IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-37

THE STATE OF FLORIDA,

Petitioner,

vs.

KEVIN KINDER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent's Statement of the Case and Facts is based, in large part, on an Appendix which the Respondent has filed with the Brief of Respondent on the Merits. That Appendix, and the Statement of the Case and Facts which is based on it, include numerous documents which were not a part of the lower Court record and are thus not properly before this Court. Thus, Respondent's Appendix entries 4 (Respondent's pro se motion), 13 (July 26, 2000 transcript), 21 (Respondent's motion for continuance), 22 (August 11, 2000 transcript), 23 (Defendant's motion for continuance), 24 (Defendant's motion to withdraw), and 25 (August 14, 2000 transcript), 26 (Respondent's motion for relief), are all matters which were never made a part of any record before the Second District Court of Appeal below. As such, those matters are improperly before this Court, and both the Appendix and any reliance thereon in the Respondent's Brief on the Merits should be stricken.

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.

Three Florida appellate courts have now concluded that the term "shall," when used in the statutory provision for a 30-day trial in the sexually violent predators act, is directory, not mandatory. State v. Reese, 26 Fla. L. Weekly D38 (Fla. 1st DCA Dec. 20, 2000); State v. Osborne, 26 Fla. L. Weekly D629 (Fla. 5th DCA Mar. 2, 2001); and Amador v. State, 766 So. 2d 1061 (Fla. 4thDCA 2000) (by implication, finding that the provision is not jurisdictional). The lower Court herein has also, to some extent, found that the provision is not mandatory, as the Court expressly noted that noncompliance with the provision does not divest the trial court of jurisdiction.

Nevertheless, the lower Court found that noncompliance with the provision mandates release of the detained individual, prior to trial. The First District, in Reese, expressly disagreed with that. In addition to the reasons set forth in Reese, it must also be noted that the statutory scheme provides that once probable cause has been

found, the person must be held in secure confinement until the trial. Section 394.915, Florida Statutes. As the probable cause determination relates to the person's dangerousness, the legislative intent and policy are clear; such individuals should not be released pending trial. The lower Court has thus fashioned a remedy which was expressly rejected by the legislature, and which is clearly inconsistent with the legislative policies behind this statutory scheme.

The Respondent, in large part, asserts that release pending trial should not have been the remedy; that dismissal of the commitment petition should be the remedy. Initially, the State would note that the lower Court did not mandate dismissal. Insofar as the Respondent did not file any cross-petition for discretionary review, and insofar as there is no certified question before this Court as to the propriety of dismissal as a sanction, that issue is not even properly before this Court. See, Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983). Furthermore, the claim has been rejected by the Fifth District, in Osborne, the Fourth District, in Amador (rejecting habeas jurisdiction on the ground that the alleged noncompliance with 30-day provision was not jurisdictional in nature), and, by the Court below ("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.").

For the same reasons that the provision is not mandatory vis-a-vis the remedy

created by the Second District, the provision is not mandatory/jurisdictional in the context of any claim that there should be a dismissal. Kinder predicates the jurisdictional/dismissal claim on the rule of statutory construction - expressio unius est exclusio. Brief of Respondent, pp. 11-12. This maxim "is strictly an aid to statutory construction and not a rule of law." Smalley Transportation Co. v. Moed's Transfer Co., 373 So. 2d 55, 56 (Fla. 1st DCA 1979). Furthermore, it is a maxim which, when resorted to, is applied with the most extreme caution, as explained by the Supreme Court of the United States, in Ford v. United States, 273 U.S. 593, 611-12, 47 S.Ct. 531, 71 L.Ed. 793 (1927):

> It is urged that the principle of interpretation, Expressio unius est exclusio alterius, requires the implication from the reference to the adjudication of the vessel alone. This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.
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> . . .
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> 'It will, however, be proper to observe before proceeding to give instances in illustration of the maxim, Expressio unius est exclusio alterius, that great caution is requisite in dealing with it for, as Lord Campbell observed in *Saunders v. Evans*, it is not of universal application, but depends upon the intention of the party as discoverable on the face of the instrument or of the transaction; thus where general words are used in a written instrument, it is

> necessary, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied.'
>
> . . .
>
> 'It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'

Applying the foregoing principles in the instant case, while the 30-day provision does not contain any express disclaimer that it is not jurisdictional, that is manifested throughout the act in numerous other ways: the purpose of the act, the need for treatment, the public's need for protection, the ability to obtain continuances, and the lack of any express remedy of dismissal in the statute. Thus, in contrast to the above quoted maxim of statutory construction, other rules of statutory construction are much more compelling and applicable in the instant case. "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. . . . To determine legislative intent, we must consider the act as a whole - 'the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the

subject.'" State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). See also Tampa-Hillsborough County Expressway Authority v. K.E. Morris Allignment Service, Inc., 444 So. 2d 926, 929 (Fla. 1983) ("Statutes should be construed in light of the manifest purpose to be achieved by the legislation."); Mackey v. Household Bank, F.S.B., 677 So. 2d 1295, 1298 (Fla. 4th DCA 1996) ("Laws should be enforced with common sense and applied without losing sight of the legislative purpose behind their enactment. To do otherwise is to generate disrespect for the law by creating a morass of technical regulations with no connection to human experience."); Devin v. City of Hollywood, 351 So. 2d 1022, 1023 (Fla. 4th DCA 1976) ("The primary guide to statutory interpretation is to determine the purpose of the legislature."). Based on the foregoing, the legislative purpose is clearly to provide needed treatment to those with mental health problems that render them dangerous to the public, and to provide the public with needed protection. Those goals are not advanced by the manner in which the Kinder suggests that the statute should be interpreted, and the maxim upon which the Kinder relies is thus inapplicable.

The Respondent also relies extensively on comments from Representative Villalobos, at a legislative hearing, for the purpose of arguing that Florida's act was patterned after the Kansas act, and that the subsequent Kansas appellate court decision of In re Brown, 978 P. 2d 300 (Kan. App. 1999), should therefore be controlling in

Florida. Brief of Respondent, pp. 12-15.

Statements of individual legislators are utterly irrelevant, as legislative intent is determined from statutory language itself, and it has repeatedly been held to be improper to look to isolated statements from single legislators (which, inter alia, ignores the multitude of other legislators). Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983); State v. Patterson, 694 So. 2d 55, 58 (Fla. 5th DCA 1997); Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 166 (1993); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 893 (1991). Furthermore, Representative Villalobos had no knowledge of the In re Brown case, which was decided subsequent to the quoted statements, and he could thus not be expressing any approval of that of which he had no knowledge. Moreover, to whatever extent the intent of Representative Villalobos had any relevancy, he clearly did not want individuals to be released due to noncompliance with time periods: "This is a method simply of ensuring that if we release somebody [from prison] that we know is going to commit a crime, that has told people that as soon as they go out the door, they're going to find a child and commit a crime, this is a way that we can hold them and try and make them better so that they don't do that." (Respondent's Appendix 29, pp. 12-13). Such concerns are hardly consistent with releasing a dangerous and mentally

abnormal person into the community due to a failure to seek a continuance before the expiration of a 30-day trial period.

With respect to the Kansas appellate court's opinion in Brown, itself, that mandated dismissal which, as noted above, four District Courts of Appeal in Florida, including the Kinder court herein, have rejected. Moreover, as noted in the State's Initial Brief of Appellant, Brown is clearly an aberrational decision, reflecting an approach which has been rejected in numerous other jurisdictions in similar contexts. In the Interest of M.D., 598 N.W. 2d 799 (N. Dak. 1999); In re the Commitment of Matthew A.B., 605 N.W. 2d 598 (Wis. App. 1999); People v. Curtis, 223 Cal. Rptr. 397, 399 (Cal. App. 1986);[1] People v. Williams, 91 Cal. Rptr. 2d 91 (Cal. App. 1999). The essence of Kinder's response to such cases as these is to say that other jurisdictions provide greater procedural safeguards than Florida. While that is an utter irrelevancy, it is also one that is clearly erroneous. Florida provides for counsel, full trials, cross-examination, experts when needed, and extensive post-commitment review proceedings. The only safeguard which Kinder focuses on is the entitlement to an adversarial probable cause hearing. That is simply an irrelevancy. First, regardless of what the Florida statute provides, the Fourth District, in Valdez v.

[1] The Fifth District, in Osborne, supra, was particularly impressed by the reasoning of Curtis.

Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999), and State v. Kobel, 757 So. 2d 556 (Fla. 4th DCA 2000), effectively held that upon completion of the prison sentence, there must be an adversarial probable cause hearing within five days of a demand by the defense. That is currently the law in Florida and is not subject to review by this Court at this time. Moreover, the Florida act attempts, to a degree unequaled by other jurisdictions, to fully process and try these commitment cases before the prison sentence expires.[2] Thus, the distinctions proffered by Kinder are either non-existent, or they are distinctions without substance.

In the Initial Brief of Petitioner on the Merits, the State presented the argument that pursuant to rules of statutory construction, when a statute provides for a time period, the absence of a remedy for non-compliance in the same statute is an indication that the time period is directory, rather than mandatory. Kinder relies on two Florida cases, in an effort to negate that assertion. Neither case supports Kinder's position. Kinder first relies on Machin v. Lumber Transport, 556 So. 2d 446 (Fla. 1st DCA 1996). That case simply held that when a notice of appeal had been filed, the lower tribunal was without jurisdiction to entertain a motion for an extension of time

[2] Florida's act starts the notice and evaluation periods a full year before the anticipated expiration of the prison sentence. Section 394.913, Florida Statutes. Other state acts wait until much later in the final year of the prison sentence and thus increase the likelihood that trials will be held after the prison sentence expires.

for the filing of a supersedeas bond. Second, the case dismissed an appeal due to the failure to file a mandatory supersedeas bond. The statutory provision at issue, §440.25(4)(c), Florida Statutes (1987), expressly made the filing of a bond a condition precedent to the pursuit of an appeal: "As a condition of filing a notice of appeal . . . an employer . . . shall file with his notice of appeal a good and sufficient bond. . . ." Unlike the statutory provision in the instant case, the one involved in Machin involved an express condition precedent to the filing of an appeal. Moreover, the very same court that decided Machin, the First District, has clearly construed the instant statute to be directory. Reese, supra. Additionally, the statute does not involve a time limitation and thus does not implicate the principle that statutory time periods are directory when they are not accompanied by express remedies.

The other case relied upon by Kinder, Nobile v. Nobile, 722 So. 2d 848 (Fla. 1st DCA 1999), is similarly inapplicable. Petitions for custody and visitation, in that case, were dismissed due to non-compliance with mandatory requirements "concerning subject matter jurisdiction." Those provisions, regarding oaths under §61.132, Florida Statutes, similarly do not implicate time periods and the concomitant rule that with statutory time periods, the absence of an express remedy for non-compliance renders the time period directory.

Kinder further asserts that due process principles mandate that the 30-day trial

provision be construed to be jurisdictional. Brief of Respondent, pp. 28, et seq. This claim should not be considered herein. The only issue before the Court is the certified question, regarding the propriety of release as a remedy, pending trial. Kinder did not seek or obtain any certified questions regarding due process and the possibility of dismissal, and the issue should therefore not be entertained. Trushin, supra.

Furthermore, the claim has no merit. Initially, it must be reiterated that the statute, as written, is what is before the Court. The statute contemplates that in the typical case, evaluations will be commenced one year prior to the end of the prison sentence and completed within 45 days. Section 394.913, Florida Statutes (1999). Under such circumstances, the norm, expected by the legislature, was that trials would be held within 30 days of the filing of petitions and initial probable cause orders, and that the petitions would be filed several months, perhaps ten, prior to the end of the prison sentence. With such a statutory scheme, the failure to proceed to a commitment trial within 30 days could not implicate any due process rights, since the alleged sexually violent predator would remain incarcerated, in prison, for several more months, regardless of whether the case proceeded to trial within 30 days. There is absolutely no liberty interest at stake at that point in time.

Furthermore, there is no constitutional entitlement to a trial or evidentiary proceeding within 30 days of custody under a commitment detention in any event. In

Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd sub nom. Briggs v. Arafeh, 411 U.S. 911 (1973), the federal district court, acting through a three-judge panel, examined Connecticut's general civil commitment statute. That act effectively permitted involuntary detention of a person, prior to trial, for up to 45 days. The federal district court entertained due process claims and concluded that the detention of up to 45 days did not violate due process, as there was "a rational basis for the time allowed by the statute." 346 F. Supp. at 1269. The Supreme Court summarily affirmed that decision, and that was an affirmance on the merits, with precedential value. Briggs v. Arafeh, 411 U.S. 911 (1973). See, Hicks v. Miranda,422 U.S. 332 (1975) (binding effect of memorandum decisions of Supreme Court); French v. Blackburn, 428 F. Supp. 1351, 1355-56 (M.D. N.C. 1977) (expressly recognizing the binding precedential value of Arafeh). Likewise, in Jones v. United States, 463 U.S. 354 (1983), the Supreme Court rejected a due process challenge to a commitment scheme in which the commitment trial was not mandated for up to 50 days after custody under the commitment statute commenced. Thus, regardless of whether the 30-day period runs while the person is still serving the prior prison sentence, or after that sentence has expired, no due process rights are implicated.

Kinder next asserts that the statutory provisions should be strictly construed since they are "penal in nature." Brief of Respondent, pp. 36, et seq. Very simply,

involuntary civil commitment schemes for sexually violent predators are civil in nature, not penal. Westerheide v. State, 763 So. 2d 637 (Fla. 5th DCA 2000); Kansas v. Hendricks, 521 U.S. 346 (1997). In conjunction with this argument, it should be noted that Kinder has made factual allegations about the facilities used by the Department of Children and Families for the pretrial detention and/or post-judgment commitment of individuals under this Act. Brief of Respondent, p. 38. No such facts were developed in the trial court, none were presented in the Second District below, and the Respondent has once again exhibited a flagrant disregard for the limits of what matters are properly presented to this Court.

CONCLUSION

For the reasons set forth in this Brief and in the State's Initial Brief of Petitioner, the statutory language regarding the 30-day trial period is directory; the remedy of release pending trial is one which is rejected by the statute itself; and the remedy of dismissal is not properly before this Court and is otherwise improper under the act. The decision of the lower court should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits was mailed this _____ day of March, 2001, to JEANINE COHEN, Assistant Public Defender, and JOHN SKYE, Assistant Public Defender, Office of the Public Defender, 801 E. Twiggs Street, 5th Floor, Tampa, Florida 33602.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Reply Brief of Petitioner has been typed in Times New Roman, 14-point type.

RICHARD L. POLIN