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

REPLY BRIEF OF APPELLANT

JAMES ROBERT KALWAY, #067809
Apalachee Correctional Institution
P.O. Box 699 - East Unit
Sneads, FL 32460-0699

ARGUMENT

ISSUE 1

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.

Kalway does not dispute any, and in fact agrees with all matters addressed by Singletary in his Answer Brief of Appellee (hereinafter "AB"), in section A. STANDARD OF REVIEW, or in section B. ARGUMENT ON MERITS, subs. 1. The Adoption of Fla.R.App.P. 9.100(c)(4). Id. at 5-7. However, Kalway does dispute section B, subs. 2. Response on Merits in its entirety. Id. at 7-23, as well as the Conclusion, Id. at 24.

Notably, Singletary makes no effort to correlate his argument to any relative argument in Kalway's Initial Brief (hereinafter "IB"), by reference. Accordingly, Kalway will attempt to do so herein.

Singletary alleges that "Kalway does not challenge the 30[-] (sic) day limitation period as unreasonably short, nor does he claim s. 95.11(8) should have had a grace period. This is significant, as his petition was filed 36 days after the Secretary of D.O.C. Denied relief (footnote omitted)."(AB.7). Contrarily, these matters were argued extensively by Kalway.(IB.20-21). Also, Singletary's footnote (AB.7 n.2) is a fact in dispute as addressed in Kalway's jurisdictional statement, first paragraph (IB.1), incorporated herein by reference.

Next, Singletary argues that it does not violate separation of powers for the Legislature to impose a reasonable statute of

limitation because "An inmate bringing such challenge under Rule 1.630 has had an adversarial, evidentiary hearing and two plenary reviews on the merits within D.O.C.", pointing out that s. 95.11 (8) expressly cross-references ch. 33, Florida Administrative Code (FAC), concluding that "no other writ can initiate plenary judicial review after adversarial, evidentiary hearing and two administrative reviews in which the reviewing entity may reweigh the evidence". (AB.7-9)(Emphasis added).[1] Singletary further proceeds to compare the standard of review in certiorari proceedings to all writs, including mandamus. (AB.9-11). However, from the beginning, Kalway relied on Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), which delineates the essential elements for declaratory relief, and Key Haven V. Bd. of Trustees of Internal Imp., 427 So.2d 153 (Fla. 1982), for the proposition that "it is proper to seek declaratory relief to determine if the administrative rules cited in Kalway's argument, when not complied with, implicated constitutional rights." (R.6-8 ¶¶ 4 & 5 respectively).

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1 -- Singletary also points to "several other cases relied on by the Van Meter majority", noting that "none of these cases involved anything comparable to inmate disciplinary proceedings at issue here." (AB.14). However, the majority drew no relevance to this fact in rendering its decision. Indeed, there are many situations comparable to inmate disciplinary proceeding followed by one or more levels of plenary review wherein evidence may be reweighed and which, in fact, must be exhausted prior to seeking extraordinary remedies, See e.g., 35 Fla.Jur.2d, Mandamus and Prohibition, s.44 &nn.28 & 29, unless it would be fruitless. Id. at s.45; 1 Fla. Jur.2d, Administrative Law, s. 147. See e.g., Fredericks v. School Board, 307 So.2d 463 (Fla.3d DCA 1975)(Five-level grievance procedure, the fifth being arbitration). Additionally, courts "will not reweigh or evaluate the evidence presented before the tribunal oragency whose order is under examination." DeGroot, supra at 916; Wolf v. McDonald, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 2d 879(1974).

Singletary does not address this remedy and it is questionable as to whether anything in his argument is even remotely relevant to it. Certainly, declaratory relief sought did not involve or request the court to "reweigh the evidence". Additionally, Kalway relied on DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957)(standard for review for certiorari relief)(R.8-9, ¶ 6), and applied the facts and law accordingly (R.9-10, ¶ 7), which clearly did not require the court to "reweigh the evidence". Finally, Kalway relied on DeGroot, supra at 916 (mandamus distinguished from certiorari) and specifically clarified that he "seeks declaratory judgment first to determine the existence of such rights, which if so determined, would be subject to enforcement by mandamus. State v. McNayr, 133 So.2d 312 (Fla. 1961)." (R.10-11, ¶ 8), again, without requiring the court to "reweigh the evidence". The relief sought is also abundantly clear (R.11-12).

Next, Singletary argues that, "Although nominally writs, actions by inmates are far more akin to typical civil causes of action", relying on Holcomb v. D.O.C., 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.") and Alexander v. Singletary, 626 So.2d 333,334 (Fla. 1st DCA 1993)(when trial court summarily denied relief after considering D.O.C.'s response to the order to show cause, the posture of the case was "comparable to appellate review of an order granting D.O.C.'s motion for summary judgment") (AB.11-12), and use of the word "complaint" in Rule 1.630 (AB.12-

13)[2], as well as In re Amendments to Rules of Civil Procedure, 458 So.2d 245,247 (Fla. 1984) and "Court Commentary" for the 1984 Amendment to Rule 1.630. (AB.13). However, these authorities fully support Kalway's argument which distinguishes proceedings filed under Rule 1.630 which are civil in nature and those filed under Rule 9.030(c)(3) which are appellate in nature (IB.16-19)[3]. See Art. V, s.5(b), Fla. Const. Indeed, proceedings under Rule 9.030(c)(3) are specifically called "petitions", in contrast to "complaints" under Rule 1.630. See Rule 9.030(c)(3) and Committee Notes, 1996 Amendment.

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2 -- The term "complaint" is also found in 1950 Common Law Rule 9 (b), superseded by 1954 R.C.P. 1.8(a). See Fla.R.Civ.P. 1.110(a) Historical Note, subtitle Prior Provisions, under subpart Law, and the Author's Comment -- 1967, third paragraph.

3 -- Whether stemming from prisoner disciplinary proceedings or otherwise, "The general nature of procedure in mandamus action is appellate and presumes that the proceeding is basically an appellate proceeding. In an appellate court, therefore, the proceedings are generally governed by the Florida Rules of Appellate Procedure. However, when mandamus is sought in a trial court, the appellate rules are difficult to apply. Therefore, when petitioning for a writ of mandamus in the circuit court, the Rules of Civil Procedure apply instead of the Appellate Rule." 35 Fla.Jur. 2d, Mandamus and Prohibition, s. 137. Further, "A mandamus proceeding is an original action as distinguished from a case on appeal. In contrast to an appellate proceeding, in mandamus, the record and evidence are made and offered in that proceeding." Id. at s.2. Moreover, "Mandamus is a proceeding at law in which the rules of practice and procedure in civil cases are generally applicable. Observation: The Rules of Civil Procedure merely codify preexisting

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Next, Singletary argues that the Van Meter majority resorted to a handful of "quite old cases" which "all stand for the unquestioned proposition that extraordinary writs, as historically conceived, were not considered typical civil causes of action[4]; and thus were subject to equitable doctrine of laches rather than

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(cont.3 --) common law principles with respect to the practice and procedure for the issuance of writs of mandamus." Id. at s.136. Clearly, Singletary bears undue emphasis upon the "nature of procedure" by which courts process an extraordinary writ, instead of upon the "nature of remedy" it serves to afford. Thus, "although classified as a legal remedy, a proceeding in mandamus is equitable in nature and controlled according to equitable principles." Id. at s. 12. Accordingly, "[w]hile forms of action and technical forms for seeking relief have been abolished [see Fla.R.Civ.P. 1.110(a)], and there is now one form of action to be known as a "civil action" [see Fla.R.Civ.P. 1.040], it is still important for many reasons to determine whether an action is legal or equitable." 22 Fla.Jur. 2d, Equity, s.3. "Such [equity] courts evolved from the need to grant justice in cases wherein the law courts, in view of their rigid principles, were deficient. The purpose of equity is to remedy defects in the law." Id. at s. 2.

4 -- Extraordinary writs "as historically conceived" as not being civil causes of action, has not changed, contrary to Singletary's implication. "The statute of limitations does not apply in mandamus proceedings, such a proceeding not being an 'action' or a 'civil action' within the meaning of limitation statutes. Instead, mandamus is generally controlled by the equitable doctrine of laches." 35 Fla.Jur.2d Mandamus and Prohibition, s. 139.

statutes of limitation", (AB.13). However, nothing in the Van Meter opinion or cases cited can be construed to imply that extraordinary remedies are not civil in nature or that it is "as historically conceived", or, more importantly that that was the basis of those decisions. See IB.11 quoting Van Meter at 2344.

Singletary drew special attention to three cases relied upon in Van Meter to distinguish s. 95.11(8) from them, concluding in each, respectively, that first, s. 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; second, the circuit court's jurisdiction is not enlarged or narrowed; and third, the circuit court is not precluded from issuing a writ of prohibition when D.O.C. lacks jurisdiction. (AB.15-17). As to the first, s. 95.11(8) precludes any and all remedies after the 30-day period expires; as to the second, jurisdiction is likewise narrowed to a 30-day period within which it can be invoked; as to the third, an inmate lacks standing to seek a writ of prohibition once entitlement to seek extraordinary relief is lost by failure to file within 30 days.

Singletary presumes the statute of limitation is reasonable but does not address Kalway's argument to the contrary. Compare AB. 17-18 with IB.19-21.

Singletary also adopts the Van Meter dissent, construing the phrase "provided by law" in rule 1.630(c) to include general law passed by the Legislature (AB.18-22), but fails to address Kalway's extensive argument against such a construction (IB.11-14).

Finally, Singletary argues that the doctrine of unlawful

delegation is inapplicable (AB.22-23). Again, Kalway extensively argued to the contrary (IB.14-15). The problem lies in the fact that the legislature historically could regulate statutes of limitation governing civil actions, but not equitable actions. Notably, the "statutory laches" provision, s. 95.11(6), Fla. Stat., allows laches to bar any equitable action that is not commenced within the time provided for legal actions concerning the same subject matter. 35 Fla.Jur.2d, Limitations and Laches, s. 118. Previously, statutes of limitation were not controlling but could be looked for for purposes of analogy and guidance. Id. at n.31. Further, "the 'leagal action concerning the same subject matter' as that of an equitable action within the meaning of the statutory laches provisions, must be the 'equivalent to' the 'equitable action'. In turn, the term 'equivalent to' has been construed as referring to the cause of action asserted in the equitable action and, thus, to connote 'the same as'." 35 Fla.Jur.2d, Limitation and Laches, s.118. "It is the inadequacy, not the mere absence of another legal remedy, and the danger of a failure of justice without it, that generally determines the issuance of mandamus." 35 Fla.Jur.2d, Mandamus and Prohibition, s.43 Formerly, 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), but that remedy was abrogated by the Legislature. (IB.17). Thus, there now is no adequate ordinary remedy and as a matter of equity, extraordinary remedies are appropriate. Thus, Singletary is also wrong in suggesting "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." (AB.21 n.5). Indeed, an ordinary remedy was not created, but abrogated. Nonetheless, while the right to judicial review of administrative agency action is now quite generally given by statutory provision, the Florida courts have very broadly and definitely established the right to judicial review of administrative action (or certain elements), such as its reasonableness and lawfulness, arbitrariness, or abuse of discretion, power, and authority to take the action complained of, etc., in courts of competent jurisdiction and in appropriate proceedings, even though a statute makes no provision for such review; and such review is often expressly stated to be a matter of constitutional right. Administrative agencies are subject to the judicial power of the courts as may be provided by the Constitution; and the Constitution, particularly the guarantee of due course or due process of law, and the provision which vests judicial power in the courts confers the power of and right to judicial review of the action of administrative agencies or to a review of certain elements of administrative action, such as its validity and lawfulness, power and authority to take the action complained of, reasonableness, arbitrariness, or abuse of discretion, etc. The justice dispensed by courts and the social and regulatory control exercised by administrative tribunals are treated as parts of a single system in which the courts wield ultimate authority. 1 Fla.Jur.2d, Administrative Law, s. 142. Getzen v. Sumter County (1925) 89 Fla. 45, 103 So. 104.

Notably,

> Both before, and under, the former Administrative Procedure Act, a final order by the administrative agency was necessary as a basis for review. The former Act provided that the "final orders" of an agency entered in any agency proceeding, or in the exercise of any judicial or quasi-judicial authority, should be reviewable by certiorari. The present Administrative Procedure Act still requires final agency action as a prerequisite to judicial review..."

Id. at s. 146. "Common-law certiorari will lie to review quasi-judicial action." 3 Fla.Jur.2d, Appellate Review, s. 475. "Finality, in turn, is established by determining whether the judicial labor required or permitted to be done by the ...[administrative agency] has been performed, other than such further proceedings and orders as may be necessary to enforce the decree." Id. at s. 51. Certainly, the order under review sub-judice is a final order of a quasi-judicial administrative proceeding. DeGroot v. Sheffield, 95 So.2d 912, 915 (Fla. 1957)("when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive.")(IB. ¶ 6).[5]

> It is a general rule that in the area in which the Constitution prevents the legislature from precluding judicial review of administrative action, the legislature may not indirectly avoid such constitutional requirements by imposing conditions upon the right to resort to the courts which intimidate the person affected from exercising such right. Where a party is given his choice between acceptance of the administrative action in the first place or becoming subject to excessive penalties in the event that his challenge to such action is not upheld in the courts, he is not afforded such opportunity for judicial review as satisfies the constitutional requirements.

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5 -- The question remains as to how Rule 9.100(c)(3) can apply when sub s. (c) states: "Exceptions; Petitions for Certiorari; Review of Non-Final Action."

1 Fla.Jur.2d, Administrative Law, s. 142. However, s. 57.085 (6), (8) and (9), Fla. Stat. (1997) provide for dismissal of any action, in part or in whole, deemed frivolous or malicious. Moreover, in such a case, a prisoner is now "subject to forfeiture of gain-time and the right to earn gain-time." The Attorney General concedes that 72% of all inmates are functionally illiterate. Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985). Yet, issues subject to judicial review are necessarily limited to violations of constitutional rights, i.e., due process. Moreover, Singletary emphasises that the grievance process is adversarial, rather than impartial. Thus, the inmate is always wrong.[6] Clearly then, a time limit for seeking judicial review is unreasonable.

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6 -- Ms. Celeste Kemp, Chief of the Inmate Grievance Department, DOC Central Office, issued a memorandum dated May 2, 1996, stating in part:

> THROUGHOUT THE EVOLUTION AND PROGRESS OF THE GRIEVANCE PROCEDURE, THERE HAVE BEEN RESPONSES THAT DO NOT APPEAR TO ADEQUATELY OR COMPLETELY ADDRESS THE ISSUES PRESENTED.
>
> SOME RESPONSES SEEM TO REFLECT AN ATTITUDE OF, "THE INMATE IS ALWAYS WRONG", "IT'S US AGAINST THEM", OR A FEELING THAT GRIEVANCES ARE A PERSONAL AFFRONT TO THE AUTHORITY/ INTEGRITY OF THE RESPONDING PARTY. IT SEEMS THAT THE RESULT OF THIS TYPE RESPONSE IS AN INCREASE IN THE NUMBER OF APPEALS, MORE DUPLICATION OF WORK, AND SUBSEQUENTLY, MORE CASES ENDING WITH COURT DECISIONS. THE ULTIMATE RESULT BEING THE DESTRUCTION OF THE INTENT OF THE PROCEDURE AND ITS OVERALL EFFECTIVENESS.
>
> ...AN INCREASE IN THE NUMBER OF REQUESTS WAS PARTIALLY DUE TO FORMAL GRIEVANCE RESPONSES THAT WERE INCOMPLETE OR INAPPROPRIATE.

CONCLUSION

Section 95.11(8), Fla. Stat. (1995) violates separation of powers. The decision below must be reversed and; if the cases are traveling together, the Van Meter decision approved.

Respectfully submitted,

/s/ _____
James Kalway, pro se

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been served by U.S. Mail this 7 day of April, 1997 to Charlie McCoy, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050.

/s/ _____
James Kalway, pro se