IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

IGNACIO PEREA,

Petitioner,

CASE NO.: 2006-CA-6555-O
WRIT NO.: 06-64

v.

JUAN R. ALMEYDA, CHIEF HEALTH OFFICER, CENTRAL FLORIDA RECEPTION CENTER

Respondent.

_____/

Petition for Writ of Mandamus

Benjamin S. Waxman, Esquire
Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, P.A.
for Petitioner.

Joy A. Stubbs, Assistant Attorney General
for Respondent.

Before MIHOK, LATIMORE, and COHEN, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Ignacio Perea ("Petitioner"), an inmate with the Florida Department of Corrections, pursuant to rule 9.030(c), Florida Rules of Appellate Procedure, filed a Petition for Writ of Mandamus with this Court seeking to compel Juan R. Almeyda, Chief Health Officer of the Central Florida Reception Center ("Respondent"), to recommend to the Department of Corrections' Director of Health Services that Petitioner is eligible for a Conditional Medical Release. Alternatively, Petitioner filed this action

against any other person holding the title of Chief Health Officer for the Central Florida Reception Center. This Court has original jurisdiction pursuant to rule 9.030(c)(3), Florida Rules of Appellate Procedure.

Petitioner was convicted in Miami-Dade County Circuit Court of three counts of kidnapping, five counts of lewd and lascivious acts on a child under sixteen, and eleven counts of sexual battery on a child under twelve. Petitioner was sentenced to life imprisonment. Petitioner entered the Department of Corrections ("Department"), already afflicted with AIDS and diabetes.

Petitioner has been regularly housed by the Department at the Central Florida Reception Center. During January of 2000, Petitioner began complaining of rapid loss of eyesight in both eyes. On April 19, 2000, Petitioner was diagnosed with optic atrophy in both eyes, and on April 28, 2000, the optic atrophy was determined to be secondary to Petitioner's HIV disease.

On August 1, 2003, Petitioner, with the assistance of counsel, requested that the then Chief Health Officer of the Central Florida Reception Center, Dr. Rudy Panganiban, file a recommendation for Conditional Medical Release with the Department's Director of Health Services. A recommendation from the Chief Health Officer of a particular institution to the Department's Director of Health Services that an inmate is eligible for Conditional Medical Release is a necessary first step prior to the Department referring an inmate to the Parole Commission for Conditional Medical Release. Fla. Admin. Code R. 33-401.201(2). Petitioner implored Dr. Panganiban to file the recommendation for Conditional Medical Release based on Petitioner being permanently incapacitated "as a result of neuropathy of the optic nerve, secondary to diabetes," and terminally ill as a

result of AIDS. Petitioner argued that, according to the Florida Administrative Code, Dr. Panganiban was required to make the recommendation. Dr. Panganiban declined to recommend that Petitioner was eligible for a Conditional Medical Release.

Then, on December 29, 2004, Petitioner filed a request for an administrative remedy with the Superintendent of the Central Florida Reception Center seeking to have the Chief Health Officer file a recommendation of eligibility for Conditional Medical Release with the Department's Director of Health Services. Petitioner declared that due to the optic nerve atrophy in both eyes Petitioner was permanently incapacitated under section 947.149, Florida Statutes, and entitled to a recommendation for Conditional Medical Release. Respondent and Warden Charles E. Germany, Sr., denied Petitioner's request for administrative remedy on February 23, 2005. According to Respondent, Petitioner did not meet the criteria for being declared permanently incapacitated, and therefore Petitioner did not qualify for Conditional Medical Release.

On April 7, 2005, Petitioner appealed the denial of his request to the Secretary of the Department of Corrections. Petitioner argued that his blindness in both eyes required constant assistance and rendered him permanently incapacitated. Additionally, Petitioner argued that due to his blindness he was no longer a danger to himself or others. On or about April 29, 2005,[1] Petitioner's administrative appeal was denied.

> Appeal Denied:
>
> Your request for administrative remedy was received at this office and it was carefully evaluated. Records available to this office were also reviewed.
>
> It is determined that the response made to you by Dr. Almeyda Gomez on 2/23/05 appropriately addresses the issues you presented.

[1] Petitioner alleges that the date may have been May 5, 2005.

> It is the responsibility of your Chief Health Officer to determine the appropriate treatment regimen for the condition you are experiencing.
>
> It is the decision of the Chief Health Officer if an inmate qualifies for a Conditional Medical Release.

On August 11, 2006, Petitioner sought relief from this Court seeking a Writ of Mandamus to compel Respondent to issue a Conditional Medical Release recommendation. On December 7, 2006, Petitioner was transferred from the Central Florida Reception Center to the Tomoka Correctional Institution.

Respondent argues that the petition is moot because Petitioner is no longer housed at the Central Florida Reception Center.

Florida courts have adopted the standard set forth by the Untied States Supreme Court in defining mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)); *Montgomery v. Dep't of Health & Rehabilitative Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). Mootness occurs "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The United States Supreme Court has held that, even where a court properly acquires jurisdiction in a case, said jurisdiction may abate if the case becomes moot in the following two situations:

> "(1) [where] it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and

(2) [where] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (citations omitted).

The rule that courts may not issue opinions or declare rules of law in moot cases "is derived from the requirement of the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy." *Montgomery*, 468 So. 2d at 1016 (citations omitted). Additionally, an inmate's claim challenging the conditions of his confinement at a particular institution was declared moot when the inmate was transferred to another institution. *Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir. 1988). However, an issue or claim is not moot where a party's claimed injury or deprivation of rights is reasonably likely to reoccur yet evade judicial review. *Honig v. Doe*, 484 U.S. 305, 318 (1988). In *Martinez v. Singletary*, 691 So. 2d 537, 538-39 (Fla. 1st DCA 1997), the First District Court of Appeal held that an inmate's claim of due process violations by the Department of Corrections was *not moot* even though the Department had transferred him to another institution because the inmate's "alleged grievances not only are 'capable of repetition' but also have recurred so as to evade effective judicial review."

Although Petitioner is no longer housed at the Central Florida Reception Center, his claimed deprivation of rights or right to a recommendation from Respondent to the Department's Director of Health Services may continue to evade any judicial determination if the Department continues to transfer Petitioner. The Department has failed to meet its burden under *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), and therefore, the Petition is not moot.

Petitioner argues that he is permanently incapacitated due to his irreversible blindness, no longer a danger to himself or others, and therefore, eligible for Conditional Medical Release. Petitioner points out that he may also be terminally ill, but does not seek the recommendation here based on being terminally ill. Furthermore, Petitioner argues that by not recommending a Conditional Medical Release to the Director of Health Services, Respondent has failed to fulfill his statutorily mandated obligation to Petitioner.

Respondent argues that Petitioner has failed to demonstrate a clear legal right to mandamus requiring the Chief Health Officer to make a determination that Petitioner is eligible for a Conditional Medical Release and recommend such a release to the Director of Health Services. Respondent further states that because Respondent has already determined that Petitioner is not permanently incapacitated under the statute and rules, Petitioner is essentially seeking to have this Court override Respondent's medical determination.

The Court finds that Petitioner does not have a clearly established right under the statute and rules, and because Respondent's duty is not ministerial, Petitioner is not entitled to a Writ of Mandamus.

The Legislature created the Conditional Medical Release program in 1992, and divided the authority under it between the Department of Corrections and the Parole Commission. Ch. 92-310, § 16, Laws of Fla. (1992); § 947.149, Fla. Stat. (2007).

> An inmate is eligible for consideration for release under the conditional medical release program when the inmate, because of an existing medical or physical condition, is *determined by the department* to be within one of the following designations:

> (a) 'Permanently incapacitated inmate,' which means an inmate who has a condition caused by injury, disease, or illness which, *to a reasonable degree of medical certainty*, renders the inmate permanently and irreversibly physically incapacitated *to the extent that the inmate does not constitute a danger to herself or himself or others*.
>
> (b) 'Terminally ill inmate,' which means an inmate who has a condition caused by injury, disease, or illness which, *to a reasonable degree of medical certainty*, renders the inmate terminally ill to the extent that there can be no recovery and death is imminent, *so that the inmate does not constitute a danger to herself or himself or others*.

§ 947.149(1), Fla. Stat. (2007) (emphasis added).

The authority over whether or not to grant a Conditional Medical Release lies solely within the discretion of the Parole Commission. § 947.149(3), Fla. Stat. (2007). The Department is vested with the responsibility of determining which inmates are eligible for Conditional Medical Release, and after determining an inmate is eligible, "shall refer them to the commission for consideration." § 947.149(3), Fla. Stat. (2007). Before any inmate may be considered for a Conditional Medical Release by the Parole Commission, the Department must first make the recommendation. § 947.149(1), Fla. Stat. (2007).

The Florida Administrative Code provides the required procedure for the Department to follow when determining whether to recommend a prisoner to the Parole Commission for Conditional Medical Release:

> (1) The Department of Corrections shall refer to the Florida Parole Commission for conditional medical release inmates who are permanently and irreversibly physically incapacitated or terminally ill due to injury, disease or illness *to the extent that they do not constitute a danger to themselves or others*.

> (2) The chief health officer of an institution housing an inmate whose health has deteriorated to a point where consideration for conditional medical release may be appropriate shall provide a conditional medical release recommendation to the Director of Health Services.

Fla. Admin. Code R. 33-401.201 (emphasis added).

Petitioner is seeking to have this Court direct Respondent to issue a recommendation of eligibility for Conditional Medical Release to the Department's Director of Health Services.

The Florida Administrative Code continues:

> Based upon this review, the Director of Health Services shall:
>
> (a) *Reject the recommendation based upon the fact that the inmate fails to meet the eligibility requirements in (1)*;
>
> (b) Defer a [recommendation to the Parole Commission] pending additional investigation to assess the response to recent treatment or to obtain additional information from specialized health professionals or laboratory consultants; or
>
> (c) Agree that the medical situation is such that the inmate should be referred for conditional medical release consideration and forward the recommendation and attachments to the Florida Parole Commission.

Fla. Admin. Code R. 33-401.201(2) (emphasis added).

Both Section 947.149(2), Florida Statutes, and Rule 33-401.201(5), Florida Administrative Code, clearly state that an inmate has *no right* to a Conditional Medical Release or to a medical evaluation for a determination of eligibility for a Conditional Medical Release.

The purpose of mandamus, according to the Florida Supreme Court, is not to establish a legal right. *State ex rel. Glynn v. McNayr*, 133 So. 2d 312, 316 (Fla. 1961).

"Its function is to enforce a right which has already been clearly established. In other words, the petitioners must demonstrate their entitlement to a clear legal right to compel the performance of an indisputable legal duty." *McNayer*, 133 So. 2d at 316.

The Fourth District Court of Appeal has described mandamus as:

> [A]n appropriate remedy to compel the performance of a ministerial act that an agency has the clear legal duty to perform. *See Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996). "A duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." *Id*.

Shea v. Cochran, 680 So. 2d 628, 629 (Fla. 4th DCA 1996).

In other words, "[a] writ of mandamus cannot be used to compel a public agency clothed with discretion to exercise that discretion in a given manner." *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993).

Here, section 947.149, Florida Statutes, and Rule 33-401.201, Florida Administrative Code, specifically provide that no legal right attaches to an inmate regarding a Conditional Medical Release or to an evaluation for the determination of eligibility for a Conditional Medical Release. Hence, mandamus is an inappropriate remedy because Petitioner does not have a clearly established legal right to a determination of eligibility or to a recommendation from Respondent.

Additionally, section 947.149(1), Florida Statutes, states that an inmate is only eligible for a Conditional Medical Release upon a *determination*, made by the Department, that the inmate is permanently incapacitated to a reasonable degree of medical certainty to the extent that the inmate no longer constitutes a danger to himself or others. The words "determination" and "evaluation" are terms of discretion evidencing

the fact that the Respondent's duty is not ministerial. Moreover, making a determination of permanent incapacitation to a reasonable degree of medical certainty requires the exercise of discretion. Likewise, the additional element of permanent incapacitation, requiring a determination that the inmate is no longer a danger to himself or others, also requires the exercise of discretion. Mandamus may not be used "to compel the exercise of discretion in a particular fashion or to establish a right." *Marshall v. State*, 838 So. 2d 702 (Fla. 5th DCA 2003). Therefore, because the statute and administrative rules fail to define or specifically establish what a reasonable degree of medical certainty is, or what constitutes an inmate no longer being a danger to himself or others, the statute and administrative rules clothe the Chief Health Officer and the Department with the discretion in making those determinations. Mandamus will not lie where a determination or act is discretionary. *Architectural Sheet Metal, Inc., v. RLI Ins. Co.*, 936 So. 2d 1181, 1182 (Fla. 5th DCA 2006) (holding that because the trial court had discretion mandamus could not issue).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Perea's Petition for Writ of Mandamus is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this ___11_ day of _____May_____, 2007.

_/S/_____
A. THOMAS MIHOK
Circuit Court Judge

_/S/_____
ALICIA L. LATIMORE
Circuit Court Judge

___/S/_____
JAY PAUL COHEN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to **Benjamin S. Waxman, Esq.,** Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, P.A., Lawyers Plaza, Fourth Floor, 2250 Southwest Third Avenue, Miami, Florida 33129; and to **Joy A. Stubs,** Assistant Attorney General, Office of the Attorney General, The Capital Suite PL01, Tallahassee, Florida 32399, on this __11____ day of ___May_____, 2007.

_____/S/_____
Judicial Assistant