

IN THE SUPREME COURT OF FLORIDA

MARK WINKLER,
CHRISTOPHER HALL,
and
KELLY TORMEY,

Petitioners,

vs.

Case No. SC93294
Consolidated Nos. SC94507, SC97143

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,
and
FLORIDA PAROLE COMMISSION,

Respondents.

**TORMEY'S RESPONSE TO RESPONDENT MOORE'S
MOTION TO STRIKE AMENDED PETITION OR
IN THE ALTERNATIVE, MOTION FOR PERMISSION TO RESPOND**

Petitioner Tormey, by and through the undersigned appointed counsel, responds to respondent Moore's motion to strike and for alternative relief as follows:

1. The Court should deny respondent Moore's motion to strike petitioner Tormey's reply and amended petition and grant Secretary Moore's alternative request for leave to file a response.

2. Petitioner Tormey's reply is the logical and necessary extension of her original petition, and it advances the same fundamental claim. The original petition, which was very short and filed *pro se*, demanded provisional credits under the *Ex Post Facto* Clause. The Secretary responded to the original petition by asserting that Ms. Tormey was excluded from eligibility for provisional credits by section 944.277(1)(i), Florida Statutes (1989). Ms. Tormey's reply simply

challenges the constitutionality, under article III, section 6, of the Florida Constitution and the *Ex Post Facto* Clause, of the very exclusion invoked by the Secretary in his response.

3. Although it was not clear under the circumstances that Ms. Tormey's reply needed to be in the form of an amended petition, counsel chose to cast it in that form so that Secretary Moore and the Court would know that it contained argument to which the Secretary might wish to respond. The Secretary is not in an "untenable" position, and his motion to strike is an overreaction. The Secretary does, however, seek leave to respond, and Ms. Tormey does not oppose that appropriate request.

4. In casting Ms. Tormey's pleading as a reply and amended petition, counsel followed the practice of other appointed counsel in similar circumstances. *See* Amended Petition for Extraordinary Relief and Reply of Petitioner, *Downes v. Singletary*, 729 So.2d 369 (Fla. 1998) (No. 90,188). In that case appointed counsel did not seek prior leave to file his reply and amended petition, and the Court properly resolved the case on the merits.

5. Contrary to the Secretary's suggestion in his motion, rule 9.040(d) does not require Ms. Tormey's reply to be cast as an amended petition. Further, nothing in rule 9.040(d) or the cases applying it requires Ms. Tormey's reply and amended petition to be accompanied by a motion for leave. The Secretary provides no authority for his motion to strike. His motion is unsupported and thus fails to comply with the clear dictates of rule 9.300(a).

6. The intent of rule 9.040(d) is directly opposed to the Secretary's motion to strike. The rule expresses a strong preference for resolution of disputes on the merits. *See Rolax v. State*, 505 So.2d 440, 441 (Fla. 2d DCA 1987); *Sebree v. Salcedo*, 390 So.2d 801 (Fla. 3d DCA 1980)(Pearson, J., concurring specially). Toward that end it instructs courts to allow amendments liberally and to

overlook formal and procedural technicalities. *See* Fla. R. App. P. 9.040(d) and 1977 committee note. Assuming an amendment to Ms. Tormey's original petition was necessary or desirable, rule 9.040(d) fully supports it. The Court should adhere to the letter and spirit of rule 9.040(d) and refuse to strike the reply and amended petition.

7. Whatever prejudice respondent Moore alleges will be adequately remedied by granting him leave to respond. The motion provides no justification whatsoever for the far more extreme remedy of striking the reply, which would avoid resolution on the merits and be contrary to the express command of rule 9.040(d).

For the foregoing reasons, the Court should afford the Secretary a reasonable time within which to respond to Ms. Tormey's reply and amended petition and deny the motion to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

_____I hereby certify that a true copy of Tormey's Response to Respondent Moore's Motion to Strike Amended Petition or in the alternative, Motion for Permission to Respond has been furnished by U.S. Mail to **Judy Bone**, Assistant General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399-2500, **Susan Maher**, Assistant General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399, **Bradley R. Bischoff**, Assistant General Counsel, Florida Parole Commission , 2601 Blair Stone Road, Building C, Tallahassee, FL 32399, and **Baya Harrison, III**, Esq. P.O. Box 1219, Monticello, FL 32345 on this 9th day of May, 2000. _____

John C. Schaible