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IN THE SUPREME COURT OF FLORIDA

HARRY K. SINGLETARY, et al.,

Appellants,

vs.

CASE NO. 89,325

ROBERT VANMETER,

Appellee.

On Mandatory Review from the District Court of Appeal
First District of Florida

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

The First DCA declared §95.11(8), Florida Statutes, to be "an unconstitutional violation of the doctrine of separation of powers" (slip op., p. 1; App. A hereto), and thus facially unconstitutional. Under Art. V, §3(b)(1) of the Florida Constitution, and Fla.R.App.P. 9.030(a)(1)(A)(ii), this Court must review the decision below.

In October 1993, Appellee Vanmeter was disciplined for the infraction of lying to staff, (R 15,725; R 69).[1] Over-simply, Vanmeter claimed one of his law books was lost when he was transferred to a different prison. After he was compensated, the book was found in his possession. Upon a hearing, he received 60 days of disciplinary confinement, and lost 60 days gain time. (R 15,725; R 71).

Vanmeter took his first administrative appeal on the merits, to the superintendent of the prison, but was denied relief. (R 15,726; R 73) Similarly, his second administrative appeal, to the Secretary of the Florida Department of Corrections (DOC), was unsuccessful on the merits. The Secretary denied relief on March 2 1, 1994. (R 15,727; R 75).

Effective June 15, 1995, Section 95.11(8), Florida Statutes (1995) imposed a 30-day time limit for an inmate to commence a challenge to prison disciplinary

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[1] Citations to the record (R [page no.]) are those used before the First DCA.

proceedings. The 30 days began running upon denial of relief by the Secretary of DOC. See §§2 & 61, ch. 95-283, Laws of Florida.

On September 27, 1995--roughly 18 months after the Secretary denied relief--Vanmeter filed a "Petition for a Writ of Mandamus" in the Leon County Circuit Court. (See index to record on appeal from trial court, first entry.) The petition (R 1-93) sought restoration of the gain time and expungement of the disciplinary infraction.

Upon the trial court's order to show cause (R 101), DOC asserted the petition was barred by §95.11(8), but did not respond to the merits of the petition. (R 102-107) The trial court dismissed on this ground alone. (R 108- 109).

Vanmeter contested application of §95.11(8) on several constitutional grounds, including separation of powers (R 1 10- 116), which were rejected upon denial of his motion for rehearing. (R 120- 1) He appealed to the First DCA, which held §95.11(8) facially violated separation of powers. (App. A)

The First DCA issued its opinion on October 30, 1996. DOC filed its notice of appeal on November 12, 1996.

SUMMARY OF THE ARGUMENT

Section 95.1 l(S), Florida Statutes (1995) is a narrowly tailored statute of limitation. It sets a 30 day deadline for commencing inmate challenges to prison disciplinary proceedings under ch. 944, Florida Statutes and ch. 33, Florida Administrative Code. Consequently, §95.11(8) assumes the prior occurrence of an adversarial disciplinary hearing and exhaustion of two administrative appeals on the merits.

Case law establishes that judicial review of DOC disciplinary hearings is through a petition for writ of mandamus. Such petition, however, is far more akin to a complaint found in any other civil cause. Under Fla.R.Civ.P. 1.630 expressly treats the "initial pleading" as a "complaint" from the outset, If the petition demonstrates minimal legal sufficiency, it functions as a complaint for all purposes. Therefore, the extraordinary writs nominally contemplated by Rule 1.630 are not writs in substance, but complaints typical to civil causes of action.

Section 95.1 1(8) operates very narrowly--only against inmate challenges to prison disciplinary proceedings. An inmate seeking a writ has already had an adversarial, evidentiary hearing and two plenary reviews on the merits; again indicating that inmate petitions are not the same as extraordinary writs historically.

Under these facts, it does not violate separation of powers for the Legislature to impose a reasonable statute of limitation.

Rule 1.630(c) provides that "complaints shall be filed within the time provided *by law*." [e.s.] Through this language, this Court has deferred to the Legislature to set time limits when necessitated by public policy. Section 95.1 1(8) does exactly that. The statute, having been authorized by rule of this Court, cannot violate separation of powers.

Issue II: Adoption of Rule

Regardless of whether this Court holds §95.1 1(8) violates separation of powers, the deadline it imposes represents sound public policy. Should this Court be inclined to affirm the First DCA's decision, DOC respectfully requests this Court to adopt a comparable 30 day deadline as an amendment to Fla.R.Civ.P. 1.630 and 9.100. Alternatively, this Court could declare that inmate challenges to disciplinary must be brought as petitions for certiorari under Rule 1.630.

ARGUMENT

ISSUE

WHETHER THE 30-DAY DEADLINE IN §95.11(8), FLORIDA STATUTES, FOR CHALLENGING PRISON DISCIPLINARY PROCEEDINGS CIRCUMSCRIBES THE COURTS' CONSTITUTIONAL AUTHORITY TO ISSUE WRITS AS HISTORICALLY UNDERSTOOD

A. Standard of Review

By holding §95.11(8), Florida Statutes (1995) facially violates separation of powers, the First DCA answered a question of law. Review of questions of law is plenary. See Coleman v. Florida Ins. Guar. Ass'n, Inc., 517 So.2d 686, 690 (Fla. 1988) ("The question of the extent of coverage under the insurance policy in this case is a question of law and is therefore subject to plenary review.").

Since this Court's review is plenary, there is no presumption that the lower court was correct. To the contrary, the challenged statute is still presumed constitutional:

> when an appellate court has occasion to pass upon the validity of a statute after a trial court has found it to be unconstitutional, the statute is favored with a presumption of constitutionality. This is an exception to the rule that a trial court's judgment is presumptively valid. Moreover, all reasonable doubts as to the validity of statutes under the Constitution are to be resolved in favor of constitutionality.

In re Caldwell's Estate, 247 So.2d 1, 3 (Fla. 1971). See State v. Slaughter, 574 So.2d 218, 219-20 (Fla. 1 DCA 1991) ("At the outset, an exception to the rule that a trial court's judgment is presumptively valid occurs when an appellate court is called upon to pass upon a statute which the trial court has declared unconstitutional. In such circumstances, the statute, rather than the trial court's ruling, is favored with a presumption of validity."). Reading Caldwell and Slaughter together, this Court must not lend a presumption of correctness to the First DCA's opinion, but interpret the statute in a constitutional manner.

B. Argument on Merits

Section 95.11(8) operates very narrowly--only against inmate challenges to prison disciplinary proceedings. An inmate bringing such challenge under Rule 1.630 has had an adversarial, evidentiary hearing and two plenary reviews on the merits within DOC. Therefore, the writ of mandamus being sought is quite different from a writ of mandamus historically. Under these facts, it does not violate separation of powers for the Legislature to impose a reasonable statute of limitation.

As created in 1995, §95.11(8) provides:

> **95.11 Limitations other than for the recovery of real property.–** Actions other than for recovery of real property shall be commenced as follows:
>
> * * * *

> (8) WITHIN 30 DAYS FOR ACTIONS CHALLENGING CORRECTIONAL DISCIPLINARY PROCEEDINGS.-Any court action challenging prisoner disciplinary proceedings conducted by the Department of Corrections pursuant to *s. 944.28(2)* must be commenced within 30 days after final disposition of the prisoner disciplinary proceedings *through the administrative grievance process under chapter 33, Florida Administrative Code.* Any action challenging prisoner disciplinary proceedings shall be barred by the court unless it is commenced within the time period provided by this section, [e.s.]

On its face, the statute is narrowly tailored. It applies only to writs or other civil actions brought by prisoners challenging DOC disciplinary proceedings.[2] It does not apply to writs or other actions brought by inmates for other purposes.

Moreover, the statute expressly cross-references ch. 33 of the Florida Administrative Code. That chapter ("Inmate Discipline") sets forth inmates' rights as to disciplinary proceedings, as well as the disciplinary offenses themselves (rule 33-22.012). Inmates must be notified of charges (rule 33-22.005) The conduct of disciplinary hearings is detailed (rule 33-22.006), including a provision for inmates

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[2]As the opinion below correctly noted, changes to ch. 120, Fla. Stat., and caselaw establish that "prisoners seeking judicial review of disciplinary action taken by the Department have been limited to the extraordinary remedies set out in Florida Rule of Civil Procedure 1.630" (slip op., p. 3) citing Jones v. Dept. of Corrections, 615 So.2d 798 (Fla. 1st DCA 1993). Although it appears inmates still may challenge disciplinary proceedings through appellate-level writs under Rule 9.100, inmates are still limited to one level writ or the other. Consequently, the majority's holding below, that §95.11(8) violates separation of powers by abridging the issuance of constitutionally authorized writs, effectively holds the statute facially unconstitutional.

to request material witnesses (rule 33-22.007(2)(b)). Significantly, two levels of plenary review on the merits--by the prison superintendent and the Secretary of DOC--are provided (rule 33-22.009).[3]

By cross-referencing ch. 33, Florida Administrative Code, the challenged statute narrows its field of operation to inmate actions seeking judicial review of an administrative disciplinary proceeding; that is, a three-step proceeding comprised of an evidentiary hearing and two plenary reviews on the merits within DOC. Thus, §95.11(8) is narrowly tailored to a factual situation not contemplated by the historic jurisprudence of writs. No other writ can initiate plenary judicial review after an adversarial, evidentiary hearing and two administrative reviews on the merits.

A writ of certiorari to review local government administrative action does not compel plenary review. See Education Develonment Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So.2d 106,108 (Fla. 1989):

> When the circuit court reviews the decision of an administrative agency under Florida Rule of Appellate Procedure 9.030(c)(3), there are three discrete components of its certiorari review.
>
> Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been

[3]The provisions for administrative review do not prohibit the prison superintendent or the Secretary of DOC from reweighing the evidence.

> observed, and whether the administrative findings and judgment are supported by competent substantial evidence.
>
> In turn, the standard of review to guide the district court when it reviews the circuit court's order under Florida Rule of Appellate Procedure 9.030(b)(2)(B) is necessarily narrower. The standard for the district court has only two discrete components. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law. [emphasis original; internal quotes omitted]

Again, an inmate has already enjoyed two plenary administrative reviews on the merits. If the subsequent action in the circuit court were truly a writ, the circuit court's review would be that described above.[4] At most, the circuit court would engage in a three-pronged review, and decide whether the disciplinary action was supported by competent, substantial evidence, etc. Since an inmate would have had two plenary administrative reviews, the circuit would more properly be limited to the two-pronged review assigned to district courts. Under either alternative, however, the circuit court would not be able to treat the "writ" as a complaint and start from scratch, including new discovery and a bench trial. See Holcomb v. Department of

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[4] Practically, it matters little whether an inmate's pleading is deemed to be on for writ of mandamus or for writ of certiorari. The former seeks to compel DOC compliance with the minimal due process required of prison disciplinary hearings; the latter, to correct a alleged departure from the essential requirement of law. Ironically, if inmate pleadings were treated as petitions for certiorari, this Court's long-established 30-day deadline would apply.

Corrections, 609 So.2d 75 1,753 (Fla. 1 st DCA 1992) ("Once a show cause order has' issued, it becomes in all respects the complaint and subject to the same rules of pleading as are any other complaints.").[5]

Contrast with other true writs also shows an inmate's challenge to a disciplinary proceeding is more akin to a typical civil action. The constitutional writ of habeas corpus, for example, tests the lawfulness of detention of a person who has not been tried, declared incompetent, etc. The writ of prohibition seeks to prevent an action, alleged to be outside of the challenged entity's jurisdiction, from taking place. Mandamus seeks to compel performance of a nondiscretionary duty. Quo warranto challenges the authority of an official to take a certain action, or the legal ability of someone to hold office. None of these writs are premised on a prior adversarial, evidentiary hearing followed by two plenary administrative reviews.

The quoted observation by the Holcomb court is crucial to DOC's argument. Although nominally writs, actions by inmates are far more akin to typical civil causes of action. The fact that the court first evaluates the "petition" for bare legal sufficiency (see *id.*, 609 So.2d at 753) presents no barrier to characterizing an inmate's writ as a civil action. It means only that the court on its own, rather than in

[5]This case began with a writ filed under Rule 1.630. DOC's logic, however, applies with equal force to writs issued by appellate courts under Rule 9.100.

response to a motion to dismiss, initially assesses the "writ" for a prima facie case. The court must still construe the writ's factual allegations liberally and take them as true. Thereafter, the "writ" is treated as a complaint, with no difference from a typical civil action. See *id*. (after show cause order issued, writ treated "in all respects" like complaint, so that respondent must "admit or deny the factual allegations" and present any affirmative defenses; and noting that all facts not specifically denied are admitted to be true). See *also,* Alexander v. Singletary, 626 So.2d 333, 334 (Fla. 1st DCA 1993) (when trial court summarily denied relief after considering DOC's response to the order to show cause, the posture of the case was "comparable to appellate review of an order granting DOC's motion for summary judgment").

The crucial language of Rule 1.630 speaks in terms of a "complaint" rather than a writ:

> Rule 1.630. Extraordinary Remedies
>
> * * *
>
> (b) Initial Pleading. *The initialpleading shall be a complaint.* It shall contain:
>
> * * *
>
> When the *complaint* seeks a writ directed to a lower court or to a governmental or administrative agency, a copy of as much of the record as is necessary to support the plaintiffs *complaint* shall be attached.
>
> (c) Time. A *complaint* shall be filed within the time provided by law, except that a complaint for common law certiorari shall

> be filed within 30 days of rendition of the matter sought to be reviewed.
>
> (d) Process. If the *complaint* shows a prima facie case for relief, the court shall issue:
>
> * * *
>
> (e) Response. Defendant shall respond to the writ as provided in rule *1.140* . . . . [e.s.]

The use of "complaint" is not accidental, but a deliberate recognition by this Court that trial-level writs have characteristics of civil actions. See In re Amendments to Rules of Civil Procedure, 458 So.2d 245, 247 (Fla. 1984) ("Rule 1.630 is entirely new. It tailors procedures related to extraordinary remedies to the trial court. It is designed to complement Rule of Appellate Procedure 9.100.").

If trial level writs were truly such, there would be no need to tailor the procedures already being used for appellate-level writs. See *also,* "*Court* Commentary" for the 1984 Amendment to Rule 1.630 (noting that rule 9.100 presumes an appellate proceeding, so that changes to rule 1.630 were made to fit trial court procedure). Also, a response is made pursuant to Fla.R.Civ.P. 1.140, which establishes the procedure for answering a complaint and raising affirmative defenses. Altogether, Rule 1.630 contemplates trial-level extraordinary writs as possessing substantial attributes of a civil cause of action.

Failing to recognize this, the majority below resorted to a handful of quite old cases holding that the Legislature could not interfere with the courts' constitutional authority to issue writs. These cases all stand for the unquestioned proposition that extraordinary writs, as historically conceived, were not considered typical civil causes of action; and thus were subject to equitable doctrine of laches rather than statutes of limitation. Representative is the U.S. Supreme Court opinion quoted by the majority (slip op., p. 4): U.S. ex rel Arant v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650 (19 19). Decided in 1919, Arant involved a federal park superintendent who was removed from his job. Over a year later he sought mandamus relief. Ultimately, the Court affirmed dismissal on the basis of laches. 249 U.S. at 371, 39 S.Ct. at 294. The park superintendent, before petitioning, received no hearing, much less two plenary administrative reviews.

Several of the other cases relied on by the majority also involved classic use of writs, seeking to compel public officials to comply with the law. None of these cases involved anything comparable to inmate disciplinary proceedings at issue here. See State ex rel. Haft v. Adams, 238 So.2d 843 (Fla. 1970) (declining to issue mandamus as to placing candidate's names on ballot for judicial election, as petitioner waited too long under circumstances); State ex rel. Perkins v. Lee, 142 Fla. 154, 194 So. 3 15 (1940) (denying motion to quash petition for mandamus when

comptroller refused to pay full salary, as established by statute, to state employee); Buckwalter v. Citv of Lakeland, 112 Fla. 200, 150 So. 508 (1933) (holder of defaulting city's bond coupons seeking mandamus to compel payment from such money as city had on hand); and Tampa Waterworks Co. v. State ex rel. City of Tampa, 77 Fla. 705, 82 So. 230 (1919) mandamus sought by city to compel water supplier to comply with city ordinance requiring disclosure of water rate payers; laches precluded relief).

Three cases relied upon below bear a closer look. In Buckwalter, the petitioner's entitlement to some relief was not seriously questioned. The city was defaulting on its bonds, It relied on a statute, probably necessitated by the collapse of the land boom or the Depression, which limited the remedies available to the courts. In essence, the statute directed that courts could compel payment only on a pro-rata basis; that is, the complaining bondholder could receive payment only in proportion to the amount of money on hand compared to the total amount of bonded indebtedness. The purpose was to avoid the unfair result when the "first-come-first-served" rule depleted the money on hand, leaving nothing for other bondholders. *Id*. at 5 10- 11. Nevertheless, the Court held that the statute was invalid, as it limited the scope of the writ of mandamus. *Id*. at 5 11-12.

Here, §95.11(8) in no way limits the court's power to effectuate any remedy. The statute simply places a time limit on an inmate's filing a petition for a writ; which writ, again, is far more akin to a typical civil complaint.

Buckwalter discussed Brinson v. Tharin, 99 Fla. 696, 127 So. 3 13 (1930). Brinson began as a civil trial over a real estate contract. Judgment was affirmed by the circuit court. After rehearing was denied, the petitioner obtained a stay of the mandate. Later a petition for certiorari was filed in this Court, but not for 48 days after the circuit court's affirmance. Tharin moved the writ be quashed, first urging that the petition was not filed within 30 days. *Id.* at 3 14-15.

Apparently, the petitioner relied on a 1920 statute which allowed appeals, albeit by certiorari, to this Court within 30 days after judgment below was rendered. The problem in Brinson was that the case, in substance, was not within this Court's appellate jurisdiction, and was too late for common law certiorari. To the extent the 1920 statute would allow review, this Court held the statute improperly attempted to enlarge its appellate jurisdiction. *Id*. at 3 15.

Nothing of the sort has occurred here. The circuit court's jurisdiction is not enlarged. Instead, the statute indirectly limits exercise of that jurisdiction by placing a time limit on the filing of complaints to review DOC disciplinary proceedings.

Notably, the time limit corresponds to the 30 days in which an appeal from a circuit to a district court must be noticed.

Lastly, the majority relied on Palmer v. Johnson, 97 Fla. 479, 12 1 So. 466 (1929), for the proposition that the Legislature "could not constitutionally impose restrictions upon the time which one might seek a writ of certiorari." (slip op., p. 4).

In Palmer, the circuit court for Hillsborough County reversed a judgment of the civil court of record. Certiorari was sought before this Court. The respondents moved to dismiss on the ground that the petition was not filed within 30 days of the circuit court's decision. *Id.* at 466. Dismissal was granted. *Id.* at 467.

The 1925 statute creating the civil court of record for Hillsborough County also provided this Court could review the circuit court's judgments by "certiorari or otherwise" if the petition for certiorari was filed within 30 days. In passing, and without so holding, this Court observed that if the intent of the statute was to circumscribe its power to issue writs of certiorari, then the statute would be ineffectual:

> at least where such proceedings were had without jurisdiction and where no appeal or direct mode of reviewing the proceedings exists[.]

Id. at 466-67.

As can be readily seen from the quoted language, Palmer simply does not stand for the broad proposition observed by the majority below. First, the 1925 statute had the same defect later as the statute invalidated in Brinson--it attempted to make all circuit court judgments appealable through certiorari. Second, the Palmer court actually observed that the statute could not prevent this Court from issuing a writ of certiorari, when it was alleged the lower tribunal (circuit court) acted without jurisdiction and no other remedy was available. Here, §95.1 l(X) does not have the noted defect, and does not preclude the circuit court from issuing a writ (of prohibition) when DOC lacks jurisdiction.

In short, the majority opinion rests completely on old cases involving true writs; or cases in which a statute made substantive changes to the remedy available to the trial court, or attempted to enlarge this Court's jurisdiction. Beyond that, the majority assumes--with little analysis--that inmate writs are writs in the historic sense. As discussed above, this is not so. In substance, and in the words of Rule 1.630, inmate petitions are tantamount to civil causes of action.

The fact that genuine writs are amenable to laches instead of statutes of limitation has nothing to do with the validity of §95.1 1(8). The real question is whether the Legislature can place a statute of limitation on inmate actions that are deemed writs, but have evolved to closely resemble commonplace civil actions.

The question answers itself. It is well established that the Legislature may impose reasonable statutes of limitation. See Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994) ("The Legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute." [internal quote omitted]). See ***also*** Foley v. Morris, 339 So.2d 215,217 (Fla. 1976) ("Generally referring to the conceded authority of the Legislature to pass a statute of limitations . . . so long as a reasonable time is permitted by the new law . . .").

The 30 day limitation imposed by §95.1 1(8) is quite reasonable under the circumstances.[6] First, it runs from the time administrative remedies are exhausted, regardless of when the original disciplinary infraction was committed. Second, it follows two plenary reviews, during which time the inmate will have had the benefit of preparing written documents and effectively have been provided a record. Third, the 30 days coincides with the amount of time given to file a notice of appeal. No one, including Vanmeter, has claimed the 30-day amount of time is unreasonable.

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[6]The statute did not provide a grace period. Vanmeter's petition was not filed for 3% months after §95.1 1(8) took effect, presumably after any grace period would have expired. At most, the absence of a grace period raises a question of constitutionality of the statute as applied, a question not presented here; and one which will be cured by the passage of time.

As astutely noted by the dissent below, Rule 1.630 authorizes the Legislature to adopt time limits for the filing of "complaints" other than complaints for common law certiorari. Rule 1.630(c) provides:

> **(c) Time.** A complaint shall be filed within the time provided *by* ***law,*** except that a complaint for common law certiorari shall be filed within 30 days of rendition of the matter sought to be reviewed. [e.s.]

The phrase "provided by law" is not limited, as it could have been, to judicially-announced law. Since there is only one other source of time limits--general law passed by the Legislature--this Court has, by the clear language quoted above, authorized the Legislature to adopt time limits for filing writs based on considerations of public policy. By this statute, the Legislature has simply exercised its substantive lawmaking authority, as authorized by this Court's rule. Having been authorized by rule of this Court, §95.11(8) cannot violate separation of powers.

The dissent below observed that the phrase "provided by law" presented "another potential problem . . . [of] unconstitutional delegation of judicial authority." (slip op., p. 12) DOC disagrees. By deferring to Legislative judgment in this manner, this Court has laudably recognized the Legislature's primacy in matters of public policy. Such deference is not unusual in this Court's rules. See, e.g., Amendment to Florida Rule of Juvenile Procedure 8.100(a), 667 So.2d 195, 195 (Fla. 1996) (recent

amendment to juvenile rule 8.010(f)(2) directing the trial court to consider the "need for detention according to the criteria provided by law" that is, the requirements of $39.042, Florida Statutes); In re Family Law Rules of Procedure, 663 So.2d 1049, 1076 (Fla. 1995) (setting forth new family law rule 12.740(b), directing that all contested family issues, except as "provided by law and this rule" may be referred to mediation).

The more precise question is whether this Court may constitutionally defer to the Legislature as to time limits generally; and, specifically, as to time limits for writs. Preliminarily, it is common for this Court's rules to reference matters as "provided by law."[7] Thus, this Court's historic practice has been to exercise its rulemaking authority with deference to substantive lawmaking by the Legislature, when appropriate.

This Court's deference has not been limited to substantive matters, but has expressly allowed the Legislature to specify numerous time limits for juvenile

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[7] The phrase "provided by law", according to a computer search done concurrently with this brief, appears about 68 times in this Court's rules relating to trial-level proceedings; excluding the evidence code and forms. The lion's share (46 instances) appears in the rules of juvenile procedure, reflecting this Court's recognition of the Legislature's preeminent role in juvenile matters. See A.A. v. Rolle, 604 So.2d 813, 818-19 (Fla. 1992) (holding that courts cannot, under juvenile statute, place juveniles in secure detention as punishment for contempt; and observing, that although juvenile services and placements are needed but not available, the "courts, however, cannot attempt to supply the legislative vacuum in this fashion").

proceedings.[8] Within the rules of civil procedure, however, the other occurrences of "provided by law" do not involve time limits.[9] Nevertheless, DOC is not willing to assume the phrase "provided by law" in rule 1.630(c) is an historic anachronism or surplusage, something this Court has prohibited in the context of statutory interpretation. See, e.g., Neu v. Miami Herald Publishing Co., 462 So.2d 821, 825 (Fla. 1985) ("In construing legislation, courts should not assume that the legislature acted pointlessly.").

Again, this Court could have, but did not, limit the phrase to judicially announced law. Why then, would this Court allow the Legislature set times for seeking extraordinary writs, but not allow the Legislature to set any other deadlines? The answer, ironically, can be found in the majority's opinion below:

> Historically, it has been generally recognized that ... [mandamus] is an extraordinary remedy . . . generally regarded as

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[8] *See* Fla.R.Juv.P. 8.101(b), 8.070, 8.180(b)(2)[flush language], 8.240(b), 8.305(b)(2), 8.315(a), 8.510(a)(2)(B) [flush language], 8.630(b), 8.655(b)(2), 8.665(b), 8.730(a), 8.735(a).

[9] See Fla.R.Civ.P. 1.060(c) (transferred cases subject to taxation as provided by law); rule 1.390(d) (rule does not prevent taking of depositions provided by law); rule 1.410(c) (service shall be made as provided by law); rule 1.431(a) (questionnaire used after names of prospective jurors selected as provided by law); rule 1.490(d) & (e) (as to duties of masters). As it existed in 1954, rule of civil procedure 1.6(b) declared that the trial court could not, except as provided by law, extend the time for making a motion for new trial, etc.

> not embraced within statutes of limitation applicable to ordinary actions . . . .
>
> * * *
>
> Thus, it is clear that the law relating to writs of mandamus, including that involving the time within which a request for such relief must be made, has been developed by the judiciary.

Slip op. at p. 4-5 (internal quote and cites omitted).

Although they can arise in an array of actions, civil and criminal, writs--"developed by the judiciary"--are not separate causes of action established by common or statutory law, This fact, plus the lack of time limits for all writs but certiorari, combine to place writs outside the purview of the Legislature, which normally "develops" causes of action through substantive lawmaking. Without the Legislature's approval, writs have the potential to undermine the finality of judgments, or at least contribute substantially to the courts' formidable caseload." Precisely because writs have developed independently of the legislative branch, this Court has chosen to allow the Legislature to provide time limits by law for writs sought under Rule 1,630.

The majority, ignoring the unique nature of extraordinary writs, declared it was "unwilling to presume [10] this Court was surrendering "a power which it had zealously guarded for so long." (slip op., p. 5) Of course, the majority ignored the fact that

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[10] *See* footnote 12 herein.

Rule 1.630 was "entirely new" with its adoption in 1984, and that the phrase "provided by law" was part of the new rule. In re Amendments to Rules of Civil Procedure, 458 So.2d 245, 247 & 257 (Fla. 1984). See slip op. at p. 7-10 (tracing history of rules relating to writs, and observing that rule 1.630 was the first to include the phrase "provided by law,") (Miner, J., dissenting) The majority also ignored the fact the phrase "provided by law" was not necessary to preserve this Court's ability to set deadlines for other writs, and this Court could have repealed the phrase at any time. Thus, the only reasonable inference is that this Court made a conscious choice to allow the Legislature to set time limits for writs other than certiorari.

Concluding, the dissent perceived a "potential problem" (slip op., p. 12); that is, separation of powers through excessive delegation of judicial authority to the legislature. Ironically, the two cases cited for this proposition involved legislative encroachment into this Court's sole authority to adopt procedural rules; rather than the dissent's actual concern for excessive delegation.

By allowing time limits to be set by law, this Court could not be encroaching on another branch of government. More important, this Court has not excessively delegated its authority. First, absent §95.11(8), there is no time limit on inmate mandamus petitions other than laches. Although any statutory time limit would necessarily be shorter, it would also allow a timely action to proceed; thereby not

raising the same level of concern that would arise if the Legislature did the opposite; for example, by reviving claims already barred by statutes of limitation. Second, if a statute imposed an unreasonably short deadline, this Court would declare the statute unconstitutional. See Askew v. Cross Key Waterways, 372 So.2d 913, 918 (Fla. 1979) ("A corollary of the doctrine of unlawful delegation is the availability of judicial review."). Finally, the amount of time for seeking various forms of extraordinary relief does not go the heart of this Court's constitutional powers; as would, for example, a rule delegating an adjudicatory function to the Legislature. See Smith v. State, 537 So.2d 982,987 (Fla. 1989) (invalidating this Court's rules for the original sentencing guidelines during the time before the rules were adopted by the Legislature, since "by enacting rules which placed limitations upon the length of sentencing, this Court was performing a legislative function").

There is also a very significant conceptual difference between delegations from this Court to the Legislature, and delegations from the Legislature to this Court. When this Court delegates modest procedural matters with obvious public policy concerns to the Legislature; this Court is, after all, delegating authority to the branch which constitutionally is the policy-maker. See Johnson v. State, 660 So.2d 637,646 (Fla. 1995) ("Rather, political questions--as opposed to legal questions--fall within

the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution."). The reverse is not true.

The phrase "provided by law" is not an excessive delegation of judicial authority, but deference to the Legislature on matters of substantive law and public policy. Such deference does not violate separation of powers, but is required by it.

ISSUE II

WHETHER THIS COURT SHOULD ADOPT A RULE IMPOSING THE SAME DEADLINE ESTABLISHED BY §95.11(8), FLORIDA STATUTES

As discussed in Issue I, inmate writs challenging disciplinary proceedings have evolved to where they far more closely resemble complaints typical of civil causes of action than writs as historically conceived. Nevertheless, such complaints retain one feature which sets them apart from civil causes of action--they are not based on a common law cause or a statutorily created remedy. Thus, a nominal "writ" is the only vehicle left to an inmate, as the courts, which can issue writs, cannot create new causes of action.

To this limited extent--which should not sustain the decision below--895.1 **l(S)** does impose a procedural bar to issuance of writs. If a writ is not sought within 30 days of DOC's final decision, then it is time-barred. This time-bar has important

implications for the courts as well as the Department of Corrections(DOC). Inmates are notoriously litigious; nearly all are indigent. Even though DOC can now deduct certain fees from money later accumulated by an indigent inmate (see ch. 96-106, Laws of Fla.), such inmates can initiate litigation without cost. Absent a deadline, they have been known to wait inordinate amounts of time to seek review of disciplinary hearings.[11] Evidence and memories grow stale; inmate witnesses leave upon serving their time; non-inmate witnesses obtain employment elsewhere or get transferred. The Leon County Circuit Court--where all writs against Singletary as head of DOC are filed--is burdened with stale claims among the hundreds filed by inmates every year.[12]

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[11]Here, for example, Vanmeter waited 18 months from denial of relief by the Secretary of DOC to file his mandamus petition.

[12]According to statistics compiled by the Second Judicial Circuit, inmate filings in the Leon County circuit court have proliferated:

Year	Inmate Cases	Total Cases	% of Total	Inmate Appeals	Total Appeals	% of Total
1990	411	5,574	7.4%			
1991	450	5,193	8.7%			
1992	498	5,321	9.3%			
1993	875	5,540	15.8%			
1994	1,388	6,176	22.5%			
1995	1,430	6,566	21.8%	285	369	77.2%
Total:	5,052	34,370	14.7%			

The Legislature wisely sought to remedy this situation, for the benefit of the courts as well as the DOC. Regardless of whether this Court holds §95.11(8) violates separation of powers, the deadline it imposes represents sound public policy. Should it affirm the decision below, DOC respectfully suggests this Court adopt a comparable 30 day deadline by adding this language to Fla.R.Civ.P. 1.630(c):[13]

> **(c) Time.**
>
> * * *
>
> A complaint challenging prisoner disciplinary proceedings conducted pursuant to §944.28, Florida Statutes, shall be filed within 30 days after final disposition of the administrative grievance process under ch. 33, Florida Administrative Code.

This Court has often adopted rules to end any separation of powers problem in statutes. Perhaps the most notable example occurred when this Court adopted the evidence code by rule. See In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979):

> To avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they had

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Family law matters and name changes are not included in the inmate case numbers, although they are included in total civil cases. Beginning in 1995, name changes were no longer done in circuit civil court. Information regarding appeals is not available for the years before 1995.

[13] If Rule 1.630 is amended, comparable language should be inserted as new paragraph (4) in Rule 9.100(c):

> (4) A complaint challenging prisoner disciplinary proceedings conducted pursuant to §944.28, Florida Statutes, shall be filed within 30 days after final disposition of the administrative grievance process under ch. 33, Florida Administrative Code.

> not been adopted by this Court under its rule-making authority, the Court hereby adopts temporarily the provisions of the evidence code ....

In fact, this Court has routinely adopted the Legislature's changes to the evidence code. See, e.g., In re Amendment of Florida Evidence Code, 497 So.2d 239 (Fla. 1986); In re Florida Evidence Code, 675 So.2d 584 (Fla. 1996).

Not only has this Court adopted rules to effectuate the procedural aspects of statutes,[14] it has done so spontaneously in the course of deciding a case. See Timmons v. Combs, 608 So.2d 1, 3 (Fla. 1992):

> This leaves section 768.79 as the only statute on the subject for new causes of action. Because the statute does contain procedural aspects which are subject to our rule-making authority, we hereby adopt the procedural portion of section 768.79 as a rule of this Court effective as of the date of this opinion..

DOC requests the Court do the same thing here, by adopting the proposed change as an amendment to Rule 1.630(c) and Rule 9.100(c), retroactive to June 15, 1995. Alternatively, the need for the change would be eliminated by declaring inmate

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[14] The process has worked the other way, with the Legislature adopting this Court's rules. See Smith v. State, 537 So.2d 982,987 (Fla. 1989) ("When the legislature adopted rules 3.701 and 3.988 in chapter 84-328, the substantive/procedure problem was resolved because the rules then became a statute. This practice has been followed thereafter when the legislature has chosen to adopt new Supreme Court rule changes.").

complaints under Rule 1.630 must proceed as petitions for certiorari in the circuit court.

CONCLUSION

Section 95.11(8), Florida Statutes (1995) does not violate separation of powers. The decision below must be reversed, and remanded for consistent proceedings."

Respectfully submitted,

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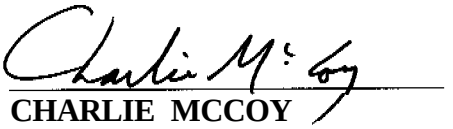
ATTORNEY GENERAL



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[15]DOC notes that the First DCA considered only the separation of powers question, which was one of several issues raised. That court should have the first opportunity to rule on the other issues, which DOC respectfully declines to address in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this **Initial Brief of Appellant** has been furnished by U.S. Mail to Robert Van Meter #A-032518, Madison Correctional Institution, Post Office Box 692, Madison, Florida 32341-0692; this 2d day of December, 1996.

Charlie McCoy

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Assistant Attorney General

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