IN THE SUPREME COURT OF FLORIDA

JIM FAIR,

Petitioner,

vs.

CASE NO. 65,693

JAMES ANTISTA, Senior Attorney with, and CAROLE BARICE, General Counsel for, and GEORGE FIRESTONE, Secretary of State, and DOT GLISSON, his Elections Division Deputy, and STATE OF FLORIDA, and each individually and of like class and successors,

Respondents.

FILED
SID J. WHITE
AUG 15
CLERK, SUPREME COURT
By Chief Deputy Clerk

RESPONSE TO ORDER TO SHOW CAUSE

COME NOW RESPONDENTS, GEORGE FIRESTONE, Secretary of State, DOT GLISSON, Deputy Secretary of State for Elections, CAROLE BARICE, General Counsel for the Department of State, JAMES ANTISTA, Legal Counsel for the Department of State, and STATE OF FLORIDA, pursuant to Fla.R.App.P. 9.100(h) and respond to the Petition for Writ of Mandamus in this action. Respondents submit that they are not proper parties to the instant proceedings nor is this the proper forum.

Petitioner, Jim Fair, seeks a Writ of Mandamus compelling Respondents (state officials) to register or allow Petitioner to register to vote. It is unclear from the Petition as to what additional relief, if any, Petitioner is requesting. Petitioner alleges that he was twice involuntarily committed to the Florida State Hospital in 1973 by a lower court. He now questions the validity of the previous orders of commitment to which these Respondents were not parties. Petitioner alleges that "he is stripped of his right to vote by respondents' recognitions of a county judge's 73 commitment orders." Petitioner also challenges legal conclusion asserted by Department of State, Division of

Elections in the case of Fair v. Reagan, Case No.: TCA 82-1035, which case is still pending in the United States District Court for the Northern District of Florida.

Mandamus is an extraordinary remedy at law based on equitable principles to require or compel the performance of a ministerial duty imposed by law where such duty has not been performed as the law requires. State ex rel. Clendinen v. Dekle, 173 So.2d 452 (Fla. 1965); and State ex rel. Knott v. Haskell, 72 Fla. 176, 72 So. 651 (1916). It has also been defined as a remedy to command performance of a ministerial act which the person deprived has a right to demand and which it is the official duty of the respondent to perform. State ex rel. Allen v. Rose, 123 Fla. 544, 167 So. 21 (1936); and State ex rel. Eldredge v. Evans, 102 So.2d 403 (Fla. 3d DCA 1958). Its purpose is not to establish a legal right, but to enforce a right which has already been clearly established. State ex rel. Glynn v. McNayr, 133 So.2d 312 (Fla. 1961); and State ex rel. Topp v. Bd. of Medical Examiners for Jacksonville Beach, 101 So.2d 583 (Fla. 1st DCA 1958). In other words, it is a discretionary writ which issues only upon the showing of a clear legal right of the petitioner to the performance of an indisputable legal duty by the respondent. State ex rel. Eichenbaum v. Cochran, 114 So.2d 797 (Fla. 1959); and Odom v. Construction Trades Qualifying Bd. of Dade County, 309 So.2d 622 (Fla. 3d DCA 1975). In order to be entitled to a writ of mandamus, the petitioner must show a clear legal right to the performance of not just any duty, but to a **particular** duty. Fasenmyer v. Wainwright, 230 So.2d 129 (Fla. 1969).

Mandamus is a discretionary writ which will issue only upon a showing of a clear legal right to the performance of a ministerial act. State ex rel. Long v. Carey, 121 Fla. 515, 164 So. 199 (1935); and Rhoades v. Sweet, 276 So.2d 221 (Fla. 3d DCA

1973). The writ is not available to command official action which invokes the exercise of discretion. City of Miami Beach v. The Atheneum, Inc., 254 So.2d 41 (Fla. 3d DCA 1971). Discretion, as exercised in the granting of mandamus, is not an unbridled prerogative possessed by either ministerial or judicial officials, but it connotes the exercise of opinion and judgment circumscribed by law and, where the right is indisputable, there is no room for the exercise of discretion other than the keeping of the law. State ex rel. Beacham v. Wynn, 28 So.2d 253 (Fla. 1946). A ministerial act is distinguished from a judicial act in that in the former the duty is clearly prescribed by law, the discharge of which can be performed without the exercise of discretion. If the discharge of the duty requires the exercise of judgment or discretion, the act is not ministerial and mandamus will not be. City of Coral Gables v. State, 44 So.2d 298 (Fla. 1950). The duty is ministerial when the law prescribes it and defines it with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Where the act to be done invokes the exercise of discretion or judgment, it is judicial or discretionary, and not a ministerial duty. State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla. 4th DCA 1974).

Mandamus will not be granted to compel the performance of an act that the respondents are under no legal duty to perform and that the law has not authorized them to perform. Dance v. City of Dania, 114 So.2d 697 (Fla. 2d DCA 1959). It will not lie where the petitioner does not have a clear legal right to the duty he seeks to compel, City of Hallandale v. State, 322 So.2d 600 (Fla. 4th DCA 1975); nor will it be to try collateral questions requiring legal controversy for their settlement, Curtis v. City of Miami Beach, 46 So.2d 24 (Fla. 1950), or where the right to which the petitioner claims he is entitled depends on a

determination of controverted questions of fact, State ex rel. Blatt v. Panelfab Int'l Corp., 314 So.2d 196 (Fla. 3d DCA 1975).

The petitioner must demonstrate in the petition for mandamus that he has a clear and established legal right to the performance of a duty by the respondents. Where the petition fails to so allege and demonstrate, it is properly dismissed. McDaniel v. City of Lakeland, 304 So.2d 515 (Fla. 2d DCA 1974). See also Slaughter v. State, 245 So.2d 126 (Fla. 1st DCA 1971). In State ex rel. Allen v. Rose, supra, the Florida Supreme Court held that where the petitioner's right to mandamus appears even doubtful, it cannot be issued. More importantly, mandamus may not be resorted to and will not issue where the petitioner has another adequate remedy at law. Rice v. Arnold, 45 So.2d 195 (Fla. 1950); Rose, supra; and Board of County Comm'rs, Collier County v. Hendry, 301 So.2d 483 (Fla. 2d DCA 1974) Moreover, the petitioner must show in the petition itself that no other adequate remedy at law or method of redressing the wrong exists. Heath v. Becktell, 327 So.2d 3 (Fla. 1976); State ex rel. Blatt v. Panelfab Int'l, Corp., supra; State ex rel. Lane v. Dade County, 258 So.2d 347 (Fla. 3d DCA 1972), cert. denied 267 So.2d 830. This is particularly applicable when the petitioner has an adequate remedy, as here, by declaratory judgment. See City of Miami Beach v. State, 4 So.2d 116 (Fla. 1941); and State ex rel. Fraternal Order of Police v. City of Orlando, 269 So.2d 402 (Fla. 4th DCA 1972). It also applies when the petitioner has available administrative remedies, the exhaustion of which must be alleged in the petition. City of Miami Beach v. The Athencum Inc., supra; City of Miami Beach v. Braca, 151 So.2d 669 (Fla. 3d DCA 1963); and Ferris v. Bd. of Public Instruction of Sumter County, 119 So.2d 389 (Fla. 2d DCA 1960).

In the instant cause, mandamus is an improper remedy and does not lie as Respondents have no statutory authority to

register or refuse to allow Petitioner to register to vote. The authority to register electors rests **exclusively** with the supervisor of election of each county. Section 98.161, F.S., states, in pertinent part, as follows:

> (1) A supervisor of elections shall be elected in each county at the general election in each year the number of which is a multiple of four for a 4-year term commencing on the first Tuesday after the first Monday in January succeeding his election. Each supervisor shall, before performing any of his duties, take the oath prescribed in s. 5, Art. II of the State Constitution and give a surety bond payable to the Governor in the sum of $5,000, conditioned on the faithful discharge of his duties.
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> (3) **The supervisor is the official custodian of the registration books and has the exclusive control of matters pertaining to registration of electors.** (emphasis added).

Respondents would also note that Section 98.201, F.S. gives the supervisor the exclusive authority to strike and remove the name of a disqualified elector from the list of registered electors. Petitioner admits that he was previously involuntarily committed, however, he contests the validity of the commitment orders. Respondents have no control over the orders of commitment entered by the lower court in 1973, to which Respondents were not parties and which Petitioner does not allege were appealed.

The above-cited statutes make it clear that supervisors of elections in the various counties have the exclusive authority to register electors and to disqualify electors who have been adjudicated mentally incompetent in accordance with law. Kyle v. Brown, 167 So.2d 904 (Fla. 3d DCA 1964)

The Petitioner does not allege that he has attempted to register to vote and was denied said opportunity by the supervisor of elections. In the absence of such allegations, the

Petition does not present a justiciable issue. More importantly, there is no provision of law which would authorize or permit Respondents at this or anytime, to supercede the authority of the supervisors in the area of voter registration and disqualification. Accordingly, Respondents are not proper parties to the Petition for Writ of Mandamus as the registration of electors is not a ministerial duty of the Respondents imposed by law.

Petitioner further seeks relief against Respondents in their individual capacity. However, Fla.R.App.P. 9.030(3) provides that the Supreme Court may issue writs of mandamus to state officers and agencies. The applicable authority does not authorize the application of the Writ of Mandamus to state officers in their individual capacity or to the State of Florida. Respondents Barice and Antista are not state officers.

The Petition for Writ of Mandamus alleges no clearly established legal right to which the Petitioner is entitled and which the Respondents are denying him. The Petitioner alleges no particular ministerial duty owed him under law which involves no discretion or judgment by the Respondents. The Petition clearly lacks an adequate statement of the nature of the relief sought in mandamus and argument and appropriate citations of authority in support thereof. Furthermore, the statement of facts is woefully inadequate.

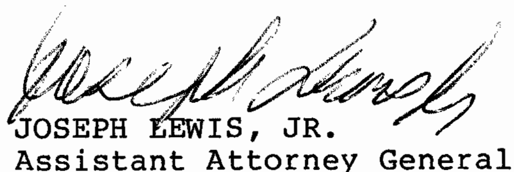
The Petition fails to show that Petitioner has exhausted all administrative remedies available to him or that he has no adequate remedy at law, which in fact he has by way of an action for declaratory judgment. Any complaint which Petitioner may have concerning his inability to vote which would derive from Petitioners previous commitments should be directed to the lower court which adjudged him incompetent and then to the county supervisor of elections who is statutorily impowered to reinstate

eligibility to register to vote pursuant to §97.041(3)(a), §98.201 and 98.161(3), F.S. Respondents have no statutory authority to grant the relief sought.

In conclusion, it is clear that by law the local supervisors of election have the exclusive control over matters pertaining to registration of electors. §§98.201 and 98.081(5), F.S., affords a remedy - plain, adequate and complete - to any person whose name has been improperly removed as an elector. Without expressing an opinion as to the merits of Petitioner's claim in the proper proceeding and against the proper party, it is not the duty of Respondents to replace names improperly erased as electors, and no statute gives them such power or authority. It is not alleged by Petitioner that he has ever at any time made his declaration under oath required by statute before the local supervisor of elections and been refused a certificate that would entitle him to have his name replaced. Consequently, no justiciable cause exists in regard to the instant issues. State ex rel. Scott v. Board of County Com'rs of Jefferson County, 17 Fla. 707 (1880); and Fair v. Davis, 283 So.2d 377 (Fla. 1st DCA 1973). Furthermore, Respondents have no control or authority over the validity of any prior involuntary commitments by a lower court in 1973 to which Respondents were not parties and which Petitioner does not allege were appealed.

Respectully submitted,

JIM SMITH
Attorney General



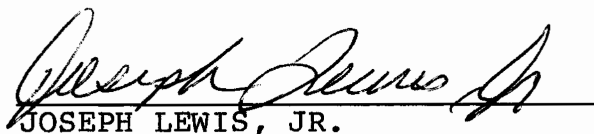
JOSEPH LEWIS, JR.
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

Counsel for James Antista, Senior Attorney with, and Carole Barice, General Counsel for, and George Firestone, Secretary of State, and Dot Glisson, his Elections Division Deputy, and State of Florida, and each individually and of like class and successors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to JIM FAIR, pro se, 1611 1/2 N. Boulevard, Tallahassee, Florida 32303, this 15th of August, 1984.



JOSEPH LEWIS, JR.