IN THE SUPREME COURT OF FLORIDA

JAMES ROBERT KALWAY,

Petitioner,

vs. CASE NO. 89,724

HARRY K. SINGLETARY,

Respondent.
_____/

On Discretionary Review from the District Court of Appeal
Second District of Florida

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

ISSUE I

WHETHER THE 30-DAY DEADLINE IN §95.11(8), FLA. STAT., FOR CHALLENGING PRISON DISCIPLINARY PROCEEDINGS CIRCUMSCRIBES THE COURTS' CONSTITUTIONAL AUTHORITY TO ISSUE WRITS AS HISTORICALLY UNDERSTOOD 5

A. Standard of Review 5

B. Response on Merits 5

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF CITATIONS

Cases	Pages
Alexander v. Singletary, 626 So. 2d 333 (Fla. 1st DCA 1993)	3,13
Amendments to the Fla. Rules of Appellate Procedure, 21 Fla.L.Weekly S507 (Fla. Dec. 26, 1996)	6
In re Amendment of Florida Evidence Code, 497 So. 2d 239 (Fla. 1986)	2
In re Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984)	12,23
Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1979)	24
Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930)	15,17
Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (1933)	14,15
Coleman v. Florida Insurance Guaranty Association, Inc., 517 So. 2d 686 (Fla. 1988)	5
Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So. 2d 106 (Fla. 1989)	9
In re Family Law Rules of Procedure, 663 So. 2d 1049 (Fla. 1995)	19
Florida Rule of Juvenile Procedure 8.100, 667 So. 2d 195 (Fla. 1996)	19
Foley v. Morris, 339 So. 2d 215 (Fla. 1976)	18
Holcomb v. Department of Corrections, 609 So. 2d 751 (Fla. 1st DCA 1992)	10,11
Kalway v. Singletary, 22 Fla.L.Weekly D198 (Fla. 2d DCA Dec. 27, 1996)	2
Neu v. Miami Herald Publishing Co., 462 So. 2d 821 (Fla.1985)	20
Palmer v. Johnson, 97 Fla. 479, 121 So. 466 (1929)	16,17
Smith v. State, 537 So. 2d 982 (Fla. 1989)	23

State ex rel. Haft v. Adams, 238 So. 2d 843 (Fla. 1970) 14

State ex rel. Perkins v. Lee, 142 Fla. 154, 194 So. 315 (1940) 14

Tampa Waterworks Co. v. State ex rel. City of Tampa, 77 Fla. 705, 82 So. 230 (1919) 14

U.S. ex rel Arant v. Lane, 249 U.S. 367, 39 S. Ct. 293, 63 L. Ed. 650 (1919) 13

Van Meter v. Singletary, 21 Fla.L.Weekly D2343 (Fla. 1st DCA Oct. 30, 1996) . *passim*

Wiley v. Roof, 641 So. 2d 66 (Fla. 1994) 17

Other Authorities

§95.11(8), Florida Statutes . . . . . *passim*

ch. 944, Florida Statutes 3

ch. 95-283, Laws of Florida 2

ch. 33, Florida Administrative Code 8,9

Florida Rule of Appellate Procedure 9.030(c)(3) 8

Florida Rule of Appellate Procedure 9.030(b)(2)(B) 9

Florida Rule of Appellate Procedure 9.100 . . . . . *passim*

Florida Rule of Civil Procedure 1.140 13

Florida Rule of Civil Procedure 1.630 . . . . . *passim*

Florida Rules of Juvenile Procedure (numerous provisions) 20

PRELIMINARY STATEMENT

This case attacks the constitutionality of §95.11(8), Florida Statutes, on separation of powers grounds. The same issue is raised in Singletary v. Van Meter, case no. 89,325; pending before this Court. Appellee suggests the cases travel together.

STATEMENT OF THE CASE AND FACTS

Appellee Singletary (hereinafter the "State") accepts the procedural history in Appellant's statement of the case as accurate, however, critical dates have been omitted. The State objects to Appellant's statement of the facts, which merely paraphrases the procedural history and contains argument.

In April 1995, during a search of Appellant's footlocker and cell, three bags with unauthorized "beverages" (actually, food items) were found. (R 39)[1] After a hearing, Appellant received 60 days confinement and lost 180 days of gaintime. (R 40)

Kalway took administrative appeals to the assistant superintendent of the prison, and to the Secretary of the Department of Corrections (DOC). In the latter, relief was denied on August 2, 1995. (R 42) Thirty-six days later (September 7, 1995), Kalway filed a petition in the circuit court, alternating requesting declaratory,

[1]Cites are to the record index prepared for the appeal to the Second DCA.

certiorari, and mandamus relief. (R 1, 18-19) The State responded by moving to dismiss (R 25-6); and urged, among other grounds, that the petition--as to certiorari--was untimely. (R 28)

Effective June 15, 1995--about seven weeks before the Secretary of DOC denied relief here--§95.11(8), Florida Statutes (1995) imposed a 30-day time limit for an inmate to commence a challenge to prison disciplinary proceedings. The 30 days began running upon denial of relief by the Secretary of DOC. *See* §§2 & 61, ch. 95-283, Laws of Florida.

The trial court granted the State's motion to dismiss, and denied Appellant's petition, through an order dated November 7, 1995. (R 97) After rehearing was denied (R 131), Kalway perfected his appeal to the Second District.

The Second DCA affirmed in a one paragraph order:

> Affirmed. We certify that our decision in this case is in direct conflict with the decision of the First District Court of Appeal in Van Meter v. Singletary [cite omitted].

Kalway v. Singletary, 22Fla.L.Weekly D198 (Fla. 2d DCA Dec. 27, 1996). Kalway timely sought discretionary review in this Court, which apparently has not reserved its decision on jurisdiction.

SUMMARY OF THE ARGUMENT

Section 95.11(8), 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. This Court, in Fla.R.Civ.P. 1.630, expressly treats the "initial pleading" as a "complaint" from the outset. Assuming bare legal sufficiency, the petition 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.

An inmate seeking a writ of mandamus has enjoyed 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 95.11(8) does exactly that. The statute, having been authorized by rule of this Court, cannot violate separation of powers.

ARGUMENT

ISSUE I

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.").

B. Argument on Merits

1. The Adoption of Fla.R.App.P. 9.100(c)(4)

Effective January 1, 1997, this Court extensively amended Fla.R.App.P. 9.100. In relevant part, the amendments provide:

> (c) **Exceptions; Petitions for Certiorari; Review of Non-Final ~~Administrative~~Agency Action.** The following shall be filed within 30 days of rendition of the order to be reviewed:
>
> (4) A petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings.

* * * *

(f) **Review Proceedings in Circuit Court.**

(1) **Applicability.** The following additional requirements apply to those proceedings that invoke the jurisdiction of the circuit court described in rules 9.030(c)(2) and (c)(3) to the extent that the petition involves review of judicial or quasi-judicial action.

[Committee Notes]

1996 Amendment. The reference to "common law" certiorari in subdivision (c)(1) was removed so as to make clear that the 30-day filing limit applies to all petitions for writ of certiorari.

Subdivision (c)(4) is new and pertains to review formerly available under rule 1.630. It provides that a prisoner's petition for extraordinary relief, within the original jurisdiction of the circuit court under rule 9.030(c)(3) must be filed within 30 days after final disposition of the prisoner disciplinary proceedings conducted through the administrative grievance process under chapter 33, Florida Administrative Code. *See Jones v. Florida Department of Corrections*, 615 So. 2d 798 (Fla. 1st DCA 1993).

* * * *

Subdivision (f) was added to clarify that in extraordinary proceedings to review lower tribunal action this rule, and not Florida Rule of Civil Procedure 1.630, applies ....

Amendments to the Florida Rules of Appellate Procedure, 21 Fla.L.Weekly S507 (Fla. 1996), *as modified on rehearing* (Fla. Dec. 26, 1996). The above-quoted change to Rule 9.100, and the commentary, make it clear that inmate writs challenging DOC

disciplinary proceedings are subject to the same 30 day deadline imposed by §95.11(8).

This case is not moot, however. The challenged statute took effect June 15, 1995; the new rule took effect January 1, 1997. In the 18-month interim, numerous inmate petitions were dismissed. Also, the First District's opinion in Van Meter, to which the decision below cited to certify conflict, has established an erroneous precedent which could be extended by analogy to other legislative attempts to place time limits on writs.

2. Response on Merits

Preliminarily, Kalway does not challenge the 30 day limitation period as unreasonably short, nor does he claim §95.11(8) should have had a grace period. This is significant, as his petition was filed 36 days after the Secretary of DOC denied relief.[2]

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

[2]Relief was denied through an order dated August 2, 1995. (R 42) The thirtieth day thereafter was September 1, 1995; a Friday. The petition was filed on Thursday, September 7, 1995. (R 1)

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.]

The statute is narrowly tailored. It applies only to writs or other civil actions brought by prisoners challenging DOC disciplinary proceedings. It does not apply to writs or other actions brought by inmates for other purposes. The statute shares much with this Court's new rule. Neither is expressly retroactive. Both impose a limitation period of 30 days; neither includes a grace period.

Section 95.11(8) 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 to request material witnesses (rule 33-22.007(2)(b)). Significantly, the two levels of review--by the prison superintendent and the Secretary of DOC--are plenary. Nothing prohibits the prison superintendent or the Secretary of DOC from reweighing the evidence. (rule 33-22.009).

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 in which the reviewing entity may reweigh the evidence.

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

> 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 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. 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 enjoyed 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 a true writ as a complaint and start from scratch, including new discovery and a bench trial. *See* Holcomb v. Department of Corrections, 609 So.2d 751, 753 (Fla. 1st 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.").

Contrast with other historic 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.

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* Holcomb., 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 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 initial pleading 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 plaintiff's *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."). *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 Van Meter majority 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. *Id.* 21 Fla.L.Weekly at D2344: U.S. ex rel Arant v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650 (1919). 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 other cases relied on by the Van Meter 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. 315 (1940) (denying motion to quash petition for mandamus when comptroller refused to pay full salary, as established by statute, to state employee); Buckwalter v. City 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 in Van Meter 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 510-11. Nevertheless, the Court held that the statute was invalid, as it limited the scope of the writ of mandamus. *Id.* at 511-12. 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.

Buckwalter discussed Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (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 314-15.

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 315.

Nothing of the sort has occurred here. The circuit court's jurisdiction is not enlarged or narrowed. Instead, the statute places 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.

The Van Meter majority also relied on Palmer v. Johnson, 97 Fla. 479, 121 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." *Id.* 21 Fla.L.Weekly at D2344. 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.

Palmer simply does not stand for the broad proposition observed by the Van Meter majority. 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, §95.11(8) does not have the noted defect, and does not preclude the circuit court from issuing a writ (of prohibition) when DOC lacks jurisdiction.

The fact that genuine writs are amenable to laches instead of statutes of limitation has nothing to do with the validity of §95.11(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 §95.11(8) is quite reasonable. It runs from the time administrative remedies are exhausted, regardless of when the original disciplinary infraction was committed. 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. The 30 day deadline coincides with the amount of time given to file a notice of appeal.

As astutely noted by the Van Meter dissent, 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 Van Meter dissent observed that the phrase "provided by law" presented a "potential problem ... [of] unconstitutional delegation of judicial authority." *Id.* 21 Fla.L.Weekly at D2345. This observation is not correct. Instead of an excessive delegation, this Court has recognized the Legislature's primacy in matters of public policy; something not unusual in this Court's rules. *See, e.g.,* 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 precise question is whether this Court may constitutionally defer to the Legislature as to time limits for the filing of writs which have evolved to more closely resemble civil actions than extraordinary remedies. Again, it is common for this Court's rules to reference matters as "provided by law."[3] Thus, the Court's historic practice has been to exercise its rulemaking authority with deference to substantive lawmaking by the Legislature, when appropriate. For example, this Court has expressly allowed the Legislature to specify numerous time limits for juvenile proceedings. The State assumes this Court, as the final interpreter of Florida's Constitution, would not--over many years and numerous rules--violate separation of powers.

Within the rules of civil procedure, however, the other occurrences of "provided by law" do not involve time limits.[4] Nevertheless, DOC is not willing to assume the phrase "provided by law" in rule 1.630(c) is an historic anachronism or

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[3] The phrase "provided by law", according to a computer search done IN LATE 1996, 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. *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).

[4] *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.

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.").

When the phrase "provided by law" was adopted in 1984, it could have been limited to judicially announced law; but was not. This Court did not explain itself. The explanation, ironically, may lie in the Van Meter majority's opinion:

> Historically, it has been generally recognized that ... [mandamus] is an extraordinary remedy ... generally regarded as not embraced within statutes of limitation applicable to ordinary actions ....

Id., 21 Fla.L.Weekly at D2344 (internal quote and cites omitted).

Genuine writs--developed by the judiciary--are not separate causes of action established by common or statutory law. This circumstance places writs outside the purview of the Legislature, which normally develops causes of action through substantive lawmaking.[5] Without the Legislature's approval, writs have the potential to undermine the finality of judgments. Consequently, this Court has chosen to allow the Legislature to provide time limits for writs sought under Rule 1.630.

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[5]Perhaps the real separation of powers problem lies here: the courts have created a cause of action, for inmates challenging disciplinary hearings, which did not exist at common law; and is not expressly created by the U.S. or Florida Constitutions, or by Florida statutes.

The Van Meter majority, ignoring the unique nature of inmate writs, declared it was "unwilling to presume " this Court was surrendering "a power which it had zealously guarded for so long." *Id.* at D2344. Of course, the majority ignored the fact that 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* Van Meter 21 Fla.L.Weekly at D2344-5 (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 Van Meter 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.

Absent §95.11(8), there is *no* specific time limit on inmate mandamus petitions. Any statutory time limit could not operate to revive already-barred petitions. If a statute imposed an unreasonably short deadline, judicial review would be available to challenge the deadline. *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. The same cannot be said for excessive delegation by the Legislature to the two other branches.

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.

CONCLUSION

Section 95.11(8), Florida Statutes (1995) does not violate separation of powers. The decision below must be affirmed and; if the cases are traveling together, the Van Meter decision reversed.[6]

Respectfully submitted,

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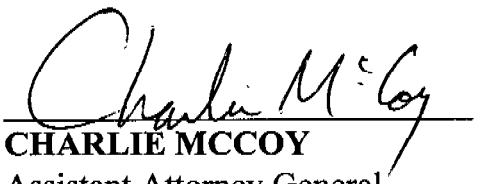

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[6]In Van Meter, the First DCA considered only the separation of powers question, which was one of several issues raised. That court should have the first opportunity to rule on the other issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this **Answer Brief of Appellee** has been furnished by U.S. Mail to **James Robert Kalway**, DOC #067809, Apalachee Correctional Institution, Post Office Box 699, Sneads, Florida 32460-0699; this 18th day of March, 1997.

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