IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-612

WILLIE F. JONES,

Petitioner,

vs.

FLORIDA PAROLE COMMISSION,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

John R. Hamilton
Florida Bar No. 0774103
jhamilton@foley.com
FOLEY & LARDNER LLP
111 N. Orange Ave., Suite 1800
Post Office Box 2193
Orlando, Florida 32802-2193
Telephone: (407) 423-7656
Facsimile: (407) 648-1743

Attorneys for Petitioner

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PRELIMINARY STATEMENT

In this brief, the petitioner will refer to the parties and cite to the record in the same manner as in his initial brief. In addition to citing to the record, Jones will also cite to the consecutively-paginated appendix that he filed in connection with his initial brief, using the citation format PAPP:__:__, according to tab and page number. Thus, for example, the citation "PAPP:C:20-22" would refer to pages 20 through 22 of tab C of that appendix. The initial brief is cited as IB:__, according to page number.

The Commission's answer brief is cited as AB:__, according to page number. The unpaginated appendix to that brief is cited as RAPP:__, according to exhibit number. The single-page supplemental appendix accompanying this reply brief is cited as SAPP:1.

ARGUMENT

A. THIS COURT SHOULD DISREGARD SEVERAL STATEMENTS IN THE COMMISSION'S ANSWER BRIEF AND MANY OF THE ITEMS IN THE COMMISSION'S APPENDIX

Only four items are contained in the circuit court's file: (1) the civil cover sheet; (2) Jones's habeas corpus petition; (3) the circuit court's order dismissing Jones's petition; and (4) the mandate and opinion from the Fourth District. SAPP:1. With its answer brief, the Commission

nevertheless submitted an appendix containing a host of documents that were not before either the circuit court or the district court. In its answer brief, the Commission also makes numerous representations of fact based on those documents--representations that are completely outside the record. This court should disregard both the Commission's representations and the underlying documents on which they are based.

The improper items in the Commission's appendix consist of: (1) Exhibit A (described by the Commission as "Commitment Papers – Case No. Criminal 115"); (2) Exhibit B (described as "Commitment Papers – Case No. 67-22803-X"); (3) Exhibit C (described as "Disciplinary Reports" for alleged incidents occurring while Jones has been incarcerated); (4) Exhibit D (described as "Commitment Papers – Case No. 79-77 CF"); (5) Exhibit E (described as "Order of Parole Release"); (6) Exhibit F (described as "Disciplinary Report (parole rescinded)"); (7) Exhibit G (described as "Certificate of Parole Release"); and (8) Exhibit I (described as "Petition for Writ of Habeas Corpus").

In addition to not being in the record, Exhibits A, B, C, and D are not even remotely relevant to any of the issues that are presented in this case. See RAPP:A, B, C, D. Similarly, Exhibits E and F apparently concern the grant, and

subsequent withdrawal, of a parole other than the parole that eventually gave rise to this case; they too have no relevance to the issues presented here. See RAPP:E, F. The Commission devotes a portion of its answer brief to factual representations based on all of these documents. AB:2-3. The Commission has seemingly made those representations--and submitted the documents in question--solely for the purpose of trying to portray Jones unfavorably.[1]

And Exhibit I, remarkably, is not even the habeas petition that Jones filed in this case. It is apparently some earlier habeas petition that Jones may (or may not) have filed in an altogether different proceeding.[2] Compare RAPP:I with Habeas Pet., at 1-7 & PAPP:A:1-16.

"That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to bring such matters before the court." Altchiler v. State Dep't of Prof. Reg., 442 So. 2d 349, 350 (Fla. 1st DCA 1983); see also Dade County v. Eastern Air Lines, Inc., 212 So.

[1] Unlike the other improper exhibits in the Commission's appendix, Exhibit G is at least relevant here in that in concerns the later-revoked parole that gave rise to Jones's habeas petition. Compare RAPP:G with Habeas Pet., at 2 & PAPP:A:2.

[2] The habeas petition included in the Commission's appendix is dated October 11, 2006. RAPP:I, at 9. The habeas petition at issue here was physically filed in the circuit court on November 21, 2008. See SAPP:1.

2d 7, 8 (Fla. 1968); Thornber v. City of Ft. Walton Beach, 534 So. 2d 754, 755-56 (Fla. 1st DCA 1988). This court should therefore either strike or disregard the Commission's improperly-submitted documents, as well as the statements in its answer brief based on those documents. See, e.g., Pedroni v. Pedroni, 788 So. 2d 1138, 1139 n.1 (Fla. 5th DCA 2001); Altchiler, 442 So. 2d at 350.

B. THE COMMISSION HAS NOT PROVIDED ANY PRINCIPLED BASIS FOR RECONCILING THE DISTRICT COURT'S DECISION IN THIS CASE WITH THIS COURT'S BINDING PRECEDENT

In his initial brief, Jones pointed out how the Fourth District's decision in this case is utterly irreconcilable with this court's decision in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). IB:21-26. The Commission's response to that argument is wholly unconvincing.

Specifically, on this issue the Commission says only that Allen was concerned the unconstitutional nature of legislative deadlines for habeas corpus actions challenging "the validity of a conviction and sentence." AB:12 (quoting Allen, 756 So. 2d at 62). The Commission has completely missed the point of this court's holding in Allen.

To be sure, the types of habeas proceedings that were principally affected by the unconstitutional deadline in the Death Penalty Reform Act of 2000 ("DPRA") at issue in Allen were habeas

actions directed to convictions and sentences in capital cases. But the reason the legislative deadline in the DPRA was unconstitutional was because of the nature of habeas corpus itself--and its interrelationship with constitutional separation-of-powers principles--not because of the specific or peculiar type of habeas proceedings implicated by the DPRA.

The crux of a habeas claim is an assertion of illegal or unlawful detention. See, e.g., Sneed v. Mayo, 69 So. 2d 653, 654 (Fla. 1954); Hancock v. Dupree, 129 So. 822, 823 (Fla. 1930); Watts v. State, 985 So. 2d 21, 22 (Fla. 2d DCA 2008). Habeas claims are therefore not at all limited to instances in which a petitioner has been detained as a result of a conviction and sentence under the criminal law. On the contrary, the courts of this state have recognized numerous other instances of illegal or unlawful detention that are subject to redress through a petition for a writ of habeas corpus.[3]

[3] See, e.g., State v. Luster, 596 So. 2d 454, 455 (Fla. 1992) (interstate extradition); Sandstrom v. Leader, 370 So. 2d 3, 5 (Fla. 1979) (challenge to constitutionality of statute under which petitioner is confined); Champion v. Cochran, 133 So. 2d 68, 68 (Fla. 1961) (confinement of minor); Tittsworth v. Akin, 159 So. 779, 780 (Fla. 1935) (challenge to validity of ordinance); Ex parte Pitts, 17 So. 76, 76-77 (Fla. 1895) (challenge to legal existence of court by whose judgment petitioner is imprisoned); Clarke v. Regier, 881 So. 2d 656, 657 (Fla. 3d DCA 2004) (involuntary hospitalization); A.W. v. State, 711 So. 2d 598, 599 (Fla. 5th DCA 1998) (detention of infant by state authorities); Parsons v. Wennet, 625 So. 2d 945, 946 (Fla. 4th DCA 1993) (confinement for civil contempt); Lee v. Meeks, 592 So. 2d 282,

The right of the people to habeas relief in those instances is no more susceptible to legislative encroachment than were the habeas rights of the petitioners in Allen. That is the lesson of Allen: The Florida Constitution does not permit the legislature to enact statutes of limitations restricting the right of habeas corpus. The source or cause of the illegal detention is irrelevant; if a limit is to be placed on when habeas proceedings must be commenced to challenge illegal detention, that limit is purely a matter of practice and procedure that is within the exclusive constitutional domain of this court, not the legislature.[4]

Thus, when the Fourth District here applied section 95.11(5)(f) of the Florida Statutes to Jones's habeas petition, it did so unconstitutionally--and in violation of this court's decision in Allen. The Commission's argument to the contrary is

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284-86 (Fla. 1st DCA 1991) (child custody); MacNeil v. State, 586 So. 2d 98, 99 (Fla. 5th DCA 1991) (involuntary commitment for mental illness); Lee v. State, 546 So. 2d 436, 436 (Fla. 5th DCA 1989) (involuntary commitment for treatment for alcoholism); Durant v. Boone, 509 So. 2d 1275, 1276 (Fla. 1st DCA 1987) (procedural validity of contempt order).

[4] This case concerns only habeas corpus proceedings. It does not present the question of whether section 95.11(5)(f) can constitutionally be applied to other types of extraordinary writ proceedings. See, e.g., Moger v. Florida Parole Comm'n, Case No. 1D08-4169, at 2 (Fla. 1st DCA Nov. 17, 2009) (applying section 95.11(5)(f) to an inmate's petition for a writ of mandamus).

based on both a misunderstanding of Allen and of habeas corpus itself. The Commission's argument should accordingly be rejected.

C. THE COMMISSION'S ANALOGY TO FEDERAL LAW IS MISPLACED AND WITHOUT MERIT

The Commission also attempts to defend the application of section 95.11(5)(f) to habeas proceedings through an analogy to federal law. Specifically, the Commission refers to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244, and the one-year limit set forth in the act for state prisoners to file for postconviction relief in federal courts. AB:17-18. The Commission's theory is that section 95.11(5)(f)'s application to habeas actions should be deemed constitutional under the Florida Constitution for the same reasons as the one-year limitation under the AEDPA has been held constitutional under the federal Constitution. AB:17-18.

The Commission's argument is quite surprising, because it is precisely the same argument that the State of Florida made, and that this court rejected, in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000).

Specifically, in Allen, the state argued that the statute of limitations contained within the DPRA should be held constitutional under the Florida Constitution for the same reasons that the one-year limit under the AEDPA had been held

constitutional under the United States Constitution. Id. at 62-63. This court rejected that argument:

> The State asserts that if Congress has the authority to set a statute of limitations in this area, then the Florida Legislature should also have that authority. This argument, however, is not persuasive, as there are significant distinctions between the balance of power in the federal system and the balance of power in this state. Although the federal constitution grants the United States Supreme Court limited original jurisdiction, article III, section 2 provides that the appellate jurisdiction of the United States Supreme Court is derived from the authority of Congress. In contrast, the original and appellate jurisdiction of the courts of Florida is derived entirely from article V of the Florida Constitution. See art. V, §§ 3(b), 4(b), 5(b), Fla. Const. Further, the United States Supreme Court has recognized that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law" and "judgments about the proper scope of the writ are normally for Congress to make." Felker v. Turpin, [518 U.S. 651, 664 (1996)] (internal quotation marks omitted). In Florida, article V of the Florida Constitution explicitly grants circuit courts, district courts, and this Court the authority to issue writs of habeas corpus. See art. V, §§ 3(b)(9), 4(b)(3), 5(b), Fla. Const. Finally, the United States Supreme Court promulgates the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure pursuant to the authority conferred to it by Congress under the Rules Enabling Act. See 28 U.S.C. § 2072 (1994). . . . In Florida, article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to adopt rules of procedure. Consequently, the separation of powers argument raised in the present case

> would never be an issue in the federal system. Unlike the Florida Constitution, the federal constitution does not expressly grant the United States Supreme Court the power to adopt rules of procedure. In fact, it appears that the two branches work together in formulating procedural rules in the federal system. Hence, the State's reliance on the AEDPA is clearly without merit.

Id. at 63-64 (emphasis added; footnote omitted).

The Commission's resurrection of the same argument that this court rejected in Allen is no more meritorious now than it was then. This court should reject that argument once again.

Equally surprising as the Commission's invocation of federal law is its reliance on Kalway v. Singletary, 708 So. 2d 267 (Fla. 1998), as putative support for its argument that section 95.11(5)(f) can constitutionally be applied to habeas proceedings. AB:13. The Commission's argument based on Kalway was, once again, the same argument that this court rejected in Allen.

As this court explained in Allen, Kalway concerned a statute of limitations (i.e., section 95.11(8) of the Florida Statutes) that was also replicated and embodied in rule 1.630 of the Florida Rules of Civil Procedure and rule 9.100 of the Florida Rules of Appellate Procedure. See Allen, 756 So. 2d at 62 n.4 (citing Fla. R. Civ. P. 1.630(c) & Fla. R. App. P. 9.100(c)(4)). This court expressly "clarif[ied] our holding in Kalway 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." Id. Kalway thus provides no support for the Commission's position here for the obvious reason that the limitations period set forth in section 95.11(5)(f) does not similarly appear in any rule of procedure, unlike the limitations period at issue in Kalway.

D. THE COMMISSION'S POLICY ARGUMENTS MAY PROVIDE REASONS FOR THIS COURT TO ADOPT A RULE OF PROCEDURE THAT WOULD GOVERN THE CIRCUMTANCES PRESENTED HERE, BUT THEY DO NOT PRESENT ANY BASIS FOR APPROVING THE DISTRICT COURT'S DECISION

At various points in its answer brief, the Commission seems implicitly (although almost certainly unintentionally) to recognize that Jones is entitled to relief here. Specifically, the Commission suggests that this court should "affirm the Fourth District's and/or adopt a rule setting a reasonable time limit for which inmates can file habeas actions challenging the Commission's parole or conditional release revocation orders." AB:6; see also AB:27. Similarly, the Commission quotes extensively (AB:13-15) from Judge Thomas's concurring opinion in Presley v. Florida Parole Commission, 904 So. 2d 573 (Fla. 1st DCA 2005), in which Judge Thomas called upon this court to adopt "a uniform rule establishing a time limitation for filing petitions for habeas corpus challenging a parole revocation." Id. at 574 (Thomas, J., concurring).

Consistently with the views expressed by Judge Thomas, the Commission then provides a number of policy-based reasons why it believes inmates in Jones's position should be provided with only a limited, finite timeframe within which to initiate habeas proceedings. AB:13-15. For example, the Commission notes the difficulty that accompanies long-delayed proceedings, the system's interest in finality, and the burdens caused by frivolous inmate litigation. AB:13-17, 22-24.

There may indeed be merit to some of what the Commission says.[5] Indeed, similar or identical considerations are presumably

[5] The Commission nevertheless is undoubtedly exaggerating. Even without a rule limiting the time within which petitioners must file a habeas proceeding to challenge the revocation of parole or conditional release supervision, other principles of law exist to protect the courts against the dangers and evils raised in the Commission's brief. For example, such a habeas petition can potentially be barred by laches, waiver, collateral estoppel, res judicata, or prohibitions against abuse of the writ. See, e.g., McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997) (laches); Card v. Dugger, 512 So. 2d 829, 831 (Fla. 1987) (abuse of writ); Chastain v. Mayo, 56 So. 2d 540, 542 (Fla. 1952) (waiver); Knox v. State, 873 So. 2d 1250, 1251 (Fla. 5th DCA 2004) (collateral estoppel). Moreover, the courts of this state have adopted procedures to protect against frivolous filings. See, e.g., State v. Spencer, 751 So. 2d 47, 47-49 (Fla. 1999); Martin v. Moore, 781 So. 2d 1172, 1173 (Fla. 3d DCA 2001); Dennis v. State, 685 So. 2d 1373, 1374-75 (Fla. 3d DCA 1996). Moreover, as a practical matter, there is an inherent disincentive against delaying the commencement of a habeas proceeding. "[N]on-capital prisoners have no incentive to put off habeas corpus filings, which would only prolong the confinement they believe is unlawful when the alternative is freedom rather than execution." Currier v. Holder, 862 P.2d 1357, 1374 (Utah Ct. App. 1993) (Orme, J., concurring) (emphasis in original).

what led this court to adopt time limitations for seeking postconviction relief in criminal proceedings. See Fla. R. Crim. P. 3.850(b), 3.851(d).[6] But that is precisely the point Jones is making: Irrespective of whether a rule should be adopted that limits the time within which petitioners in Jones's position must commence habeas proceedings, it is clear that no such rule currently exists. And without an existing rule, there is no formal time limitation other than that which may arise as a result of laches or some other existing principle of law--just as there was no time limit for the commencement of postconviction proceedings prior to the incorporation of such a time limit into rule 3.850.

In other words, there may have been compelling reasons for this court to adopt the time limitations now contained in rule 3.850 and 3.851. There may be similar considerations that warrant the adoption of a rule imposing time limitations for those in Jones's position. This court has the constitutional authority to

[6] Rule 3.850 originated as Criminal Procedure Rule No. 1, which this court adopted in 1963. See In re Crim. P., Rule No. 1, 151 So. 2d 634, 634 (Fla. 1963). The two-year time limitation now within that rule was adopted in 1984. See The Fla. Bar Re: Amendment to Rules of Crim. P., 460 So. 2d 907, 907 (Fla. 1984). The time limitation in what is now rule 3.851 was adopted in 1993. See In re Rule of Crim. P. 3.851, 626 So. 2d 198, 198 (Fla. 1993). Prior to 1993, the time limitations governing postconviction remedies in capital cases at the pre-warrant stage were governed by rule 3.850. See In re Fla. Rules of Crim. P., Rule 3.851, 503 So. 2d 320, 320 (Fla. 1987).

adopt such a rule, and it is free to do so as it deems appropriate. But unless and until it does, no rule limited the time within which Jones was required to commence a habeas proceeding--and section 95.11(5)(f) cannot constitutionally be used to serve that role.

E. THE COMMISSION IS WRONG AS A MATTER OF LAW IN ARGUING THAT THE STATUTE OF LIMITATION BEGAN TO RUN ON THE DATE THAT JONES'S PAROLE WAS REVOKED

In his initial brief, Jones noted that the Fourth District's decision should be quashed even if section 95.11(5)(f) can be constitutionally applied to his habeas petition because that petition was actually filed timely. IB:32-40. The Commission's response to that argument (AB:21-27) is unpersuasive.

Succinctly stated, the reason why Jones's habeas petition was timely even under section 95.11(5)(f) is because Jones's unlawful detention constitutes a continuing wrong--and Jones's habeas petition was filed within one year of that illegal confinement. See Martin v. Florida Parole Comm'n, 951 So. 2d 84, 86 (Fla. 1st DCA 2007); Currier v. Holden, 862 P.2d 1357, 1376-78 (Utah Ct. App. 1993) (Orme, J. concurring). But the Commission disagrees, saying that Jones's "reasoning is flawed." AB:22. The Commission is wrong.

The Commission does not devote even a single sentence of its answer brief to attacking Jones's "reasoning." Instead, it

discusses what it perceives as negative practical consequences of Jones's view (and, as discussed previously in this brief, it exaggerates those consequences). AB:22-25. When it concludes, Jones's "reasoning" remains both untouched and unassailable.

Indeed, it cannot seriously be disputed that unlawful confinement, when it occurs, is on ongoing, continuing wrong--a textbook example of such a phenomenon. The continuing nature of the wrong occasioned by unlawful confinement is well illustrated, ironically enough, by contrasting that situation with the situation presented by the one case that the Commission cites in its answer brief on this issue: Tobin v. Damian, 772 So. 2d 13 (Fla. 4th DCA 2000). AB:21 n.6.

In Tobin, the plaintiff sued her father's estate for various acts of sexual abuse and incest that the father had allegedly inflicted upon her over the course of several years. Id. at 14. In affirming a partial summary judgment in the estate's favor on limitations grounds, the Fourth District held that the continuing tort doctrine did not prevent summary judgment for the estate because the daughter did not file suit within four years of the last wrongful conduct--the last act of sexual abuse or incest. Id. at 16.

The distinction between Tobin and this case is obvious. In Tobin, the wrongful conduct had long since ceased when the

plaintiff filed suit, so the continuing tort doctrine clearly did not apply and the applicable statute of limitations had begun to run. Here, in sharp contrast, the wrongful conduct--Jones's illegal confinement--was ongoing and continuing when he filed his habeas petition. As a matter of law, any corresponding statute of limitations therefore had not yet begun to run. Any conclusion to the contrary cannot be reconciled with either the principles of habeas corpus or the well-established law concerning the application of statutes of limitations to cases involving continuing wrongs.

CONCLUSION

For the foregoing reasons and the reasons set forth in Jones's initial brief, Jones respectfully requests the relief described in his initial brief.

John R. Hamilton
Florida Bar No. 0774103
jhamilton@foley.com
FOLEY & LARDNER LLP
111 N. Orange Ave., Ste. 1800
Post Office Box 2193
Orlando, Florida 32802-2193
Telephone: (407)423-7656
Facsimile: (407) 648-1743

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 25th day of November, 2009, to Anthony Andrews, Assistant General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450.

_____
John R. Hamilton

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
John R. Hamilton