IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-37

THE STATE OF FLORIDA,

Petitioner,

vs.

KEVIN KINDER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

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STATEMENT OF THE CASE AND FACTS

On September 3, 1999, the State filed a petition for civil commitment. (Petitioner's Appendix A-4).[1] This petition sought the involuntary civil commitment of Kinder, pursuant to sections 394.910, et seq., Florida Statutes (1999), Florida's sexually violent predators act, which went into effect on January 1, 1999. The petition alleged that Kinder had three prior convictions for sexually violent offenses; that he was serving a prison sentence with the Department of Corrections, with a scheduled release date of September 3, 1999; that he had a mental abnormality or personality disorder (pedophilia, antisocial personality disorder, among others); and that the mental abnormality or personality disorder made it likely that Kinder would engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (Pet. App. A-4). The petition further alleged that two psychologists had evaluated Kinder and concluded that he satisfied the criteria for involuntary civil

[1] Due to the expedited briefing schedule in the instant case, the Clerk of the District Court of Appeal has not yet prepared or transmitted a record on appeal. Furthermore, since the proceeding in the District Court of Appeal was an original writ proceeding, there was no record on appeal from the trial court. The primary trial court documents upon which the District Court of Appeal relied were contained in the Appendix to the Petition for Writ of Prohibition and the Appendix to Response to Petition for Writ of Prohibition, both of which were filed in the lower court. Due to the absence of any current record on appeal or index thereto, the State of Florida, in this Brief, is referring to the primary pleadings in the manner in which they were referenced in the lower court proceeding.

commitment under the sexually violent predators act. Id.

Pursuant to the commitment petition and its attachments, the Circuit Court, on September 3, 1999, entered an ex parte order finding that probable cause existed that Kinder was a sexually violent predator, and further ordered that the Department of Corrections transfer Kinder to the custody of the Department of Children and Families, to be held in an appropriate secure facility pending the commitment proceedings. (Pet. App. A-5). The order further directed the Clerk of the Circuit Court to notify the Public Defender's Office of the date, time and place of the "status review and determination of indigence hearing," for the purpose of determining whether the Public Defender would be appointed to represent Kinder. Id.

The status review/indigence hearing was set for September 21, 1999. (Pet. App. A-9, p. 11). However, due to an approaching hurricane on that date, the court was closed, and the initial hearing, at which time counsel would have been appointed, and a trial date set or continued, was not held, due to the closure of the court. Through an apparent oversight, a hearing on the case was not promptly rescheduled, and, when the State Attorney's Office realized this, on October 12, 1999, that office contacted the judge's judicial assistant, and obtained the date of October 18, 1999, for the initial

hearing in the case. (Pet. App. A-9, pp. 11-12).

On October 20, 1999, Kinder, represented by the Office of the Public Defender, filed a Motion to Dismiss, arguing that the failure to conduct a trial on the commitment case within 30 days required the dismissal of the case. (Pet. App. A- 8). A hearing was held on that motion on October 21, 1999. (Pet. App. A-9). At that hearing, an assistant state attorney represented the above facts, regarding the cancellation of the September 21st status hearing date due to the hurricane, and the rescheduling of the initial hearing between October 12th and October 18th. Id. at pp. 11-12. The trial court, after hearing argument from the parties, deferred ruling. On or about October 25, 1999, the State filed a Response to the Motion to Dismiss. (Pet. App. A-11).

On January 7, 2000, the lower court entered a written order denying the motion to dismiss. (Pet. App. A-10). After setting forth the above facts, and citing relevant provisions from the commitment statute and the rules of civil procedure, the order provided:

> . . . The Court does not believe that the legislature, by its enactment of Section 394.916(1), established a per-se rule mandating the sanction of dismissal in the event of non-compliance with the time limitation. Nor does it appear

> that the legislature intend to deprive a trial court of authority to exercise its discretion in granting relief in the most effective manner to enforce statutory created rights. "It has long been the public policy of Florida that litigation should, whenever possible, be resolved on the merits rather than on the basis of a procedural default." Coon Clothing Co., Inc. v. Eggers, 560 So. 2d 1357 (Fla. 3d DCA 1990). "Dismissal is an extreme sanction and should only be imposed as a last resort." Id. at 1358. Furthermore, the 30-day time-limitation prescribed in Section 396.916(1) cannot be equated to a statute of limitations set forth in Section 95.11 (1999) (setting time-limitations on various civil actions). In the present case, Respondent has not demonstrated irreparable prejudice resulting from the delay, nor does Respondent show that the sanction of dismissal is the only viable remedy under the circumstance. Accordingly, dismissal of the present action is not warranted.

(Pet. App. A-10, pp. 3-4).

Approximately two months after the entry of the trial court's order, Kinder filed a petition for writ of prohibition in the Second District Court of Appeal, and, upon entry of an order directing the State to respond, the State filed a response. Both of those pleadings were accompanied by appendixes which included the relevant trial court pleadings and transcripts.

On July 7, 2000, the District Court of Appeal issued its opinion. The Court concluded that the 30-day time limit for trial, set forth in the sexually violent predators

act, was mandatory, as it referred to the possible deprivation of a substantive right. The Court rejected the State's arguments that the time limit was directory; that the statutory time period conflicted with the rules of civil procedure and that the civil rules should control as to a procedural matter; and other arguments as well. As to the remedy, however, the Court declined to direct that the trial court proceedings be dismissed. Instead, the Court directed that Kinder immediately be released from his confinement by the Department of Children and Families while his commitment trial was still pending in the trial court:

> The Act provides no remedy for this violation. Kinder argues that the thirty-day time limit should be construed as jurisdictional, the expiration of which divests the trial court of authority to proceed. We disagree. However, because, in this case, we have construed the time limit to be a statutory right, the only remedy that will adequately redress this violation is the release of the detainee. [FN. 2] We, therefore, grant Kinder's petition to the extent that it seeks his release from confinement and direct the trial court to order Kinder's immediate release.
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> . . .
>
> [FN. 2] Because it is not yet properly before us, we decline at this time to address whether the Act permits the State to continue the commitment proceeding against Kinder on the originally filed petition.

(App. 1-2).[2]

[2] App. refers to the Appendix to this Brief.

Subsequent to the foregoing opinion, the State timely filed a Motion for Rehearing and/or Motion for Certification of Question of Great Public Importance, and a separate Motion for Rehearing En Banc. In those pleadings, the State argued, inter alia, that the remedy which the District Court of Appeal created (1) was expressly prohibited by statutory provisions; and (2) was a remedy which Kinder himself had never requested.

The State also filed a separate Motion for Stay Pending Rehearing, in which the State sought to stay Kinder's "immediate release" pending consideration of the rehearing motions. The District Court of Appeal granted that motion for stay.

Kinder filed a separate Emergency Motion for Stay Pending Rehearing, in which Kinder apprised the lower court that the trial court had scheduled the commitment trial for August 14, 2000. Kinder sought to bar the trial court from conducting the trial while the rehearing motions were pending in the appellate court. The State filed a response to that motion, pointing out that the appellate court's opinion did not preclude the trial court proceedings from continuing, and further pointing out that the ability to conduct a prompt trial, while the rehearing motions

were pending, would avoid the prospect of the release of an individual whom the trial court, through the entry of a probable cause order, had found to probably be a sexually violent predator in need of civil commitment. The appellate court denied Kinder's motion to stay the trial court proceedings pending rehearing.

On December 8, 2000, the District Court of Appeal denied the State's motions for rehearing and rehearing en banc. Kinder v. State, 25 Fla. L. Weekly D2821 (Fla. 2d DCA Dec. 8, 2000) (App. 3). The Court, however, reissued and revised its opinion, granting the State's request to certify a question of great public importance, and the Court certified the following question:

> WHETHER THE FAILURE TO COMMENCE A COMMITMENT TRIAL WITHIN THE 30-DAY PERIOD OF SECTION 394.916(1), FLORIDA STATUTES (1999), ABSENT A PRIOR CONTINUANCE FOR GOOD CAUSE, AUTHORIZES THE RELEASE OF THE DETAINED INDIVIDUAL, WHEN THE COMMITMENT CASE HAS NOT BEEN DISMISSED, AND THE TRIAL COURT HAS PREVIOUSLY MADE AN EX PARTE DETERMINATION THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE INDIVIDUAL IS A SEXUALLY VIOLENT PREDATOR IN NEED OF COMMITMENT.

25 Fla. L. Weekly at D2822 (App. 4). The Court's opinion also includes a request that this Court adopt rules of procedure designed to deal with problems arising with respect to the implementation of the sexually violent predators act. Id.

The State thereafter filed its Notice to Invoke Discretionary Jurisdiction, commencing the instant proceeding. During the pendency of the rehearing motions, the commitment case did proceed to trial (as noted in the lower court's order on rehearing [App. 3]), and the resulting commitment of Kinder, pursuant to the commitment verdict and judgment, is currently the subject of a pending appeal in the Second District Court of Appeal.

SUMMARY OF ARGUMENT

The lower court erred in holding that the failure to proceed to trial in accordance with the statutory 30-day trial period of the sexually violent predators act requires the immediate release of the alleged predator from the custodial confinement of the State. Insofar as the commitment trial proceedings remained pending, the legislature has expressly repudiated this remedy, by stating, in the relevant statutory provisions, that subsequent to the entry of an order finding probable cause that the person is a sexually violent predator, the person must be held in secure confinement until the commitment trial is held. Additionally, the statutory provision should be deemed directory, not mandatory, based upon a consideration of the legislative purposes, the lack of any substantive right of the alleged predator, and the failure of the legislature to specify any remedy for a violation of the statute. The First District Court of Appeal, in State v. Reese, infra, has expressly rejected the conclusions of the Second District in this case, and the First District has reached the correct conclusion - the 30-day trial period set forth in the statute is directory, not mandatory. Any contrary conclusion would mean that the legislature was improperly intruding into the domain of this Court's rule-making capacity, as the setting of a trial period is a matter of judicial procedure.

ARGUMENT

THE FAILURE TO COMMENCE A COMMITMENT TRIAL WITHIN THE 30-DAY PERIOD OF SECTION 394.916(1), FLORIDA STATUTES (1999), ABSENT A PRIOR CONTINUANCE FOR GOOD CAUSE, DOES NOT AUTHORIZE THE RELEASE OF THE DETAINED INDIVIDUAL, WHEN THE COMMITMENT CASE HAS NOT BEEN DISMISSED, AND THE TRIAL COURT HAS PREVIOUSLY MADE AN EX PARTE DETERMINATION THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE INDIVIDUAL IS A SEXUALLY VIOLENT PREDATOR.

In fashioning the remedy of the "immediate release" of Kinder pending further commitment proceedings in the trial court, the District Court of Appeal erred in concluding that the statutory 30-day trial period under the commitment act is a mandatory, substantive right of the individual against whom the State is proceeding. That remedy is expressly repudiated by the other provisions of the Act, and it is inconsistent with the entire purpose and structure of the Act. It is also a remedy which was never requested by Kinder. The First District Court of Appeal, in State v. Reese, 26 Fla. L. Weekly D38 (Fla. 1st DCA Dec. 20, 2000), has recently considered the identical issue and has expressly disagreed with the Second District's analysis in Kinder. Based on the ensuing arguments herein, it will be seen that neither "immediate release" nor dismissal of the commitment case would be an appropriate remedy.

With respect to the concept of "immediate release" as a remedy for noncompliance with the 30-day trial period, the State would initially note that it is a remedy which the legislature has expressly repudiated. Section 394.915(5), Florida Statutes (1999), expressly forbids any form of release pending trial, after a probable cause order has been entered:

> After a court finds probable cause to believe that the person is a sexually violent predator, the person must be held in custody in a secure facility without opportunity for pretrial release or release during the trial proceedings.

(emphasis added). Such probable cause was found in the instant case. (Kinder's Appendix to Petition for Writ of Prohibition, A-5). As that probable cause determination reflects the likelihood that the individual has a mental abnormality or personality disorder which renders the person dangerous - i.e., likely to engage in further acts of sexual violence if not committed for care, control and treatment - the remedy of "immediate release" is clearly contrary to the purpose of the Act as well.

The Second District's analysis further proceeds from the notion that the 30-day trial period under the statute is a "substantive" right of the respondent in the trial court proceedings. (App. 4). As will be seen in the subsequent discussion of the statutory scheme, that conclusion is erroneous. Under the scheme created by the legislature, it is intended that Department of Corrections prisoners be evaluated for potential civil

commitment at the conclusion of the prison sentence.[3] The evaluation is to commence approximately one year prior to the conclusion of the prison sentence, and that evaluation is expected, by the legislature, to be completed within 45 days, with recommendations to the State Attorney as to any need for civil commitment proceedings. It is thus envisioned that the State Attorney will have the needed information and ability to file commitment petitions approximately 9-10 months prior to the end of the person's prison sentence. With a statutory-30 day trial period being the norm envisioned by the legislature, it is clear that the legislature hoped that most, if not all, commitment trials would be completed well within the last 9 months of the prison sentence. Thus, if the case does not proceed to trial within the initial 30-day period, as envisioned by the legislature, the respondent in the trial court will still be incarcerated with the Department of Corrections, as he will be if the case does not proceed to trial within a second 30-day period or, indeed, during the next six or seven 30-day periods. Very simply, as envisioned by the legislature, regardless of whether the case proceeds to trial within the statutory 30-day period, a violation of that period would not have any substantive effect on the respondent, as the respondent is not going anywhere, with several months still remaining to be served on the concluding DOC prison sentence.

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[3] This summary is detailed, with full statutory references, at pp. 13-16, infra.

Under such circumstances, the statutory 30-day trial period does not confer any "substantive" rights on the respondent in the trial court proceedings. As will be further detailed herein, the goal of the legislative 30-day trial period is twofold: first, it protects the public against any possibility of release of a mentally abnormal and dangerous person at the conclusion of that person's prison sentence; and, second, it eliminates the need for costly and time consuming adversarial/evidentiary probable cause hearings in the trial court, which can be triggered by the failure to proceed to trial within the initial 30-day period. Neither of these purposes is for the benefit of the respondent in the trial court proceedings. Those purposes are inconsistent with the creation of a substantive right on the part of the trial court respondent.

A. <u>Statutory Background</u>

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.[4]

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 multidisciplinary 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 who prosecuted the most recent conviction for a sexually violent offense. 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).

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[4] 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, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (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). The Fifth District has similarly concluded that the proceedings are civil in nature. Westerheide v. State, 767 So. 2d 637 (Fla. 5th DCA 2000), rev. granted and pending.

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), 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.
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> (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. The Term "Shall" is Neither Mandatory Nor Jurisdictional

Kinder argues 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. Kinder relies, primarily, 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. The lower Court relies on the same concept of the time period being "mandatory" as the basis for its remedy of "immediate release" pending further trial court proceedings.

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 (March 30, 1999), for CS/SB 2192, p. 20. 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, regarding pre-petition assessments, etc., 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, or releasing a person pending a commitment trial, when the person may be mentally ill or abnormal, and dangerous, does not promote any of the legislature's goals.

A Wisconsin appellate court, in In re the Commitment of Matthew A.B., 605 N.W. 2d 598 (Wis. App. 1999), has similarly concluded that the statutory time period for the trial in a sexually violent persons commitment case is not mandatory, and that the expiration of that time period does not divest the trial court of jurisdiction to proceed.

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; 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. 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, this 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.

As the emphasis on "mandatory" uses of "shall" is on the question of the existence of substantive rights, as set forth previously herein, the 30-day provision does not vest any alleged sexually violent predators with a substantive right. See, pp. 11-12, supra.

Most significantly for the instant case is a California decision, which dealt with the requirement in a mentally disordered sex offender 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 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. . . . Second 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.[5] 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:

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[5] 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.

> 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 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, 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, and is thus not "mandatory."

In light of the foregoing, the First District's conclusion, in Reese, that the 30-day time period herein is directory, rather than mandatory, is eminently correct. As that Court noted, the Second District's opinion herein is repudiated by the statutory scheme itself. Not only does section 394.915(5), Florida Statutes (1999), expressly prohibit the release of a person after a probable cause determination and pending commitment trial, but, section 394.915(2), Florida Statutes (1999), contemplates that an adversarial probable cause hearing will be held only if the case has failed to

proceed to trial within the statutory 30-day period. Reese, 26 Fla. L. Weekly at D38. That statutory provision would be rendered meaningless by the Second District's statutory interpretation, as there would be no ability to follow the mandate that a person be kept in secure confinement, pending commitment trial, after an adversarial probable cause hearing results in a second determination of probable cause. Section 394.915(4), Florida Statutes (1999).

Thus, the adversarial probable cause hearing provisions are highly relevant in demonstrating the fallacy of the Second District's reasoning, and those provisions led the First District, in Reese, to conclude that the adversarial probable cause hearing and ensuing order of probable cause starts a new 30-day trial period running, and to further conclude that, in any event, the 30-day trial period is directory rather than mandatory. 26 Fla. L. Weekly at D38. Those conclusions were further corroborated by the language in section 394.916(2), Florida Statutes (1999), authorizing continuances upon a "showing of good cause." Id.

Thus, noncompliance with the term "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. Good Cause Existed to Continue the Hearing Date

Not only was the 30-day time period not jurisdictional, but, good cause for a continuance of the trial period is reflected by the record. The basic reasons in this case are a combination of the effect of the threatening hurricane and clerical errors in having the case promptly rescheduled for a hearing in the aftermath of the reopening of the trial court after the hurricane threat had passed. As a result of the hurricane threat, the court was closed on the date on which a pretrial hearing would have been held, addressing preliminary matters, including the appointment of counsel and the setting of the trial date and/or granting of continuances beyond the 30-day period. Although the hearing obviously should have been reset in a reasonable time after the court reopened, a clerical oversight, resulting from the unanticipated hurricane threat,

is something which will periodically occur. As the instant proceedings are civil in nature, it should thus be noted that Florida courts have often found that clerical errors constituted good cause for continuing trial court proceedings. See Dohnal v. Syndicated Offices Systems, 529 So. 2d 267 (Fla. 1988) (clerical error held to constitute good cause to justify extension of time to file independent action on claim against an estate); Kelly Assisted Living Service, Inc. v. Estate of Reuter, 681 So. 2d 813 (Fla. 3d DCA 1996) (same); Ricciardelli v. Faske, 505 So. 2d 487 (Fla. 3d DCA 1987). Similarly, given that the instant proceedings are likewise civil in nature, good cause should be held to exist for purposes of the statute authorizing continuances of trial dates.

The Fourth District Court of Appeal, in Meadows v. Krischer, 763 So. 2d 1087 (Fla. 4th DCA 1999), has already held that good cause for a continuance existed under similar circumstances. In that case, arising under the same sexually violent predators act, Meadows was not brought into court until the 29th day following the initial probable cause order. The delay in this initial appearance was attributed primarily to the newness of these commitment proceedings and confusing statutes. Thus, the opinion in Meadows refers to the "administrative misrouting of the file (the file had initially gone to the wrong criminal division in which other Ryce Act cases were

pending on a constitutional question and was not sent to the correct judge until September 22 [the 27th day after the initial probable cause determination]). . . ." Id. The Court found that good cause for continuing the trial existed. The basis for good cause is essentially the same in both this case and Meadows; the fact that the postponement is not evaluated, in the instant case, until the 44th day after the initial probable cause order is, based on the reasoning of M.D., supra, of no significance.

D. Time Limits are Procedural and Governed by Court Rules

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) 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 field that "only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts." Markert v. Johnston, 367 So.2 d 1003, 1005 at n. 8 (Fla. 1979); Johnson v.

State, 336 So.2 d 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. This 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). For the foregoing reasons, the First District, in

Reese, properly concluded that construing the term "shall" as directory avoids the otherwise inevitable conclusion that the legislature improperly intruded into this Court's rule-making domain. Reese, 26 Fla. L. Weekly at D38.

The lower Court apparently declined to address this aspect of the State's argument on the grounds that the State, in its appellate court pleadings, did not assert that the statutory 30-day trial period was "unconstitutional." Kinder, 25 Fla. L. Weekly at D2822 (App. 4). The State's Response to Petition for Writ of Prohibition in the Second District Court of Appeal asserted that the statutory provision conflicts with the civil rules of procedure, and that a conflict as to such a procedural matter must result in the rule controlling over the statute. (See Response to Petition for Writ of Prohibition, pp. 15-18). Additionally, the State expressly relied on the analysis set forth in this Court's opinion in R.J.A. v. Foster. The Second District's conclusion that the issue of whether the rule controls over the statute was somehow "not before" that Court is clearly specious.

D. Harmless Error

The last reason that neither "immediate release" pending trial, nor dismissal is 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) (Appendix to Response to Petition for Writ of Prohibition, pp. 31-39), 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." Id. at p. 3. (Resp. App. 36). The Court then emphasized that since the proceedings were not punitive, there were no double jeopardy concerns. See also Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (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, 727 N.E. 2d 228 (Ill. 2000); Commonwealth v. Bruno, 735 N.E. 2d 1222

(Mass. 2000).[6] 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.

Likewise, it a commitment petition could, in any event, be refiled, as dismissals would be without prejudice,[7] such refiling would simply lead to the same reissuance of probable cause orders, and those orders would again trigger the secure confinement of Kinder pending commitment trial on the refiled petition. Once the petition for commitment was refiled, the court would the same finding as to the existence of probable cause, and the statute would then again mandate that the alleged sexually violent predator be held in secure confinement pending the commitment trial.

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[6] 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.

[7] Dismissals of civil cases for noncompliance with similar time periods are without prejudice, as they are not adjudications on the merits. See, e.g., Kohly v. Wallach, 580 So. 2d 880 (Fla. 3d DCA 1991) (dismissal for lack of prosecution within one year period of Rule 1.420, Florida Rules of Civil Procedure, was without prejudice); Southeast Mortgage Co. v. Sinclair, 632 So. 2d 677 (Fla. 2d DCA 1994) (same); Gaines v. Placilla, 634 So. 2d 711 (Fla. 1st DCA 1994) (dismissal for failure to effect service of process within 120-day period under Rule 1.070(j), Florida Rules of Civil Procedure, was without prejudice).

E. Remedies

The lower Court's opinion necessitates a consideration of what the appropriate remedy should be when there is a violation of the 30-day trial period. If this Court concludes that the civil rules of procedure prevail over the statute, that would be an academic question. However, even if the statute remains applicable, whether through this Court's opinion or procedural rules promulgated for the implementation of the sexually violent predators act, other remedies would exist. First, as noted by the First District in Reese, failures to comply with the 30-day trial period will often trigger adversarial (evidentiary) probable cause hearings for which there would not otherwise be an entitlement. Second, an aggrieved party, upon expiration of the 30-day period, can simply request that the trial court forthwith schedule a prompt trial and, upon the failure of the trial court to do so, can seek the setting of such a prompt date through the filing of a mandamus petition in the appellate court.

Such remedies promote the goal of protecting the public from those who are dangerous as a result of mental health conditions, as well as the goal of providing a quick trial. Remedies such as "immediate release" or dismissal are inconsistent with both the statutory language and the general purpose of the Act.

CONCLUSION

Based on the foregoing, this Court should reverse the lower Court and conclude that immediate release is not an appropriate remedy for a violation of the statutory 30-day trial period.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner on the Merits was mailed this 7th day of February, 2001, to JEANINE L. COHEN, Assistant Public Defender, Office of the Public Defender, Courthouse Annex, North Tower, 801 E. Twiggs Street, Fifth Floor, Tampa, Florida 33602-3548.

RICHARD L. POLIN
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that this Brief has been typed in Times New Roman, 14-point type.

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RICHARD L. POLIN