ORIGINAL

IN THE SUPREME COURT OF FLORIDA

HARRY K. SINGLETARY, et al.,

Appellants,

VS.

CASE NO. 89,325

ROBERT VAN METER,

Appellee.

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

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

This case addresses the constitutionality of §95.11(8), Florida Statutes, on separation of powers grounds. The same issue is raised in Kalway v. Singletary, (case no. 89,724) pending before this Court. Appellant (DOC) suggests the cases travel together.

Van Meter's Issue I--the constitutionality of applying §95.11(8) retroactively--is new. His second and third issues correspond to Issues I and II of DOC's initial brief. For clarity, DOC's reply will follow Van Meter's format.

SUMMARY OF THE ARGUMENT

Issue I: Retroactivity of §95.11(8)

DOC agrees that §95.11(8) should not have been applied retroactively to Van Meter's petition. The decision below must still be reviewed, as the statute is still presumed constitutional, and cannot be invalidated by affirming the First DCA's opinion as right result for the wrong reason. Also, there are appeals pending before the First DCA in which §95.11(8) was applied grosnectively by the trial court. Judicial economy justifies a decision by this Court.

Issue II: Constitutionality of Section 95.11(8) as Applied to Writs of Mandamus

DOC relies on the points made in its initial brief.

Issue III: Retention of New Rule

Shortly after DOC's initial brief was written, this Court adopted Rule 9.1 00(c)(4), which imposes the same 30 day deadline as does $95.1 1(8). The rule is prospective only, and prevents inmates from unduly disrupting prison administration and the courts by filing stale petitions. The rule represents good public policy, as originally expressed through §95.1 1(8); regardless of whether the statute violates separation of powers. If § 95.1 1(8) is held unconstitutional, rule 9.1 00(c)(4) should be retained.

Van Meter's request that the rule be reconsidered has no basis in fact or law. He offers speculation, but no facts, to contend the 30 day time limit is inherently too short or unreasonable. He ignores the fact that inmates have every reason to delay. He ignores the fact that delay is highly disruptive in a prison system which handles many disciplinary proceedings; and one in which inmates must be transferred for administrative reasons. Van Meter's request to eliminate or lengthen the 30-day deadline must be disregarded.

ARGUMENT

ISSUE I

WHETHER THE 30-DAY STATUTE OF LIMITATIONS IN §95.11(8), FLORIDA STATUTES, MAY BE APPLIED RETROACTIVELY

DOC does not dispute Van Meter's assessment of legislative history. Nothing in the documents attending the statute's passage indicates legislative intent that §95.11(8) applies, when the Secretary of DOC denied relief before the statute took effect. Also, the strongly implies there was no intent to apply the statute to such proceedings.

Generally, DOC does not dispute Van Meter's reading of this Court's prior case law, that statutes of limitation confer substantive rights. See Boyd v. Becker, 627 So.2d 48 1, 484 (Fla. 1993) ("We have previously stated that statutes of limitation provide substantive rights and supersede our procedural rules."). DOC also agrees this Court's earlier decisions require §95.11(8) to be applied prospectively. ***But see*** In re Estate of Smith, 685 So.2d 1206, 1210 (Fla. 1996) (statute of limitations for actions relating to paternity determination constitutionally applied to woman challenging will about 39 years after reaching majority).

Van Meter's petition should be reinstated. Consequently, this Court need not address the part B of Van Meter's first issue, which contends retroactive application

of the statute violates his right of access to courts, However, Part C of the same issue requires further response. There, Van Meter suggests the first DCA's opinion should be affirmed as it "reached the right result." (answer brief, p. 24)

The First DCA held §95.11(8) unconstitutional as applied to inmate writs of mandamus. Because such writs are the only remedy currently available,[1] the effect of the decision below is to hold the statue facially unconstitutional. Regardless, the holding does not enjoy a presumption of correctness. To the contrary, the statute is *still* presumed constitutional:

> [W]hen 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.

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.

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[1]The Legislature could enact a statutory remedy; which, as an "ordinary" remedy would obviate an inmate's ability to seek an "extraordinary" writ. Also, a period of limitation for such remedy would not give rise to a separation of powers problem.

The same logic applies here. Therefore, this Court cannot simply affirm the opinion below as the "right result." To do so would disregard the still-viable presumption of constitutionality which attends §95.11(8). If this Court nevertheless declines to reach the separation of powers issue, it should vacate the opinion below and declare that the opinion has no precedential value.

The DOC requests this Court reach the issue on the merits. There are cases already pending before the First DCA, in which inmates have challenged §95.11(8) on the separation of powers ground raised by Van Meter. These cases involve prospective application of the statute.[2] Absent a decision by this Court, the First DCA will continue to follow its own decision in Van Meter. See e.g., Ash v. Singletary, case no. 96-1635 (Fla. 1st DCA Feb. 18, 1997); Hubbard v. Singletary, 684 So.2d 273 (Fla. 1st DCA 1996). The DOC will again appeal. Since the issue is one of law only, it does not turn on any facts unique to Van Meter. Judicial economy also dictates the issue be decided in this case.

The constitutionality of §95.11(8) is not a moot issue. Rule 9.100(c)(4) did not take effect until January 1, 1997. Section 95.11(8) took effect June 15, 1995. DOC

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[2]For example, in Jones v. Singletary, case no. 96-791, the DOC moved for a stay pending a decision in Van Meter. There, the Sec. of DOC denied relief on June 19, 1995; four days after §95.11(8) took effect; the petition was not filed until November 16, 1995. The First DCA granted the stay, On February 20, 1997, this Court denied Jones' petition for writ of prohibition in the same case, See order entered in Jones v. First DCA, case no. 89,781.

has relied on the statute to attack prisoner writs as time-barred. If §95.11(8) is constitutional,[3] then the 30-day deadline has properly been available for a year and a half longer than the deadline imposed by this Court's rule.

ISSUE II

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

DOC relies on the points made in its initial brief. Those points can be simply stated. Inmate writs challenging prison disciplinary proceedings were tantamount to civil causes of action. For all practical purposes, and expressly in name; they were treated as complaints under Fla.R.Civ.P. 1.630.[4] In short, inmate "writs" were such in name only. They definitely were not devices for extraordinary relief, as historically contemplated and authorized by the Florida Constitution. By placing a 30 day deadline for filing certain inmate writs, §95.11(8) does not violate separation of powers.

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[3] On December 27, 1996, the Second DCA issued an opinion implicitly upholding §95.11(8), by certifying direct conflict with the First DCA's decision in this case. Kalway v. Singletary, 685 So.2d 973 (Fla. 2d DCA 1996), review pending, case no. 89,724.

[4] As of January 1, 1997, Fla.R.App.P. 9.100, which does not deem writ petitions to be "complaints," controls. See Committee Notes for the 1996 Amendment to rule 9.100 ("Subdivision (f) was added to clarify that in extraordinary proceedings . . . this rule, and not . . . [rule] 1.630 applies[.]").

With a zealot's broad brush, Van Meter paints a very exaggerated and totally incorrect picture. He claims $95.1 1(8) "expressly impairs a citizen's right to file a petition for the extraordinary wit of mandamus to seek redress of grievances." (answer brief, p. 26) In reality, the challenged statue applies only to inmates, not all citizens; most of whom are law-abiding. It applies only to writs of mandamus challenging prison disciplinary proceedings--not to such writs involving other matters. Most obvious, $95.1 1(8) does not impair anything--it simply places a reasonable deadline on a very narrow type of writ/complaint.

Van Meter then expends much breath describing the historical importance of mandamus as a device to protect law-abiding citizens from wrongful government action or inaction. Without agreeing or disagreeing with Van Meter's observations, DOC repeats the obvious. The historic purpose and importance of mandamus has nothing to do with the nominal "writ" of the same name; when such writ is sought by inmates who have enjoyed an adversarial, evidentiary hearing and two administrative appeals.

Van Meter next resorts to absurdity, observing that Appellant and the dissent below would give the "partisan political branches a free hand to enact a one-hour statute of limitation or perhaps bar the action entirely." (answer brief, p. 40)

Constitutional issues do not turn on hypothetical circumstances, much less those which are extreme and absurd.

Taking issue with the dissent below, Van Meter urges this Court cannot delegate, to the Legislature, the ability to specify deadlines for filing writ petitions. See Rule 1.630(c) ("A complaint shall be filed within the time *provided by law* . ..." [e.s.]). DOC contends the word "law" contemplates not only judicial rules or decisions, but also legislation. (See initial brief, p. 19-22.)

Van Meter contends such interpretation of the word "law" violates separation of powers. There are two flaws to this contention. First, if "law" means only judicially-announced decisions or court rules, then the phrase "provided by law" is superfluous. This Court does not have to adopt language in one rule recognizing that future rulemaking can occur, just as the Legislature need not adopt a statute authorizing future statutes.

Second--and a point Van Meter does not address--any delegation to the Legislature is narrow. It constitutes very limited authority to set deadlines for filing of extraordinary writs other than certiorari, perhaps the writ most commonly sought. Such delegation has strong public policy justification, as noted in DOC's initial brief ('p.22). Also, it is far less troubling for the judiciary to delegate a narrow procedural matter to the Legislature, than for the Legislature to delegate substantive, policy

matters to this Court. Also as noted in DOC's initial brief (p. 24), any unreasonable deadline imposed by the Legislature would be subject to judicial review.

On page 41, Van Meter correctly notes an oversight in DOC's initial brief. Contrary to a point made in that brief, there is a statutory deadline on extraordinary writs absent the statute under review. Pursuant to §95.11(5)(f), all inmate petitions for extraordinary writs are subject to a one year deadline, except for mandamus writs subject to the 30 day deadline imposed by the statute at issue.

Van Meter's point is disingenuous. He broadly attacks §95.11(8) on separation of powers grounds, urging the Legislature cannot place any time limit on the ability to petition for mandamus. If he is correct, then the one-year deadline in §95.11(5)(f) is also unconstitutional. Apparently, Van Meter is conceding a statutorily-imposed deadline is constitutional, but is now objecting only to the length of time allowed.

Van Meter then departs far from the subject of this appeal. At pages 42-44, he discusses the opinion in which this Court recently adopted significant changes to the rules of appellate procedure: Amendments [etc.], 685 So.2d 773' (Fla. 1996). Van Meter's discussion must be ignored. His crucial premise is that rules regarding extraordinary writs are the exclusive province of this Court. If he is correct, then appellate rules addressing the "legal remedy of appeal" (answer brief, p. 43), and this Court's discussion of appeals of right, are irrelevant to this case.

Continuing, Van Meter characterizes the Amendments opinion as without "textual analysis," and asks this Court "to recede from that portion of its decision in Amendments." (answer brief, p. 44) This tack is highly improper, and should be condemned by this Court. It is one thing for DOC's initial brief to request very narrow, *sua sponte* rulemaking as this Court as done in the past. It is quite another for Van Meter to ask an adopted rule be rescinded, and--most egregiously--seek a major change in this Court's Amendments decision, when that decision has nothing to do with this case.

Whether the Legislature can adopt a general law requiring convicted criminals to preserve issues for their direct appeals has nothing to do with this case. After all, such law merely establishes appellate jurisdiction by limiting it, with some exceptions, to preserved issues only. It is highly improper for Van Meter to attack that law, this Court's implementing rules, and the rationale of the Amendments decision; which apparently has become a cause celebre. It would be equally improper for DOC to ask, in this case, for the Court to recede from its holding that criminals have a state constitutional right to a direct appeal.

If Amendments has any relevance, it would support the principle that the Legislature can place "reasonable conditions" (id., 685 So.2d at 774) upon constitutional rights, including the right to petition for an extraordinary writ. Since

the Legislature can place reasonable conditions upon the right of direct appeal, then it also can place a reasonable condition on petitioning for extraordinary relief; that is, a deadline. If so, then §95.11(8) cannot be held facially unconstitutional. At most, it would be subject to challenge as unconstitutionally applied.

ISSUE III

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

Above, DOC observed how §95.11(8) could be sustained as a reasonable condition upon the right to petition for extraordinary relief, subject only to challenge as applied. Perhaps fearing this outcome, Van Meter three times contends the 30 day deadline is unreasonably short. Twice he attacks the time period as part of the challenge to §95.11(8). (answer brief, p. 21-4 & 43) Last, he attacks the time period as unreasonable within this Court's rule 9.100(c)(4).[5] (answer brief, p. 46-7)

There are at least two problems with Van Meter's argument. First, at no time below did he contest the 30 day time period as inherently unreasonable. Second, there are no facts in the record showing the deadline is unreasonable as applied to him. In short, this point is not preserved. Trushin v. State, 425 So.2d 1126, 1129-30

[5]DOC agrees that rule 9.100(c)(4) is prospective only, and thus not applicable to Van Meter's petition.

(Fla. 1982) ("The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level.") The Court should not reach Van Meter's third issue. Out of caution, however, DOC will respond.

Again, the existence of rule 9.100(c)(4) does not depend on the constitutionality of §95.11(S). There are sound reasons of public policy to retain the rule. Inmates are notoriously litigious. Most are indigent. Depending on whether gaintime matters are considered "criminal," inmates either pay no fees or costs, or pay the fees through "instalments" taken from their accounts. See § 57.085, Fla. Stat. (1996 Supp.)

Inmates have every reason to delay. Allowing lengthy time to file mandamus petitions causes unnecessary administrative and security problems for the prison system. Inmate-witnesses, if not released, are often transferred to other institutions for safety and security reasons. Corrections staff may have moved on.

By the time a mandamus petition can be filed, an inmate has had to exhaust two administrative reviews. The documentation necessary to substantiate a writ is already in the inmate's hand. Inmates rely on jailhouse lawyers who have "form" writ petitions available. Once a petition is timely filed, it can be amended. It is absolutely reasonable to impose a deadline of 30 days.

Van Meter contends 30 days is unreasonable, in part because prisoners "have little or no control to exert over the processes affecting them in their respective institutions." (answer brief, p. 22) It may come as a surprise to him, but loss of control over "processes" is exactly what prison is all about. To tolerate stale writ petitions and their disruptive effect on the courts and prison system, is to reward prisoners with the benefit of their own wrongdoing.

Of course, prisoners are subject to all the other deadlines and procedural bars which occur in criminal and civil matters. Under Van Meter's logic all statutes of limitation, etc. should be relaxed for inmates. Such logic must be rejected, and rule 9.1 00(c)(4) retained.

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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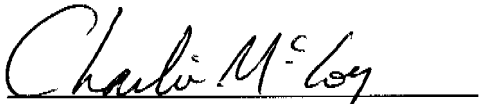

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this **Reply Brief of Appellant** has been furnished by U.S. Mail to **CHET KAUFMAN,** Asst. Public Defender, Leon County Courthouse, Suite 401,301 S. Monroe Street, Tallahassee, Florida 32301; this 2d day of June, 1997.

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Assistant Attorney General

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