IN THE SUPREME COURT OF FLORIDA

RONALD MOREL SVP#990542,

Appellant,

v.

SC10-2293
Case No. 2D09-2096
L.T. No. 2009-CA-091
20th Jud. Cir. - Desoto Co.

GEORGE H. SHELDON, ET AL.,

Appellees.
_____/

SUPPLEMENTAL ANSWER BRIEF

_____

Appeal from the Circuit Court of the Twentieth Judicial Circuit, in and for Desoto County, Florida

_____

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT v

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT:

SUPPLEMENTAL ISSUE I (RESTATED): THERE IS NO CONSTITUTIONAL OR STATUTORY RIGHT FOR A PRE-COMMITMENT DETAINEE TO PARTICIPATE IN ALL PHASES OF FLORIDA'S SEX OFFENDER TREATMENT PROGRAM AND DENIAL OF TREATMENT DOES NOT VIOLATE EITHER THE EQUAL PROTECTION OR THE DUEPROCESS CLAUSES OF THE U. S. CONSTITUTION..... 10

SUPPLEMENTAL ISSUE II (RESTATED): THERE ARE NO "WAITING LISTS" FOR SEX OFFENDER TREATMENT AT THE FCCC AND THE COMPREHENSIVE TREATMENT PROGRAM AT THE FCCC WAS FOUND TO BE CONSTITUTIONALLY ADEQUATE IN THE FEDERAL CLASS ACTION SUIT, CANUPP V. SHELDON.....19

ISSUE III (RESTATED): MOREL NEVER PRESENTED THIS ARGUMENT IN HIS PETITION FOR WRIT OF HABEAS CORPUS, THEREFORE IT HAS NOT BEEN PROPERLY PRESERVED; ALTERNATIVELY, THE DELAY IN TRIAL IS WHOLLY ATTRIBUTABLE TO MOREL AND HIS TRIAL STRATEGY, NOT THE GOVERNMENT CONSEQUENTLY MOREL'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED BY THE GOVERNMENT.....24

ISSUE IV (RESTATED): MOREL'S INVOLUNTARY CIVIL COMMITMENT TRIAL HAS BEEN PENDING FOR EIGHT (8) YEARS AS PART OF HIS LITIGATION STRATEGY AND MOREL HAS BEEN REPRESENTED BY COUNSEL THROUGHOUT THE PROCESS.....29

CONCLUSION 30

CERTIFICATE OF SERVICE 31

FONT CERTIFICATION 31

TABLE OF CITATIONS

Page No.

Cases:

Bailey v. Gardebring,
940 F.2d 1150 (8th Cir. 1991) 17

Barber v. State,
877 So.2d 59 (Fla. 4th DCA 2004) 24

Bell v. Wolfish,
441 U.S. 520 (1979) 16

Canupp v. Sheldon, Slip Copy
2009 WL 4042928, 75 Fed.R.Serv. 3d 112 (M.D. Fla. 2009) . 2

Chicken 'N' Things v. Murray,
329 So.2d 302 (Fla. 1976) 10, 26

Chiles v. State Employees Attorneys Guild,
834 So.2d 1030 (Fla. 1999) 10, 26

City of Cleburne Tex. v. Cleburne Living Center,
473 U.S. 432 (1985) 18

Curry v. State,
880 So.2d 751 (Fla. 2d DCA 2004) 27

Doggett v. U.S.,
505 U.S. 547 (1992) 28

E & T Realty v. Strickland,
830 F.2d 1107 (11th Cir. 1987),
cert. denied, 485 U.S. 961 (1988) 19

In Re Commitment of Morel,
406 U.S. 715 (1972) 4

Kansas v. Hendricks,
--- So.3d ---, 2010 WL 4861507 (Fla. 2d DCA 2010) . 12, 16

Morel v. Sheldon,
59 so.3d 1082 (Fla. 2011) 5, 25

Parham v. J.R.,
442 U.S. 884 (1979) 16

TABLE OF CITATIONS

Page No.

Cases (Cont'd):

State v. Goode,
830 So.2d 817 (Fla. 2002) 24, 27

State v. Kinder,
830 So.2d 832 (Fla. 2002) 27

Stephens v. State,
748 So.2d 1028 (Fla. 1999) 10

U.S. v. Mohawk,
20 F.3d 1480 (9th Cir. 1994) 28

Westerheide v. State,
831 So.2d 93 (Fla. 2002) 12

Youngberg v. Romeo,
457 U.S. 307 (1982) 12, 13, 16, 17

Other Authorities:

Fla.R.App.Proc. 9.125 3

Fla.R.App.Proc. 9.125 11

§§ 394.910, Fla. Stat., et seq. (2010) 1, 6, 8

§ 394.912(10), Fla. Stat. (2010) 11

§ 394.9135, Fla. Stat. (2010) 1

§ 394.915(1), Fla. Stat. (2010) 11

§ 394.916(1), Fla. Stat. (2010) 8

§ 394.916(2), Fla. Stat. (2010) 26

§ 394.917(2), Fla. Stat. (2010) 11

PRELIMINARY STATEMENT

This appeal arises out of a petition for writ of habeas corpus in which the appellant, Ronald Morel, a resident and detainee at the Florida Civil Commitment Center, sought his release from custody on the grounds that the Department of Children and Families (DCF) unconstitutionally has denied him participation in the full sex offender treatment program because of his detainee status. The petition was dismissed *sua sponte* by the circuit court for failure to state a claim and the DCF defended against this claim on appeal in the Second District Court of Appeal. In his initial brief, appellant Morel raised for the first time an additional claim not brought in his petition below that his failure to receive treatment as a detainee affected his ability to timely disposition of and release in his civil commitment proceedings.

The DCF is not part of the civil commitment proceedings as those proceedings are under the jurisdiction of the Office of the State Attorney and DCF's statutory role ends upon referral of each case to the State Attorney's Office in the appropriate jurisdiction.

Issues I and II in the supplemental initial brief relate to Morel's claim with regard to his constitutional right to sex offender treatment as a detainee. Issues III and IV relate to Morel's civil commitment proceedings. The Court is advised that for purposes of these issues on this supplement answer brief, Susan Adams Maher, Chief Assistant Attorney General, Corrections Litigation, represents DCF as to issues I and II. The Court further

is advised that Sue-Ellen Kenny, Assistant Attorney General, Criminal Appeals, represents the State of Florida, Office of the State Attorney in Broward County, with regard to issues III and IV. Should oral argument be granted in this case, it would be shared by undersigned counsel representing the different entities and interests in this case.

In this brief, Ronald Morel be referred to as appellant or as Morel. Respondent below, David Wilkins, Secretary of the Florida Department of Children and Families,[1] will be referred to as appellee or Secretary Sheldon or DCF. Record citations to the original record from the Twentieth Judicial Circuit in Desoto County will be indicated by the designation "R." followed by the relevant page number. Record citations to the supplemental record from the Seventeenth Judicial Circuit in Broward County will be indicated by the designation "SR." References to the transcript for the hearing on February 18, 2011, will be referred to as T18. References to the transcript for the hearing on February 25, 2011, will be referred to as T25. The transcript references will be followed by V to designate the volume, P for the page references, and L for the specific lines. References to the supplemental initial brief will be indicated by the designation "SIB" followed by the relevant page

[1] David Wilkins has replaced George Sheldon as Secretary of the Florida Department of Children and Families. Mr. Wilkins should be substituted in his official capacity pursuant to Florida Rule of Appellate Procedure 9.360(c)(2).

number. All references to Florida Statutes is 2010 unless otherwise specified. This brief is submitted in Courier New 12-point font.

STATEMENT OF THE CASE AND FACTS

I. Preliminary Statement of Facts

Appellant, Ronald Morel, is a resident in the custody of the Florida Department of Children and Families (DCF) at the Florida Civil Commitment Center (FCCC) in Arcadia, Florida. (R 2, ¶ 2). Morel is detained at the FCCC under the provisions of the Sexually Violent Predators Act (SVPA), §§ 394.910, Fla. Stat., et seq. (Id.). Morel was transferred into the custody of the DCF on April 18, 2002, pursuant to the immediate release provisions of section 394.9135, Florida Statutes.[2] (R 2, ¶ 2; R 6, ¶ 22).

II. Course of the Proceedings Before the Circuit Court in Desoto County

On February 10, 2009, Morel filed an Emergency Petition for Habeas Corpus Relief alleging that, as a civil detainee under the SVPA, he is being unconstitutionally deprived of sex offender treatment and rehabilitation by the Department of Children and Families.[3] (R 6, ¶ 23,

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[2] A thorough examination of the petition below reveals that Morel does not provide any further information as to the stage of his civil commitment proceedings that might explain his continued detainee status.

[3] Morel's habeas petition contains a multitude of allegations with regard to the constitutional adequacy of the sex offender treatment program at the Florida Civil Commitment Center; however, because the disposition of Morel's petition does not turn on the adequacy of the treatment program but rather on his access to the treatment program as a detainee, the allegations are not recounted

24). Morel alleges that his inability to participate in the comprehensive sex offender treatment program[4] prevents any "realistic opportunity for release." (R 6-7, ¶¶ 26, 30).

As relief, Morel requested the circuit court to dismiss the involuntary commitment petition pending under the SVPA and to discharge him from custody because he was unconstitutionally being deprived of participation in the sex offender treatment program due to his detainee status. (R 1-9, habeas petition generally). On April 7, 2009, the circuit court denied the petition. (R 11). Morel timely appealed the denial on May 1, 2009, to the Second District Court of Appeal. (R 12).

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in the statement of facts. Moreover, the constitutional adequacy of the treatment program for those residents who are eligible and consent to participate in treatment was addressed in the case of Canupp v. Sheldon, 2009 WL 4042928, 75 Fed.R.Serv.3d 112 (M.D.Fla. 2009)(case dismissed with prejudice on Joint Motion for Approval of Settlement and Dismissal of Case because Final Action Plan addresses the issues raised in the complaint).

[4] Morel does concede that there are some basic treatment groups that he has been permitted to participate in as a detainee that are preliminary to entry into the sex offender treatment program. For example, Morel has completed Moral Reconation Therapy (MRT) and Thinking for Change (T4C). (R 7, ¶ 29.)

II. Course of the Proceedings Before the Second District Court of Appeal

Following Morel's timely appeal, a briefing schedule was set and briefing was completed on January 6, 2010. (See docket, 2D09-2096). On August 31, 2010, the Second District issued a show cause order directed to the Secretary of the Department of Children and Families to show cause why resident Ronald Morel had been detained since April 2002 and had not been afforded trial.[5] (Id.; see also, record from 2DCA filed in Florida Supreme Court on 12/01/2010).[6] The order advised that failure to show cause could result in the granting of the petition and the imposition of sanctions. (Id.). The Secretary moved to vacate the order to show cause on the grounds that DCF has continuously retained custody of Mr. Morel pursuant to a lawful Order Determining Probable Cause and Warrant for Custodial Detention entered by the circuit court in Broward County on April 23, 2002, in Case No. 02-007799. (Id.). The Secretary also noted that DCF is not

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[5] On appeal, Morel argued for the first time that the trial court's dismissal of his habeas petition "impeded and delayed Appellant's constitutional challenge to his pre-trial detention." (SIB at 15). Morel also argued that he has been detained "without being afforded his constitutional right to an adversarial probable cause hearing to further challenge his continued pre-trial detention under the act." (Id.). In response to the show cause order, the Secretary again noted that Morel failed to raise these claims below and they were inappropriate for consideration on appeal.

[6] The entire record before the Second District Court of Appeal has been transferred through to the Florida Supreme Court pursuant to Florida Rule of Appellate Procedure 9.125.

a party to the civil commitment proceedings pending in Broward County and that the state attorney in the appropriate circuit who must determine whether a petition will be filed and and how and when it is to be prosecuted under the Sexually Violent Predator Act (SVPA). (Id.). The Secretary further pointed out that as of September 3, 2010, Mr. Morel's civil commitment proceeding had been noticed for trial. (Id.).

On December 1, 2010, the Second District Court of Appeal issued its Certification of Order Requiring Immediate Resolution By The Supreme Court, in which it transferred the entire matter to this Court pursuant to Florida Rule of Appellate Procedure 9.125. In re Commitment of Morel, --- So.3d ----, 2010 WL 4861507 (Fla. 2d DCA 2010).

III. Course of Proceedings Before The Florida Supreme Court

On January 21, 2011, this Court issued an order in the instant appeal and in a related Petition for Writ of Prohibition filed by Mr. Morel, Case No. SC11-105, relinquishing jurisdiction temporarily to the circuit court in Broward County to conduct fact-finding proceedings on the following issues identified by the Court:

> a. Whether Morel's allegations in his petition regarding the inability to receive treatment because of his pretrial detainee status are accurate and to obtain details regarding the issues surrounding treatment (or lack thereof) for pretrial detainees awaiting civil commitment trials;

> b. Whether Morel's allegations in his petition regarding the waiting list to obtain treatment, even if eligible for treatment, are accurate and, if not, explain;
>
> c. Whether Morel's commitment is illegal or unlawful because of the inordinate amount of time (eight years) since his release from his prison sentence; and
>
> d. The reason why the trial in this case has not taken place for eight years and whether Morel has had counsel throughout that time, and if not, the reasons for lack of counsel.

Morel v. Sheldon, 59 So. 3d 1082 (Fla. 2011).

A two-day evidentiary hearing was conducted before The Honorable Eileen O'Connor on February 18, 2011, and February 25, 2011. (Appendix A; SR 803-1139). The circuit court judge issued her findings on April 19, 2011, and jurisdiction was returned to this Court that same date. (Id.; SR 733-770).

IV. The Factual Findings Related to This Case

The factual findings related to this case and the issues identified by the Court are set forth in Judge O'Connor's April 19, 2011 order attached as Appendix A and are incorporated by reference. The findings appear in the record at SR 733-802.

However, a summary of the findings follows as they specifically relate to the questions presented by this Court follows:

a) as a pre-commitment detainee, Mr. Morel is not provided the full panoply of sex offender treatment; however, detainees are eligible

for certain sex offender treatment, adjunct therapies and activities, as well as educational and vocational services;

b) there are no “waiting lists” for treatment at the Florida Civil Commitment Center (FCCC), rather, for valid reasons, there are gaps of time between specific programs in the first phase of sex offender specific treatment only, and not in the remaining three phases;

c) although Mr. Morel now claims he wants all four phases of sex offender specific treatment as a detainee and specifically before he is required to go to his commitment trial, such treatment is not available under the Involuntary Civil Commitment of Sexually Violent Predators Act (SVPA) found at section 394.910, *et seq*., nor is such treatment mandated by the United States Constitution;

d) the delays in Mr, Morel’s commitment trial have been at his request and made for tactical reasons; he has never requested a commitment trial; and Morel consistently has been represented by counsel during the eight-year delay in the commitment trial.

(Appendix A at 2; SR at 734.)

SUMMARY OF THE ARGUMENT

Morel, a pre-commitment civil detainee under Florida's Sexually Violent Predator Act, filed a habeas corpus petition seeking invalidation of his civil commitment proceedings and discharge from custody claiming that he is being denied his constitutional right of access to treatment and rehabilitation and ultimately his release from custody. Morel's claim for relief seeking invalidation and dismissal of his civil commitment proceedings and discharge from custody is not a relief Morel can obtain in the habeas corpus proceeding because the validity of his continued detention was not raised in the petition below. Rather, Morel only challenged a condition of his confinement -- that is, the failure to provide treatment during his pre-commitment detention -- and he sought release on that basis. However, neither the statutory provisions of the Sexually Violent Predator Act nor the U. S. Constitution mandates that sex offender treatment be afforded an alleged sexually violent predator in detainee status awaiting the commitment trial.

Morel's allegation that the denial of treatment while awaiting disposition of his commitment proceedings is preventing his release is disingenuous. During the special fact-finding hearings before the circuit court in Broward County, the circuit judge made the following findings:

a) as a pre-commitment detainee, Mr. Morel is not provided the full panoply of sex offender specific treatment; however, detainees are eligible for certain sex offender specific treatment, adjunct therapies and activities, as well as educational and vocational services; the circuit court found there are valid reasons based upon the professional judgment of the treatment staff administering the program to exclude detainees from the core sex offender treatment program;

b) there are no "waiting lists" for treatment at the Florida Civil Commitment Center (FCCC), rather, for valid reasons, there are gaps of time between specific programs in the first phase of sex offender specific treatment only, and not in the remaining three phases;

c) although Mr. Morel now claims he wants all four phases of sex offender specific treatment as a detainee and specifically before he is required to go to his commitment trial, such treatment is not available under the Involuntary Civil Commitment of Sexually Violent Predators Act (SVPA) found at section 394.910, *et seq*., nor is such treatment mandated by the United States Constitution;

d) the delays in Mr. Morel's commitment trial have been at his request and made for tactical reasons; he has never requested a commitment trial; and Morel consistently has been represented by counsel during the eight-year delay in the commitment trial.

Morel holds the keys to disposition of his civil commitment proceedings. The SVPA contains provisions for an expedited trial under

section 394.916(1), Florida Statutes. Mr. Morel has failed to pursue any of the remedies available to him to expedite his commitment proceedings. Rather he has specifically taken steps to delay his trial for tactical reasons.

ARGUMENT

STANDARD OF REVIEW:

The standard of review of the trial court's findings of fact is whether they are supported by competent, substantial evidence, while the trial court's legal conclusions are subject to de novo review. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999); see also Chiles v. State Employees Attorneys Guild, 834 So.2d 1030, 1034 (Fla. 1999)("The findings of a trial court are presumptively correct and must stand unless clearly erroneous."); Chicken 'N' Things v. Murray, 329 So.2d 302, 305, (Fla. 1976)("We are bound by the trial court's view of the facts on appeal, unless the findings are clearly erroneous.").

SUPPLEMENTAL ISSUE I (RESTATED): THERE IS NO CONSTITUTIONAL OR STATUTORY RIGHT FOR A PRE-COMMITMENT DETAINEE TO PARTICIPATE IN ALL PHASES OF FLORIDA'S SEX OFFENDER TREATMENT PROGRAM AND DENIAL OF TREATMENT DOES NOT VIOLATE EITHER THE EQUAL PROTECTION OR THE DUE PROCESS CLAUSES OF THE U. S. CONSTITUTION

Morel's sole claim in his habeas petition is that due to his civil pretrial detainee status he is being denied his constitutional right of access to treatment, rehabilitation and ultimately his release from custody. Morel is detained under the provisions of Florida's Sexually Violent Predators Act (SVPA) awaiting trial to determine if he meets the criteria for commitment as a "sexually violent predator."[7] To

[7] "Sexually violent predator" means any person who: (a) [h]as been convicted of a sexually violent offense [as defined by the Act];

date, there has been no civil commitment of Morel for purposes of treatment.

The statutory provisions of the SVPA make clear that Morel has no statutory right to treatment prior to a determination, after trial, that the person is a sexually violent predator. Then, and only then, is comprehensive sex offender treatment required. See § 394.917(2), Fla. Stat. (2010)("if the court or jury determines that the person is a sexually violent predator . . . the person shall be committed to the custody fo the Department of Children and Family Services for control, care, and **treatment** . . . .")(Emphasis supplied.) In the absence of a commitment, a person may be detained under the SVPA if the court concludes that there is probable cause to believe that the person is a sexually violent predator. See § 394.915(1), Fla. Stat. (2010) ("If the judge determines that there is probable cause to believe that 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"). Conspicuously absent from the statutory provision on probable cause detentions is any reference to treatment.

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and (b) [s]uffers from a mental abnormality or personality disorcer that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." § 394.912(10), Fla. Stat. (2010)

Not only is there no statutory entitlement to sex offender treatment during pretrial detention under the SVPA, but there is no constitutional entitlement to treatment. In Westerheide v. State, 831 So.2d 93 (Fla. 2002), the Florida Supreme Court, relying on the United States Supreme Court's decision in Kansas v. Hendricks, 521 U.S. 346 (1997), held that the Ryce Act does not violate due process by delaying treatment until the completion of a person's prison sentence. Westerheide at 101, citing Hendricks, 521 U.S. at 381. If there is no due process violation as a result of delaying treatment until the completion of sentence, then there can be no due process violation for the normal delay occasioned by precommitment proceedings. The right to participate in the all phases of Florida's sex offender treatment program clearly does not attach until entry of an order of commitment determining such treatment is needed.

That does not mean, however, that as a detainee Mr. Morel is entitled to no treatment or care at all. The Supreme Court has established that there exists a constitutionally protected right of persons confined in state institutions to receive minimally adequate habilitation, treatment and training to protect their fundamental rights to safety and freedom from physical restraints. See Youngberg v, Romeo, 457 U.S. 307, 316, 319, 322 (1982). Although restrictions burdening fundamental rights generally receive strict scrutiny, in Youngberg, the Supreme Court found that such a rigorous analysis would unduly burden the ability of states, specifically their professional employees, to

administer mental health institutions. Youngberg, at 322. Thus, the standard to be applied in assessing whether Morel is entitled to the full panoply of sex offender treatment is whether appropriate professional judgment was in fact exercised regarding his treatment as a detainee and that the determination regarding treatment is not a substantial departure from accepted professional judgment, practice, or standards. Youngberg, at 323. Specifically, the Supreme Court noted that

> In determining what is "reasonable"-in this and in any case presenting a claim for training by a State-**we emphasize that courts must show deference to the judgment exercised by a qualified professional.** By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. [FN29 omitted] Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. See Parham v. J. R., supra, at 607, 99 S.Ct., at 2506-2507; Bell v. Wolfish, supra, at 544, 99 S.Ct., at 1877 (courts should not " 'second-guess the expert administrators on matters on which they are better informed' "). For these reasons, the decision, if made by a professional, (footnote omitted) is presumptively valid; liability may be imposed **only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards** as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Youngberg, at 322-23. (Emphasis supplied.)

In this case, the testimony at hearing of the several treatment professionals responsible for operation of Florida's Sexually Violent Predator Program (SVPP) clearly establishes valid and substantial reasons for precluding pre-commitment detainees from participating in

the full comprehensive sex offender treatment program. The decision to exclude pre-commitment detainees from the higher phases of the sex offender treatment program was not one made lightly or without input from outside consultants and representatives of the detainee population. As the circuit court found based upon testimony and documentation submitted at hearing from DCF's administrator of the SVP program, Dr. Suzonne Kline; the program director at the Florida Civil Commitment Center (FCCC), Tim Budz; and the clinical director of the program at the FCCC, Dr. Robin Wilson, extensive thought and consideration was given to whether the later phases of the comprehensive sex offender treatment program should be extended to pre-commitment detainees:

> In September 2005, Liberty closed the comprehensive sex offender treatment program to detainees. In 2006, GEO sex offender treatment experts discussed and debated whether residents who are detained should be permitted to fully participate in treatment. After consultation with the Treatment Advisory Board, Public Defenders and others it was decided that the then existing policy to preclude detainees from Phases II-IV was a sound one. The decision to exclude detainees from the SOTP is appropriate for several reasons outlined by the experts. First, participation in treatment beyond the initial MRT program in Phase I requires preparation for a full disclosure of the resident's prior sexual crimes. Full disclosure, in the current treatment paradigm, is made at the beginning of Phase II. Full disclosure is critical to the effectiveness of the treatment program. Committed residents are motivated to make full disclosure of their offender histories (prior deviant sexual behavior) in order to achieve the benefits of the treatment and move forward in the program. Detainees have less motivation for full disclosure because their commitment proceeding[s] are still pending and information disclosed in the

> clinical records made of the detainee[’]s commitment progress may negatively impact the detainee at trial. [FN 16] Secondly, the lack of candor of the detainees works to degrade the integrity of the program and effectiveness of the group dynamic for those who are committed, consenting, and fully participating. Finally, detainees are more likely to drop out of treatment due to the issues associated with disclosure and the tension created between treatment and the commitment proceedings. Some research studies indicate that those who drop out before completing the treatment phases are more likely to recidivate than those who don’t begin treatment at all.
>
> FN16. The Legislature considered this dilemma in March 2006 and chose not to change the statute to preclude statements made by detainees (or those already committed) during treatment.

(Appendix A at 20-22; SR 752-754; T18-V2-P197-L10-25, P198-200, P201-L1-16, Kline; T25-V1-P64-L17-25, P65-L1-14, P147-L18-25, P148-L1-20, Budz; T25-V2-P199-L20-25, P200-L1-22, Wilson.)

In the judgment of the treating professionals, participation by detainees in the higher levels of the comprehensive sex offender treatment program clearly was contraindicated and potentially jeopardized the integrity of the program for those committed and participating. Mr. Morel contends that because the facility administrator at the FCCC, Mr. Budz, did not know specifics with regard to whether the detainees who were grandfathered in and actually participated in the comprehensive SOTP at FCCC had been more deceptive than committed residents or more disruptive or had experienced higher recidivism that the justifications given by the DCF and GEO were unsubstantiated theories. (SIB at 9-10). However, Mr. Morel brought

forth no expert testimony to contradict the uniform testimony of Dr. Kline, Dr. Wilson, and Mr. Budz – three highly experienced and qualified professionals in the field of sex offender treatment.

The Supreme Court specifically noted in Youngberg that "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." Youngberg at 322-23, citing to Parham v. J. R., 442 U.S. 584, 607 (1979); Bell v. Wolfish, 441 U.S. 520, 544 (1979)(courts should not "'second-guess the expert administrators on matters on which they are better informed'").

Mr. Morel claims he has a constitutional right to participate in all levels of sex offender treatment in order to achieve his release and to do so before his civil commitment proceedings are had. However, the United States Supreme Court, in addressing the Kansas Sexually Violent Predator Act[8] in Kansas v. Hendricks, 521 U.S. 346 (1997), specifically rejected Hendricks' argument that the statute was punitive because it failed to offer any legitimate treatment. The Court stated that it has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." Id. at 366. At least one federal circuit considering the issue of treatment *per se* for the civilly committed sex offenders noted that Youngberg did not establish such a

[8] Florida's Act is modeled on the Kansas Statute.

right, but only "held that the Constitution required only such 'minimally adequate training . . . as may be reasonable in light of [the] liberty interest in safety and freedom from unreasonable restraints.'" Bailey v. Gardebring, 940 F.2d 1150, 1154 (8th Cir. 1991), quoting Youngberg, 457 U.S. at 322.

In this case, it has been established by experts highly regarded in the field of sex offender treatment that there are cogent and compelling reasons to exclude detainees from participation in the treatment program beyond Phase I. These same experts, however, also recognized that there are a variety of adjunct therapies and activities available to all residents, including detainees that would benefit them and prepare them for participation in the later phases of sex offender treatment upon commitment. (T25-V1-P74-L24-25, P75-76, P77-L1-4, Budz). These adjunct therapies and activities include Substance Abuse Education and Treatment, Treatment for Co-Occurring Conditions, Substance Abuse Relapse Prevention, Human Sexuality Education, Emotions Management, Interpersonal Communication, Family Relationship, Health and Wellness, Medication Management, Mental Health Treatment, Lifestyle Management, NA/AA, Personal Victimization, Sexual Thoughts and Fantasies, and Sexual and Interpersonal Violence Awareness. (Id.) All residents, including detainees, may access educational and vocational services including GED and adult education, the computer lab, the law library, as well as recreational and leisure services. (Id.).

Detainees are able to enroll in MRT in Phase I of the SOTP as well as a specialized group specifically designed for detainees one night a week. (T25-V2-P199-L20-25, P200-L1-8, Wilson). However, testimony at hearing revealed that Mr. Morel avails himself of little of these adjunct programs except for spiritual programming. (T25-V2-P200-L1-22, Wilson).

It is clear that under Youngberg, Mr. Morel has not constitutional right to participate as a detainee in all levels of Florida's sex offender treatment program and that the FCCC is providing constitutionally minimally adequate therapies and activities to protect Mr. Morel's limited liberty interest in safety and freedom from unreasonable physical restraints. Neither Youngberg nor Hendricks requires more.

As to Mr. Morel's claim that he has been denied equal protection because he is treated differently from those residents who have been committed, this claim too is unavailing. Equal protection does not demand that all persons be treated equally and uniformly -- it demands only reasonable conformity in dealing with persons similarly circumstanced. See City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). "Different treatment of dissimilarly situated persons does not violate the equal protection clause." E & T Realty v. Strickland, 830 F.2d 1107, 1109 (11th Cir. 1987), cert. denied, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). Mr. Morel asserts that he is similarly situated to those

residents who already have been committed because "[a]ll residents at the FCCC have been deemed by professionals in a DCF screening committee to be sexually violent predators. . .[and]. . . a judge finds probable cause for that determination." SIB at 11. Such an analysis is superficial and should be rejected. As the circuit judge clearly recognized, detainees are in a completely different legal posture from those who are committed, which makes a significant difference in their motivation and willingness to participate in treatment, to fully disclose prior sexual offense history, and otherwise meet treatment requirements that could be detrimental to their pending commitment proceedings. (Appendix A at 35; SR 767).

SUPPLEMENTAL ISSUE II (RESTATED): THERE ARE NO "WAITING LISTS" FOR SEX OFFENDER TREATMENT AT THE FCCC AND THE COMPREHENSIVE TREATMENT PROGRAM AT THE FCCC WAS FOUND TO BE CONSTITUTIONALLY ADEQUATE IN THE FEDERAL CLASS ACTION SUIT, CANUPP V. SHELDON

The issue outlined by Mr. Morel in Supplemental Issue II arises from this Court's quest for factual findings to address the factual allegations made in the petition for writ of habeas corpus. Whether there are waiting lists or whether the comprehensive treatment program is adequate is not an issue for which Mr. Morel, as a detainee, has standing to litigate as he is not yet committed and participating in the program. Neither is Mr. Morel's habeas petition is a class action suit on behalf of the over 700 residents currently confined at the FCCC. Nevertheless, Mr. Morel alleges "a defect in the Sex Offender Treatment Program operated by the FCCC." (SIB at 12). Mr. Morel alleged in his

petition below that there are a limited number of actual residents participating in treatment and that the remaining residents who have been committed are on a long waiting list. (R 6, ¶ 21).

Mr. Morel's factual claims are completely unfounded. On February 25, the date of the hearing at which Mr. Budz testified, there were 663 residents at the FCCC, with 6 out of custody by court order and 657 residents on site. (T25-V1-P62-L12-19, Budz). On that date, there were 504 committed residents with 77% or 386 of those consenting and participating in treatment. (T25-V1-P62-L17-24, Budz). Mr. Budz also testified that there also were 12 detainees actively participasting in the comprehensive treatment program, seven of which are residents who were grandfathered in to the treatment program in September 2005 and five of which are technically detainees but who have court agreements directing them to participate in treatment. (T25-V1-P64-L7-16, Budz.) Florida has one of the highest rates in the nation for treatment participation in an SVP treatment program. (T25-V1-P100-L15-25, Budz). There were also 159 residents in detainee status, comprising 24 percent of the FCCC population. (T25-V1-P63-L2-4, Budz). Mr. Budz testified that the detainee figure was a dramatic reversal since July 2006 when GEO took over the facility when the FCCC population was 75% detained and only 25% committed. (T25-V1-P63-L5-15, Budz).

Dr. Kline, Tim Budz, and Dr. Wilson consistently testified that there are no extended waiting lists for treatment at the FCCC as claimed by Mr. Morel. However, all acknowledged that some of the modules, such

as the Phase I modules of T4C and TRY, move in tracks or cohorts which are closed to additional participants once the tracks begin. Each group module has three tracks, which run on staggered time frames. Therefore, there could be a 16-20 week time gap between tracks. During this time, residents are encouraged to participate in transition or interphase groups until the next track opens up. There are no closed groups in Phases II or higher so any time phasing up from Phase I generally is minimal. (T18-V2-P193-L10-15, P195-196, P197-L1-13, Kline; T25-V1-P72-L13-25, P73-74, P75-L1-9, P77-L9-25, P78-L18, Budz; T25-V2-P246-L6-25, P247-250, P251-L10-7, Wilson). Another reason a gap between treatment groups might occur would be if the resident dropped out, or was dismissed from the group, and the resident's clinician made a treatment decision to temporarily suspend treatment participation as part of a structured, therapeutic intervention. (T18-V2-P196-L15-25, P197-L1-3, Kline).

Mr. Morel filed 170 survey questionnaires that were executed by the survey respondents under penalties of perjury. (Morel's Composite Exhibit 16). DCF did not object to the admission of these questionnaires on the grounds of inadmissible hearsay but did object on the grounds of relevance. (T25-V2-P311-L10-25, P312-L1, Maher). The only parts of the questionnaire that appeared to have any relevance to this proceeding were those sections where residents were asked to identify the length of time they had to get into various groups of the

treatment program. (Id., Maher). DCF was permitted to file a rebuttal declaration to a number of questionnaires where the waits claimed were 16 weeks or longer. (T25-V2-P313-L3-10, Judge O'Connor; see also Declaration of Keri Fitzpatrick, Recreational Therapist, FCCC, dated March 17, 2011). The 16 week benchmark is the low end of the 16-20 week range identified by the Facility Admministrator Tim Budz as the maximum time gap between tracks of the groups in Phase I. (Id., T25-V1-P74-L2-14, Budz).

Of the 48 claims by residents that they waited 16 weeks of longer to enter a treatment group in Phase I or to phase up to Phase II, 42 were found to be inaccurate and/or untruthful. Two additional residents presented claims part of which were inaccurate and part of which appeared true. Four additional residents claims were found to be true; however, two of those claims (Fitts and White) were for waits of 16 weeks which are not inconsistent with the 16-20 week time gap between tracks considered acceptable by Mr. Budz. Only two claims (Batzler and Calvin Brown) revealed unexplained significant gaps between eligibility for placement and entry into the groups.[9] Two isolated and unexplained

[9] There was one additional case brought to the attention of the Court regarding resident Gregory Hunter, who was not entered into treatment for over one year. Mr. Budz testified that when the resident requested to join treatment and submitted his treatment readiness letter, his assigned therapist did not process the necessary paperwork to move Mr. Hunter into treatment. (T25-V1-P78-L19-25, P79, Budz). When the oversight came to the

extended wait periods do not equate to the existence of "wait lists" for treatment due to some systemic reason such as lack of funding or lack of staffing. The alleged "wait lists" are simply appropriate time frames between the staggered cohorts or tracks in the early stages of the treatment program that are conducted in groups that are closed to additional participants once the treatment track begins.

Accordingly, it should be clear that Mr. Morel has not fairly presented this factual issue based upon the testimony at hearing. Moreover, the constitutional adequacy of the sex offender treatment program at the FCCC was determined by the federal district court in the Middle District of Florida in Canupp v. Sheldon, 2009 WL 4042928 (M.D. Fla., November 23, 2009). The class action not only was dismissed with prejudice but without court oversight. Id. Thus, even if Mr. Morel had standing to bring such claims, any issues with regard to the integrity or constitutionality of the sex offender treatment program should be adequately addressed by the hearing before the circuit court in Broward County and the decision of the federal district court in Canupp.

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attention of Dr. Wilson, Mr. Hunter was placed into treatment and the responsible therapist was terminated. (Id.) Mr. Budz testified that he was not aware of any other specific cases, but acknowledged that while rare, there could be other isolated instances. (Id.)

ISSUE III (RESTATED): MOREL NEVER PRESENTED THIS ARGUMENT IN HIS PETITION FOR WRIT OF HABEAS CORPUS, THEREFORE IT HAS NOT BEEN PROPERLY PRESERVED; ALTERNATIVELY, THE DELAY IN TRIAL IS WHOLLY ATTRIBUTTABLE TO MOREL AND HIS TRIAL STRATEGY, NOT THE GOVERNMENT CONSEQUENTLY MOREL'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED BY THE GOVERNMENT.

Morel argues pursuant to State v. Goode, 830 So.2d 817 (Fla. 2002), his pre-commitment confinement is illegal. (IB 14-15). Initially, the merits of this argument are not properly before the Court. The origin of this particular case was Morel's Emergency Petition of Habeas filed February 10, 2009. (R 1-10). Morel argued only that his constitutional right to pre-commitment treatment had been violated, thus warranting release. (R 1-10). The circuit court denied the petition. (R 11). It was not until his appellate brief in the Second District Court of Appeal that Morel rather cursorily raised this issue. The Answer Brief pointed out this argument had never been presented to the circuit court, thus appellate review is precluded. In fact, Morel's counsel specifically argued this was not raised in his petition. (T18-V2-P114). Because Morel never raised this issue in his initial habeas petition, appellate review is not available. See Barker v. State, 877 So.2d 59, 63 (Fla. 4th DCA 2004).

Alternatively, Morel's argument is without merit. This Court specifically requested the Seventeenth Judicial Circuit hold an evidentiary hearing and determine, "[T]he reason why the trial in this case has not taken place for eight years and whether Morel has had counsel throughout that time, and if not, the reasons for lack of counsel." Morel

v. Sheldon, 59 So.3d 1082, 1084 (Fla. 2011). Subsequently, a two (2) day evidentiary hearing was held and the circuit court specifically found,

> d) the delays in Morel's commitment trial have been at his request and made for tactical reasons; he has never requested a commitment trial; Morel consistently has been represented by counsel during the eight year delay in the commitment trial.

(Appendix A at 2; SR 734). These findings are supported by the record and are not disputed by Morel. (SIB 14-17).

Morel's attorney, Ms. Cohen, testified she was privately retained to stop the trial which was set. (T18-V2-P96-97). In fact, Ms. Cohen acknowledged that "the State in this case was always ready for trial." (T18-V2-P100). Further, Ms. Cohen acknowledged the State did not in any way prevent Morel from being ready for trial. (T18-V2-P100, 111-112). The prosecutor also testified she filed a notice for trial in February 2005 and at all times has been ready for trial. (T18-V2-P157-158). Morel has never requested trial be set in this matter and the State has never delayed the trial process. (T18-V2-P158). The parties had been engaged in settlement negotiations from 2008. (T18-V2-P159). The prosecutor testified the State had engaged in absolutely no behavior which deprived Morel the ability to proceed to trial if he so chose. (T18-V2-P163). Ms. Cohen testified she sought to delay the proceedings to pursue both a Rule 3.850 motion through appeal and settlement negotiations. Thus these undisputed factual findings of

the trial court were supported by competent substantial evidence and should be upheld. See Chiles v. State Employees Attorneys Guild, 734 So.2d 1030, 1034 (Fla. 1999)("The findings of a trial court are presumptively correct and must stand unless clearly erroneous.") and Chicken "N' Things v. Murray, 329 So.2d 302, 305 (Fla. 1976)("We are bound by the trial court's view of the facts on appeal, unless the findings are clearly erroneous.").

Morel's argument that dismissal is warranted due to the delay in proceeding to trial is disingenuous at best. The only reason Morel has not proceeded to trial is because he has sought delay and continuances for tactical reasons. In fact, had the trial court denied Morel's requested continuances or limited Morel to one continuance for only 120 days, he would then level a claim of "manifest injustice." § 394.916(2), Fla. Stat. Morel sought the continuances to complete discovery; prepare for trial; pursue a Rule 3.850 motion through appeal; pursue settlement negotiations and secure an expert. Further delays were caused by Morel's appellate filings divesting the court of jurisdiction in some instances. Finally, it was Morel's trial strategy to judicially force the Department to provide him all available treatment prior to the commencement of trial.

The undisputed evidence reveals the State has at all times been ready for trial and has not requested a continuance or otherwise delayed the proceedings. Further, the evidence reveals Morel has at all times been represented by counsel. Morel executed a waiver of the 30 day trial

and throughout has sought continuances and delays. (Appendix A at 4-9; SR 736-741). This Court explained that in Goode, "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." State v. Kinder, 830 So.2d 832, 833 (Fla. 2002). (e.s.). At bar the sole cause for delay was Morel via both waiver and motions to continue. Morel at all times possessed the ability to reassert his right to trial within 30 days. Curry v. State, 880 So.2d 751, 755 (Fla. 2nd DCA 2004). In fact, when the State sought to have this matter tried, Morel filed further continuances. It was through no fault or action of either the State or the court that Morel has not yet been tried. Rather, it is Morel's deliberate tactics which have prevented trial to date. Therefore, Morel can hardly now be heard to complain of delay he himself caused, especially where the State has at all times been prepared and ready for trial and all efforts to progress this matter have been thwarted by Morel. Such "'gotcha!'" maneuvers will not be permitted to succeed in criminal, any more than in civil litigation." State v. Belien, 379 So.2d 446, 447 (Fla. 3rd DCA 1980).

Morel's reliance upon Doggett v. U.S., 505 U.S. 647 (1992) and U.S. v. Mohawk, 20 F. 3d 1480 (9th Cir. 1994) is misplaced. (IB 15). In both Doggett and Mohawk federal due process claims based upon delay of proceedings were examined. In Doggett the 8 ½ years delay between

the indictment and arrest was attributed to the "Government's negligence" in failing to more diligently pursue locating Doggett. Doggett, 505 U.S. at 658. Thus, the court found Doggett's due process rights to a speedy trial had been violated by the government's seemingly lackadaisical efforts to locate the defendant. However, the federal constitutional speedy trial rights at issue in Doggett, do not apply to civil commitment proceedings. Similarly, in Mohawk, the delay was also attributed to the government. Specifically, Mohawk's appellate proceedings were delayed due to the actions of a dilatory court reporter and the court's failure to adequately supervise the court reporter. Mohawk, at 1489. Thus in both Doggett and Mohawk, the delays at issue were laid at the government's feet. This is not the case at bar. Therefore this Court must reject Morel's argument.

ISSUE IV (RESTATED): MOREL'S INVOLUNTARY CIVIL COMMITMENT TRIAL HAS BEEN PENDING FOR EIGHT (8) YEARS AS PART OF HIS LITIGATION STRATEGY AND MOREL HAS BEEN REPRESENTED BY COUNSEL THROUGHOUT THE PROCESS.

The Broward Circuit Court properly concluded, "for tactical reasons, Morel has delayed trial for years." (Appendix A at 38; SR 770). As discussed in Issue III, Appellant has not disputed the factual findings, nor could he as competent substantial evidence adduced at the evidentiary hearing supports each finding. Since April 29, 2002 Morel has been represented by counsel. Morel has been thwarted the State's efforts to bring this matter to trial. Neither the State nor the Court have in any manner hampered Morel's ability to proceed to trial. Counsel, with Morel's agreement, has pursued a campaign of delay for various strategic purposes. The record demonstrates that Morel has never desired a trial in this matter and is the sole reason why trial has not occurred.

CONCLUSION

Wherefore, for the foregoing reasons, the order of the circuit court below denying the petition for writ of habeas corpus must be affirmed.

Respectfully submitted,

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FONT CERTIFICATION

I HEREBY CERTIFY that the foregoing answer brief has been prepared in Courier New 12-point font.

_____
Susan A. Maher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUPPLEMENTAL ANSWER BRIEF and APPENDIX** was furnished by U.S. Mail to **PATRICK REYNOLDS, ASSISTANT REGIONAL COUNSEL**, Office of Criminal Conflict and Civil Regional Counsel, Fourth District, 605 N. Olive Avenue, Second Floor, West Palm Beach, Florida 33401, on this _____ day of September, 2011.

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Susan A. Maher