IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-973

STEPHEN LLOYD OSBORNE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

On September 16, 1999, the State filed a petition for civil commitment, seeking the involuntary civil commitment of Stephen Lloyd Osborne, as a sexually violent predator, pursuant to section 394.914, Florida Statutes (1999), et seq. (R. 55). The petition alleged that Osborne had prior convictions for sexually violent offenses, that he was expected to be released from his then current Department of Corrections prison sentence on September 16, 1999, that he had a mental abnormality or personality disorder, and that the mental abnormality or personality disorder 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. 55-103).

Based upon the commitment petition and its attachments, which included psychological and psychiatric evaluations from one psychologist and one psychiatrist, the lower court, on September 16, 1999, the same day that the petition was filed, entered an order finding that probable cause existed to believe that Osborne was a sexually violent predator. (R. 104). The order further directed that Osborne "should be detained for further proceedings under the Jimmy Ryce Act." (R. 104). A warrant for custodial detention, issued that same day, directed that the Department of Corrections transfer Osborne to the custody of the Department of Children and

Families upon the expiration of his incarcerative sentence. (R. 105).

On October 1, 1999, Osborne moved to disqualify the trial court judge who, pursuant to that motion, recused herself in an order dated October 8, 1999 and filed on October 11, 1999. (R. 107-111). The case was reassigned to another judge by order dated October 12, 1999 and filed on October 14, 1999. (R. 112-113).

On December 17, 1999, Osborne filed a Motion to Dismiss State's Petition for Civil Commitment as Sexually Violent Predator. (R. 123). The motion to dismiss alleged that the petition should be dismissed because the court lost jurisdiction over Osborne since the trial in the action was not held within 30 days of the initial probable cause determination, as required by section 394.916(1), Florida Statutes (1999). (R. 123). The State filed a Response to the Motion to Dismiss. (R. 141). In the Response, the State argued, inter alia, that the 30-day trial provision of the Act did not warrant dismissal in the event of noncompliance. The State further argued that Osborne's act of seeking the disqualification and replacement of the original judge, within that 30-day period, was, in large part, responsible for delays which precluded the conduct of the trial during that period of time, as a trial obviously could not be held while the motion to disqualify was pending for a week, and the appointment of a replacement judge took a few more days. The State further argued that proceedings under the Act are governed by the Rules of Civil Procedure, and that the case was not

ready for trial under the provisions of Rule 1.440, Florida Rules of Civil Procedure. (R. 141-53).

The lower court held a hearing, on February 14, 2000, on the motion to dismiss. (R. 12, et seq.). After hearing argument from counsel, the lower court orally granted the motion to dismiss. (R. 49). On the same day, a written order was signed and filed, 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, (1999); since the time limit for commencing trial in this case has expired, it is hereby ordered that the petition is dismissed with prejudice.
>
> 2. That the Respondent, STEPHEN LLOYD OSBORNE, shall be immediately discharged and RELEASED from custody of the Florida Department of Children and Families Services;
>
> 3. The Florida Department of Children and Families Services, and all of its agents and employees, are hereby ORDERED and directed to immediately release the Respondent, STEPHEN LLOYD OSBORNE, from custody.

(SR. 1-2).[1]

The State appealed the order of dismissal to the Fifth District Court of Appeal. That Court issued its opinion on March 2, 2001. State v. Osborne, 781 So. 2d 1137 (Fla. 5th DCA 2001). Initially, the Court rejected Osborne's claim that the State had no right to appeal the order of dismissal:

> Before addressing the merits of the State's appeal, we must consider Osborne's contention that the State lacks authority to appeal the instant dismissal order because no such right of appeal is expressly provided for in the Act. We reject this contention as meritless because the State possesses the same right to appeal as any other party in a civil proceeding; therefore, an express grant is not necessary for each statutorily-created cause of action. *See* Art. V, § 4(b), Fla. Const.; *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996).

781 So. 2d at 1138.

Addressing the State's appeal on the merits, the Court concluded "that the State is correct that the statutory time provision is not jurisdictional." 781 So. 2d at 1138. Based on that conclusion, the Court reversed the trial court's order of dismissal and remanded the case to the trial court for further proceedings. 781 So. 2d at 1141. Osborne's motion for rehearing was denied on April 11, 2001. (R. 228).

Osborne then sought discretionary review in this Court. After submission of

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[1] "SR." refers to the Supplemental Record on Appeal in the Fifth District Court of Appeal.

jurisdictional briefs, this Court entered an order staying proceedings in this case pending disposition of State v. Goode, SC01-28. After the issuance of the opinion in State v. Goode, 830 So. 2d 817 (Fla. 2002), this Court issued an order directing the parties to advise the Court as to why this Court should not remand the case for reconsideration in light of the decision in Goode. Upon receipt of the parties responses to that order, this Court issued an order establishing a briefing schedule, directing the parties to "serve briefs on the merits on all relevant issues, including the proper remedy when there is a violation of the thirty (30) day time period in accord with State v. Goode, 830 So. 2d 817 (Fla. 2002), and State v. Kinder, 830 So. 2d 832 (Fla. 2002)."

SUMMARY OF ARGUMENT

I. As sexually violent predator commitment proceedings are civil in nature, the State has the same right as any other litigant to appeal a final order disposing of the case. There is no need for an express statutory authorization for the State, as that entitlement flows from the Florida Constitution.

II. In prior decisions, this Court has held that the 30-day trial period of the sexually violent predators commitment act is mandatory. However, the two opinions from this Court approved different remedies used by lower courts - dismissal in one case; release pending trial in the other. As a result, clarification would be beneficial. Since the concerns addressed in the prior decisions are with lengthy pretrial detentions without evidentiary hearings, the remedy of release pending trial is a remedy which should be viable, as that remedy satisfies the concerns addressed by this Court in its prior opinions. The Court should further conclude that any dismissal for non-compliance with the 30-day trial period should be without prejudice, even after the prior incarceration with the Department of Corrections has been completed.

ARGUMENT

I. THE LOWER COURT PROPERLY CONCLUDED THAT THE STATE HAD THE RIGHT TO APPEAL THE ORDER DISMISSING THE SEXUALLY VIOLENT PREDATOR COMMITMENT PROCEEDINGS.

Osborne initially argues that the lower court erred in holding that the State has the right to appeal an order of dismissal entered in a sexually violent predators civil commitment proceedings. Preliminarily, the State notes that all five District Courts of Appeal have routinely been deciding state-initiated appeals under the sexually violent predators civil commitment act on the merits. Although the opinion issued by the Fifth District herein is the only published opinion to address this issue, it is clear that all of the District Courts of Appeal recognize that they have jurisdiction to entertain such appeals.[2]

Should this Court proceed to consider this argument on the merits, it is clear

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[2] Among the appeals taken by the State, resulting in published opinions by the District Courts of Appeal, are the following: State v. Jones, 764 So. 2d 655 (Fla. 1st DCA 2000); State v. Mitchell, 848 So. 2d 1209 (Fla. 1st DCA 2003); State v. McFarland, 2003 WL 22259634 (Fla. 1st DCA 2003); State v. Goode, 779 So. 2d 544 (Fla. 2d DCA 2001); State v. Siddal, 772 So. 2d 555 (Fla. 3d DCA 2000); State v. The Commitment of Timms, 849 So.2 d 462 (Fla. 4th DCA 2003); State v. Robbins, 785 So. 2d 620 (Fla. 5th DCA 2001); State v. Brewer, 767 So. 2d 1249 (Fla. 5th DCA 2000); State v. Rompre, 837 So. 2d 453 (Fla. 5th DCA 2003). As the foregoing are merely published opinions, it would obviously be reasonable to infer that there are other state appeals that the district courts of appeal have entertained and summarily affirmed on the merits.

that the State has the same right to appeal a final order in a civil proceeding as any other litigant in a civil case.

Osborne's argument is premised on State v. C.C., 476 So. 2d 144 (Fla. 1985), which, in turn, was based on State v. Creighton, 469 So. 2d 735 (Fla. 1985), a case which has been expressly overruled by this Court. Furthermore, Creighton involved the question of whether the State had the right to appeal a final order in a criminal case, absent express statutory authorization; it did not involve an appeal in a civil case. Creighton needs to be understood in its evolutionary context.

In 1964, this Court, construing Article V of the Florida Constitution (1956), held that the right to appeal from final judgments was self executing, and did not require express statutory authorization. Crownover v. Shannon, 170 So. 2d 299 (Fla. 1964). The relevant language in Article V was amended, in 1972, and the addition of the word "that" became the focus of Creighton, which addressed the State's right to appeal an order granting a post-verdict judgment of acquittal in a criminal case. According to the Court in Creighton, the 1972 amendment to article V altered the conclusions ensuing from the 1956 version of Article V and from Crownover, and, as a result of the amended language, the right to appeal the final judgment was no longer a matter of right, and was no longer self-executing absent express statutory authorization. Thus, the Court, in Creighton, "reaffirm[ed] the principle that the state's right of appeal in

criminal cases depends on statutory authorization and is governed strictly by statute." 469 So. 2d at 740.

In the process of reaching that conclusion, the Court, in dicta, addressed civil cases as well:

> Moreover, during the period from 1957 through 1972, when the language underlying the Crownover decision (a civil case) was in effect, the courts of Florida continued to operate under the assumption that the state's right of appeal in criminal cases was governed by statute. [citations omitted]. Cases decided after the 1972 revision of article V still recognize the right of appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well. [citations omitted].

469 So. 2d at 739-40.

In 1996, in the aftermath of the Criminal Appeal Reform Act of 1996, which purported to place limits on a defendant's right to appeal in criminal cases, the Court revisited the foregoing issues, and effectively concluded that its prior analysis in Creighton was erroneous:

> . . . we did not consider in *Creighton* the fact that nowhere in the voluminous documents which reflect the history and intent of the 1972 revision of article V is there any suggestion that the revisers intended to remove from the constitution the right to appeal. Therefore, we now recede from *Creighton* to the extent that we construe the language of article V, section 4(b) as a constitutional protection of the right to appeal. However, we believe that the legislature may implement this constitutional right and place reasonable

> conditions upon it so long as they do not thwart the litigants' legitimate appellate rights.

Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1104-1105 (Fla. 1996). The "legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights." Id. at 1104. In a concurring opinion, Justice Anstead emphasized that the Creighton analysis of the 1972 constitutional amendment was flawed and that the Creighton opinion, as to matters other than the State's right to appeal in criminal cases, was dicta. 696 So. 2d at 1107. Thus, the 1972 constitutional language "provid[ed] for appeals to the district courts as a matter of right from final judgments and orders of trial courts. . . ." Id. at 1111. "A plain reading of these provisions reveals that the constitution explicitly provides for appeals as a matter of right from final judgments and orders. . . ." Id.

Osborne asserts that the constitutional right to appeal is one which pertains only to "citizens," not to the State. In support of that position, Osborne relies, *inter alia*, on State v. Allen, 743 So. 2d 532 (Fla. 1st DCA 1997). Allen, however, is a criminal case in which the State was seeking to appeal the reduction of a restitution claim; it was not a civil case. Furthermore, the relevant language in Article V, section 4(b)(1) of the Florida Constitution is that "District courts of appeal shall have jurisdiction to

hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts. . . .” The Constitution does not refer to appeals “as a matter of right” from citizens, or from parties other than the State; it is the character of the final judgment, not the character of the party, which is dispositive.

This Court, in Creighton, set forth an erroneous grammatical construction of the “right to appeal” language in Article V, section 4. The Court, recognizing its flawed interpretation of the constitutional provision, has taken steps to undo the prior misreading. 696 So. 2d at 1104-05. The grammatical misconstruction of Creighton should not be replaced, at this point, with an equally improper construction of the “right to appeal” language, which makes no distinction as to the nature of the party seeking appellate review. If there is a constitutional right to appeal final judgments, it is a constitutional right of all litigants appearing in this State’s courts

Osborne’s reliance on C.C. adds nothing to the analysis derived from Creighton, as C.C. was based entirely on Creighton. For purposes of the analysis under Creighton, juvenile cases were treated as “criminal in nature.” 476 So. 2d at 146.

In any event, to whatever extent Creighton still remains viable in the aftermath of this Court’s decision to recede from it, its reasoning as to the State is uniquely related to the criminal context, as it was based on common law limitations of the state’s right to seek an appeal in criminal cases. 469 So. 2d at 740 and n. 7. As the

instant civil commitment proceedings are entirely statutory in nature, they do not have any such common law limitations. Thus, in Creighton, the Court reaffirmed "the principle that the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute." Id. at 740 (emphasis added). The foregoing point is the subject of a recent law review article. See, Marks, Thomas C., Jr., "The State of Florida is not as Entitled to a Fair Trial or Right of Appeal in its own Courts as a Criminal or Juvenile Defendant," 29 Stetson Law Rev. 325 (1999). The author points out that the reason for the principle that the State's right to appeal was contingent upon statutory authorization derived from the unique aspects of common law review in criminal cases. Thus, it was pointed out that at common law, a "writ of error" was not available to the State in criminal cases. Id. at pp. 327-51. This principle, in turn, is traced back to an early opinion of this Court, State v. Burns, 18 Fla. 185 (1881). As the "writ of error" was unavailable to the State in criminal cases, any right to appeal had to be statutorily authorized. The reasoning has absolutely no validity in the context of civil appeals, as the common law limitation on the "writ of error" was in criminal cases. Neither Creighton nor any other case ever held that the State's right to appeal civil final judgments, under the current Constitution, was in any way dependent upon statutory authorization.

In light of the foregoing, the State would make several points. First, the instant

case is a civil commitment proceeding - a civil case; not a criminal case. Osborne attempts to argue that the commitment cases should also be treated as being partially criminal in nature since they involve restraints on liberty. This argument has no basis. In addition to the Supreme Court of the United States in Kansas v. Hendricks, 521 U.S. 346 (1997), and this Court, in Westerheide v. State, 831 So. 2d 93 (Fla. 2002), appellate courts in other jurisdictions with similar commitment acts have consistently acknowledged that these commitment statutes are civil in nature; they are remedial, protecting the public and providing treatment to those in need of treatment. Thus, such cases have consistently rejected double jeopardy and ex post facto claims which asserted that the commitment proceedings were punitive. See Hubbart v. Superior Court, 969 P. 2d 589 (Cal. 1999); In re Linehan, 557 N.W. 2d 171 (Minn. 1997)[3]; In re Young, 857 P. 2d 989 (Wash. 1993); State v. Post, 541 N.W. 2d 115 (Wis. 1995); In the Matter of Hay, 953 P. 2d 666 (Kan. 1998); Martin v. Reinstein, 987 P. 2d 779 (Ariz. App. 1999); Grosinger v. M.D. 598 N.W. 2d 799 (N. Dak. 1999); In re Detention of Samuelson, 727 N.E. 2d 228 (Ill. 2000). Osborne attempts to analogize the instant commitment proceeding to juvenile cases, which were treated as criminal

[3] Linehan was vacated and remanded for reconsideration in light of Hendricks. Linehan v. Minnesota, 522 U.S. 1011, 118 S.Ct. 596, 139 L.Ed. 2d 486 (1997). The Minnesota Supreme Court reaffirmed its prior conclusions. In re Linehan, 594 N.W. 2d 867 (Minn. 1999).

for purposes of Creighton. That effort is likewise misguided. Juvenile delinquency proceedings are, in part, punitive. Thus, the legislature has stated that for those found to be delinquent, "secure detention is appropriate to provide punishment that discourages further delinquent behavior." Section 985.02(4)(b), Florida Statutes. While the primary purpose of juvenile delinquency proceedings is rehabilitation and treatment, there is a legislatively decreed component which is, in part, for punishment. Thus, P.W.G. v. State, 702 So. 2d 488 (Fla.1997), quotes approvingly from earlier cases, to the effect that "[j]uvenile delinquency proceedings are neither wholly criminal nor civil in nature." 702 So. 2d at 491, quoting State v. Boatman, 329 So. 2d 312-13 (Fla. 1976). Moreover, while juvenile proceedings are governed by their own unique rules of procedure, the legislature has decreed that the involuntary civil commitment cases under the sexually violent predators act shall be governed by the rules of civil procedure, unless otherwise specified. Section 394.9155(1), Florida Statutes (1999). Thus, there is an express legislative mandate to treat these commitment cases as regular civil cases; unlike juvenile cases, involuntary civil commitment cases do not have any criminal component.

By way of analogy, the State would further note that civil contempt cases can likewise entail incarceration as a sanction, while the contempt proceedings retain their civil character; the mere fact of confinement or a restraint of liberty does not convert

the proceeding into either a criminal or a "quasi-criminal" proceeding. See Arena v. Herman, 675 So. 2d 210, 211 (Fla. 3d DCA 1996) (incarceration appropriate remedy for civil contempt where contemnor has ability to pay to purge contempt); Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d DCA 1996) (prior civil contempt order including sanction of incarceration did not pose criminal double jeopardy bar to further contempt proceedings); International Medical Centers, Inc. v. Colavecchio, 563 So. 2d 784, 786 (Fla. 4th DCA 1990) (civil contempt may include jail sentence if opportunity to purge is provided). Not only are civil contempt proceedings deemed civil in nature notwithstanding the sanction of incarceration, but, when they are appealed, they are appealed in accordance with the rules governing civil appeals. For example, a post-final judgment order of civil contempt was deemed reviewable as an interlocutory appeal as a non-final order entered after a final judgment, under Rule 9.130(a)(4), Florida Rules of Civil Procedure. Department of Health and Rehabilitative Services v. Beckwith, 624 So. 2d 395, 397 (Fla. 1993). Other courts have treated civil contempt orders as reviewable as interlocutory appeals under the same rule. Continental Casualty Co. v. Morgan, 445 So. 2d 678 (Fla. 4th DCA 1984); Langbert v. Langbert, 409 So. 2d 1066 (Fla. 4th DCA 1981). This Court, and the First District,

have concluded that such civil contempt orders are non-final,[4] but since they are not specified as appealable orders under Rule 9.130, they are reviewable by certiorari. Stewart v Mussoline, 487 So. 2d 96 (Fla. 3d DCA 1986). What is significant, however, is that all of the courts are treating civil contempts, including those with sanctions of incarceration, as subject to analysis, for appellate purposes, as civil appeals or certiorari, not as criminal cases.

Furthermore, to whatever extent a statutory right to appeal a final order may still be needed, the State of Florida has the same statutory right, in a civil case, as does any other civil litigant. Section 59.06(1), addressing matters reviewable on appeal (in civil cases), states that: "All judgments and orders made in any action wherein the trial court: . . . (b) Shall sustain or overrule any motion to dismiss the action may be assigned as error upon any appeal from the final judgment or order in the action."[5] Thus, the statutory right to appeal from final judgments or orders in civil actions.

Osborne attempts to circumvent section 59.06 by arguing that it created a right only to appeal from causes of action which were recognized at common law.

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[4] They are apparently treated as non-final since the opportunity to purge means that the contempt sanction is not final; it can be removed at the decision of the contemnor.

[5] It should be noted that even Creighton acknowledged chapter 59 as governing appellate rights in general civil cases. Creighton, 469 So. 2d at 740.

Osborne's argument is not supported by any case law so interpreting section 59.06 or its predecessors. Osborne's argument is also expressly refuted by the language in the statute itself. As previously noted, section 59.06(1) authorizes appeals from final judgments or orders of dismissal "in any action. . . ." (emphasis added). The statute refers to appeals in any action; it does not refer to appeals taken only in actions previously recognized at common law. Osborne's motion to dismiss this appeal makes extensive note of general rules of statutory construction. The most significant rule is that words of a statute are to be given their ordinary meaning. When the statute says "any action," it means "any action." If the legislature meant to say "any action which existed at common law," the legislature would have stated that in a clear and understandable manner; but, the legislature did not do so.

As Osborne notes, section 59.06, Florida Statutes, has roots which go back to 1852. In all of its previous incarnations, the statute similarly authorized appeals from final judgments or orders of dismissal in "any action." Thus, in Chapter 521, section 1 (1852), specified appeals were authorized to be taken from "any cause" of action in the circuit courts. Chapter 3430, Laws of Florida (1883), similarly authorized specified appeals to be taken in any civil cause. Section 59.06 took on its current form in 1945, by authorizing specified appeals, "in any cause where the trial court" shall sustain or overrule a motion to dismiss the cause. Thus, for approximately 150 years,

the Florida legislature has been authorizing enumerated appeals, "in any" civil cause of action. Never has the legislature used any terminology which would limit the right to appeal to causes of action which existed only at common law.

Similarly, notwithstanding the 150 year history of the foregoing legislation, Osborne has been unable to cite a single appellate court decision in which any Florida court ever held that section 59.06 authorized appeals only in common law causes of action.

The notion that any such right exists for all but the State, which is the implication of Osborne's motion to dismiss, is utterly absurd. Over the past 40-plus years, Florida's District Courts of Appeal have entertained hundreds, if not thousands, of appeals taken by the State, in civil actions, from final judgments or final orders. Several such appeals are cited here, by way of example. See, e.g., State, Department of Environmental Protection v. Harbor Utilities Co., Inc., 684 So. 2d 301 (Fla. 2d DCA 1996) (State Department of Environmental Protection appealed trial court's order dismissing party from an administrative enforcement action); State, Department of Health and Rehabilitative Services v. Arnold, 670 So. 2d 96 (Fla. 1st DCA 1996) (in tort action against State, the State appealed from trial court's order granting a new trial); State, Department of Corrections v. Vann, 650 So. 2d 658 (Fla. 1st DCA 1995), approved, 662 So. 2d 339 (Fla. 1995) (State appealed a final judgment assessing

damages); State, Department of Environmental Protection v. Burgess, 667 So. 2d 267 (Fla. 1st DCA 1995) (State appealed order granting partial summary judgment); State, Department of Corrections v. Niosi, 552 So.2 d 244 (Fla. 4th DCA 1989) (State appealed final judgment of monetary damages); State, Department of Environmental Protection v. Crest Products, Inc., 671 So. 2d 211 (Fla. 2d DCA 1996) (State appealed civil order of dismissal for lack of prosecution); State, Department of Corrections v. Parker, 553 So. 2d 289 (Fla. 4th DCA 1989) (state appealed final judgment for damages in tort action); State, Department of Environmental Protection v. SCM Glidco Organics Corp., 606 So. 2d 722 (Fla. 1st DCA 1992) (State appealed order granting summary final judgment in favor of defendant in action for civil penalties).

Furthermore, as to the dicta in Creighton, suggesting that the right to appeal in civil cases, as well as in criminal, was statutory, 469 So. 2d at 739-40, the five cases cited by the Creighton court for that proposition simply do not support it. Three of the five cases involve the State's right to appeal orders in criminal cases. State ex rel. Sebers v. McNulty, 326 So. 2d 17 (Fla. 1975); State v. Matera, 378 So. 2d 1283 (Fla. 3d DCA 1979); State v. Brown, 330 So. 2d 535 (Fla. 1st DCA 1976). One of the five involved the State's right to appeal in a juvenile delinquency (non-civil) proceeding. State v. I.B., 366 So. 2d 186 (Fla. 1st DCA 1979). The sole civil appeal, Clement v.

Aztec Sales, Inc., 297 So. 2d 1 (Fla. 1974), simply observed that there was a statutory right to appeal an order granting a new trial (which was deemed not to be interlocutory), and that the relevant statute conferred "a right to appeal which creates an exception to the general rule that appeals at law lie only from final judgments." 297 So. 2d at 2. Clement did not involve a situation where anyone was attempting to appeal from a final order or judgment without statutory authorization; as such, Clement does not address the situation of a self-executing right to appeal civil final judgments. Furthermore, just as Clement simply said that an appeal could be taken where a statute existed to permit it, so, too, section 59.06 permits the instant appeal. Lastly, Clement did not assert that any special rules applied to the State in the context of civil appeals.

To summarize: (1) In the aftermath of this Court receding from Creighton, the right to appeal a final order or final judgment in civil cases is self-executing; (2) even if it is not self-executing and requires statutory authorization, such a statute exists, and grants all litigants, in civil cases, including the State, the right to appeal final orders or judgments; (3) Florida's District Courts of Appeal have a lengthy history of entertaining appeals from the State in civil cases, from final orders or judgments; and (4) Florida's District Courts of Appeal have routinely been entertaining appeals by the State, in sexually violent predator commitment cases, on the merits.

II. THE REMEDY FOR VIOLATING THE 30-DAY

TRIAL PROVISION OF THE SEXUALLY VIOLENT PREDATORS CIVIL COMMITMENT ACT SHOULD BE EITHER RELEASE FROM CUSTODY PENDING TRIAL OR DISMISSAL WITHOUT PREJUDICE TO REFILE THE COMMITMENT PETITION.

This Court, addressing violations of the statutory requirement of a trial within 30 days, absent a timely continuance for good cause, held that the statutory provision was mandatory, but not jurisdictional. State v. Goode, 830 So. 2d 817 (Fla. 2002); State v. Kinder, 830 So. 2d 832 (Fla. 2002). Those two opinions, however, left the issue of the appropriate remedy for a violation in need of clarification. In Goode, this Court approved the dismissal of the trial court action. However, in Kinder, this Court approved the District Court of Appeal decision which merely called for the release of the individual from custody, while the trial court proceedings remained pending, with a trial ultimately to be held.

The sexually violent predators civil commitment act provides that the trial shall be conducted "within 30 days after the determination of probable cause." Section 394.915(1), Florida Statutes. Continuances may be granted upon a showing of good cause. Section 394.915(2), Florida Statutes.

In Goode, this Court concluded that the statutory provision was "mandatory, although not jurisdictional." 830 So. 2d at 830. The Court further, "for reasons stated in this opinion," "affirm[ed] the judgment of the trial court," and "also approve[d] the

Second District's opinion in *Kinder*. . . ." Id.

As detailed in the Goode opinion, the trial court, in Goode, had dismissed the commitment petition. 830 So. 2d at 819. The Goode opinion therefore affirmed the dismissal of the commitment petition as the remedy for non-compliance with the statutory 30-day trial period. However, this Court, in Goode, also approved the Second District's decision in Kinder v. State, 779 So. 2d 512 (Fla. 2d DCA 2000). In Kinder, upon concluding that the State had failed to comply with the 30-day trial period, the Second District granted a petition for writ of mandamus, and "direct[ed] the trial court to order Kinder's release." 779 So. 2d at 514. Having construed the time limit to be a statutory right, the Court stated that "the only remedy that will adequately redress this violation is the release of the detainee. 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." 779 So. 2d at 515. The Court declined to "address whether the Act permits the State to continue the commitment proceeding against Kinder on the originally filed petition," finding that that issue was "not yet properly before us." 779 So. 2d at 515, n. 2. Upon review in this Court, this Court approved the Second District's decision in Kinder. 830 So. 2d at 834.

Based on the foregoing, this Court appears to have left open the possibility that release pending trial might be a viable remedy for a violation of the 30-day trial

requirement. The State submits that when a violation of the 30-day trial requirement does occur, the remedy of release pending trial should be available to the trial court absent compelling reasons to the contrary - such as proof of prejudice in the respondent's ability to prepare for trial.

At the outset, it should be noted that the concerns addressed herein should pertain only to those situations in which the violation of the 30-day period occurs after the end of the alleged sexually violent predator's incarcerative sentence with the Department of Corrections. When the 30-day violation occurs during the last months of the incarcerative sentence, as stated in Goode, any dismissal of the petition for commitment would be without prejudice, and the State would be free to refile another commitment petition. 830 So. 2d at 826.[2] If the same principles apply to violations of the 30-day period after the incarcerative sentence has expired, the question of a remedy - i.e., dismissal or release - will become an irrelevancy, as the State can simply refile its petition, without prejudice, if there is a dismissal. The State will return to this question at pp. 28-30, infra.

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[2] "Presumably, if the State followed the time periods established in the Ryce Act, the commitment trial would take place well in advance of the respondent's date of release from prison and the due process concerns of commitment beyond imprisonment would be substantially alleviated. Under this scheme, the State would have multiple opportunities to initiate and pursue these commitments before the respondent's criminal sentence expires." Goode, 830 So. 2d at 826.

The overriding concern, in both Kinder and Goode, was that due process barred long-term civil commitment absent an evidentiary hearing. Thus, in Kinder, the concern was that "[t]his Court can think of no other context, civil or criminal, that would allow an individual to be detained indefinitely based on a probable cause determination where the individual has no right to appear." Kinder, 830 So. 2d at 834. The same concern with the consequences of indefinite detention pending the commitment trial appears in Goode, 830 So. 2d at 825-26. Release, pending trial, would remedy the Court's concerns with indefinite, long-term detentions absent evidentiary proceedings where the respondent is present and represented by counsel.

As release would satisfy the concern over indefinite detention absent an evidentiary proceeding with a right to appear and representation by counsel, the question should then become whether there is any reason why the remedy of release, as opposed to dismissal, would be insufficient. The only possible basis upon which such a finding could be made would be upon the demonstration of prejudice in the ability to prepare for trial. If the respondent is released pending trial, the concern of long-term detention absent a trial has been abated. As to the possibility of prejudice, as a general rule, it should be difficult to envision prejudice after the passage of a mere 30 days from the filing of a commitment petition. The passage of such a time period does not raise any significant likelihood of difficulties in finding witnesses or mental

health professionals; nor does the passage of 30 days render likely any scenario in which any relevant witness will suffer a memory loss impairing a respondent's ability to defend a case. The focus of the commitment case is on the here and now - current mental conditions; current dangerousness. Furthermore, many of the commitment cases are based, in large part, on facts of sex offenses that have already been fully litigated, with trials or pleas, establishing the facts of those prior cases.

A consideration of the constitutional right to a speedy trial in criminal cases provides a basis for comparison and for a determination of the scope of proper remedies. The Supreme Court, in Barker v. Wingo, 407 U.S. 514, 530 (1972), adopted a balancing test for determining whether the constitutional right to a speedy trial had been violated, and the Court identified the following factors as being relevant: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The fourth factor, prejudice to the defendant, was identified as implicating three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532. The last factor, impairment of the ability to defend, was recognized as being "the most serious, . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also

prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." Id.

In adopting the time periods in Rule 3.191, Florida Rules of Criminal Procedure, this Court essentially adopted bright-line tests for determining at what point in time such prejudice to the ability to prepare for trial became an irrebuttable presumption. The time periods in the state rule of procedure were implemented as the method for "guaranteeing to the defendant his constitutional right to a speedy trial." State ex rel. Hanks v. Goodman, 253 So. 2d 129, 130 (Fla. 1971). Thus, prejudice in the ability to prepare for trial is a presumptive norm implemented through the time periods in the state speedy trial rule.

By contrast, the provision at issue in the sexually violent predator proceedings is a state statute, and there is no constitutional mandate that a trial must be held within 30 days. Furthermore, the concern with prejudice to the ability to prepare for trial is, for reasons set forth above, of greater magnitude in criminal cases than it is in sexually violent predator civil commitment proceedings.

The only justification for dismissal, as opposed to release, offered by Osborne in this case, is the provision of the commitment act which bars pretrial release after the finding of probable cause. Section 394.915(5), Florida Statutes. That, however, in

light of this Court's opinion in Kinder, has become an irrelevant argument, since this Court has already approved the Second District's remedy of release pending trial.

Furthermore, if a trial court has available to it a potential ultimate remedy of dismissal of a case, it would appear to be reasonable to conclude that in instances where the ultimate remedy might otherwise be viable, the trial court should have the inherent power to utilize a lesser remedy when it will suffice. Indeed, the Fourth District Court of Appeal, in Johnson v. Department of Children and Family Services, 747 So. 2d 402 (Fla. 4th DCA 1999), has already held that where the multidisciplinary team, in a sexually violent predator proceeding, did not submit a report containing the requisite findings, the Court, through the exercise of "The Great Writ of Habeas Corpus," had the inherent power to order the release of a detainee, even though the Act did not provide for such release. Likewise, in Tanguay v. State, 782 So. 2d 419 (Fla. 2d DCA 2001), review pending, SC01-613, the Second District, relying, in part, on Johnson, held that where the State wrongfully detained Tanguay beyond the expiration of his prior incarcerative sentence, the remedy, in the subsequent civil commitment proceeding, was release pending the commitment trial. ("We conclude, however, that the only adequate remedy to address the State's failure to comply with the requirements of the Act or to afford Tanguay even minimal constitutional protections is to order Tanguay's release from custody pending his commitment

hearing.").[3] Accordingly, Osborne's claim that the trial court would lack the authority to order release pending trial is a claim that has already been rejected by this Court and two District Courts of Appeal.

As noted above, the question of the remedy for a violation of the 30-day trial requirement after the expiration of the incarcerative sentence is a meaningful question only if the State is barred from refiling a new commitment petition. This Court, in Goode, has already stated that while the individual is still incarcerated with the Department of Corrections, serving the final year of an incarcerative sentence on a prior criminal case, the dismissal of the sexually violent predators commitment petition would be without prejudice and a new commitment petition could be filed after the dismissal of the original case. Goode, 830 So. 2d at 826.[4] The State submits that the

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[3] See also, In the Matter of the Civil Commitment of E.D., 803 A. 2d 166 (N.J. App. 2003) (holding that in absence of provision in sexually violent predators commitment act for conditional release of individuals, the court had the inherent power to order such conditional release).

[4] Dismissal without prejudice is consistent with general principles applied in other contexts in civil cases. See, e.g., Wright v. Allen, 611 So. 2d 23 (Fla. 1st DCA 1992) (dismissal as sanction for failure to prosecute is without prejudice); Sekot Laboratories, Inc. v. Gleason, 585 So. 2d 286 (Fla. 3d DCA 1990) (dismissal for failure to timely amend complaint is without prejudice); Samuels v. King Motor Co. of Fort Lauderdale, 782 So. 2d 489 (Fla. 4th DCA 2001) (dismissal as sanction for non-compliance with court order was erroneously stated to be with prejudice where the trial court did not make any findings that the party had willfully refused to obey a court order or had displayed contumacious disregard for a court order).

same principle should apply after the expiration of the incarcerative sentence. If this Court were to reach that conclusion, the question of the proper remedy for the violation at issue herein would then become an academic issue, at least barring unusual circumstances.

The current version of the sexually violent predators commitment act, provides a simple answer to this question, as the act expressly recognizes the right of the Office of the State Attorney to file a commitment petition even after the individual has been released from incarceration with the Department of Children and Families. Nothing in the act requires that a commitment petition be filed prior to the expiration of an incarcerative sentence. While § 394.913, Florida Statutes, provides that the multidisciplinary team's evaluation process be done during the last year of the incarcerative sentence, that section does not require that the commitment petition be filed prior to the expiration of the incarcerative sentence. Similarly, § 394.914, Florida Statutes, which addresses the filing of the commitment petition by the Office of the State Attorney, does not establish the completion of the incarcerative sentence as a deadline. Indeed, § 394.9135(4), Florida Statutes, expressly provides that a commitment petition may be filed after an individual has been released from

incarceration with the Department of Corrections.[5] Furthermore, insofar as the commitment act is concerned with current mental conditions which make the individual dangerous, it would be anomalous and contrary to the legislative purpose to let individuals avoid potential commitment proceedings if the petition is filed shortly after release from state institutions as opposed to prior to such release. Thus, the State submits that commitment petitions may be filed after release from incarceration, and that the ability to refile a petition, after noncompliance with the 30-day trial period, would provide an alternative answer to the issue before this Court, as it would, in many instances, make the issue of the proper remedy for noncompliance irrelevant.

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[5] Section 394.9135, Florida Statutes, addresses concerns about "immediate release" of individuals whose incarcerative sentences are going to end immediately, for any reason - e.g., an appeal in the criminal proceedings results in a shortening of the sentence. In such situations, the Department of Corrections is authorized to transfer the individual to the Department of Children and Families where the person can be held for an evaluation over the next 72 hours, and for an additional 48 hours while the State Attorney determines whether to file a commitment petition. Section 394.9135(4) then provides: "The provisions of this section are not jurisdictional, and failure to comply with the time limitations, 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 provisions of this part." Thus, petitions can be filed after release from incarceration.

CONCLUSION

Based on the foregoing, this Court should clarify its opinions in Goode and Kinder and should hold that release pending trial is a viable remedy for a violation of the statutory 30-day trial period, and that dismissal of a commitment petition for non-compliance with the 30-day trial period is without prejudice to the refiling of the petition, even after the expiration of the prior incarcerative sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits was mailed this ___ day of December, 2003, to BLAISE TRETTIS, Assistant Public Defender, Office of the Public Defender, 2725 Judge Fran Jamieson Way, Building E, Second Floor, Melbourne, FL 32940.

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RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Answer Brief of Respondent on the Merits was typed in Times New Roman, 14-point type.

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RICHARD L. POLIN