

**STATE OF FLORIDA
AGENCY FOR WORKFORCE INNOVATION**

IN RE:

FO No. 10-003

Petition to Initiate Rulemaking to Promulgate and to Amend Rules With Respect to Court Procedure, Jury Instructions, Gain Time for Prisoners, Community Release Parole Programs, and Custody Classification of Inmates

AWI Litigation File No. 2010-00028
AWI Log Item No. 10-73

FINAL ORDER DISMISSING PETITION TO INITIATE RULEMAKING

On January 27, 2010, the Agency for Workforce Innovation (Agency) received a Petition to Initiate Rulemaking, pursuant to Section 120.54(7), Florida Statutes, from Clarence S. Allen. The Petition asked the Agency to amend Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts*, to promulgate a rule related to jury instructions in criminal trials, and to amend certain provisions of the Florida Administrative Code which were promulgated by and are administered by the Department of Corrections. The Agency dismisses the petition with prejudice for the following reasons:

PETITION TO AMEND RULES OF PROCEDURE GOVERNING FEDERAL HABEAS CORPUS PROCEEDINGS

1. Petitioner requests that the Agency initiate rulemaking to amend Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts* to require that, "All attorneys for respondents appointed during court ordered federal habeas show cause proceedings be required to answer or respond with either an exhaustion defense or waiver of exhaustion; and, that a waiver of exhaustion by a state respondent provide that the court's staff attorney in any alternative court order include appropriate en-route case references and law statutes which argumentatively support in opposition the cited and or alleged constitutional rights violation and error by the state court."

2. The U.S. Congress has the authority to determine rules of procedure in federal courts. Wayman v. Southard, 23 U.S. 1 (1825); Bank of United States v. Halstead, 23 U.S. 51, 54 (1825). The U.S. Congress has delegated this rulemaking authority to the federal judiciary. 28 U.S.C. §§2071-2077.

3. The Agency is an agency of the State of Florida, and is neither a court nor a federal body. § 20.50, Fla. Stat. (2009). Congress has not delegated to the Agency any authority over procedures in federal courts. Therefore, the Agency has no authority to amend Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts*.

4. The Agency has no jurisdiction over habeas corpus petitions under 28 USC § 2254 or the U.S. Constitution.

5. Procedural rules of court in Florida courts, including those related to habeas corpus petitions, are exclusively under the Florida Supreme Court's rulemaking authority. Art. V, § 2(a), Fla. Const.; State v. Raymond, 906 So. 2d 1045, 1048 (Fla. 2005). Therefore, the Agency has no authority to adopt a state rule with similar meaning to that suggested by petitioner.

6. Section 120.569(2)(c), Fla. Stat. (2009) provides that each petition be dismissed once without prejudice and the petitioner be given leave to refile and cure the defect unless the defect cannot be cured. The Agency has no jurisdiction to adopt the rule requested by petitioner or any similar rule governing court procedures. Because it is apparent from the face of the petition that the defect cannot be cured, the Agency has the authority to dismiss with prejudice. Nat'l States Ins. Co. v. Office of Ins. Regulation, 988 So. 2d 107, 110 (Fla. 1d DCA 2008).

7. Petitioner's petition to amend Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts* is dismissed with prejudice.

PETITION TO INITIATE RULEMAKING REGARDING JURY INSTRUCTIONS IN
CRIMINAL TRIALS

8. Petitioner requests that the Agency initiate rulemaking to adopt a rule to require that, “Selected criminal trial jurors to be informed within the court’s jury instructions and rules of deliberation that [they] are to be included and have a right and a duty to participate during the imposition of penalty phase or at the criminal sentencing proceeding state, to consider whether a intended and or imposed sentence is fair and reasonable or unfair and unreasonable in all Florida future criminal trial sentencing cases.”

9. Procedural rules of court used in the Florida state court system, including rules related to sentencing and the *Florida Standard Jury Instructions for Criminal Cases*, are exclusively under the Florida Supreme Court’s rulemaking authority. Art. V, § 2(a), Fla. Const.; § 921.141(4), Fla. Stat. (2009). The Agency is within the executive branch of government. § 20.50, Fla. Stat. (2009). The Florida Constitution states, “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Art. II, § 3, Fla. Const. The Florida Constitution does not grant the Agency any authority to determine procedural rules of court or jury instructions. Therefore, the Agency cannot adopt a rule of court or amend the *Florida Standard Jury Instructions for Criminal Cases*.

10. The Agency has no jurisdiction to amend the *Florida Rules of Criminal Procedure* or the *Florida Standard Jury Instructions for Criminal Cases* and is prohibited from doing so by Art. V, § 2(a), Fla. Const. and Art. II, § 3, Fla. Const.

11. Section 120.569(2)(c), Fla. Stat. (2009) provides that each petition be dismissed once without prejudice and the petitioner be given leave to refile and cure the defect unless the defect cannot be cured. The Agency has no jurisdiction to adopt the rule requested by petitioner or any similar rule governing court procedures. Because it is apparent from the face of the petition that the defect cannot be cured, the Agency has the authority to dismiss with prejudice. Nat’l States Ins. Co. v. Office of Ins. Regulation, 988 So. 2d 107, 110 (Fla. 1d DCA 2008).

12. Petitioner's request to adopt a rule governing jury instructions and procedures in Florida criminal proceedings is dismissed with prejudice.

AMENDMENTS TO RULES ADMINISTERED BY THE DEPARTMENT OF
CORRECTIONS

13. Petitioner requests that the Agency amend Florida Administrative Code Rules 33-601.105, 33-601.101, 33-601.602, and 33-601.210.

14. The legislature has delegated rulemaking authority to the Department of Corrections. § 944.275(7), Fla. Stat. (2009); § 944.281, Fla. Stat. (2009); § 945.091(1),(3),(8)(c), Fla. Stat. (2009); § 946.002(1)(a), Fla. Stat. (2009); § 944.09(1), Fla. Stat. (2009); § 958.11(1), Fla. Stat. (2009). Pursuant to that grant of authority, Florida Administrative Code Rules 33-601.105, 33-601.101, 33-601.602, and 33-601.210 were promulgated and are administered by the Department of Corrections. The Agency has no authority to amend these rules, or to engage in rulemaking on issues of gain time, community release programs, or custody classification of inmates.

15. Section 120.569(2)(c), Fla. Stat. (2009) provides that each petition be dismissed once without prejudice and Petitioner be given leave to refile and cure the defect unless the defect cannot be cured. The Agency has no jurisdiction to amend the rules requested by Petitioner. Because it is apparent from the face of the petition that the defect cannot be cured, the Agency has the authority to dismiss with prejudice. Nat'l States Ins. Co. v. Office of Ins. Regulation, 988 So. 2d 107, 110 (Fla. 1d DCA 2008).

16. Petitioner's request to amend these rules is dismissed with prejudice.

ORDER

17. The Agency has no jurisdiction to adopt or amend any of the rules suggested by Petitioner. Therefore the defect in Petitioner's petition to initiate rulemaking cannot be cured. It is therefore ORDERED:

For the reasons stated above, the Petition to Initiate Rulemaking from Clarence Allen is DISMISSED with prejudice. The Agency will deny further petitions from Petitioner to initiate rulemaking or to amend rules which request the Agency to engage in rulemaking related to federal rules of court governing habeas corpus, engage in rulemaking related to the *Florida Rules of Criminal Procedure* or the *Florida Standard Jury Instructions for Criminal Cases*, or to engage in rulemaking under Florida Administrative Code Chapter 33.

RIGHT TO APPEAL

Petitioner has no right to an appeal from this Order. Petitioner is a prisoner within the meaning of § 944.02(6), Fla. Stat. (2009). Pursuant to Section 120.81(3)(a), Fla. Stat. (2009), a prisoner shall not be considered a party and does not have appeal rights in his capacity as a prisoner. Caldwell v. State, 821 So. 2d 374, 374-375 (Fla. 1d DCA 2002); Quigley v. Florida Dep't of Corrections, 745 So. 2d 1029, 1031 (Fla. 1d DCA 1999). Petitioner is not entitled to appellate review this dismissal of Petitioner's petition.

DONE and ORDERED on this 12 day of February 2010, in Tallahassee, Florida.

STATE OF FLORIDA AGENCY
FOR WORKFORCE INNOVATION



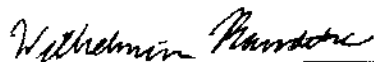
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service this 15th day of February, 2010 to:

Clarence S. Allen
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