IN THE
SUPREME COURT OF FLORIDA

RAYVON L. BOATMAN,

Petitioner,

v. **Case Number: SC10-1630**

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION

PETITIONER'S INITIAL BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Case **Page**

Statutes and Rules **Page**

PRELIMINARY STATEMENT

This proceeding involves the direct appeal from Appellant's involuntary civil commitment as a sexually violent predator under the Jimmy Ryce Act ("Ryce Act"), sections 394.910-.931, Fla. Stat. (2006). The following symbols will be used to designate references to the record in this appeal:

"R[volume number]. [page number]" - 2 volumes labeled "Record On Appeal";

"T[volume number]. [page number]" - 2 volumes labeled "Jury Trial Proceedings";

"Supp.R. [page number]" - 1 volume labeled "Supplemental Record On Appeal";

2Supp.R. [page number]" - 1 volume labeled "Second Supplemental Record on Appeal."

STATEMENT OF THE CASE AND FACTS

On July 9, 2008, the Multidisciplinary Team of the Department of Children and Families recommended that the State pursue Mr. Boatman's involuntary civil commitment as a sexually violent predator (R1. 6). On October 1, 2008, the State filed a petition seeking Mr. Boatman's commitment (R1. 1-8). On that same date, the circuit court found probable cause that Mr. Boatman met the criteria for a sexually violent predator (R1. 9-11).

At a hearing on October 8, 2008, the court appointed counsel for Mr. Boatman (2Supp.R. 304). Counsel moved for the appointment of two mental health experts, and the court granted the motion (2Supp.R. 305). The court informed Mr. Boatman that he had a right to go to trial within 30 days of the finding of probable cause, and Mr. Boatman invoked that right (2Supp.R. 303, 306-07). Trial was set for October 20, 2008 (2Supp.R. 307). Mr. Boatman's counsel stipulated to the State's request to take depositions to perpetuate testimony (2Supp.R. 308).

On October 10, 2008, the State filed a motion requesting a continuance of trial under section 394.916(2), Fla. Stat. (Supp.R. 279-82). The motion noted that at the hearing held on October 8, 2008, Mr. Boatman's counsel "asserted that the trial must be held within 30 days of the Court's determination of probable cause" (Supp.R. 279). As grounds for the continuance, the motion stated that State expert Kevin Raymond was out of the country and unavailable for a trial the week of October 20, 2008 (Supp.R. 280). Another State expert, Jeffrey Muskgrove, was available the week of October 20 (Id.). The motion also argued that Mr. Boatman would not be prepared for trial the week of October 20 (Supp.R. 281).

At a hearing on the motion, the State indicated that at the October 8 hearing, Mr. Boatman's counsel had stated that the defense was not going to ask for a continuance of the 30-day time limit for trial and requested that the trial be set for the week of October 20 (Supp.R. 254). The State requested a continuance, arguing, "good cause is adequate and self-evident" (Supp.R. 254). Mr. Boatman's counsel opposed the continuance, arguing that the situation was of the State's own making:

> What happened in this case, the State received notice from the Multidisciplinary Team that they were recommending that the petition be filed by letter dated July 9, 2008. So in July the State was on notice that the petition needed to be filed.
>
> Mr. Boatman's sentence is not scheduled to expire until November, whether it was through decision and planning or is through inadvertence and neglect, they did not file this petition until right at the expiration of his sentence in October. It got moved up unexpectedly on them.
>
> Now, Mr. Boatman is being held over, his liberty is being deprived now solely for this civil matter. Perhaps the State is just callused towards taking other people's liberty because they do it so frequently in criminal proceedings. But in a civil case, I think we need to step back and take a look and decide if this is not, in fact, substantial prejudice to Mr. Boatman.
>
> What's interesting in the motion to continue, they cite very briefly the fact that one of their experts is unavailable and out of the country, although the other expert is available and could proceed. They spend three or four paragraphs explaining why discovery has not been completed and why the defense is not ready for trial. It's not the State's job to determine whether the defense is ready for trial. The

> defense announced ready for trial. Defense is ready and wanting to have this trial next week. The fact that this short time frame and the ability of our experts to get prepared –- if the Court wants to look at the last Jimmy Ryce case filed, Mr. Deon Richardson, which we went to trial in approximately two weeks after appointment and prevailed in that case.
>
> 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 admissions, 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.R. 255-57).

The court then asked the State, "how is it not substantial prejudice to the defense if they think they've got you on the ropes to continue the case?" (Supp.R. 257-58). The State responded that the State was entitled to a fair trial, would not be able to depose Mr. Boatman's expert and would not be able to review six boxes of material (Supp.R. 258-59). The State contended that Mr. Boatman's opposition to a continuance was "simply an attempt to put us on the ropes and deprive the State of a fair trial" and argued that the fact that Mr. Boatman's release date was moved up was not the State's fault (Supp.R.

259). Mr. Boatman's counsel reiterated that the State had created the situation:

> [T]hey got notice in July. 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.R. 260-61).

The judge indicated he was inclined to deny the continuance, but allowed the parties until the next day to submit any case law on the definition of "substantial prejudice" (Supp.R. 262). The State mentioned that Mr. Boatman could request an adversarial preliminary hearing, and Mr. Boatman's counsel responded, "We prefer the trial" (Supp.R. 270). The judge asked Mr. Boatman's counsel, "If I decide I'm going to continue the case, do you want a preliminary hearing next week?" (Supp.R. 272). Counsel answered, "Mr. Boatman is entitled to it, so yes, we would ask for that" (Supp.R. 272). The court restated Mr. Boatman's position regarding a preliminary hearing to the prosecutor: "He is saying that if it's continued, he would like a preliminary hearing" (Supp.R. 272). Later, the

court told Mr. Boatman, “If it is continued, we’ll anticipate an adversarial hearing next week” (Supp.R. 273).

The next day, the court granted the continuance, stating:

> 1. The State demonstrated good cause and the defense did not establish substantial prejudice as required by Florida Statutes §394.916(2).
>
> 2. The defense was not willing to waive an adversarial probable cause hearing.

(Supp.R. 283). The court set trial for the week of February 2, 2009, and set an adversarial probable cause hearing for the week of October 20, 2008 (Supp.R. 283). The record does not reflect whether or not this hearing occurred, but no probable cause finding other than that issued on October 1, 2008, appears on the circuit court docket or is contained in the record. The trial was later continued to the week of February 9, 2009, by stipulation of both parties (Supp.R. 284, 286). Before jury selection on that date, Mr. Boatman moved to dismiss the State’s petition for failure to hold the trial within 30 days, and the court denied the motion (T1. 5).

At trial, the State presented testimony regarding a February 6, 1994, incident in which a 13-year-old boy reported that Mr. Boatman had anally raped him (T1. 84-86, 90-94). Mr. Boatman was arrested and admitted having sex with the boy but

said it was consensual (T1. 87). Mr. Boatman was convicted of the offense (T1. 88).

The State also presented the testimony of mental health experts. Kevin Raymond, a forensic psychologist, evaluated Mr. Boatman on June 9, 2008, and issued a report on June 13, 2008 (T1. 99; R1. 111; State Ex. 3). The evaluation included an interview of Mr. Boatman and actuarial testing, as well as a review of Mr. Boatman's prison and criminal records (T1. 100-01). Raymond diagnosed Mr. Madison as suffering from a nonspecific paraphilia involving nonconsenting adults (T1. 106-08). Raymond opined that Mr. Boatman was likely to reoffend if he was not confined for long-term care, control and treatment (T1. 128).

Patrick Cook, a psychologist, described the process the Department of Families and Children undertakes in order to determine whether or not to recommend that a person be civilly committed (T1. 146-55). Based upon a review of records and the reports of other mental health experts, Cook opined that Mr. Boatman met the criteria as a sexually violent predator and should be committed for care, control and treatment (T1. 161).

Jeffrey Muskgrove, a clinical and forensic psychologist, evaluated Mr. Boatman on June 25, 2008, and issued a report on June 29, 2008 (T1. 166; R1. 140; State Ex. 5). For the

evaluation, Muskgrove reviewed records, interviewed Mr. Boatman, and scored an actuarial (T1. 167-69). Muskgrove diagnosed Mr. Boatman as suffering from pedophilia, alcohol abuse, a nonspecific depressive disorder and a nonspecific personality disorder with antisocial features (T1. 174-78). Muskgrove opined that Mr. Boatman met the criteria for involuntary civil commitment as a violent sexual predator and that Mr. Boatman was in the high risk category for reoffending (T1. 194-95).

In the defense case, Mr. Boatman described his childhood and youth (T2. 215-21). He denied telling Muskgrove or Raymond that he had a sexual addiction and denied abusing alcohol (T2. 222-23). Mr. Boatman explained what being in prison was like for him and discussed some of his disciplinary reports (T2. 224-30). Mr. Boatman testified that some statements which appeared in his records were not true and that he had not made some statements attributed to him (T2. 230-32). Mr. Boatman testified that he was sexually abused numerous times during his first prison sentence but was too frightened to report the abuse and was sexually abused twice during his second incarceration (T2. 134-35). Mr. Boatman explained that he had changed since he was last sent to prison in 1994 (T2. 236-40). A defense mental health expert testified that actuarial instruments do not accurately predict recidivism (T2. 262-70).

The jury found Mr. Boatman was a sexually violent predator (R2. 226). The court entered judgment and ordered Mr. Boatman committed to the Florida Civil Commitment Center (R2. 227-28).

Mr. Boatman appealed his commitment to the First District Court of Appeals (R2. 233). He argued that the trial court's continuance of trial beyond the 30-day time limit set by the statute deprived him of his due process liberty interest and was contrary to the statute. Mr. Boatman contended that the 30-day time limit was mandatory, that the State did not show good cause for the continuance, that he was substantially prejudiced by the continuance and that he should be immediately released from custody.

The First District agreed that the trial court erred in granting the continuance because Mr. Boatman was "substantially prejudiced." Boatman v. State, 35 Fla. L. Weekly D1389, 2010 WL 2483749 (Fla. 1st DCA June 22, 2010). The court nevertheless affirmed Mr. Boatman's civil commitment, determining that he had waived his argument by not filing a petition for a writ of habeas corpus immediately after his motion to dismiss was denied. Boatman, 2010 WL 2483749 at *3. The court then certified a question of great public importance to this Court:

> 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?

Boatman, 2010 WL 2483749 at *4.

Mr. Boatman filed a motion for rehearing which the First District denied on July 20, 2010. On August 18, 2010, Mr. Boatman filed a notice to invoke this Court's discretionary jurisdiction. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

After receiving the multidisciplinary team's recommendation, the State waited three months–-until the eve of Mr. Boatman's release from prison–-before filing its petition seeking Mr. Boatman's commitment under the Jimmy Ryce Act. The trial court then granted the State's motion to continue the trial beyond the 30-day mandatory time limit, and Mr. Boatman was detained beyond the expiration of his criminal sentence.

When a Ryce Act respondent whose criminal sentence has expired is detained beyond the 30-day limit without a valid continuance of trial, the respondent's remedy is "release from detention and a dismissal without prejudice of the pending proceedings." Although finding Mr. Boatman was "substantially prejudiced" by the continuance, which was therefore invalid, the First District held Mr. Boatman waived this remedy by raising the issue on direct appeal rather than immediately filing a habeas corpus petition. The First District incorrectly interpreted "dismissal without prejudice" and disregarded the effect of the respondent's "release from detention." Correctly interpreted, the remedy requires the respondent's release from custody, dismissal of the State's petition, and refiling the petition only if other conditions in the Ryce Act are satisfied. This remedy is not rendered moot by raising it on direct appeal.

Mr. Boatman should be released, and the State's petition should be dismissed.

ARGUMENT

WHEN A RESPONDENT IN A JIMMY RYCE PROCEEDING WHO HAS COMPLETED HIS PRISON SENTENCE IS NOT BROUGHT TO TRIAL WITHIN THIRTY DAYS OF THE FINDING OF PROBABLE CAUSE AND THUS IS CONFINED IN VIOLATION OF HIS LIBERTY INTEREST, THE REMEDY IS THE RESPONDENT'S RELEASE FROM CUSTODY AND DISMISSAL OF THE STATE'S PETITION, REGARDLESS OF WHETHER THE RESPONDENT IMMEDIATELY SEEKS HABEAS CORPUS RELIEF OR RAISES THE ISSUE ON DIRECT APPEAL.

A. STANDARD OF REVIEW

Because the 30-day time limit safeguards a Ryce Act respondent's liberty interest under the due process clauses of the state and federal constitutions, Mr. Boatman's argument raises a constitutional question, which is reviewed *de novo*. Connor v. State, 803 So. 2nd 598, 605 (Fla. 2001). Mr. Boatman's argument also raises questions of statutory interpretation which are also reviewed *de novo*. J.A.B. v. State, 25 So. 3d 554, 557 (Fla. 2010).

B. ARGUMENT

> [W]here a respondent has completed his criminal sentence and is being detained awaiting a Ryce Act trial and the trial period has exceeded thirty days without a continuance for good cause, the respondent's remedy is release from detention and a dismissal without prejudice of the pending proceedings.

Osborne v. State, 907 So. 2d 505, 509 (Fla. 2005). The First District's decision and certified question rest upon that Court's interpretation of this remedy. Although finding that Mr. Boatman was "substantially prejudiced" by the continuance and therefore that the continuance was invalid, the First District held that Mr. Boatman had waived any remedy by not immediately seeking habeas corpus relief when his motion to dismiss was denied.[1] In so holding, the First District interpreted the Osborne remedy in a way which renders the 30-day time limit without effect and a Ryce Act respondent's liberty interest without protection.

The issues raised by the First District's holding and certified question are the definition and effect of "release from detention and a dismissal without prejudice of the pending proceedings." Osborne, 907 So. 2d at 509. Mr. Boatman contends that "release from detention and a dismissal without prejudice of the pending proceedings" means that the respondent is released from custody, the State's petition is dismissed, and the State may refile the commitment petition if other conditions in the Ryce Act are satisfied. Applying this definition, it is clear that an argument challenging an erroneous continuance of a

[1]In the First District, the State did not raise a waiver defense, and neither party briefed the waiver issue.

Ryce Act trial may be raised on direct appeal. Further, under this definition, Mr. Boatman's civil commitment should be reversed, he should be released from custody, and the State's petition should be dismissed.

1. The Statutory and Decisional Background

The Ryce Act requires the Florida Department of Corrections to give notice to the multidisciplinary team of the Department of Children and Family Services (DCFS) at least 545 days prior to the anticipated release of a person who has been convicted of a sexually violent offense. §394.913(1)(a), Fla. Stat. (2006). Within 180 days after receiving this notice, DCFS is required to provide the state attorney with a written assessment regarding whether the person meets the definition of a sexually violent predator and with a written recommendation which includes the multidisiplinary team's written report. §394.913(3)(e), Fla. Stat. (2006). After receiving the assessment and recommendation, the state attorney may file a petition in the circuit court alleging that the person is a sexually violent predator. §394.914, Fla. Stat. (2006). The circuit court then determines whether probable cause exists to believe the person is a sexually violent predator. §394.915(1), Fla. Stat. (2006). If the court finds probable cause, "the judge shall order that the person remain in custody and be immediately transferred to an appropriate secure facility if the person's incarcerative sentence expires." Id. Once the court finds probable cause, the person "must be held in custody in a secure facility without opportunity for pretrial release or release during the trial

proceedings." §394.915(5), Fla. Stat. (2006). The act also provides for an expedited procedure for completing these steps if a person's release from total confinement becomes imminent. §394.9135, Fla. Stat. (2006).

The Ryce Act "applies to all persons currently in custody . . . and sentenced to total confinement." §394.925, Fla. Stat. (2006). This means that the act "is limited to persons who [are] in lawful custody," State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002), and that "an individual must be in lawful custody when the State takes steps to initiate commitment proceedings." Larimore v. State, 2 So. 3d 101, 117 (Fla. 2008). These conclusions are based not only upon the act's language, but also upon the basic fairness and due process considerations required to protect the respondent's constitutional rights. Atkinson, 831 So. 2d at 174; Larimore, 2 So. 3d at 116-17.

The Ryce Act contains a time limit for conducting the commitment trial:

> (1) Within 30 days after the determination of probable cause, the court shall conduct a trial to determine whether the person is a sexually violent predator.
>
> (2) The trial may be continued once upon the request of either party for not more than 120 days upon a showing of good cause, or by the court on its own motion in the interests of justice, when the person will not be substantially prejudiced. No additional continuances may be granted unless the court finds that a manifest injustice would otherwise occur.

§394.916, Fla. Stat. (2006). The 30-day time provision is mandatory. State v. Goode, 830 So. 2d 817, 821 (Fla. 2002). The time limit implements the Legislature's "inten[tion] that the State would initiate commitment proceedings while the inmate is still incarcerated" on his criminal sentence in order to safeguard a Ryce Act respondent's liberty interest under the due process clauses of the Florida and United States Constitutions. Id. at 825-26, citing, *inter alia*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Addington v. Texas, 441 U.S. 418, 425 (1979). Because of "the obvious liberty rights at stake," the Florida "Legislature intended that there should be 'scrupulous compliance' with the statutory thirty-day time limit." Goode, 830 So. 2d at 826 (quoting Johnson v. Dep't of Children & Family Servs., 747 So. 2d 402, 403 (Fla. 4th DCA 1999)).

The Ryce Act does not define "substantial prejudice." The purpose of the 30-day time limit is to assure "that the State would initiate commitment proceedings while the inmate is still incarcerated" in order to safeguard a Ryce Act respondent's liberty interest. Goode, 830 So. 2d at 825-26. In discussing the distinction between whether the time limit was mandatory and/or jurisdictional, the Goode court explained:

> [B]ecause these indefinite commitments are supposed to ordinarily take place while the person is still incarcerated, there will be situations where the trial court would make a probable cause determination, but

> the thirty-day time period runs while the respondent is still incarcerated. Under those circumstances, a "mandatory" trial would not have occurred, and the State may be entitled to a continuance, because the respondent would not be substantially prejudiced. A person already imprisoned would obviously carry a greater burden to demonstrate prejudice than one who would be free but for the Ryce Act detention. Thus, in such circumstances, the trial court would retain jurisdiction even though the mandated time period for trial had expired.

830 So. 2d at 828-29. In reiterating Goode's holding, State v. Kinder, 830 So. 2d 832 (Fla. 2002), explained:

> In Goode we concluded that the Legislature did not intend the thirty-day time period explicitly set out in the statute to be merely a "suggested" practice, particularly when, as illustrated by this case, failure to comply with the time limit may mean a person can be detained for months or years on end without trial based on an ex parte proceeding.

830 So. 2d at 833-34. The Second District has indicated that "substantial prejudice" is shown by continued detention beyond the expiration of a criminal sentence: "When the defendant still has significant time remaining before his criminal sentence is fully served . . . the defendant is unlikely to suffer any prejudice from a continuance or postponement of the trial beyond the thirty days allotted." Curry v. State, 880 So. 2d 751, 754 (Fla. 2nd DCA 2004).

2. The First District's Decision

The First District found that Mr. Boatman had been "substantially prejudiced" by the continuance because he had

"served his criminal sentence and would have been free but for his detention under the Jimmy Ryce Act," explaining:

> The only case in Florida to address a similar situation is Meadows v. Krischer, 763 So. 2d 1087 (Fla. 4th DCA 1999), which held that the respondent did not establish any substantial prejudice arising from a brief seven-day continuance under the Jimmy Ryce Act. In this case, the continuance was considerably longer, over three months. Although the state argues that appellant was not substantially prejudiced because the statute allows a continuance for good cause if it does not exceed 120 days, we conclude that such an interpretation would render the "substantially prejudiced" language superfluous. The statute allows a continuance for good cause up to 120 days if the person will not be substantially prejudiced. 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.

Boatman, 2010 WL 2483749 at *2 (emphasis in original). The court nevertheless affirmed Mr. Boatman's civil commitment, determining that he had waived his argument by raising it on direct appeal and not filing a petition for a writ of habeas corpus immediately after his motion to dismiss was denied. Boatman, 2010 WL 2483749 at *3. The First District's rationale for the waiver rule rests upon its interpretation of the remedy established by Osborne, particularly of the phrase "dismissal without prejudice":

> This remedy contemplates that "the State may be entitled to continue the proceedings, but the respondent may be entitled to his freedom where the State has not scrupulously complied with the Act's provisions." Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005). Thus, dismissal without prejudice would release appellant from custody without depriving the trial court of jurisdiction over the case. See Madison v. State, 27 So. 3d 61, 63 (Fla. 1st DCA) (holding that the only jurisdictional requirement is that the respondent is in lawful custody when the state initiates commitment proceedings under the Jimmy Ryce Act by referring the respondent to the multidisciplinary team for evaluation), rev. denied, 24 So. 3d 559 (Fla. 2009). However, any relief provided by a dismissal without prejudice would be moot in this case because appellant already has been tried and committed under the Act. 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."
>
> 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. . . . Thus, we conclude that appellant waived his claim by waiting to raise it in this appeal rather than seeking immediate relief by habeas corpus upon expiration of the thirty-day deadline.

Boatman, 2010 WL 2483749 at *3. (citations omitted).

3. The First District's Erroneous Interpretation of the Osborne Remedy

The Ryce Act does not provide a remedy for a violation of the 30-day time limit, and this Court has not explicitly defined

or explained the effect of "release from detention" and "dismissal without prejudice" of a petition seeking a respondent's involuntary commitment under the Ryce Act. However, an examination of decisions shows that the First District misinterpreted Osborne by emphasizing "without prejudice" while disregarding "dismissal" and "release from detention."

This Court has said that following a "dismissal without prejudice," "the State may be entitled to continue the proceedings, but the respondent may be entitled to his freedom where the State has not scrupulously complied with the Act's provisions." Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005). The First District understood this statement to mean "dismissal without prejudice would release appellant from custody without depriving the trial court of jurisdiction over the case." Boatman, 2010 WL 2483749 at *3. According to the First District, this rendered any post-trial remedy moot because "[a] dismissal without prejudice would only prolong the proceedings by allowing the state to refile the petition and requiring yet another trial." Id.

In Osborne, after stating that dismissing the State's petition with prejudice would be contrary to its prior holdings, the Court noted, "Of course, the State's ability to refile a

Ryce Act petition is subject to the appropriate statutory limitation period. Our opinion should not be read as suspending or extending that requirement in any way." 907 So. 2d at 508 n.4. This Court has also stated:

> In State v. Goode, 830 So. 2d 817 (Fla. 2002), we held that the thirty-day time period provided for trial in section 394.916(1), although not jurisdictional, is mandatory and, if there has not been a prior continuance for good cause granted pursuant to section 394.916(2), commitment proceedings should be dismissed. Thus, after the time period in section 394.916(1) has run, trial is no longer pending and section 394.915(5) no longer requires the defendant to be detained pending trial.

Kinder, 830 So. 2d at 833.

The 30-day time limit is not "a rigid jurisdictional bar to further proceedings." Goode, 830 So. 2d at 828. Dismissal of the petition "without prejudice" is not a decision on the merits which would establish a *res judicata* bar and "does not forever foreclose the State from filing a new petition for civil commitment." In re Commitment of Goode, 22 So. 3d 750, 752 (Fla. 2nd DCA 2009).

However, when the petition is "dismissed," "trial is no longer pending and section 394.915(5) no longer requires the defendant to be detained pending trial." Kinder, 830 So. 2d at 833. In order to proceed against the respondent, the State must reinitiate the proceedings and file a new petition. Under the

statute, the State can only initiate proceedings against a respondent who is in "total confinement": "There are no provisions in the Act that expressly provide or even imply that the State may initiate a civil commitment proceeding after a person has been released from custody and is living in society." Larimore, 2 So. 3d at 111; Gordon v. Regier, 839 So. 2d 715, 719 (Fla. 2nd DCA 2003)("There is no provision in the [Ryce] Act for commencing proceedings against a person under the Act where he or she is not in custody and is, in fact, living in society."), *approved*, Larimore, 2 So. 3d at 117. Thus, dismissing a petition without prejudice "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." In re Commitment of Goode, 22 So. 3d at 752 (emphasis in original). The State cannot pursue commitment proceedings against a person who has been "release[d] from detention."

The First District based its conclusion that the State could simply refile the petition after the respondent was released in part upon that court's decision in Madison v. State, 27 So. 3d 61 (Fla. 1st DCA), *rev. denied*, 24 So. 3d 559 (Fla. 2009). Madison argued that his involuntary commitment should be reversed because "he was not in lawful custody when the State

filed its commitment petition" and therefore that "the trial court lacked subject-matter jurisdiction to adjudicate the commitment proceedings." 27 So. 3d at 62. The First District held that the only jurisdictional requirement of the Ryce Act is that the respondent be in lawful custody when he is referred to the multidisciplinary team for evaluation. 27 So. 3d at 63. This holding depended upon the First District's reading of Larimore as holding that a Ryce Act proceeding is initiated when a respondent is referred to the multidisciplinary team. However, in a rules decision released one week before Madison, this Court stated it had not decided the substantive question "whether a respondent must be in total confinement when the [Ryce Act commitment] petition is filed." In Re: Florida Rules Of Civil Procedure For Involuntary Commitment Of Sexually Violent Predators, 13 So. 3d 1025 (Fla. 2009).

More importantly, referral to the multidisciplinary team does nothing to invoke the circuit court's jurisdiction. Ryce Act commitment proceedings are "civil in nature." Larimore, 2 So. 3d at 107 (citing Mitchell, 911 So. 2d at 1213)). A fundamental tenant of civil procedure is that "[a] complaint is . . . essential to initiate an action. . . . [I]ts purpose is to invoke the subject matter jurisdiction of the court and to give notice of the claim." Pro-Art Dental Lab, Inc. v. V-Strategic

Group, LLC, 986 So. 2d 1244, 1252 (Fla. 2008) (quoting Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797, 800 (Fla. 2003) ((quoting Gen. Dynamics Corp. V. Paulucci, 797 So. 2d 18, 21 (Fla. 5th DCA 2001), *quashed on other grounds*, 842 So. 2d 797 (Fla. 2003))). *See also* §394.9155(1), Fla. Stat. (2006) ("The Florida Rules of Civil Procedure apply unless otherwise specified in this part"); Fla. R. Civ. P. 1.050 (2006) ("Every action of a civil nature shall be deemed commenced when the complaint or petition is filed. . . ."). In Ryce Act cases, the State's petition is the complaint which invokes the circuit court's jurisdiction. Thus, if the respondent is not in lawful custody at the time the petition is filed, the circuit court's jurisdiction has not been invoked.

In Larimore, this Court held, "an individual must be in lawful custody when the State takes steps to initiate commitment proceedings pursuant to the Jimmy Ryce Act in order for the circuit court to have jurisdiction to adjudicate the commitment petition." 2 So. 3d at 117. Larimore was not in lawful custody when the State filed the commitment petition. Id. at 104. This Court ordered him released and the State's petition dismissed with prejudice. Id. at 117.

Larimore establishes that the time at which the respondent must be in lawful custody is when the State files its petition. The Ryce Act requires that the respondent be in lawful custody "when the State takes steps to initiate civil commitment proceedings." Larimore, 2 So. 3d at 103. Larimore repeatedly refers to this time as determinative: "lawful custody is required to initiate Jimmy Ryce proceedings"; "the Legislature appears to have specifically contemplated that an individual would be lawfully in the State's custody when civil commitment proceedings are commenced"; "nothing in the Jimmy Ryce Act expressly grants a circuit court jurisdiction over a commitment petition filed against a person not in lawful custody when the proceedings were initiated"; "the Act requires that the individual be in lawful custody when commitment proceedings are initiated." Larimore, 2 So. 3d at 105, 107, 115, 117.

Larimore approved the decision in Gordon, 2 So. 3d at 117, where the respondent had been released from prison and was living in society when the State obtained a warrant for his arrest in order to have him evaluated by the multidisciplinary team. 839 So. 2d at 717. Gordon was arrested two days after his release, and four days later, the circuit court issued an order finding probable cause that he was a sexually violent

predator. Id. The Second District held that the circuit court did not have jurisdiction to hear the case, explaining:

> Following the receipt of the written assessment and recommendation, the state attorney may file a petition with the circuit court alleging that the person is a sexually violent predator. §394.914. *Prior to the expiration of the incarcerative sentence*, the circuit court is to determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the circuit court determines the existence of probable cause, it is to order that the person remain in custody and be transferred to an appropriate secure facility upon expiration of the incarcerative sentence. §394.915(1). Thus, *the Act contemplates that the circuit court make a determination prior to the expiration of the incarcerative sentence as to whether probable cause exists to hold the person as a sexually violent predator.* This is consistent with our legal historical precedents requiring a probable cause determination prior to a person's seizure.

Gordon, 839 So. 2d at 719 (emphasis added).

Larimore also describes the time period during which the respondent is referred to the multidisciplinary team as "initiat[ing]" commitment proceedings. Thus, Larimore describes the steps to be taken under §394.913(1), Fla. Stat. (2006), or under §394.9135(1), Fla. Stat. (2006), as the two ways in which "the commitment process is initiated." Larimore, 2 So. 3d at 108. Although use of the word "initiate" may appear ambiguous, other portions of Larimore make clear that the time at which a person must be in lawful custody is the time at which a court

becomes involved in the process, which is the time when the state files its petition.

Larimore explains that when the process is begun under §394.913, the multidisciplinary team then provides its written assessment and recommendation to the state attorney under §394.913(3). Following receipt of this report, the state attorney may file a petition in the circuit court under §394.914. Once the State files the petition and the circuit court finds probable cause to believe the person is a sexually violent predator, "the judge shall order that the person *remain in custody* and be immediately transferred to an appropriate secure facility if the person's incarcerative sentence expires." Larimore, 2 So. 3d at 109, quoting §394.915(1), Fla. Stat. (2004) (emphasis supplied by Larimore). A court cannot order that a person "remain in custody" if that person is not already in lawful custody. Clearly, Larimore requires that the person is in lawful custody at the time the State files its petition.

This conclusion is also supported by Larimore's discussion of §394.9135. First, it must be emphasized that the State did not utilize this section in Mr. Boatman's case. Nevertheless, the Court's discussion of this section shows that the time at which a person must be in lawful custody is the time when a court becomes involved in the process. Section 394.9135 applies

when a person in lawful custody is about to be released and allows the transfer of such a person to the Department of Children and Families upon the person's "immediate release from total confinement." §394.9135(1), Fla. Stat. (2006). The multidisciplinary team is then required to submit its written assessment and recommendation to the state attorney within seventy-two hours, and the state attorney is allowed forty-eight hours within which to file a petition. §§394.9135(2), 394.9135(3), Fla. Stat. (2006). After the petition is filed and the circuit court finds probable cause, "the judge shall order the person to be maintained in custody." §394.9135(3). As the Court explained, "These provisions of the Act all demonstrate legislative intent that the individual be in lawful custody when civil commitment proceedings are initiated." Larimore, 2 So. 3d at 110.

Allowing the State to resume commitment proceedings against a person who has been released from detention would eliminate the Ryce Act's protection of a respondent's liberty interest. This Court has "repeatedly emphasized the procedural safeguards provided by the Act that ensure an individual's constitutional rights are protected." Larimore, 2 So. 3d at 107. "[V]irtually the only safeguard and limitation put on the State's continued detention [of a respondent after a criminal sentence expires] is

the statute's requirement that the court 'shall' conduct a trial within thirty days of a determination of probable cause." Goode, 830 So. 2d at 826. If the State may simply refile its petition after exceeding the mandatory 30-day time limit, the Ryce Act provides no protection of a respondent's liberty interest. The consequence of the First District's interpretation of a dismissal without prejudice is that when trial is continued beyond 30 days with substantial prejudice to the respondent, the State may still proceed against the respondent without impediment and has no incentive to honor the 30-day time limit.

4. Mr. Boatman's Remedy

On July 9, 2008, the State was notified that the Multidisciplinary Team of the Department of Children and Families recommended Mr. Boatman's commitment as a sexually violent predator (R1. 6). Both State experts completed their evaluations and reports in June 2008 (R1. 111, 140). However, the State waited three months–-until October 1, 2008, just as Mr. Boatman's criminal sentence was about to expire (Supp.R. 255)--to file its petition seeking Mr. Boatman's commitment (R1. 1-8). When Mr. Boatman invoked his right to have the commitment trial held within 30 days of the court's finding of probable cause, the State moved for a continuance, citing the

unavailability of Raymond and the lack of time for discovery as reasons the State would not be prepared for trial on October 20 (R1. 280). Mr. Boatman opposed the continuance, arguing that the State had not shown good cause because the situation was of the State's own making and that Mr. Boatman would be substantially prejudiced because he was being confined beyond the expiration of his criminal sentence (Supp.R. 255-57, 260-61). The court granted the continuance, finding that the State had shown good cause, the defense had not shown substantial prejudice, and the defense was not willing to waive an adversarial hearing (Supp.R. 283).

In these circumstances, the First District should have ordered Mr. Boatman released from custody and the State's petition dismissed. Mr. Boatman was "substantially prejudiced" by continuing his trial beyond the 30-day limit because he was confined beyond the expiration of his criminal sentence.[2] Thus,

[2]Because Mr. Boatman was substantially prejudiced by the continuance, addressing "good cause" appears unnecessary to resolving the issues presented here. Alternatively, should the Court determine that it is necessary to define "good cause," that definition may be found by analogy in Rule 1.420(e), Fla. R. Civ. P. (2006), which provides, "[g]ood cause must include . . . some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines." Norflor Const. Corp. v. City of Gainesville, 512 So. 2d 266, 268 (Fla. 1st DCA 1987). Here, the State's argument for the continuance amounted to "negligence or inattention" rather than "excusable conduct." The State was on notice for three months that the multidisciplinary team recommended Mr. Boatman's

Mr. Boatman's trial was held in violation of the Ryce Act and of due process. Contrary to the First District's reasoning, Osborne and Kinder establish that a respondent's remedy when his trial has been improperly continued beyond the 30-day limit is not rendered moot by waiting until direct appeal to challenge the continuance. Rather, the remedy is the respondent is released from custody and the State's petition is dismissed without prejudice. That is, when the continuance is invalid, holding the trial was also invalid, and the commitment must be

---

commitment but did not act until the eve of Mr. Boatman's release from prison. As defense counsel argued, "If [the State] had filed the petition in August, the trial would have been scheduled in August or early September," and if the State needed a continuance, "they could have done that through September without affecting Mr. Boatman's liberty interest before he gets out of prison" (Supp.R. 260-61).

The State did not show "good cause" for the continuance. The State argued a continuance was necessary because Raymond was unavailable and there was insufficient time for the State and Mr. Boatman to complete discovery. Had the State timely filed the petition, there would have been ample time for a continuance based on a witness's unavailability. The State offered no explanation for its failure to timely file the petition. Further, Raymond had submitted a report which was admissible at trial under §394.9155(5), Fla. Stat. (2006) (reports prepared on behalf of the multidisciplinary team are admissible). In fact, Raymond's report was admitted into evidence (R1. 111-36; State Ex. 3), and State expert Cook, who had not evaluated Mr. Boatman, provided testimony based upon Muskgrove's and Raymond's reports (T1. 161). The lack of time available for discovery is inherent in the 30-day limit, but also was created by the State's failure to timely file the petition. As to whether the defense had time to prepare for trial, that was not the State's concern. Mr. Boatman stated that he was ready for trial and that he was bound by that statement (Supp.R. 256, 267-68).

set aside and the respondent released. A challenge to the propriety of holding a trial is properly raised on direct appeal. *See*, *e.g*, Winter v. State, 865 So. 2d 555 (Fla. 1st DCA 2003) (on direct appeal, court reversed convictions and ordered discharge for speedy trial violation); Waggy v. State, 935 So. 2d 571, 573 (Fla. 1st DCA 2006) (subject-matter jurisdiction is an issue of fundamental error which may be raised for the first time on appeal). Mr. Boatman's argument was properly raised on direct appeal. He should be released from custody, and the State's petition should be dismissed.

5. Dismissal With Prejudice

Alternatively, Mr. Boatman contends that because he was "substantially prejudice" by the erroneous continuance, the State's petition should be dismissed with prejudice. In holding that the 30-day time limit was mandatory but not jurisdictional, this Court relied upon the fact that the Ryce Act contained "limited instances where the court would retain jurisdiction beyond the thirty-day time period, most notably where a continuance for good cause or in the interest of justice has been granted under section 394.916(2)." Goode, 830 So. 2d at 828. Later, in Osborne, the court stated:

> 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 (first emphasis in original; second and third emphasis added). These statements indicate that there are only "limited instances" where the circuit court retains jurisdiction beyond the 30-day limit and that if the respondent suffers prejudice--as the First District found Mr. Boatman did--the petition should be dismissed with prejudice and the respondent released.

6. Application of a Previously Unannounced Waiver Rule

Finally, the waiver rule upon which the First District relied was neither raised nor briefed by the parties. The First District's opinion sprung a procedural trap, applying a previously unannounced waiver rule to Mr. Boatman's argument. *See* Barr v. City of Columbia, 378 U.S. 146 (1964); Wright v. Georgia, 373 U.S. 284 (1963). The fact that an argument such as Mr. Boatman's *may* be raised by a writ proceeding does not mean

that the argument *must* be raised by a writ proceeding or be waived. The issue presented here is analogous to a speedy trial violation which may be challenged in a petition for a writ of prohibition, Westlake v. Miner, 460 So. 2d 430 (Fla. 1st DCA 1984), or in a direct appeal. Winter v. State, 865 So. 2d 555 (Fla. 1st DCA 2003). The fact that the argument has been raised and addressed in writ proceedings in prior cases, Boatman, 2010 WL 2483749 at *3 (citing cases), does not mean that this is the only way to preserve the issue when no prior case law has established such a rule. At the least, a new waiver rule such as the one the court applied to Mr. Boatman should not be applied in the case in which it is first announced.

CONCLUSION

Based upon the arguments presented here, this Court should answer the certified question in the negative, direct that Mr. Boatman be released from custody, and direct that the State's petition be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by electronic mail to **Thomas H. Duffy**, Assistant Attorney General, The Capitol, at criminalappealsintake@myfloridalegal.com, as agreed by the parties, and by U.S. Mail to **Mr. Rayvon L. Boatman**, SVP# 991180, Florida Civil Commitment Center, 13613 Southeast Highway 70, Arcadia, Florida 34266, on this 24th day of September, 2010.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR PETITIONER