IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

GEORGE FIRESTONE, et al.,

Petitioners,

vs. CASE NO. 66,774

FLORIDA OPTOMETRIC
ASSOCIATION, et al.,

Respondents.
_____/

BOB GRAHAM, et al.,

Petitioners,

vs. CASE NO. 66,768

FLORIDA OPTOMETRIC
ASSOCIATION, et al.,

Respondents.
_____/

FLORIDA SOCIETY OF
OPHTHALMOLOGY, et al.,

Petitioners,

vs. CASE NO. 66,762

FLORIDA OPTOMETRIC
ASSOCIATION, et al.,

Respondents.
_____/

BRIEF OF PETITIONERS

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STATEMENT OF THE FACTS

The Petitioners, Governor Bob Graham and Secretary of State George Firestone, have invoked the discretionary jurisdiction of this Court to review a March 15, 1985, opinion of the First District Court of Appeal ("DCA") wherein the DCA held that the Governor's veto of Senate Bill 168 (1963) was untimely and that a writ of mandamus should be issued requiring that the Secretary of State file Senate Bill 168 as a law of the State of Florida.

On June 13, 1983, the 1983 Regular Legislative Session adjourned sine die.

On June 14, 1983, Senate Bill 168 was presented to the Governor for his approval.

On June 15, 1983, the Governor called a special session of the Legislature that lasted through June 24, 1983.

On June 29, 1983, fifteen days after presentation, the Governor vetoed Senate Bill 168. Thereafter, his veto message was presented to the Secretary of State.

On July 12, 1983, a second special session of the Legislature was convened. The Secretary of State transmitted the Governor's veto message to the Legislature before the first day of the second special session.

On July 13, 1983, the Secretary of the Senate returned Senate Bill 168 to the Secretary of State and informed him that "no action was taken" on that bill by the Legislature.

Subsequently, on July 27, 1983, the Respondents, Florida Optometric Association, et al., filed a petition for writ of mandamus in the Second Circuit Court seeking an order directing the Secretary of State to publish Senate Bill 168 as a law. They argued that under Article III, Section 8(a) of the Constitution, the Governor had only seven consecutive days during which to veto Senate Bill 168 and not the fifteen days he took.

On August 11, 1983, the Governor filed a motion to intervene in the Circuit Court proceeding as did the Petitioner, Florida Society of Ophthalmology, Inc. on August 15, 1983.

On January 30, 1984, Circuit Judge Ben C. Willis, after hearing oral argument, held that although a petition for writ of mandamus directing the Secretary of State to publish Senate Bill 168 as a law was an appropriate remedy, the Governor nevertheless had fifteen days in which to veto that bill and that the Secretary of State had acted properly by transmitting the veto message to the next special legislative session.

On February 22, 1984, the Respondents appealed Judge Willis' Final Order to the DCA. The Petitioners cross-appealed that portion of the Final Order accepting mandamus jurisdiction.

In its March 15, 1985, opinion, the DCA reversed the circuit court, ruling that the Governor had only seven consecutive days during which to veto Senate Bill 168 and that the writ of mandamus be issued. However, "in light of the potential impact" of its decision on the "state's legislative and executive

processes," the DCA certified the following question to this Court:

> Whether Article III, Section 8(a), Florida Constitution, allows the Governor seven or fifteen consecutive days to act on a bill presented to him after the Legislature adjourns sine die, and if he is allowed only seven days thereafter, should the effect of an opinion so holding have only prospective application?

Subsequently, all three Petitioners invoked the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Governor Graham's veto of Senate Bill 168 fifteen days after it was presented to him by the Legislature was proper because that bill was presented to him after the Legislature adjourned sine die. The DCA erred when it determined that the meaning of Article III, Section 8(a) is clear and unambiguous and therefore the Governor only had seven days in which to veto Senate Bill 168 even though it was presented to him after adjournment sine die of the Legislature.

The DCA further erred in ruling that since that provision is clear and unambiguous that the long-standing construction given that provision by all three branches of government was not persuasive and that it need not look into the intent of that provision.

Article III, Section 8(a) is not clear and unambiguous. To the contrary, the Constitution is silent as to how much time the Governor has to veto a bill presented after adjournment. Article III, Section 8(a) only applies to bills presented during the session, not to bills presented after adjournment.

The longstanding interpretation given Article III, Section 8(a) by the Legislature, the Governor, the Secretary of State, the Attorney General, and this court, until the DCA's opinion should be conclusive and controlling. The Governor has fifteen consecutive days in which to act on bills presented after adjournment.

The DCA was correct in determining that three controlling purposes of Article III, Section 8 aid to safeguard the Governor's opportunity to consider all bills presented to him, to give the Legislature an opportunity to reconsider vetoed bills and to insure promptness. The only logical and reasonable interpretation of Article III, Section 8, is that the Governor has fifteen consecutive days during which to act on bills that are presented to him after adjournment sine die. First, he needs additional time to consider bills presented after adjournment since the majority of all bills are presented after adjournment. Second, the additional time afforded the Governor to consider such bills in no way affests the Legislature's ability to reconsider any vetoed bills since the Legislature is no longer in session. Similarly, promptness is no longer a matter of urgency once the Legislature has adjourned since they can no longer take action on a veto.

The DCA also erred in holding that mandamus is proper. The DCA ignored this Court's holding in Brown v. Firestone, 382 So.2d 654, 671 (Fla. 1980), that "[m]andamus is an extremely limited basis for jurisdiction" and should be "employed sparingly". All three of the requirements for mandamus set forth in Department of Health and Rehabilitative Services v. Hartsfield, 399 So.2d 1019, 1020 (Fla. 1st DCA 1981) are absent in this case. The Respondent does not have a clear legal right. The intent of and the construction given Article III, Section 8 support the Governor's veto. The Secretary of State did not have an indisputable duty to publish Senate Bill 168 as law.

To do so he would have had to override the Governor's veto and ignore the Legislature's refusal to act on the veto. The Secretary of State fulfilled his constitutional duties when he transmitted the Governor's veto message to the Legislature. Moreover, other adequate remedies such as declaratory relief exist.

Finally, the DCA misconstrued this Court's holding in Brown v. Firestone and erred in concluding that mandamus was justified because an immediate decision was necessary to protect the functions of government. While this case poses an "important" issue, it lacks "immediacy" as evidenced by the fact that government has functioned under the Governor's interpretation of Article III, Section 8 for the last fifteen years.

I

THE DISTRICT COURT ERRED IN FINDING ARTICLE III, SECTION 8(a) TO BE CLEAR, UNAMBIGUOUS AND SUSCEPTIBLE TO ONLY ONE INTERPRETATION

The First District Court of Appeal held that Article III, Section 8(a) is clear, unambiguous and not susceptible to more than one interpretation. Therefore, the lower court found that the Circuit Court erred in considering extrinsic matters such as long standing interpretation and legislative intent. Petitioner maintains that Article III, Section 8(a) is not clear and unambiguous and that it is susceptible to more than one interpretation.

Article III, Section 8(a) provides as follows:

> Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill....

The second sentence in the above-cited provision modifies the first sentence. The second sentence begins, "If during <u>that period</u> or on the seventh day, the legislature adjourns." (emphasis added) "That period" refers to the seven consecutive days after presentation. The second sentence when read with the first suggests that the Legislature will be in session at the time of presentment. Therefore, Article III, Section 8(a) does not specifically address the circumstance of presentment

after adjournment. In such a circumstance, it is appropriate to look to the long standing construction which has been given this provision which would allow the Governor fifteen days to veto a bill presented after adjournment sine die.

In addition to its lack of crystal clarity regarding presentment after adjournment, Article III, Section 8(a) is vague in other ways. Respondent Optometric Association argues that the fifteen day provision is only applicable if the Legislature adjourns or takes a recess of more than thirty days while a bill is on the Governor's desk for review. Respondent rejects all ambiguity in Article III, Section 8, however, this is not the case. For example, if the Legislature recesses, how will the Governor be certain that the recess is for more than thirty days until that thirty day mark passes? Once the thirty days has passed, it would be too late for the Governor to make any effective use of the fifteen day period. Moreover, even if the recess was for a time certain exceeding thirty days, the Legislature might return from its recess at the call of the Chair prior to that time. If the Legislature returned from a 'thirty' day recess on the eighth day after recess, the Governor's presumed fifteen day veto period might instantly be truncated to seven.

Admittedly, the instant case does not involve a recess, however, examination of this provision demonstrates that Article III, Section 8(b) is not clear and unambiguous. Therefore, the trial court was correct in considering "extrinsic" evidence to determine the proper construction of this section. The District Court erred in rejecting such evidence.

II

THE LONG-STANDING CONSTRUCTION OF ARTICLE III, SECTION 8 SUPPORTS THE TRIAL COURT'S FINDING THAT GOVERNOR GRAHAM'S VETO OF SENATE BILL 168 WAS PROPERLY EXERCISED

In construing constitutional provisions, the court should properly consider the construction given by the affected officials. State ex rel. Kurz v. Lee, 121 Fla. 360, 163 So. 859 (1935). In Amos v. Moseley, 74 Fla. 555, 77 So. 619, 625 (1917), the Florida Supreme Court quoted the following:

> But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument ab inconvenienti is sometimes allowed to have very great weight.

The interpretation of Article III, Section 8 of the Florida Constitution which would allow the Governor fifteen days to veto a bill presented after adjournment sine die has been consistently followed by every Governor since adoption of the 1968 Constitution. (R. 114-125). Furthermore, as discussed below, this construction of Article III, Section 8 has also

been suggested by the Florida Supreme Court and accepted, through implication, by the Florida Legislature. Admittedly, clear constitutional language may not be otherwise construed; however, the continuous and sustained interpretation of Article III, Section 8 by all three branches of government would suggest that the meaning is not clear and, therefore, the principle of Amos v. Moseley, supra, should be applied.

The 1968 Constitution was ratified by the voters on November 5, 1968. All three Governors since the adoption of the 1968 Constitution have interpreted Article III, Section 8 as allowing fifteen days from presentation to properly veto a bill presented after the Legislature adjourns sine die.

In the 1970 Regular Legislative Session, the first session after the adoption of the 1968 Constitution, 29 bills which had been presented after adjournment were vetoed more than seven days after presentment. (R. 112, App. 2). Those in Governor Kirk's administration responsible for legislative matters clearly understood the Constitution to allow fifteen days for veto of a bill presented after adjournment sine die. (R. 123-125). This interpretation is significant because it so clearly followed the adoption of the 1968 Constitution when memories of legislative intent were fresh. It was, therefore, an interpretation which, as provided in Amos v. Moseley, "has occurred contemporaneously with the adoption of the Constitution".

Similarly, during the period from 1974 through 1978, a total of 99 bills presented to the Governor after adjournment

sine die was vetoed by Governor Askew more than seven days after presentment. (R. 112, App. 2). Governor Askew and those in his administration responsible for legislative matters clearly understood the Constitution to allow fifteen days for veto of a bill presented after adjournment sine die. (R. 117-122, App. 3). Governor Askew served as a member of the Constitutional Revision Commission which proposed revisions to the Constitution of 1885 and was also a member of the Legislature to which that proposal was submitted. Again, this would be an interpretation which has "occurred contemporaneously with the adoption of the Constitution and by those who had the opportunity to understand the intention of the instrument". Therefore, according to Amos v. Moseley, "it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

Governor Bob Graham and his legislative counsel have also followed the construction of Article III, Section 8 given by his predecessors. (R. 114-116, App. 4). For example, during the 1979 legislative session, 17 bills which had been presented after adjournment sine die were vetoed by Governor Graham more than seven days after presentment. (R. 112, App. 2). In the 1980 session, 12 such bills were vetoed. (R. 112, App. 2). Again, in 1981, 16 such bills were vetoed. Similarly, three such bills were vetoed in 1982 and three in 1983. The Secretary of State has not rejected any of these vetoes.

The interpretation given Article III, Section 8 by the Governors of Florida since 1968 is not limited to the Executive Branch. The Florida Supreme Court assumed the correctness of this view in In re Advisory Opinion, 374 So.2d 959 (Fla.1979). Therein, the Justices were requested their opinion concerning a bill passed during the 1979 session. During that session, the Legislature adjourned sine die on June 6 and Justices Adkins, Boyd, Overton and Alderman stated as follows at page 963:

> After being enrolled and signed by the required constitutional officers, CS for SB 268 was presented to you on June 20. In your letter of June 29 requesting our advice on these questions, you stated that you would not sign this legislation but that you would allow it to become law without your signature. Accordingly, under Article III, Section 8(a) of the Florida Constitution, this bill would become law on July 6. (emphasis added)

Justice Overton fully concurred with the opinion. (Id. at 968). Justice Sundberg, in a concurring opinion, also assumed that the bill became law on July 6. (Id. at 971). Therefore, six Justices of the Florida Supreme Court were of the view that under Article III, Section 8(a), the Governor has fifteen days after presentment to veto a bill presented after adjournment sine die. While such Advisory Opinions may not be binding, they are "frequently very persuasive and usually adhered to." Lee v. Dowda, 19 So.2d 570 (Fla. 1944). Moreover, the opinion underscores the Petitioners position that Article III, Section 8(a) is not clear and unambiguous. Furthermore, this Advisory Opinion was actively litigated with oral argument and a brief from the Attorney General, President of the Senate and Speaker of the House.

The executive and judicial branches of government are not alone in supporting Governor Graham's interpretation of Article III, Section 8(a). The Legislature, at least by implication, has also accepted this view. In the fifteen years since adoption of the 1968 Constitution, a significant number of bills presented after adjournment sine die have been vetoed after the seven day period which Respondents would hold applicable. Many of these bills were hotly contested. Presumably, if this interpretation were in violation of a clear provision of the Constitution, the sponsors of such vetoed bills and, indeed, the House and Senate members who had voted for such bills, would have challenged these vetoes.

For example, in Brown v. Firestone, 382 So.2d 654 (Fla. 1980), the Governor vetoed certain portions of the appropriations bill. This particular bill had been presented to the Governor after adjournment sine die and the Governor's veto was exercised fifteen days after presentment. The Legislature strongly challenged the exercise of these vetoes but did not suggest that the vetoes were untimely exercised. In the instant case, the Secretary of the Senate, in fact, assumed the validity of the Governor's veto of Senate Bill 168 and returned the vetoed bill to the Secretary of State with no action taken.

As stated in State ex rel. Kurz v. Lee, 163 So. 859, 863 (Fla. 1935):

> It has likewise been held permissible to examine in the same spirit and for

> the same purpose the contemporaneous construction or interpretation that has been placed on a provision of the Constitution by affected officials of the state and the responsible departments of the state government charged with the duty of interpreting and observing it, in order to ascertain what judicial construction should be followed with regard to such provisions when they become involved in a controversy brought in the courts affecting same.

Respondents maintain that these long term interpretations by the three branches of government are merely long term mistakes without meaning. On the contrary, these consistent long standing interpretations require application of the principles contained within Kurz and Amos v. Moseley and a finding that Senate Bill 168 was properly vetoed.

III

THE DISTRICT COURT'S INTERPRETATION OF ARTICLE III, SECTION 8(a) FRUSTRATES THE PURPOSE TO BE SERVED BY ALLOWING THE GOVERNOR FIFTEEN DAYS TO VETO A BILL AND LEADS TO ILLOGICAL RESULTS

Petitioners maintain that Article III, Section 8, was adopted with the intent of providing additional time for the rational and deliberate review of the great number of bills presented to the Governor during the final days of a regular session and after adjournment sine die. The DCA, citing Edwards v. United States, 286 U.S. 482 (1932), with approval, noted that one of the purposes of Article III, Section 8(a) was to safeguard the Governor's opportunity to consider all bills. A review of actual practice with regard to presentment confirms that this interpretation is sound and should be adopted by the court because it safeguards the Governor's constitutional obligation to review bills.

It would appear that Article III, Section 8(a), was adopted to provide additional time to review the "glut" of bills which is passed at the end of a session. Indeed the majority of bills passed by the Legislature in recent years has been presented to the Governor after adjournment sine die. An interpretation of Article III, Section 8 which would deny the Governor a fifteen day period to review bills presented after adjournment sine die would frustrate the purpose for granting additional time particularly when the Legislature has adjourned and can no longer override a veto.

During the 1981 Session, for example, 344 bills or 67% of the total number of bills presented to Governor Graham were

presented after adjournment sine die. (R. 112, App. 2). This compares with only 110 bills or 21% presented during the last seven days. Furthermore, the general appropriations bill, which usually exceeds 1,000 line items, has been presented after adjournment sine die in each year between 1979 and 1983. (R. 114-115, App. 4). Because of the Governor's line item veto authority, the appropriations bills is comparable to reviewing 1,000 separate bills. (R. 114-115, App. 4).

Respondent's interpretation of Article III, Section 8(a) would allow the Governor only seven days to review what is generally the majority of bills presented but would allow him fifteen days to review what is, in most years, a smaller number of bills presented during the last seven days of the session.

Reference to other sessions further supports trends shown in 1981. In 1980, 58% of the bills presented were presented after adjournment sine die. (R. 112, App. 2). In 1979, 38% were presented after adjournment sine die.

Article III, Section 8(a) of the 1968 Constitution, keys the fifteen day time period to presentation rather than adjournment as was provided in the 1885 Constitution. The date of presentation may be a number of days later than passage of the bill and, in fact, there is no requirement that a bill be presented any specific number of days after passage. The date of presentation is strictly controlled by the Legislature and is restricted only by the requirement of Article III, Section 7, Florida Constitution, that:

> ...Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by

> the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.

Because the Legislature controls the time of presentation, the provisions of the 1885 Constitution, which counted the days for exercise of a veto from adjournment sine die, allowed manipulation by the Legislature of the number of days which the Governor would have to veto a bill at the end of the session.

The 1885 Constitution allowed twenty days after adjournment to veto bills received during the last five days of the session without regard to the date of presentation. Thus, the provisions of Article III, Section 8 of the 1968 Constitution could quite properly be viewed as an attempt by the Legislature to rationalize the effective time period allowed to the Governor. The effective minimum time which the Governor would have to consider bills would be greater under the 1968 Constitution than under the 1885 Constitution because the time runs from presentment. This insures that the Governor actually has the bill in his hands for the prescribed period of time. As stated previously, the Legislature controls the date of presentment, therefore, running the time for veto from adjournment does not insure the Governor any period of time to review the bill. Although the number of days provided in the 1885 Constitution, twenty, was reduced to fifteen days in the 1968 Constitution, this is not then an actual reduction in time. Logically, once the Legislature has adjourned sine die, the purpose of limiting the Governor to seven days in which to consider bills is

passed. The Legislature is no longer in session, thus, there is no hurry to return the vetoed bills to the Legislature for consideration. Neither the history of the Constitution nor the purpose to be served indicates any intent to interpret Article III, Section 8 as has the First District.

As a practical matter, the interpretation of Article III, Section 8, adopted by the District Court would deny the Governor an effective fifteen day period to consider practically all bills. In considering bills presented before adjournment, the Governor can never predict the actual date of adjournment sine die because the Legislature may extend itself pursuant to Article III, Section 3(d) or the Legislature may adjourn early.

In the 1983 session, for example, the Legislature in fact extended its regular session for an additional eight days beyond the constitutionally allotted 60 days. Thus, even with bills received during the last seven days of the 60 day regular session, theoretically the last week, the Governor must fully consider these bills and be prepared to veto each within seven days of presentation. It is only after the actual adjournment sine die that the Governor can, with any precision, determine which bills were received during the last seven days of the session, and may be properly considered for up to fifteen days. The District Court's interpretation would frustrate the intent of the Constitution to allow the Governor additional time to compensate for the crush of bills

at the end of the session. The Governor must and does personally review each bill which is vetoed and, therefore, this additional time is crucial.

The position adopted by the lower court would lead to an illogical result. Under this view, a bill presented the last day of the session could be considered by the Governor for fifteen days while a bill presented the very next day could only be considered for seven. Moreover, a bill presented six days before the last day of the session could be properly vetoed one day later than a bill presented the day after adjournment.

The change from "adjournment" to "presentation" in the date from which the extended period was allowed to the Governor, was made by House Amendment No. 273 adopted on August 11, 1967. Florida State Archives, Series No. 727, Box 2, Folder 6. In presenting House Amendment No. 273 to the House of Representatives, Representative Caldwell stated:

> Mr. Speaker and ladies and gentlemen of the Committee, this merely defines the time period that the Governor shall have in which to sign or veto the bill and . . . the problem arose I believe this last time we had so many bills that were jammed up here that they didn't get down to the Governor's office. There is some question as to when he had to have his bills signed or vetoed and rather than adjournment or recess I've inserted the words "presentation to the Governor." He shall have 20 days after that date. (Fla. State Archives, Series 727, Box 9, Tape No. 1, August 11, 1967).

Although the 20 days was changed by subsequent amendment to fifteen days, it is clear that Representative Caldwell intended and understood that the Governor would have the extended period of time in which to act on all bill presented at the end of the session.

The 20 day period in which the Governor must act, which was reflected in the Constitution Revision Commission draft, was reduced to fifteen days by House Amendment No. 744 adopted on September 1, 1967. (Fla. State Archives, Series 727, Box 2, Folder 11). This amendment was introduced by Representative Land. During the discussion following presentation of the amendment, we find the following dialogue:

> Representative Ducker: Mr. Land, will you explain why the 20 days was reduced to 15. Is there any reason for that?
>
> Mr. Land: Well, no specific reason, Mr. Ducker, but now, take for example in the case of the cigarette tax. Several members of the city commissions, mayors, budget directors and so forth want to know whether the Governor is going to veto or has vetoed the additional cigarette tax. Certainly, I think this gives any executive sufficient time when we leave here and we go home and the people ask "what happened, what happened." It is just a matter, I mean, you could make it 30 days, you could make it 3 months, you could make it 10 days, but I think if anything is of sufficient importance that any chief executive with a staff available to him could certainly come out with his veto message, or with a veto, within a 15-day period. (Fla. State Archives, Series No. 727, Box No. 13, Tape No. 3, September 1, 1967).

Clearly, Representative Land believed that when a bill was presented to the Governor after the Legislature had "gone home" that the Governor would have 15 days in which to act on the legislation.

Therefore, the interpretation of Article III, Section 8(a) which was adopted by the trial court furthers the purpose intended to be served by allowing the Governor additional time to consider a bill. This interpretation complies with legislative intent, both express and inferred. The interpretation of this section adopted by the District Court leads to certain illogical and incongruous results. As the Florida Supreme Court stated in Plante v. Smathers, 372 So.2d 933, 936 (Fla. 1979), regarding constitutional construction:

> We may glean light for discerning the people's intent from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evil sought to be prevented.

This court should, therefore, adopt the interpretation of Article III, Section 8(a) as stated by the trial court and reject that of the District Court based upon common sense and the purpose of Article III, Section 8(a).

IV

THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT MANDAMUS WAS APPROPRIATE

The DCA erred by determining that mandamus was appropriate in this case.

Mandamus is an extraordinary, discretionary writ, State ex rel. Eichenbaum v. Cochran, 114 So.2d 797 (Fla. 1959), which thrusts the courts into the political arena. Brown v. Firestone, 382 So.2d 654 (Fla. 1980). As recently as 1980, the Supreme Court, in Brown v. Firestone, supra at 671 issued the stern warning that:

> Mandamus is an extremely limited basis for jurisdiction which traditionally has been, and will continue to be employed, sparingly.

To be entitled to a writ of mandamus, the Respondent's must demonstrate (1) a clear legal right on their part, (2) an indisputable duty on the part of the Petitioner, Secretary of State, and (3) that no other adequate remedy exists. State Department of Health and Rehabilitative Services v. Hartsfield, 399 So.2d 1019, 1020 (Fla. 1st DCA 1981). The Petitioners submit that the Respondents have not met any of these criteria.

A. THE RESPONDENTS DO NOT HAVE A CLEAR LEGAL RIGHT

As the Petitioners have shown above, the Respondents do not have a clear legal right under Article III, Section 8(a) to the relief it has requested. Indeed, the Petitioners have made a compelling argument that the Governor's veto

was properly exercised. Article III, Section 8(a) is ambiguous in that it does not specifically state when bills presented to the Governor after the Legislature adjourns must be vetoed. Thus, the long-term, consistent construction given Article III, Section 8(a) by the Legislature, Governor, Attorney General, and the Supreme Court that the Governor has fifteen days in which to veto a bill presented to him after adjournment is controlling. Allowing the Governor fifteen days is reasonable and the only logical interpretation that can be given to the Constitution's silence as regards bills presented after adjournment. For these reasons, the Respondents do not have a clear legal right under Article III, Section 8(a).

B. THE SECRETARY OF STATE DOES NOT HAVE AN INDISPUTABLE DUTY TO CAUSE SENATE BILL 168 TO BE PROCESSED AND PUBLISHED AS A LAW

The Secretary of State has two legal duties that are relevant to this case. One is general, the other specific. The general duty of the Secretary of State under Article IV, Section 4(b) is to "keep the records of the official acts of the legislative and executive departments." The more specific duty of the Secretary of State, under Article III, Section 8(b) is to "lay" bills that the Governor vetoes after the Legislature has adjourned before the house in which they originated at its next regular or special session.

Faced with the Governor's veto message for Senate Bill 168, the Secretary of State complied with his more specific

obligation and delivered the vetoed bill to the Legislature during the July 12-July 13 Special Session "C." Shortly afterwards, the Secretary of the Senate returned the vetoed bill to the Secretary of State informing him that the Legislature had not acted on the veto during the Special Session.

Since the Governor had vetoed the bill and the Legislature had not taken any action to override the veto, the Secretary of State acted properly by not filing Senate Bill 168. The filing and transmittal duties given the Secretary of State by the Constitution do not vest him with the sweeping authority to override a gubernatorial veto and to second guess the Legislature's apparent decision not to override that veto. The Secretary of State, therefore, did not have an indisputable duty to cause Senate Bill 168 to be processed and published as a law.

In this case, the Respondent would put the Secretary of State in the position of exercising discretion each time he is presented with a veto of a bill by the Governor. The Secretary of State would necessarily have to exercise discretion in choosing whether to accept the Governor's veto message or to ignore it if the veto was not timely. Mandamus, however, cannot be used to compel a discretionary act of a public official, but can only be used to force ministerial actions. Somlyo v. Schott, 45 So.2d 502 (Fla. 1950). As such, a determination by the Secretary of State that a bill had not been properly vetoed by the Governor would not be subject to mandamus since it would be a discretionary action, not a ministerial action.

In a Mississippi case which closely parallels this case, the Mississippi Supreme Court found mandamus to be inappropriate for that very reason. In Ladner v. Deposit Guaranty National Bank, 290 So.2d 263 (Miss. 1973), the Governor of Mississippi did not return a bill to the Legislature within five days as required by the Mississippi Constitution. In turn, the Secretary of the Senate of Mississippi did not deliver the particular bill for filing but honored the veto of the Governor. Although a lower court entered a writ of mandamus commanding the Secretary of the Senate to deliver the bill to the Secretary of State for filing, the Mississippi Supreme Court held that mandamus was improperly granted.

> Under these circumstances we are unable to categorize the diversion of these documents from their addressee to the secretary of state, an official of another governmental department for publication as a law contrary to the veto message, to be a merely ministerial act subject to mandamus. The resolution by the secretary of the senate that the bill became the law, thereby imposing upon him the incidental duty of delivery to the secretary of state, would obviously require the exercise of great discretion. It is our opinion that this determination is much more than a ministerial act incident to the faithful discharge of the duties of the office which are subject to mandamus. Id. at 267.

This holding applies with equal force in this case.

C. OTHER ADEQUATE REMEDIES EXIST

Relief by mandamus is unavailable where other adequate remedies exist. Shevin ex rel. State v. Public Service Commission,

333 So.2d 9 (Fla. 1976). Furthermore, where an adequate remedy is provided by statute, such as Chapter 86, Florida Statutes (1983), the Declaratory Judgments Act, a petitioner is not entitled to mandamus. State ex rel. Fraternal Order of Police v. Orlando, 269 So.2d 402 (Fla. 4th DCA 1972), cert. denied, 276 So.2d 54 (Fla. 1973).

The Respondents have conceded that declaratory and injunctive relief were available to them. Therefore, the Respondents' request for mandamus relief is inappropriate. The DCA, however, citing Brown v. Firestone, supra, ruled that a declaratory judgment would not have been adequate. Petitioners submit that the DCA misconstrued Brown v. Firestone in which the Supreme Court held:

> . . . mandamus to be the appropriate remedy because the functions of government would have been adversely affected without an immediate determination. Brown v. Firestone, 382 So.2d at 662. (Emphasis added).

The DCA reasoned that in this case, an immediate determination was necessary because:

> "until this appeal is resolved, there will remain lingering uncertainty over the number of days in which the Governor is authorized to exercise his veto authority." Opinion at 4.

Both the Governor and the Secretary of State wish to see the lingering uncertainty regarding the timeliness of vetoes put to rest by this case; however, they disagree with the DCA's determination that functions of the government would have been adversely affected without an immediate decision.

The uncertainty the court refers to has lingered for more than 18 months, disproving any need for immediate action. Indeed, for the past 15 years, government in Florida has functioned quite well with the understanding that the Governor has fifteen days in which to veto a bill presented to him after adjournment. This is clearly an issue of great "importance"; but, it is not an issue of "immediacy" as determined by the DCA.

Furthermore, Brown v. Firestone involved a dispute between the executive and legislative branches of government in Florida over crucial budgetary matters which left unresolved would have had an immediate impact on the functions of government. This case pales in comparison to what was at stake in Brown v. Firestone. Here, there is no dispute between branches of government as regards the functions of government. Rather, it involves a private party aggrieved over the Governor's veto. In addition, the government functioned in this case. The Governor, exercising his constitutional authority, vetoed Senate Bill 168. The Secretary of State transmitted the veto to the Legislature as he is supposed to do. The Legislature, although it had the opportunity to do so, did not exercise its constitutional authority to override the veto. Significantly the Legislature is not a party to this case and thus does not object to the timeliness of the Governor's veto.

Finally, the Respondents are in no position to claim any such adverse effects. They have not pursued this case on an expedited basis and did not choose to challenge the

Governor's veto until after the Legislature failed to override the veto.

In view of the above, the DCA erred when it determined that other adequate remedies were not available.

D. THE EXTRAORDINARY WRIT OF MANDAMUS IS PROPERLY DENIED WHERE CONFUSION AND DISORDER WOULD RESULT

Because mandamus is a discretionary writ, it should not be granted where, as here, it would upset long settled policy and result in confusion and disorder. The Florida Supreme Court stated in Bronson v. Board of Public Instruction, 145 So. 833, 836 (Fla. 1933):

> This court is committed to the doctrine that extraordinary relief [by mandamus] will not be granted in cases where it plainly appears that, although the complaining party may be ordinarily entitled to it, the granting of such relief in the particular case will result in confusion and disorder, and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.

As has been shown, a significant number of vetoes have been exercised since 1968 which would be invalid under Respondents' interpretation of Article III, Section 8. Also, subsequent legislation has been enacted in reliance upon the effectiveness of these vetoes.

Moreover, people have governed their acts in reliance on such legislation and upon the effectiveness of such vetoes.

Adoption of Respondents' reading of Article III, Section 8 would cast a cloud upon all such past vetoes and would risk confusion and disorder in the law.

Mandamus is a discretionary writ and appellate courts are "loathe to disturb a judgment based on discretions". State ex rel. Beacham v. Wynn, 28 So.2d 253 (Fla. 1946). Mandamus is also "extremely limited basis for jurisdiction" which is to be "employed sparingly". Brown v. Firestone, supra, at 671. In view of the restrictive nature of mandamus, this court should overrule the DCA's intrusion into the functions of Governor, the Secretary of State, and the Legislature, particularly as is the case here where none of these governmental entities sought judicial involvement, and where the Legislature has acquiesced to the Governor's veto.

V

SHOULD THIS COURT ADOPT THE DISTRICT COURT'S INTERPRETATION OF ARTICLE III, SECTION 8, ITS APPLICATION SHOULD BE PURELY PROSPECTIVE

The second question certified is that regarding retroactivity of the law. In the event it is decided the Governor has only seven days during which to consider bills presented to him after adjournment sine die of the Legislature, should this ruling apply retroactively or prospectively? As retroactive application is not constitutionally required, the Florida Supreme Court has the sole power to determine whether its decisions should be prospective or retroactive in application. Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975).

Justice requires a purely prospective application of the rule in this case. All three Governors in office since the revision of Article III, Section 8 in 1968 have relied in good faith on the fact that the Governor has fifteen days during which to consider a bill presented to him after adjournment sine die of the Legislature. Indeed, nearly 200 bills have been vetoed in reliance on this construction. Retroactive application of the rule would result in complete confusion, providing the potential for an abundance of litigation.

The Colorado Supreme Court, facing a similar situation involving the Governor's untimely vetoes found that by reason of the acts of the General Assembly in considering the Governor's vetoes and in sustaining them or declaring the bills "lost" there was compliance with the constitutional provisions relating

to the vetoes. It therefore held the vetoes were effective. In re Interrogatories of the Colorado Senate of the Fifty-First General Assembly, Senate Resolution No. 5, 578 P.2d 216 (Co. 1978).

Justice Erickson, concurring in part and dissenting in part the Colorado Senate case and its companion case, In re Interrogatories of the Governor Regarding Certain Bills of Fifty-First General Assembly, 578 P.2d 200 (Co. 1978), was concerned with the fact that both the executive and legislative branches of the government had failed to comply with clear constitutional mandates. However, he also realized that retroactive application of a strict constitutional construction, while, in his view, correct as a matter of law, would create uncertainty, administrative confusion, and would further burden the courts. Colorado Governor at 209. He therefore reasoned that "only the prospective approach provides a sound constitutional basis for the resolution of this case, while at the same time minimizing or eliminating the impairment of the stability of past legislative and executive acts." Colorado Governor at 210.

CONCLUSION

For the foregoing reasons the Governor and the Secretary of State urge this Court to overturn the decision of the First District Court of Appeal and affirm the decision of the Second Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER'S has been furnished by U.S. mail to John D.C. Newton, II, Esquire, Leonard A. Carson, Esquire, Cambridge Centre, 253 East Virginia Street, Tallahassee, Florida 32301; Richard Collins, Esquire, Post Office Box 5286, Tallahassee, Florida 32314-0058; Kenneth G. Oertel, Esquire, Lewis State Bank Building, Suite 646, Tallahassee, Florida 32301 and Susan Tully, Esquire, Office of the Attorney General, Administrative Law Section, Tallahassee, Florida 32301, this 16th day of April, 1985.

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