IN THE SUPREME COURT OF FLORIDA

RAYVON L. BOATMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-1630

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, Rayvon L. Boatman, was the respondent in this sexually violent predator (SVP) case and the appellant below. This brief will refer to him as Petitioner or by proper name. Respondent, the State of Florida, was the petitioner in the trial court and the appellee below; the brief will refer to Respondent as the State.

The record on appeal consists of three volumes, which will be referenced as the Record on Appeal and by appropriate volume, followed by any appropriate page number. The Supplemental Records will be referenced "Supp.: __" or "2 Supp: __" followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was serving a 15-year prison sentence for sexual battery, the anal and oral rape of a 13-year-old boy, when, in May of 2008, the Department of Children and Family Services commenced evaluating him for possible civil commitment as a sexually violent predator. (I: 12-18, 44, 61-63, 85) Two psychologists separately examined him and various prison and court records and each concluded that he met the criteria for civil commitment. (I: 19-58, 59-87) Each evaluation noted that Petitioner had often been disciplined while imprisoned. (I: 31, 36, 46-52, 66, 71-72)

At the time of the later evaluation, Petitioner was scheduled to be released from prison on December 6, 2008; at the time of the earlier evaluation the release date was November 24, 2008. (I: 19, 59) On July 9, 2008, the matter was referred to the State Attorney's Office in the First Judicial Circuit with a recommendation that civil commitment proceedings under the Sexually Violent Predator Act be instituted. (I: 85-87)

On October 1, 2008, the State filed a petition to commit Petitioner as a sexually violent predator. (I: 1-8) The petition noted that Petitioner's release date was October 5, 2008. (I: 2) Also on October 1, 2008, Circuit Judge Jan Shackleford entered an order finding probable cause to detain Petitioner. (I: 9-11) One week later, on October 8, 2008, Judge Shackleford held a hearing at

which Petitioner apparently appeared by telephone, during which Judge Shackleford said to Petitioner:

> Mr. Boatman, if you don't know what's happened to you, you were just about due to be released and then the State Attorney's Office filed something with me asking me to find probable cause to continue to detain you under what's called the Jimmy Ryce proceeding.
>
> Basically, I found probable cause that you suffer from a mental abnormality or personality disorder which makes you likely to engage in acts of sexual violence if not confined in a secure facility and if you don't get treatment. Now, that was just a probable cause finding, that's why you didn't get released, just straight released, you got shifted to Arcadia.

(2 Supp. 303) The judge appointed two experts for Petitioner's side of the case and set trial for October 20, 2008. (I: 88, 89; 2 Supp.: 306-307)

On October 10, 2008, the State moved to continue the trial. (Supp.: 253, 279-282) The motion stated, in part:

> State expert Dr. Kevin Raymond is out of the country and unavailable for trial. He has been unavailable since before the petition was filed and is unaware that there might be a trial the week of October 20th. Consequently, his deposition cannot be taken to be used at trial nor can he be available to testify by video conferencing.
>
> The State's second expert, Dr. Jeffrey Musgrove is available the week of October 20th in the event the Court orders a continuance but wants to do the preliminary hearing contemplated in Florida Statute 394.915(2). This would be a reasonable compromise and would protect the rights of Respondent as well as the rights of the people of the State of Florida.
>
> Other reasons exist to persuade the Court to exercise its discretion and find a showing of good cause as stated in section 394.916(2). Defense counsel has obtained the

> services of Dr. Gregory Prichard who, at most, will have available only the material contained in the Commitment Petition since by forcing the case to trial without engaging in discovery, the defense will not have any of the thousands of pages contained in Respondent's Department of Corrections file. This is a waste of taxpayer money, i.e., appointing an expensive expert who will have virtually no information from which to testify effectively.
>
> Moreover, assuming Dr. Prichard somehow finds the time to travel to the Florida Civil Commitment Center, interview the respondent, and prepare a report, there will be no time available for the State to depose Dr. Prichard. The State is entitled to due process as well as the defense.

(Supp.: 280-281)

A hearing on the motion was held on October 13, 2008. At the hearing the State noted that two other cases were scheduled for the same week and argued that discovery on either side was not complete, so "good cause [for continuance] is adequate and self-evident." (Supp.: 254)

Petitioner's counsel noted that Petitioner's sentence was not supposed to expire until November of 2008 but his release "got moved up" and the petition had been filed around the time of his release in October. (Supp.: 255) Counsel argued that continuances had to be justified with more than good cause, and that a continuance could not substantially prejudice the person on trial. (Supp.: 255-256) Petitioner would be substantially prejudiced by a delay because the State would gain a competitive advantage through discovery. Counsel argued:

> The defense can go to trial very quickly on these matters and is set to do so in Mr. Boatman's case and thinks the State is manipulating the situation to force Mr. Boatman into participating in discovery by answering interrogatories, by answering demands for production of documents, which we simply don't want to participate in, and I think it would be inappropriate to require him to stay confined beyond the expiration of his sentence, beyond the 30 days encompassed by the statute, just to enable the State to force him to help them build a case against him. So we're ready for trial next week. We strongly object to a continuance.

(Supp.: 256-257)

Judge Shackleford said her concern was not whether the State had good cause for a continuance but, rather, whether there was substantial prejudice to the defense, asking "how is it not substantial prejudice to the defense if they think they've got you on the ropes to continue the case?" (Supp. 257-258)

The State responded:

> Well, Judge, both sides are entitled to a fair trial. It would be substantial prejudice to the defense in any case to allow the State to investigate a case, to allow the State to be able to obtain handwriting exemplars, to allow the State to obtain DNA evidence; those are all prejudicial to the defense. Here, the State's entitled to a fair trial, as well. We're not going to have the opportunity to depose his expert, assuming his expert is capable of rendering an opinion in that period of time. We're not going to have the benefit of any of the discovery that he's being able to get from us. There are six boxes of material that we haven't even received as yet.
>
> * * *
>
> At this point, Judge, we don't have all the materials. They have had Dr. Prichard appointed, but he's not going

> to have the material he needs in order to render an opinion. If he does render an opinion, we are not going to be able to depose him on it or investigate that opinion based on his lack of material.
>
> As the Court says, this is simply an attempt to put us on the ropes and deprive the State of a fair trial . This is a civil proceeding. We have the same right to a fair trial that they do.
>
> * * *
>
> We knew when we came in last week, that Dr. Raymond was going to be out of the country; prior to the setting of the original date, we did not know he was going to be out of the country.
>
> The fact that his release date was moved up unexpectedly is not our fault. It's not a decision that we made. I understand his desire to get out of incarceration as quickly as possible, but a statute provides the Court upon finding a probable cause with the ability to investigate this and detain him as long as 120 days if that's what it takes to get the matter resolved and prepare the matter for a trial.
>
> So I think it's a bit curious to say that there is a legally recognizable substantial prejudice here. Granted, it may impinge upon his ability to conduct trial by ambush, but that's not actually a right that he has.

(Supp.: 258-260)

Petitioner's counsel noted that the State had received the notice from DCF in July, and continued:

> If they had filed the petition in August, the trial would have been scheduled in August or early September. If they were unable because their expert was out of the country or if they wanted a continuance to complete discovery, they could have done that through September without affecting Mr. Boatman's liberty interest before he gets out of prison.
>
> So whether it was through inaction or through their own

> deliberate tactics, they have created this situation, and I think they just have to suffer the consequences of it.

(Supp.: 260-261)

Judge Shackleford stated “my inclination is to deny it,” but took the matter under advisement, giving the parties until noon the next day to provide case law defining substantial prejudice. (Supp. 262) The State noted that it could not adequately determine what witnesses it would call because there still were “six boxes material from the facility” that it had not received or evaluated and thus could not amend the pretrial memorandum it had filed. (Supp.: 264-265)

Judge Shackleford also asked the parties to choose available dates if the continuance were granted and ultimately February 2, 2009 was chosen as the date. (Supp.: 269-270) The trial court also asked Petitioner’s counsel if, in the event the continuance were to be granted, the defense wanted a preliminary hearing to be held, and counsel said he did. (Supp.: 272) Apparently, no hearing was held, as there is no notation in the docket notes and no transcript or order in the record on appeal.

The same day, October 13, 2008, Judge Shackleford granted the continuance, ruling that the State showed good cause and the defense did not show substantial prejudice. (Supp.: 283) There was no attempt to seek interlocutory review of this ruling.

On January 20, 2009, the parties jointly stipulated to

continue the case from February 2, 2009 until February 9, one week later, because State expert witnesses would be unavailable. (Supp.: 284) The order was granted the same day. (Supp.: 286)

Prior to commencement of the jury trial on February 9, 2009, Petitioner again objected to the fact that he had not been brought to trial within 30 days of probable cause to detain him having been found; the objection was overruled by Circuit Judge Joseph Tarbuck. (II: 5)

On February 10, 2009, the jury unanimously found that Petitioner met the criteria for civil commitment as a sexually violent predator. (I: 226; II: 336) He was committed to state custody for control care and treatment that same day. (I: 227-228)

Petitioner appealed the judgment to the First District Court of Appeal, arguing that he was substantially prejudiced by Judge Shackleford granting the State's motion for continuance. On June 22, 2010, the First DCA held that because Petitioner had been substantially prejudiced by delay, Judge Shackleford had abused her discretion in granting the State's motion for continuance, and also ruled that Petitioner was entitled to have the petition dismissed without prejudice and to be released. *Boatman v. State*, 39 So. 3d 391, 392 (Fla. 1st DCA 2010). The court affirmed the judgment, however, because Petitioner had waived his claim for relief by waiting to raise it until the direct appeal. *Id.* Inasmuch as the

Petitioner had already been tried and found to meet the criteria for civil commitment, dismissal without prejudice would be moot. 39 So. 3d at 394-95. The First DCA certified the following question as being one of great public importance:

> WHEN A RESPONDENT WHO HAS SERVED HIS OR HER PRISON SENTENCE IS NOT BROUGHT TO TRIAL WITHIN THIRTY DAYS OF THE FINDING OF PROBABLE CAUSE UNDER THE JIMMY RYCE ACT, MUST THE RESPONDENT FILE A MOTION TO DISMISS AND, IF THE MOTION IS DENIED, SEEK RELIEF BY HABEAS CORPUS, TO PRESERVE THE CLAIM THAT THE MOTION SHOULD HAVE BEEN GRANTED?

39 So. 3d at 395.

On August 30, 2010, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The State submits that the certified question should be answered in the affirmative. The State also submits that, below, the defense did not demonstrate substantial prejudice. SVP pretrial detainees waive or forfeit the right to challenge state continuances unless they move to dismiss the petition and, if denied, seek immediate relief through habeas corpus.

The First District's ultimate determination of this question was correct and proper. SVP detainees are entitled to trial within 30 days of probable cause but if the State improperly is permitted to continue the trial past that date, the remedy is dismissal without prejudice and immediate release. Those remedies are addressed most directly by the procedure the court below requires.

Thus, not only was its reasoning sound, but the holding makes for sound policy. In the particular circumstances here habeas corpus is the most expeditious procedure for immediate resolution of a ruling granting the State a continuance, one that is fairest to both parties and makes the most efficient use of judicial resources.

The rule in this case protects the State's interests by preventing what the court below called a "second bite of the apple." Had the First DCA voided the judgment, the State would have had to have retried a person who already had been adjudicated a

sexually violent predator. When there are evidentiary or other trial issues at stake, that result is just, but there were no defects in the trial at all. Petitioner did not even argue to the court below that his trial proceeding was flawed in any way.

The rule set out below also protects the liberty interests of SVP respondents who have been substantially prejudiced by a delay in the proceedings. They could receive more or less immediate relief from a wrongfully granted continuance by being released from secure detention.

The procedure set out by the court below also makes sense in terms of judicial economy by resolving the issue of the State's continuance prior to a jury verdict making the issue moot.

This Court also should reject Petitioner's argument that a dismissal without prejudice still would bar the State from bringing an SVP petition against him.

In the alternative, the record below shows that the Petitioner did not demonstrate substantial prejudice from the continuance; thus, the First DCA was right, but for the wrong reason.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT REVERSIBLY ERRED IN GRANTING THE STATE'S MOTION TO CONTINUE THE TRIAL IN PETITIONER'S SEXUALLY VIOLENT PREDATOR COMMITMENT CASE.(Restated)

A. JURISDICTION

The Court has discretionary jurisdiction pursuant to Article V, section 3(b)(5), Florida Constitution.

B. STANDARD OF REVIEW

Petitioner attempts to couch this issue as one of constitutional law or statutory interpretation, meaning review would be *de novo*. As the First DCA found, however, the standard of review for an order granting or denying a motion for continuance is abuse of discretion, *see, e.g., Strand v. Escambia County*, 992 So. 3d 150, 154 (Fla. 2008), and this case has no constitutional dimension nor does it involve construction of a statute, only its application.

C. THE TRIAL COURT'S RULING

Circuit Judge Jan Shackleford ruled "the State demonstrated good cause and the defense did not establish substantial prejudice as required by Florida Statutes §394.916(2)." (Supp.: 283)

D. THE LOWER COURT'S HOLDING

The First District Court of Appeal affirmed the judgment committing Petitioner to state custody. Even though the trial court

abused its discretion in continuing the trial for up to 120 days Petitioner did not immediately move for a writ of habeas corpus upon the trial court's continuing to detain him after granting the motion for continuance and thus either waived, forfeited or failed to preserve that issue for appellate review. 39 So. 3d at 395.

The First DCA noted that under *State v. Goode*, 830 So. 2d 817, 828 (Fla. 2002) the 30-day deadline established by section 394.916(1) Florida Statutes is mandatory but not jurisdictional. 39 So. 3d at 393-94. Thus, when the SVP respondent has completed his prison sentence and is not brought to trial within 30 days, the proper remedy would be to dismiss the petition without prejudice and to release the respondent from custody. *Id.* at 394, *citing Osborne v. State*, 907 So. 2d 505, 509 (Fla. 2005).

When the trial already has been held, however, the First DCA opined, there would be no point in an appellate court reversing the judgment and remanding with orders to dismiss the petition without prejudice and release the respondent from custody. *Id.* at 395.

> A dismissal without prejudice would only prolong the proceedings by allowing the state to refile the petition and requiring yet another trial. The purpose of the thirty-day deadline is to minimize pretrial detention by requiring commitment trials to be held promptly, not to give respondents a proverbial "second bite at the apple."

Id. Thus, the First DCA concluded:

> We believe that, to further the legislature's intent that such trials be held promptly, the proper remedy in such cases is for the respondent to file a motion to dismiss

> the petition as soon as the thirty-day deadline has expired, and to seek immediate relief by habeas corpus if the motion is denied.

39 So. 3d at 395. The lower court, acknowledging that it was considering a case of first impression certified the following question:

> When a respondent who has served his or her prison sentence is not brought to trial within thirty days of the finding of probable cause under the Jimmy Ryce Act, must the respondent file a motion to dismiss and, if the motion is denied, seek relief by habeas corpus, to preserve the claim that the motion should have been granted?

Id.

E. MERITS

In his argument Petitioner strays somewhat from the narrow issue that this case presents. His lengthy recitation of the procedures employed in sexually violent predator (SVP) cases (IB, 14-18) may be helpful as background, especially for members of the Court who are not familiar with what used to be called the Jimmy Ryce Act, but is not otherwise enlightening as to resolution. His reliance upon cases that involve people who should have been out of prison at the time their civil commitment petitions were filed (IB, 22-30) actually misapprehends the narrow facts and issue here; the record is clear that Petitioner was lawfully in custody on October 1, 2008, when the SVP petition was filed.

This case presents an SVP respondent whose prison sentence has

expired and who is not brought to trial within 30 days, as required by section 394.916, Florida Statutes, because the State has been granted a continuance. The legal question here is whether such a respondent must move to dismiss the petition and, if that ruling is denied, seek a writ of habeas corpus in the district court in order not to have waived – or, considering that waiver is knowing and voluntary, the better term is forfeited – his right to argue that point on appeal.

The State submits that the certified question should be answered in the affirmative. The State also submits that, below, the defense did not demonstrate substantial prejudice.

1. SVP Pretrial Detainees Waive Or Forfeit The Right To Challenge State Continuances Unless They Seek Immediate Relief Through Habeas Corpus.

The First District's ultimate determination of this question was correct and proper. SVP detainees are entitled to trial within 30 days of probable cause but if the State improperly is permitted to continue the trial past that date, the remedy is dismissal without prejudice and immediate release. Those remedies are addressed most directly by the procedure the court below requires.

Thus, not only was its reasoning sound, but the holding makes for sound policy. In the particular circumstances here habeas corpus is the most expeditious procedure for immediate resolution of a ruling granting the State a continuance, one that is fairest

to both parties and makes the most efficient use of judicial resources.

The decision below is based on the sound legal principle that objections should be contemporaneous. It is true that Petitioner opposed the continuance, but he did not ask for the relief that this Court has said is appropriate when a continuance is improperly granted. He did not move to have the trial court dismiss the petition and grant his immediate release. Rather, he accepted the trial court's ruling and took what tactical advantage he could from the delay, not raising the issue of the continuance again until Feb. 9, 2009, after the stipulated-to second continuance.

Simply put, petitioner was entitled to two things: dismissal of the petition and immediate release from custody. He did nothing toward either one of those goals. He did not move to dismiss until the first day of trial and that motion was pro forma. (Tr. I: 5) As to custody, he did not even press for the adversarial probable cause determination that was discussed in open court.

The decision below recognizes the well-established principle that habeas corpus is the appropriate means to challenge unlawful custody. "The writ of habeas corpus was designed as a speedy method of affording a judicial inquiry into the cause of the alleged unlawful custody of an individual." *In Interest of E.H.*, 609 So. 2d 1289, 1291 (Fla. 1992).

Thus, by requiring SVP respondents to seek appropriate remedies by appropriate procedures, the decision below is legally sound.

It also makes for good policy and protects all interests.

The rule in this case protects the State's interests by preventing what the court below called a "second bite of the apple." Had the First DCA done as Petitioner requested and voided the judgment, the State would have had to have retried a person who already had been adjudicated a sexually violent predator. When there are evidentiary or other trial issues at stake, that result is just, but there were no defects in the trial at all. Petitioner did not even argue to the court below that his trial proceeding was flawed in any way.

The rule set out below also protects the liberty interests of SVP respondents who have been substantially prejudiced by a delay in the proceedings. They could receive more or less immediate relief from a wrongfully granted continuance by being released from secure detention. This Court has clarified that when the State does not bring to trial within 30 days an SVP respondent whose prison term has expired, the remedy is release from secure detention and dismissal of the petition without prejudice. *Osborne v. State*, 907 So. 2d 505, 509 (Fla. 2005) While the State could refile the petition, the SVP respondent would no longer be a pretrial

detainee. He would have his liberty.

Thus, the State cannot agree with Petitioner's contention that the court below interpreted *Osborne* in such a way as to vitiate the 30-day time limit found in section 394.916(1) and deprive him of his liberty. The facts of this case demonstrate that his liberty interests would have better been vindicated by the procedure the court below required.

Assume that, rather than acquiescing in the trial court's order so completely as to agree to a trial date in February and then stipulate to another one-week delay, Petitioner had petitioned the First DCA for habeas corpus relief. If the Court had found, as it did here, that the continuance should not have been granted, Petitioner would have been released and would have been at liberty at least until the jury's verdict. At the point, of course, he would not be entitled to liberty until such time as he no longer poses a threat to society as a sexually violent predator.

The procedure set out by the court below also makes sense in terms of judicial economy. While what Petitioner seems to be suggesting is that he is actually entitled to a void judgment with no retrial, the Court below did not take that to be an acceptable alternative. Rather, the First DCA noted that the remedy for not being brought to trial within 30 days of the first probable cause determination is for the respondent to be released from confinement

and the petition dismissed without prejudice.

2. Petitioner Improperly Seeks To Expand *Goode* and *Osborne*.

Petitioner's argument appears to be that, contrary to *State v. Goode*'s pronouncement that the 30-day trial deadline is not jurisdictional, he was entitled to dismissal with prejudice. That is that the only way his liberty interests would have been vindicated was for the State to be barred from seeking civil commitment forever – or at least until such time as he returned to prison again. *See In Re Commitment of Goode*, 22 So. 3d 750, 752 (Fla. 2010).

Such an argument, however, is directly contrary to *Osborne*. In that case the State did not bring Mr. Osborne to trial within 30 days – indeed, it appears that three months had passed without a motion for continuance being sought or granted – and he moved to dismiss the petition. *State v. Osborne*, 781 So. 2d 1137, 1137-38 (Fla. 5th DCA 2001). The trial court granted the motion and dismissed with prejudice but the Fifth District Court of Appeal reversed, ruling that the 30-day limit was not jurisdictional and, moreover, that the respondent had not demonstrated prejudice from the failure to be brought to trial. 781 So. 2d at 1139-40.

Upon review, this Court rejected the holding that the respondent had to show prejudice from not being brought to trial within 30 days, but held that because the statutory 30-day period

was not jurisdictional under *Goode*, the remedy for a violation was to release the respondent and dismiss the petition without prejudice to refile. 907 So. 2d at 507-09.

Thus, *Osborne* unequivocally holds that the proper remedy for not being brought to trial within 30 days, absent a properly granted continuance, is precisely what the First DCA said it was: release from detention and dismissal without prejudice.

Petitioner's argument is that the court below "emphasiz[ed] 'without prejudice' [and] disregard[ed] 'dismissal' and 'release from detention.'" (IB, 21) His reasoning appears to be that the court wrongly concluded that habeas corpus was the proper remedy because it incorrectly assumed "that the State could simply refile the petition after the respondent was released . . . ."

In fact, however, that is exactly what *Goode* (as well as *State v. Kinder*, 830 So. 2d 817 (Fla. 2002)) held and *Osborne* clarified:

> In accordance with our holdings in *Goode* and *Kinder* that the thirty-day rule is mandatory but not jurisdictional, we find that a dismissal of a Ryce Act petition with prejudice for failure to try the case in the required time period would be incongruous with our prior interpretation of the thirty-day rule. A dismissal of a petition with prejudice would terminate the case on procedural grounds, essentially divesting the circuit court of jurisdiction. We, of course, have already held that the time period is not jurisdictional. Although the State must be held to the mandatory statutory time frames, we do not believe the Legislature intended that those time frames be used as vehicles by which to dispose of Ryce Act proceedings where the respondent suffers no prejudice. Rather, we conclude that absent a

> demonstration of prejudice, the dismissal should be without prejudice and the respondent should be released.

907 So. 2d at 508. The only qualification on this rule appears in footnote 4 of *Osborne*: "Of course, the State's ability to refile a Ryce Act petition is subject to the appropriate statutory limitation period." 907 So. 2d at 508, n.4.

This Court has not clarified what, precisely, it was referring to in footnote 4, but it appears that it was addressing the statute of limitations, rather than a procedural rule that governs the time deadline for bringing a case to trial. As the Second DCA noted in *Commitment of Goode*,

> Where the State fails to bring a detainee to trial within the thirty-day period, the petition for civil commitment must be dismissed and the detainee must be released. However, unlike the running of a statute of limitations, the expiration of the thirty-day period does not forever foreclose the State from filing a new petition for civil commitment. Rather, it acts as a procedural bar to the continued detention of the detainee at that time. If the detainee is subsequently imprisoned for another offense, the State is free to file a new petition.

22 So. 3d at 752.[1] There is no specific statute of limitations for SVP commitment proceedings – and, in any event, no statute of

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[1] The appellant in *Detention of Goode* is the same man who was the respondent in this Court's *State v. Goode* decision. After the trial court ordered his release, his probation commenced. 22 So. 3d at 751. He was returned to prison when his probation was revoked for failing to register as a sex offender and the State filed another SVP petition. The trial court dismissed the petition, citing *res judicata* principles and ruling that the previous dismissal was an adjudication upon the merits under Florida Rule of

limitations is necessary. SVP commitment proceedings derive not from events but, rather, from status. The respondent meets certain criteria, specifically that he's been convicted of a sexually violent offense and that he suffers from a mental abnormality or personality disorder that renders him likely to commit further acts of sexual violence. Unless something changes in his mental state, he always will meet the criteria. In any event, the statute of limitations does not appear to be an issue here and even if it did the rule is that a complaint that has been dismissed can be refiled outside the statute of limitations so long as the new complaint relates back to the original. Fla.R.Civ.P. 1.190(c). This rule is to be applied liberally. *See, e.g., C.H. v. Whitney*, 987 So. 2d 96, 99 (Fla. 5th DCA 2008).

Civil Procedure 1.420. *Id.* The Second DCA reversed, holding that the previous dismissal was not an adjudication upon the merits. 22 So. 3d at 752. *Commitment of Goode* should not be read as holding that the State could not refile an SVP petition that has been dismissed without prejudice. The reference to filing a petition once the respondent has returned to prison simply reflects the facts of Mr. Goode's case and is not a holding that the State cannot refile an SVP petition unless the respondent has been reincarcerated.

It is not clear why the State did not re-file its petition after this court's *Goode* decision, but it is worth noting that it was not clear until *Osborne* that such dismissals were without prejudice. 907 So. 2d at 509-12 (dissenting opinion of Justice Anstead).

3. “Without Prejudice” Means The Case May Be Refiled

Simply put, *Goode* and *Osborne* expressly hold that dismissal is to be without prejudice. The common meaning of that term is that the prosecuting party can refile the complaint, motion or petition. “Without prejudice” means “[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party,” and dismissed without prejudice means “removed from the court’s docket in such a way that the plaintiff may refile the same suit on the same claim.” *Black’s Law Dictionary*, 2009 ed.

Petitioner’s position, however, is that that First DCA was incorrect because the State could not have effectively re-filed the petition once he was released. At times he argues that because he would no longer be in “total confinement,” the jurisdictional basis for filing against him would have vanished. (IB, 22-23) Elsewhere, he appears to assert that the Petition was invalid because he actually had been released from prison at the time the SVP proceedings were instituted. (IB, 23-30) Neither point has merit.

The first point, if accepted, would nullify the holdings in *Goode* and *Osborne*. Petitioner’s position is that there effectively is no dismissal without prejudice when an SVP respondent is not brought to trial within 30 days.

To press his second point, Petitioner misplaces reliance on cases that involve petitions that were declared invalid because, at

the time the SVP proceedings were instituted, the respondent was not in lawful custody. An example is *Larimore v. State*, 2 So. 3d 101 (Fla. 2008). There, the SVP respondent had been released from a prison sentence and had been returned to prison after violating his probation, during which time the State commenced SVP proceedings. 2 So. 3d at 104.

Ultimately, however, the First DCA determined that he was entitled to an award of gaintime credits "which had the effect of erasing his five-year sentence for violating probation." *Id.* (*See Larimore v. State*, 823 So. 2d 287 (Fla. 1st DCA 2002), *Larimore v. Dept. of Corrections*, 910 So. 2d 847 (Fla. 1st DCA 2004). Because he never should have been in prison for violating his probation, the Court held, the SVP proceedings should have been dismissed. 2 So. 3d at 113-114.

That is not the situation here. While Petitioner's release from prison apparently occurred prior to what the State had anticipated, he was still in Department of Corrections custody on Oct. 1, 2008, when the petition was filed. Petitioner appears to argue that he actually was not in custody on that date, but the record, and the Department of Corrections offender database indicate otherwise. The database shows that he was released on October 5, 2008. (App. 1) The Petition alleged that his release date was October 5, 2008. (I: 2) The record shows that on October

8, 2008, Petitioner had been transferred to the Florida Civil Commitment Center in Arcadia, but not until Judge Shackleford had made a finding of probable cause, which occurred contemporaneously with the petition being filed on Oct. 1, 2008. (I: 1-8, 9-11) As the transcript of the Oct. 8 hearing shows:

> Mr. Boatman, if you don't know what's happened to you, **you were just about due to be released and then the State Attorney's Office filed something with me asking me to find probable cause to continue to detain you** under what's called the Jimmy Ryce proceeding.
>
> Basically, I found probable cause that you suffer from a mental abnormality or personality disorder which makes you likely to engage in acts of sexual violence if not confined in a secure facility and if you don't get treatment. **Now, that was just a probable cause finding, that's why you didn't get released, just straight released, you got shifted to Arcadia.**

(2 Supp. 303) (emphasis supplied).

It's clear that Petitioner was in prison when the SVP case was filed. Thus, Petitioner does not fall under the rule in *Larimore* – so Petitioner's lengthy argument that it is the date the petition is filed and not the date that the multidisciplinary team issues its recommendation concerns a factually moot point. It is worth pointing out, however, that the *Larimore* rule apparently only applies when "no part of the process was begun while the person was in lawful custody . . . ." 2 So. 3d at 113.

Moreover, once a timely petition was filed against Petitioner, the lower court had jurisdiction, and the point of dismissal

without prejudice is that it does not deprive the court of jurisdiction. As the Court below succinctly summed up: "Thus, dismissal without prejudice would release appellant from custody without depriving the trial court of jurisdiction over the case." 39 So. 3d at 394.

4. Petitioner Did Not Establish Substantial Prejudice.

In the event the Court were to disapprove the decision of the court below and rule that Petitioner was not required to move to dismiss the petition and seek release via habeas corpus, the State asserts that the result below can nonetheless be approved on alternative grounds, i.e., the lower court was right for the wrong reason. *See, e.g., Dade County School Bd. v. Radio Station WQBA,* 731 So. 2d 638, 645 (Fla. 1999). The court below should have ruled that Petitioner did not show substantial prejudice.

The decision below does not expressly say that any continuance past a prisoner's release date is substantial prejudice, but that appears to be an assumption. The court did not discuss any other considerations that might be taken into account.

As argued below, SVP proceedings are civil so there is no constitutional right to a speedy trial. The United States Supreme Court, however, has established a methodology for evaluating speedy trial rights under the Sixth Amendment. Those cases, which the State offers by way of analogy to demonstrate a more balanced

approach to analyzing section 394.916, teach that there are no bright-line rules for determining when the Sixth Amendment speedy trial right has been violated, nor are any of the considerations automatically dispositive. "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972).

In affirming a ruling that a four-year-plus delay in bringing a defendant to trial did not violate the Sixth Amendment, the *Barker* Court identified four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. The court noted:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

407 U.S. at 532, 92 S.Ct. at 2193. Thus, prejudice was a factor, but not the determining one. Moreover, the defendant's extended confinement was a only a component of prejudice.

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such 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.

Id. In discussing the prejudice caused by lengthy detention prior to trial, the Court said:

> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

407 U.S. at 532-33, 92 S.Ct. at 2193 (footnotes, citation omitted).

Here it is important to notice that Petitioner already was incarcerated, so he did not lose a job or have his family life disrupted and any idleness that incarceration may have sparked will long ago have taken hold. His ability to aid in his own defense is not substantially hampered because the facts of the cases that sent him to prison are already established and, moreover, these cases are typically defended by reliance on expert witnesses whose testimony might rebut that of the State’s experts.

The Court below appears to assume that any delay is past an unspecified though brief time is presumptively prejudicial. This assumption is contrary to constitutional speedy trial

jurisprudence. In *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S.Ct. 2686, 2690-91 (1992) the Court noted that ordinary delays between arrest and trial are not presumptively prejudicial. The delay here was ordinary and for normal purposes, i.e., to get the case competently prepared for trial. Also, the State did not seek the delay for an improper purpose; rather, the State needed to depose defense experts and examine material it previously had not had access to. *Doggett* discussed that presumptive prejudice is more important in deciding a speedy trial question when the State acts deliberately or negligently, rather than when its prosecution has been diligent. 505 U.S. at 656-57, 112 S.Ct. at 2693.

In its assumption that a full 120-day continuance was prejudicial, the court below either discounted or failed to apprehend that Petitioner's sole ground for opposing the continuance: He wanted a trial before he had to participate in discovery. Counsel argued:

> The defense can go to trial very quickly on these matters and is set to do so in Mr. Boatman's case and thinks the State is manipulating the situation to force Mr. Boatman into participating in discovery by answering interrogatories, by answering demands for production of documents, which we simply don't want to participate in, and I think it would be inappropriate to require him to stay confined beyond the expiration of his sentence, beyond the 30 days encompassed by the statute, just to enable the State to force him to help them build a case against him. So we're ready for trial next week. We strongly object to a continuance.

(Supp.: 256-257)

This case preceded adoption of the SVP rules, *In Re Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators*, 3 So. 3d 1025 (Fla. 2009) so discovery was governed by the Florida Rules of Civil Procedure. § 394.9155(1) Fla. Stat. The State would have been entitled to documents, answers to interrogatories and responses to requests for admission within 30 days of service of the proper pleadings. *See*, Fla.R.Civ.P. 1.280(a), 1.340(a), 1.350(b), 1.370(a). The defense mechanism against overly burdensome discovery is to move for a protective order under Rule 1.280(c), not to push for a trial in order to, in Judge Shackleford's words, "put the State on the ropes" in terms of trial preparation.

The State moved for continuance so that it could secure the attendance of an expert witness who had evaluated Petitioner and who was out of the country at the time the petition was filed and would remain abroad at the time the trial was scheduled to begin. (Supp.: 280) Gaining a competitive advantage by depriving a party of a particular witness with personal knowledge of relevant events, who also could advise the State concerning reports by defense experts, and by eliminating discovery obligations is not substantial prejudice, it's simply litigation tactics.

It is worth noting that once the continuance was granted, Petitioner did not request the earliest possible date and, in fact,

agreed to a one-week postponement. Moreover, despite the parties contemplating an adversarial probable cause hearing during the October 8, 2008, court session, no such hearing ever was scheduled. The fact that Petitioner did not press this issue suggests two things. First, that the outcome of such a hearing was unlikely to be favorable. Second, that, once the case was continued, Petitioner was content to let the case develop. As the State noted in open court, the defense did not have time to depose witnesses, either.

The opinion below noted that "substantially prejudiced" has not been defined, but, despite Petitioner's acquiescence to a trial date at or past the end of the 120 days, stated:

> We conclude that appellant was substantially prejudiced by the extension of his pretrial detention by over three months. This problem could have been avoided if the state had not waited three months to file the petition as appellant was approaching his release date from prison. Appellant would not have been substantially prejudiced by a continuance if he was still serving his prison sentence.

39 So. 3d at 394. Thus, in the First DCA's view, whenever an SVP trial is scheduled for more than 30 days past the finding of probable cause, which must made be contemporaneously with the petition being filed,[2] the respondent will be substantially

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[2] § 394.915(1), Fla. Stat: "When the state attorney files a petition seeking to have a person declared a sexually violent predator, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator."

prejudiced by a continuance if he is no longer in Department of Corrections custody.

The State also takes exception to the First DCA's suggestion that the State was dilatory in filing its petition and, therefore, would have had only itself to blame for being unable to take discovery before trial. The record does not show why the petition was filed when it was, but it is an established fact that Petitioner's release date moved up unexpectedly. Dr. Musgrove's June 29, 2008, report showed that Petitioner's release date was December 6, 2008; Dr. Raymond's later report showed the release date to be November 24, 2008. (I: 19, 59) It would not be unreasonable for the State to have relied on the later date; given Petitioner's record of disciplinary actions in prison it is not improbable that gaintime awards, if any, might have been forfeited, resulting in his release date being moved from late November until early December. (I: 46-52) Thus, the October 1, 2008, filing date was not necessarily due to dilatory filing.

Likewise, it is not unreasonable for the State to have delayed filing the Petition in order to manage caseload. Prosecutor's offices usually have one or two lawyers dedicated to SVP practice and if caseload piles up it would not be an unreasonable management practice to delay filing by a brief period of time.

Moreover, if, as the First DCA suggests, any delay past 30

days is substantial prejudice for someone who's a pretrial detainee the State would be foreclosed from taking any discovery when a prisoner is given an unexpected immediate release and the emergency provisions in section 394.9135 take effect. In such cases the State is not to blame, but it would have to go to trial in 30 days or let a putatively dangerous person be released into society.

5. Applying The Waiver Rule Was Proper

In his final point, Petitioner argues that the Court below was unfair to him because it applied a procedural bar to his case without prior notice. Petitioner misses the point of the First DCA's holding that the remedy became moot once a jury found he met the criteria for being declared a sexually violent predator. If there is no effective remedy once a jury has determined the ultimate outcome of the case, then, obviously, the issue must be raised prior to that event.

Petitioner's attempts to characterize section 394.916 as the speedy trial rule for SVP cases run counter to the holdings in *Goode* and *Osborne.* The speedy trial rule, as well as the constitutional principle underlying it, is a creature of criminal law, and SVP proceedings are civil in nature. § 394.910, Fla. Stat. More to the point, a speedy trial violation results in the defendant being forever immune from prosecution – in essence, it is a dismissal with prejudice. This Court already has determined that

dismissal for failure to bring an SVP respondent to trial within 30 days is to be without prejudice. *Osborne*, 907 So. 2d at 508.[3]

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court approve the decision below.

[3] The State reiterates that its discussion of constitutional speedy trial analysis, above, was offered only to demonstrate an alternative analytical approach that is more thorough than that which the court below employed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Assistant Public Defender Gail E. Anderson, Esq., whose physical address is 301 S. Monroe St., Tallahassee, FL 32301 by electronic mail, as agreed by the parties, to the following e-mail address: Gail.Anderson@flpd2.com on November 17, 2010.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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