IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 27 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JAMES ROBERT KALWAY,

Petitioner,

V.

CASE NO: 89,724

HARRY K. SINGLETARY,

Respondent. /

DISTRICT COURT OF APPEAL, 2ND DISTRICT

CASE NO: 96-00425.

INITIAL BRIEF OF APPELLANT

(AMENDED)

ON CERTIORARI REVIEW FROM THE DISTRICT COURT OF APPEAL, 2ND DISTRICT -- CERTIFIED CONFLICT

BY: JAMES ROBERT KALWAY, PETITIONER
APALACHEE CORRECTIONAL INSTITUTION
P.O. BOX 699
SNEADS, FLORIDA 32460-0699

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OTHER AUTHORITIES (Continued):

JURISDICTION

Concededly, "[i]t is a fundamental principle that Courts will not pass upon the validity of a statute where the case . . . may be disposed of upon any other ground." Williston Highlands Development Corp. v. Hogue, 277 So.2d 260, 261 (Fla. 1973). And it is true that Petitioner alleged that his Petition was in fact timely "filed" based on the "mail box" rule, and submitted several uncontested affidavits as proof, but neither the trial court nor the appellate court addressed those allegations or affidavits. Notwithstanding, in Williston, which had relied on Mounier v. State, 178 So.2d 714 (Fla. 1965), Id. at 261 & n.2, the court went on to hold that, "this result does not, however, divest this Court of jurisdiction under the Constitution and we will retain jurisdiction to dispose of the entire matter. Mounier v. State, supra., (citation omitted)." Id. at 262. In Mounier, the court held:

> where a trial court directly passes upon the validity of a state statute, this Court has jurisdiction of and should determine the appeal even though in its consideration of the case it is decided that the action of the trial court in passing upon the jurisdictional issue of statutory validity was unnecessary to the disposition of the cause.

Id. at 715.

On the other hand, this Court should address the issue because it is 'capable of repetition, yet evading review. Kight v. Dugger, 574 So.2d 1066 (Fla. 1990) ("We agree with CCR that although the files have been disclosed in this case, thereby rendering the issue moot, this Court should address the issue because it is 'capable of repetition, yet evading review' Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 601, 98 L.Ed.2d 686 (1988); see In re T.W., 551 So.2d 1186 (Fla. 1989)." Id. at 1068. In In re T.W., the court cited Holly v. Auld, 450 So. 2d 217 (Fla. 1984), citing Pace v. King, 38 So.2d 823 (Fla. 1949), which held:

> '... abstract, moot, academic, or hypothetical questions will not be considered or decided, unless, according to some decisions, it is clear that the litigation will be advanced by such consideration, or the question is one of great pub-

lic interest, or is likely to recur; nor will trivial or unimportant objections or questions, not affecting the parties' substantial rights, be considered ***.' 5 C.J.S., Appeal and Error, s. 1455(a), pp. 36-44.

Id. at 827.

Alternatively, pursuant to Florida Rule of Judicial Administration 2.130, the Court may find, sua sponte, that an emergency situation exists as to the application of s. 95.11(8), Fla. Stat., to inmates seeking extraordinary remedies under Fla. R. Civ. P. 1.630, especially considering the amendment to Fla. R. App. P. 9.100 and amend rule 1.630 and/or committee note thereunder, and/or rule 9.100 and/or court note thereunder, to clarify and remedy the matter. See McFadden v. 4th DCA, 21 FLW (S) 183 (April 25, 1996)(filed mandamus to reinstate appeal):

> if we simply granted McFadden's petition for writ of mandamus and ordered the district court to reinstate McFadden's appeal it would remedy McFadden's situation but would not protect other indigent inmates who might slip through the cracks of the system. Instead, pursuant to Florida Rule of Judicial Administration 2.130, the Court finds, sua sponte, that an emergency situation exists as to the application of rule 9.430 to indigent inmates at the appellate level and hereby amends that rule.

Id. at 184. Of course, if necessary to afford relief, the court may assume original jurisdiction of this cause, pursuant to Art. V, s.2(a), Fla. Const., and treat this pleading as a Petition For Writ of Mandamus to compel the circuit court to resume jurisdiction and to proceed to rule on the merits.

PRELIMINARY STATEMENT

Petitioner, herein was the petitioner in the Circuit Court and the appellant in the District Court of Appeal, second District, and will be referred to as either Petitioner or Appellant. Respondent was the respondent in the Circuit Court and the appellee in the District Court, and will be referred to as either Respondent or Appellee. Citations to the record will be referred to by reference to the portion of the record cited and the letter "R" followed by a page number(s), relying on the record on appeal in the District Court of Appeal.

STATEMENT OF THE CASE

On September 7, 1995, Appellant filed a Petition For Declaratory Judgment, Petition For Common Law Certiorari, and Petition For Writ of Mandamus. (R. 1-23). On September 22, 1995, the Circuit Court entered an Order to Show Cause (R. 24). On October 18, 1995, Appellee filed a Response to Order to Show Cause and Respondent's Motion to Dismiss (R. 25-53). On October 26, 1995, Appellant filed a Motion to Strike, or in the Alternative, Traverse to Respondent's Response to Court's Order to Show Cause and Respondent's Motion to Dismiss (R. 54-62). On November 3, 1995, Appellee filed an Opposition to Plaintiff's Motion to Strike, Respondent's Motion For Leave of Court to file an /and/ Amended Response to Court's Order to Show Cause and Respondent's Amended Motion to Dismiss (R. 63-96). On November 14, 1995, Appellant filed a Motion to Strike, or in the Alternative, Traverse to Respondent's "Amended" Response to Court's Order to Show Cause and Respondent's "Amended" Motion to Dismiss, and also contemporaneously filed a Motion to Rescind Order Granting Motion to Dismiss or in the Alternative, Motion For Rehearing (R. 98-127) on the Court's Order Dismissing Appellant's Petition For Declaratory Judgment, Petition For Common Law Certiorari, and Petition For Writ of Mandamus, filed on November 7, 1995 (R. 97). On November 28, 1995, Appellee filed Opposition to Petitioner's Motion to Rescind Order Granting Motion to Dismiss, or in the Alternative, Motion For Rehearing (R. 128-130). On January 10, 1996, the Circuit Court entered an Order Denying Motion to Rescind Order or in the Alternative, Motion For Rehearing (R. 131). On January 29, 1996, Appellee filed Notice of Appeal (R. 132-134). On February 21, 1996, Appellee filed Appellant's Motion to Consolidate (R. 136). On December 27, 1996, the court per curiam affirmed but certified conflict with the decision in Van Meter v. Singletary, 21 Fla. L. Weekly D 2343 (Fla. 1st DCA Oct. 30, 1996). Notice to Invoke Discretionary Jurisdiction was filed January 10, 1997.

STATEMENT OF THE FACTS

Appellant seeks review of an Order from the Circuit Court, Hardee County, Florida, dismissing Appellant's Petition For Declaratory Judgment, Petition For Common Law Certiorari, and Petition For Writ of Mandamus (R. 97). Appellee filed a Motion to Dismiss (R. 25-53) without Notice of hearing on said motion. Appellant filed a Motion to Strike (R. 54-62). Appellee then filed an "amended" Motion to Dismiss and Motion For Leave to Amend (R. 63-94). Only seven days later, the Circuit Court entered an Order Dismissing the Petitions (R. 97) without a hearing or opportunity to be heard. Appellee filed a Motion to Rescind Order or Alternative Motion For Rehearing and contemporaneously filed an amended Motion to strike (R. 98-127). Appellee filed Opposition (R. 128-130), arguing that Appellee's Motion For Leave was never granted (R. 129). Appellant maintains that he was misled by the erroneous facts stated in Appellee's first Motion to Dismiss, was not aware of all of the relevant material facts until Appellee filed the Amended Motion, and the Circuit Court entered the Order prematurely without a hearing or opportunity to be heard, and thus, the Court did not have all of the relevant material facts before it. The record does not show as a matter of law that Appellant is entitled to no relief or that he failed to state a cause of action or could not state a cause of action by amendment, and the Motion to Dismiss contained material issues of fact requiring a hearing. Thus, the Court abused its discretion denying Appellant's Petitions and Dismissing them.

The District Court of Appeal, Second District, per curiam affirmed, but certified conflict with the decision in Van Meter v. Singletary, 21 Fla. L. Weekly D 2343 (Fla. 1st DCA Oct. 30, 1996)(declaring unconstitutional s. 95.11(8), Fla. Stat., enacted by Laws 1995, c. 95-283, s. 2, eff. June 15, 1995).

SUMMARY OF THE ARGUMENT

Section 95.11(8), Fla. Stat., is an unconstitutional violation of the doctrine of separation of powers expressed in art. II, s. 3, Fla. Const. because Art. V, s.s. 3(b)(7) & (8), 4(b)(3) and 5(b), Fla. Const. vests 'exclusively' in the Supreme Court, the district courts of appeal and the circuit courts, respectively, the power to issue extraordinary writs. Further, since the time for filing such writs is procedural rather than substantive, the authority to adopt rules for such practice and procedure in all courts is vested solely in the Supreme Court by art. V, s. 2(a), Fla. Const. Moreover, extraordinary remedies are generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches, thus precluding applicability of s. 95.11(8) as it is a statute of limation. Additionally, the wording "shall be filed within the time provided by law" refers to judicial rather than legislative pronouncements, reflecting the intent to preserve the power reserved by the Supreme Court regarding procedural matters, as a contrary construction would defeat the very purpose of the great writs, e.g., to afford just, speedy, full and complete determination of causes and to further justice where no other remedy is available. On the other hand, absent express intent, it can not be presumed the legislature intended to veto or repeal, by two-thirds vote, rules adopted by the Supreme Court, and while existing statutes were adopted as rules promulgated by the Supreme Court, the Legislature had no authority to amend or supersede the rules, including Fla.R. Civ. P. 1.630. Nor can the Supreme Court delegate its authority to the Legislature to promulgate rules because the legislature is not competent to do so and such would effectually amend or abrogate a right resting in either substantive or adjective law. Further, public necessity requires the Supreme Court to exercise its powers; otherwise, it is recreant to the trust reposed in it by the people.

The recent amendments to Fla.R.App.P. 9.100 have no impact on rule 1.630 proceedings, since the 30-day time frame imposed on proceedings under rule 9.100

are designed to mirror proceedings formerly available under rule 9.140(b) and s. 120.68, which are appellate in nature, while proceedings under rule 1.630 are evidentiary in nature, requiring full use of all rules of civil procedure.

Finally, the doctrine of stare decises prevents extraordinary remedies from being subjected to statutes of limitation. Further, it is incumbent upon the Supreme Court to create an ordinary remedy for judicial review of disciplinary proceedings rather than infringing on extraordinary remedies, especially in a manner that discriminates in violation of equal protection by creating a sub class of prisoners. Moreover, the time frame creates severe hardship and excessive burdens upon prisoners due to restriction on access to legal research material and time for preparation of legal documents.

ISSUE

WHETHER SECTION 95.11(8), FLORIDA STATUTES IS AN UNCONSTITUTIONAL VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS EXPRESSED IN ARTICLE II, SECTION 3, OF THE FLORIDA CONSTITUTION

Section 95.11(8), Fla. Stat., was declared invalid as "an unconstitutional violation of the doctrine of separation of powers expressed in article II, section 3, of the Florida Constitution." Van Meter, Jr. v. Singletary, 21 FLW(S) 2343, 2344 (1st DCA Oct. 30, 1996). The court construed art. V, s.s. 3(b)(7) & (8), 4(b)(3) and 5(b), Fla. Const. as vesting "exclusively" in the Supreme Court, the district courts of appeal and the circuit courts, respectively, the power to issue extraordinary writs, including writs of mandamus, reasoning,

> In State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (1933), our supreme court concluded that the intent behind the constitutional grant of such power was to vest in the courts the full and complete authority to grant such writs, and that the legislature was prohibited from interfering with that power in any way. Similarly, in Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930), the court concluded that the legislature could not extend, limit or regulate the power conferred on the court by the constitution to issue writs of certiorari. And, in Palmer v. Johnson, 97 Fla. 479, 121 So. 466 (1929), the court said that the legislature could not constitutionally impose restrictions upon the time within which one might seek a writ of certiorari to review the deci-

sion of the lower tribunal, because such power rested exclusively in the court.

Id, at 2344.

Article V, s.2(a), Fla. Const. provides that, "The supreme court shall adopt rules for the practice and procedure in all courts. . . ." Thus, according to Haven Federal Sav. & Loan v. Kirian, 579 So.2d 730 (Fla. 1991), the court:

> must determine whether the statute concerns matters of substantive law, which is within the legislature's domain, or whether it concerns matters of practice and procedure, which this Court has the exclusive authority to regulate. Market v. Johnston, 367 So.2d 1003 (Fla. 1978). Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. State v. Garcia, 229 So.2d 236 (Fla. 1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. Adams v. Wright, 403 So.2d 391 (Fla. 1981). On the other hand, practice and procedure 'encompass the course, form, manner, means, methods, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.' In re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring). It is the method of conducting litigation involving the rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So.2d 114 (1941). . . . Where this Court promulgates rules relating to the

practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. School Board v. Surette, 281 So. 2d 481 (Fla. 1973), receded from on other grounds, School Board v. Price, 362 So. 2d 1337 (Fla. 1978).

Id. at 732-33.

A problem arises because s. 95.11(8), Fla. Stat., was enacted as a "statute of limitation." See State v. L.H., 392 So. 2d 294 (Fla. 2d DCA 1980) =

> Statutes of limitation derive their authority from the legislature; they are not judicial in nature. (Citations omitted). Before our new constitution authorized the supreme court to establish the time periods for the taking of appeals, the courts held that the determination of the time within which appeals could be taken was a legislative rather than a judicial function. Ramagli Realty Co. v. Craver, 121 So. 2d 648 (Fla. 1960); Saffan v. County of Dade, 159 So. 2d 102 (Fla. 3d DCA 1963), rev'd on other grounds, 173 So. 2d 138 (Fla. 1965)

Id. at 296, approved, 408 So. 2d 1039 (Fla.). See also, Williams v. Law, 368 So. 2d 1285 (Fla. 1979) =

> The sixty-day limit set forth in section 194.171(2) is not a time limit for filing an appeal from a decision of the Board of Tax Adjustment but, rather, constitutes a statute of limitations governing the time for filing an original action to challenge such decision. Since the legislature clearly has the authority to establish such limitations, no constitutional violation exists.

Id. at 1287-88. But see Strauss v. Sillin, 393 So. 2d 1205 (Fla. 2d DCA 1981) ("statute of limitations is generally regarded as being procedural in

character because it affects the remedy." Id. at 1206). However, the problem was circumvented in Van Meter since extraordinary remedies are generally regarded as not embraced within statutes of limitation =

> Historically, it has been generally recognized that 'while mandamus is classed as a legal remedy, it is a remedial process, which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles . . . . It is an extraordinary remedy which will not be allowed in cases of doubtful right . . ., and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches . . .. United States ex rel. Arant v. Lane, 249 U.S. 367, 371, 39 S.Ct. 293, 294, 63 L.Ed. 650, 652 (1919)(citations omitted). Accord State ex rel. Haft v. Adams, 238 So.2d 843 (Fla. 1970); State ex rel. Perkins v. Lee, 142 Fla. 154, 194 So. 315 (1940); Tampa Water-works Co. v. State ex rel. City of Tampa, 77 Fla. 705, 82 So. 230 (1919).

Id. at 2344.

Another problem was raised in Van Meter, by Justice Miner, dissenting, who reviewed the history of the rules regulating extraordinary remedies leading to the development of rule 1.630(c), Florida Rules of Civil Procedure ("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"), and concluded that the majority was incorrect in construing "'shall be filed within the time provided by law' may refer to judicially-developed law rather than law enacted by the legislature", Id. at 2345, as that explanation does not account for the phrasing in subsection (d) of the rule ("If the complaint shows a prima facie case for relief, the court shall issue: [an appropriate writ, summons or order]. The writ shall be served in the manner prescribed by law, except the summons in certiorari

shall be served as provided in rule 1.080(b)"). Id. at 2345. The majority opined "... we are unwilling to presume that the Supreme Court intended so cavalierly to surrender to the legislature a power which it had zealously guarded for so long. Instead, we believe that the court intended by such language to refer to the judicially developed law regarding the time within such relief must be sought -- i.e., the concept of laches." Id. at 2344. Notably, the dissent relied on one rule of statutory construction in construing rule 1.630:

> "See Bryan v. State, 114 So. 773, 775 (1927) ("The court is bound by the rules which must be construed as statutes are construed"). A statute [or a rule] must be, if possible, be read and interpreted in such a manner as to give effect to every provision thereof. See Forehand v. Bd. of Public Instruction, 166 So. 2d 668 (Fla. 1st DCA 1964)."

Id. at 2345. However, other rules of construction are highly relevant. See Singletary v. State, 322 So. 2d 557 (Fla. 1975) (procedural rules should be given a construction calculated to further justice, and not to frustrate it); Lehmann v. Cloniger, 294 So. 2d 344 (Fla. 1st DCA 1974) (all related rules should be construed in para materia and if, when so construed, ambiguities develop, those ambiguities should be construed in favor of, not in restriction of, access to the courts, including appellate courts); Glassman v. Deaville Enterprises, Inc., 99 So. 2d 641 (Fla. 3d DCA 1958) ("all rules of procedure must be used as tools for obtaining the just as well as the speedy determination of causes. O'Gara v. Hancock, 76 Fla. 1, 79 So. 167; Giddens v. Giddens, 146 Fla. 395, 1 So. 2d 163, 165." Id. at 642); Shares v. Murphy, 88 So. 2d 294 (Fla. 1956) (Purposes of rules of civil procedure are to enable trial courts to clear congested dockets and to liberate trial courts from many hard and fast technical procedural restrictions of common law, and to expand judicial discretion in procedural matters wherever full and complete justice so requires). These rules of construction and authorities clearly weigh heavily against the dissent's view in Van Meter, as such a construction of the rules' intent

would defeat the very purpose of the great writs, which, extraordinary in nature, were created to afford just, speedy, full and complete determination of causes and to further justice where no other remedy is available.

Discussing Article V, s.2(a), Fla. Const., in In re Clarification of Florida Rules of Practice & Procedure, 281 So.2d 204 (Fla. 1973)("...under the Constitution the Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature" Id. at 205), the Supreme Court clarified that,

> At the time the Civil Rules of Procedure were promulgated, there were various statutes in existence relating to procedure. The order adopting the rules (In re Florida Rules of Civil Procedure 1967 Revision, Fla., 187 So.2d 598) provides that all statutes not superseded by the rules or in conflict with the rules shall remain in effect as rules promulgated by the Supreme Court. (Citation omitted)... The adoption as rules of the Court of all statutes which have not been superseded or may be in conflict with the rules is primarily a matter of convenience or administrative expediency. Such adoption avoids the question of whether a matter lies within the field of substantive law or procedural law. The fact that this Court may adopt a statute as a rule does not vest the Legislature with any authority to amend the rule indirectly by amending the statute. In other words, an attempt by the legislature to amend a statute which has become a part of rules of practice and procedure would be a nullity.

Id at 205. Accord Graham v. Murrell, 462 So.2d 34, 35 (Fla. 1st DCA 1984)("a law clearly relating to practice and procedure [is]... void, unless the Florida Supreme Court has formulated a rule conforming with the perceived intent of the legislature framed by the enactment, thereby adopting the statute as its own."); Carter v. Sparkman, 335 So.2d 802 (Fla. 1976)(Justice England concurring)(individual and direct votes,

with knowledge and specific intent on the part of each chamber, rather than mere vote totals, that their action is intended to override the judgment of the Supreme Court as to a specific rule of practice or procedure, is required). See e.g., Williams v. Law, 368 So. 2d 1285 (Fla. 1979) (addressing s. 194.171(2), Fla. Stat.):

> this Court has adopted Rule 1.010, Fla. R. Civ. P. which provides that the form, content, procedure and time for pleadings in all statutory special proceedings[1] (such as replevin) shall be prescribed by the statutes for such proceedings, unless the civil rules specifically provide to the contrary. We do not find 1.140 and 1.500, Fla. R. Civ. P. to be specifically contrary to the portions of Sec. 78.065(2) here under attack. Therefore, the statute does not violate the Constitution and the trial court correctly denied the motion to quash service. (Original emphasis).

Id. at 1288. Summarily, the critical facts are that: 1) at the time the Supreme Court promulgated Rule 1.630, there was no time limit specified for filing extraordinary remedies, other than certiorari, by rule, statute, or judicial fiat; 2) the Supreme Court has specifically opined that extraordinary remedies are not subject to statutes of limitations and the Court is presumed to be cognizant of its own prior announcements; 3) the Supreme Court has historically restrained the legislature from interferring with the regulation of the extraordinary writs in any way; 4) the Supreme Court has not adopted any rule to incorporate or adopt the amendment by the legislature; 5) absent express intent, it can not be presumed that the legislature intended to override the judgment of the Supreme Court.

The dissent in Van Meter noted that:

> it might be argued that rule 1.630, to the extent it authorizes the legis-

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[1] -- Sub judice, extraordinary remedies, being constitutional in origin, do not fall within the meaning of "statutory special proceedings."

lature to impose the time limit contained in section 95.11(8), Florida Statutes. amounts to an unconstitutional delegation of judicial authority. See Haven Fed. Sav. & Loan Assoc. v. Kirian, 579 So.2d 730 (Fla. 1991)(Legislation regarding severence of counter claims in mortgage foreclosure actions declared unconstitutional); Market v. Johnson, 367 So.2d 1003 (Fla. 1978)(Section 627.7262, relating to joinder of a motor vehicle liability insurer, an unconstitutional invasion of rule-making authority).

Id. at 2344.

This view has merit as well. "[S]ince the constitution itself vests the power to issue quo warranto and mandamus in the Supreme Court, (footnote omitted) it is not competent for the legislature to change or modify either of these writs." 13 Fla. Jur. 2d Courts and Judges, s.18 & n.40. In Rose v. Palm Beach Cty, 361 So.2d 135 (Fla. 1978), the Supreme Court specifically opined that,

> where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements.

Id. at 137. The court reasoned,

> 'It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people.' State ex rel. Schneider v. Cunningham, 39 Mont. 165, 168, 101 P. 962, 963 (Mont. 1909).

Id. at 138 n.8. Further, courts may not by rule of practice either by statutory or inherent rule making authority amend or abrogate a right resting in either 'substantive or adjective law.' Lundstrom v. Lyon, 86 So.2d 771 (Fla. 1956). The constitutional right to competent regulation of extraordinary remedies, vested exclusively in the courts by art. II, s.3 and art. V, s.s. 3, 4 and 5, Fla. const., is itself 'substantive or adjective law.' Accordingly, delegation of authority to the Legislature is prohibitted.

Petitioner has not overlooked that the Supreme Court amended Fla.R.App.P. 9.100 less than one month after the opinion in Van Meter was decided, in Amendments to the Fla.R.App.P., 21 FLW(s) 507 (Supreme Court November 22, 1996) (effective January 1, 1997):

> (c) Exceptions; Petitions for Certiorari; Review of Non-Final 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.

Id. To determine the intent of the Supreme Court, a review of rule 1.630 Court Commentary, 1984 Amendment, is necessary:

> Rule 1.630 replaces rules and statutes used before 1980 when the present Florida Rules of Appellate Procedure were adopted. Experience has shown that rule 9.100 is not designed for use in trial court. The times for proceeding, the methods of proceeding, and the general nature of the procedure is appellate and presumes that the proceeding is basically an appellate proceeding. When the extraordinary remedies are sought in the trial court, these items do not usually exist and thus the rule is difficult to apply. The uniform procedure concept of rule 9.100 has been retained with changes making the procedure fit trial court procedure. (Emphasis added).

Id. Next, it is notable that Laws of Fla., ch. 92-166, s. 9, amending s. 120.52 (10)(d), Fla. Stat., see now, s. 120.52 (12)(d), Fla. Stat. (Supp. 1992), was held to apply retroactively. Endress v. D.O.C., 612 So.2d 645, 646 (Fla. 1st DCA 1993). However,

> In reaching this conclusion we note that many aggrieved prisoners may now be able to pursue a declaratory judgment under chapter 86, Florida statutes * * *. Furthermore, if any aggrieved prisoners who are now deprived of a chapter 120 remedy fail to satisfy the criteria for relief

by a declaratory judgment under chapter 86, it would appear that other remedies, such as an extraordinary writ, might then be invoked.

Id. at 646. More specifically, Jones v. D.O.C., 615 So.2d 798 (Fla. 1st DCA 1993):

> the appropriate remedy to seek review of an order denying an administrative appeal of a disciplinary report is by petition for extraordinary relief in the circuit court pursuant to Rule 1.630, Florida Rules of Civil Procedure. (Citations omitted). If the petition is denied, petitioner may then seek review of the final order of the circuit court pursuant to Rule 9.110, Florida Rules of Appellate Procedure. (Emphasis added).

Id. at 798. Prior to Endress and Jones, supra, and the amendment to s.120.52(10)(d), inmates were entitled to appeal disciplinary action by direct appeal into the appellate court pursuant to s.120.68, Fla. Stat. and Fla.R.App.P. 9.110(b).[12] That procedure was consistent with Fla.R.Civ.P. 1.010, as explained in Williams v. Law, supra, and as addressed previously, infra. However, even where no such appeal was taken, extraordinary relief was available in both trial and appellate courts. Brown v. State, 375 So.2d 66 (Fla. 2d DCA 1979):

> the circuit court did have jurisdiction to consider appellant's petition for habeas corpus. When appellant filed his petition in the circuit court, more than thirty days had passed since the confiscation of his gain time. Thus, Florida Rule of Appellate Procedure 9.110(b) barred review by a district court pursuant to Section 120.68, and so appellant's only avenue to relief was a habeas corpus petition..." We note that the first district court of appeal has on several occassions permitted prisoners to seek habeas corpus relief when they raised constitutional issues, without considering

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[12] -- See Dept. of Offender Rehab. v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1215 (Fla. 1978).

whether they could have sought administrative review. (Citations omitted). Id. at 67. The effect of Jones, supra, was to make extraordinary remedies under rule 1.630 in the trial court the exclusive remedy to address disciplinary actions, to extent of excluding proceedings under rule 9.100, whether in the trial or appellate court. Thus, it is clear the Supreme Court amended subsection (c)(4) of rule 9.100 to expand Jones to allow for extraordinary remedies under 9.030(c)(3), which due to Jones, were formerly available under rule 1.630 only. At the same time, recognizing that proceedings under rule 9.030(c)(3) are appellate in nature, the court applied a 30 day time frame to proceedings under rule 9.030(c)(3) only, to mirror the 30-day time frame for direct appeals formally available under rule 9.110(b) and s.120.68, Fla. Stat. See rule 9.100 Committee Notes, 1996 amendment =

> Subdivision (c)(4) is new and pertains to review formally 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)[13] 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).

Id. A contrary construction would have necessitated amendment to rule 1.630 (and Court commentary). Also illustrative is that rule 9.100 (f) imposes additional requirements to proceedings under "rules 9.030(c)(2) and (c)(3) to the extent that the petition involves review of judicial or quasi-judicial action." (Emphasis added). Disciplinary hearings conducted by administrative agencies qualify as "quasi-judicial action." The Committee Notes state =

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[13] -- The note does not say, "under rule 9.030(c)(3) and rule 1.630."

subdivision (f). ... If the proceeding before the circuit court is or may be evidentiary in nature, then the procedures of the Florida Rules of Civil Procedure should be followed. (Emphasis added).

Id. Summarily, a reasonable construction of the rules makes it clear that the Supreme Court intended prisoners to seek extraordinary remedies under rule 1.630 when the proceeding is evidentiary in nature, requiring application of all civil rules of procedure such as discovery, in which case a 30-day time frame does not apply. But when the proceedings are appellate in nature, rule 9.100 must be used, and the 30-day time frame does apply, to mirror former s. 120.68, Fla. Stat. and rule 9.110(b) appeals.

Additionally, the doctrine of stare decises[4] mitigates against the promulgation of any rule of procedure that serves as a statute of limitation for extraordinary remedies based on well-established pronouncements by the Supreme Court declaring such remedies not subject to statute of limitations, but subject to the equitable doctrine of laches. Infra. Since extraordinary remedies were created to afford just, speedy, full and complete determination of causes and to further justice where no other remedy is available, but are not available as a matter of right, and since judicial review of administrative disciplinary proceedings is commonplace rather than the exception, it appears incumbent upon the Supreme Court to create an "ordinary remedy," in order to reserve the great writs for their intended purpose, rather than to infringe on their extraordinary nature by imposing statutes of limitations -- especially to the extent of being unconstitutionally overbroad by oversweeping the right to equal protection, in that a subclass of prisoners has been created and adversly discriminated against, eg., prisoners litigating disciplinary reports but not prisoners litigating gain time, parole, confinement, or other matters. Moreover, the time limitation is grossly inadequate due to the nature of the subject matter,

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[4] -- Haag v. State, 591 So.2d 614, 618 (Fla. 1992)

since most disciplinary reports result in disciplinary confinement, and therefore, access to legal research materials is severely restricted. Notwithstanding, the Florida Administrative Code severely restricts the hours of access to the institutions' law libraries, and further restricts access based on verifiable deadlines. Rule 33-3.0055 (1), (2)(a) and (f), (16) and (17). On top of that, access is restricted based on:

1. The inmate's security classification and housing assignment;
2. Staff and space limitations;
3. Scheduled work and other assignments; and
4. Any other limitation based on the interests of security and order of the institution.

Id. at subs. (2)(a). Additionally, some institutions only have "minor collections," such as the institution confining Petitioner (Apalachee C.I.), adding to substantial delays due to the necessity of ordering materials from an institution having a "major collection," through normal mail channels. And as if that were not enough, the institution confining Petitioner has promulgated Institutional Operating Procedure 58.7.E., which states:

> Any inmate who can supply written proof of a court mandated deadline that falls within the next 20 days will be given reasonable access to the law library. Upon application to the law librarian, and after approval has been granted, they may be given a pass which will serve as an excusal from work for the purpose of working in the law library.

Inmates are required to work and therefore can not have access to the law library except for scheduled days off. Thus, inmates who are off-duty only on the same days that the library is closed have no access until within 20 days of their deadline. Apalachee C.I. Institutional Operating Procedure 2.7.A; and 58.7.A. and E. The court should be mindful that judicial review in such cases will generally be limited to constitutional issues that are extremely complex to the typical pro se litigant, who has no right to free counsel.[5] The above-stated reasons are comparable to those relied upon to expand

the time limitation imposed for filing motions to correct illegal sentence under Fla.R. Crim.P. 3.800 in Amendments to Fla.R.App.P. 9.020(g) and Fla.R.Crim.P. 3.800, 675 So.2d 1374 (Fla.1996)(providing for 10 days), amended by, Amendments to the Florida Rules of Appellate Procedure, 21 Fla.L.Weekly, (S) 507 (Fla. Nov. 22, 1996)(extended to 30 days). The court should note that grievance responses from the Secretary are delayed by mail substantially, sometimes exceeding 30 days.

CONCLUSION

WHEREFORE, premises considered the court is respectfully requested to declare s.95.11(8), Fla.Stat. unconstitutional and to amend the Court Commentary to Fla.R.Civ.P. 1.630 to reflect that proceedings pursuant to the rule are distinct from, and not governed by Fla.R.App.P. 9.030(c)(3) and 9.100(c)(4), and to amend Committee Notes to Fla.R.App. 9.100 accordingly, pursuant to Fla.R.Jud.Admin. 2.130.

Respectfully submitted,

/s/ [signature]

James Robert Kalway DC#067809

Apalachee Correctional Institution

P.O.Box 699

Sneads, FL 32460

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been served by U.S. mail this 26 day of February, 1997 to Charlie McCoy, Assistant Attorney General, Fla.Bar No.0333646, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050.

/s/ [signature]

James Robert Kalway pro se

5-- The Attorney General concedes that 72% of all inmates are functionally illiterate. Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985).