IN THE

SUPREME COURT OF FLORIDA

NO. 76,417

JERRY WESLEY GOSBY,

Petitioner,

vs.

THE THIRD JUDICIAL
CIRCUIT COURT and JUDGE
ROYCE AGNER SITTING
STEAD, et al.,

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

PETITIONER'S SUPPLEMENTAL BRIEF

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ISSUE

Can a circuit court, before it will rule on a prison inmate's petition for name change, require the prisoner's presence at a hearing without providing the prisoner the means to appear, thereby effectively abating the inmate's petition until he is no longer incarcerated?

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PRELIMINARY STATEMENT AND JURISDICTION

On August 1, 1990, Petitioner Jerry Gosby invoked the discretionary jurisdiction of this Court based on certified conflict. Art. V, § 3(b)(4), Fla. Const.

Petitioner filed an Initial Brief on the Merits pro se, and Respondent, the Third Judicial Circuit Court of Florida, filed an Answer Brief on the Merits. This Court then appointed counsel to represent Petitioner and ordered that supplemental briefs be filed. This brief is filed in compliance with that order.

The symbol "A" refers to the Appendix attached to the "Initial Brief of Petitioner on the Merits." The symbol "R" refers to the Record on Appeal.

STATEMENT OF THE CASE

Petitioner, Jerry Wesley Gosby, is an inmate at Cross City Correctional Institution, Cross City, Florida. In May 1989, Mr. Gosby petitioned the circuit court to change his name for religious reasons to Abdul Ghaffaar-Abdullah Muhammad. (A. 1-3)

On August 7, 1989, Petitioner wrote a letter to Judge Royce Agner, Circuit Judge for the Third Judicial Circuit, asking the court to consider his name change petition and to inform him if any further papers were required. (R. 12)

On August 8, Judge Agner informed Petitioner by letter that "name change petitions are not granted without a hearing." The letter also stated that "a hearing will be difficult or perhaps

impossible for you to obtain due to the fact that you are confined under a sentence for a crime," and "unless you can arrange to appear for a hearing, there is no procedure known to me whereby the court can correctly take any further action with regard to your case." (R. 11)

On August 29, 1989, the Department of Corrections (DOC) filed a response to Mr. Gosby's petition (A. 7-8), accompanied by an affidavit sworn and subscribed to by Trisha Redd, Assistant Admission and Release Administrator, Department of Corrections. (A. 9-10) The DOC's response and affidavit did not contest Petitioner's entitlement to a name change but requested in the interests of security that any order granting a name change include a statement that Petitioner continue to use his committed name, the name under which he was arrested and prosecuted, in all official respects within the state prison system, including the posting and receipt of mail, identification at court, answering at roll calls, and the like. (A. 8)

On October 17, 1989, Petitioner filed a reply to the DOC's response (A. 11-14), contending he was entitled to a name change, and requesting only that the new religious name be placed on his prison garb and that he be permitted to send out and receive mail with his new name so long as his prison number also appears on the address. (A-12) Petitioner expressly stated he recognized the DOC could not be ordered to change all its files and records to reflect the new name. (A.13)

On April 19, 1990, Petitioner filed a writ of mandamus to

the First District Court of Appeal, requesting an order directing the circuit court to either enter a ruling or conduct a hearing on his petition for name change. (R. 1-4) Petitioner alleged that he had filed two notices of hearing, the first on August 7, 1989, and the second on February 19, 1990. (R. 3)

On May 22, 1990, the First District Court of Appeal denied the writ of mandamus on the grounds that Petitioner failed to allege he had actually scheduled a hearing on his petition with the judge's office, or if such a hearing were held that he or his legal representative would attend. (R. 15-16) The First District certified conflict between its holding and Lane v. Kaney, 557 So. 2d 210 (Fla. 5th DCA 1990).

SUMMARY OF ARGUMENT

Article I, section 21, of the Florida Constitution, expressly guarantees to "every person" the right to access to the courts. Access to justice is not a privilege of class, it is a right of citizenship. Petitioner has not lost that right by virtue of his felony conviction. Nor has he lost that right by virtue of his incarceration. Florida courts, as well as federal and other state courts, consistently have held incarcerated felons have a right to bring civil actions in state courts.

Although the right to access does not give a prisoner an absolute right to appear personally, courts must take reasonable steps to insure that prisoners can present their cases. When a

hearing before a court has been set, the trial court must decide whether to order the inmate/litigant transported before the court. In making its decision, the court should consider whether a personal appearance is necessary to the litigant's presentation of the case, the security risks involved in transporting the prisoner to the courthouse, and the availability of alternatives such as obtaining the prisoner's testimony by deposition, tape recording, or telephone.

If the court decides the prisoner should appear at a hearing or trial, the court may not withhold from the prisoner the means for such appearance. By statute, the court must order the inmate transported to any court proceeding at which the inmate is required. Due process and the right to access also require the court to order a prisoner transported to the courthouse if the prisoner's in-court testimony is necessary to his case.

The Third Circuit Court apparently requires a hearing on any petition for name change. In the instant case, the court informed Petitioner by letter that he must appear at a hearing before his petition could be considered but that due to his incarceration, such appearance would be impossible. Petitioner's access to the courts was thus predicated upon his doing the impossible. This is not a lawful reason for the court's refusal to consider Petitioner's motion.

Mandamus is appropriate because the court had no authority to refuse to act, and Petitioner lacks any other means of relief.

ARGUMENT

I

PRISON INMATES ENJOY A CONSTITUTIONALLY PROTECTED RIGHT OF ACCESS TO THE COURTS, WHICH INCLUDES THE RIGHT TO PETITION THE COURT FOR A NAME CHANGE

Article I, section 21, of the Florida Constitution, expressly guarantees to "every person" the right of access to the courts.[1] The right of access to the courts also is guaranteed under the due process provision of the federal constitution. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

The constitutional right to access includes the right of incarcerated felons to bring civil actions in state courts. McCuiston v. Wanicka, 483 So.2d 489, 491 (Fla. 2d DCA 1986)(right "includes access to all courts, both state and federal, without regard to the type of petition or relief sought"); see also Straub v. Monge, 815 F.2d 1467, 1470 (11th Cir.)(right of access has "from its inception been applied to civil as well as constitutional claims"), cert. denied, 484 U.S. 946, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); Jackson v. Procunier, 789 F.2d 307,

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[1] "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const.; see also § 944.292, Fla. Stat. (1989)(expressly preserving a convicted felon's right to access to the courts).

311 (5th Cir. 1986)(prisoner's right of meaningful access not limited to constitutional, civil rights, and habeas corpus claims).

The right to access to courts thus includes a prisoner's right to petition for a name change. Florida district courts have over the years recognized this right. See In re Keppro, 573 So.2d 140 (Fla. 1st DCA 1991); In re Davis, 510 So.2d 1124 (Fla. 2d DCA 1987); Isom v. Circuit Court of the Tenth Judicial Circuit, 437 So.2d 732 (Fla. 2d DCA 1983).[2]

Although at common law, a person could change her name simply by adopting another name, most states, including Florida, now have statutes providing an additional method of effecting a name change. See § 68.07, Fla. Stat. (1989); see generally Annotation, Circumstances Justifying Grant or Denial of Petition to Change Adult's Name, 79 A.L.R.3d 559 (1977 & Supp. 1990). Under Florida's statute, the petition must be verified and must include such information as whether the petitioner is a convicted felon, has been known or called by any other names, or has ever been adjudicated a bankrupt. § 68.07(2)(f)-(h). The petition also must show that it is filed for no ulterior or illegal purpose and granting it will not invade the property rights of

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[2] Florida case law mirrors the general trend of decisions in other jurisdictions. See Matter of Mees, 465 N.W.2d 172 (N.D. 1991); Petition of Alexander, 260 Pa. Super. 371, 394 A.2d 597 (1978); In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975); see also Barrett v. Virginia., 689 F.2d 498 (4th Cir. 1982)(Virginia statute categorically prohibiting name changes by prison inmates violated inmate's first amendment right to freely exercise his religion).

others. § 68.07(2)(j).

If the allegations are true as alleged, the court must grant the petition. In re Hooper, 436 So.2d 401 (Fla. 2d DCA 1983). Thus, the only duty of the trial court upon the filing of the petition is to determine whether the name change is sought for a fraudulent purpose or will cause injury to the rights of others.

Moreover, the court must have some factual basis to support its denial of a name change. In Isom, for example, the Second District Court of Appeal reversed the trial court's summary denial of prison inmate Gregory Keith Isom's petition to change his name to Talib Muhammad Abdullah. Isom's petition stated he wanted to change his name for religious purposes and that he had no intention to further an ulterior of illegal purpose. The trial court concluded, however, that granting the name change would create problems for the Department of Corrections and law enforcement officers. The district court held that in light of the facially sufficient petition and lack of evidence to support any ulterior purpose, the trial court erred in summarily dismissing the petition. 437 So.2d at 733.

Similarly, in In re Keppro, the First District Court of Appeal reversed the trial court's summary denial of a prisoner's petition for a name change where the petition was sufficient on its face and, although the trial court had ordered the petitioner be brought before the court for a hearing, it was not apparent whether a hearing was in fact held or petitioner was present. 573 So.2d at 142.

II

ALTHOUGH A PRISON INMATE HAS NO RIGHT TO APPEAR PERSONALLY, IF A COURT REQUIRES AN INMATE'S PRESENCE, FUNDAMENTAL FAIRNESS AND SECTION 944.17(8), FLORIDA STATUTES (1989), REQUIRE THE COURT TO ORDER THE PRISONER TRANSPORTED TO THE COURTHOUSE

Although a litigant cannot be denied access to the courts simply because he or she is an inmate, the right of access does not necessarily give an inmate the right to be physically present at judicial proceedings. See Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); Brown v. Sheriff of Broward County Jail, 502 So.2d 88 (Fla. 4th DCA 1987). Whether to permit a prisoner/litigant to be physically present in court is within the trial court's discretion. Price, 334 U.S. at 284-85, 68 S.Ct. at 1059-60, 92 L.Ed. at 1369; Brown, 502 So.2d at 88. In exercising its discretion, the court must balance "the need for the prisoner's in-court testimony vis-a-vis the difficulties attendant to securing it." Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977). State and federal courts alike have used this balancing test in deciding whether the right to access in a particular case requires an inmate litigant's personal appearance in court. See, e.g., Bonner v. City of Pritchard, 661 F.2d 1206, 1212-13 (11th Cir. 1981); Strube v. Strube, 158 Ariz. 602, 764 P.2d 731 (1988).

Among the factors the trial court is to consider are the cost and inconvenience of transporting the prisoner, any potential danger or security risk a particular inmate's presence would pose to the court, whether the prisoner can and will offer

admissible, noncumulative testimony which cannot be offered effectively by deposition, telephone, or otherwise, whether the prisoner's presence is important in judging his demeanor and credibility, Brewer v. Taylor, 737 S.W.2d 421 (Tex. Ct. App. 1987), the nature of the hearing, the impact of court-ordered transportation and lodging on the state and sheriff, and the integrity of the correctional system. Brown, 502 So.2d at 89.

In exercising its discretion, the court also must consider appropriate alternatives. Courts should be "imaginative and innovative" in devising ways to afford a prisoner his day in court. Dorsey v. Edge, 819 F.2d 1066, 1067 (11th Cir. 1987). Some possible alternatives are for the plaintiff/prisoner to proceed by affidavit, deposition, tape recording, videotape, or administrative record. See Kirk v. United States, 589 F. Supp. 808, 810 (E.D. Va. 1984).

Although the authorities make clear that the court has discretion whether to allow an inmate litigant to appear personally, once a court decides to permit or require the inmate's presence in court, the court must order the sheriff to transport the prisoner to the courthouse.[3] Section 944.17(8),

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[3] The issue of whether an inmate may appear personally typically arises when the prisoner/litigant petitions the court for an order to be transported to the courthouse to testify. A prisoner may petition for such order by writ of habeas corpus testificandum. See In re Gill, 575 So.2d 311 (Fla. 2d DCA 1991)(reversing trial court's refusal to issue writ of habeas corpus ad testificandum where incarcerated father requested his presence at trial on wife's petition for name change of minor children).

Fla. Stat. (1989) provides in pertinent part:

> [i]f a state prisoner's presence is required in court for any reason after the sheriff has relinquished custody to the department, the court shall issue an order for the sheriff to assume temporary custody and transport the prisoner to the county jail pending the court appearance.

The language of section 944.17(8) is plain. This section directs the court to order a prisoner transported to the court if the prisoner is required in court for any reason. Surely, the court's own requirement that a prisoner appear at a hearing satisfies this provision. Thus, the court has no discretion to compel a prisoner's attendance at a hearing but refuse to order the inmate transported to the courthouse. Furthermore, an indigent inmate is entitled to the services of the sheriff without charge or prepayment of costs when the party has obtained a certification of indigency. § 57.081(1), Fla. Stat. (1989)[4]; In re Keppro, 573 So.2d at 142 (First District Court of Appeal held prison inmate has right to be transported to final hearing on name change at government expense).

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[4] Section 57.081(1) states in pertinent part:

> Any indigent person who is a party . . . in any judicial . . . proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks with respect to such proceedings, without charge. No prepayment of costs to any judge, clerk, or sheriff is required in any action when the party has obtained from the clerk in each proceeding a certification of indigency, based on an affidavit filed with him that the applicant is indigent and unable to pay the charges otherwise payable by law to any of such officers.

III

MANDAMUS IS APPROPRIATE BECAUSE RESPONDENT COURT HAD NO AUTHORITY TO COMPEL PETITIONER TO APPEAR AT A HEARING WITHOUT PROVIDING HIM THE MEANS TO DO SO, AND PETITIONER HAS NO ADEQUATE ALTERNATIVE REMEDY

Where a trial court's refusal to rule has no lawful basis, mandamus is the appropriate remedy. Quintana v. Barad, 528 So.2d 1300 (Fla. 3d DCA 1988); Flagship Nat'l Bank of Miami v. Testa, 429 So.2d 69, 70 (Fla. 3d DCA 1983)("mandamus lies to require that [the judge] rule one way or the other if there is no lawful justification that the ruling be withheld").

Here, the trial judge refused to rule on petitioner's motion for name change apparently because the court does not grant any name change petitions without a hearing, and because, in the judge's own words, "it would be difficult if not impossible" for petitioner to get there. Although petitioner did not submit a formal request a for writ of habeas corpus ad testificandum, or a formal order directing prison officials to transport him to court, the trial court's letter to petitioner can only be construed as a prospective denial of any such request.

This is not a lawful basis for the trial court's refusal to act in this case. The court had discretion to order a hearing on the name change petition, see § 68.07(3)("[t]he hearing on the petition may be immediately after it is filed"), and the court had discretion to require or permit petitioner's presence at such hearing. The court had no authority or discretion, however, to require petitioner's presence at the courthouse and deny him the

means to get there. This course of action violates section 944.17(8) and forecloses petitioner's right to be heard at all.

The court's refusal to rule amounts to a denial of the petition simply because Gosby is in state custody. According to every precedent in Florida and elsewhere, this is not a lawful basis for the court's failure to rule. The circuit court's refusal to issue a ruling was not an act of discretion but rather a refusal to exercise discretion, thus denying Petitioner a right to appeal. Furthermore, if the circuit court below is not compelled to issue a ruling on Petitioner's motion, this would result in a categorical prohibition against name changes (and perhaps other civil action as well) by prison inmates in the Third Judicial Circuit, with no right of appeal. There is no question but that this would be unconstitutional. The circuit court must either grant Gosby's petition for a name change, order Gosby transported to the courthouse for an evidentiary hearing on the state's objections[5], or devise some alternative way for him to present his testimony, for example, by telephone hearing.

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[5] Most courts have rejected confusion in record-keeping as a sufficient reason to summarily deny a prison inmate the right to a name change. See, e.g., Barrett, 689 F.2d at 503 ("We see no reason why the reliability and efficiency of correctional records could not be safeguarded by . . . adding the inmate's name to the existing records reflecting the inmate's previous legal name and aliases."); In re Knight; Isom; In re Petition of Alexander; see also Masjid Muhammad-D.C.C. v. Keve, 479 F. Supp. 1311, 1324 (D. Del. 1979)(holding unconstitutional prison officials' refusal to deliver mail addressed to a prisoner under his legal religious name). A few courts have refused to order prison officials to change all of their records to reflect the new name. E.g., United States v. Duke, 458 F. Supp. 1188 (S.D.N.Y. 1978). Petitioner here did not made such a request.

CONCLUSION

Petitioner clearly is entitled to petition the court for a name change, and thus is entitled to a ruling one way or the other. Although the court had discretion to order a hearing, it had no authority to require Petitioner's presence at such hearing, refuse to issue an order to the sheriff to transport him to the courthouse, and then refuse to act on the petition because Petitioner could not appear on his own volition. The district court below erred in denying the petition for mandamus and refusing to order the circuit court to act on Petitioner's motion.

For the foregoing reasons, the decision of the First District Court of Appeal should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on Baya Harrison, III, Esq., Post Office Box 656, Monticello, Florida 32344, and Assistant Attorney General Jason Vail, Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050, this 22nd day of April, 1991.