of mandamus in PPRD proceedings was dicta as the issue in that case involved the review of the revocation of parole by petition for writ of habeas corpus. Thus, any reliance on *Johnson* in the PPRD context is misplaced.²

Here, the issue does not involve a petition for habeas corpus. The only constitutional challenge to the statute is a separation of powers challenge. Appellant raises no other "constitutional infirmities" in applying Florida Rule of Civil Procedure 1.630 and section 95.11(5)(f) to non-habeas writs. Until the Florida Supreme Court exercises its authority to control the time in which a PPRD writ of mandamus must be commenced, Florida Rule of Civil Procedure 1.630 controls and the time shall be "as provided by law." Because of this interplay of rule and law, section 95.11(5)(f) does not violate the separation of powers doctrine.

AFFIRMED. (BENTON, C.J. and SWANSON, J., CONCUR.)

¹The *Kalway* court did acknowledge its recent adoption of the same thirty-day limit in Florida Rule of Appellate Procedure 9.100(c)(4), but that rule would not have been applicable to the outcome of the previously-filed *Kalway* case.

²Other cases cited by appellant, including *Roberts v. Florida Parole Commission*, 951 So. 2d 75 (Fla. 1st DCA 2007), do not specifically address the applicability or constitutionality of section 95.11(5)(f) in the PPRD context either because the case did not involve a PPRD or because one year had not yet lapsed between the final decision of the Commission and the filing of the petition for writ of mandamus.

* * *

Criminal law—Continuance—Trial court erred in denying motion for continuance by defendant, who in a case just over a year old sought to replace his third lead attorney with a fourth, where state made no showing of any bad faith intent on defendant's part to delay proceedings, defendant was prejudiced by having his defense in the hands of a lawyer he felt was inadequate, no prejudice to the state's interest was shown, and the court made no finding that its schedule could not accommodate the continuance—It was an abuse of discretion not to perform analysis under *McKay v. State* even where prior continuances had been granted—Defendant's right to counsel of his choice was improperly impeded—Remand for new trial

JAMES MADISON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D11-2210. Opinion filed March 6, 2013. An appeal from the Circuit Court for Leon County. Hon. Angela C. Dempsey, Judge. Counsel: Michael Ufferman, Tallahassee, for Appellant. Pamela Jo Bondi, Attorney General, Virginia Chester Harris, Assistant Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Appellee.

(MAKAR, J.) The United States Supreme Court recently reminded us that the Sixth Amendment right to counsel "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit,

that the accused be defended by the counsel he believes to be best." *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); see also *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.").¹ Justice Scalia, for the Court in *Gonzalez-Lopez*, stated that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." 548 U.S. at 144. At issue in this case is whether the denial of a second continuance of trial, sought for the purpose of replacing existing private counsel with new counsel, violated the defendant's constitutional right to the attorney of his own choosing. We hold that it did under the circumstances presented and reverse.²

I.

On December 31, 2009, James Madison, an eighteen year-old with no prior criminal record, was charged with armed robbery with a firearm and attempted armed robbery with a firearm arising out of two incidents on the evening of December 6, 2009. Shortly after his arrest, Madison was appointed a public defender; a month later, in January of 2010, his family hired private counsel who was substituted for the public defender. The record shows that neither the public defender nor the initial private counsel did any significant work on Madison's case during the brief times they were counsels of record; two continuances of pre-trial conferences occurred during this time period.

A few months later, in May 2010, Madison's family retained new private counsel. Other than a waiver of Madison's right to speedy trial and a continuance of trial, the record reflects little activity on Madison's case³ from the time she became counsel of record until slightly less than a month prior to the trial date, when Madison sent a letter dated February 2, 2011, to the trial judge. His handwritten letter expressed his dissatisfaction with current counsel:

Dear your honorable [judge] . . . my name is James C. Madison I am a defendant in your courtroom. I am writing you to ask for a continuance of my trial due to my dissatisfaction with my current lawyer. Your honour I am very unhappy with my lawyers performances on my current case(s). If I continue to allow her to represent me, in my honest opinion, I will spend half my life in prison due to her poor performances. Some of the issues I have with her is that it is very difficult contacting her and she has failed to file motions I have requested. She always speaks negative about my situation, she shows up late to my court dates, does not have confidence in herself as my lawyer, barely comes to viste me to inform me of what is coming up and she has also misinformed me of what I am going to trial for. Your honour I am seeking another lawyer immediatley and I apologize for the last minute change. I understand my trial is less than a month away but I am only trying to secure a fighting chance.

Respectfully summitted

/s/ James C. Madison

In addition to Madison's letter, the trial court received a lengthy letter from Mr. Madison, his father,⁴ discussing the history of the case, his concerns about Madison's counsel, as well as other matters (most of which would be improper ex parte communications).

Over two weeks later, on February 17, 2011, the trial court⁵ held a hearing on Madison's motion—eight days before trial. The attorney Madison was seeking to discharge appeared and was first to speak. She defended her actions in the case, noting that on the previous day she had for the first time taken depositions of one of the two victims and the law enforcement officers. She had yet to take the deposition of the other victim (who spoke only Spanish), the only witness who could connect Madison with the crime; she had also not yet found an interpreter for this deposition. She told the trial court that she intended to file a written motion to suppress an alleged confession by Madison