

IN THE

SUPREME COURT OF FLORIDA

GEORGE LEWIS,

Petitioner,

v.

FLORIDA PAROLE COMMISSION,

Respondent.

Case No. SC13-982

Lower Tribunal No(s): 1D12-2806
2012-CA202

REPLY BRIEF OF THE PETITIONER

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C. ARGUMENT AND CITATIONS OF AUTHORITY

Section 95.11(5)(f), Florida Statutes, is unconstitutional and therefore both the district court and the circuit court erred by finding that Petitioner Lewis' mandamus petition was time-barred.

The Parole Commission's argument in its Answer Brief rests entirely on *Kalway v. Singletary*, 708 So. 2d 267 (Fla. 1998). See Answer Brief at 7-14. As explained in the Initial Brief, in *Jones v. Florida Parole Commission*, 48 So. 3d 704 (Fla. 2010), 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. Section 95.11(8) provides:

Any court action challenging prisoner disciplinary proceedings conducted by the Department of Corrections pursuant to s. 944.28(2) must be commenced within 30 days after final disposition of the prisoner disciplinary proceedings through the administrative grievance process under chapter 33, Florida Administrative Code. Any action challenging prisoner disciplinary proceedings shall be barred by the court unless it is commenced within the time period provided by this section.

In *Allen* [*v. Butterworth*, 756 So. 2d 52 (Fla. 2000)], 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). The Parole Commission argues that *Jones* is limited to habeas corpus petitions. *See Answer Brief at 9.* But in *Jones*, the Court did *not* say:

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 *habeas corpus* actions must be commenced.

Rather, in *Jones*, the Court said:

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.

Jones, 48 So. 2d at 708 (emphasis added). Obviously, a mandamus petition is an “extraordinary writ action.” *See, e.g., Mathews v. Crews*, 39 Fla. L. Weekly S37, S38 (Fla. Jan. 23, 2014) (“Mandamus is a[n] . . . extraordinary writ used to compel the

performance of a clear legal duty when there is no other adequate remedy available.”) (citation omitted). Pursuant to *Jones*, the Court has not ceded to the Legislature the power to control the time in which mandamus petitions must be commenced.

As explained in the Initial Brief, in *Allen*, the Court stated that

Prior to this Court’s opinion in *Kalway*, rule 9.100, entitled “Original Proceedings,” was amended to state:

(a) Applicability. This rule applies to those proceedings that invoke the jurisdiction of the courts . . . for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction. . . .

. . . .
(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).¹ Thus, the Court could adopt a rule of

¹ In its Answer Brief, the Parole Commission argues that by adopting Florida Rule of Civil Procedure 1.630(c), the Court has granted the Legislature the power to control the time in which non-habeas extraordinary relief actions must be commenced. *See* Answer Brief at 12-13. If the Parole Commission’s argument was correct, then there would have been no need for the Court to adopt Florida Rule of Appellate Procedure 9.100(c)(4).

appellate procedure that establishes a time limitation for parties to file mandamus petitions. But absent such a rule, a mandamus petition seeking review of a presumptive parole release date (“PPRD”) determination is “subject to no rigid time requirement for filing.” *Griffith v. Florida Parole Commission*, 485 So. 2d 818, 819 n.1 (Fla. 1986).

Accordingly, for all of the reasons set forth above and contained in the Initial Brief – and consistent with the Court’s opinion in *Jones* – Petitioner Lewis submits that the application of the statute of limitations set forth in section 95.11(5)(f), Florida Statutes, to a mandamus petition seeking review of a PPRD determination violates the separation of powers doctrine. As the Court initially stated in *Allen* and repeated in *Jones*, the Court “did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced.” *Jones*, 48 So. 3d at 708 (quoting *Allen*, 756 So. 2d at 62 n.4). Only the judicial branch – pursuant to a judicial rule – can establish a time limitation on extraordinary writs (such as petitions for writs of mandamus). And unlike *Kalway*, where the judicial branch 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 petition seeking review of a PPRD determination. Therefore, Petitioner Lewis requests the Court to quash the

decision of the First District finding that his mandamus petition was time-barred.

This case should be remanded to the circuit court for consideration of Petitioner

Lewis' mandamus petition on the merits.

D. CONCLUSION

Petitioner Lewis respectfully requests that the First District's decision be quashed and that this case be remanded with directions that the circuit court consider the merits of Petitioner Lewis' mandamus petition.

E. CERTIFICATE OF SERVICE

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

Assistant General Counsel Mark Hiers
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by email delivery this 14th day of March, 2014.

Respectfully submitted,

/s/ Michael Ufferman

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F. CERTIFICATE OF COMPLIANCE

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

/s/ Michael Ufferman

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