

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-37

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN KINDER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS AND OF THE CASE

The Respondent accepts the Petitioner's statement of the case and facts with the following additions and clarifications:

Kevin Kinder completed the incarcerative portion of his prison sentence on September 3, 1999 and, without ever being released from custody, was immediately transferred to the custody of the Department of Children and Family Services to be held in secure detention pursuant to an Ex Parte Probable Cause Order (**Respondent's Appendix 2**), an Order of which he received neither prior notice nor an opportunity to be heard. Subsequent to his detention under this probable cause order, he was not even scheduled to be brought before the court until September 21, 1999, eighteen days later (**Resp. App. 3**), and no hearing was in fact held on this date because the court was closed due to an impending hurricane.¹ Nevertheless, due to

¹ The Second District Court of Appeal in the Order on Motions for Rehearing, Rehearing En Banc, and Certification issued on December 8, 2000, found that the State's assertion that "but for the threatening hurricane this case would have proceeded in a timely manner, with pre-trial motions, the appointment of counsel . . . (and that) [i]t was an act of God which prevented that from occurring on the scheduled date, and that act of God set in motion the subsequent chain of events" to be meritless, pointedly noting that: "[T]he 'act of God' accounted for only one of the forty-four days that transpired before Kinder was served with the petition for commitment and appointed counsel. And, the 'act of God' cannot be said to have set in motion the subsequent chain of events which consisted of the State's failure to take any action in this case." Kinder v. State, 25 Fla. L. Weekly D2821 (Fla.2d DCA Dec. 8, 2000).

the finding of probable cause, Mr. Kinder continued to be held in a secure facility, without counsel being appointed, without access to the court, and without even being served with a copy of the Petition (**Resp. App. 1**) and Ex Parte Order which had caused his confinement, until he filed a Pro Se Motion. (**Resp. App. 4**). It was only then, after his filing of a Pro Se Motion, that the State scheduled a hearing for October 18, 1999 - a date forty-four days after he had been detained - as his *first* appearance before the court. On October 18, 1999, Mr. Kinder was for the first time served with a copy of the Petition and Order which had resulted in his detention (**Resp. App. 6**), and also for the first time was provided with counsel, the Office of the Public Defender for the Thirteenth Judicial Circuit. (**Resp. App. 5**).

After his Motion to Dismiss (**Resp. App. 7**) challenging jurisdiction of the court was denied (**Resp. App. 8**), Mr. Kinder filed a Petition for Writ of Prohibition in the Second District Court of Appeal. In his Petition (**Resp. App. 9**), Mr. Kinder sought a writ ordering the trial court to dismiss the petition for commitment (and consequent upon such dismissal, his release from custody), arguing that the 30-day trial period provided in section 394.916(1) (which had been clearly violated in his case) was jurisdictional and mandatory, such that its violation required dismissal of the case. Upon review of Mr. Kinder's Petition for Writ of Prohibition, the Second District ordered the State to respond (**Resp. App. 10**) and, after it did so, Mr. Kinder

filed a Reply. (**Resp. App. 11**).

The Second District determined to treat Mr. Kinder's Petition for Writ of Prohibition as a Petition for Writ of Mandamus and, on July 7, 2000, issued its original opinion in Kinder v. State, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000) (**Resp. App. 12**). Although in this opinion the Second District found that (after a finding of probable cause which required a respondent to be held in secure detention pending a trial) the 30-day time limit for a trial was "mandatory," it also found that the issue of the trial court's jurisdiction to proceed on the petition (for Mr. Kinder's commitment) was not properly before the court, and declined to address it. However, due to the State's violation of Mr. Kinder's "statutory right" to a trial within 30 days (or to otherwise afford Mr. Kinder "even minimal due process"), the Second District ordered Mr. Kinder's immediate release, finding it to be "the only remedy that will adequately redress this violation," even though this was not a remedy which Mr. Kinder had directly requested (except as it would be the natural consequence of the dismissal of the petition for commitment).

After receiving the Second District's July 7, 2000 opinion, the State demanded an immediate trial date, and the trial court scheduled a status conference for July 26, 2000, and set the case for jury trial on August 14, 2000. (**Resp. App. 13, p. 4**). On July 9, 2000, the State, through the Office of the Attorney General, filed a

Motion to Stay Mr. Kinder's release pending a rehearing (**Resp. App. 14**), which motion was granted on July 13, 2000 (**Resp. App. 15**), and on July 19, 2000, the State filed a Motion for Rehearing (**Resp. App. 16**), Motion for Rehearing En Banc, and Motion to Certify a Question of Great Public Importance. (**Resp. App. 17**).

On July 26, 2000, at the status conference before the trial court, Mr. Kinder objected to the August 14, 2000 trial date and requested a stay of the proceedings in the trial court pending the rehearing requested by the State before the Second District. The State objected to such a stay and requested that the case proceed to trial on August 14, 2000, and the trial court denied Mr. Kinder's request for a stay and left the case set for trial on August 14, 2000. (**Resp. App. 13, pp. 4-6**).

On July 31, 2000, Mr. Kinder filed a motion to stay all proceedings in the trial court in the Second District Court of Appeal (**Resp. App. 19**), and also filed his Reply to the State's a Motion for Rehearing, Motion for Rehearing En Banc, and Motion to Certify a Question of Great Public Importance. (**Resp. App. 18**).

On August 8, 2000, the Second District denied Mr. Kinder's Motion for Stay of all proceedings in the trial court. (**Resp. App. 20**).

On August 11, 2000, Mr. Kinder filed a Motion for Continuance with the trial court, and informed the trial court that all of counsel's efforts to litigate Mr. Kinder's case had thus far been focused at the appellate level, while the State, through

two different agencies, the State Attorney and the Attorney General, was able to prepare for the litigation at the trial level *and* at the appellate level. (**Resp. App. 21 and 22, pp. 12-14**). The Defendant's Motion for Continuance was denied. (**Resp. App. 22, p. 22**).

On August 14, 2000, the date of the scheduled trial, the Office of the Public Defender filed a Motion for Continuance Due to the Unavailability of Material Witnesses on Mr. Kinder's behalf (**Resp. App. 23**) and, on its own behalf, filed a Motion to Withdraw as counsel. (**Resp. App. 24**). In its motion to withdraw, the Public Defender asserted that it would be unethical for that Office to continue to represent Mr. Kinder at a jury trial on that date. The assistant public defender before the trial court informed the court that counsel was unprepared to proceed to trial because virtually no discovery or investigation had been done on Mr. Kinder's behalf, and that no defense experts had yet been hired, because, up to that point, all of counsel's efforts had been focused on the proceedings before the Second District. (**Resp. App. 25, pp. 25-30, 32-34, 36-38**).

The trial court was also asked to consider that the State's desire for a rapid trial setting was made not because the case was "ready for trial," but because the State wanted to have a trial (at all costs) before Mr. Kinder could be released from custody as a result of the Second District's July 7, 2000 order. (**Resp. App. 25, pp.**

23-25, 31).

The trial court denied both of Mr. Kinder's motions. (**Resp. App. 25, pp. 35, 38**).

The case proceeded to trial on August 14, 16 - 18, 2000 and resulted in a jury finding that Mr. Kinder was a sexually violent predator. The trial court involuntarily committed him as such on August 18, 2000.

Mr. Kinder filed a Motion for Relief (**Resp. App. 26**) from the order of commitment on September 12, 2000, after discovering that during the course of the trial the State had learned of the whereabouts of a defense witness defense counsel had bene unable to locate , but had failed to disclose this fact to defense counsel. Mr. Kinder's Motion for Relief was denied and the order involuntarily committing him is currently on appeal.² (**Resp. App. 27**).

On December 8, 2000, the Second District denied the State's Motion for Rehearing, and Rehearing En Banc, specifically finding that the trial court's closure due to a hurricane - for a single day - did not justify the delay of 44 days before Mr. Kinder

² Mr. Kinder's notice of appeal and directions to the Clerk were filed on September 18, 2000. As of the date of this writing, over five months later, the record on appeal has still not been completed. See Harris v. State 766 So. 2d 1239, 1241 (1st DCA, 2000): "[T]his court has stated that it will afford expedited consideration to appeals from orders of involuntary commitment."

“was served with the petition for commitment and appointed counsel.” The Second District did, however, certify the following question to be of great public importance:

WHETHER THE FAILURE TO COMMENCE A COMMITMENT TRIAL WITHIN 30-DAY PERIOD OF SECTION 394.916(1), (1999), ABSENT A PRIOR CONTINUANCE FOR GOOD CAUSE, AUTHORIZES THE RELEASE OF THE DETAINED INDIVIDUAL, WHEN THE COMMITMENT CASE HAS NOT BEEN DISMISSED, AND THE TRIAL COURT HAS PREVIOUSLY MADE AN EX PARTE DETERMINATION THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE INDIVIDUAL IS A SEXUALLY VIOLENT PREDATOR IN NEED OF COMMITMENT.

Kinder v. State, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000), reh. denied, question certified, 25 Fla. L. Weekly D2821 (Fla. 2d DCA December 8, 2000).

SUMMARY OF ARGUMENT

The Second District Court of Appeal was correct in finding that the 30-day time provision found in section 394.916(1) Fla. Stat. (1999) is mandatory, and that a violation of this section of the Act was a violation of a substantive, statutory right, which must be remedied. The only adequate remedy for this violation, however, is dismissal of the Petition for Commitment. Merely ordering the release of an individual is an inadequate and illusory remedy that will never actually be obtained, as demonstrated in Kevin Kinder's case.³

This Court should answer the question of whether the failure to commence a commitment trial within the 30-day time period of section 394.916(1) (where no continuance is sought or granted) authorizes the release of the individual being detained, positively; but should also rule that the remedy of release from custody, neither authorized by the statute or adequate to redress the wrong, does not go far enough, and that violation of this statutory right also denies due process and divests the circuit court of jurisdiction to proceed.

As provided by the Act, section 394.916(1) is the *only* section that

³ As explained above in the Statement of the Case and Facts, the upshot of this remedy was for the State to first have the Second District's order stayed, and then, before the legal issues involved could be further litigated or resolved, demand that the case proceed to trial as quickly as possible in order to avoid this remedy from ever being effective as such.

purports to grant, or enables a respondent such as Mr. Kinder to obtain, the constitutionally required due process and statutory rights of appointed counsel, notice, and access to the courts within a reasonable time after they have been deprived of their freedom under the Act.

Therefore this Court should hold that under the present Act, section 394.916(1) Fla. Stat., (1999), which states that “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” (emphasis added) is mandatory and jurisdictional, and *not* merely directory or discretionary.

Such a finding is required because this section is the only procedural safeguard within the statute to ensure the person against whom commitment is sought is provided due process. As found by the Second District Court of Appeal in Kinder:

As our sister court has observed, "the continued confinement of a person after he has served his full sentence for conviction of a crime is serious enough to warrant scrupulous compliance with the statute permitting such confinement, not to mention the applicable constitutional provisions." Johnson v. Department of Children & Family Servs., 747 So.2d 402, 403 (Fla. 4th DCA 1999). In this case, the State neither complied with the requirements of the Act nor afforded Kinder even minimal due process.

Kinder v. State, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000), reh. denied, question certified, 25 Fla. L. Weekly D2821 (Fla. 2d DCA December 8, 2000).

ARGUMENT

The Court is asked to determine whether section 394.916(1), Fla. Stat. (1999), which states that: “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” (emphasis added), is mandatory and jurisdictional or merely discretionary. The Petitioner submits that this Court should find that the 30 days provided for in the statute is mandatory and jurisdictional in nature and not merely discretionary because it is the only procedural safeguard within the statute to ensure the person against whom commitment is sought is provided due process.

I. The 30 Day Time Limit For Trial Is Jurisdictional

When Chapter 99-222, Laws of Florida, (**Resp. App. 28**) was enacted, the Legislature re-created the Involuntary Civil Commitment of Sexually Violent Predators Act (hereinafter “the Act”) within Chapter 394 of the Florida Statutes. Although it did not explicitly address whether the 30 day time limit for trial provided by section 394.916(1) was jurisdictional, the Act did specifically provide that all the other time periods it created were *not* jurisdictional. Section 394.913, Fla. Stat. (1999),⁴ governing time periods for agencies giving notice and completing

⁴ Chapter 99-222, § 6, Laws of Florida, see **Resp. App. 28**.

assessments, provides that those time limits are *not* jurisdictional.⁵ Section 394.9135, Fla. Stat. (1999),⁶ setting time limits for evaluating inmates released earlier than anticipated, also provides that those provisions limiting time are *not* jurisdictional.⁷

The Legislature had the opportunity to provide that section 394.916, Fla. Stat.(1999), including the 30 day time period for trial, was *not* jurisdictional, but opted not to do so, and it is a general principle of statutory construction that the mention of one thing implies the exclusion of another – *expressio unius est exclusio alterius*. Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). Thus, where the legislature has used a term in one section of a statute, but omits it in another section of the same statute, a court may not imply it where it has been excluded. Leisure Resorts v. Frank J. Rooney, Inc., 654 So. 2d

⁵ The final paragraph of section 394.913, Fla. Stat. (1999) states: “The provisions of this section are not jurisdictional, and failure to comply with them in no way prevents the state attorney from proceeding against a person otherwise subject to the provisions of this part.”

⁶ Chapter 99-222, § 7, Laws of Florida, see Resp. App. 28.

⁷ Section 394.9135(4), Fla. Stat.(1999) states: “The provisions of this section are not jurisdictional, and failure to comply with the time limitations, which results in the release of a person who has been convicted of a sexually violent offense, is not dispositive of the case and does not prevent the state attorney from proceeding against a person otherwise subject to the provisions of this part.”

911, 914 (Fla. 1995);⁸ Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997).⁹

Likewise when a law expressly describes a particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997). Therefore the only reasonable interpretation - if any “interpretation” is permitted¹⁰ - is that the Legislature intended the 30 day trial time limit of section 394.916(1) (“Within 30 days after the determination of probable cause, the court *shall* conduct a trial ...) to be mandatory and jurisdictional.

Although to date no Florida appellate court has directly addressed this issue

⁸ “When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded. See Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87 (Fla. 1949); accord Ocasio v. Bureau of Crimes Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982).”

⁹ “As a general rule, ‘[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983).”

¹⁰ Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. See Florida State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 576 (Fla. 1958) and other cases cited in Section II, pp. 22-28, infra.

with respect to section 394.916(1),¹¹ the Kansas case of In re Brown, 978 P.2d 300 (Ct. App. Kan. 1999) has done so in “interpreting” the comparable section of the Kansas Act.¹²

Brown’s holding furnishes especially strong and persuasive authority for both the Respondent’s position and the reasoning of the lower court, not only because it definitively rules on the identical issue (involving a virtually identical statutory provision, see n.12, supra), but also because Florida’s Act was modeled upon and patterned after the Kansas Act.

¹¹ In Kinder v. State, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000), the court held that the 30 day time limit of section 394.916(1) is mandatory and a statutory right, without directly addressing the issue of whether said statute is jurisdictional. The Kinder panel commented on jurisdiction as follows: “Kinder argues that the thirty-day time limit should be construed as jurisdictional, the expiration of which divests the trial court of authority to proceed. We disagree. ...” [Footnote 2:] “Because it is not yet properly before us, we decline at this time to address whether the Act permits the State to continue the commitment proceeding against Kinder on the originally filed petition.”

¹² Kansas Statute § 59-29a06 (1995) provides (and so provided in Kansas’ original 1994 law), in pertinent part, that: “Within 60 days after the [determination of probable cause], the court shall conduct a trial to determine whether the person is a sexually violent predator.”

Section 394.916(1), Fla. Stat., reads (*and* when originally enacted as section 916.36(1) in Laws of Florida Chapter 98-64, § 8 read): “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.”

The Florida Act originated in the Florida House of Representatives in 1998 as House Bill 3327, sponsored by Representative J. Alex Villalobos. Comments at a hearing on 26 March 1998 before the Health & Human Services Appropriations Committee, a complete transcript of which is found in **Resp. App. 29** indicates that the original, 1998 “Jimmy Ryce” legislation, was closely modeled on the Kansas Statute. Thus:

REPRESENTATIVE VILLALOBOS: We are calculating \$30,000 per year, per client and that is based on the numbers that we have out of Kansas. We have included a little bit higher amount for Florida since things, obviously, cost a little bit more in Florida than they do in Kansas.

But we're basing that on the law that Kansas did. We're trying to mirror that.... (Page 9, lines 18 - 24).

....

In the first place, to alleviate the members' concerns about lawsuits and particularly the Department's concerns about these numbers, *we are based on the Kansas law which happened to have gone all the way to the United States Supreme Court.*¹³ And based on what Kansas has done which is what *we are trying to mirror*, that is constitutional. (Page 29, lines 10 -16). (Footnote added.)

I'm basing my numbers on what Kansas has done and *that's what this law is based on.* (Page 30, lines 13 - 15).

....

¹³ Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), which held that the original Kansas Act did not violate the federal constitutional guarantees of due process, double jeopardy and ex post facto.

CHAIRMAN SANDERSON: As far as it being in our committee as a – as a fiscal respondent to the policy, *this is patterned after the law in Kansas as I understand it....* (Page 39, lines 14 - 16).

....

MRS. RYCE: *It was paralleled closely on the Kansas Act and we did that because that's already been found constitutional. It's passed constitutional muster and we won't have to worry about it. Everybody's getting their rights considered.* (Page 41, lines 20 - 23).

....

MR. RYCE: And then I'd like to make one final comment. I apologize but fiscal issues alone are not the reason for this bill. We thought long and hard before we asked that Jimmy's name be put to a piece of legislation. And the reason why this legislation qualified is first of all, *we know that it's constitutional because Kansas already went through that battle for us.* (Page 46, lines 19 - 25).

(All emphasis added.)

Thereafter, the Final Bill Research and Economic Impact Statement, CS/HB 3327, dated 26 May 1998 (**Resp. App. 30**) concerning the legislation being discussed at this hearing, the original “Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act,” was prepared by the staff of the Florida House of Representatives Committee on Family Law and Children.

In section III. A., Constitutional Issues, this Statement discusses the Kansas Act and the fact the United States Supreme Court’s decision in Kansas v. Hendricks, *supra*, relied, *inter alia* on the Kansas Act’s “strict procedural safeguards.” (**Resp. App. 30, p. 5**).

In the following section, III. B., Effect of Proposed Changes, the Statement compares 14 of the 24 sections of the bill to similar or identical sections of the Kansas statute. (**Resp. App. 30, pp. 5-10**).

The Statement contains no reference to or discussion of the statutes of any other state throughout its entire 20 pages.

With respect to the provisions of section 916.36 (renumbered as 394.916 by Chapter 99-222, § 11, but otherwise reenacted in its identical, original form, see Resp. App. 28, p. 10), the May 26, 1998 Impact Statement, in section III. B., Effect of Proposed Changes, Section 8, also specifically states that section 916.36 (now 394.916): “Requires the court to conduct a trial within 30 days of the determination of probable cause.” (**Resp. App. 30, p. 6**). Again, in section III. E., Section-By-Section Research, Section 8, it states that the Act “creates s. 916.36, F.S. requiring the court to conduct a trial within 30 days of the determination of probable cause .” (**Resp. App. 30, p. 14**).

Nothing in the legislative history cited by the State,¹⁴ suggests that the 1999 amendments to the Act (see Resp. App. 28) were intended to change the original legislative intent in this regard. In fact, this 1999 Senate Staff Analysis continues to

¹⁴ Senate Staff Analysis and Economic Impact Statement of the Committee on Children and Families, CS/SB 2192 (March 30, 1999), cited in the State’s Initial Brief on the Merits at 17.

state, in paragraph 5 of Section II. A, Present Situation, that: “Within 30 days after the determination of probable cause, the court is *required* to conduct a trial ,” (emphasis added).¹⁵ *No* further mention of section 916.36/394.916 is made in this 1999 Senate Analysis, and the 1999 legislature made *no* changes to this section.

Thus, in In re Brown, *supra*, the Kansas Court of Appeals dealt with a situation identical to Mr. Kinder’s (the Kansas respondent had not been brought to trial within the 60 days provided for in the Kansas Statute, and no continuance had been sought), “interpreted” a virtually identical statute (after which Florida’s was modeled), and disposed of identical arguments from the government, stating that:

Despite Brown's misplaced application of speedy trial rights to K.S.A.1995 Supp. 59-29a06,¹⁶ this court must consider whether the 60-day limitation pursuant to K.S.A.1995 Supp. 59-29a06 is mandatory or directory. The State argues that if the statute is taken as a whole, the intent is that the provision be directory. (Footnote added.)

"In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.”

¹⁵ *Id.* at 6.

¹⁶ Brown had contended that 60-day limit in K.S.A 59-29a06 as mandatory because the limit is intended to provide the speedy trial protection afforded criminal defendants.

(Citations omitted.)

When defining "shall," the State suggests the interpretation of this term should include consideration of the fact that the same provision permits the continuance of the trial. The State asserts that by providing the discretion to continue, the time limit can only be construed as directory. The State argues that the use of the term "shall" was done only to emphasize the priority of these cases for purposes of assigning cases for trial.

In construing a statute, the court must interpret the statute to give the effect intended by the legislature. (Citation omitted.) "[I]n construing statutes, statutory words are presumed to have been and should be treated as consciously chosen, with an understanding of their ordinary and common meaning and with the legislature having meant what it said." (Citations omitted.) When a statute is plain and unambiguous, the court will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. (Citation omitted.)

In construing the language of K.S.A.1997 Supp. 59-29a04, another statute dealing with sexual predators, our Supreme Court held that the "75-day provision is jurisdictional, and a district court has no jurisdiction to entertain a petition filed beyond the time provided," even though the word "shall" was not used in the statute. *In re Care & Treatment of Ingram*, 266 Kan. 46, 49, 965 P.2d 831 (1998).

The language of K.S.A.1995 Supp. 59-29a06 is clear. The use of the term "shall" indicates the legislature mandated that the commitment trial be held within 60 days after the

probable cause hearing.¹⁷ The inclusion of the language "[t]he trial may be continued" does not render the term "shall" discretionary. Additionally, continuance is conditional. A continuance (1) must be considered upon a motion; (2) must be granted for the purpose of due administration; and (3) cannot substantially prejudice the defendant. Neither the court nor the parties in this case filed a motion for continuance of trial. We hold that the 60-day requirement specified in K.S.A.1995 Supp. 59- 29a06 is mandatory and jurisdictional. (Footnote added.)

... [W]e have no choice but to conclude that the district court erred in denying Brown's motion to dismiss. There was no trial within 60 days and no record of any motion for continuance by the court or either party.

Brown, *supra* at 302-3.

In light of the facts and holding of Brown, and the legislative history of relating Florida's sexually violent predator act to that of Kansas, the State's mere

¹⁷ Kansas section 59-29a06 reads: "Within 60 days of *any* hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator." (Emphasis added.) Subsection (a) of K.S. A. 59-29a05 provides for an *ex parte* probable cause hearing, and subsection (b) gives the respondent a *right* to a "hearing to contest the probable cause," within "72 hours after a person is taken into custody," on such *ex parte* probable cause determination. Florida section 916.35/394.915, the section comparable to Kansas' 59-29a05, did not, and *does* not, give a Florida respondent a *right* to any hearing - ever. See section 394.915 (2), **Resp. App. 28, p. 8**. Thus, under the Kansas statute the respondent has an additional right not given to citizens of Florida. In Florida there is *no* mechanism to start the 30 day trial period running *other than* the "determination of probable cause," whether made in an *ex parte* hearing or at an adversarial probable cause hearing which "may" be held only "if" the trial judge finds that is "necessary," but even then with *no* time limits within which it must be held.

passing reference to the case,¹⁸ and suggestion that cases¹⁹ from other states with more dissimilar statutes²⁰ should be considered while Brown and its rationale are essentially ignored, is neither persuasive nor even logical. This is especially true when the rationale for this position seems to be based largely, if not exclusively, on a legislative history²¹ which relates to amendments to the original Act which in no way affected the section in question, section 394.916(1).

Nor is the Respondent's position, and that adopted in Brown, a departure from settled rules of statutory construction otherwise well recognized in Florida.

Thus, in Machin v. Lumber Transport, 556 So. 2d 446, 447 (Fla. 1st DCA 1990), the court held that, pursuant to section 440.25(4)(c) Fla. Stat. (1987),²² a Judge

¹⁸ See State's Initial Brief on the Merits at 17.

¹⁹ For further discussion of the cases cited by the State on this point, see Section III, infra.

²⁰ And which deal with significantly different factual situations, not as directly and immediately effecting the personal freedom and liberty interests of citizens in the same way that Mr. Kinder's liberty was, and has been, affected, and those of other citizens' *will be* if the Act is interpreted as contended by the State.

²¹ Senate Staff Analysis dated March 30, 1999 relating to the *1999 amendments* to the original Act as cited in the State's Initial Brief on the Merits at 17.

²² "As a condition of filing a notice of appeal to the District Court of Appeal, First District, an employer who has not secured the payment of compensation under this chapter in compliance with s. 440.38 shall file with his
(continued...)

of Compensation Claims had no jurisdiction to provide a seven day extension of time for the appellant to file the bond after the notice of appeal had been filed because the statutory provision that the party “shall” file a bond with a notice of appeal was mandatory and jurisdictional, and in Nobile v. Nobile, 722 So. 2d 848 (Fla.1st DCA 1998), the court ruled that a petitioner’s failure to comply with the requirements of section 61.132, Fla. Stat. (1997),²³ requiring that certain information “shall” be provided under oath, was sufficient to find a lack of subject matter jurisdiction.

The most reasonable, logical and persuasive conclusion is that section 394.916, Fla. Stat. (1999) is jurisdictional. The Florida legislature intended to make the 30 day time limit for trial jurisdictional as demonstrated by the omission of the non-jurisdictional language (of sections 394.913 and 394.9135) from section 394.916; Florida courts have held that other similar provisions of law are jurisdictional and not merely directory or advisory; Florida patterned its Act after the Kansas Act; and the Court of Appeals of Kansas has held that Kansas’ counter-part to section 394.916, Fla. Stat. (1999) is jurisdictional.

(...continued)
notice of appeal a good and sufficient bond....”

²³ “Every party in a custody proceeding, in his or her first pleading or in an affidavit attached to that pleading, shall give information under oath as to the child's present address [et cetera]....”

II. The 30 Day Time Limit for Trial Is Mandatory

The 30 day time limit for trial is mandatory. The U.S. Supreme Court has ruled that the use of the term “shall” in a statute normally creates an obligation impervious to judicial discretion. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34 (1998). See also Escoe v. Zerbst, 295 U.S. 490, 493 (1935) (the word “shall” is ordinarily “the language of command,”) and United States ex rel. Siegel v. Thoman, 156 U.S. 353, 360 (1895) (when the same statute uses both “may” and “shall”, the normal inference is that each is used in its usual sense – “may” being permissive and “shall” being mandatory).

In Kinder v. State, 25 Fla. L. Weekly D1637 (Fla. 2d DCA July 7, 2000), the lower court held that the 30-day time limit of section 394.916, Fla. Stat. (1999) is mandatory. The Kinder panel cited Belcher Oil Co. v. Dade County, 271 So. 2d 118 (Fla. 1972) for the proposition that the word “shall” is generally mandatory, though it may be directory under appropriate circumstances, citing S.R. v. State, 346 So. 2d 1018 (Fla. 1977), for the proposition that the meaning of “shall” depends on the context in which it is found and upon the intent of the legislature as expressed in the statute, and Neal v. Bryant, 149 So. 2d 529 (Fla. 1962), for the proposition that: “Generally, ‘shall’ is interpreted to be mandatory where it refers to some action

preceding possible deprivation of a substantive right and directory where it relates to some immaterial matter in which compliance is a matter of convenience.”

Applying these principles to the facts of this case the Kinder panel held that the 30 day time limit created a “statutory right to be brought to trial within 30 days.”

Without doubt the court was correct in its interpretation. Though Florida decisional law contains numerous rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes, “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” See A.R. Douglass, Inc. v. McRaney, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931) see also Carson v. Miller, 370 So. 2d 10, 11 (Fla. 1979); Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950).

Thus, courts of this state are “without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.” See American Bankers Life Assurance Co. of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968), see also Holly v. Auld, 450 So. 2d 217, 219 (Fla.

1984) and McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998).

In this context, Section 394.916(1), Fla. Stat. (1999) presents no ambiguity when it provides that “the court shall conduct a trial” within 30 days of a finding of probable cause. This language is neither equivocal, ambiguous nor in need of interpretation.

Any departure from the “letter of the statute” is sanctioned only when there are cogent reasons for believing that such “letter” does not accurately disclose the legislative intent. State ex rel. Hanbury v Tunncliffe, 98 Fla. 731, 735, 124 So. 279, 281 (1929). Even the fact that a literal interpretation of the plain language of a statute would produce a result which might seem to be illogical does *not* warrant the court's deviating from the plain language of the statute in search of a *more* logical result. In re Estate of Blankenship, 122 So. 2d 466 (Fla. 1960).²⁴

In Allied Fidelity Insurance Co. v. State, 415 So. 2d 109, 110-111 (Fla. 3d DCA 1982), the court exhaustively considered when the word “shall” is mandatory

²⁴ “But the fact that a literal interpretation of the plain language of the statute (making charitable devises voidable at the option of the decedent’s survivors) in some cases, i. e. those cases in which the last will and the next to the last will are both executed within six months of testator's death, produces a result which seems to be illogical does not warrant the courts deviating from the plain language of the statute in search of a more logical result.” Blankenship, supra at 469.

and when it might be construed as discretionary.²⁵

The Allied court held that the first rule of statutory construction was that words were to be given their normal meaning,²⁶ but it is equally an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or ridiculous conclusion, or a result obviously not designed by the Legislature, will not be adopted,²⁷ and concluded that “whether ‘shall’ is mandatory or discretionary will depend ... upon the context in which it is used and the legislative intent expressed in the statute.”²⁸

Thus, where “shall” refers to some required action preceding a possible deprivation of a substantive right,²⁹ or the imposition of a legislatively-intended

²⁵ The issue in this case was whether a court may enter a judgment against a bail bond surety, upon unpaid and undischarged forfeitures, where written notices to the surety were not given within seventy-two hours of the forfeitures as required by section 903.26(2), Fla. Stat. (1979) which provided that: “If there is a breach of the bond, the court shall declare the bond and any bonds or money deposited as bail forfeited and shall notify the surety agent and surety company in writing within 72 hours of said forfeiture. The forfeiture shall be paid within 30 days.”

²⁶ Allied, supra at 110, citing Neal v. Bryant, 149 So.2d 529 (Fla. 1962).

²⁷ Allied, supra at 111, citing City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1959), and Palm Springs General Hospital, Inc. of Hialeah v. State Farm Mutual Automobile Insurance Co., 218 So. 2d 793 (Fla. 3d DCA 1969).

²⁸ Allied, supra at 111, citing S. R. v. State, 346 So. 2d 1018 (Fla. 1977).

²⁹ Allied, supra at 111, citing S. R. v. State, 346 So. 2d 1018 (Fla. 1977);

(continued...)

penalty,³⁰ or action to be taken for the public benefit³¹ (all of which factors would seem to be applicable legal proceedings under the Act), the indicated action is mandatory.

Only when no rights are at stake,³² and when only a non-essential mode of proceeding is prescribed,³³ can the word “shall” be said to be advisory or directory only. By the same reasoning, the Allied court also concluded that even the permissive word “may” is deemed to be obligatory “[w]here a statute directs the doing of a thing for the sake of justice.”³⁴

Applying the rules of Allied to the instant case, the use of the word “shall” refers to a required action (trial within 30 days) preceding a possible deprivation of a substantive right (loss of liberty), *and*, arguably, the imposition of a

(...continued)

Neal v. Bryant, 149 So. 2d 529 (Fla. 1962); Gilliam v. Saunders, 200 So. 2d 588 (Fla. 1st DCA 1967).

³⁰ Allied, *supra* at 111, citing White v. Means, 280 So. 2d 20 (Fla. 1st DCA 1973).

³¹ Allied, *supra* at 111, citing Gillespie v. County of Bay, 112 Fla. 687, 151 So. 10 (1933).

³² Allied, *supra* at 111, citing Reid v. Southern Development Co., 52 Fla. 595, 42 So. 206 (1906).

³³ Allied, *supra* at 111, citing Fraser v. Willey, 2 Fla. 116 (1848).

³⁴ Id.

legislatively-intended penalty,³⁵ *and* action to be taken for the public benefit (commitment of the respondent for the protection of the public).³⁶ The indicated action, trial within 30 days, is mandatory by *at least* two of the three alternatives in the Allied rule.

Use of the word “shall” in procedural rules also denotes a mandatory provision. Thus, in Simpson v. Simpson, 700 So. 2d 170 (Fla. 4th DCA 1997), the court held that the word “shall” in Florida Rule of Civil Procedure 1.440(c),³⁷ governing the time limit for setting a trial, was mandatory and applicable to final hearings and jury trials.

Based on the above, both logic and the law require that the 30 day time limit for trial established by section 394.916 Fla. Stat. (1999) be “interpreted” as being mandatory.

³⁵ Is a loss of one’s liberty any less punitive if the style of the case is civil?

³⁶ See section 394.910, Fla. Stat. (1999), **Resp. App. 28, p. 2.**

³⁷ “If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial.”

III. Due Process Considerations Require the 30 Days to Be Mandatory and Jurisdictional

“Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 425 (1979). In examining the Act, it can be readily seen that it contains no other procedural safeguards to assure that a person detained under its authority will be brought - either promptly *or at all* - before the court for the appointment of counsel or any other purpose.

Without the “right to a trial in 30 days” safeguard of section 394.916(1) - the *only* protection the Act affords with respect to the duration of pre-trial restraint - persons detained under the Act could be held in a secure facility without notice, counsel, or an opportunity to be heard for an indefinite period of time;³⁸ they could, as Mr. Kinder almost was, simply be forgotten.

The State relies on several cases from other states in its attempt to have

³⁸ Given due process considerations, the plain wording of section 394.916(1), judicial economy, and common decency (as well as common sense), a person being detained in secure detention, *with no right to pre-trial release* under 394.915(5), should *not* be required to file a petition for writ of habeas corpus or, as suggested on page 38 the State’s Brief, a petition for writ of mandamus, in order to obtain a speedy trial date in order resolve the petition against him.

this Court rule that the 30 day time period of 396.916(1) is merely directory or discretionary. However, with respect to the issue presently before the Court, the Florida Act should not, and cannot, be compared to the laws of these other states. Those laws have additional procedural safeguards to ensure due process, and specifically to ensure that a person whom the state is seeking to commit has the *right* to be brought before the court and appointed counsel *promptly* after a finding of probable cause and detention. *No* such safeguards, other than the 30 day trial period of section 394.916(1), are found in Florida's Act

In the Interest of M.D., 598 N.W. 2nd 799 (N.D., 1999), upon which the State relies, did address whether the failure to bring the Respondent to trial within 30 days, as required by the North Dakota statute, warranted dismissal. This court should not be persuaded by the finding in M.D., however, because the North Dakota statute contains other safeguards that Florida's law does not.

Under North Dakota's Act, the Office of the State Attorney files a Petition alleging that the respondent is a sexually dangerous individual and may have the Petition heard ex parte. If the court finds there is cause to believe the respondent meets the criteria, the court issues an order for detention.³⁹ Once the court issues an order for detention, written notice advising the respondent of his rights, including the

³⁹ N.D. Stat. Sec. 25-03.3-03. and 25-03.3-08.(1999).

right to a preliminary hearing, the right to counsel, with counsel being appointed if the respondent is indigent, and the right to have an expert appointed, *must* be given to the respondent.⁴⁰ Such notice must also include the date, time, and place for the preliminary hearing, and include a copy of the Petition that has been filed.⁴¹

The Respondent is then *entitled to a preliminary hearing within 72 hours of being taken into custody pursuant to the court's Order*, unless the respondent waives this hearing.⁴²

Here, Mr. Kinder, on the day he was scheduled to be released from prison, was taken and held in a secure facility for forty-four (44) days without notice of the cause for his detention, the appointment of counsel, or the opportunity to be heard. The only provision of the Florida Act that offers any due process protection is section 394.916(1). Contrary to the State's position that this is discretionary, it was clearly intended to be, and must be, mandatory.

The State's reliance on In re the Commitment of Mathew A.B., 605 N.W. 2d 598 (Wis. App. 1999), is also misplaced. In this case the issue addressed was the respondent's contention that he was denied effective assistance of counsel because

⁴⁰ N.D. Stat. Sec. 25-03.3-10.

⁴¹ *Id.*

⁴² N.D. Stat. Sec. 25-03.3-11.

counsel failed to raise several issues - including that the trial did not commence within 45-days as required by Wis. Stat. 980.05(1) (1999).⁴³ Mathews did not address whether the 45-day period for trial was mandatory because it found that all the delays in the case proceeding to trial were caused either by a continuance sought by Court or by a motion or stipulation of the parties. It therefore did not need to address whether the time provision was mandatory. Mathew at 703.

Also of significance is that, like the North Dakota law, the Wisconsin Act provides many due process safeguards that Florida does not. In Wisconsin, once a Petition is filed, alleging a person is a sexually violent person, the court is required to hold a hearing within 72 hours after the Petition is filed.⁴⁴ If the person "claims or appears to be indigent" the court is required to provide counsel, *prior* to the probable cause hearing.⁴⁵ These protections simply do not exist in Florida.

The case of People v. Curtis, 223 Ca. Rptr. 397 (Cal. App. 1986), upon which the state further relies, is also not dispositive. Though the California statutes

⁴³ Wis. Stat. 980.05(1) provides that: "[A] trial to determine whether the person is subject of a petition under s. 980.02 is a sexually violent person shall commence no later than 45 days after the date of the probable cause hearing under s. 980.04. The court may grant a continuance of the trial date for good cause upon it's own motion, the motion of the other party, or the stipulations of the parties."

⁴⁴ Wis. Stat. 980.04(2) (1999).

⁴⁵ Wis. Stat. 980.04(5) (1999).

involved in that case were not only substantially different from current Florida's Act, those California statutes have since been repealed.⁴⁶ The most substantial difference, even in the repealed statutes, however, were the procedural safeguards that were in effect at the time of Curtis to ensure the respondent due process of law.

First, in Curtis the respondent had already been committed to a state hospital for a specific term of years and the State was merely seeking to have the respondent committed for an additional specific term of years;⁴⁷ second, the respondent received notice, was appointed counsel, and appeared before the court prior the expiration of his commitment, and third, the statute in question only required the respondent be brought to trial no later than 30 days *prior to his release date*. Curtis at 398. In fact, the respondent, or his counsel, had actually appeared before the court on three separate occasions *before* the 30th day prior to the respondent's release date, and the trial had actually commenced on the 28th day prior to his release date. It was on this basis that a motion to dismiss was denied. *Id.*

While Curtis did find that the requirement that the trial begin 30 days

⁴⁶ Cal. Welf. & Inst. Code sec. 6316.2. (1999).

⁴⁷ The State, in relying on People v. Williams, 91 Cal. 2d 91 (Cal. App. 1999), fails to mention that Williams, like Curtis, had already been committed for involuntary treatment, and the State of California was merely seeking to extend the commitment for an additional year.

before the respondent's release date was directory rather than mandatory, this should have no bearing on this Court's decision. The law and facts of Curtis are entirely different and, unlike California, Florida legislature created no other procedural safeguards, other than the requirement that a trial begin within 30 days of the finding of probable cause, to ensure due process.

Under the *current* California Act, a petition is filed while the respondent is still incarcerated under a sentence of a specific term of years.⁴⁸ When the State presents the petition to the court to determine if probable cause exists, the respondent is noticed of the hearing, has the right to be present, and to be represented by counsel.⁴⁹ If the respondent's scheduled release date will expire before the probable cause hearing, the agency bringing the petition may seek judicial review at which the court will determine whether the facts presented, if true, constitute probable cause to detain and, if so, the respondent may then be held beyond his release date. The probable cause hearing under the California Act, *shall* be held within 10 days of the order issued by the court. (Emphasis added.)⁵⁰

The current California Act is distinguishable from Florida's Act in that

⁴⁸ Cal. Welf. & Inst. Code Sec. 6601.

⁴⁹ Cal. Welf. & Inst. Code Sec. 6602.

⁵⁰ Cal. Welf. & Inst. Code sec. 6601.5.

the respondent's due process rights are preserved by the requirements of being noticed of the probable cause hearing, and the right to be present and to have counsel.

This is clearly not the status of the law in Florida, where a respondent has absolutely no rights in regard to the ex parte probable cause hearing, and no right to an adversarial probable cause hearing.⁵¹ The only safeguard of the respondent's due process rights in Florida is that the trial must occur within 30 days of the order taking the respondent into custody.

In the case at bar, the Mr. Kinder was held 44 days after he completed his lawful prison sentence based upon a petition and order which was entered against him ex parte, and without his having any rights at all with respect to his being heard at this hearing. He wasn't even served a copy of the Petition or Order, or given counsel, until 44 days after he been detained.

Like California, Wisconsin and North Dakota, Washington state requires the appointment of counsel, and a hearing before the court within 72 hours of the state filing a petition for the involuntary civil commitment.⁵² Similarly, Iowa and Arizona

⁵¹ Section 394.915(2), Fla. Stat. (1999); but see Valdez v. Moore 745 So.2d 1009 (Fla. 4th DCA 1999) (determining that a detained respondent has a due process right to an adversary probable cause hearing within 5 days of a demand for one).

⁵² Wash. Stat. 71.90.040 (2000).

also require the appointment of counsel and access to the court within 72 hours of the state's filing a petition seeking to have a person involuntarily committed as a sexually violent person.⁵³

Florida is the only state which has no provision, other than section 394.916(1), to ensure that the person whom the State seeks to have involuntarily committed has access to the court, or appointed counsel.

IV. Ambiguous Language Requires Strict Construction

Without doubt, liberty is a common law right. See, e.g., Heriot v. City of Pensacola, 108 Fla. 480, 486, 146 So. 654, 656 (1933).⁵⁴ The announced purpose the Act is to create a civil commitment procedure for the long-term care, control and treatment of sexually violent predators who are otherwise about to be released from confinement.⁵⁵ Continued incarceration and confinement pursuant to sections the Act constitute a complete deprivation of liberty. Tal-Mason v. State, 515 So. 2d 738, 739 (Fla. 1987). Therefore the statute stands in derogation of a right established at

⁵³ Ariz. Stat. Sec. 36-3705 (2000); Iowa Stat. Sec. 229A.5 (2000).

⁵⁴ Citing Ex Parte Sims, 40 Fla. 432, 442, 25 So. 280, 281 (1898).

⁵⁵ See sections 394.910, 394.912(11), 394.913(1)(a) and 394.925, Fla. Stat. (1999), **Resp. App. 28**.

common law and must be strictly construed.⁵⁶ When so construed, under the plain language of section 394.916(1), a court *must* conduct a trial within 30 days of a finding of probable cause in a case brought under the Act, sections 394.910 et seq., Fla. Stat. (1999).

V. A Statute Penal in Nature Requires Strict Construction

The Court does not have to determine whether or not the Respondent's current confinement constitutes punishment⁵⁷ in order to conclude that the statute must be strictly construed in a respondent's favor, and that differing constructions of its language must also be resolved in favor of a respondent.

A statute is penal if:

[T]he injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as

⁵⁶ This Court has ruled that statutes containing provisions in derogation of common law rights are to be strictly construed. See Kraemer v. General Motors Acceptance Corp., 613 So. 2d 483, 490 (Fla. 2d DCA 1992); Humana of Florida, Inc. v. McKaughan, 652 So.2d 852, 859 (Fla. 2d DCA 1995); Nales v. State Farm Mutual Automobile Insurance Co., 398 So. 2d 455, 456 (Fla. 2d DCA 1981).

⁵⁷ Rules of statutory construction require penal statutes to be strictly construed. When a penal statute is susceptible to more than one construction, the statute must be construed in favor of the citizen. Cabal v. State, 678 So. 2d 315, 318 (Fla. 1996); Scates v. State, 603 So. 2d 504, 505 (Fla. 1992). For at least this purpose sections 394.910 et seq., Fla. Stat. (1999) should be regarded as penal in nature.

solely and strictly penal in its nature.

State v. Atlantic Coast Line Railroad Company, 56 Fla. 617, 650, 47 So. 969, 980 (1908).

In Atlantic Coast Line, this Court held that a civil penalty imposed on a railroad for failure to promptly move a freight car *was* penal in nature. 56 Fla. at 629, 47 So. at 973.

When a statute imposes sanctions and penalties in the nature of denial of a professional license, suspension from professional practice, revocation of license to practice, probation, and private or public reprimand, the statute may be considered penal in nature.⁵⁸ Thus, even administrative or civil proceeding that (merely) “tend to degrade the individual’s professional standing, professional reputation, or livelihood” may be deemed penal in nature.⁵⁹

Similarly, in Lester v. Dept. of Prof. & Occ. Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977), the First District Court of Appeal concluded that a licensing statute must be strictly construed, and any ambiguities must be construed, in favor of the applicant or licensee. The court reached this conclusion even though the legislature stated that the statute was enacted in the interest of the public welfare and is to be

⁵⁸ State v. Pattishall, 99 Fla. 296, 297, 126 So. 147 (1930).

⁵⁹ in State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973).

liberally construed so as to advance that purpose.⁶⁰

This same rules of statutory construction should apply to the Act. The penal nature of the regulatory statutes at issue in the cases cited above, and in n. 60, are insignificant compared to the penal nature of the Act, sections 394.910 et seq., Fla. Statutes (1999).

The filing of a petition for involuntary commitment results in literal incarceration in a maximum security, prison-like setting, in the Florida Civil Commitment Center (in Arcadia, Florida) or in a separate cell block inside the perimeter of the maximum security prison at South Bay Correctional Facility. Once the State petitions to commit a person pursuant to section 394.914, Fla. Stat. (1999), he can be afforded *no* form of pre-trial release,⁶¹ and once committed may be incarcerated indefinitely.⁶² Such incarceration is much more grave than a mere degradation of a person's "professional standing, professional reputation, or livelihood."

⁶⁰ Lester at 925; accord Solloway v. Dept. of Prof. Regulation, 421 So. 2d 573, 574 (Fla. 3d DCA 1982), and see McClung v. Criminal Justice Standards and Training Comm., 458 So. 2d 887, 888 (Fla. 5th DCA 1984), in which the Fifth District held that statutes which impose conditions and restrictions on law enforcement certification must be strictly construed, and ambiguities in the statutes must be construed, in favor of the licensee.

⁶¹ Section 394.915(5), Fla. Stat. (1999).

⁶² Sections 394.918, 394.919 and 394.920, Fla. Stat. (1999).

Therefore, even if the not jurisdictional or mandatory, the failure of the trial court to conduct a trial within the 30 day time limit for trial established by section 394.916, Fla. Stat. (1999), unless such period is waived or continued as permitted by the statute, constitutes a departure from the essential requirements of law.

VI. No Adequate Remedy Is Available after Final Judgment

No adequate remedy would be available after final judgment because the respondent is incarcerated without any possibility of release pending trial.⁶³ Delay is therefore substantially more burdensome for him than for a typical - or any other - civil litigant. Sjuts v. State, 754 So. 2d 781 (Fla. 2d DCA 2000).

No provision of Florida law exists which would allow the respondent to even seek a remedy for the lengthy incarceration he might suffer if the trial court failed provide him with the timely remedy provided by section 394.916(1). Unlike a person accused of committing a crime, a respondent under the Act has absolutely no statutory or procedural provision available which would allow him to seek pre-trial release. Time lost to the Respondent because the court below failed to do what the statute requires is lost to him forever.

As stated in Murray v. Kearney, 25 Fla. Law Weekly D942 (Fla. 4th DCA Apr. 12, 2000):

⁶³ Section 394.915(5), Fla. Stat. (1999).

Clearly, an improper refusal to dismiss the Ryce Act proceedings would cause petitioner irreparable harm that could not be remedied on appeal since he will be in detention during the proceedings, and nothing on appeal can cure that.

CONCLUSION

Based on the foregoing discussion and authorities, this Court should affirm the lower court's ruling that the right to a trial with 30 days granted by section 394.916(1) is a substantive right. This Court should also find and hold that this right (unless waived by the respondent or the trial is postponed beyond the 30 days only as permitted by the Act) is, under the current Act, essential to provide a respondent with due process, and that its violation warrants not merely a respondent's release from custody but dismissal of the petition.

CERTIFICATE OF SERVICE

We HEREBY CERTIFY that a copy of the foregoing motion has been furnished to Richard Polin, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on the _____ day of March, 2001.

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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that this Brief has been typed in Times New Roman, 14-point type.

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