IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1996
3DCA CASE NO. 04-2366

DAVID EVERETTE,

Petitioner,

-vs-

THE STATE OF FLORIDA
DEPARTMENT OF CHLDREN AND FAMILIES,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

On or about October 22, 1994, David Everette, Petitioner, was charged with first degree felony attempted murder and aggravated assault. (A. 4-5).[1] He was determined to be incompetent to proceed to trial due to mental retardation and he was committed to the Department of Children & Families (n/k/a the Agency for Persons with Disabilities[2]) for competency restoration in a secure setting. On December 18, 1996, the trial court dismissed Everette's criminal charges and also involuntarily committed him to DCF for continued placement in a secure residential facility pursuant to

[1] Consistent with Petitioner's brief, in this brief the letter "A." followed by a numeral will reference the page number of the Appendix that was filed with the Response to Petition for Writ of Certiorari on or about September 17, 2004.

[2] The Agency for Persons with Disabilities (APD) was created by the Florida Legislature in 2004, effective October 1, 2004, as a separate entity, distinct from the Department of Children and Families (DCF). See, Chapter 2004-267, Section 87, Laws of Florida. The Act also provided for the substitution of APD as the real party in interest with respect to any proceeding pending as of October 2004 that involved developmental services programs of DCF. APD is not subject to the control, supervision, or direction of DCF in any manner. The Legislation was a Type II transfer so that APD succeeded to all of the duties, responsibilities, and obligations of the former agency unless otherwise provided by law. Thus, APD is the successor in interest to DCF in this case much in the same way that a surviving corporation of a merger would be in litigation. Consistent with Petitioner's brief and for purposes of clarity, though, all subsequent references in this brief will be to DCF.

sections 393.11 and 916.145 Florida Statutes.[3] (A. 8-10). Everette was then admitted to Pathways, a secure residential facility, in accordance with the December 18 Order. As provided by statute, the trial court retained jurisdiction over the Petitioner's case. § 916.3025(3), Fla. Stat. (2005). On or about August 3, 2004, the Pathways program was relocated from Miami to Marianna, Florida.

On August 2, 2004, the trail court entered an order appointing two experts to evaluate Petitioner for the purpose of determining whether he continued to meet the criteria for involuntary commitment to a secure residential facility. (A. 14). On August 13, 2004, the trial court entered another order directing DCF, rather than the county sheriff, to transport Petitioner for the court-ordered evaluations. (A. 23).

On September 13, 2004, DCF filed a Petition for Writ of Certiorari and Stay of Proceedings with the Third District Court of Appeal. The Writ

[3] Chapter 916, Fla. Stat. (1996) was amended and reorganized, effective October 1, 1998. The amendments included the creation of Section 916.303, which provided for dismissal of charges and involuntary commitment to secure or non-secure residential services under specified circumstances. Section 916.303 (2)(b) described and controlled the Petitioner's placement after 1998. The statute was amended again effective June 12, 2006; this amendment did not make any significant substantive changes to the language of the sections relevant to this appeal. Consistent with Petitioner's brief and for purposes of clarity, all subsequent references to Chapter 916 in this brief will be to the 2005 statute, unless otherwise noted.

sought to quash the trial court's order that DCF, rather than the county sheriff, was responsible for transporting Petitioner from Marianna to Miami for court-ordered evaluations.

On October 27, 2004, the Third District granted certiorari, quashed the trial court's orders and remanded the matter, instructing the trial court to order the county sheriff to arrange for Petitioner's transportation, if the court deemed transport necessary. *Florida Department of Children & Families v. Everette*, 911 So. 2d 119 (Fla. 3d DCA 2005).

Petitioner filed a Motion for Rehearing and Rehearing *En Banc*, based on issues raised in the dissenting opinion. After consideration of briefs submitted by all parties, the Third District denied the motion. This appeal followed.

SUMMARY OF ARGUMENT

Petitioner in this case makes the argument that since he was committed in accordance with Chapter 393.11, Everette is no longer a defendant or a forensic client as defined by Chapter 916 and, therefore, cannot be transported by the Sheriff in accordance with Section 916.107(10). Petitioner's argument ignores the fact that although he was indeed committed pursuant Chapter 393.11, he was ordered **to a secure setting** pursuant to Chapter 916.303 (formerly Chapter 916.145). As such, he remains subject to the provisions of Chapter 916, including the one governing transportation.

As further grounds for reversal, Petitioner argues that the sheriff was a "necessary and indispensable party" to this litigation and that the failure to join the sheriff is, therefore, reversible error. Petitioner cannot sustain this argument because it was not preserved for appeal; it was, in fact, raised for the first time in the briefs on jurisdiction before this Court.

Finally, Petitioner suggests that the Third DCA improperly granted certiorari review of the trial court's order. Contrary to Petitioner's argument, however, the Third DCA acknowledged the limitations of certiorari review and specifically held that the trial court had departed from

the essential requirements of the law and that its error was serious enough to warrant certiorari review.

ARGUMENT

I.

EVERETTE IS STILL SUBJECT TO THE PROVISIONS OF F.S. CHAPTER 916 BECAUSE, ALTHOUGH HE WAS INVOLUNTARILY ADMITTED TO RESIDENTIAL SERVICES PURSUANT TO F.S. CHAPTER 393.11, HE WAS COURT-ORDERED TO A SECURE PLACEMENT PURSUANT TO F.S. CHAPTER 916.

In its December 18, 1996 Order (A. 8-10), the trial court found that Everette met the criteria for involuntary admission to residential services as set out in Chapter 393.11 of the Florida Statutes. §393.11 Fla. Stat. (2005). The court's inquiry did not end there, however. The court also specifically found that Everette was in need of a *secure* residential placement as authorized by Chapter 916 of the Florida Statutes. In other words, Everette was involuntarily admitted to residential services in accordance with Chapter 393.11, but he was placed, by court order, into a secure setting pursuant to Chapter 916.

Chapter 393.11 does not make any provision for placement in a secure setting: a person admitted pursuant to Chapter 393.11 can *only be* placed in a secure setting with reference to Chapter 916. The plain language of §916.303(2)(b) reflects an assumption that the provisions of Chapter 916

continue to apply to a defendant who is placed, pursuant to the section, in a secure setting:

> "If the defendant is considered to need involuntary residential services under s. 393.11 and, further, there is a substantial likelihood that the defendant will injure another person or continues to present a danger of escape, and all available less restrictive alternatives . . . have been judged to be inappropriate, then . . . the committing court [may] *continue* the defendant's placement in a secure facility or program *pursuant to this section*. Any defendant involuntarily admitted under this paragraph shall have his or her status reviewed by the court at least annually at a hearing."

§916.303 (2)(b), Fla. Stat. (2005) (emphasis added). In addition, as suggested by the annual hearing requirement, the criminal court that orders a defendant into a secure placement pursuant to §916.303(2)(b) retains jurisdiction over that defendant as long as he remains in a secure placement. *See* §916.3025(3), Fla. Stat. (2005).

Thus, a defendant placed in a secure setting pursuant to §916.303(2)(b) remains a forensic client, whose rights are delineated by Chapter 916, unless and until the committing criminal court orders placement into a non-secure setting. *See* §916.3025, Fla. Stat. (2005). The provisions of Chapter 916, including the provision regarding transportation, must be applied to Petitioner and any other client in his circumstances. *See* §916.107(10), Fla. Stat. (2005).

The continued application of Chapter 916 to a defendant ordered to a secure placement makes sense as a practical matter. A court's decision to

order that a client be placed in a secure facility, even after his charges have been dismissed, is informed by evidence that "there is a substantial likelihood that the defendant will injure another person or continues to present a danger of escape . . ." §916.303(2)(b), Fla. Stat. (2005). Likewise, the definition of a "forensic client" in Chapter 916 describes a defendant who is "dangerous to himself or herself or others; or . . . [presents] a clear and present potential to escape . . . §916.106(7), Fla. Stat. (2005).[4]

In short, a defendant committed to a secure setting after his charges are dismissed is subject to Chapter 916, not because of the status of his charges, but because of the level of his dangerousness. It makes sense that the Legislature would designate the Sheriff, which has the infrastructure,

[4] The definition of forensic client was simplified in the 2006 amendments to Chapter 916, but the substance of the definition was not implicated. Now, a forensic client is simply "any defendant who has been committed to the . . . agency pursuant to . . . s. 916.302." § 916.106(1), Fla. Stat. (2006). In turn, Section 916.302 describes the circumstances under which a mentally retarded defendant is initially committed to a secure facility as incompetent to proceed. Similar to the former definition of forensic client, § 916.302 notes that a secure setting for competency training is necessary when there is "a substantial likelihood that in the near future, the defendant will inflict serious bodily harm on himself or herself or another person . . ." §916.302(1)(b), Fla. Stat. (2006). Every defendant, like Everette, who is involuntarily admitted to a secure setting pursuant to §916.303(2)(b) is, earlier in the process, committed to a secure setting for competency training pursuant to § 916.302. The 916.303(2)(b) commitment is essentially a re-commitment, an acknowledgment that the defendant still requires a secure setting.

knowledge, capacity and means, to "determine the most appropriate and cost effective means of transportation for forensic clients [who are likely to injure another or escape]." §916.106(7), Fla. Stat. (2005). DCF is not so equipped: if a defendant is dangerous enough to warrant placement in a secure setting, it only makes sense that he dangerous enough to be transported by a law enforcement officer.

Unlike a client involuntarily admitted to residential services pursuant solely to Chapter 393.11, a defendant committed pursuant to both Chapters 391.11 and 916 to a secure setting, requires a certain curtailment of rights, as defined by Chapter 916. Indeed, if that were not true, §916.303(2)(b) would be meaningless: such commitment would be functionally no different from a civil commitment, even though a court had decided that the defendant was dangerous enough to warrant a secure placement.

The application of §916.107(10) in the instant case was especially appropriate because the transport in question was not being made for DCF's purposes, but rather at the behest of the court which, pursuant to statute, ordered that Everette be transported so that he could be evaluated by court-appointed experts. The recent case of *Agency for Persons with Disabilities v. Ramos*, 925 So.2d 455 (Fla. 3d DCA 2006) is instructive. Noting that

Chapter 393.11 does not provide guidance as to who should be responsible for transportation in cases like Everette's (because 393.11 does not contemplate an order for secure placement), the *Ramos* court refined its holding in *Everette*, noting that because "*Everette* concerned a statutorily-mandated evaluation under section 916.303(2)(b) . . . section 916.107(10) . . . governed the issue of who was responsible for providing transportation, namely the Sheriff's office." *Ramos*, 925 So.2d at 456. The *Ramos* court distinguished the case before it by noting that the transportation at issue, although court-ordered, was not for any purpose mandated by statute or rule, and found that the trial court acted beyond its jurisdiction by ordering DCF to transport a defendant for family visitations. *Id.* The *Ramos* court implies that, unlike Everette, Ramos was committed solely pursuant to Chapter 393.11 and, as such, the issue of his transport could not be resolved by reference to Chapter 916. Ramos confirms that when committed pursuant to § 916.303(2)(b), a defendant is controlled by the provisions of Chapter 916.

II.

THE ISSUE OF JOINDER OF THE SHERIFF AS A NECESSARY AND INDISPENSABLE PARTY IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT WAS NOT PRESERVED FOR APPEAL.

Petitioner argues that, because the Third DCA's decision in *Everette* affects county sheriffs, the sheriffs were necessary and indispensable parties, and the failure to join them is reversible error. Whether Petitioner's argument is legitimate or not is irrelevant, because it was never raised or considered during the pendency of this case and, as such, it is not properly before this Court on appeal.

Rule 1.140 of the Florida Rules of Civil Procedure dictates that the "defense of failure to join an indispensable party may not be raised after an adjudication on the merits and, thus, [can] not be raised for the first time on appeal." Fla. R. Civ. P. 1.140. See also, *Gold, Vann & White, P.A. v. Friedenstab, M.D.*, 831 So.2d 692, 696 (Fla. 4th DCA 2002), rev.denied, 874 So.2d 1191 (Fla. 2004). See also, *Engel Mortgage Co. Inc. v. Dowd*, 355 So.2d 1210 (Fla. 1st DCA 1977), cert. denied, 358 So.2d 130 (Fla. 1978).

While it is true that raising an issue in a motion for rehearing can preserve the issue for review, the issue of necessary parties was *not* raised in this case on a motion for rehearing. Petitioner relies on the following

statement from his motion for rehearing to support his argument that he raised the issue of necessary parties in that pleading:

> "Judge Ramirez's dissenting opinion also sets forth in detail other problems with the majority opinion. As the opinion speaks for itself, those arguments will not be repeated . . ." (Motion for Rehearing, Rehearing En Banc and Certified Question at p. 4)

This allusion to the dissenting opinion can hardly be considered sufficient to preserve the particular issue of the necessity of the sheriff as a party to this case. See *Archer v. State, 613 So.2d 446, 448 (Fla. 1993)* ("For an issue to be preserved for appeal, however, it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" (citing *Tillman v. State,* 471 So.2d 32, 35 (Fla. 1985)). *See also, Steinhorst v. State,* 412 So.2d 332 (Fla. 1982).

Likewise, the mere mention in the Third DCA's dissenting opinion that the sheriff did not receive notice or an opportunity to be heard does not preserve the issue for review, because a dissent cannot confer conflicts jurisdiction on this Court. *See Jenkins v. State,* 385 So.2d 1356, 1359 (Fla. 1980) ("[T]he language and expressions found in a dissenting or concurring opinion cannot support [conflict] jurisdiction . . . because they are not the decision of the district court of appeal.") *See also, Reaves v. State,* 485 So.2d 829 (Fla. 1986).

Petitioner did not present his argument about the necessary joinder of the sheriff to this litigation in the trial court nor in the DCA. The issue was articulated for the first time in the Brief of Petitioner on Jurisdiction in this Court. As such, the issue was not preserved for appellate review and it is not properly before this Court.

III.

THE DISTRICT COURT OF APPEAL APPLIED THE CORRECT STANDARD IN DECIDING THAT CERTIORARI REVIEW WAS PROPER IN THIS CASE.

Suggesting that the Third DCA improperly granted certiorari in this case, Petitioner argues that the trial court's error (if any) was a "simple legal error" that did not warrant certiorari review. Petitioner's argument is unfounded.

Respondent does not dispute that the nature and scope of certiorari review is limited, by this Court's precedents, to those cases in which the trial court has departed from the essential requirements of law and the departure has resulted in a miscarriage of justice. *Ivey v. Allstate Ins. Co.,* 774 So.2d 679 (Fla. 2000); *Allstate Ins. Co. v. Kaklamanos,* 843 So.2d 885, 889 (Fla. 2003). Rather, Respondent asserts that, in the instant case, the trial court's order not only departed from the essential requirements of Section 916.107, but its departure rose to the level of a miscarriage of justice and thus merited certiorari review.

In *Department of Highway Safety & Motor Vehicles v. Alliston,* 813 So.2d 141 (2d DCA 2002), the court noted:

> "In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or

> widespread in its application to numerous other proceedings." *Id.* at 145.

The court suggested that a circuit court order that is especially fact-specific, or one that otherwise has little precedential value, generally will not merit certiorari review. *Id.* The court went on to distinguish the order in the case before it, and held that its precedential value and potentially widespread application rendered the trial court's error egregious enough to fall within the scope of the district court's certiorari review. *Id.*

Likewise in the instant case, the trail court's order had potentially far-reaching application. DCF has many forensic clients similarly situated to Petitioner, who have been committed to secure facilities pursuant to 916.303(2)(b), after being found incompetent to proceed on felony charges. These forensic clients are subject to all of the provisions of Chapter 916 governing the rights of forensic clients, not just the provision regarding transportation. To the extent it had precedential value, the trial court's erroneous order was potentially pervasive and thus amounted to a miscarriage of justice for purposes of establishing certiorari.

In addition, unlike the district court in *Ivey*, the Third DCA in this case specifically noted in its written opinion that "the trial *court departed from the essential requirements of law* in placing the responsibility to transport Mr. David Everette from Marianna, Florida, to Miami, Florida, for

court-appointed expert evaluations on the Department of Children & Famililes." *Everette,* 911 So.2d at 121. The Third DCA thus acknowledged that it had in fact considered this Court's precedents and determined that certiorari review was appropriate, not just because it disagreed with the trail court, but rather because the trial court departed from the essential requirements of the law.

CONCLUSION

This Court should affirm the decision of the Third DCA finding that the trial court departed from the essential requirements of law when it ordered DCF to transport a forensic client committed pursuant to Chapter 916 of the Florida Statutes and quashing that order.

Respectfully submitted,

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CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Bennett H. Brummer, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, and to Annette M. Lizardo, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida, 33131, this ___ day of July, 2005.

I HEREBY CERTIFY that this brief is printed in 14 point Times New Roman.

Respectfully submitted,

_____
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