IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

STATE OF FLORIDA,

Appellant,

v. **Case No. 2D00-1374**
L.T. No. 99-8722

IN RE: THE COMMITMENT OF DARREN GOODE,

Appellee.

APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT COURT,
IN AND FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The record on appeal, including the transcript of the hearing held on November 22, 1999, shall be referred to by(R.), and the transcript of the hearing held on January 24, 2000 shall be referred to by (T.), followed by the appropriate page number.

Throughout this initial brief, the appellant shall refer to the appellee as "the appellee," "the respondent," or "Goode." The appellant shall be referred to as "the appellant," or "the State." The appellant's appendix shall be referred to as (Appellant's App.) followed by the appropriate letter, and page designation.

STATEMENT OF THE CASE AND FACTS

On October 28, 1999 the State filed a petition for civil commitment, seeking the involuntary civil commitment of Darren Goode, as a sexually violent predator, pursuant to section 394.910-394.930 Florida Statutes (1999)(R.1). The petition alleged that Goode had been convicted of a sexually violent offense on April 30, 1997 and sentenced to forty-two (42) months in prison, with a scheduled release date of October 28, 1999 (R.1). The petition further alleged that Goode suffered from a mental abnormality or personality disorder which made it likely that he would commit further sexually violent offenses if not confined to a secure facility, under the custody of the Department of Children and Family Services, for long-term care, custody and treatment (R.2).

Based upon the commitment petition and its attachments, which included a psychological evaluation of Goode performed by Dr. Greg Prichard, Ph.D., and a letter from the multi disciplinary team of the Department of Children and Families which recommended proceeding with the civil commitment, the lower court, on October 28, 1999 entered an order finding that probable cause existed to believe that Goode was a sexually violent predator (R.6). The order further directed that Goode ". . .must be taken into custody and held in an appropriate secure facility pursuant to Section 394.915 Florida Statutes" (R.6).

On November 22, 1999 a hearing was held before the Honorable

Judge Steinberg (R.39-83). It should be noted that this hearing was held within thirty (30) days of the finding of probable cause entered on October 28, 1999. During that hearing, Judge Steinberg made it clear that the case was assigned to a different division, however, in an effort to avoid further delay, the court appointed the public defender to represent Goode (R.62). The public defender then made moved to dismiss the petition based, in part, on the State's failure to bring the matter to trial within the initial thirty-day time period (R.63-65). Specifically, counsel stated, "[t]herefore, I'm asking the Court on the record to strike the Petition and to dismiss the case. It's not even reasonable to think that we would be able to proceed to a trial in six days" (R.63).

When the attorney representing Mr. Goode moved to dismiss the petition for failing to bring Goode to trial within thirty (30) days, the court denied the motion and instructed defense counsel to make his arguments to the judge the case was assigned to. That exchange proceeded as follows:

> THE COURT: Well, if you are telling me that you are moving to dismiss based on these matters, I'm going to deny it without prejudice. . . .
>
> MR. STANLEY: Thank you, Your Honor.
>
> THE COURT: Without prejudice and specifically,

because it's assigned to another judge.

MR. STANLEY: Okay.

THE COURT: And I want to give you an opportunity to present that to Judge Padgett. He's the Judge presiding over this case, You can even do it in writing, but right now I'm denying it.

Well, I don't see any authority to dismiss it. That's number one. And, number two, its assigned to another Judge. . . .I prefer that it be ruled on by the Judge that it's assigned to.

(R.66-67).

Later during the same hearing, Judge Steinberg refused to assign a trial date for Mr. Goode's trial, although he did assign a trial date for another defendant who was appearing before him at the same time:

MR. TAYLOR: Are you putting 12-16 for both of [the defendants trials]?

MR. STANLEY: I don't know what the deal is with the other case.

MR. TAYLOR: Need to do that in front of Judge Padgett.

THE COURT: Get with his [judicial assistant].

(R.82).

On January 6, 2000 defense counsel for Mr. Goode filed two (2) separate motions, titled Respondent's Motion to Dismiss and Respondent's Motion to Dismiss and Release From Custody Due to the Unconstitutional Application of Sections 394.910-394.929, Florida Statutes, the Involuntary Civil Commitment of Sexually Violent Predators' Act (R.9-32). One basis for these motions was the fact that the respondent had not been brought to trial within thirty (30 days of the finding of probable cause (R.10, 27-31).

On January 24, 2000, a hearing on the respondent's motions to dismiss was held before the Honorable Judge Padgett (T.1-24). During that hearing, the State argued that the trial had, in effect, been continued, during the previous hearing when Judge Steinberg refused to rule on the respondent's motion (T.19). At the time of that hearing, the State was within its thirty (30) day window for trial, but Judge Steinberg would not discuss setting Goode's case for trial, rather he instructed Goode's counsel to proceed with his motion to dismiss in front of Judge Padgett, who had been assigned to the case (T.20-21).

At the conclusion of the hearing On January 24, 2000, the court orally granted Goode's motion to dismiss based on the failure to commence the trial within thirty (30) days of the finding of probable cause (T.22). The lower court also appears to have expected the State to re-file the petition immediately (T.21-22).

A written order granting the respondent's motion to dismiss was entered on the same day, providing the following:

> 1. That the Respondent's Motion to Dismiss be, and hereby is, GRANTED; The Court finds that pursuant to Sections 394.916(1), Florida Statutes (1999), the Petitioner failed to bring the Respondent to trial within the required 30 days; the 30 day time limit for trial was not requested to be continued for good cause by either party or by the court on its own motion pursuant to 394.916(2), Florida Statutes, (19999); since the time limit for commencing trial in this case has expired, it is hereby ordered that the petition is dismissed (R.33).

The State filed a timely Notice of Appeal on January 27, 2000, and this appeal ensued.

SUMMARY OF THE ARGUMENT

The lower court erred in dismissing the civil commitment petition based on the failure to bring the case to trial within 30 days. First, the "term" shall, as used in Section 394.916(1), Florida Statutes (1999), is neither mandatory nor jurisdictional. Second, good cause existed for a continuance, and such good cause may be found to have existed even absent a specific request for a continuance within the initial 30-day period. Furthermore, provisions regarding the time in which a case must proceed to trial relate to practice and procedure in the courts; matters for the rule-making capacity of the Supreme Court. In promulgating such a statutory time period, the legislature exceeded its constitutional powers. Lastly, since the 30-day period specified by the legislature conflicts with the relevant provision of the Rules of Civil Procedure, Rule 1.440, the rules of civil procedure must prevail.

ARGUMENT

THE LOWER COURT ERRED IN DISMISSING THE INVOLUNTARY CIVIL COMMITMENT PETITION, AS THE FAILURE TO CONDUCT THE TRIAL WITHIN THE STATUTORY 30-DAY PERIOD IS NOT JURISDICTIONAL, AND THAT FAILURE DOES NOT DIVEST THE TRIAL COURT OF JURISDICTION TO PROCEED.

The sole reason for the dismissal of the civil commitment petition was the failure to bring the case to trial within 30 days of the initial determination of probable cause. As will be seen herein, that 30-day provision is not mandatory, and the failure to comply with it does not divest the trial court of jurisdiction. It will also be seen that, under the terms of the statute, good cause did exist for extending the time in which the trial would commence, and the court may make such a finding even after the 30-day period has expired, and even in the absence of an express request for such a determination.

A. Statutory Background

The sexually violent predators act became effective January 1, 1999, Section 916.31, et.seq., Florida Statutes (Supp. 1998), and was amended, and moved to Chapter 394, Section 394.910, et.seq., Florida Statutes (1999), effective May 26, 1999. The essence of the act is that the State may seek the involuntary civil commitment of qualifying individuals, who have a prior conviction for a sexually violent offense, who have a mental abnormality or personality disorder, and who, as a result of that mental abnormality or personality disorder are likely to commit further

sexually violent offenses if not confined for long-term care, control and treatment. The commitment proceedings are civil commitment proceedings; they are not criminal cases.[1]

Evaluation of potential sexually violent predators commences approximately one year prior to the end of the individual's confinement in a Department of Corrections prison. Section 394.913, Florida Statutes. After the evaluation is done by a multi disciplinary team created by the Department of Children and Families, which will typically involve a full clinical evaluation by one or more psychologists or psychiatrists, a recommendation is made to the State Attorney. Section 394.913, Florida Statutes (1999). The State Attorney then evaluates the case and determines whether to file a commitment petition. Section 394.914, Florida Statutes (1999).

Upon the filing of the commitment petition, the trial court must make an initial, ex parte, determination of whether there is probable cause to proceed with the case. Section 394.915(1),

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[1]Section 394.910, Florida Statutes (1999), refers to the proceedings as "civil commitment" proceedings. Section 394.915(1), Florida Statutes, 1999, provides that the proceedings are governed by the Florida Rules of Civil Procedure unless otherwise specified in the sexually violent predators act. The Supreme Court of the United States, in rejecting double jeopardy and ex post facto attacks on the Kansas sexually violent predators act, which is very similar to Florida's, has concluded that the commitment proceedings are not criminal in nature; they are remedial and non-punitive. *Kansas v. Hendricks,* 117 S.Ct. 2072 (1997). The Fourth District Court of Appeal, in finding that there was no entitlement to bail in these commitment cases, has similarly concluded that they are civil, not criminal, in nature. *Valdez v. Moore*, 745 So. 2d 1009 (Fla. 4th DCA 1999).

Florida Statutes. This, as in the instant case, is typically done on the day that the petition is filed. The respondent, at that time, is typically still completing a prior Department of Corrections prison sentence, and may have anywhere from a few days or weeks to several months remaining on the prison sentence. If the court finds that probable cause exists, the court directs that the person, upon completion of the DOC prison sentence, be transferred to the custody of the Department of Children and Families, and be held in an appropriate secure facility pending the commitment proceedings. Section 394.915, Florida Statutes (1999).

Section 394.916, Florida Statutes (1999), addresses the subsequent trial:

> (1) Within 30 days after the determination of probable cause, the court shall conduct a trial to determine whether the person is a sexually violent predator.
>
> (2) The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the interests of justice, when the person will not be substantially prejudiced.

The Act further provides that indigent persons shall be represented by the Office of the Public Defender. Section 394.916(3), Florida Statutes (1999). In the event that the case does not proceed to trial within 30 days, the statute provides for an additional adversarial probable cause hearing:

> Upon the expiration of the incarcerative sentence. . .the court may conduct an adversarial probable cause hearing if it

> determines such hearing is necessary. The court shall only consider whether to have an adversarial probable cause hearing in cases where the failure to begin a trial is not the result of any delay caused by the respondent. . .
> Section 394.915(2), Florida Statutes (1999).

B. <u>The Term "Shall is Neither Mandatory Nor Jurisdictional</u>

In the lower court, Goode argued that the language in Section 394.916(1), Florida Statutes, which provides that "the trial court shall conduct a trial" within 30 days of the probable cause determination, is mandatory, and that the failure to conduct the trial within that time period, absent a request for a continuance for good cause within the initial 30-day period, necessitates dismissal of the commitment petition. Goode relies, in part, on the decision of a Kansas appellate court, in *In Re Brown*, 978 P.2d 300 (Kan. App. 1999), construing a similar provision in Kansas' sexually violent predators act.

Notwithstanding the use of the word "shall" in section 394.916(1), the failure to hold the trial, or to seek a continuance, within the specified 30-day period, does not mandate dismissal of the petition. While the Kansas statute is, in fact, similar to Florida's, Florida based its legislation on that of several different states, including Washington, Kansas, Wisconsin, Arizona, North Dakota, Minnesota, Iowa and New Jersey. *See Senate Staff Analysis and Economic Impact Statement of the Committee on Children and Families* (April 8, 1999), for CS/SB 2192, p.2

(Appellant's Appendix A). Not only does the Kansas statute not provide either the sole or a unique model for Florida's legislation, but the time periods under the Kansas act are significantly different, thus suggesting that, as to the trial date, Florida's legislators were looking elsewhere for a model for the legislation.

In light of the foregoing, the recent decision of the Supreme Court of North Dakota, in *In the Interest of M.D.*, 598 N.W. 2d 799 (N. Dak. 1999), is highly significant. In that case, the Court addressed the North Dakota sexually violent predators act. Like Florida's, it provided that the trial shall be conducted within 30 days of the probable cause determination, and similarly permits the court to extend the time for good cause. Section 25-03.3-13, North Dakota Century Code; 598 N.W. 2d at 802. As in the instant case, the 30 day period expired without either a trial or a request for a continuance. On the basis of a request for a continuance, filed two days after the 30 day trial period expired, the trial court found good cause for a continuance and the Supreme Court affirmed that conclusion. 598 N.W. 2d at 803. The Court expressly rejected the argument that the failure to either conduct the trial or seek the continuance within the original 30-day period required dismissal:

> M.D. also suggests the original extension was improper because the petitioner's motion was made after the 30-day period required in N.D.C.C. s. 25-03.3-13 had expired. The

> statute does not require that the motion to extend be made within the original 30-day period. In a related context, this Court noted in *Nyflot,* 340 N.W. 2d at 182:
>
> > If, as the respondent contends, the fourteen-day limit is jurisdictional in nature, September 8 marked the end of the court's authority to order her detained and the end of the court's power to order her involuntary hospitalization and treatment. This would be so regardless of her mental state and the possible danger presented to herself, to others, or to property. We do not believe that such a construction would effectuate the intent of the Legislature as derived from the entire statute. The statute, read in its entirety, reflects a balance between the due process rights of the respondent and the respondent's possible need for treatment and society's interest in ensuring that that treatment is forthcoming.
> >
> > Similarly, we conclude the petitioner's failure to move for an extension until after the original 30-day period had expired did not deprive the court of authority to consider whether there was good cause to extend the time for the hearing.

598 N.W. 2d at 804.

The same reasoning would be applicable in the instant case. Florida's statute balances the interests of a respondent's due process rights with society's interest in the need for protection from those who, as a result of mental abnormalities, pose a current danger to society; and with society's interest in obtaining

treatment for the individual in need of it, to promote the prospect of an ultimate reintegration into society without the concomitant threat of danger on the part of the individual. Dismissing a commitment petition, when the person may be mentally ill or abnormal, and dangerous, does not promote any of the legislature's goals.

The broader question presented by the foregoing is whether the use of the term "shall" in a statute renders the statute mandatory or merely discretionary or directory. Florida case law reflects that there is not a single, simple answer to this; "shall" does not always mean "shall," just as "may" does not always mean "may." It is important to look at the entire statutory scheme and the full context in which the language is used. Highlighting the different ways that "shall" has been interpreted, and the different contexts for the particular interpretation, the Third District Court of Appeal, in *Allied Fidelity Insurance Co. v. State*, 415 So. 2d 109, 111 (Fla. 3d DCA 1982), summarized relevant case law, as follows:

> Whether "shall" is mandatory or discretionary will depend, then, upon the context in which it is used and the legislative intent expressed in the statute. *S. R. v. State*, 346 So.2d 1018 (Fla.1977). Thus, for example, where "shall" refers to some required action preceding a possible deprivation of a substantive right, *S. R. v. State, supra; Neal v. Bryant, supra;*[2] *Gilliam v. Saunders,* 200 So.2d 588 (Fla. 1st DCA 1967), or the imposition of a legislatively-intended penalty, *White v. Means,* 280 So.2d 20 (Fla.

[2]*Neal v. Bryant,* 149 So. 2d 529 (Fla. 1962).

> 1st DCA 1973), or action to be taken for the public benefit, *Gillespie v. County of Bay*, 112 Fla. 687, 151 So. 10 (1933), it is held to be mandatory. And, by the same reasoning, the permissive word "may" will be deemed to be obligatory "[w]here a statute directs the doing of a thing for the sake of justice...." *Mitchell v. Duncan,* 7 Fla. 13 (1857). But where no rights are at stake, *Reid v. Southern Development Co.,* 52 Fla. 595, 42 So. 206 (1906), and only a non-essential mode of proceeding is prescribed, *Fraser v. Willey,* 2 Fla. 116 (1848), the word "shall" is said to be advisory or directory only.

Thus, the Florida Supreme Court has repeatedly acknowledged that the term "shall," in appropriate circumstances, may be merely directory. *See Belcher Oil v. Dade County*, 271 So. 2d 118 (Fla. 1972); *Schneider v. Gustafson Industries, Inc.,* 139 So. 2d 423 (Fla. 1962). Other jurisdictions, when confronted with comparable questions, have observed that when the supposedly mandatory term "shall" is used in conjunction with "time" requirements, it is construed as merely directory, unless the statutory language is accompanied by an express sanction for noncompliance.

Most significantly for the instant case is a California decision, which dealt with the requirement in a mentally disordered sex offender (MDSO) statute that the hearing on a petition to extend commitment "'shall commence no later than 30 days prior to the time the patient would otherwise have been released. . . .'" *People v. Curtis,* 223 Cal. Rptr. 397, 399 (Cal. App. 1986).

Addressing the question of whether this requirement was mandatory or directory, the Court stated:

> With respect to time-limit statutes the general rule is that "requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." (*Edwards v. Steele (1979)* 25 Cal. 3d 406, 410, 158 Cal. Rptr 662, 599 P. 2d 1365.) In *Edwards* our high court suggested a proper test of legislative intent is to focus on the likely consequences of holding a particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of the enactment.

Given such a mode of analysis, the purpose of the MDSO statute was deemed to be primarily for the protection of the public and, as such the 30-day period was deemed directory: "It would be anomalous to construe a statute designed to prevent the release of dangerous people into the community in such a way that an inconsequential violation of a time requirement would allow the very release the statute is designed to prevent." *Id*.

A similar issue arose in yet another California case, *People v. Williams*, 91 Cal. Rptr. 2d 91 (Cal. App. 1999). California's Mentally Disordered Prisoners Act provides for involuntary commitment of individuals whose terms of parole are expiring and who satisfy the requisite mental conditions and dangerousness requirements. The Act provides that a trial shall commence at least 30 days before a defendant is scheduled for release from parole unless he or she waives the time period or the court finds

good cause. 91 Cal. Rptr. 2d at 96. In *Williams,* the trial was not held within that time, no hearing was held on the good cause issue, and no finding of good cause was made. *Id.* The Court held "that the trial court's failure to comply with the statutory procedure concerning commencement of trial did not divest it of fundamental jurisdiction to proceed," and further held that "the trial court did not automatically lose jurisdiction to proceed after defendant's scheduled release date." *Id.*

As in *Curtis, supra*, the California appellate court found that the time period was not mandatory, notwithstanding the statutory language that the trial "shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." 91 Cal. Rptr. 2d at 99-103. Several aspects of the appellate court's reasoning are highly relevant in the instant case. First, the court emphasized that "the deadline is primarily designed to serve the interests of the public, rather than the MDO, by providing reasonable assurance that an MDO who has been receiving treatment for a severe mental disorder will not be released unless and until a determination is made that he or she does not pose a substantial danger to others." 91 Cal. Rptr. 2d at 103. Similarly, the timetable of the Florida Act is designed to allow the involuntary commitment case to proceed to trial before the prison sentence expires, thereby providing the public with

protection against the release of a person who is dangerous as a result of the requisite mental condition.

Second, the California appellate court in *Williams* noted "that the lack of a penalty or consequence for noncompliance with a statutory procedure is indicate of a directory [as opposed to mandatory] requirement. . . . Section 1972(a) does not provide that, in the absence of waiver or good cause, a trial commenced fewer than 30 days before a release date is invalid. Nor does the statute prescribe a sanction or other consequence for commencing a trial in such circumstances." 91 Cal. Rptr. 2d at 103.[3] The same reasoning would be equally applicable to Florida's statutory provision, as there is no sanction or penalty provided for the failure to commence the trial within the specified time period.

The third significant reason for the statutory time period being deemed directory rather than mandatory was that a contrary construction would be violative of the clear public policy behind the Act:

> Last, we observe that if the 30-day deadline were mandatory, then the failure to comply would, in effect, automatically terminate an MDO's involuntary treatment, regardless of need, and require his or her release, regardless of the potential danger to others. Such a result is inconsistent with the purpose of the MDPA and elevates the secondary benefit of the deadline to an MDO over the fundamental

[3] The text of *Williams* then proceeds to cite several other cases for the proposition that the absence of an express statutory penalty suggests that time requirements are not mandatory. 91 Cal. Rptr. 2d at 103-104.

purpose of the MDPA; to protect the public.

91 Cal. Rptr. 2d at 104. The same principles are equally applicable under Florida's Act. *See* Section 394.910, Florida Statutes (1999).

The above quoted analysis from *Allied Fidelity* and the California cases is fully consistent with this contextual determination of whether shall is directory or mandatory. Similarly, Florida courts, when confronted with mandatory language as to "time" requirements, have been consistent with the approach used in the California cases. In *Lomelo v. Mayo*, 204 So. 2d 550 (Fla. 1st DCA 1967), the Court construed a statutory provision requiring an administrative order to be entered within 180 days from the date of filing of specified documents by a public utility. The Court held that "unless the body of the statute indicates a contrary legislative intent, mandatory words specifying the time within which duties of public officers are to be performed may be construed as directory only." 204 So. 2d at 553. The Court also quoted from the Florida Supreme Court, in *Stieff v. Hartwell*, 35 Fla. 605, 17 So. 899, 900-901 (Fla. 1895), for the proposition that, "[a]s a general rule, a provision in a statute, naming the time when an act is to be done in the assessment and collection of taxes, is a direction, and not a limitation. There must be something in the statute indicating that the time named was intended as a limitation, before the courts will construe it as

such."

Federal courts have adhered to the same principles. *See*, *Thomas v. Barry,* 729 F. 2d 1469, 1470 at n. 5 (D.C. Cir. 1984) ("The general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.'"); *Hendrickson v. Federal Deposit Insurance Corp.,* 113 F. 3d 98, 101 (7th Cir. 1997) (same); *William G. Tadlock Construction v. United States Department of Defense,* 91 F. 3d 1335, 1341 (9th Cir. 1996) (same).

In yet another recent case, the Fourth District Court of Appeal has, at least implicitly, concluded that the failure to conduct a trial within the statutory 30-day period is not a jurisdictional defect. In *Amador v. State*, 25 Fla. L. Weekly D259 (Fla. 4th DCA Jan. 26, 2000), a habeas corpus petition alleged that the commitment case had not been tried within the 30-day period. As Amador was in custody at a facility within the Fourth District's jurisdiction, but the trial court was beyond the Fourth District's jurisdiction, habeas corpus jurisdiction was limited, pursuant to a decision from the Florida Supreme Court, to determining whether proceedings in the trial court are "void or illegal." *Id.* The Fourth District held: "Considering that this is not a criminal

proceeding, but rather a 'civil commitment procedure for the long-term care and treatment of sexually violent predators,' section 394.910, we conclude that the Collier County judge's order refusing to discharge petitioner for a violation of his right to a speedy trial is not a void or illegal order over which we are authorized to exercise habeas corpus review." *Id.* Had the failure to comply with the 30-day time period been "jurisdictional" in nature, the trial court proceedings would presumably have been "void or illegal." Thus, the Fourth District, in *Amador*, has effectively, if implicitly, held that the 30-day time period is not jurisdictional in nature.

Thus, noncompliance with the mandatory "shall" in the instant case was not jurisdictional, as it was a time requirement, and it was not accompanied by any specified sanction or consequence for noncompliance. Moreover, given the total context of the statute, it is simply not a reasonable inference that the legislature intended individuals who pose a danger to the public to be released because the trial was not held within 30 days. Even in criminal cases, our speedy trial rule provides for a window period to capture those cases which otherwise slip through the cracks. As commitment cases are civil in nature, designed for the protection of the public, it is not reasonable to assume that the legislature intended to confer greater rights on those awaiting their commitment trials.

C. <u>Good Cause Existed to Continue the Hearing Date</u>

Good cause for continuance can be shown where a defendant is unavailable for trial. This is true even in criminal cases which mandate a speedy trial, and specifically allow for the dismissal of an action for failure to comply. Typically, the defendant's unavailability will be established based on pleadings filed by the defense, such as discovery requests, requests for pretrial hearings, etc., which indicate that the defendant is not yet ready for trial. *See, e.g., State ex rel. Furland v. Conkling*, 405 So. 2d 773 (Fla. 5th DCA 1981; *State v. Reaves,* 609 So. 2d 701 (Fla. 4th DCA 1992).

As noted earlier, the initial hearing on this matter was held before the Honorable Judge Steinberg, on November 22, 1999, approximately twenty-four (24) days after the signing of the order finding probable cause to detain the respondent (R.39). At that hearing the court appointed the public defender to represent the respondent, and the public defender moved, prematurely, to dismiss the petition based on the State's alleged failure to bring the matter to trial within the original 30-day time period (R.63-65). However, counsel for the respondent also instructed the court that it was ". . .not even reasonable to think that we would be able to proceed to trial in six days" (R.63).[4] By this statement alone,

[4]Although this statement is erroneously attributed to the court, in the transcript of the proceedings, it is obvious that the person speaking is counsel for the respondent. The paragraph, in its entirety, reads as follows: "[t]herefore, I'm asking the Court on

counsel for the respondent conceded that good cause existed for the continuance of the trial, and that rather than being prejudiced by the continuance, his client would actually be prejudiced by going forward with the trial within the initial thirty-day time period.

Shortly after that exchange, the court specifically refused to set the matter for a trial. When counsel for the State asked if Judge Steinberg was setting a December 16 trial date for both the case of Mr. Goode, and another defendant who was appearing before him at the same time, the court specifically told the attorneys to speak with Judge Padgett's judicial assistant to deal with any matter pertaining to Goode(R.82). Throughout the hearing of November 22, 1999 the court made clear its belief that any matters concerning the civil commitment of Goode, (other than the routine appointing of the public defender) should be handled by the judge who had been assigned to the case, Judge Padgett.

The Fourth District Court of Appeal, in *Meadows v. Kirscher*, 24 Fla. L. Weekly D2546 (Fla. 4th DCA Nov. 17, 1999), has already held that there was good cause for a continuance, under circumstances similar to those here. In *Meadows* the defendant was not brought into court until the 29th day following the initial probable cause order, due, primarily, to the "administrative misrouting of the file (the file had initially gone to the wrong

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the record to strike the Petition and to dismiss the case. It's not even reasonable to think that we would be able to proceed to a trial in six days"(R.63).

criminal division in which other Ryce Act cases were pending on a constitutional question. . .). . .” *Id*.

The court in *Meadows* found that “. . .even if, as petitioner argues, the legislature intended that the thirty-day time period for trial be jurisdictional, the statute itself allows for an extension of that period and continuances under certain circumstances. (Footnote reference omitted.) *Id.* In that case, the court determined that the “. . .administrative misrouting of the file. . . and the necessity to allow the parties, and the judge, to establish the trial procedures and jury instructions for the trial constitute an adequate showing of good cause for the brief continuance ordered here and that the continuance was in the interests of justice. Petitioner did not establish any substantial prejudice arising from the continuance.” *Id*.

Here, as in *Meadows*, there was good cause shown for the continuance. First, defense counsel had introduced a pending motion to dismiss which the court was required to rule on prior to a trial. Fla. R. Civ. P. 1.440(a)(1999). Furthermore, as counsel for the respondent pointed out, it would probably not be possible for him to be adequately prepared for a trial within the remaining days before the expiration of the initial thirty-day period. Judge Steinberg then, on his own motion, effectively continued the trial date when he refused to set the matter on his calendar. Although he never used the exact words, the effect of his actions was the

same, and the matter was continued pending scheduling on Judge Padgett's calendar.

Finally, the fact that the failure to proceed to trial is not evaluated, in the instant case, until after the 30-day period had already passed, is of no significance, based on the reasoning of *M.D., supra.*

D. <u>Time Limits are Procedural and Governed by Court Rules</u>

Perhaps the most compelling reason why the 30-day period set forth is not mandatory or jurisdictional is that the statute conflicts with the applicable Rule of Civil Procedure. Since the setting of a trial date, in a civil case, is a matter of procedure, it is governed by rule, not by statute. Section 394.9155(1), Florida Statutes (1999) provides that "[t]he Florida Rules of Civil Procedure apply unless otherwise specified in this part." Rule 1.440, Florida Rules of Civil Procedure, governs the setting of trial dates. First, pursuant to Rule 1.440(a), a case is not at issue until 20 days after service of the last pleading. Subsequent to that point in time, any party may file and serve a notice that the action is at issue and ready to be set for trial. Rule 1.440(b), Florida Rules of Civil Procedure. If the court agrees that the action is ready for trial, the trial shall be set "not less than 30 days from the service of the notice for trial." Rule 1.440(c), Florida Rules of Civil Procedure. Pursuant to the provisions of Rule 1.440, this case was not ready for trial.

In view of the obvious conflict between the statute and the rule, it must be concluded that the provisions of the rule control. It has routinely been held that "only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts." *Markert v. Johnston,* 367 So.2d 1003, 1005 at n. 8 (Fla. 1979); *Johnson v. State*, 336 So.2d 93, 94-95 (Fla. 1976). In the event of a conflict between a statute and a rule, when both govern a matter of judicial procedure, the judicial rule of procedure must control. *R.J.A. v. Foster*, 603 So. 2d 1167 (Fla. 1992). Even in the absence of a court rule addressing a procedural issue, a statute setting forth judicial procedural requirements would be inoperative. *See, Military Park Fire Control Tax District No. 4 v. DeMarois,* 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981).

The setting of a trial date is a procedural matter, governed by rules of court as opposed to statutes. *R.J.A.* dealt with the same issue. A statute had provided that if a juvenile delinquency adjudicatory hearing was not commenced within a 90-day period, the petition would be dismissed with prejudice. By contrast, the similar provision in the Rules of Juvenile Procedure, had asserted that the speedy trial rule included an additional 10-day window period. The Supreme Court first rejected the contention that the statutory 90-day provision evidenced a legislative intent that dismissal must ensue after a violation, even though the statute used the term "must," comparable to the term "shall" in the statute

in the instant case:

> Petitioners take the position that the legislature, by section 39.048(7), established an absolute, rigid time period, which results in the application of a remedy more serious than the exclusionary rule without any inquiry into other factors, including how the delinquent has been prejudiced. We do not believe that the legislature intended by its enactment of section 39.048(7) to establish a much greater right to a speedy trial than is granted by the constitution by making the violation of a statutorily enacted time period per se prejudicial.

603 So. 2d at 1171. Furthermore, the Court concluded that the time period was "procedural in nature and, consequently, our rule of procedure takes precedence over the legislative enactment." *Id.* As far as dates related to lawsuits, the question of "when" an action was to be filed was substantive; the question of "how" the action was to be tried was procedural. *Id.* at 1171-72. The speedy trial time period governed "how" the action would be tried, and the relevant rule therefore prevailed over the statute. Thus, *R.J.A.* compels the conclusion that the provisions of Rule 1.440, Florida Rules of Civil Procedure, are controlling; and allegedly "mandatory" statutory language is not.

Similarly, just as the setting of the trial date is a procedural matter, governed by the rules of procedure, so, too, Rule 1.460, Florida Rules of Civil Procedure, regarding continuances, is likewise governing as to procedural matters. The interpretation of that rule has routinely been that the granting of

a continuance of trial rests within the discretion of the trial court. *Martin v. Garrison*, 658 So. 2d 1019 (Fla. 4th DCA 1995); *United States Employers Consumer Self-Insurance Fund v. Payroll Transfers, Inc.*, 678 So. 2d 908 (Fla. 2d DCA 1996).

E. Harmless Error

The last reason that dismissal is not appropriate flows from the analysis of a comparable statute in the State of Washington. Section 71.09.050 of the Revised Code of Washington provides that the involuntary commitment trial for sexually violent predators "must" take place within 45 days of a probable cause hearing. In *In re Clewley*, 1998 WL 97222 (Wash. App. 1998)(unpublished opinion)(Appellant's Appendix B), the case proceeded to trial long past the expiration of that date, under circumstances where the appellate court found that the statute had been violated. On appeal, Clewley argued that the order of commitment should be reversed and that he should be discharged, due to the violation of the statutorily mandated trial period. The Court rejected that argument, finding that the delay in the trial constituted harmless error, since, "in the event of vacation, the State could refile a petition and reinstitute the commitment proceedings." (Appellant's Appendix B). The Court then emphasized that since the proceedings were not punitive, there were no double jeopardy concerns. *See also Kansas v. Hendricks*, 117 S.Ct. 2072 (1997); *Hubbart v. Superior Court*, 969 P. 2d 589 (Cal. 1999); *In re Linehan*, 594 N.W.

2d 867 (Minn. 1999); *In the Matter of Hay*, 953 P. 2d 666 (Kan. 1998); *In re Young*, 857 P. 2d 989 (Wash. 1993); *Martin v. Reinstein*, 987 P. 2d 779 (Ariz. App. 1999); *State v. Post*, 541 N.W. 2d 115 (Wis. 1995); *In re Detention of Samuelson*, _____ N.E. 2d _____ (Ill. Jan. 21, 2000).[5] Thus, since a commitment petition could, in any event, be refiled, there is no compelling reason to go through additional paperwork, additional court hearings, etc., to get back to the same posture that the case is in now. Indeed, that would only serve to delay the trial date further.

Lest Goode claim that there is no right to refile a petition for commitment, the following should be noted. Section 394.914, Florida Statutes (1999), governs the filing of the petition and it does not specify any date by which the petition must be filed. The intent of the legislature is to focus on those with current mental abnormalities and those who are currently dangerous to the public. As long as those current conditions exist, the concept of a filing deadline is inconsistent with the legislative intent. By analogy, there would not be a statute of limitations on general civil commitments under the Baker Act. There, too, as long as the person is mentally ill and dangerous when the petition is filed, the petition would be timely.

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[5]All of the cited cases find that similar involuntary commitment schemes for sexually violent predators or sexually violent persons are civil and remedial in nature, and do not violate either double jeopardy or ex post facto principles, as they are not criminal or punitive.

For the foregoing reasons, there would be no merit to the claim that a petition must be filed prior to the expiration of the preexisting DOC prison sentence. Section 394.913(1) Florida Statutes (1999), requires the evaluative process to start one year prior to the anticipated release of the person from total confinement. "Total confinement," in turn, is defined as current detention in a physically secure facility under the Department of Corrections supervision. (In limited circumstances it could also be facilities of the Department of Children and Families or the Department of Juvenile Justice). This concept of "total confinement," however, was not intended to create a deadline for the filing of the commitment petition–i.e., the expiration of the DOC sentence. The concept of "total confinement," which exists only under Section 394.913, is being used as no more than a convenient mechanism for starting the evaluative process of those who are likely to qualify as sexually violent predators.

The elements of proof under the sexually violent predator act are those contained in the definition of sexually violent predator, in section 394.912(10), Florida Statutes (1999) (a conviction of a sexually violent offense; mental abnormality or personality disorder; likelihood of future acts of sexual violence if not confined). "Total confinement," or "custody" within the Department of Corrections, at the time of the filing of the petition, are not elements of proof as to a sexually violent predator.

A recent case from California corroborates this. In *Garcetti v. Superior Court*, 80 Ca. Rptr.. 2d 724 (Ca. App. 1999), the states commitment act defined a sexually violent predator as "an individual who is in custody under the jurisdiction of the Department. . ." *Id.* at 729. Notwithstanding this "custodial" element, the Court concluded that the fact that someone may not have been in lawful custody would not be a jurisdictional bar to the filing of the commitment petition: "However, it does not inevitably follow from the SVP Act's element of custody that a determination of lawful custody is a jurisdictional prerequisite to the filing of a petition under the SVP Act for civil commitment." *Id.* The purpose of the act was the protection of the public, and allowance of adequate time for evaluations and commitment proceedings prior to a scheduled prison release date. Given such purposes, wrongful custody at the time of the filing of the commitment petition would "not deprive the trial court of jurisdiction to entertain the People's petition for commitment pursuant to the SVP Act." *Id.* at 730.

Furthermore, under recent amendments to the Florida act, Section 394.9135(3) and (4), Florida Statutes (1999), dealing with "immediate release" cases, specifically contemplates a situation in which a commitment petition will be filed after the person has been discharged by DOC.[6] Applying the same type of analysis in the

[6]Under those provisions, if the State Attorney fails to file a petition within the statutorily authorized 48 hours, for immediate

instant case, it would have to be concluded that there is no harm in permitting the trial to proceed under the already filed petition, since, in the worst case scenario, the State could simply refile the identical petition and have Goode detained once again.

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release cases, the failure to comply with those time provisions, "which results in the release of a person who has been convicted of a sexually violent offense, is not dispositive of the case and does not prevent the state attorney from proceeding against a person otherwise subject to the provision of this part." Section 394.9135(4), Florida Statutes (1999). There is nothing in any other provision of the Act which prohibits the State from filing a commitment petition after the person, even in a non-immediate release situation, has been discharged from DOC. (An immediate release situation might typically be the case of a DOC prisoner whose release date is, unexpectedly moved up to an "immediate" release, by virtue of, for example, the granting of post-conviction relief resulting in a substantially reduced sentence.

CONCLUSION

As discussed throughout this brief, there are many reasons to conclude that the failure to comply with the statutory provision regarding a trial within 30 days does not mandate dismissal. The State believes that the statute was complied with, as good cause for the postponement was demonstrated and there was no showing of substantial prejudice to Goode's ability to prepare for trial. However, even absent such compliance with the statute, dismissal is not mandated, as the statute, contains no provision for dismissal as a sanction, and while setting forth a laudatory goal, the time limit expressed in the statute is procedural in nature, and not binding. As such, the applicable rules of court should apply and they clearly do not mandate dismissal. Appellee respectfully requests that the order entered by the lower court, granting the Respondent's motion to dismiss the petition for civil commitment, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. mail to Debra Bruckheimer, Public Defender's Office, Tenth Judicial Circuit, P.O. Box 9000, Drawer PD, Bartow, FL 33830, on this the __ day of May, 2000.

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Assistant Attorney General